

The Plenary of the Constitutional Court, composed of Judge Cándido Conde-Pumpido Tourón, President, and Judges Inmaculada Montalbán Huertas, Ricardo Enríquez Sancho, María Luisa Balaguer Callejón, Ramón Sáez Valcárcel, Enrique Arnaldo Alcubilla, Concepción Espejel Jorquera, María Luisa Segoviano Astaburuaga, César Tolosa Tribiño, Juan Carlos Campo Moreno and Laura Díez Bueso, has handed down

IN THE KING'S NAME

the following

JUDGMENT

Appeal of unconstitutionality No. 4523-2010, brought by seventy-one deputies of the parliamentary group in Congress of the People's Party, against several provisions of Organic Law 2/2010 of 3 March 2010 on sexual and reproductive health and voluntary termination of pregnancy. The Government Legal Service has appeared and made allegations. The rapporteur was Judge Inmaculada Montalbán Huertas.

I. Legal Grounds

1. Subject-matter of the appeal and order to try the case

(A) Subject matter of appeal and positions of the parties

This appeal of unconstitutionality, brought by seventy-one deputies of the parliamentary group in Congress of the People's Party, goes against several provisions of Organic Law 2/2010 of 3 March 2010 on sexual and reproductive health and voluntary termination of pregnancy (hereinafter referred to as Organic Law 2/2010); in particular, against Articles 5(1)(e), 8 *in limine* and sections (a) and (b), which form part of Title I (under the heading 'Sexual and reproductive health'); against Articles 12, 13(4), 14, 15(a)(b) and (c), 17(2) and (5) and 19(2), which form part of Title II (referred to as 'Involuntary termination of pregnancy'); and against the second final provision, amending Basic Law 41/2002 of 14 November 2002 regulating patients' autonomy and rights and obligations regarding information and clinical documentation.

The complaint is based on eight grounds that are articulated in two blocks. The initial block contains the first six grounds and concerns the challenge of legal provisions relating to the voluntary termination of pregnancy, which are substantially considered to be harmful to Article 15 of the Spanish Constitution (SC) in its interpretation by the Constitutional Court in Constitutional Court Judgment (CCJ) 53/1985 of 11 April 1985 and contrary to the guarantee of legal certainty enshrined in Article 9(3) SC. The appellants maintain that the weighting of conflicting constitutional values and assets, carried out by the legislator, does not conform to the canon of constitutionality laid down in that judgment and leaves the life of the unborn child completely unprotected, despite the fact that its protection is required by Article 15 SC. In this same block, the challenge goes about the regulation of the consent of women aged 16 and under 18 for the infringement of Articles 27(3) and 39(1) and (4) SC, as well as about the regulation of conscientious objection of health professionals for the violation of Articles 16(1) and (2) and 18(1) SC. The second block of challenges — which includes the seventh and eighth grounds — calls into question those provisions that, according to the appellants, seek to impose a gender perspective on sexual and reproductive health education and research, which, according to them, would violate the constitutional principles, values and rights that protect ideological, conscience and educational freedom.

The State's attorney requests the dismissal of the appeal for unconstitutionality. In brief, it argues that the content of CCJ 53/1985 does not result from any ruling on the constitutionality or not of one or other legal system of voluntary termination of pregnancy, and that doctrine must be transposed to the present case with due perspective, without losing sight of the necessary adaptation of the legislation to the evolution of Spanish society and comparative law. It also argues that gender perspective is a methodological approach that starts from the examination of differences affecting gender, whose only element of value is the purpose pursued in its use, which is to give effect to the principle of equality between men and women. This represents one of the higher values of the legal system [Art. 1(1) SC] and, in addition, is part of the aims constitutionally pursued through the right to education.



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(B) Supervened amendments to the challenged Organic Law and delimitation of the subject matter of prosecution

Prior to the examination of the grounds for challenge set out in the appeal, it is necessary to specify the subject-matter of our judgment, as Organic Law 2/2010 has been amended twice since the appeal was filed.

(a) the first of these amendments took place under Organic Law 11/2015 of 21 September 2015 to strengthen the protection of minors and women with judicially modified capacity in the voluntary termination of pregnancy. This rule repealed the contested Article 13(4) (which regulated the necessary consent for the voluntary termination of pregnancy in the case of underage women); it also affected the second final provision (with a new wording of Article 9(5) of Law 41/2002, which regulates the consent of underage women and judicially modified capacity for the voluntary termination of pregnancy).

Both provisions of Organic Law 2/2010 refer to the fifth ground of appeal, alleging infringement of the protection of the rights of minors (Article 39(4) SC, read in conjunction with Article 10 SC), as well as the right of parents to form the moral conscience of their children (Article 27(3) SC) and of the State's duty to protect the family and life of the nasciturus (Arts. 39(1) and 15 SC), on the ground that the termination of the pregnancy of a minor is permitted without the consent (and sometimes without the knowledge) of her parents or guardians.

Since Organic Law 11/2015 has deleted Article 13(4) of Organic Law 2/2010 and amended its second final provision to incorporate a rule with a different meaning than the one at issue here, we must, in accordance with our case-law, declare the supervening loss of the legitimate object in dispute in relation to the aforementioned provisions. This is because "in an abstract remedy, such as that of unconstitutionality, which is aimed at the objective cleansing of the legal system, it makes no sense to rule on regulations that the same legislator has already expelled from that legal system (...) in total, without ultra-activity" (CCJs 136/2011, of 13 September, PoL 2, 160/2013 of 26 September 2013, PoL 3; and 214/2014, of 18 December, PoL 2, among others).

(b) The second amendment to Organic Law 2/2010 has been implemented by Organic Law 1/2023 of 28 February 2023, which was published in the Official State Gazette on 1 March

2023 and entered into force the following day, with the exception of the final provisions mentioned therein. This provision has reworded a number of provisions which are the subject of this action of unconstitutionality, namely Article 5(1)(e), Article 8 *in limine* and points (a) and (b); and Articles 14, 17(2) and (5), and 19(2).

However, this amendment does not affect the subject matter of the present proceedings, which must be resolved taking into account that the various grounds of unconstitutionality that serve as the basis for the appeal were the subject of deliberation and dismissal by this court at the plenary sessions of 8 and 9 February 2023, a date on which the amendment of Organic Law 2/2010 by Organic Law 1/2023 had not yet taken place. In addition, given the approach of the appeal and the material scope of the changes to the provisions challenged by Organic Law 1/2023, this court considers that the constitutional interest in prosecuting the grounds of unconstitutionality included in the appeal still persists.

In that regard, it is necessary, first, to consider what the appellants' main legal approach is. They do not preclude the specific legal configuration of the system of time limits for the voluntary termination of pregnancy, which has been partially affected by the amendment of the contested Articles 14 and 17 (relating to the first 14 weeks of pregnancy which, from the point of view of the merits of the appeal, can be understood as having undergone substantive modifications). Rather, they question the constitutional viability of the time-limit system itself, regardless of its specific legislative configuration. What the action of unconstitutionality mainly calls into question is not, therefore, the specific regulation contained in the original wording of Organic Law 2/2010, but the possibility of a legislative transition from a system of indications to a system of time limits, a fundamental question which the entry into force of Organic Law 1/2023 in no way removes.

Nor can it be ignored that the appellants' overall questioning of the system of time limits is based on a complaint of incompatibility with the duty to protect human life and, therefore, on the legislator's breach of Article 15 SC. The challenge thus formulated thus affects one of the fundamental aspects of the constitutional system, and this determines that a ruling by this court becomes particularly relevant, especially in view of the time elapsed since CCJ 53/1985 of 11 April 1985.



(C) Order of the trial

Once the subject matter of the appeal has been delimited, we find that the appeal raises constitutional questions common to several grounds, capable of being classified as nuclear or substantial for the resolution of the action of unconstitutionality. Firstly, the compatibility with the Constitution of the regulation of the voluntary termination of pregnancy as a whole enshrined in Organic Law 2/2010, through the so-called system of time limits (which is the subject of the first six grounds of the complaint); and, secondly, more specifically, the compatibility with the Constitution of the decriminalisation of the voluntary termination of pregnancy during the first fourteen weeks of gestation in the terms set out in Article 14 of the Law (first ground of appeal), which the appellants claim to be unconstitutional on the grounds that the State renounces the protection of prenatal life and gives prevalence to the mere will or desire of the mother, disregarding the existence of a situation of conflict and the due weighing up of the conflicting values, as required by the case law of this court.

Having established the core constitutional questions to be resolved, and in order to clarify our response, we will set out some preliminary considerations about the scope of the review of the constitutionality of laws that corresponds to this court, interpretative guidelines and differences between the present appeal and the one that was the object of constitutional review by CCJ 53/1985 [Point of Law (PoL) 2]. Next, in view of the appellants' complaint of a lack of weighing of conflicting constitutional values and assets and of the lack of protection of the life of the unborn child, the constitutionality assessment requires us, first, to determine the constitutional framework, that is, the fundamental rights and constitutional assets linked to the voluntary termination of pregnancy (PoL 3). Then, based on this constitutional framework, we will assess the constitutionality of the legal system of time limits introduced by Organic Law 2/2010 for the regulation of the voluntary termination of pregnancy (PoL 4). The following points of law of the judgment will be specifically devoted to the examination of the constitutionality of each of the provisions of Organic Law 2/2010 challenged.

2. Previous issues

Having defined the object of the constitutional process and established the order of the trial, it is still necessary to make some general considerations before beginning the examination of the block of challenges directed against the model of regulation of the voluntary termination

of pregnancy introduced by the law in question. Such considerations are particularly appropriate in this case, given that virtually all of the grounds of challenge comprising the first block of the appeal are based on a common ground: to consider that the contested provisions are unconstitutional because, in the appellants' opinion, they do not conform to the case-law that this court established in relation to the protection of the life of the unborn child in its CCJ 53/1985, of 11 April, which states that it contains the "constitutional status of a human life in formation".

(A) Scope of constitutionality review

Since its first pronouncements, the Court has been affirming that the Constitution is not a closed programme, but an open text, "a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds", as it could not be otherwise in a constitutional order that enshrines political pluralism as one of its superior values [Art. 1(1) SC]. "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 government options are not previously programmed once and for all, so that all that remains to be done in future is implement that previous programme." (CCJ 11/1981, 8 April, PoL 7, and citing it among many others, CCJs 194/1989, 16 November, PoL 2; 55/1996, 28 March, PoL 6; 197/1996, 28 December, PoL 8; 236/2007, 7 November, PoL 1; 49/2008, 9 April, PoL 12).

Therefore, the Court's function in examining the constitutionality of provisions - as already stated in CCJ 4/1981, 2 February, PoL 3 - consists of setting the limits within which the legislator can move freely and turn his political options into law, expressing his ideological preferences and his judgments of opportunity. This freedom of the legislator derives from his or her specific democratic legitimacy, from his or her nature as the representative at each historical moment of popular sovereignty. (Art. 66 SC). "The law, as an emanation of the will of the people, can only be repealed or amended, in principle, by the representatives of that will, and it is only in the case where the statutory provision infringes the Constitution that this Court has been given the power to annul it" (CCJ 17/1981, 1 June, PoL 7).



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(B) Interpretive guidelines

Also in general, but with particular significance in relation to the leading role that the appellants give to CCJ 53/1985, it is appropriate to recall two guidelines that govern the action of the Court in the review of constitutionality.

(a) In carrying out its supervisory task, the Court must interpret the Constitution in the light of the specific historical context. As we argued in CCJ 198/2012, 6 November, PoL 9, based on the judgment of the Supreme Court of Canada of 9 December 2004, which takes up the expression of *Privy Council, Edwards v. Attorney General for Canada* of 1930-, “ the Constitution is a ‘living tree’ (...) i.e. a progressive interpretation allows a constitution to adjust to the realities of modern life as means to guarantee its own relevance and legitimacy. This is so not only because the basic principles of the constitutional text are applicable to situations not envisaged by its founders, but also because the public powers -and the legislator in particular- gradually update these principles. Furthermore and because the Constitutional Court, when ensuring that any such updating conforms to the Constitution, endows the rules with a content to enable their reading in light of modern-day issues and the needs of current society; as otherwise there is the risk of an unfulfilled Constitution”.

Following this hermeneutical pattern, this court has taken particular account of the need to maintain a connection between the constitutionality trials that it is called to carry out and the social reality on which such judgments will have an impact in pronouncements on matters as diverse as the protection of fundamental rights against environmental noise that may arise from technological society (CCJ 119/2001, 24 May), the fight against gender-based violence (CCJ 59/2008, 14 May), same-sex marriage (CCJ 198/2012, 6 November), discrimination based on sex (CCJs 233/2007, 5 November, 108/2019, 30 September and 153/2021, 13 September), or the impact of social media on the balance between the right to honour and personal privacy and freedom of expression and information (CCJ 8/2022, 27 January).

The European Court of Human Rights (ECtHR) also adopts a dynamic and evolving approach as a way of interpreting the Convention to ensure that its rights are practical and effective. According to it, “the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved” (ECtHR judgments of 11 July 2002,

Goodwin v. United Kingdom, § 74, and of 28 May 2002, *Stafford v. United Kingdom*, §§ 68-69). It has projected the specific context of voluntary termination of pregnancy (ECtHR of 16 December 2010, *A. B. and C. v. Ireland*, § 234). Consensus has therefore been invoked to justify a dynamic interpretation of the Convention.

(b) On the other hand, we must remember that this Court, in carrying out its constitutional judgments, is obliged to interpret the rights, principles and values concerned taking into account the principle of unity of the Constitution (inter alia, CCJs 113/1994, 14 April, PoL 9); 179/1994, 16 June, PoL 5; 292/2000, 30 November, PoL 11; and 9/2010, 27 April, PoL 3); that is, taking into account the relationship and interdependence of the different elements of the constitutional text, which should be interpreted as a harmonious whole.

(C) Differences between the subject-matter of the present action of unconstitutionality and the subject-matter of CCJ 53/1985.

In close connection with what has just been explained, and given that the appeal for unconstitutionality repeatedly invokes CCJ 53/1985 and is based on the appellants' interpretation of the case-law laid down therein, the following considerations should be made in this respect.

(a) Neither the aforementioned judgement nor any other constitutes a parameter of control of constitutionality for the Court, which, by virtue of the provisions of Article 1(1) of the Organic Law on the Constitutional Court, "is subject only to the Constitution and this Organic Law".

(b) The subject-matter and procedural framework of those proceedings and the present ones are different, as the State Attorney submits. CCJ 53/1985 was handed down in the context of a preliminary constitutional appeal against a draft Organic Law of a criminal nature from 1983 - it had not yet been approved as a law by the Spanish Parliament (Cortes Generales) - and its aim was to introduce Article 417 *bis* into the Criminal Code, which excluded the punishability of abortion in certain cases and which responded to the so-called therapeutic, ethical and embryopathic indications. The analysis of constitutionality was carried out at that historical moment on the basis of two fundamental premises that determined the scope of the ruling: (i) voluntary termination of pregnancy was then criminalised and sanctioned by the Criminal Code without any exception other than that which could arise from the general exonerating circumstances of criminal responsibility; (ii) what was at issue was, very specifically, whether it

was in accordance with the Constitution for the legislator to exempt from punishment certain cases of harm to the legal right protected by Chapter III, Title VIII, Book II, namely, the life of the unborn child. The possible unconstitutionality of absolute decriminalisation was therefore left out of the constitutional debate.

This action of unconstitutionality (presented twenty-five years after CCJ 53/85) is directed against certain provisions of an organic law approved by the legislator in 2010, whose objective is to regulate the voluntary termination of pregnancy as a woman's right and, correlatively, as a health service, outside the Criminal Code, following the legislative technique - through a specific law - of the majority of the countries in our European environment.

(c) It is worth noting that the legal consideration and regulatory treatment of voluntary termination of pregnancy has undergone a profound evolution - at international, European and national level - since the last third of the 20th century, moving from the strict criminal punishment of abortion with severe penalties to systems of regulation of voluntary termination of pregnancy as a subjective public right of women and a health service, seeking to strike a balance between respect for the rights and legitimate interests of women and the protection of prenatal life.

The declarations from international and European bodies illustrate the consensus on the standards of protection of rights in this area. The following are just a few examples of these declarations:

(i) The report of the International Conference on Population and Development (ICPD), held under the auspices of the United Nations in Cairo in 1994, included the concept of reproductive health as "the capability [of women] to reproduce and the freedom to decide if, when and how often to do so" (point 7.2) and "the right to make decisions concerning reproduction free of discrimination, coercion and violence" (point 7.3).

(ii) The Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women, held in Beijing, China, in September 1995, states in paragraph 96 that "[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence".

(iii) General comment No. 22 (2016) issued by the Committee on Economic, Social and Cultural Rights, on the right to sexual and reproductive health (Article 12 of the International

Covenant on Economic, Social and Cultural Rights), states that preventing unsafe abortions requires States to liberalise restrictive abortion laws, to guarantee women and girls access to safe abortion services and quality post-abortion care, and to respect the right of women to make autonomous decisions about their sexual and reproductive health.

(iv) At the European Union level, the European Parliament adopted on 24 June 2021 the resolution on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health [2020/2215(INI)]. It calls on the Member States, in accordance with the access to safe and legal abortion, to decriminalise abortion, to review their national legal provisions on abortion and bring them into line with international human rights standards and regional best practices by ensuring that abortion at request is legal in early pregnancy and, when needed, beyond if the pregnant person's health or life is in danger; and recalls that a total ban on abortion care or denial of abortion care is a form of gender-based violence (points 33 to 35).

Likewise, the evolution of the social and legal position of women in our society has been reflected in the regulatory treatment of the voluntary termination of pregnancy. A brief historical reference is enough to check it out.

Indeed, in Spain, voluntary termination of pregnancy was strictly prohibited, under criminal sanction, by Articles 411 to 415 of the Criminal Code (Decree 3096/1973, of 14 September 1973). Organic Law 9/1985 of 5 July 1985 amending Article 417 *bis* of the Criminal Code partially decriminalised it through the so-called term system and the indications system; The law also provided that the termination of a pregnancy "by a doctor, with the woman's consent, is not punishable when any of the following indications are present: serious danger to the life or health of the pregnant woman; the pregnancy is the result of an act constituting the offence of rape of Art. 429, provided that the abortion is carried out within the first twelve weeks of gestation and that the rape has been reported; or it is probable that the foetus will be born with serious physical or mental disabilities, provided that the abortion is performed within the first twenty-two weeks of gestation and that the unfavourable prognosis is stated in an opinion issued by two medical specialists other than the pregnant woman's doctor.

Art 417 bis CC was in force until the approval of Organic Law 2/2010, which aims - according to its Preamble - to adapt the regulatory framework regarding the development of sexuality and the capacity for procreation to the consensus of the international community by updating public policies and incorporating new sexual and reproductive health care services.

Among the provisions to achieve this objective, the law recognises in the Preliminary Title the right to freely decided motherhood [Art. 3(2)] and establishes in the Second Title a new regulation of the conditions of voluntary termination of pregnancy and the guarantees of access to the service, which follows the time limit model or system. As also stated in the Preamble, “following the most widespread pattern in the countries of our political and cultural environment, [this new regulation outside the Criminal Code] seeks to guarantee and adequately protect the rights and interests of women and prenatal life”.

Finally, Organic Law 1/2023, of 28 February 2023 which amends Organic Law 2/2010, of 3 March 2010 on sexual and reproductive health, consolidates the system of time limits and, according to its preamble, aims to revise the 2010 law in order to remove the obstacles faced by women in accessing voluntary termination of pregnancy.

In short, since STC 53/1985, the consensus on the legal consideration of the voluntary termination of pregnancy has undergone a profound evolution until its regulation as a woman’s right and the subsequent health service, seeking a balance between respect for these rights and the protection of prenatal life.

d) The requirement of a balanced and harmonious interpretation, which takes into account the different constitutional elements at stake, prevents us from carrying out our judgement - contrary to what the appellants propose - on the basis of a single and isolated consideration of prenatal life as a constitutionally protected legal right.

Pregnancy, and its continuation or interruption, are events that primarily affect the pregnant woman’s body, her life project, her way of being in the world and of establishing relationships of all kinds in it -personal, work, educational, cultural, even leisure and recreational-. No aspect of a woman’s life is unaffected by pregnancy and childbirth. From this point of view, the voluntary termination of pregnancy puts interpretative pressure on the Constitution, the poles of which are situated, on the one hand, in respect for the dignity and free development of the personality of the pregnant woman [Art. 10(1) SC] and her fundamental right to physical and moral integrity (Art. 15 SC); and, on the other hand, in the State’s duty to protect prenatal life as a constitutionally protected legal right, as it can be anticipated. This element of pressure cannot be resolved from one of its extremes. On the contrary, as we have been pointing out, it needs to

be solved on the basis of a systematic and global interpretation of the constitutional provisions involved.

e) In the light of the foregoing, we must conclude that not only can the case-law set out in CCJ 53/1985 not be simply transferred to resolve the central challenge of the action of unconstitutionality, which questions the legal model, but that a change in the approach of this court to the constitutional problem raised is necessary. The new perspective from which constitutional review must be approached should be based on the existential effect of pregnancy on women and its impact on their constitutional rights, which the State must always respect in articulating the protection of prenatal life.

3. Constitutional rights and interests at stake in the voluntary termination of pregnancy

As will be explained throughout this Point of Law, a woman's decision to terminate her pregnancy is covered by Article 10(1) SC, which enshrines "the dignity of the person" and the "free development of personality", and Article 15 SC, which guarantees the fundamental right to physical and moral integrity. However, as no right is absolute in nature, as its exercise is limited by other rights or constitutional rights with which it may conflict, and voluntary termination of pregnancy may at some point collide with prenatal life, which, as the Court has stated, is a legal right constitutionally protected by Art. 15 SC (CCJ 53/1985, Points of Law 5 and 7), in order to determine whether or not the contested provisions are in accordance with the Constitution, it is necessary to examine whether the contested norms respond to a correct weighing of the constitutional rights of the pregnant woman and the duty of the State to protect prenatal life.

In order to resolve the question that is the subject of this Point of Law, it is necessary to analyse, first of all, the constitutional rights from which a woman's right to voluntary termination of pregnancy may derive; and, secondly, to what extent the State's duty to protect prenatal life, as a constitutionally protected right, may limit these rights. And, once the scope of these constitutional rights has been defined, the weighting technique must be used to verify whether the regulation of voluntary termination of pregnancy by the contested regulations constitutes a proportionate limitation of the rights in conflict.

(A) Dignity and free development of personality as the basis for a woman's right to self-determination with regard to the termination of pregnancy [Arts. 1(1) and 10(1) SC].



Voluntary termination of pregnancy, in so far as it presupposes the freedom of women to adopt a vital decision of the utmost importance, enjoys primary constitutional protection through the recognition of freedom as a superior value of the legal system [Article 1(1) SC] and of the principles of dignity and free development of her personality, which constitute “the foundation of political order and social peace” [Article 10(1) SC].

We have stated that Article 1(1) SC, by enshrining freedom as the highest value of the legal system, “evidently implies the recognition, as a general principle inspiring it, of the autonomy of the individual to choose between the various life options that are presented to him or her, in accordance with his or her own interests and preferences” (CCJs 132/1989, 18 July, PoL 6; 113/1994, 14 April, PoL 11; 179/1994, 16 June, PoL 7; in the same vein, CCJs 120/1990, 27 June, PoL 11; 137/1990, 19 July, PoL 9; 154/2002, 18 July, PoL 12; 225/2006, 17 July, PoL 3; 37/2011, 28 March, PoL 3). Any restriction of a woman’s freedom to make a decision for herself that is transcendental in her life and compromises her vital development affects her freedom, proclaimed as a superior value of the legal system in Article 1(1) SC.

Dignity and the free development of the personality — proclaimed by Article 10(1) SC — are not only abstract foundations that inform the legal system as a whole, but, in the words of this court, “they integrate objective legal mandates and have a relevant value in constitutional law” (CCJ 150/1991, 4 July, PoL 3).

Pregnancy, childbirth and motherhood undoubtedly condition a woman’s life project. The decision to continue with pregnancy, with the consequences that this implies for all aspects of a woman’s life - physical, psychological, social and legal - is directly linked to her dignity, understood by this court as “the right of all persons to treatment that does not contradict their condition as equal and free rational beings, capable of determining their conduct in relation to themselves and their environment, that is, the capacity for conscious and responsible self-determination of their own life” (CCJ 192/2003, 27 October, PoL 7).

The dignity of the person thus defined is therefore structured as “an invulnerable minimum that every legal statute must ensure, so that the limitations imposed on the enjoyment of individual rights do not provoke contempt for the esteem which, as a human being, the person deserves” (CCJs 120/1990, 27 June, PoL 4; 57/1994, 28 February, PoL 3; and 91/2000, 30 March,

PoL 7). It also guarantees everyone a minimum degree of autonomy, including decisions that can be considered to affect the free development of his or her personality [Article 10(1) SC], “a principle that protects the autonomous shaping of one’s own life plan” (CCJ 60/2010, 7 October, PoL 8).

Based on this premise, we have declared that the free development of the personality would be affected if life decisions or choices of a particularly intimate and personal nature were imposed on the person, such as the prohibition of cohabitation as man and wife (*more uxorio*) or, on the contrary, the imposition of the marriage bond (CCJ 184/1990, 15 November, PoL 2), the imposition of marriage celebrated in a certain religious form or the free choice of spouse (CCJ 51/2011, 14 April, PoL 12), or the continuation or termination of an affective relationship or cohabitation (CCJ 60/2010, 7 October, PoL 8, letter b). Likewise, this Court has recognised that freedom of procreation is one of the expressions of the free development of personality (CCJ 215/1994, PoL 4). The recognition of this freedom, inherent in the free development of the personality, highlights the fact that it is one of the aspects that shapes one’s own life plan.

In view of this case-law, it can be concluded that the decision to continue with the pregnancy, with the consequences that this implies in all aspects of a woman’s life - physical, psychological, social and legal aspects - is directly linked to her dignity and the free development of her personality, insofar as it affects her freedom of procreation and undoubtedly conditions her life plan.

Accordingly, the legislator cannot fail to be inspired by respect for the dignity of women and the “free development of the personality” when regulating the voluntary termination of pregnancy. In particular, these principles would clearly be ignored if the termination of the pregnancy itself and the subsequent delivery were to be imposed on the pregnant woman in absolute terms.

(B) Voluntary termination of pregnancy as part of the constitutionally protected content of the fundamental right to physical and moral integrity (Art. 15 SC).

In close connection with the dignity and free development of the personality proclaimed by Article 10(1) SC, the fundamental right to physical and moral integrity (art. 15 SC) is also



affected by the State's decision to prohibit women from interrupting an unwanted pregnancy, imposing, as her only option, to continue with the pregnancy and become a mother.

According to our case-law, the right to personal integrity protects “the inviolability of the person, not only against attacks aimed at harming their body or spirit, but also against any kind of intervention in these rights that lacks the consent of their owner” (inter alia, CCJs 120/1990, 27 June, PoL 8, and 207/1996, 16 December, PoL 2), against any interference which is conceived as an essentially positive action by third parties on the corporal or spiritual substratum of the person.

Together with this “negative” dimension, stated in terms of safety or the right to defence, our case-law has also highlighted the “positive dimension” of the right to physical and moral integrity “in relation to the free development of personality, aimed at its full effectiveness” (in this sense, among others, CCJs 221/2002, 25 November, PoL 4; 220/2005, 12 September, PoL 4; 62/2007, 27 March, PoL 3, and 160/2007, 2 July, PoL 2). In this positive aspect, the right to personal integrity has a primordial meaning as a right of self-determination that protects the essence of the person as a subject with the capacity for free and voluntary decision, which is violated when the individual is mediatised or instrumentalised, thus forgetting that every person is an end in himself or herself (CCJs 181/2004, of 2 November, PoL 13, and 34/2008, of 25 February, PoL 5).

The woman's decision regarding the voluntary termination of pregnancy falls *prima facie* within this double protective aspect, both in terms of her bodily integrity and her psychological or moral integrity:

(a) On the “bodily” side, when examining the constitutionality of the then so-called “therapeutic indication”, this court concluded that in those cases the physical integrity of the pregnant woman was seriously affected. A clear link was thus established between the prohibition of abortion and the interference with the rights to life and physical integrity of the pregnant woman, justifying the constitutional legitimacy of the exception to the punishment of abortion in these cases in the protection of the rights to life and physical integrity of the pregnant mother. Although not explicitly stated, this conclusion was logically based on the consideration that the prohibition of abortion in these cases constituted an “excessive” state interference in women's rights as proclaimed by Article 15 SC.

Pregnancy is, first and foremost, a biological process of the utmost importance for a woman's body in that it involves substantial morphological and physiological changes in virtually all body systems: the endocrine, circulatory, immune, musculoskeletal, dermal, respiratory, excretory, digestive and, of course, reproductive systems. Childbirth, on the other hand, is a complex physiological event, naturally painful and risky, which in most cases requires some kind of surgical intervention on the mother's body, whether it is a minor intervention (episiotomy) or one of greater medical relevance (caesarean section). In addition to these strictly physical alterations of the body, there are also relevant changes on a psycho-emotional level; In fact, pregnancy has been identified in the scientific literature as a potent stressor, and can even lead to symptoms of perinatal depression.

Based on these premises, and taking into account the case-law that we upheld in 1985 to validate the constitutionality of abortion in the case of therapeutic indications, it can be affirmed that pregnancy and childbirth, even when they do not present any additional complication of any kind, generate in themselves a relevant affectation of the physical integrity of the woman who is subjected to them.

To this we must add, on the other hand, that one of the essential objectives of the regulation of voluntary termination of pregnancy, repeatedly affirmed in international texts and expressly referred to in the preamble of Organic Law 2/2010, is the prevention of abortions carried out clandestinely and in poor sanitary and health conditions, which constitute a serious risk, not only for the health and physical integrity of the pregnant woman, but also for her own life.

(b) As far as the moral or spiritual aspect of personal integrity is concerned, the decision on whether to continue or terminate a pregnancy is clearly a question of profound vital relevance, which has a transcendental impact on the life project of the pregnant woman and the free development of her personality. The very fact of motherhood gives rise to obligations that may impose on a woman a complete change in her own life plan both legally and effectively. Therefore, a regulation that imposes on the pregnant woman an obligation to terminate the pregnancy regardless of her decision-making powers and regardless of the stage of gestation in which she is, would be tantamount to the imposition of forced motherhood and, as such, would be an instrumentalisation of the person contrary to Article 15 SC.

Based on the foregoing, we consider that the voluntary termination of pregnancy, as a manifestation of the right of women to make free and responsible decisions and choices, without violence, coercion or discrimination, with respect for their own bodies and life plans, forms part of the constitutionally protected content of the fundamental right to physical and moral integrity (Art. 15 SC) in connection with the dignity of the person and the free development of their personality as guiding principles of political order and social peace (Art. 10(1) SC).

(C) Prenatal life as a constitutionally protected right and a limit to women's rights related to the voluntary termination of pregnancy.

When it comes to the regulation of voluntary termination of pregnancy, the limit to women's fundamental rights is found in the State's duty to protect prenatal life, which has been recognised as a constitutionally protected right. Indeed, this court affirmed in CCJ 53/1985, PoL 5, that "human life is a process of development", beginning with gestation and ending in death. That gestation has generated a tertium which is existentially distinct from the mother although it is she who accommodates it. 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". 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".

It follows from this concept that, if the Constitution protects life as an essential fundamental right, it cannot unprotect it at that stage of its development process which is a condition for independent life, so that prenatal life is a legal right whose protection is constitutionally based on Article 15 SC. This State obligation to protect prenatal life, first stated in CCJ 53/1985, has been reiterated in CCJs 212/1996, 19 December, PoL 3 and 116/1999, 17 June, PoL 5.

However, this court has also unequivocally held that the right to life as proclaimed by Article 15 SC is held exclusively by those who were born and who, by the fact of birth, have full legal personality. It is not possible to extend that right to those who have been conceived but have not yet been born. That who is not a person cannot be and is not, a holder of rights, and therefore, of fundamental rights. So, in the case of prenatal life, we are not faced with the fundamental right itself, but before a constitutionally protected legal right, as part of the regulatory content of Article

15 SC (CCJs 53/1985, 11 April, PoLs 5 and 7; 212/1996, 19 December, PoL 3; 116/1999, 17 June, PoL 4). As we highlighted in CCJ 212/1996, 19 December 1996, PoL 3, “in the case of the life of the unborn child, we are not dealing with the fundamental right itself, but, as we shall see, with a constitutionally protected legal right as part of the normative content of Article 15 of the Spanish Constitution. Hence, it is not possible to invoke a regulatory guarantee, that of essential content, which the Constitution reserves precisely for the rights and freedoms themselves, recognised in Chapter Two of Title I of the Constitution [Art. 53(1) SC]. Strictly speaking, therefore, it is not possible to speak of the essential content of a constitutionally protected legal right within the meaning of Art. 53(2) SC”.

This concept of prenatal life is in line with the international treaties ratified by Spain. Specifically, the International Covenant on Civil and Political Rights, done in New York on 19 December 1966, guarantees the inherent right to life of every “human being” in its Article 6. Within the scope of the Council of Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms, done in Rome on 4 November 1950 (ECHR), recognises “to everyone within their jurisdiction” the rights and freedoms of Title I (Art. 1), including the right to life (Art. 2), to which “everyone” is entitled. In the same vein, the Charter of Fundamental Rights of the European Union of 7 December 2000 (amended on 12 December 2007) provides that “everyone” has the right to life (Art. 2).

In short, the international texts attribute the ownership of the right to life and the other rights proclaimed therein to the “human being”, to “everyone”. Neither from the wording of the aforementioned texts, nor from the appellants’ arguments, nor from international case law and practice can it be concluded that there are sufficient grounds to infer an obligation on the part of the States Parties to recognise the ownership of the fundamental right to life of the unborn child.

The European Commission of Human Rights first ruled on this issue in its decision of 13 May 1980 on the admissibility of case *X. v. United Kingdom* (8416/1978), in which the compatibility between Article 2 ECHR and the legality of abortion performed in the event of risk to the life or health of pregnant women (medical indication) was raised. At that time, the Commission stated, in similar terms to the pronouncements which would later be reflected in CCJ 53/1985, that the foetus could not be granted an absolute right to life under Article 2 ECHR (§18), a right which can only be recognised in its entirety to born persons (§§ 9 and 17).

Following this judgment, the ECtHR — whose case-law constitutes an interpretative criterion of particular importance, as we have repeatedly held (inter alia, CCJ 119/2001, 24 May, PoL 5); 37/2011, 28 March, PoL 4) — in its interpretation of Article 2 of the SCHR stressed that there is no European consensus on the scientific and legal definition of the beginnings of life, nor on the nature or status of the embryo or foetus, so that the starting point of the right to life falls within the discretion of the States. “At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person [...] require protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2.” (ECtHR judgment, Grand Chamber, 8 July 2004, case *Vo v. France*, § 82, 84 and 85; reaffirming this case-law, ECtHR judgment, Grand Chamber, 16 December 2010, case *A. B. and C. v. Ireland*, § 222 y 223).

(D) Conclusion.

In accordance with the foregoing, respect for the fundamental right of women to physical and moral integrity (Art. 15 SC), in connection with their dignity and the free development of their personality [Article 10(1)], requires the legislator to recognise an area of freedom in which women can reasonably, independently and without coercion of any kind, take the decision they deem most appropriate as to whether or not to continue pregnancy. Respecting this minimum scope which guarantees women a reasonable exercise of their rights, it is up to the legislator to determine the way in which women’s constitutional rights are to be limited in order to protect prenatal life, as a constitutionally protected good, always bearing in mind that any act or decision limiting fundamental rights must ensure that the limiting measures are necessary to achieve the end pursued (CCJs 69/1982, PoL 5, and 13/1985, PoL 2), must take into account the proportionality between the sacrifice of the right and the situation of the person on whom it is imposed (CCJ 37/1989, PoL 7), and, in any case, must respect its essential content (CCJs 11/1981, PoL 10; 196/1987, PoLs 4 to 6; 12/1990, PoL 8, and 137/1990, PoL 6).

4. Review of the time-limit system as a whole

Once the framework of constitutional rights linked to the voluntary termination of pregnancy has been determined, it is appropriate to begin the analysis on the constitutionality of the specific provisions challenged in the complaint, an examination that cannot be carried out by reading each of them out of context, but must take into account that they form part of a legal

design, the so-called system of time limits, in which each phase or period is regulated according to the system as a whole.

To this end, it should be noted once again that the system of time limits introduced by Organic Law 2/2010 replaces the system of indications of the previous legislation and, in line with European legislation, distinguishes three periods:

(a) The first period covers the first fourteen weeks of gestation. During this period the woman can terminate her pregnancy under her own informed and conscious decision, free from any other interference. It is based on the idea, stated in the preamble of Organic Law 2/2010, that “the determining intervention of a third party in the formation of the will of the pregnant woman does not offer a greater guarantee for the foetus and, at the same time, unnecessarily limits the woman’s personality”.

The protection of prenatal life during this period is articulated through a general preventive system materialised in family planning policies and measures aimed at promoting free and responsible sexuality, which aims to avoid the adverse consequences that an unwanted pregnancy can have on the pregnant woman, and, in particular, the use of clandestine abortions or abortions carried out in poor safety and health conditions. The criminal sanction of the termination of pregnancy carried out without the informed consent of the pregnant woman (Art. 144 Criminal Code [CC]), or without complying with the conditions required by the Organic Law itself, should be added to this.

(b) The second period goes from the end of the fourteenth week of gestation to the end of the twenty-second week. During this period, voluntary termination of pregnancy is only legitimate if one of these two medically accredited indications is present; “serious risk to the life or health of the pregnant woman” (therapeutic indication) or “risk of serious foetal abnormalities” (embryopathic indication).

The protection of prenatal life is carried out through the criminal sanction (Art. 145 CC) of the interruption of pregnancy carried out during this period outside the specific cases regulated by the Organic Law, or without respecting the legally established conditions for the performance of the surgery (Art. 145 bis CC).



(c) The last period begins at the end of the 22nd week of gestation, where Organic Law 2/2010 sets the threshold of foetal viability, “as generally endorsed by the scientific community and based on studies by neonatology units”, according to its preamble. From this moment onwards, there is a substantial modification in the legal status of potential life, and only two exceptional cases of termination of pregnancy are allowed - that of a foetus with anomalies incompatible with life or an extremely serious and incurable illness at the time of diagnosis. Strict safeguards are established in order to ensure that the corresponding indication is met. Termination of pregnancy carried out in this period outside these exceptional circumstances is punishable by criminal sanctions (Art. 145 CC).

It follows from the above that the model of time limits provided for in the contested Organic Law constitutes a system of “gradual protection” of the life of the unborn child or, more precisely, of gradual limitation of the constitutional rights of women in order to protect prenatal life, which takes into particular consideration, in the words of CCJ 53/1985, PoL 5, “the qualitative changes in the development of the life process which are reflected in the legal status of the vital subject”. This system of time limits, declared in conformity with the ECHR by the European Commission of Human Rights in its decision of 19 May 1992 on the admissibility of the case of *H. v. Norway* (17004/90), corresponds to that adopted by almost all the Member States of the Council of Europe, whose Parliamentary Assembly declared itself in favour of extending it to other States with more restrictive legislation as early as 2008.

In accordance with this model, the legislator has chosen not to restrict the autonomy of the pregnant woman to decide freely whether or not to continue with the pregnancy for a period of fourteen weeks, which, according to the preamble of the law, “considers reasonable, in accordance with the indications of experts and the analysis of comparative law” to guarantee women “the possibility of making a free and informed decision on the termination of pregnancy, without interference from third parties”. Once this “reasonable” period has elapsed and until the moment of foetal viability, in order for the termination of pregnancy to be considered legal, circumstances additional to the woman’s will are required, which imply an additional and relevant compromise, either of her right to life or physical integrity (therapeutic indication), or of her freedom and free development of her personality in the face of the heavy personal burden of being the mother of a son or daughter with serious physical or psychological anomalies (embryopathic indication), establishing specific safeguards to guarantee the concurrence of such indications. From the moment of foetal viability, the protection of prenatal life is given clear

priority over the constitutional rights of the woman, which are understood to have been sufficiently guaranteed through the options granted to the pregnant woman prior to that moment, and the termination of pregnancy is only permitted in absolutely exceptional cases in which, either it is not possible to speak of prenatal “life” in the proper sense, given the lack of viability of the foetus, or there is a very serious compromise not only of the rights of the pregnant woman but also of the physical and moral integrity of the foetus itself.

We consider that this regulatory option is in accordance with our constitutional text and with the case-law of this court, as it satisfies the State’s duty to protect prenatal life - with preventive and punitive measures, the weight of which varies as the gestation process progresses - and does so without violating the rights of the woman. It must be reiterated that the time limit model is not only a mechanism for the protection of prenatal life, but also, and reciprocally, a measure restricting women’s rights. The Court considers, however, that this restriction, which results in the requirement that, after the 14th week of gestation, additional circumstances to a woman’s free will for the legal termination of pregnancy, connected with other essential aspects of her fundamental rights, apply — is constitutional because (i) it is for the legitimate purpose of protecting prenatal life; (ii) is appropriate and necessary for the achievement of that purpose; (iii) its gradual configuration in the light, on the one hand, of the progress of gestation and the physiological and vital development of the conceived child, and, on the other hand, of the additional or extraordinary affectation of the woman’s constitutional rights, conforms to the canon of proportionality required by this Court for the constitutionality of any limitation of fundamental rights, as well as to the gradual model of protection of prenatal life accepted by CCJ 53/1985 itself; and (iv) it is carried out respecting, in any case, the possibility of a “reasonable” exercise of the woman’s rights, through the recognition of a time frame in which she can decide, in a free and informed manner, whether to continue with the pregnancy or to terminate it, assuming, in a conscious and voluntary manner, all the consequences derived from one or the other decision.

Having set out the foregoing considerations, it is appropriate to examine the complaints of unconstitutionality that the appellants specifically address against each of the contested provisions.



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5. Examination of the grounds of unconstitutionality directed against Article 14 of Organic Law 2/2010 and, in conjunction with this, against Article 17, paragraphs 2 and 5: Termination of pregnancy within the first 14 weeks of gestation

Having analysed the system of time limits as a whole and having affirmed its conformity with the Constitution, it is appropriate to examine the arguments contained in the first of the grounds of the appeal. The first ground claims the unconstitutionality of Article 14 of Organic Law 2/2010 of 3 March 2010, and, in conjunction with it, of Article 17, paragraphs 2 and 5 of the same law.

The wording of the provisions in question is as follows:

“Article 14. Termination of Pregnancy on Request of the Woman.

Pregnancies may be terminated within the first fourteen weeks of gestation at the request of the pregnant woman, provided the following requirements are met:

- (a) That the pregnant woman is informed of her rights and of available counselling and support services and assistance, pursuant to articles 17(2) and 17(4) of this Law.
- (b) That at least three days elapse between delivery of the above information and performance of the procedure.

Article 17. Information Prior to Consent to Voluntary Termination of Pregnancy. (...)

2. Women choosing to terminate a pregnancy pursuant to Article 14 will be given a sealed envelope containing information on:

- (a) Public assistance and counselling services available to pregnant women and health coverage during pregnancy and childbirth.
- (b) Labor-related rights accruing to pregnant women and new mothers, available childcare services and assistance, government benefits, and other relevant childbearing incentive and assistance information.
- (c) Centers providing adequate contraception and safe sex information.
- (d) Centers where counselling can be obtained both before and after pregnancy termination.

This information will be available at all public health care facilities, or in those accredited to perform voluntary termination of pregnancy. For the purposes of Article 14 above, pregnant women will be issued a certificate attesting to the date information was provided.

The contents and format of the above information will be set out in the regulations to be enacted by the Government.

(...)

5. The information to be provided pursuant to this article will be presented in a clear, objective, and understandable manner. Persons with disabilities will have this information provided in suitably accessible formats and media.

Written materials will specify that all information will also be provided verbally upon request.”

The appellant deputies consider that those provisions infringe Article 15 SC in conjunction with Article 10(1) and (2) SC and the case-law contained in CCJ 53/85, as well as Article 9(3) SC in conjunction with the guarantee of legal certainty. They argue, in essence, that the time limit system allows the life of the unborn child to be terminated by the mere will of the pregnant woman within the first fourteen weeks of gestation, which implies a renunciation by the

State of the effective protection of the life of the unborn child. In this way, the appellants claim, absolute prevalence is given to the will of the pregnant woman and the weighing of the conflicting values is avoided, which is incompatible with the constitutional case-law of Article 15 SC. They assert that it follows from this case-law that the State must provide effective protection for all human life *erga omnes*, also with regard to the mother, through the Criminal Code, and that the exclusion of punishment is only authorised in specific, singular and exceptional cases, because the conduct that is normally required is that which respects the life of the unborn child. Finally, they consider that Article 9(3) SC is violated due to the lack of legal definition as to when the fourteen-week period provided for in the law should begin to run.

As indicated in the previous Point of Law, and contrary to the claimant's assertion, with the contested provisions the State does not renounce the protection of prenatal life during the first fourteen weeks. The preamble of Organic Law 2/2010 expressly recognises prenatal life as a legal right worthy of protection, and seeks to make this protection compatible with the guarantee of the constitutional rights of the pregnant woman, whom it conceives as an adult, responsible person and holder of fundamental rights, the content of which must also be respected. Furthermore, it establishes as a principle that "the competing rights and interests involved in regulating voluntary termination of pregnancy are not absolute" and recognises its duty to "balance the protected legal interests and rights at hand and attempt to harmonize them if possible, or if not, spell out the conditions and requirements for one of them to prevail". From this starting point, the legal design of a gradual protection of prenatal life correlated to a gradual limitation of women's fundamental rights - examined in detail in the fourth Point of Law of this judgment - is fully in line with the Constitution.

The specific and additional arguments of the complaint on this point cannot succeed either:

(i) In relation to the alleged "renunciation by the State of criminal sanctions" during the first fourteen weeks of pregnancy, we must recall that the protection of prenatal life continues to be articulated in criminal law (Arts. 144, 145 and 145 bis CC) even during this initial period in all those cases in which the termination of pregnancy is carried out without respecting the conditions and requirements demanded by the Organic Law, especially when it is carried out without the free consent of the pregnant woman.



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(ii) In relation to the accusation of “absolute lack of protection” of the life of the unborn child during this first phase of pregnancy, the truth is that, in addition to the criminal protection of prenatal life to which we have just referred, Organic Law 2/2010 establishes a social, welfare and health model of a preventive nature in a twofold direction: (a) through public policies promoting responsible and safe sexuality and family planning techniques, aimed at reducing the number of unwanted pregnancies; and (b) through maternity-support policies that contribute to reducing recourse to voluntary termination of pregnancy for reasons linked to the socio-economic difficulties associated with caring for a child.

In this sense, Title I of the Organic Law is oriented towards the articulation of public policies related to sexual and reproductive health, both in the health and educational spheres, aimed at the prevention of unwanted pregnancies, especially among young people and groups with special needs. In order to achieve these objectives, Chapter IV, Art. 11, provides for the elaboration of a plan called “Sexual and Reproductive Health Strategy”.

In addition to the educational and reproductive health promotion measures aimed at preventing the emergence of conflict situations articulated in Title I of the Law, Article 17(2) of the Organic Law refers specifically to the development of active social policies to support pregnant women and motherhood in various areas (health, employment, benefits and public aid for childcare); tax benefits and other incentives and aids to childbirth), unequivocally aimed at preventing recourse to termination of pregnancy for reasons linked to the socio-economic difficulties associated with pregnancy and motherhood.

In short, there is a body of law unequivocally oriented towards the fulfilment of the duty to protect prenatal life also during this first phase of gestation. A preventive and welfare model that is undoubtedly more respectful of the rights of pregnant women than the exclusive use of criminal sanctions.

(iii) The appellants’ assertion of the total ineffectiveness of the information referred to in Article 17(2) of the Organic Law arising from the way in which it is made available to women — in writing and in a sealed envelope — is also unsubstantiated.

The aim of Articles 14 and 17 of the Organic Law is not to pressure or persuade the woman to decide in a certain direction — to continue with the pregnancy. The system designed by the

Organic Law is aimed at guaranteeing that the woman has within her reach the most complete information she may need when making a decision that is considered to be of extraordinary importance, free from any external pressure, with full knowledge of the facts and having all the appropriate elements to form a judgement, including those that could contribute to resolving the difficulties of any kind that the birth of a son or daughter may pose for her. The way in which the provision of this information to women has been regulated meets this objective without creating unlawful, insofar as excessive, intrusions into fundamental rights. Moreover, the principles analysed here contain the specific legal provision that the information contained in Article 17(2) be given orally to the woman if she so requests.

(iv) As for the “absolute prevalence” which, in the appellants’ opinion, is attributed to the constitutional rights of women, the legislator has chosen to limit the woman’s right to decide freely about her own bodily substratum and her life plan to the first fourteen weeks of gestation, a period in which prenatal life is still in a hypothetical or potential state. Based on this premise, it can in no way be affirmed that the law, in the face of the conflict between fundamental rights and legal interests that voluntary termination of pregnancy generates, has given absolute prevalence to the constitutional rights of women. What the legislator does is to define the minimum scope considered “reasonable” for women to have a real and effective opportunity to assert their constitutional rights, without leaving prenatal life unprotected.

The recognition of a woman’s freedom to decide in the initial phase of her pregnancy is necessary for the effectiveness of her constitutional rights, specifically her fundamental right to physical and moral integrity (Art. 15 SC) in connection with her dignity and the free development of her personality (Art. 10(1) SC), constitutional rights that limit the legislator’s freedom of configuration in the terms set out above.

(v) Finally, the alleged legal uncertainty which - in the appellants’ opinion - would be generated by the impossibility of specifying exactly the *dies a quo* in the calculation of the period of fourteen weeks of gestation within which the pregnancy can be terminated at the request of the pregnant woman must be rejected.

The principle of legal certainty provided for in Article 9(3) SC has been understood by this Court as the certainty of the applicable legal system and the legally protected interests, seeking “clarity and not regulatory confusion” (CCJ 46/1990, 15 March, PoL 4); as well as “the



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citizen's reasonably well-founded expectation as to what the actions of the authorities in the enforcement of the law should be" (CCJ 36/1991, 14 February, PoL 5). Thus, "only if in the legal system in which they are inserted, and taking into account the rules of interpretation admissible in law, the content or omissions of a regulatory text produce confusion or doubts that generate reasonably insurmountable uncertainty in those to whom it is addressed as to the conduct required for compliance or the foreseeability of its effects, could it be concluded that the rule infringes the principle of legal certainty" (CCJs 150/1990, 4 October, PoL 8; 142/1993, 22 April, PoL 4; 212/1996, 19 December, PoL 15; 96/2002, 25 April, PoL 5; 238/2007, 21 November, PoL 5; 84/2008, 21 July, PoL 8, 90/2009, 20 April, PoL 4; 136/2011, 13 September, PoL 9).

In the present case, the reference in Article 14 of Organic Law 2/2010 to "the first fourteen weeks of gestation" is compatible with legal certainty, since, although it contains a margin of appreciation, it is susceptible to being defined in a manner "in accordance with the general idiomatic sense of the term" (CCJ 53/1985, PoL 10), which eliminates the fear of absolute indeterminacy in terms of its interpretation or that insurmountable doubts about the required conduct may be generated in those to whom it is addressed. Indeed, the *dies a quo* of the calculation of that period is fixed by reference to the beginning of gestation, a term perfectly coined both in ordinary language and in medical-scientific and legal language to refer to the calculation of the weeks of pregnancy (as the appellants themselves recognise, from the moment of the nesting or implantation of the fertilised ovum in the woman's uterus). Moreover, this terminology has been previously used in our legislation to refer to the computation of time limits in the now repealed Article 417 bis CC, which established the system of indications and did not merit any accusation of unconstitutionality for this reason. Although in the current state of medical science there is a margin of appreciation as to the exact moment of onset of gestation, no further precision is required. Sufficient interpretative tools exist to avoid creating legal uncertainty in the application of the rule to specific cases.

In the light of the foregoing, we reject the first ground of appeal and declare Articles 14 and 17(2) and (5) of the Organic Law, which are the subject of the present action, constitutional.

6. Examination of the specific grounds of unconstitutionality raised in relation to Article 15(a) of Organic Law 2/2010: termination of pregnancy due to medical reasons

The second plea in law concerns Article 15(a) of Organic Law 2/2010 — the so-called ‘therapeutic indication’ — which provides that, exceptionally, pregnancy may be terminated for medical reasons in the following circumstances:

- a) “Prior to the twenty-second week of pregnancy, if the woman’s life or health is in serious risk, as confirmed in advance by a medical specialist not performing or supervising the procedure. Confirmation will not be required in emergency cases of immediately life-threatening risk.”

The appellants do not question the constitutionality of that therapeutic indication — otherwise confirmed by CCJ 53/1985, PoL 11 (a) — but an interpretation of that provision in conjunction with Article 2 of the Law, which defines health as:

“A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”

The appellants consider that the possibility that the serious risk to the health of the pregnant woman could be interpreted as referring to “social health” could lead to an exorbitant extension of this indication, allowing the free termination of pregnancy up to the end of the 22nd week. They add that, since the serious damage to social health cannot be medically proven, the control mechanisms established to guarantee the existence of the alleged factual situation would be disabled in practice. They consider that, for these reasons, Article 15(a) of the Organic Law infringes Article 15 SC and the constitutional case-law that develops it, as set out in CCJ 53/1985.

In the analysis of this specific ground of unconstitutionality, we must begin by pointing out that the definition of “health” contained in Article 2 of the Organic Law is a literal transcript of that provided by the World Health Organisation. On the other hand, this definition does not refer solely and specifically to the regulation of voluntary termination of pregnancy, but is projected onto all the regulations of the Organic Law, which has a much broader objective scope of application and thus regulates sexual and reproductive health in a comprehensive manner. The provisions regulating the voluntary termination of pregnancy constitute only one part of this comprehensive regulation.



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Starting from this point, we find that the appellants' challenge is based on a hypothetical or possible systematic interpretation of the contested provision, which does not necessarily derive from its literal wording. Here, it should be recalled that the function of this court is to determine whether or not the rule submitted to the examination of constitutionality is opposed to constitutional mandates, not to rule on possible hypothetical interpretations of the contested provisions proposed by the parties. Therefore, it is not for us to make preventive pronouncements referring to possible, and as yet unproduced, applications of the legal provisions, which are not necessarily derived from them, and which, if they were to occur, could be subject to an appropriate assessment through the channels offered by our legal system (inter alia, CCJs 77/1985, 27 June, PoL 4; 172/1992, 29 October, PoL 2; 31/2010, 28 June, PoL 79).

In any case, what emerges unequivocally from the literal wording of Art. 15(a) of the Law, as a premise of the so-called "therapeutic indication", is the requirement of a "serious risk" to the life or health of the pregnant woman and its confirmation in an opinion issued by a medical specialist prior to the surgery. This means, on the one hand, that a particularly significant affectation of the pregnant woman's rights to life or to physical and moral integrity (Art. 15 SC) - a "serious" risk to her life or health - is required for the concurrence of the therapeutic indication. On the other hand, this impact on the woman's rights to life and physical and moral integrity must necessarily be established beforehand by a medical specialist - except in cases of emergency due to vital risk. Thus, the allegation regarding the "impossibility of control" of the factual circumstances that would enable this therapeutic indication is meaningless, since, if the serious risk required by the rule were not accredited through a medical opinion, this would simply not be the case, with the exception of cases of urgency due to life-threatening circumstances.

Consequently, this plea must be rejected and the provision must be declared to be in conformity with the Constitution.

7. Examination of the common and specific grounds of unconstitutionality of paragraphs (b) and (c) of Article 15 of Organic Law 2/2010.

The third ground of appeal calls into question the constitutionality of Article 15(b) and (c) for infringement of Articles 9(3), 10, 14, 15, 43 and 49 SC. These provisions regulate the so-called

“embryopathic indication” (eugenic, in the terminology used in the application) in the following terms:

Article 15. Termination of Pregnancy on Health Grounds

Exceptionally, a pregnancy may be terminated for medical reasons in any one of the following circumstances:

(...)

(b) Prior to the twenty-second week of pregnancy, provided that there is a risk of serious foetal anomalies, as confirmed in advance by two medical specialists not performing or supervising the procedure.

(c) In case of foetal anomalies incompatible with life as confirmed in advance by a medical specialist not performing or supervising the procedure, or when the foetus is found to suffer from an extremely serious condition that is incurable at the time of diagnosis, as confirmed by a Medical Committee.

The analysis of this ground of appeal - as argued by the State Attorney- makes it convenient to differentiate between the accusations of unconstitutionality that are specifically formulated with regard to each of the cases regulated (“risk of serious anomalies in the foetus”, “foetal anomalies incompatible with life” and “extremely serious and incurable illness”) and those accusations that are formulated in general with regard to the regulation. We will begin with the analysis of the latter.

(A) Challenges of a general nature common to all three cases of “embryopathic abortion”.

a) In the first general complaint, the appellants maintain that Article 15, paragraphs (b) and (c) of the Organic Law violates Article 14 SC, interpreted in the light of Article 15 SC and the International Treaties signed by Spain, as it discriminates against those conceived with disabilities, who are entitled to the right to life and the right not to suffer discrimination and therefore deserve constitutional protection on an equal footing with those who are not disabled. They add that Articles 43 SC (right to health protection) and 49 SC (State duty to protect persons with disabilities) are violated because, according to them, by denying the right to live to those conceived with disabilities, the State renounces to exercise over them the special duty of protection imposed on it by the Constitution.



As we recalled in the third legal ground, section (C), our case-law has unequivocally affirmed that, although prenatal life is a legal right constitutionally protected by Art 15 SC, the unborn is not the holder of the right to life proclaimed by Art 15 SC, nor of any fundamental right, rights whose ownership is reserved exclusively to the born (CCJs 53/1985, of 11 April, PoLs 5 and 7; 212/1996, 19 December, PoL 3; 116/1999, 17 June, PoL 5). Therefore, it cannot be affirmed that Art. 15 of Organic Law 2/2010 violates Art. 14 SC, nor Arts. 43 and 49 SC, since the unborn child is not the holder of the rights proclaimed by or derived from these constitutional provisions.

This conclusion is not contrary to the international treaties signed by Spain, which attribute the ownership of the rights proclaimed therein, and specifically the right to equality and non-discrimination, to the “person” -Art 26 ICCPR, Art 14 ECHR and Art 20 of the Charter of Fundamental Rights of the European Union - with the sole exception of Art 10 of the United Nations Convention on the Rights of Persons with Disabilities, signed in New York on 13 December 2006 (CRPD), which speaks of the right to life “of every human being”, although it refers the right to equality and the prohibition of discrimination “to all persons” (Art 5).

In short, it cannot be concluded from the international texts that there is an obligation on the part of the States to attribute to the conceived child the consideration of “person” for the purposes of recognising him/her as the holder of rights and, specifically, of the fundamental right to equality and non-discrimination. On the contrary, what emerges from international regulations, case-law and practice - as the State Attorney points out, citing the opinion of the Council of State - is that, in the absence of international consensus on this issue, the extension of the benefits provided for in the CRPD to the unborn child remains within the margin of appreciation of each State. The Spanish legislator has opted not to attribute legal personality to the embryo and foetus, with the provisions of Art. 29 of the Civil Code being applicable for these purposes, according to which “birth determines personality”. Based on this option of the legislator - the constitutionality of which was expressly declared by CCJ 53/1985 and has been reiterated in CCJs 212/1996, 19 December, PoL 3, and 116/1999, 17 June, PoL 4 - it cannot be affirmed that the CRPD, specifically Art. 10, does not oblige the legislator to modify its options or this court to reinterpret its doctrine in this matter in order to guarantee to those conceived with disabilities the fundamental rights to life or to non-discrimination, nor that the unconstitutionality of the embryopathic indication can be derived from this.

(b) The second general complaint to the three cases of embryopathic indication - regulated in Article 15 (b) and (c) of the Organic Law - relates to the lack of accuracy of the terms used (“serious foetal anomalies”; “foetal anomalies incompatible with life” and “extremely serious condition that is incurable at the time of diagnosis”), which are understood as generating legal uncertainty and violating Article 9(3) SC.

The Court cannot agree with this argument of the appellants either. The terms in question, although they contain a margin of appreciation, are susceptible of being defined in a manner “in accordance with the general idiomatic meaning” (CCJ 53/1985, PoL 10), which eliminates the fear of an absolute lack of accuracy as to their interpretation or of generating insurmountable doubts in the addressees as to the required conduct.

As regards the replacement of the term “defects” used in the previous regulation by the term “foetal anomalies”, as the State Attorney points out, the wording of the Organic Law is technically more precise than the previous one, in accordance with the grammatical interpretation of these terms (since according to the definition of the Dictionary of the Royal Academy of Language, a defect is understood as any “physical or psychological defect, usually important”, and an anomaly as “malformation, biological alteration, either congenital or acquired”); and it also removes the pejorative connotations that the term defect has in common parlance. The requirement that the anomaly be “serious” or that the disease be “extremely serious” expresses, on the one hand, its importance and depth and, on the other hand, its permanence over time. The fact that the disease is incurable expresses its irreversibility. All this is to be assessed according to the state of medical knowledge at the time of diagnosis and with the guarantee that the factual situation will in any case be established at least by a doctor other than the one performing the surgery; and in the case of “extremely serious and incurable” diseases by a clinical committee under the terms of Art. 16 of the Law.

(B) Challenges specifically referring to the various cases regulated by Article 15(b) and (c) of Organic Law 2/2010.

a) In relation to Art 15 (b) of Organic Law 2/2010, the appellants’ complaint is based on their interpretation of PoL 11 of our CCJ 53/1985, in which we declared the decriminalisation of the voluntary termination of pregnancy by embryopathic indication to be in accordance with the constitutional text.



At that time we considered that “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 addition, in conjunction with Article 49 SC and the duty of the State to protect prenatal life under Article 15 SC, “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.”

The appeal argues that, with this last statement, CCJ 53/1985 would be subjecting the constitutionality of the embryopathic indication to a sort of resolutive condition. Thus - the appellants submit -, by extending the mechanisms of protection and assistance to persons with disabilities - as has happened over the years - it must be understood that this resolutive condition has been fulfilled and it is no longer possible to speak of the unenforceability of the conduct or, therefore, of the constitutional legitimacy of the decriminalisation of the voluntary termination of pregnancy in these cases.

Neither the appellants’ interpretation of our judgment nor the conclusion they draw from that interpretation can be shared.

The argument that in 1985 served as the *ratio decidendi* for the declaration of conformity with the Constitution relating to the waiver of the criminal sanction on voluntary termination of pregnancy in cases of embryopathic indication was the unenforceability of the conduct (continuation of the pregnancy), due to the existence of an exceptional circumstance (the fact that the foetus had serious physical and mental disabilities). As an *obiter dictum*, and in a tangential manner, it was stated that, given that this situation was aggravated by the lack of State benefits that would help to alleviate it in the existential aspect, progress in these benefits would help to avoid the situation that

was at the basis of decriminalisation. However, this consideration did not contain any sort of resolute condition by which it could be concluded that the constitutionality of the rule was then based on the non-existence of such benefits, nor that the increase in the benefits offered by the State to persons with disabilities would make the unenforceability of the conduct on which the declaration of constitutionality was based disappear. In the framework built by CCJ 53/1985 to examine the constitutionality of the decriminalisation of the voluntary termination of pregnancy, these considerations were to be understood as a call to the legislator to advance in social policies aimed at the protection and assistance of persons with disabilities, insofar as it was considered that such an advance could contribute to favouring the woman's decision to continue with her pregnancy, in the confidence that she would have State support.

On the other hand, as we have already explained in detail in the second and third points of law, the canon applicable to the exam of constitutionality of Organic Law 2/2010 differs substantially from the framework designed by CCJ 53/1985. Within the new framework set out throughout this resolution, the constitutional legitimacy of voluntary termination of pregnancy is generally based on the fundamental right of women to physical and moral integrity (Art. 15 SC) in connection with their dignity and the free development of their personality [Art. 10(1) SC].

Starting from this basic premise, the voluntary termination of pregnancy from the fourteenth week to the end of the twenty-second week of gestation regulated in section (b) of Article 15 of the Organic Law - that is, due to the existence of an accredited risk of serious anomalies in the foetus - not only finds its constitutional legitimacy in the "non-requirement of other conduct" from a legal-criminal point of view, but also in the exceptional impact on the constitutional rights of the woman that derives from the detection of such anomalies in the foetus.

As we have stated throughout this judgment, the fundamental right to physical and moral integrity (Art. 15 SC) in conjunction with the dignity of the person and the free development of personality (Article 10(1) SC), protect the recognition of a woman's reasonable freedom in which she can adopt, autonomously and without coercion of any kind, the decision she considers most appropriate as to whether or not to continue with the pregnancy, assuming the consequences derived from one or the other decision in a conscious and meditated manner. It is clear that the detection of serious anomalies in the foetus is an extraordinarily influential variable in the decision making process, completely altering the decision-making scenario prior to the decision.



In the current state of science, the detection of a large number of these anomalies is carried out around the 14th week of gestation, and many of them are not detected or confirmed within this period, but at a much later time, which is closer to the deadline established by the Organic Law of 22 weeks (think of all those cases in which an amniocentesis or cordocentesis is necessary for diagnosis). By not extending the period granted to the woman to take her decision on whether or not to continue the pregnancy in the event of the detection of serious foetal anomalies beyond those fourteen weeks, she would be de facto deprived of the possibility of taking this circumstance into account, which is extremely relevant in all respects, when taking her decision, either because at the time of detection she lacks the necessary time to be able to reflect calmly before making her decision, or because the detection occurs outside the 14-week period.

The free development of the personality, as a principle endowed with a preferential value by Art. 10(1) SC, shows an additional impact in these cases that legitimises granting the pregnant woman a period longer than the first fourteen weeks of gestation to be able to carry out a voluntary termination of pregnancy. This is the only way to adequately ensure that the decision she takes can take into account the probable presence of serious foetal anomalies and the possible consequences of such anomalies for herself and for her child (disability that her child may have the impact of this disability on her child's development and quality of life, public disability support or resources that may be available to her, and so on).

The ground of unconstitutionality must therefore be rejected.

(b) Regarding Article 15(c) of Organic Law 2/2010, the appeal states that allowing the termination of pregnancy in fetuses of more than 22 weeks, and therefore viable, implies a disproportionate and unjustifiable disprotection of the life of the unborn child, in violation of Article 15 SC, without there being any value worthy of recognition that could be opposed to it, given that it is a foetus that could be born and have life independent of their mother through a preterm birth. Such assertions apply to the two cases referred to in Article 15(c) of the Law, which must be treated differently.

The first subparagraph of Article 15(c) of the Organic Law refers to cases in which “foetal anomalies incompatible with life” are detected. The challenge to this subparagraph is based on an erroneous premise, as it is claimed to authorise the performance of abortions on viable fetuses. However, what the Law authorises is the termination of pregnancy with respect to fetuses whose

anomalies are “incompatible with life”, that is, with respect to non-viable foetuses, which do not have the capacity to develop as a person in the sense of Art. 10(1) SC, which prevents their consideration as unborn children and the extension to them of the State’s duties to protect prenatal life ex Art. 15 SC. In this sense, we have already pronounced in CCJ 212/1996, 19 December, PoL 5 and 116/1999, 17 June, PoL 9, stating that “by definition” these human foetuses cannot be granted the character of unborn children, since “they will never be ‘born’ in the sense of having a ‘life independent of the mother’”, which places them outside the scope of the constitutional protection of Art. 15 SC.

Finally, with regard to the second clause of Art. 15(c) of the Law (“when the fetus is found to suffer from an extremely serious condition that is incurable at the time of diagnosis”), here we are dealing with foetuses that enjoy the constitutional protection of Art. 15 SC. But it cannot be agreed that there is “no value worthy of recognition that can be set against the value of life” in the making in these cases. The fact that the foetus is viable does not make it possible to ignore the existence of a situation of conflict with the fundamental rights of the pregnant woman at stake, to which we refer in the third Point of Law and, particularly in these cases, the extraordinary impact that forcing a woman to carry her pregnancy to term in such circumstances would have on the free development of her personality [Art. 10(1) SC]. Once again - as in the other cases of embryopathic indication - we are dealing with borderline cases, absolutely exceptional situations, which, if not covered by Organic Law 2/2010, would fall within the scope of application of Article 145 of the Criminal Code, giving rise to a criminal sanction.

On the other hand, this case is configured in the law as an exceptional case, referring to extremely serious and incurable alterations in the health of the foetus. This exceptional indication is surrounded - as the State Attorney points out - by a much more rigorous procedural guarantee than in any other case, since the factual situation has to be established by a clinical committee, formed by a multidisciplinary team made up of two doctors specialised in gynaecology and obstetrics or experts in prenatal diagnosis and a paediatrician, as established in Article 16 of the Law.

From this point of view, we consider that, in these absolutely exceptional circumstances, imposing under criminal threat the continuation of pregnancy or preterm delivery constitutes a disproportionate sacrifice of the woman’s constitutional rights.



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In view of the above, Art 15 (c) of the Law is declared to be in conformity with the Constitution.

8. Grounds of challenge in relation to Article 12 of Organic Law 2/2010. Ensuring access to voluntary termination of pregnancy

The fourth ground of challenge concerns Article 12 of Organic Law 2/2010, which reads as follows:

Article 12. Guaranteed Access to Voluntary Termination of Pregnancy

Access to voluntary termination of pregnancy is guaranteed in the conditions set out herein. These conditions will be interpreted in the manner most favourable to the protection and effectiveness of the fundamental rights of women requesting the procedure, in particular their right to personal growth and development, life, physical and moral integrity, privacy, freedom of thought, and freedom from discrimination.

The appellants submit that this provision replaces the necessary weighing of the conflicting values (the life of the unborn child against the rights of the pregnant woman) with the legal decision to interpret the rules and conditions of the law always in the sense most favourable to the rights of the woman, who is still one of the parties in conflict, thus failing to protect the life of the unborn child.

As we have explained above -and as is made explicit in the preamble of the Organic Law-, the legislator starts from his duty to articulate a model for the protection of prenatal life, as a constitutionally protected legal right, compatible with the guarantee of the fundamental rights of pregnant women. With this starting point, the law articulates a model of gradual protection throughout gestation, weighing up, in each of the periods, the limitations that must be imposed on the pregnant woman's exercise of her constitutional rights, precisely with the aim of providing prenatal life with the protection it deserves as a constitutional right. We have already stated that this weighing is in accordance with the Constitution.

Article 12 of the Organic Law, whose heading is "Guaranteed Access to Voluntary Termination of Pregnancy", has no power whatsoever to alter the weighing carried out by the

legislator. It rather contains a mandate addressed to the Public Administrations to guarantee the provision of voluntary termination of pregnancy under the terms and conditions established by the law itself. In other words, the provision does not refer to the weighing up between the constitutional rights of the pregnant woman and prenatal life, but to the way in which the service aspect of voluntary termination of pregnancy must be articulated in the cases in which it is legally authorised.

From the reading of the preamble of Organic Law 2/2010, in relation to its articles, it is clear that the legislator responds to the recognition of the right to freely chosen motherhood [Art. 3(2)] with the correlative creation of an obligation on the part of the Public Administrations to guarantee a public service of voluntary termination of pregnancy, which is configured as a subjective public right of a benefit nature. The legislator considers that such a model “generates greater certainty and security for the people for whom it is intended”, offers higher levels of guarantee against clandestine abortions, and seeks effective equality in the exercise of rights and access to benefits.

With these purposes in mind, Organic Law 2/2010 requires that voluntary termination of pregnancy be carried out by or under the direction of a specialist doctor, in an accredited public or private health centre, with the written consent of the woman in accordance with the provisions of Law 41/2002, which regulates patient autonomy and the rights and obligations regarding clinical information and documentation; regulates the clinical committee to be involved in legal cases; provides for the inclusion of the provision of voluntary termination of pregnancy in the portfolio of common services of the National Health System; establishes specific administrative measures to ensure equality and quality of care throughout the country; as well as the protection of the right to privacy and confidentiality in the processing of data.

In this way, the legislator incorporates and complies with the case-law of this Court, which has repeatedly ruled that, in their objective dimension, fundamental rights impose on the public authorities the duty to guarantee their effective enforcement and, especially, obliges the legislator to protect the positivised values formalised in the legal system through fundamental rights, recognising, where appropriate, the subjective entitlements and obligations that it deems necessary for this purpose” (STC 129/1989, 17 July, PoL 3).

This service model is also in line with the case-law of the ECtHR, which has repeatedly ruled that, once the legislator has decided to authorise abortion, the State has a positive obligation to create the necessary regulatory framework and enforcement mechanisms to enable pregnant women to

exercise their right to legal termination of pregnancy. Failure to comply with these obligations constitutes a violation of the fundamental right to privacy proclaimed in Art 8 ECHR (in this sense ECtHR judgments of 20 March 2007, *Tysiac v. Poland*, § 116; 16 December 2010, *A.B. and C. v. Ireland*, § 245; and 28 November 2011, *R.R. v. Poland*, § 186 and § 200).

Moreover, the fact that ordinary law should be interpreted, in general, in the manner most favourable to the effectiveness of the fundamental rights at stake and, specifically, in the manner most favourable to the fundamental rights of the woman requesting voluntary termination of pregnancy, constitutes an interpretative criterion in accordance with our constitutional text and with the case-law according to which the Constitution has introduced a principle of interpretation of the legal system in the sense most favourable to the effectiveness of fundamental rights (inter alia, CCJs 76/1987, 25 May, PoL 2; 136/1999, 20 July, PoL 29; 105/2007, 10 May, PoL 4) and having cited ECtHR case-law.

To this, it must be added that both pregnancy and its eventual termination are phenomena that exclusively affect women, and unjustified or disproportionate limitations on their rights arising from such events, which are indissolubly linked to their sex, constitute discrimination based on sex prohibited by Article 14 SC (CCJs 173/1994, 7 June; 136/1996, 23 July; 182/2005, 4 July; 214/2006, 3 July; 17/2007, 12 February; 12/2008, 29 January; 66/2014, 5 May; 108/2019, 30 September, among many others).

Indeed, over the years, this court has developed an extensive body of case-law specifically aimed at constructing a constitutionally reinforced sphere of protection for the rights of women who choose to become mothers, based on the fact that motherhood, the biological facts associated with it - pregnancy, childbirth and breastfeeding - and the tasks associated with childcare, assumed by women in a clear majority to date, are at the origin and basis of the historical inequality between the sexes.

The prohibition of discrimination on grounds of sex (Art. 14 SC) is thus identified with the prohibition of discriminatory treatment that is based on or justified by that particular category. And insofar as pregnancy, childbirth and subsequent motherhood, especially during breastfeeding, are vital situations associated with the female sex, the fact that there may be a different treatment based on maternity will be linked to the existence of a different treatment based on sex. By creating this sphere of reinforced protection of the rights of women who choose motherhood, the obligation

imposed by the Constitution on all public authorities to promote the conditions for equality, as the highest value of the legal system, to be real and effective [Art. 9(2) SC] is fulfilled.

In order to achieve real and effective equality between men and women in all spheres of life, it is not enough to provide enhanced protection of the rights and legitimate expectations of women who choose motherhood. It is equally necessary to protect the rights of those women who, faced with a gender-related event such as pregnancy, decide to terminate it freely, within the assumptions and conditions established by the law itself.

It follows from this that any limitation of women's rights based on events that can only affect them - in this case the right to decide whether or not to continue the pregnancy under the circumstances and conditions established by the legislator - must be interpreted in the manner most favourable to the effectiveness of those rights.

At this point of the reasoning, we must remember that Organic Law 3/2007 for the effective equality of women and men - issued by the legislator in development of the fundamental right to equality and non-discrimination on grounds of sex proclaimed by Art. 14 SC - establishes, in general terms, that the principle of equal treatment between women and men, which implies the absence of any discrimination on grounds of sex, especially those derived from maternity and the assumption of family obligations, is a guiding principle of the legal system, and as such, it must be integrated and observed in the interpretation and application of legal rules (Arts. 3 and 4). All public authorities must adjust their actions to the commitment to the effectiveness of the constitutional right to equality between women and men [Art. 14(1)] and this principle must inform, in a cross-cutting manner, the actions of all public authorities (Art. 15).

9. Grounds for challenge in relation to Article 19(2), first paragraph (sic) of Organic Law 2/2010: conscientious objection of health professionals

The sixth ground of appeal challenges the regulation of the conscientious objection of health professionals set out in the second paragraph of Article 19(2) of Organic Law 2/2010 — it is clear from the reading of the appeal that the second paragraph is contested and not the first paragraph — on grounds of infringement of Articles 16(1), 16(2) and 18(1) SC.

The wording of the paragraph of the contested provision is as follows:



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“Health care providers directly involved in voluntary termination of pregnancy may object on conscientious grounds, provided their choice does not undermine access or the quality of care. Refusal to perform a pregnancy termination procedure for reasons of conscience is a personal decision which must be made in advance and communicated in writing. This notwithstanding, medical practitioners will at all times provide adequate medical treatment and care to women who so require, both before and after a pregnancy termination procedure.”

The appellants consider that this regulation of the right to conscientious objection incurs unjustified and disproportionate restrictions that affect its essential content, by limiting its scope to professionals “directly involved in voluntary termination of pregnancy”; because its recognition is not preferential, but is conditional on it not undermining access and quality of care; and by requiring that conscientious objection be manifested “in advance and in writing”, which they also understand contrary to the right to privacy [Article 18(1) SC], since no one is obliged to discover aspects of their privacy or to declare about their ideology, belief or religion [Article 16(2) SC].

Against this, the State Attorney argues, in addition to the fact that the appellants rely on a certain interpretation of the law - not on the law itself - that the limitation of the right to professionals directly involved in the voluntary termination of pregnancy is justified by its exceptional nature and the need to make the provision of the right compatible with conscientious objection. As regards the obligation for conscientious objection to be expressed in advance and in writing, the State Attorney considers that it constitutes a condition for the exercise of the right which is in no way prejudicial to the Constitution.

In order to resolve the above constitutional complaint, we must necessarily start from the constitutional configuration of conscientious objection. According to reiterated constitutional case-law, Art 16(1) SC “by itself would not be sufficient to free citizens from constitutional or <sub-constitutional> duties for reasons of conscience, with the risk of relativising legal mandates (CCJs 160/1987, 27 October, PoL 3; 321/1994, 28 November, PoL 4; 55/1996, 28 March, PoL 5, as well as Constitutional Court Order 135/2000, 8 June, PoL 2).

However, the legislator should not ignore or disregard, when regulating certain matters, the possibility that the unconditional imposition of certain obligations could seriously compromise the freedom of conscience of some of the persons concerned, by placing them at the exceptional crossroads of renouncing rationally arguable moral convictions, although not shared by the majority, or suffering, by being consistent with them, the sanction that would be associated with the non-fulfilment of a legal duty. In this sense, and only in this sense, one must understand the assessment

that the Court made in the past, in the light of the silence of a specific legal regulation, as conscientious objection “is part of the content of the fundamental right to ideological and religious freedom” (CCJ 53/1985, PoL 14).

Consequently, “conscientious objection in general, i.e. the right to be exempted from the fulfilment of constitutional or legal duties on the grounds that such fulfilment is contrary to one’s own convictions, is not recognised, nor can it be imagined to be recognised, in our law or in any law, since it would mean the very negation of the idea of the State. What may happen is that it is admitted exceptionally with respect to a specific duty” (CCJ 161/1987, 27 October, PoL 3). The legislator may, or even in some cases must, recognise the morally controversial nature of certain normative decisions on vital matters and then allow, with due safeguards for the general interest, that the individual initially obliged may be exempted from complying with a mandate that is not reconcilable with his or her most deeply held convictions. Under these circumstances - no doubt verifiable in the cases under consideration - freedom of conscience could be compromised if the legislator had completely disregarded, against all reason, such situations of conflict or extreme personal commitment, provided that they had sufficient cultural roots and if the guarantees that had been established for this purpose were ignored by means of specific acts or decisions, eventualities in which the jurisdictional remedies for the protection of the fundamental right set out in Article 16(1) SC would undoubtedly remain fully open.

In cases of legally permitted voluntary termination of pregnancy, this implies that the law must harmonise the right of the objector with the guarantee of the service by the health administrations and with the rights of the pregnant woman that may be compromised in these cases. In this harmonisation, the legislator enjoys freedom of configuration within the limits imposed by the Constitution. In the words of CCJ 161/1987, 27 October, PoL 4, referring to the right to conscientious objection to compulsory military service, “in this task of harmonisation, the legislator could certainly not place arbitrary conditions on the exercise of the objector’s right because it would violate the prohibition of arbitrariness contained in Article 9(3) of the Constitution, but it can place reasonable and proportionate conditions for the protection of the interests affected”.

In coherence with the above, the Court does not share the objection of unconstitutionality raised by the appellants regarding the restrictive and disproportionate nature of the regulation of conscientious objection because it is only recognised for “health care providers directly involved in voluntary termination of pregnancy”. On the one hand, because conscientious objection, as an exception to a



legal obligation and therefore of an exceptional nature, must be interpreted strictly. On the other hand, because the expression “directly involved” is not contrary to the principle of legal certainty, deriving from the wording of the contested provision - which is what we must judge in this constitutional process and not the possible restrictive interpretations of it suggested in the appeal - unequivocally and without further interpretative effort, a recognition of the right to all those health professionals who intervene directly in the performance of the abortion, whatever their professional category and performance. The only actions that can be exempted from the legal duty because they are covered by conscientious objection are direct clinical interventions, not other auxiliary, administrative or instrumental support actions carried out by professionals who, moreover, do not need to know the nature and circumstances of the clinical intervention in question. It is precisely with regard to these direct clinical interventions that it should be noted that there may be situations of emotional conflict (due to ideological or moral convictions) that justify the health professional’s withdrawal from an intervention that is, in general, a legal imperative. Beyond these cases, conscientious objection would not only lack a constitutional basis, but would also put at extreme risk the effectiveness of the healthcare provision under consideration.

Secondly, the appellants argue that recognition of the right is not preferential and is conditional on access and quality of care not being undermined. Once again, as the State Attorney points out, the alleged unconstitutionality of the provision derives from the peculiar interpretation of it by the appellants. The contested provision does not contain a limit to the right to object, but rather a mandate addressed to the public health administrations to adopt the necessary organisational measures to guarantee the provision, with the aim of making the exercise of the right to conscientious objection of health professionals compatible with the right of women to access the health service that they are obliged to guarantee. A provision perfectly in line with the requirements of our case-law - cited above - according to which the law may regulate the exercise of conscientious objection in order to make it compatible with the requirements derived from other constitutional rights to whose protection the duty from which the objector is exempted is oriented.

Finally, we must reject the possible collision of legal regulations with the rights recognised in Articles 16(2) and 18(1) SC, which, in the appellants’ view, derive from the requirement that the objection be expressed in advance and in writing. As we pointed out in CCJ 160/1987, 27 October, PoL 4, the objector “must provide the necessary cooperation if he wants his right to be effective in order to facilitate the task of the public authorities in this regard [Article 9(2) SC], collaboration which already begins, in principle, by the renunciation of the holder of the right to keep it [...] in

personal privacy, since no one is obliged to declare about their ideology, religion or belief [Article 16(2) SC]”. And the judgement goes on to state in PoL 5(b) that such a collision “disappears by the exercise of the right to object, which in itself entails the objector’s renunciation to maintain his ideological reservations to violence and/or military service in the secret sphere of his conscience, it being understood that without the objector’s will to draw legal consequences - and therefore external to his conscience - from his objection, no one can enter into his privacy or force him to declare his ideology, religion or beliefs. Personal privacy and the right not to declare intimate convictions is something that the objector has to evaluate and weigh in the context of the guarantees that the Constitution recognises and decide, never better said, in conscience, but also in the knowledge of the special nature of the right to object and of the guarantees that the community and on its behalf the State must also demand”.

This reasoning is perfectly applicable to conscientious objection regarding the practice of voluntary termination of pregnancy. Health personnel may or may not object, but if they choose to do so, this decision entails the externalisation of their ideological, religious or moral reservations towards the practice of abortion. The renunciation of these reservations in personal privacy is a necessary premise for the exercise of the right that does not collide with the rights recognised in Articles 16(2) and 18(1) SC.

Moreover, the fact that this externalisation must be made “in advance” and “in writing” does not constitute a disproportionate restriction on the exercise of the right, nor is it contrary to its essential content. These requirements do not limit the content of the right, but only regulate the conditions of its exercise with regard to the legitimate aim justifying the imposition of the duty from which exemption is sought: the guarantee of service provision to which the health administration is obliged. That the objection is made “in advance” seems essential in order to be able to organise the service and guarantee its provision; and the requirement that externalisation be carried out “in writing” is a formality aimed at the same purpose, without the appellants arguing — beyond conjectures and interpretations outside the norm — why merely verbal externalisation would have a lesser impact on the fundamental rights recognised in Articles 16 and 18 SC. As we already stated in CCJ 151/2014, 25 September, PoL 5 “[t]he creation of a regional register of professionals in relation to voluntary termination of pregnancy with the aim of the regional administration being aware, for organisational purposes and for the proper management of this health service, of those who, in exercising their right to conscientious objection, refuse to perform this practice [...] does not imply, per se, a limit to the exercise of the right to conscientious objection set out in Art 19(2) of Organic

Law 2/2010, nor a disproportionate and unjustified sacrifice of the rights to ideological freedom and privacy, without it being possible to assert, as the appellant deputies do, that the purpose of this is to keep a list of objectors with the aim of discriminating against them and retaliating against them, as this is an assertion without any legal basis and on which a complaint of unconstitutionality cannot be based”.

In short, these are reasonable and proportionate conditions for the exercise of the right, which do not in themselves infringe either Article 16(2) or Article 18(1) SC, and which are justified by organisational reasons to ensure the provision of the service, which the administration is obliged to guarantee.

10. Grounds for challenge in relation to Article 5(1)(e) and Article 8 in limine and points (a) and (b) of Organic Law 2/2010: gender perspective in the training of professionals

The appellants challenge the constitutionality of Article 5(1)(e) and Article 8 in limine and points (a) and (b) in the second block of challenge (seventh and eighth grounds).

Article 5(1) of the Law, located within the chapter dedicated to public policies for sexual and reproductive health, enshrines the objectives of the actions of the public authorities in their health, educational and social policies in the area of sexual and reproductive health, guaranteeing in letter (e) the provision of “comprehensive, gender mainstreaming sexual and reproductive health education”.

Article 8, which regulates the training of health professionals, provides:

“Training of health care providers will be gender mainstreaming and will include:

- (a) Integrating sexual and reproductive health into the curriculum of health sciences and medical schools, including research and training in the clinical practice of voluntary termination of pregnancy.
- (b) Professional sexual and reproductive health training, including the practice of pregnancy termination. (...)”

The application states that references to “gender mainstreaming”: (i) are contrary to the principle of legal certainty [Article 9(3) SC], given the lack of accuracy of this concept; (ii) are contrary to ideological freedom [Article 16(1) SC] and to the right of parents to ensure that their

children receive the religious and moral education that is in accordance with their own convictions [Article 27(3) SC], by incurring in State “indoctrination” without taking into consideration the personal beliefs and convictions of the pupils or parents; (iii) are contrary to academic freedom [Article 20(1)(c) SC] insofar as they impose a certain ideological perspective on teachers. Furthermore, it is alleged — already referring exclusively to Article 8(a) and (b) — that the imposition in curricula of health professionals of the clinical practice of voluntary termination of pregnancy infringes Articles 16(1) and 27(10) SC.

A) It is appropriate to analyse, first of all, the accusations of legal uncertainty and indoctrination directed against the expression “gender mainstreaming”.

We should begin by clarifying that, although Organic Law 2/2010 does not define this expression, the fact is that its meaning - as a category of analysis of the unequal reality between women and men aimed at achieving material and effective equality - has been specified both in the international sphere, as well as in the European Union and in our internal regulations, through the legislation passed in development of the right to equality between women and men (Art. 14 SC).

At the UN level, the 1995 Beijing Declaration and Platform for Action advocated gender mainstreaming as a methodological approach to achieving gender equality commitments (Annex I, Beijing Declaration, point 38). At its meeting on 18 July 1997, the United Nations Economic and Social Committee defined gender mainstreaming as “... a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve [substantive] gender equality.” [UN Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 1997/2: Agreed Conclusions, 18 July].

In the context of the European Union, with the entry into force of the Treaty of Amsterdam on 1 May 1999, a new stage in the process of European construction began, especially in terms of equal opportunities for men and women. Here, the promotion of gender equality in all policies and the elimination of inequalities is one of the priorities to be taken into account in the design of European Union policies. As a complement to the objectives of community action, the Council Decision of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001-2005) was approved, highlighting that it articulates gender impact

assessment in different areas of intervention of the Community framework strategy (economic life, social life, civil life, roles, etc.) as one of the actions to be undertaken in order to achieve the objectives mentioned in the aforementioned programme. Also, the Commission of the European Union, faced with the realisation that political decisions which, in principle, appear to be non-sexist, can have a different impact on women and men, despite the fact that such a consequence was neither foreseen nor desired, adopted a communication on mainstreaming as a first step towards the realisation of the European Union's commitment to integrate the gender perspective in all EU policies and drew up a "Guide to Gender Impact Assessment" designed to be used within the Commission in order to avoid unintended negative consequences that favour situations of discrimination and to improve the quality and effectiveness of EU policies.

In Spain, Law 30/2003 of 13 October 2003 on measures to incorporate gender impact assessment in the regulatory provisions drafted by the Government, includes in its preamble the European Union precedents described above. On the other hand, the preamble of the Organic Law for Effective Equality between Women and Men states that "[t]he general charting of public policy from the vantage of the principle of equality and the gender perspective entails the establishment of criteria for action to be followed by all public authorities, in which that principle is actively and explicitly integrated; and in which specific or sectoral guidelines are included to favour equality in policies affecting education, health, the arts and culture, the information society, rural or housing development, sport, culture, land management and international development cooperation." Consistent with what is stated in the preamble, its articles establish the obligation of all public authorities to adjust their actions to the commitment to the effectiveness of constitutional law on equality between women and men [Art. 14(1)]; declares, in general terms, that this principle will cross-sectionally inform the action taken by all public authorities (Art. 15), and specifically provides [Art. 24(1)] that educational authorities will guarantee equal rights to education for women and men through the active integration, in educational objectives and practice, of the principle of equal treatment.

Among other subsequent regulatory provisions that consolidate the gender perspective as a category of analysis of reality, we should mention Organic Law 5/2018 of 28 December 2018 on the reform of Organic Law 6/1985 of 1 July 1985 on the Judiciary, on urgent measures in application of the State Pact on gender violence, which includes a mandate to reinforce judicial training in "Anti-discrimination law, including cross-section and gender mainstreaming".

Against the background set out above, the alleged breach of the principle of legal certainty [Article 9(3) SC] must be rejected. The expression “mainstreaming the gender perspective” may be specified, in accordance with the rules of interpretation permissible in law, without great effort and without generating insurmountable doubts in its addressees. In short, gender mainstreaming in education, health and social policies means taking into account the different needs of men and women in these areas of reality, with the ultimate aim of guaranteeing real and effective equality between men and women.

The alleged infringement of Articles 16(1) and 27(3) SC and the complaint of indoctrination which the appeal addresses to the provisions analysed here must also be rejected; the introduction of a gender perspective in sexual and reproductive health education is a methodological approach and a cross-cutting hermeneutical criterion aimed at promoting equality between women and men as an essential part of a culture of respect and promotion of human rights. On the basis of these premises, it cannot be admitted that, as the appellants claim, the incorporation of the gender perspective implies any “indoctrination” purpose that would compromise the ideological neutrality of the State.

In this regard, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted by the General Assembly of the United Nations by Agreement 34/180 of 18 December 1979 and ratified by the Spanish State, after declaring, in general, in its Article 2 that “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women” states, in relation to the specifically educational field — Article 10 — that “States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: (...) (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods; (...) (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”

Specifically in relation to health, the Resolution of the 60th United Nations World Health Assembly, held in Geneva between 14-23 May 2007, in considering the strategy for integrating gender analysis and actions into the work of the World Health Organisation, recommends that



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Member States “formulate national strategies for addressing gender issues in health policies, programmes and research, including in the area of reproductive and sexual health”; “ensure that a gender-equality perspective is incorporated in all levels of health-care delivery and services”, “collect sex-disaggregated data” underlying gender disparities when informing policies and programmes, and “make progress towards gender equality in the health sector”.

Education, both public and private, which the Constitution places under the control of the public authorities [Article 27(8) SC] is not merely a transfer of knowledge, it is also human training [Article 27(2) SC]. The Constitution takes the side of certain values, which are precisely those of respect for the “democratic principles of coexistence” [Article 27(2) SC], including the principle of equality [Article 1(1) SC], which must be transmitted in accordance with the aforementioned Article 27(2) SC. In this way, equal education and gender perspective are also human rights education, and educate people in one of the basic principles of the system of values that underpin our Constitution and our democracy. Organic Law 2/2010 is obviously based on an axiological system that it tries to transmit, but that axiological system is none other than the one proclaimed by the Constitution itself. It cannot be considered unconstitutional to transmit, through education and at all educational levels, ideas or beliefs linked to equality between men and women, which the Constitution proclaims as a higher value of the legal system, and to whose effectiveness the actions of the public authorities must be directed.

As we recalled in CCJ 12/2008, 29 January, PoL 4, in which the constitutionality of certain provisions of the aforementioned Organic Law for Effective Equality between Women and Men was validated, “Article 9(2) SC expresses the framers’ desire to attain not only formal equality but also substantive equality, aware that only via this substantive equality is it possible effectively to perform the free development of the personality”, also stating that the incorporation of that perspective “is part of the characterisation of the State as social and democratic under the Rule of Law” and that this characterisation, with the higher values that shape it, “represents the axiological basis for understanding the entire constitutional order”.

In the same vein, the Supreme Court has repeatedly affirmed the need to integrate the gender perspective, as a methodological approach and cross-cutting hermeneutical criterion, in order to achieve real and effective equality of treatment and opportunities between women and men. Thus, CCJ 11/2020, Fourth Chamber, 6 February 2020, PoL 3(3), after recalling that, in accordance with the provisions of the Organic Law for Effective Equality between Women and Men, “[e]qual

treatment and opportunities for women and men is a principle that informs the body of law and, as such, will be integrated and observed in the interpretation and enforcement of legislation” and that “the principle of equal treatment and opportunities for women and men will cross-sectionally inform the action taken by all public authorities”, affirms that “the obligation of Judges and Courts as a State power, is to incorporate the gender perspective in the exercise of jurisdictional power”. In this sense, CCJs 747/2022, Fourth Chamber, 20 September, PoL 6(1); 167/2023, Fourth Chamber, 27 February, PoL 3; and 169/2023, Fourth Chamber, 2 March, PoL 5(1); Constitutional Court Order, Third Chamber, 2 February 2023.

For the same reasons, it is also not possible to find any infringement of the right to freedom of chair [Art. 20(1)(c) SC]. Even if - as argued in the appeal - we have affirmed that “academic freedom has a negative content insofar as teachers are allowed to resist any mandate to give their teaching a specific ideological orientation, that is, any orientation which implies a particular perspective of natural, historical or social reality” which is “incompatible with the existence of an official science or doctrine” (CCJ 5/1988, 13 February, PoL 9), the legislator’s choice is devoid of ideological orientation and does not impose any ideological perspective on teachers beyond respect for constitutional values.

(B) Finally, it is claimed that the incorporation of “research and clinical practice of voluntary termination of pregnancy” [Art. 8 (a)] and the training of professionals in sexual and reproductive health “including the practice of termination of pregnancy” [art. 8 (b)] into the curricula of medical and health sciences degree courses violates Arts. 16(1) and 27(10) SC. None of the alleged violations can be assessed.

The appellants submit that imposing on all universities, by a law outside the educational system, the teaching of a particular subject, by requiring them to incorporate it into their curricula, infringes the university autonomy enshrined in Article 27(10) SC. Such an assertion, however, is not in line with our case law, since this Court has expressly rejected that university autonomy is incompatible with the obligation to include a subject in the curricula of a university. In the words of CCJ 187/1991, of 3 October, Point of Law 3, reproduced in CCJ 155/1997 of 29 September, Point of Law 2, “University autonomy includes the competences for the preparation and approval of curricula, but with certain limits, including the determination by the State of the indispensable knowledge that must be achieved in order to obtain each of the official qualifications, which are valid throughout the national territory”. Consequently, the argument that “university autonomy



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precludes the obligation to include a subject in the curricula of a university and, on the contrary, to conclude that university autonomy is not an absolute freedom and that the State has exclusive competence to regulate the conditions for obtaining, issuing and homologating academic and professional degrees and, therefore, to impose on the curricula the subjects whose knowledge it deems necessary to obtain a specific degree, without prejudice to the fact that each University must observe the regulation and organisation of the teaching of these subjects, must be rejected”.

Finally, there is also no breach of Article 16(1) SC resulting from the imposition of ‘the clinical practice of termination of pregnancy’ as a basic element of the training of health professionals, without regard to possible conscientious objection. As stated in Point of Law 10, freedom of ideology and conscience, which is enshrined in Article 16 SC, is not enough in itself to exempt citizens from fulfilling any legally established duty on grounds of conscience, nor does it protect any act or form of conduct motivated by beliefs. The right to conscientious objection against the voluntary termination of pregnancy guarantees health workers the possibility of refraining from direct intervention in the execution of abortions. But outside of these cases from Article 16 SC or from any other constitutional provision, there is no obligation on the legislator to extend its scope to the academic field, guaranteeing the right to conscientious objection in respect of certain subjects. The specific and personal way in which direct participation in the execution of abortion can affect conscience and personal beliefs is not comparable to that which may arise from the mandatory teaching or study of its clinical practice, insofar as it does not involve direct participation in the interruption of the vital process in pregnancy. And no reason is provided in the appeal to support the claim that health professionals’ right to conscientious objection should be extended to professors and students.

Moreover, the claim raised in the appeal would involve disregarding the exceptional nature of the right to conscientious objection and the need to harmonise the objector’s right with the safeguarding of the constitutionally legitimate aims that justify the imposition of duty. It should also be borne in mind that the recognition of the right to conscientious objection in the educational field such as that intended would conflict with the very viability of the system, for otherwise all institutionalised teaching would run the risk of proving impracticable, as the ECtHR has pointed out (for all, ECHR judgment, 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, § 53; 29 June 2007, *Folgero v. Norway*, § 84).

For the reasons set out above, these grounds of unconstitutionality must be rejected.

The dismissal of each and every one of the grounds of unconstitutionality put forward in the appeal entails its dismissal in its entirety.

OPERATIVE PART

In view of the foregoing, the Constitutional Court, BY THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION,

has decided to

1. To declare this unconstitutionality appeal extinguished, due to the supervening loss of the legitimate object in dispute, with respect to the challenge of Article 13(4) of Organic Law 2/2010 of 3 March 2010 on sexual and reproductive health and voluntary termination of pregnancy, and the second final provision and against the second final provision of the same Organic Law, amending Basic Law 41/2002 of 14 November 2002 regulating patients' autonomy and rights and obligations regarding information and clinical documentation.

2. Dismiss the appeal of unconstitutionality for the remainder.

The present judgment shall be published at the Official State Gazette.

Delivered in Madrid, on 9 May 2023.

Signed Cándido Conde-Pumpido Tourón

Signed Inmaculada Montalbán Huertas



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Signed Ricardo Enríquez Sancho

Signed María Luisa Balaguer Callejón

Signed Ramón Sáez Valcárcel

Signed Enrique Arnaldo Alcubilla

Signed Concepción Espejel Jorquera

Signed María Luisa Segoviano Astaburuaga

Signed César Tolosa Tribiño

Signed Juan Carlos Campo Moreno

Signed Laura Díez Bueso

Concurring opinion given by Judge Ms. María Luisa Balaguer Callejón to the judgment issued regarding the unconstitutionality appeal no. 4523-2010.

With the greatest respect for the criteria reflected in the judgement, it seems necessary to me, in exercise of the power provided for in Art. 90(2) of the Organic Law on the Constitutional Court, to formulate this vote to place on record and make public the arguments I put forward in the deliberations of the Plenary which concluded with the total dismissal of the appeal of unconstitutionality no. 4523-2010, brought against various provisions of Organic Law 2/2010, of 3 March, on sexual and reproductive health and the voluntary interruption of pregnancy.

The relevance of this pronouncement transcends the very subject-matter of the appeal of unconstitutionality, not only because of the expectations generated in the public after the delay in the solving of the appeal, but also because the very position of the Court as interpreter of the constitutional text is placed at the centre of the debate, given the absence of constitutional amendments in the area of fundamental rights in more than 45 years of the Constitution and the cultural and political changes that our constitutional system has undergone since then. One of them refers to the evolution and presence of feminism in the public sphere and the transformations that it has promoted in the definition of public policies and the action of a legislature that is now formed on a parity basis in accordance with the provisions of Organic Law 3/2007, of 22 March, for the effective equality of women and men.

This importance called for clarity, constitutional pedagogy and a clear motivation in the solving of the appellants' claims, but also in the explanation of why the constitutional jurisdiction is legitimised to respond broadly to appeals brought against laws whose validity has disappeared in part due to a supervening legislative modification; why it is legitimised to construct constitutional content without usurping the functions of the legislator or the constituent power; and why it is not bound, in a system of concentrated constitutional jurisdiction such as ours, to its own jurisprudential precedents.

Although the judgment addresses these issues in the second legal basis, they merited particularly strong reasoning and I devote the first part of the vote to this. The second part focuses on offering a partially different argumentative logic to reach the conclusion that voluntary termination of pregnancy is a woman's right that is reflected in the Constitution, so that its limitation, while possible if the legislator identifies a legal right worthy of criminal protection, is

an exception to the rule of recognition and full exercise of a fundamental freedom and as such must be addressed in its regulation.

1. On the previous issues.

1.1. The survival of a large part of the subject-matter of the appeal of unconstitutionality has been called into question following the approval and entry into force of Organic Law 1/2023, of 28 February 2023, amending Organic Law 2/2010, of 3 March 2010 on sexual and reproductive health and the voluntary interruption of pregnancy. This legislative reform concerns, *inter alia*, Articles 5(1)(e), 8 *in limine*, 8(a), 8(b), 13(4), 14, 17(2), 17(5), 19(2) and second final provision, all of which are the subject of the present appeal.

Previous constitutional case-law had established that, in appeals of unconstitutionality such as the present one, “the amendment, repeal or loss of validity of the rule being challenged produces the extinction of the proceedings, since the objective purification function of the legal system that it serves becomes unnecessary when the legislator himself has expelled the challenged rule from the legal system” [CCJ 82/2020, PoL 2(b), citing others]. In other words, the Court had been considering that the notes of abstraction and objectivity of the action of unconstitutionality justified not entering into the resolution of this type of process, not even to eventually remove the legal situations created in application of a law which, though it could be declared unconstitutional, had already disappeared from the legal system (among others, CCJs 160/1987 and 385/1993).

However, our case-law has also recognised exceptions to this general rule of jurisprudential creation, which is not reflected in the Constitution or in the Organic Law of the Constitutional Court. To limit myself to formulating an exemplary statement, the first exception refers to challenges of jurisdictional content, which survive due to the higher interest involved in clarifying the distribution or the function of preserving the respective areas of competence [*inter alia*, CCJ 43/1996, PoL 3; or CCJ 149/2012, 5 July, PoL 2(b)]. The second exception refers to challenges to decree-laws based on the infringement of the constitutional limits to emergency legislative power, because the transitory nature of this type of regulation would make it impossible to control the constitutionality of governmental action, leaving a form of exercise of power exempt from control by the Constitutional Court [CCJ 9/2023, 22 February, PoL 2(b), and the case-law cited therein]. The third and final exception proclaims that the mere repeal is not

sufficient cause for the supervening disappearance of the object if the rule continues to be effective in some way (CCJ 39/2013, PoL 3, and references therein).

In my view, in the appeal before us, the Court finds itself faced with an exceptional situation which makes it possible to avoid, in this case, the automatic consideration that the repeal of the contested rule, even implicitly, in the context of an action of unconstitutionality, entails the supervening disappearance of the object. If in no case can a univocal and general answer be given to the question of the survival of the object of the challenge, that is to say, if it is necessary to avoid any automatism, as has been recognised in previous decisions (CCJ 206/1997, PoL 2), this is all the more necessary in the framework of an action of unconstitutionality which arises an undeniable public interest. This interest should not be frustrated by the formal substitution of the disputed norm, because in this case, the Court's role as the supreme guarantor of the Constitution through the review of the contested law is more important. All the more so if we bear in mind that this has been partially modified by another organic law that could still be appealed against, as it is within the time limit for lodging an action of unconstitutionality, and which maintains the decriminalisation model set out in the contested provision intact, the questioning of this model being one of the main axes of the action of unconstitutionality.

1.2. The Court's judgments, while usually detailing the interpretative canon used to resolve a particular case, do not usually qualify the dogmatic ascription of that canon. Exceptionally, the evolutionary interpretation of the Constitution was mentioned in CCJ 198/2012, in order to give content to marriage, which, having express constitutional recognition, had mutated in its understanding over time and since the approval of the constitutional text. The current judgment evokes the idea of evolutive interpretation without fully and adequately developing the notion introduced by the aforementioned 2012 judgment, because it fails to apply the full canon envisaged by the judgment.

But regardless of this, the fact remains that the Court, in the present case, is not faced with having to formulate an evolutionary interpretation or one based on the principle of the unity of the Constitution. The constitutional problem to be resolved requires a constructive interpretation, which, not because it is rarely used or infrequent, falls outside the margins of the powers constitutionally recognised to the Constitutional Court. And, in order to formulate this interpretation, in relation to the issue of voluntary termination of pregnancy, the recourse to comparative law or the evocation of international case-law or documents is not particularly



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useful. In this matter, the supranational framework is so open, the margin of appreciation recognised to the States so extensive and the normative diversity so wide -if we look at the examples offered by other countries, also in a restrictive and regressive sense-, that it is necessary to assume the possibility of the Spanish Constitutional Court formulating a much more protective recognition of women's rights than that which is identified in the texts or pronouncements of the treaty bodies, or in other models of constitutional democracies. International standards are always minimum standards and it is possible to create much more guaranteed models for the recognition of rights.

1.3. The last observation with respect to the initial considerations has to do with the value of CCJ 53/1985 as a precedent to be used to resolve the complaints of unconstitutionality raised by the appellants. As the judgment states, that pronouncement, issued more than three decades ago, is not a parameter for the constitutionality of Organic Law 2/2010. But the reason why the Court can radically deviate from the content of CCJ 53/1985 is not that the control procedure is different now, or that the law submitted for review of constitutionality then had a different scope to the one approved in 2010.

The main reason is that the contemporary conception of women's sexual and reproductive rights and the scope of women's freedom to decide whether or not to continue a biological process that takes place exclusively in their bodies has been so radically modified that it is necessary to resolve the same problem raised in 1983 and solved two years later from a completely different paradigm, regardless of the content of the law passed and the type of constitutionality control process that has arisen. It should not be forgotten that our system of constitutional justice, which is part of the continental model, does not subject the Constitutional Court to respect for its own precedents, as is the case in the Anglo-Saxon model. In our case, the Court may change its criteria and only reasons of legal certainty (Article 9(3) SC) and of strengthening of its own legitimacy of exercise require it to justify the change of criterion. This change is always possible, but it is particularly justified when normative and contextual changes, cultural progress and advances in the recognition of fundamental rights allow for the development of new arguments that are understandable and acceptable in and by a changing society.

In spite of everything, the judgment on this action of unconstitutionality does not fully detach itself from the precedent one, basically because it assumes, without questioning this affirmation, that prenatal life is a legal right constitutionally protected by Article 15 (CCJ

53/1985, PoLs 5 and 7), which is why in the examination of constitutionality the idea of the conflict between constitutional values constantly appears in the examination of constitutionality and is also present in the 1985 judgment. Having assumed the break with the line of case-law on which CCJ 53/1985 is based, I believe that the disconnection from the reasoning contained therein should have been much more energetic. However, the judgment, undoubtedly conditioned by the content of the allegations in the appeal, assumes part of the argumentative assumptions of 1985, formulates a theory on the limits of the right to voluntary termination of pregnancy that I do not agree with and ends up making a weighing trial that considers comparable realities that are in no way comparable. My approach departs completely from the reasoning of the 1985 Constitutional Court in the sense that I immediately explain.

2. The centre of the reasoning: the autonomy of women to decide on their bodies in a secular legal framework.

The judgment decides over the action of unconstitutionality from the approach of a conflict of interests. This conflict is resolved in terms of defining a woman's right to terminate a pregnancy, and of limiting this right in certain circumstances to ensure the defence of prenatal life understood as a constitutionally protected good. The remarkable advance that the judgement proposes, from previous jurisprudential positions, is based on the consideration that the interests or rights of the woman to decide on the continuity of the pregnancy are in a constitutionally recognisable position, as are the interests rooted in the preservation of prenatal life.

But my approach goes one step further, because I understand that there are no constitutional rights in conflict, insofar as the embryo and the foetus are part of a woman's body. Her freedom [Art. 17(1) SC], her dignity [Article 10(1) SC], her physical and moral integrity [Art. 15(1) SC], her power to shape her maternity project (Art. 18 SC) and her sexual and reproductive health (Art. 43 SC) are the only elements with express constitutional support, while women are fully entitled to all these rights recognised in the Constitution.

The proclamation of prenatal life as a constitutionally protected right can and should be reconsidered, as it is a perfectly revisable jurisprudential formulation. I do not deny that the unborn child can be considered as a legal right worthy of criminal protection -I will refer later to this-, but the constitutional coverage of its protection can be questioned, so that the free disposal of the pregnant woman is the constitutional axis that marks the argumentation regarding the legal



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design of the voluntary termination of pregnancy. If we adopt this radically different interpretative paradigm, then we can move beyond the discursive logic of the conflict of constitutional values.

From other positions, reflected in the rest of the opinions to this judgment, the protection of the life of the embryo and foetus is the centre of the argument around which reflection should revolve. This is also the perspective of the appellants. But this position cannot be shared from a secular understanding of the constitutional system. From the emergence of church doctrine in this debate, the value of the unborn child as a protectable good is historically based on the conception of the embryo and foetus as bearers of the human soul, i.e. as animate subjects. It may even be recalled that the church's own doctrine in this regard has changed from the Augustinian approach of "delayed animation", which assumed the termination of pregnancy before the soul came to occupy the prenatal body as a minor fault, to the nineteenth-century approach of Pius IX, which came to consider any voluntary abortion as punishable, drastically reducing the woman's decision-making capacity. However, any of these considerations are essentially religious. Without denying their value in the context in which they are formulated and their projection towards those who share these ethical approaches, they are not absolute in nature, nor do they have an automatic legal projection, because not everything that is ethically reprehensible is necessarily punishable.

A genuinely secular legal approach, stripped of the religious moral bias that underpins the criminal prosecution of consensual abortion, must place the woman's freedom to decide on the termination of the biological process that is pregnancy, which takes place in her own body, at the centre. The recognition of women as responsible subjects, capable of making rational decisions about the effects of their sexuality and reproductive capacity, implies:

- (i) That the dignity of women (Art. 10 SC) is not exclusively associated, nor essentially linked to their capacity to be mothers [contrary to what the doctrine of the Catholic Church maintains in the Apostolic Letter *Mulieris Dignitatem* (1988) and in some subsequent documents]. The dignity of women, like that of men, presupposes their capacity for individual determination over their own lives, a capacity which, as I said in the concurring opinion to CCJ 19/2023, allows the individual to overcome the power of the State to exercise control over specific life choices or, in this case, to project this control over women's bodies. The free development of personality, which is also contemplated in Art.

10(1) SC also includes the power to make self-determined decisions about one's own body (as recently recalled in CCJ 34/2023, 18 April), in the same way that it "protects the autonomous configuration of one's own life plan" (CCJ 60/2010, of 7 October), excluding "obstacles or public interference - perhaps also, in some cases, interventions which are sometimes called 'paternalistic' - which limit or hinder a personal development which the Constitution wishes to be 'free' without sufficient grounds: free, above all, from State intervention" (CCJ 19/2023, 22 March).

(ii) That the principle of equality (Arts. 1 and 14 SC) extends to the recognition of women's right to decide on the biological processes that take place in their own bodies, in particular those that may affect them exclusively. Failure to recognise this power could be considered as a case of discrimination by lack of differentiation, because it would mean forcing only women, as only they can gestate, to become mothers regardless of their will or not to develop a life project around motherhood. This obligation, which is a criminal law obligation, will never be imposed on those who do not possess the biological attributes necessary to carry a pregnancy. Although the case-law of the Constitutional Court does not recognise discrimination by lack of differentiation (since CCJ 86/1985 10 July 1985, PoL 3, subsequently reiterated), nothing would prevent this approach from being revised, so that it is possible to assume that not recognising the right to voluntary termination of pregnancy means imposing discriminatory treatment, by not recognising the particular position of women in the context of human reproduction and by imposing on them alone the continuation of a biological process that they do not wish to undergo and, in many cases, the assumption of a personal and social fact, motherhood, which they did not plan, with which they do not identify or which they are not in a position to develop for whatever reason.

(iii) Article 17 SC proclaims the right of every person to liberty, and this proclamation should not be reduced to the recognition of freedom of movement or the prohibition of deprivation of physical liberty. We cannot ignore the fact that freedom is also constitutionally proclaimed as a superior value of the legal system in Article 1(1) SC. Admitting the possibility of interrupting one's own pregnancy is not only affirming a right or a positive freedom (freedom to have an abortion), but it also means recognising the existence of a right of resistance to an external mandate, a negative freedom held by a woman who does not want to be forced to become a mother against her will.



- (iv) While pregnancy is a biological process, motherhood or fatherhood are psychological, cultural and social processes, which may or may not be associated with pregnancy, so that the decision on the life project associated with motherhood can be linked to the right to personal and family privacy referred to in Article 8 of the European Convention on Human Rights, which is connected, without being identical, with the provisions of Article 18 SC.
- (v) That within the notion of health preservation (Art. 43 SC), sexual and reproductive health is included, which in turn includes not only contraception and family planning, which also applies to men, but also the voluntary interruption of pregnancy, which only affects women. The link between health and physical and moral integrity, as set out in Article 15 SC, is evident from the moment it is understood that integrity is not only a defensive notion, against the illegitimate interference of private third parties or agents of public power, but also a proactive notion, which allows the State to demand positive action in order to preserve the physical integrity and health of a person. And that women's sexuality and their aspiration to a free sexuality is linked to their ability to control the effects of the exercise of that sexuality for themselves is undeniable. Women's sexual and reproductive rights, recognised since the Platform for Action of the IV United Nations World Conference on Women in Beijing (1995), are human rights, and their connection with health, and from there with the right to life and to physical and moral integrity, cannot be questioned without denying three decades of progress in the recognition of women's position as political subjects and as full holders of rights and freedoms.

From this point onwards, and with this capacity for self-determination as a woman's right, which finds its constitutional basis in Arts. 10, 14, 15, 17, 18 and 43 SC, and not as an exception to the potential right to life of the unborn and therefore not entitled to any fundamental right, the legislator's decision to criminally prosecute the voluntary and consensual termination of pregnancy must be analysed as a limit to the woman's right, and therefore, it must be examined from the perspective of the minimum invasion in the exercise of the right, assuming in this line the possibility of the total decriminalisation of consensual abortion.

From this perspective, the only possible conclusion is that Organic Law 2/2010, which defines a mixed system, with time limits until the 14th week of pregnancy and indications after

that week of gestation, has a place within the Constitution, just as a system of total decriminalisation of consensual abortion could have, if the legislator decided, at a given moment, to opt for this criminal policy option. On the contrary, I believe that a system that is more restrictive of a woman's right to self-determination over her own body than the current one should be analysed, from the point of view of constitutional control, with extreme caution and from the perspective of the non-regression of rights. The legal and jurisprudential modifications that we are familiar with in comparative law show us how regressiveness is possible at the very moment when the decision-making axis of criminal policy is placed on the side of religious morality and the logic of biopower through the control of women's bodies and life projects.

3. The obligations of the State on the basis of the recognition of autonomy: protection of women's sexual and reproductive health.

The challenge to Article 12 of Organic Law 2/2010 is based, like the entire appeal, on the argument of the weighing of conflicting values and on the lack of protection of the life of the unborn child (i.e. on the imbalance in the weighing in favour of the woman). And the response of the judgment denies that the provision in question has the potential to alter the weighting by limiting itself to articulating the benefit aspect of voluntary termination of pregnancy in the cases in which it is legally authorised.

In my opinion, it would have been necessary to reject here, as in the rest of the pronouncement, the dialectic of the conflict of values because, as I have been arguing, the only clearly identifiable constitutional recognition is that of women's rights to which I have already referred. I understand that the protection of prenatal life in certain cases, and I will refer to this in more detail later, is a choice of the organic legislator, of the criminal legislator, motivated by the protection of a legal right that does not necessarily have constitutional coverage. For this reason, the dialectic of conflict is not useful in judging the constitutionality of the contested law in any case, and even less so when what is being questioned is the guarantee of voluntary termination of pregnancy, understood as an obligation imposed on the State to ensure the full exercise of the right of the woman who decides to have an abortion to have this decision materialise, ensuring her right to health (Art. 45 SC) and her physical and moral integrity (Art. 15 SC).



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In fact, this provision, like others in the law, could be considered insufficient to ensure free and equal access to the public health system for women who decide to have an abortion, because it defines an excessively broad framework and a margin of application to the health systems of each Autonomous Community that means, in practice, that it is impossible to terminate a pregnancy in the public health system in some provinces of Spain, forcing women to travel unnecessarily far from their homes, with the economic and psychological cost that this entails.

Where this is the case, the logic of conflicting values prevails and it is women's rights that break down in the face of the exercise of the right to conscientious objection by health workers, a deliberately slow system, or the existence of a "dissuasive" information policy. For this reason, I believe that the judgment should have been more categorical in stating that the service dimension of the right to voluntary termination of pregnancy is not an instrumental aspect of the right that can admit greater limits than the proclamation of the right-freedom of access to abortion. This is the essential aspect of the exercise of the right because, once it is decriminalised, if it is not accompanied by a public health system that ensures the preservation of women's reproductive health, the risk of punishment will simply be limited, which in no way discourages voluntary termination of pregnancy, but women's access to free, safe and accessible abortion will not be ensured, and therefore the exercise of the fundamental right to self-determination over one's own body will not be guaranteed in any way.

4. The limits to women's autonomy away from religious considerations.

The recognition that there is a constitutional basis for the right of women to manage their own fertility, without interference from third parties, does not necessarily exclude a legal system of recognition of the right to voluntary termination of pregnancy that allows for the criminalisation of consensual abortion in certain cases, but it does require that such criminalisation be exceptional, essentially residual and respectful of women's fundamental rights.

An analysis from this perspective could not easily be addressed in the judgment, which had to respond to the opposite approach, i.e. the affirmation of the constitutional inadequacy of criminal provisions which, according to the appellants, leave the unborn child unprotected. However, I feel it is necessary to bring my reflection to this point, in order to close my argument and present it with sufficient internal coherence.

If it is assumed that the voluntary termination of pregnancy, understood as a biological process that takes place exclusively in the woman's body, is a right that is basically part of personal freedom and the capacity for self-determination over one's own body and life project, then criminal intervention that limits this freedom and right must find sufficient justification and must act within strict limits that are also respectful of the principle of proportionality and do not discourage the exercise of the right, i.e. do not generate what is known as the chilling effect.

The principle of detriment, which, together with the principle of legality, is inevitably associated with criminal law, requires that only actions that cause harm to third parties are punishable. In accordance with this principle, the punishment of consensual abortion only legally enshrines a moral prohibition, because in a legal system it is not possible to state unequivocally that the harmful act is projected onto a third party, because it is also not possible to state that the embryo or foetus is a "person" in the legal sense, and therefore a holder of rights and an autonomous subject. On the empirical level, embryo and foetus are phases of vital prenatal development, but this is only a moral question, which admits different solutions to the affirmation that in these phases we are dealing with the person referred to in Art. 15 SC. Therefore, criminal law can only establish a convention that, while respecting moral pluralism, allows each woman to make her own moral choices, deciding what consideration the product of pregnancy has for her.

The convention established by Organic Law 2/2010 is that during the first fourteen weeks of gestation the decision to voluntarily terminate a pregnancy is free and informed, considering this time as the time necessary to allow the moral self-determination of the woman and the making of a decision that respects her individual dignity. From that moment onwards, which could also be another if so determined, a series of conditions are established so that consensual abortion is not considered punishable, either because there is a therapeutic or embryopathic indication, which extends the time limit for termination until the 22nd week of gestation, or from that moment onwards for eugenic indications.

It could be understood that the limit of women's autonomy is set by virtue of the autonomous viability of the embryo or foetus, but from a medical approach it is not possible to formulate this equivalence because it is not possible to set a universal definition of the limit of foetal viability, given the great diversity between individuals, regions and health systems. However, a standardised limit of viability is usually set between 21 and 25 weeks of gestation. In



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fact, the International Classification of Diseases (ICD-10-EN Diagnosis, 2022) considers an abortion to be the termination of a pregnancy in progress within the first 20 completed weeks of gestation, whereas, from that moment onwards, one speaks of intrauterine foetal death, which shows that it is the twentieth week of gestation, and not the fourteenth, that defines in general terms the autonomous viability of intrauterine life. Therefore, the criminal limit defined against the woman's full capacity for self-determination over the pregnancy does not correspond to the determination of the viability of the foetus, or to the mother's susceptibility to independent life, as referred to in PoL 5 of CCJ 83/1985.

The time limit, the system of time limits in itself, is based on the protection of the legal right of prenatal life, it is fixed from the legal convention of granting the woman a period or a space of decision that is stipulated as reasonable, to decide on the continuity of the pregnancy by virtue of her own moral considerations, which are projected on the autonomous configuration of her life project, and surely also on the moral consideration that the product of the gestation deserves. In short, the woman is given a - limited - amount of time to decide whether or not to continue with the pregnancy.

In this case, criminal law intervenes to introduce a limit to a social freedom of action, after identifying prenatal life as a legal right worthy of criminal protection. This does not mean, despite what was held in PoLs 5, 6 and 7 of CCJ 53/1985, that this legal right must have or actually has constitutional recognition. Nor does it mean that the protection of prenatal life is the central element with respect to which voluntary termination of pregnancy is defined as a limit (CCJ 53/1985, PoL 9). The criminally protectable legal rights may or may not have a constitutional reflection, but not all constitutional rights have to have their equivalent criminal protection, nor is every type limited to extracting a criminally protectable right from the Constitution. According to the Constitution, criminal offences must protect legal rights, whether or not they can be deduced from the Constitution, against reprehensible conduct, in accordance with the principle of legality and proportionality, and with due regard for the legislator's discretion. And, with regard to voluntary abortion, the punishable nature of the same, after fourteen weeks of gestation and in the absence of therapeutic, embryopathic or eugenic indications, the legal right that the criminal legislator has identified is human life in its prenatal phase.

These considerations reinforce the whole previous argument that the only fundamental rights are those of which the pregnant woman is entitled, and criminal intervention acts as a limit

to those rights to protect a right of legal configuration, which is human life in its prenatal phase. But this restrictive intervention must be as unrestrictive as possible, and its provision must be governed by the principles of last resort in criminal law and neutralisation of the chilling effect on the exercise of rights.

An analysis of the voluntary termination of pregnancy as a conflict between prenatal life and the pregnant woman's freedom of decision must be avoided, because this approach attributes to the embryo the nature of an autonomous object independent of the woman who gestates it, and such a view does not fit into an understanding of the dignity of the woman as a free, conscious and responsible individual, capable of assuming the obligations arising from her moral perceptions, whichever these are. It is not, therefore, a question of weighting, but an acceptance of criminal limits that are projected onto the individual freedom of women and must be assessed in that range of ideas.

5. Informed consent of women capable of making decisions.

The consent of the pregnant woman is essential to conceptualise abortion as a right and to decriminalise the intervention of any third party in the process, as reflected in LO 2/2010 and in the Criminal Code itself. The key is how consent is shaped, which must be freely given by a capable woman in advance. Information prior to consent is configured, in the law and in the judgment, as a determining element of the free formation of consent, and I consider this formulation to be inadequate.

The appellants refer to the ineffectiveness of the information referred to in Art. 17(2) of the Organic Law to shape consent, and the judgment holds that the aim of Arts. 14 and 17 of the Organic Law is not to condition consent, but "to provide her with the most complete information she may need when making a decision that is considered to be of extraordinary importance, free from any external pressure, with full knowledge of the facts and having all the appropriate elements to form a judgement, including those that could contribute to resolving the difficulties of any kind that the birth of a son or daughter may pose for her". The judgment states that the way in which the provision of this information to women has been regulated meets this objective without creating unlawful intrusions into fundamental rights.



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This reasoning, in my view, presupposes that the adequacy or sufficiency of the woman's consent is conditional on the provision of specific prior information, and I do not consider that such an assumption should be accepted. It should be borne in mind that Article 145 bis of the Criminal Code classifies the non-compliance with the procedural requirements governed in Organic Law 2/2010 as an autonomous offence, in particular, the requirement to verify that the woman has received prior information. And it can be inferred from this that the time-limit system provided for by law is not unconditional, but a time-limit system with counselling, a configuration that the judgment seems to implicitly accept.

But I believe that a time-limit model that assumes the full decision-making autonomy of the pregnant woman is more respectful of the full exercise of the woman's right to terminate a pregnancy. A regulation on voluntary termination of pregnancy that referred to Law 41/2002 of 14 November 2002, basic law regulating patient autonomy and rights and obligations regarding clinical information and documentation, to define informed consent, or that did not provide for any additional prior information other than that provided for in that law, could also be considered constitutional, and would undoubtedly be much less restrictive of individual freedom and considerably less damaging to the principle of personal dignity.

Because the key to the reasoning cannot be the existence of a conflict between constitutional rights and values that oblige the legislator to develop mechanisms for the protection of the unborn child. The key is that, from the recognition of the woman's freedom, its criminal limit should be restricted to the maximum and the guarantee of free consent, which justifies the reduced criminal intervention, can be limited without major difficulty to the verification that there has been informed consent to carry out the abortion, that is, the "free, voluntary and conscious consent of a patient, expressed in the full use of their faculties after receiving adequate information, for an action that affects their health to take place" (Art. 3 of Law 41/2002).

No specific information with moral connotations is necessary. That information will be received, if the woman so wishes, in another context. So no reinforced or different information is necessary to access other kinds of interventions. Because to presume otherwise is to assume that women are incapable of making free decisions without administrative supervision; it is to assume that the decision taken by the woman is not final when she arrives at the health service and needs to be redirected or confirmed. It is to assume the lack of cognitive and moral autonomy of women.

In short, the voluntary and consensual termination of pregnancy is an expression of the two basic fundamental rights of contemporary secular ethics, of the two rights that in turn are proclaimed, in our Constitution, as superior values of its legal system: liberty and equality. Women, as complete and autonomous human beings, and full holders of all the fundamental rights recognised in the Constitution, must be recognised as free and capable of making decisions about themselves and their life project, about their own bodies and about their personal moral conditioning factors without the interference of the punitive power of the State. This freedom of self-determination creates an obligation on the State to preserve her health and integrity when the decision is to terminate the biological process of pregnancy. And regressiveness in the recognition of these rights and obligations does not fit from the perspective of a right autonomous from any consideration of religious morality.

And, in this respect, my opinion is hereby issued.

Madrid, on ninth May of two thousand twenty-three.

Joint opinion issued by Judges Ricardo Enríquez Sancho, Enrique Arnaldo Alcubilla and César Tolosa Tribiño to the judgment on the appeal of unconstitutionality No. 4523-2010

With due respect for the opinion of the judges who made up the majority of the Plenary and in use of the power conferred on us by Article 90(2) of the Organic Law on the Constitutional Court, we express our disagreement with both the operative part and the merits of the judgment that resolves this action of unconstitutionality, for the reasons that we set out and defended at the time during the deliberation and which we set out below.

1. On the supervening loss of the legitimate object of certain challenges.

The judgment begins [PoL 1(B)] with an erroneous delimitation of the object of the appeal as a consequence of the supervening legal amendments in Organic Law 2/2010, which decisively conditions the result of the trial, as it gives an undue solution on challenges that have a supervening loss of their object; and the loss of object is a matter of public order.

In effect, without convincingly explaining the reasons for this, the judgment gives different treatment to the reform introduced by Organic Law 11/2015 of 21 September 2015 (amending Organic Law 2/2010 with regard to the consent regime of minors for the voluntary termination of pregnancy), than to the recent (more far-reaching) reform introduced by Organic Law 1/2023 of 28 February 2023 (published in the “Official State Gazette” of 1 March). With regard to the first one, the judgment declared that the appeal had suffered a supervening loss of the legitimate object with regard to the challenge to Article 13(4) and the second final provision of Organic Law 2/2010, in accordance with the consolidated case-law of this Court referring to the challenge on substantive grounds of a legal text that is amended or repealed by the legislator during the pendency of the action of constitutionality. Surprisingly, the amendment of Organic Law 1/2010 by Organic Law 1/2023 does not give rise, according to the judgment, to the supervening loss of the legitimate object of the appeal with respect to the provisions affected by this amendment, which lacks justification.

There are two explanations for this incoherent distinction in the judgment, both of which are unfounded:

(1) The first explanation is that “the various grounds of unconstitutionality that serve as the basis for the appeal were the subject of deliberation and dismissal by this court at the plenary

sessions of 8 and 9 February 2023, a date on which the amendment of Organic Law 2/2010 by Organic Law 1/2023 had not yet taken place”.

This statement does not correspond to the real situation. In fact, what the Plenary of this Court deliberated in the sessions of 8 and 9 February 2023 was the report presented by Judge Arnaldo Alcubilla, who, when his text was rejected by the majority (the same majority that supported the judgment passed on 9 May 2023), declined to present a new report in full rejection of the appeal, which led the President of the Court to entrust another report to the Vice-President (Fact 15 of the judgment). This new report gives rise to a deliberation of the court that starts from scratch, as on 8 and 9 February none of the grounds of appeal were approved or rejected. The report submitted was simply rejected. Thus, this deliberation, scheduled for the agenda of the Plenary Session of 9 May 2023, has therefore taken place more than two months after the entry into force of the amendment introduced by Organic Law 1/2023 in Organic Law 2/2010, which made it inexcusable to take this amendment into account with regard to the survival of the present action of unconstitutionality, in accordance with the consolidated case-law of this Court in this regard. According to it, in appeals of unconstitutionality based on substantive grounds, the amendment, repeal or loss of validity of the rule being challenged produces the extinction of the proceedings, since the objective purification function of the legal system that it serves becomes unnecessary when the legislator himself has expelled the challenged rule from the legal system (CCJs 160/1987, 27 October, PoL 6; 182/1992, 16 November, PoL 1; 274/2000, 15 November, PoL 3; 136/2011, 13 September, PoL 2; 160/2013, 26 September, PoL 3; 214/2014, 18 December, PoL 2; and 15/2023, 7 March, PoL 2, among many others). There can be no ad hoc exception to the consolidated case-law of this constitutional Court, as the judgment does.

(2) The second explanation is that, “given the approach of the appeal and the material scope of the changes to the provisions challenged by Organic Law 1/2023, this Court considers that the constitutional interest in prosecuting the grounds of unconstitutionality included in the appeal still persists”.

This argument, added to the previous argument, is also untenable. What is meant by “the approach of the appeal and the material scope of the changes to the provisions challenged by Organic Law 1/2023”? The explanation given in the judgment highlights the fact that the failure to declare, as was appropriate, the loss of the legitimate object responds to the desire to provide a response in any case, even if the legislator has decided on the substantive amendment of the provisions of the law challenged here.

The appellants challenge specific provisions of a particular legal text, Organic Law 2/2010, and do so on various grounds, all of which are substantive or material (principally the violation of the right to life enshrined in Article 15 SC), not formal or procedural, or they related to jurisdiction or the system of sources. The fact that Organic Law 2/2010 incorporates into our legal system the so-called time-limit system or model, as opposed to the previous system of indications, does not imply any reason for this Court to incur in jurisdictional excess, trying provisions that the legislator himself has already expelled from the legal system. Therefore, stating that it is necessary “that a ruling by this court becomes particularly relevant” in this matter, as is done in the judgment, is nothing more than a grandiloquent and vain request for principle. In short, it is nothing more than a pretext used in the judgment to avoid the application of the more than consolidated constitutional case-law on the disappearance of the object of the appeal of unconstitutionality based on substantive challenges when there are legislative amendments that affect the challenged provisions (case-law that is applied, however, to the amendment introduced by Organic Law 11/2015, without giving reasons for this disparity of criteria). With an obvious purpose, as later evidenced by the reading of PoL 4 of the judgement, to declare that the “legal time-limit model” in the regulation of abortion is fully in accordance with the Constitution. This way, the judgment, by wrongly judging, not the specific legal provisions challenged, but a specific “legal model”, seeks to send an unacceptable prospective message: the new Organic Law 1/2023 of 28 February 2023, which amends Organic Law 2/2010, maintaining the time-limit model, will not be declared unconstitutional in the event that it is challenged.

The application of this consolidated constitutional case-law on the scope of the review of constitutionality that applies to challenges based on substantive grounds, when the challenged legal provisions are amended or repealed during the pendency of the action of unconstitutionality, should have led to declaring that the present appeal had lost its legitimate object not only with respect to the challenge to Art. 13(4) and the second final provision of Organic Law 2/2010, due to the amendment of Organic Law 11/2015 (as stated in the judgment), but also, as a consequence of the much more far-reaching and extensive amendment introduced by Organic Law 1/2023, of the challenge to Arts. 5(1)(e), 8 in limine, 14, 17(2) and (5) and 19(2) of Organic Law 2/2010. Or, in other words, that the Court is only called upon to rule, as a result of the amendments introduced by Organic Laws 11/2015 and 1/2023, on the challenges raised by the appeal to Articles 12 and 15(a), (b) and (c) of Organic Law 2/2010. This was the correct delimitation of the object of the appeal in accordance with the constitutional case-law on the matter that should have been made in the judgment from which we disagree.

The object of this judgment from which we disagree cannot reach provisions that are no longer in force and cannot be used to make statements that prejudge or anticipate decisions on provisions that are not challenged in this action of unconstitutionality.

2. On the interpretative guidelines of the judgment.

In PoL 2 (B), the judgment refers to the interpretative guidelines that it will apply in its judgment. The judgment appeals to the North American case-law of the living constitution to justify an alleged “evolutionary interpretation” of the Constitution, which in the end will serve as justification to maintain that the regulation of abortion by Organic Law 2/2010 is not only not unconstitutional, but is precisely (and even more so after its reform in 2023) the most appropriate “legal model” for our Constitution, interpreted taking into account the present historical context.

Apart from recalling that the control of constitutionality is not projected on legal “models” (in the end, they are political options that each legislator shapes into laws), but on specific legislative texts, it is worth insisting that the Constitution is not a blank sheet of paper that the legislator can rewrite at will, just as it is not a blank sheet of paper that can be rewritten by its supreme interpreter without limits. Social reality may lead to some constitutional provisions becoming obsolete, or to the need to change them, but constitutional reform is foreseen for this purpose. The Constitution imposes limits not only on the legislator (otherwise it would not be a Constitution), but also on the Constitutional Court; both must respect the rigidity of constitutional norms for the simple reason that neither the legislator nor this Court can replace the constituent power, setting themselves up as a kind of alternative constituent powers. Otherwise, the very concept of the Constitution would be broken.

3. On the improper exclusion of CCJ 53/1985.

This misunderstood “evolutionary interpretation” is also used in the judgement to avoid dialogue with CCJ 53/1985, ignoring, among other things, that the case-law of that judgment on the scope of constitutional protection, ex Art 15 SC, to the unborn child, to human life in formation, has been confirmed by subsequent case-law of this Court (CCJs 212/1996, 19 December, and 116/1999, 17 June, among others) and that Organic Law 2/2010 itself, challenged in this appeal, states in its preamble to have taken into account this case-law established in CCJ 53/1985. It is true that the judgment with which we disagree constantly relies on the case-law of CCJ 53/1985 where it considers it appropriate to support its arguments in favour of dismissing the action of unconstitutionality.



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Therefore, it is not a question of CCJ 53/1985 (or any other judgement of the Court) not constituting a parameter for the control of constitutionality, as stated in the judgement with which we disagree, since the wording of Article 28 of the Organic Law of the Constitutional Court is more than eloquent in this respect, but rather, more simply, that in the review of the constitutionality of Organic Law 2/2010, in relation to abortion, this Court cannot fail to take into account its previous case-law, from which it certainly can depart, but expressly, not covertly, and giving full reasons for this change of case-law. It should not be forgotten that the Organic Law of the Constitutional Court itself, in Article 13, prohibits a Chamber from departing from the precedent constitutional case-law established by the Court: if it considers it necessary to depart on any point from that case-law, the matter must be referred to the Plenary for decision. But the Plenary cannot ignore its previous case-law either; it can change it, of course, but it must do so by duly expressing the reasons that lead to departing from the precedent case-law. This is not the case here, for what the judgment actually seeks to do is to articulate an alleged new right categorised as fundamental, in this case a woman's right to abortion.

In any case, it should be noted that CCJ 53/1985 contains two fundamental declarations that can in no way be considered to have been superseded: 1st) that neither the protection of the unborn child can take absolute precedence over the rights of the woman, nor can the rights of the woman take absolute precedence over the life of the unborn child (PoL 9); and 2nd) that, as the unborn child is a legal right constitutionally protected by Art. 15 SC, the State has the obligation to establish a legal system for the defence of life, a duty of protection which, given the fundamental nature of life, may also include the punishment of conduct contrary to its preservation through criminal law as a last guarantee (PoLs 5, 6 and 7). Not only were these principles not superseded in 2010, when the law whose contested provisions are the object of this appeal was passed (it must be understood that in everything that has not been modified or repealed by the legislator), but, as has been said, it is its own preamble that constantly refers to CCJ 53/1985 (four times in its section II), to justify that it does not contradict it. On the other hand, this same court has continued to invoke the case-law of CCJ 53/1985 in numerous decisions, some as recent as CCJ 66/2022, of 2 June. Moreover, the judgement with which we disagree does nothing more than support many of its pronouncements in CCJ 53/1985, although interpreting it, in some cases, in a sense that we do not share.

4. On the excess of jurisdiction in qualifying abortion as a right.

Indeed, the judgment from which we dissent does not limit itself to analysing whether the specific regulatory option set out by the legislator in the legal text subject to trial respects or exceeds the constitutional limits, but rather, exceeding the scope and limits of the control of constitutionality that corresponds to this Court, recognises a new fundamental right, which it identifies as “a woman’s right to self-determination regarding the termination of pregnancy”, anchored in Article 15 SC [in conjunction with Art. 1(1) SC and Art. 10(1) SC], from which follows the constitutional duty of the public authorities (in particular, the legislator) to guarantee its effectiveness, which is nothing more than a way of affirming the benefit nature of this new right constructed completely anew by the judgement. With this, under the pretext of the alleged “evolutionary interpretation” of the Constitution, a step further is taken than the aforementioned CCJ 198/2012, which at no time went so far as to deduce an alleged fundamental right of persons of the same sex to contract marriage from the constitutional text.

Thus, in PoL 2 of the judgment, after covering itself, as has been said, in the “evolutionary interpretation” of the Constitution, resorting to profuse quotations from decisions and texts of international bodies that are intended to be elevated to the category of a canon of constitutionality and affirming the alleged notoriety of what, with notable voluntarism, it describes as “consensus on the legal consideration of the voluntary termination of pregnancy”, ends up establishing the premise, which it then develops in PoL 3, that the constitutional judgement “should be based on the existential effect of pregnancy on women and its impact on their constitutional rights, which the State must always respect in articulating the protection of prenatal life”. Accordingly, in PoL 3, entitled “constitutional rights and interests at stake in the voluntary termination of pregnancy”, the judgment, following the guidelines of the recent CCJ 19/2023, of 22 March, in relation to euthanasia, enlightens the new woman’s right to self-determination with regard to the voluntary termination of pregnancy, as a fundamental right anchored in Art 15 SC, in its dimension of “right to physical and moral integrity”, as a manifestation of the dignity of the person and the free development of their personality [Art 10(1) SC], in connection with the value of freedom [Art 1(1) SC], and as opposed to the duty of the State to protect prenatal life as a constitutionally protected right (here the judgment refers to CCJ 53/1985 to define this constitutional right). In this way, the judgment falls outside the margins of the control of constitutionality that corresponds to this Court, since recognising fundamental rights is a dominion of the constituent power, not of the constituted powers and, therefore, not of the Constitutional Court.



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Let's remember once again that in our legal system, a fundamental right is a right created by the Constitution (a constitutional right) and therefore binding on all public authorities. In other words, a right which, by virtue of its definition in the Constitution, the supreme rule of the legal system, is imposed even on the legislator, and certainly also on the supreme interpreter of the Constitution. Therefore, it is not for the Constitutional Court to rewrite the Constitution in order to create, discover or deduce new fundamental rights, replacing the permanent constituent power. Social realities may even lead to the recognition of new fundamental rights, but constitutional reform is foreseen for this purpose. When examining a law, the Constitutional Court must limit itself to examining whether the specific legislative option embodied in the contested law respects or contradicts the Constitution. Any other operation exceeds the scope and limits of the constitutional review of the Court. Moreover, it should be noted that when this Court reviews the constitutionality of laws and reaches the conclusion that the legislator has not violated the Constitution, its function is not to assess and declare that the law in question is "constitutional", but rather that it is "not unconstitutional".

As in the case of CCJ 19/2023, the judgment undertakes a dogmatic construction that incurs the clear excess of attempting to limit the legitimate options of the legislator in the regulation of the serious legal conflict that the voluntary termination of pregnancy entails. The judgment begins by stating categorically that, given the transcendence that the decision to continue the pregnancy has for the woman, the legislator "cannot fail to be inspired by respect for the dignity of women and the 'free development of the personality' when regulating the voluntary termination of pregnancy". Premise that will lead it to conclude that "voluntary termination of pregnancy, as a manifestation of the right of women to make free and responsible decisions and choices, without violence, coercion or discrimination, with respect for their own bodies and life plans, forms part of the constitutionally protected content of the fundamental right to physical and moral integrity (Art. 15 SC) in connection with the dignity of the person and the free development of their personality as guiding principles of political order and social peace (Art. 10(1) SC)".

A kind of subjective right of freedom is thus established, where the previous system or model of indications (or other regulation that does not conform to the time-limit model) is considered a restrictive measure of the woman's pre-existing rights. In this way, the plurality of options that the Constitution opens up to the legislator, which is, in short, nothing more than the expression of political pluralism as the highest value of the legal system [Art. 1(1) SC], derives from the conception of the Constitution as a framework of coincidences sufficiently broad to

allow different alternatives, without necessarily imposing one in an exclusive and excluding manner except in those points in which the Constitution unequivocally and unconditionally establishes it, disappears. This inexcusable premise, which the judgement itself claims to follow as an interpretative guideline in its PoL 2(B), is, however, immediately disproved, as we have just seen.

In order to resolve the constitutional conflict that the regulation of abortion in Organic Law 2/2010 raises, it is not necessary (nor appropriate) to enlighten, as the judgment does, a new fundamental right of women to self-determination with regard to the termination of pregnancy, anchored in Art. 15 SC, in conjunction with Art. 10(1) SC, but rather the correct approach can only be to take into account that the State not only has the duty to protect human life in the making, as a legal right whose constitutional protection is based on Art 15 SC (CCJs 53/1985, PoLs 5 and 7; 212/1996, PoL 3; and 116/1999, PoL 4, *inter alia*), but also the legitimate rights and interests of the pregnant woman, in particular her fundamental rights, whose essential content delimits the scope of the duty to protect, as this Court already declared in CCJ 53/1985, PoL 8, and therefore the legislator must refrain from making disproportionate interventions in these rights (CCJ 53/1985, PoLs 7 to 9 and 12).

5. On the excess of jurisdiction in trying a model rather than individual provisions

The judgment incurs in another evident jurisdictional excess, already noted above, when it addresses the “examination of the time-limit system as a whole” in PoL 4.

Certainly, the time-limit system or model implemented by Organic Law 2/2010 replaces the system of indications of the previous legislation and is in line with the legislation of our neighbouring countries. But it is not for the Constitutional Court to examine, as the judgment does, the “time-limit model”, in order to conclude “that this regulatory option is in accordance with our constitutional text and with the case-law of this court”. The Court, when carrying out the constitutional review of the laws entrusted to it in the context of an appeal of unconstitutionality [Art. 161(1)(a) SC and Art. 2(1)(a) and 27 *et seq.* and 31 *et seq.* of the Organic Law on the Constitutional Court), does not prosecute “legal models” or “legislative options”, but specific legal texts subject to prosecution by those who are entitled to challenge them under the Constitution and its Organic Law [Art. 162(1)(a) SC and Art. 32 of the Organic Law on the Constitutional Court). That is, the action of unconstitutionality is directed “against laws and regulations having the force of law” [Art. 161(1)(a) SC] or, what is the same, “against laws,



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regulations or enactments having the force of law” [Art. 32(1) of the Organic Law on the Constitutional Court]. Not against “legal models”.

In short, it is not up to the Constitutional Court to declare that the time-limit system or model implemented by Organic Law 2/2010 (or any other “legal model”) is, as such, in accordance with our Constitution (and even less so that it is the most appropriate to the constitutional text). As the judgement itself recalls, what corresponds to this Court, in accordance with the Constitution and its Organic Law to which it is subject [Art. 1(1) of the Organic Law on the Constitutional Court], is to judge the conformity or non-conformity with the Constitution of the specific provisions of Organic Law 2/2010 challenged in the present action of unconstitutionality [Arts. 27(1) and 28(1) of the Organic Law on the Constitutional Court). As indicated above, a constitutional trial which, as a result of the amendments introduced by Organic Laws 11/2015 and 1/2023, must be limited to the challenges that the appeal makes to Articles 12 and 15 (a), (b) and (c) of Organic Law 2/2010, since suffered the supervening loss of their legitimate object by virtue of those legislative amendments.

From PoL 5 onwards, the judgment goes on to examine the specific contested provisions of Organic Law 2/2010. An examination which, in addition to unduly extending to provisions that the legislator himself has already expelled from the legal system, as has been said, is preceded by the affirmation in PoL 4, also highlighted above, that the specific “regulatory option” embodied in that Law, which incorporates the so-called “time-limit system or model”, “is in accordance with our constitutional text”, a conclusion which is insisted on at the beginning of PoL 5: “Having analysed the system of time limits as a whole and having affirmed its conformity with the Constitution...”. Having reached this preliminary conclusion on the constitutional conformity of Organic Law 2/2010, everything that follows in PoLs 5 et seq. is redundant, since it can only be affirmed that all the challenges must be rejected, as indeed the judgment does.

6. On the unconstitutionality of the provision of Art. 17 in relation to gestational information.

Thus, in PoL 5, the judgment examines and rejects the challenge to Art. 14 of Organic Law 2/2010 and, in conjunction with this, Art 17(2) and (5) of the same law (information prior to the consent of the pregnant woman to carry out the abortion on request within the first fourteen weeks of gestation). According to the foregoing, the judgment is clearly in excess of jurisdiction,

since the amendment of Article 19 by Organic Law 1/2023 of 28 February 2023 determines the loss of the legitimate object of the appeal with regard to the challenge to this provision.

Without prejudice to the foregoing, it should be noted that, if those provisions could be tried, the last paragraph of Article 17(5) of Organic Law 2/2010, which provides that “written materials” (in a sealed envelope) will specify that all information [the one provided for in Article 17(2)] “will also be provided verbally upon request”, should in any case have been declared unconstitutional, null and void. This paragraph allows for this prior information not to be given orally, in clear, objective and understandable terms, if the pregnant woman does not expressly request it, which means that in such a case it would not be guaranteed that the pregnant woman would give her informed consent to the abortion. Consequently, it cannot be understood that, even accepting the logic of the judgment, based on the existence of an alleged constitutional right of the woman to abortion, the legislator has not carried out a weighing of the conflicting rights and interests worthy of constitutional protection, since the legislative provision is clearly insufficient, from the perspective of the protection of prenatal life ex Art 15 SC, which imposes a duty on the State to protect it, as has been pointed out.

7. On the improper omission of the exception that social health should be excluded in therapeutic abortion.

In PoL 6 of the judgment, the challenge to Article 15(a) of Organic Law 2/2010, which regulates the so-called “therapeutic abortion”, is examined and dismissed. Therapeutic abortion can be carried out provided that the pregnancy does not exceed twenty-two weeks of gestation and there is a serious risk to the life or health of the pregnant woman.

Article 15 of Organic Law 2/2010 has not been modified following the action of constitutionality, and therefore its prosecution is appropriate, as indicated above. At this point, it is appropriate to share the rationale of the judgment, except that it should be made clear (accepting an interpretation of conformity), that the term “health” used by the provision only refers to the physical or mental health of the pregnant woman, as is evident from the parliamentary debates that led to the adoption of Organic Law 2/2010, and bearing in mind that the opinion referred to in Article 15(a) is issued by a specialist doctor, who cannot report on ‘social health’, so that the term ‘health’ cannot therefore be extended to the concept of ‘social health’, which would ultimately mean extending in practice the period for free abortion from the first fourteen to twenty-two weeks.



8. On the erroneous reasoning in Point of Law 7 regarding eugenic indication.

PoL 7 examines and rejects the challenge to Article 15(a) and (b) of Organic Law 2/2010, which regulate what the appellants call “eugenic indication” and the judgment “embriopathic indication”, which appear in these two cases: (i) where there is a risk of serious abnormalities of the foetus, provided that the foetus is not more than 22 weeks’ gestation; or (ii) when foetal abnormalities incompatible with life are detected (in which case the abortion may be performed without time limit).

As has been said, Article 15 of Organic Law 2/2010 has not been modified following the action of constitutionality, and therefore it is appropriate, as indicated above. It should be noted at this point that the rejection of the challenge reached by the judgment may be shared, but not its merits, which depart unjustifiably from the criteria set out in CCJ 53/1985, PoL 11, and then constructs its reasoning from the basic premise of that alleged new fundamental right of women to self-determination with regard to the voluntary termination of pregnancy, anchored in Article 15 SC, in its dimension of ‘right to physical and moral integrity’, in connection with the value of freedom [Article 1(1) SC] and the dignity of the person and the free development of their personality [Article 10(1) SC], that the sentence states. This same unacceptable approach is undoubtedly what helps to explain the profuse, unnecessary and ill-advised disquisitions of the judgment in PoL 8, in relation to discrimination on grounds of sex prohibited by Article 14 SC.

9. On the reductionist interpretation of conscientious objection.

The judgment once again incurs in the alleged excess of jurisdiction by trying (and rejecting) the challenge referred to Art 19(2), second paragraph, of Organic Law 2/2010, a provision of ordinary rank (in accordance with the third final provision of Organic Law 2/2010 itself) referring to the conscientious objection of health professionals directly involved in the voluntary termination of pregnancy. Indeed, the amendment of Article 19 by Organic Law 1/2023 of 28 February 2023 determines the loss of the legitimate object of the appeal with regard to the challenge to this provision.

Notwithstanding the foregoing, it should be added that, if Art. 19(2) of Organic Law 2/2010 can be prosecuted, we cannot share the reductionist interpretation of the judgment, which prevents even those who carry out auxiliary clinical actions in the practice of voluntary termination of abortion from exercising their right to conscientious objection. On the contrary, we understand that the term “directly involved” used by (which used) Article 19(2) of Organic

Law 2/2010 can only be regarded as constitutional [in accordance with Article 16(1) SC] if it is interpreted as including the health professionals involved in the previous proceedings of the procedure leading to the practice of abortion for medical reasons referred to in Articles 15 and 16 of Organic Law 2/2010, as well as the health staff who prepare the instruments of the surgery and assist the doctor who performs it, and that it does not exclude staff who may have a subsequent involvement, such as those responsible for collecting and destroying the remains derived from the abortion practice.

10. On Point of Law 10.

In PoL 10, the judgment again incurs an excess of jurisdiction when it comes to prosecuting and rejecting the challenge referred to in Articles 5(1)(e) and 8 *in limine* of Organic Law 2/2010, provisions of ordinary rank (in accordance with the third final provision of Organic Law 2/2010) concerning the gender perspective in health education on sexual and reproductive health and the clinical practice of abortion in the training of health professionals. Moreover, the judgment reiterates a practice it has used before, the repeated citation of international texts and agreements which, in no case, can be taken as a canon of constitutionality.

11. Conclusion.

For all these reasons, we disagree with the merits and the operative part of the judgment passed with the support of the judges who make up the majority of the Plenary. Following the proper delimitation of the subject-matter of the appeal, the action had to be partially upheld, declaring: that the challenge of Articles 5(1)(e), 8 *in limine*, 13(4), 14, 17(2) and (5) and 19(2) and the second final provision of Organic Law 2/2010 has lost its legitimate object; (ii) that the last paragraph of Article 17(5) of Organic Law 2/2010, which provides that “written materials will specify that all information will also be provided verbally upon request”, is unconstitutional, null and void; (iii) that the reference in Article 15(a) of Organic Law 2/2010 to the “health” used by the provision is not unconstitutional provided that it is interpreted as referring only to the physical or mental health of the pregnant woman, without therefore extending to the concept of “social health”; iv) that the remainder should be dismissed (but for reasons other than those expressed in the judgment), as regards the challenges of Articles 12 and 15 (a), (b) and (c) of Organic Law 2/2010, which have not lost their legitimate object.

And in this sense, our opinion is hereby issued.



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Madrid, on eleventh May of two thousand twenty-three.

Signed Ricardo Enríquez Sancho

Signed Enrique Arnaldo Alcubilla

Signed César Tolosa Tribiño

Opinion issued by Judge Concepción Espejel Jorquera, on the judgment handed down by the Plenary on 9 May 2023 in the Appeal for Unconstitutionality No. 4523-2010 (RI 4523-2010)

With all due respect for the decision of my fellow judges and making use of the power conferred by Art 90(2) of the Organic Law of the Constitutional Court, I hereby express my dissenting opinion against the decision to reject the action of unconstitutionality 4523-2010, filed against the Organic Law 2/2010 of 3 March, on sexual and reproductive health and the voluntary interruption of pregnancy.

1. My first ground of disagreement focuses on the composition of the plenary which decided the action of unconstitutionality, because of the lack of due appearance of impartiality of some of its members, including myself, which affects the composition of the plenary itself.

I reiterate the considerations which I made regarding the composition of the Court in the dissenting opinion against order 37/2023, issued by the Plenary on 8 February 2023, by which the recusals of President Cándido Conde-Pumpido Tourón, Vice-President Inmaculada Montalbán Huertas, Judge Juan Carlos Campo Moreno and Judge Concepción Espejel Jorquera were rejected and abstention was requested from them. These considerations were also reproduced in the dissenting opinion that I formulated against the order dated 18 April 2023, rejecting the reconsideration appeal against the aforementioned decision.

By virtue of the grounds for recusal provided for in Article 219(16) of the Organic Law of the Judiciary (OLJ), I consider that I should not have been a member of the Court that decided the appeal.

For this reason, by letter dated 30 January 2023, I informed the President of the Constitutional Court of my wish to recuse myself from hearing action of unconstitutionality 4523-2010 and all its motions, as I held a public office during which I became aware of the subject-matter of the present appeal. I stated that, in my capacity as a member of the General Council of the Judiciary and of the Plenary and the Studies

and Reports Committee, I participated in the exercise of the advisory function attributed to the Council in Article 108(1)(e) and (f) OLJ -in the wording prior to its repeal by Organic Law 4/2013 of 28 June 2013 on the reform of the General Council of the Judiciary, which amends Organic Law 6/1985 of 1 July 1985 on the Judiciary. I participated in the draft bill of the Organic Law on Sexual and Reproductive Health and Voluntary Interruption of Pregnancy, from which Organic Law 2/2010 of 3 March 2010 on Sexual and Reproductive Health and Voluntary Interruption of Pregnancy, which is partially the subject-matter of this action of unconstitutionality, is directly derived. I also pointed out that, in the exercise of the aforementioned consultative function, both at the Studies and Reports Committee meeting on 15 July 2009, and at the plenary session of the General Council of the Judiciary held on 23 July 2009, I voted against the proposed report issued by the Studies and Reports Committee in relation to the aforementioned draft bill of the Organic Law, as well as in favour of the amendment which, together with member Mr. Claro José Fernández-Carnicero, I presented to the report approved by the aforementioned Committee. In order to verify these points, I attached a copy of the report and the amendment, specifying that the plenary session held on 23 July 2009 rejected both the proposed report and the amendment in its entirety, as neither of them reached the majority required for approval.

On 7 February 2023, the Plenary of the Constitutional Court issued ruling 28/2023, in which it agreed not to consider my recusal in the appeal of unconstitutionality 4523-2010 to be justified.

This decision led to my forced incorporation into the college of judges of the Constitutional Court that issued rulings no. 37/2023, in which the aforementioned motions for recusal were rejected, and no. 18 April 2023, rejecting the reconsideration appeal against the previous ruling and, finally, the judgment from which I disagree.

With all due respect for the decision of the Plenary, which considered my recusal unjustified under the grounds set out in Art. 219(16) of the Organic Law on the Judiciary, I reiterate that my participation in the deliberation and voting of the aforementioned appeal of unconstitutionality and all its motions, given my awareness about it and having expressed my wish to recuse myself, may generate the appearance of a loss of impartiality in myself. This loss could in turn be extended to other members of the Court, who, also

after holding previous public offices, developed an opinion on the issues that have decided in the judgment, with the consequent loss of the due appearance of impartiality.

In my case, the reason why I recuse myself -recusal that the Plenary did not approve- was my profound knowledge of the subject-matter of the appeal and the externalisation of a firm criterion maintained to date, in relation to some controversial points of the preliminary draft organic law, which were substantially brought to light in the contested Organic Law. I acquired this knowledge and formed that criterion when I was part of the Council of the Judiciary. This means that, when judging this appeal of unconstitutionality, I am not devoid of a previous position or stance, which is detrimental to due impartiality in its objective aspect, especially when the documents I attached to my own motion for recusal showed that I was involved in the drafting, signing and presentation to the Plenary of the General Council of the Judiciary of a detailed and extensive amendment to the report approved by the majority of the Studies and Reports Committee. We, the signatories expressed in that report our legal opinion on many of the issues that are the subject-matter of this action of unconstitutionality. This has a negative impact on the appearance of impartiality that the Court must project to society, jeopardising the trust that the courts must inspire in citizens in a democratic society.

I must insist on the fact that this risk of impacting the image of impartiality is greater when the decision to consider the alleged ground for recusal unjustified differs from those adopted by this Court in many other cases. In those cases, the recusals of other judges were considered justified in view of the same ground and under similar circumstances; hence, the judges were correctly and definitively removed from hearing the appeals and all their motions, without the need for further merits to uphold them, as the reason for their recusal was evident.

Indeed, the recusals raised by another judge of this Court have recently been approved, due to her previous position on the Council of Statutory Guarantees of Catalonia. She took part in the issuing of consultative reports on the preliminary drafts that gave rise to the laws that are the object of the following appeals of unconstitutionality: CCRs 5/2023, 24 January (AI 6052-2022); 33/2023, 7 February (AI 5630-2022) and 34/2023, 7 February (AI 5724-2022)]. Two of these recusals were approved in the same plenary session where my recusal to AI 4523-2010 was declared unjustified.



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Likewise, the Plenary has repeatedly approved numerous recusals of another judge, who in a previous public office as a member of the Advisory Council of Andalusia, issued reports on draft bills from which the laws subject to the respective appeals of unconstitutionality derived (CCRs 85/2021, 15 September, and 116/2017, 18 July, among many others).

The aforementioned recusals were not raised “in proceedings between parties that have particular interests with which it is possible to align oneself” [CCR 28/2023, PoL 4(a)]. This argument is one of the reasons why my recusal was not approved. I do not agree with this criterion, since the mandate to exercise the jurisdictional function in accordance with the principle of impartiality, which Article 22 of the Organic Law of the Constitutional Court imposes on the judges of the Constitutional Court, does not contain any exception with respect to the objective processes of constitutionality control, nor to any other of the processes heard by this Court (CCR 226/2002, 20 November, PoL 3).

With regard to the positions held by other judges, whose respective recusals were approved uncontroversially, given the obvious concurrence of the alleged ground - the same as in my case - it should be noted that the regional bodies of which they formed part exercise consultative functions, as does the General Council of the Judiciary, of which I was a member and part of the Studies and Reports Committee. The fact that the content of the Council’s reports is usually broader and covers considerations of purely normative technique and even terminology, in accordance with the principle of collaboration between constitutional bodies, obviously does not prevent the Council’s reports, in the exercise of this consultative function, from carrying out a detailed analysis of the constitutionality of the preliminary draft laws submitted for report as a necessary step. They examine the constitutionality of the preliminary draft bills submitted for report, since the Constitution is the fundamental parameter for discerning the viability of the legislative initiative submitted for report, as occurred with regard to the draft bill of the challenged Organic Law.

On the other hand, the fact that neither the report of the majority of the Studies and Reports Commission, nor the amendment I presented together with another member of the Commission, to which I referred earlier, were approved by the Plenary of the Council,

does not prevent the possible impairment of the impartiality of those of us who expressed our opinion in favour or against the constitutionality of certain provisions of the draft bill, which have been the subject-matter of this action of unconstitutionality against the resulting Organic Law. The legal ground for recusal invoked does not require the issuing of reports, let alone their approval and submission to the Government. It only requires that, in the exercise of the public office held, the current judge may have become aware of the subject-matter of the dispute and formed a criterion to the detriment of due impartiality.

A reading of the report, the amendment and the text of the draft bill, and its comparison with the Organic Law finally approved and the subject-matter of the appeal of unconstitutionality, suffices to show that the essential issues raised therein match with those analysed and on which the criteria of the report, on the one hand, and that of the signatories of the amendment, on the other, were made explicit, whether or not they were shared by a sufficient majority of the members of the Plenary of the General Council of the Judiciary, necessary for its approval.

The fact that this criterion was formed and made explicit many years ago does not exclude the loss of the appearance of impartiality, as is argued to the contrary in CCR 28/2023, PoL 4(c), particularly given the nature of the regulated matter subject to the consultative report. This is especially important when the judgment of this appeal for unconstitutionality -where the present dissenting opinion is included- shows that there has been no change in the criteria of the judges with respect to the essential points subject to constitutional controversy, with respect to the criteria formed at the time and set out in the exercise of the public offices they previously held.

On the other hand, with due respect for the opinion of my colleagues, I must insist on the fact that the ruling in which my recusal was declared unjustified cites the case-law of the Court, most of which was handed down in motions for recusal and not when a judge recused himself or herself.

Thus, CCJ 5/2004 of 16 January and CCRs 226/2002 of 20 November, 61/2003 of 19 February, 80/2005 of 17 February, 18/2006 of 24 January, 383/2006 of 2 November,



394/2006 of 7 November, 107/2021 of 15 December, 72/2002 of 27 April, and 73/2022 of 27 April refer to rejections or inadmissibility of motions for recusal.

For its part, CCR 26/2007 of 5 February upheld the recusal, while CCRs 280/2006 of 18 July, 387/2007 of 16 October and 140/2012 of 4 July found the grounds for recusal justified.

Only CCR 456/2006, 14 December, corresponds to a case in which a judge's recusal was found to be unjustified for a cause totally unrelated to that now invoked: the kinship between the judge and a party agent who represented one of the parties in the administrative action in which the question of unconstitutionality was raised.

The Court has repeatedly highlighted the difference between recusing oneself and a motion for recusal.

In this sense, CCR 387/2007, of 16 October, considered the recusals of the President and Vice-President of the Court in an appeal of unconstitutionality to be justified. It stated that, although the legal grounds for recusing oneself and the motion for recusal are the same, "there is a relevant difference between them, which is that, when a judge recuses himself or herself, it is under their own initiative, whereas in a motion for recusal, it is up to the parties to the proceedings" and that "when a judge recuses himself or herself, it is his or her own decision, in respect of which no personal interest is discernible, nor even any suspicion of an attempt to alter the composition of the Court or to impede its normal functioning, unlike what may perhaps happen in the case of a motion for recusal". The ruling also states that "it is appropriate, however, to emphasise the naturalness with which the Plenary simply declares recusals justified. It accepts the reality of the facts adduced by the recusing judges without any critical question and limits itself to establishing the applicability to them of the legal grounds invoked in each case, in terms of a jurisdiction clearly differentiated from that followed in motions for recusal". The same ruling points out that the Court has recognised "the sensitivity showed by the judges who recused themselves as to the importance of the appearance of impartiality"; to recall "the special importance attributed to it, both our case-law, and that of the European Court of Human Rights because the trust that the Courts must inspire citizens in a democratic society is at stake". As stated in the CCR 26/2007, 5 February, PoL 11, "[the impartial judge is not

only a fundamental right of the parties to a dispute, it is an institutional guarantee of the Rule of Law established for the benefit of all citizens and of the image of Justice, as a pillar of democracy”.

The importance of the appearance of impartiality has been highlighted in numerous decisions, including the Constitutional Court Ruling 48/2021, of 21 April, which accepted the recusal of a judge who had been obliged to do so for the statements he made when speaking at a conference held in the Congress of Deputies to commemorate the 40th anniversary of the Kingdom of Spain’s accession to the Council of Europe. In the ruling accepting the recusal, the judge stated that “from the content and basis of the right to a fair trial, from the constitutional case-law on the matter and the case-law of the European Court of Human Rights, the existence of a ‘superlegal cause’ can be inferred, which makes it possible to challenge and propose to depart a judge from a case, whenever there is an objectively justified fear that he maintains prejudices or preconceived ideas about the purpose of prosecution for having personal interest in a particular case, from the point of view of an external observer”.

Likewise, in the same ruling, the judge stated that he was “aware that, on some pathological occasions, recusals can be part of a procedural strategy aimed at delaying the resolution of cases, undermining the legitimate confidence of citizens in the exercise of jurisdiction, whether ordinary or constitutional, or, in short, attempting to remove the judge predetermined by law from hearing the case. For this reason, the case-law of the European Court of Human Rights and the Constitutional Court refers to the restrictive interpretation of the grounds for recusal. These precautions must be taken to the utmost in the case of the members of the Constitutional Court, given that there is no possibility of enabling their replacement and that the composition of the college of judges is the result of broad political consensus involving various state institutions”.

Then, in the same ruling, the judge stated that he “does not feel personally concerned by the interests at stake in the appeals for constitutional protection (*amparo*) submitted for consideration by the Constitutional Court [...] nor does he take any prior position on the content of the constitutional proceedings in which he has been asked to recuse himself”. He maintains, in short, that “he does not incur any of the grounds for recusing himself”.

Despite this, the judge communicated his decision to recuse himself in the appeals in which he was obliged to “with the aim of reinforcing the appearance of and confidence in the impartiality of the Constitutional Court in the exercise of the functions attributed to it in defence of the fundamental rights of all citizens, that is, in defence of the Constitution and the values it proclaims”.

In the aforementioned ruling, the Court accepted the ground for recusal in the terms requested by the judge “for the purpose of reinforcing the appearance of and confidence in the impartiality of the Constitutional Court”.

As in many other previous cases, I consider that this appearance and confidence in the impartiality of the Court should have led to my recusal being accepted, especially when the alleged cause is objectively proven and does not refer to simple legal statements or opinions expressed in conferences, seminars or legal collaborations, but in the exercise of a public office, on the occasion of which I became aware of and formed my opinion of what is subsequently the subject-matter of the appeal of unconstitutionality.

For the reasons set out above, I reiterate that the rejection of my request for recusal has meant that I have been obliged to deliberate and vote in this action of unconstitutionality, to the detriment of my appearance of impartiality and that of the Court itself. Moreover, three of its members were in a similar situation to mine, as they held public office in the exercise of which they formed a prior opinion with possible detriment to due impartiality.

2. I also disagree with the considerations which conclude that the appeal has not lost its legitimate object with regard to the contested articles which have been redrafted by Organic Law 1/2023 of 28 February 2023, specifically Articles 5(1)(e); 8 in limine and letters (a) and (b); 14; 17(2) and (5); and 19(2), on the constitutionality of which the judgement is delivered.

While in Section (a) of PoL 1(B) of the judgment, where the amendments made to the contested Organic Law are analysed and the subject-matter of the trial is delimited, in relation to the amendment of Organic Law 2/2010 by Organic Law 11/2015, the constitutional case-law on the supervening loss of the legitimate subject-matter is applied. That loss is declared in relation to the amended provisions [Art. 13(4) and the second

final provision]. Also, in Section (b) of PoL 1(B) the same criterion is not maintained with regard to the amendments introduced in Organic Law 1/2023.

I do not agree with the reasons given in paragraph (b) above for reaching the conclusion, contrary to the conclusion reached in paragraph (a), that the amendment of Organic Law 2/2010 by Organic Law 1/2023 does not render the action for unconstitutionality devoid of its subject-matter.

The considerations underpinning the conclusion from which I disagree are as follows:

First, the various grounds of unconstitutionality that serve as the basis for the appeal were the subject of deliberation and dismissal by this court at the plenary sessions of 8 and 9 February 2023, a date on which the amendment of Organic Law 2/2010 by Organic Law 1/2023 had not yet taken place.

Secondly, because there is still a constitutional interest in the judgment on the grounds of unconstitutionality included in the appeal. This statement is supported by the fact that the appellants question the constitutional viability of the time-limit system itself, regardless of its specific legislative configuration. In addition, the appellants' overall questioning of the time-limit system is based on a complaint of incompatibility with the duty to protect human life and, therefore, on the legislator's breach of Article 15 SC. The challenge thus formulated thus affects one of the fundamental aspects of the constitutional system, and this determines that a ruling by this court becomes particularly relevant, especially in view of the time elapsed since CCJ 53/1985 of 11 April 1985.

I respectfully disagree with these statements.

At the plenary session held on 8 and 9 February 2023, only a specific draft judgment was discussed and deliberated upon, and was rejected by the majority. The rapporteur made use of the power to delegate the report, which led to the appointment by the President of another rapporteur to formulate another proposal for a judgement, the deliberation of which remained pending and was not brought before the Plenary until three months after the previous one. This shows that the appeal was not resolved at that time and that it was only after the new proposal was discussed and the final vote took place that the appeal was solved.

If, as stated in the judgment, the appeal had been resolved and dismissed, it would make no sense to include it on another agenda in the section dedicated to "matters pending from



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previous sessions” and, even less so, to submit it for new deliberation and approval. It took place on 9 May 2023, as it was not possible to announce and subsequently formulate individual votes until that moment. It is obvious that they are formulated with respect to a specific text of the judgment, which has not been so until its approval on the aforementioned date, that is to say, after the entry into force of Organic Law 1/2023.

Therefore, given the dates of the judgment and of the entry into force of the new Organic Law 1/2023, it is unquestionable in my opinion that the appeal has lost its object with respect to the amended provisions. I believe so because the only decision of the Court that would have allowed the appeal to be considered not to have lost its object would have been the decision of the appeal in a judgment, which should have been notified to the parties and published in the Official State Gazette within thirty days of the date of the judgment (Art 86 of the Organic Law on the Constitutional Court).

I cannot agree either that the specific arguments on which the party filed its action of unconstitutionality, or the fundamental right alleged to have been infringed, and even less so the time that has elapsed since CCJ 53/1985 was handed down, can be decisive in deciding whether the appeal has lost its object, even though the judgment with which I disagree insists on disregarding the canon of constitutionality set out in that decision. It departs without justification from its case-law, although, paradoxically, it then cites it in a fragmentary manner when it is appropriate to some of the arguments that are subsequently put forward in the decision, as I will explain below.

From my point of view, it is striking that reference is made to the fact that the appeal affects one of the most important aspects of the constitutional system, such as the right to life in Article 15 SC, and to the time that has elapsed since CCJ 53/1985 was handed down, which declared that gestating human life is a constitutionally protected right and established the applicable canon, from which the judgment I disagree with later departs, and that this is said almost thirteen years after the appeal was filed before the Court. By the time it is finally decided, the appeal has largely lost its legitimate object. Moreover, the decision has not focused its analysis on the possible unconstitutionality of the specific provisions challenged, but rather has examined the constitutionality of the time-limit system in depth. Once a subsequent law comes into force -as I will explain later, it maintains the time-limit system-, it is thus “shielded” by the construction of an alleged fundamental right of women to the voluntary termination of pregnancy in the judgment,

thus closing off the possibility of any other legislative option, which goes far beyond the scope of this Court's decision.

After almost thirteen years of delay in resolving the appeal, all this has been done at a time when the judgment can be used in the political debate during the election period.

The construction made in the judgment is based on a disguised modification of the constitutional case-law on the loss of object, which is made only in relation to one of the two amendments to the Law, without any convincing justification.

In view of the reasons on which the modification of the case-law on loss of the legitimate object is based, apart from not having been expressly declared and duly justified in the judgment, undermines the very nature of the action of unconstitutionality.

The judgment, by considering that the appeal does not lose its legitimate object because the appellants question the constitutional viability of the time-limit system, whatever its specific legislative configuration, undermines the object of the action of unconstitutionality. This object is not a specific legal model (the time-limit system in this case), but the particular provisions of a law or a provision with the status of a law, in accordance with Article 161(a) SC.

If the considerations supporting that the action of unconstitutionality has not lost its legitimate object were accepted, it could be understood that the action of unconstitutionality would not lose its object by the amendment or repeal of regulations or, more seriously, it would make it impossible to know for certain when an action of unconstitutionality would lose its object and when it would not.

This contravenes the reiterated case-law of this Court that, when it started its case-law, already stated that "the appeal of unconstitutionality is not established by the Constitution and the Organic Law of the Court as a challenge directed against a block or part of the normative system or the legal system, so that in order to decide constitutional legitimacy, the criteria for the application of the law must be judged. The role of the appeal is more modest but clearer. It is a matter of prosecuting, exclusively, legal texts and legislative formulas that are not expressly repealed" (CCJ 11/1981, 8 April, PoL 4). We have also stated that, in an abstract remedy, such as that of unconstitutionality, which is aimed at the objective cleansing of the legal system, it makes no sense to rule on regulations that the same legislator has already expelled from that legal system, without ultra-activity"

(CCJs 160/1987, 27 September, PoL 6; cited in 136/2011, 13 September, PoL 2; 160/2013, 26 September, PoL 3; and 214/2014, 18 December, PoL 2, among others).

That nature of the action of unconstitutionality determines that, in accordance with constitutional case-law, the general rule is that the repeal or amendment of the contested provisions determines the termination of the subject-matter of the action of unconstitutionality, since the “objective cleansing function of the legal system that it serves becomes unnecessary when the legislator himself has expelled the challenged rule from the legal system” (inter alia, CCJ 15/2023, 7 March, PoL 2).

On the other hand, it is clear that the present case is not among the exceptions to this general rule, to which CCJ 15/2023, PoL 2 refers: challenges to decree-laws that do not contain an entitling premise, budget laws or challenges on grounds of competence, when the question of competence is maintained after the enactment of a new law. These exceptions find their *raison d’être*, on the one hand, in guaranteeing “the correct functioning of the system of normative production advocated by the Constitution, purifying and expelling from the system the contested regulations that deviate from that system, regardless of whether or not they are in force when they are declared unconstitutional” (CCJ 15/2023, PoL 2, citing CCJs 60/1986, 20 May, PoL 1; 137/2003, 3 July, PoL 2, and 108/2004, 30 June, PoL 4). Regarding jurisdictional remedies, the loss of the legitimate subject-matter of the proceedings will depend on the actual impact that repealing, replacing or modifying the rule will have on the system, since the ultimate purpose of these proceedings is to put an end to the dispute of jurisdiction, in the light of the constitutional order of division of competences.

In accordance with this case-law, the Court should have declared the loss of the legitimate object of the action of unconstitutionality regarding Articles 5(1)(e); 8 in limine and letters (a) and (b); 14; 17(2) and (5); and 19(2).

The Constitutional Court’s examination should therefore have been confined to the provisions that have not lost their legitimate object, namely Articles 12 and 15(a), (b) and (c) of Organic Law 2/2010.

By failing to do so, the judgment contradicts the case-law set out that an action of unconstitutionality is intended to clean the legal system, which becomes unnecessary, in accordance with constant case-law, if it has already been cleaned by the legislature.

3. *I also disagree with the approach and argumentation of the judgment which, instead of limiting itself to analysing the constitutionality of the rules challenged in the appeal, creates from scratch what it calls a woman's right to self-determination with regard to the voluntary termination of pregnancy. It builds this based on Article 10(1) SC and Article 15 SC. It finally refers to the fact that a limitation of this right would entail discrimination against women, which would violate Article 14 SC.*

In PoL 2(A), under the heading “Scope of Constitutionality Review”, the judgment takes up the case-law of the Constitutional Court. It states CCJ 11/1981, 8 April, PoL 7, among others, affirming that “the Constitution is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds, as long as they do not go against it”.

It follows, as the judgment itself recalls, that the scope of the Constitutional Court's jurisdiction is clear: “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 government options are not previously programmed once and for all, so that all that remains to be done in future is implement that previous programme.”

It also recalls that the Constitutional Court's function - as already stated in CCJ 4/1981, 2 February, PoL 3 - consists of setting the limits within which the legislator can move freely and turn his political options into law, expressing his ideological preferences and his judgments of opportunity. This freedom of the legislator derives from his or her specific democratic legitimacy, from his or her nature as the representative at each historical moment of popular sovereignty. (Art. 66 SC); “[t]he law, as an emanation of the will of the people, can only be repealed or amended, in principle, by the representatives of that will, and it is only in the case where the statutory provision infringes the Constitution that this Court has been given the power to annul it” (CCJ 17/1981, 1 June, PoL 7).

In this line, this Court has also declared that “the legislator does not execute the Constitution, but creates law freely within the framework that it offers, so that this Court does not have to act as the legislator itself, restricting its freedom of disposition where the

Constitution does not do so unequivocally (CCJs 215/2016, 15 December, PoL 3, and 191/2016, 15 November, PoL 3, among others)” (CCJ 112/2021, 13 May, PoL 5).

Similarly, this Court has pointed out that “the reversibility of regulatory decisions is inherent to the idea of democracy” and that “this notion, inherent to the democratic principle, grants the legislator a fully legitimate margin of configuration, broad but not unlimited, as it is subject to the duties that emanate from the Constitution” (CCJ 233/2015, 5 November, PoL 2). This is also the case in CCJ 224/2012, 29 November, PoL 11.

However, as was done in CCJ 19/2023, of 22 March, which declared the constitutionality of Organic Law 3/2021 on the regulation of euthanasia, against which I also formulated a dissenting opinion, the judgment goes beyond the limits of the Constitutional Court’s judgment set out above and, instead of limiting itself to analysing whether or not the legislative option is in line with the Constitution, it ends up creating a pseudo-fundamental right of women to self-determination for the termination of pregnancy not included in the Constitution, as I will detail below. Its creation obviously falls to the constituent power and not to this Court, which leads to the imposition of the model included in Organic Law 2/2010 as the only possible constitutional model. In this way, the time-limit system is “boarded up”.

The overstepping of the control function that corresponds to this Court is reiterated in other grounds of the judgment which, in addition to creating a fundamental right from scratch, analyses the time-limit system in general (PoL 4), instead of limiting itself to the examination of the constitutionality of the specific provisions challenged and without going beyond those that have not been subject to modification by Organic Law 1/2023, as I noted above.

On the other hand, given that the judgment starts from a predetermined premise, namely the constitutionality of the time-limit system, this prior pronouncement renders superfluous the subsequent analysis of the challenge to Art. 14 made in PoL 5. It already starts from the decision to consider the time-limit system as a whole to be in accordance with the Constitution, artificially constructing a fundamental right to self-determination of the woman for the voluntary termination of pregnancy, which thus closes off the possibility of any other legislative option, in order to end up prejudging the decision that may be adopted in challenges to Organic Law 1/2023.

On the other hand, I consider that the creation of a supposed fundamental right to self-determination of voluntary termination of pregnancy would not be possible insofar as it contradicts, harms or threatens a constitutionally protected right, such as the life of the unborn child.

This construction is based, to a greater extent, on voluntarist affirmations, which are highly ideological, without justifying the reasons why the freedom or dignity of the woman require the sacrifice of the life of the unborn child, which is relegated to a mere unwanted appendage of the woman's body, ignoring the fact that it is a gestating human life. Moreover, the unborn child is in a situation of total vulnerability and defencelessness in the face of a traumatic and painful action which puts an end to its existence by the mere decision of the woman in whose womb it is found.

I do not agree that sacrificing the life of a gestating human being is a legitimate means of exercising the freedom to be a mother.

It is clearly inferred from STC 53/1985 that, as I will explain later, it should have been the starting point of the examination of the constitutionality of Organic Law 2/2010, that "human life is a process of development", "beginning with gestation and ending in death. That gestation has generated a 'tertium' which is existentially distinct from the mother although it is she who accommodates it". Thus, it is not possible to speak of identity or confusion of the unborn child with the female body, and that "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". It follows that there is enhanced protection when the existence of the unborn child is still dependent on the pregnant woman, since dependence on the mother does not make the unborn child a part of the mother equivalent to a limb or bodily organ of the mother. To put it graphically, the fact that the conceived child is physically in a woman's body does not make it part of her body, even though it is not a person in the exclusively juridical and non-biological sense of Art. 30 of the Civil Code.

In short, the decisive factor is the existence of two realities. This excludes an identification or confusion that transmutes the relationship of otherness, between the unborn child and the pregnant woman, into a relationship of identity, in which only the body of the pregnant woman is taken into account, with the consequent and unacceptable exclusive relevance of the will and decision of the pregnant woman.



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In this context, it is evident that, as this court pointed out, “the core problem (...) is the scope of the constitutional protection of the unborn child”, in such a way that it generally affirms that the “right to life, recognised and guaranteed in its double physical and moral significance by Article 15 of the Constitution, is the projection of a superior value of the constitutional order - human life - and constitutes an essential and fundamental right insofar as it is the ontological assumption without which the remaining rights would have no possible existence”. Indissolubly linked to the previous one “is the legal value of the dignity of the person”, which is recognised in Article 10 SC and constitutes the “germ or core” of the rights “which are inherent to it”, as evidenced by its own constitutional location as the gateway, the starting point “logical and ontological prius for the existence and specification of the other rights” (PoL 3).

This line of argument was reiterated by the Court in CCJ 48/1996, when it affirmed that the right to life and to physical and moral integrity constitute the “existential support of any other rights in the catalogue of fundamental rights”, “indissolubly united by its ontological consistency to the dignity of the person as a profession of faith in man, which carries in itself all the others” (PoL 2). This principle is taken up again in CCJ 212/1996, which resolved the appeal of unconstitutionality brought against Law 42/1988 of 28 December 1988 on the donation and use of human embryos and fetuses or their cells, tissues or organs, to deny the embryos and fetuses referred to in the law, based on the criterion of non-viability for independent life, the protection granted by Art. 15 SC to the unborn child, recalling, at the same time that the latter is not the holder of the right to life, but constitutes a legal right under constitutional protection.

On the contrary, viability, the ordinary condition of a conceived child, constitutes a conclusive premise that determines its legal protection; a principle that marked the sense of the constituent parliamentary debate regarding the approval of Art. 15 SC.

Consequently, what is decisive for the required guarantee of protection of legal rights is not so much that the conceived child is a mere hope of a human being (*spes hominis*), from whom the ownership of rights cannot be predicated, but rather that it is a legal right which lacks the “essential content” referred to in Art. 53(2) SC, as the Constitutional Court stated in CCJs 212/1996 and 116/1999. Its relevance is derived from its human dimension, and therefore participates in the protection of the right to life (Art. 15 SC) as an object of it; an object that cannot be denaturalised beforehand by converting it into available matter.

The life of the conceived child has an intrinsic, substantive and individualised value, as it is not only a matter of life, but of human life in the gestation phase.

Therefore, it is not possible, conceptually speaking, to affirm a subjective right, referring to the voluntary termination of pregnancy, whose object is the destruction of a legal right such as human life in the gestation phase.

I also disagree that the pseudo-fundamental right to self-determination in the termination of pregnancy that is constructed in the judgment derives from the right to physical and moral integrity of women.

On the one hand, the approach taken in the judgment, as well as the Law itself, which considers it as an exclusive right of women, is based on depriving the father of any participation in the decision, considering the unborn child as just another part of the mother's body and ignoring the fact that it is a fertilised human embryo that carries the DNA of both parents.

Against this, the ECtHR has recognised that "a potential father" can present himself as a victim of an abortion performed on his unborn child (case *Boso v. Italy*).

The evident and recognised gender perspective, which inspires the contested Organic Law, is reflected in the absence of any reference to the father, or presumed father, and in general to the male. This contradicts all the legislative reforms that have introduced measures aimed at involving men, on equal terms with women, in the upbringing and care of children. In this sense, Organic Law 3/2007 of 22 March 2007 on the effective equality of women and men, was a relevant example; the extension of breastfeeding leave in favour of fathers, the extension of the right to paternity or the recognition of leave for the reconciliation of family, work and personal life, and, of course, the right to investigate paternity as recognised in Art. 39(2) of the Constitution, in coherence with the principle of co-responsibility contemplated in Art. 5(2)(b) of the Law.

However, among the public policies to which Organic Law 2/2010 refers, there is no mention of any policy aimed at involving men in the upbringing and education of children, an involvement that should begin as early as the gestation phase, promoting the appropriate instruments so that women can demand that fathers assume and fulfil the responsibilities



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derived from paternity. This public action goes beyond the legal recognition of the right to investigate and demand proof of paternity and would be the logical corollary of the latest legislative developments in terms of equality between men and women and the reconciliation of personal, family and working life.

This approach as a woman's right to self-determination encourages male irresponsibility for the consequences of sexual intercourse.

On the other hand, I consider that the construction made in the judgment contributes to perpetuating the cultural devaluation of motherhood, insofar as it aims to assimilate pregnancy to a violation of the right to physical and moral integrity or to inhuman or degrading treatment of women, which I can in no way agree with.

I also disagree with the arguments which, in order to support the creation of this alleged right of women, go so far as to assert: "both pregnancy and its eventual termination are phenomena that exclusively affect women, and unjustified or disproportionate limitations on their rights arising from such events, which are indissolubly linked to their sex, constitute discrimination based on sex prohibited by Article 14 SC".

Initially, it is difficult to understand how motherhood, which by its very nature can only be experienced by women, can be described as discriminatory towards men.

On the other hand, the assertions contained in the judgment regarding an alleged violation of the right to equality are contradictory to the legislative advances in the recognition of the professional rights of pregnant women and mothers and to the case-law of this Court in this area.

It is clear from the judgment that pregnancy and maternity are seen as a factor of discrimination against women and a limitation of their life project or their personal and professional aspirations, which I do not agree with, and even less so, that the total lack of protection of a constitutionally protected right such as gestating human life is justified based on these grounds.

In addition, it is worth remembering that the Constitution recognises and protects children and mothers, from which a right to maternity is deduced in a positive sense [Art. 39(2)

SC] and not a negative one or one of “alternative use”, at the discretion, of this circumstance.

4. I also disagree with the considerations made in the judgement in PoL 2(B) under the heading “Interpretative Guidelines”, which are based on the assertion that “[i]n carrying out its supervisory task, the Court must interpret the Constitution in the light of the specific historical context”.

To this effect, CCJ 198/2012, 6 November, PoL 9, is cited. It is based on the judgment of the Supreme Court of Canada of 9 December 2004, which takes up the expression of *Privy Council, Edwards v. Attorney General for Canada* of 1930-, “the Constitution is a ‘living tree’ (...) i.e. a progressive interpretation allows a constitution to adjust to the realities of modern life as means to guarantee its own relevance and legitimacy. This is so not only because the basic principles of the constitutional text are applicable to situations not envisaged by its founders, but also because the public powers -and the legislator in particular- gradually update these principles. Furthermore and because the Constitutional Court, when ensuring that any such updating conforms to the Constitution, endows the rules with a content to enable their reading in light of modern-day issues and the needs of current society; as otherwise there is the risk of an unfulfilled Constitution”.

It also argues that this Court must “maintain a connection between the constitutionality trials that it is called to carry out and the social reality on which such judgments will have an impact in pronouncements [...]”.

In view of this approach, I consider it appropriate to point out that what the judgment considers to be a “social reality” is not an empirically demonstrated reality, which would have required taking into account, rigorously and according to objective parameters, the opinion of all citizens on a matter as transcendental as the regulation of abortion. On the contrary, it only focuses on the vision of the problem offered by certain groups and individuals, politically very active, who are in favour of leaving the voluntary termination of pregnancy to the discretion of the woman. The media coverage of public demonstrations by these groups has the effect of extrapolating their ideas and attributing them to society as a whole.



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Furthermore, the precedents of our case-law cited in the aforementioned section of the judgment as an example of the Court's pronouncements being adapted to social reality and to the principle of the unity of the Constitution, apart from not referring to cases comparable to the present one, in which the right of all to life enshrined in Article 15 of the Constitution is concerned, in any case, do not allow for the creation of supposed new fundamental rights, which was not done in any of the judgments cited.

Entering into the examination of the international legal framework, which is also referred to in PoL 2(B) of the judgment to support the construction of a non-existent fundamental right, it should be noted that the "right to abortion" - or, if you like, the "right to decide", in terms of voluntary termination of pregnancy - is not expressly recognised in any international treaty signed by Spain. On the contrary, according to the express statements contained in those instruments:

The United Nations Universal Declaration of Human Rights of 10 December 1948 proclaims that "Everyone has the right to recognition everywhere as a person before the law"; Article 3 recognises that "everyone has the right to life, liberty and security of person"; and in Article 25(2), that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 6 of the International Covenant on Civil and Political Rights (1966) states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The UN Declaration on the Rights of the Child of 20 November 1959 states in its Preamble that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"; and Principle 4 of the Declaration states that "special care and protection shall be provided both to him [the child] and to his mother, including adequate pre-natal and post-natal care".

Finally, Article 6 of the Convention on the Rights of the Child (Resolution 44/25 of 20 November 1989) states that "States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child".

Thus, contrary to what is stated in the judgment, the truth is that no international human rights treaty ratified by our country recognises the right to abortion, so the assertion that the decriminalisation of abortion forms part of the international obligations assumed by Spain does not conform to reality.

In addition, the references cited in the judgment from which I disagree would have to be assessed in their context and in their entirety, and they also advocate the need to adopt other educational, health, contraception measures, and public, prior and preventive abortion services. The ultimate goal must be to prevent unwanted pregnancy, not to use abortion as a contraceptive measure or integrate it into a family planning policy.

Thus, in the recommendations of the Cairo Conference (Chapter VIII, p. 8.25), after insisting that in no case should abortion be promoted as a method of family planning, governments and intergovernmental and non-governmental organizations are urged to “reduce the recourse to abortion through expanded and improved family-planning services. Women who have unwanted pregnancies should have ready access to reliable information and compassionate counselling. Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion. Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe.”

From the wording of the transcribed text, it can be inferred the respect for the law of the States and that the Conference avoided pronouncing on the lawfulness of abortion in general and in particular by simply referring to “circumstances where abortion is not against the law”.

The references to voluntary termination of pregnancy to which the judgment refers are found in international texts that lack not only binding legal effect, but also normative nature.

In this regard, we noted in CCJ 11/2023, of 23 February, in relation to the Opinions of the United Nations Committees, and specifically, of the CEDAW, also cited in the judgment from which I disagree, that they contain recommendations for the States parties, but do not have jurisdictional functions (in a similar sense, CCJ 46/2022, 24 March, PoL 6).



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Similarly, in the aforementioned CCJ 11/2023, PoL 3(c), citing CCJ 184/2021, of 28 October, PoL 14, we recall that it is not up to this court to examine the observance or non-observance, per se, of international texts that bind Spain, but rather to verify the respect or infringement of the constitutional provisions denounced. This decision adds that the above is without prejudice to the fact that, under Art. 10(2) SC, such provisions must be interpreted in accordance with the Universal Declaration of Human Rights and with the international treaties and agreements on the same matters ratified by Spain.

It is essential to highlight, in any case, that in accordance with Article 96(1) of the Spanish Constitution, only the provisions contained in validly concluded International Treaties, once ratified by Spain and officially published, form part of our domestic law. I would also wish to recall that the interpretative canon recognised in Article 10(2) SC refers exclusively to the Universal Declaration of Human Rights, the Treaties and International Agreements ratified by Spain regarding fundamental rights, which do not include, as I have pointed out, an alleged right to abortion.

On the other hand, the European institutions have repeatedly refused to establish a “European right to abortion”, even when asked directly. The Committee of Ministers of the Council of Europe refused to “establish a right to abortion” in July 2013. Nor did the European Commission, which has not addressed the issue, considering that such a proposal is outside its competence. On 10 December 2013, the European Parliament rejected a resolution calling for the recognition of abortion as a fundamental right.

In particular, the ECtHR case-law does not support the conclusions reached in the judgment, given that the decisions of the ECtHR do not impose a specific legislative model, but allow for a wide margin of configuration by the Member States. Thus, regarding the main question as to whether or not the foetus is a person, as interpreted by Art 2 ECHR, which protects the right of “everyone to life”, the ECtHR has kept this question open in order to allow States to determine when life begins and thus when legal protection should begin. In *Vo v. France*, it stated “that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention”, although it added that “it may be regarded as common ground between States that the embryo/foetus belongs to the human race” and consequently “requires protection in the name of human dignity”.

In any case, none of the ECtHR decisions recognises an alleged fundamental right to abortion.

On the contrary, the SCtHR considers that Article 8 cannot be interpreted as conferring a right to abortion (ECtHR case *A, B and C v. Ireland*, 16 December 2010) or the right to practice it (case *Jean-Jacques v. Belgium*). Similarly, in the ECtHR case of 30 October 2012, *P. and S. v. Poland*, in which the Court held that Article 8 ECHR, which guarantees personal autonomy, cannot be interpreted as conferring a right to abortion.

Furthermore, the ECtHR has emphasised that, once the State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion, “the legal framework devised for the purposes of the determination of the conditions for lawful abortion should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention” (case *P. and S. v. Poland*)

The ECtHR has stated that States are free to decide whether to allow abortion, adding that, however, if national legislation decides to legalise it, the Court can analyse the legal framework by seeking a fair balance, in a specific situation, between the different rights and interests of the parties involved. Thus, the Grand Chamber stated in the case *Vo. v. France* that “It is also clear [...] that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms”. The ECtHR recalls, in short, that if a State decides to allow abortion, its “margin of appreciation is not unlimited” with respect to “how conflicting rights are balanced”, and that “the Court must supervise whether the interference constitutes a proportionate balancing of the competing interests involved”.

Consequently, the ECtHR declares that the necessity and proportionality of the rights and interests affected in cases of abortion must be weighed in the light of the ECHR.

Other constitutional courts have recognised the human embryo’s right to life. Thus, the German Federal Court, in its judgement of 25 February 1975, which was to influence the Spanish Constitutional Court in 1985, admitted that the right to life, recognised in



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Article 2 of the Basic Law of Bonn, extends to the life of the embryo, “as an independent legal interest”.

Later on, the judgment of the Federal Constitutional Court of 28 May 1993 stated that “in any case, during the duration of pregnancy what we are dealing with in the case of the unborn is an individual life, with a genetically determined identity, which is thus unique, unmistakable and inseparable. As it grows and unfolds (*im Prozeß des Wachsens und Sich-Entfaltens*), such life does not just develop into a human being, but develops as a human being”.

On the other hand, the recent judgment of the Supreme Court of the United States of America of 24 June 2022 (*Dobbs v. Jackson Women’s Health Organization*) declared that the alleged right to abortion is not enshrined in the American Constitution; that it cannot even be protected by the right to liberty; and that it cannot either be protected by the Fourteenth Amendment’s Due Process Clause. It also clarified that in no case can the foetus be considered a privacy right of the woman. “Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket” (referring to the *Roe v. Wade* and *Planned Parenthood v. Casey* judgments) Finally, it states that the time-limit theory (from when a foetus is viable) is alien to the tradition of the American nation, that the Supreme Court is not the competent body to decide that, and returns the authority to regulate abortion to the people and their elected representatives.

It can be inferred from this pronouncement that, contrary to what was done in the judgment with which I disagree, the Supreme Court of the United States recognised that the approval of abortion by that Court in the aforementioned two judgments had entailed going against the principle of separation of powers, because that task corresponds to the legislative power and not to the judiciary, which is why competence went back to the legislative chambers of the federal states.

I consider, in short, that on the basis of the alleged evolution of the social reality referred to in the judgment which, as I have stated, is contemplated in a fragmentary manner, excludes other legal positions. It is based on texts that have no binding force and on European case-law, which is analysed in an incomplete and partial manner, and ignores the fact that the only way to adapt the provisions of the Constitution to the social reality in this area is through constitutional reform, since the supreme interpreter of the Spanish

Constitution cannot in any way modify it by creating non-existent rights and replacing the constituent power.

5. I do not agree with the considerations contained in paragraph C of PoL 2, under the heading “Differences between the subject-matter of the present action of unconstitutionality and the subject-matter of CCJ 53/1985”.

The judgment with which I disagree begins by pointing out that neither the CCJ 53/1985 nor any other judgment constitutes a parameter of control of constitutionality for the Court, which, by virtue of the provisions of Article 1(1) of the Organic Law on the Constitutional Court, “is subject only to the Constitution and this Organic Law”.

This statement, which is profound in the terms in which it is formulated, suggests that the Court can disregard the precedents of its own case-law and simply depart from it. Obviously, the Constitutional Court can modify its own case-law, although without disregarding the legal provision established in Article 13 of the Organic Law on the Constitutional Court, which requires, in certain cases, that the change be justified, without being able to resort to surreptitious modification (not recognised and as such not motivated), which would mark the Plenary’s decision as arbitrary.

In my opinion, the reasoning that follows the alleged differences between the procedures and contexts in which CCJ 53/1985 was handed down and the present action of unconstitutionality are nothing more than an attempt to circumvent essential pronouncements made in that judgment, whose canon of examination would have led to declarations of unconstitutionality contrary to those made in the judgment.

The judgment, which I do not agree with, does not justify the reasons why it departs from the essential pronouncements to which I will refer later, and it cannot be accepted that the mere passage of time is sufficient to render that case-law inapplicable, especially when it has been reiterated in CCJs 212/1996, 16 December; 116/1999, 17 June; 66/2022, 2 June, and 11/2023, 23 February.

It should not be forgotten, on the other hand, that the Preamble of the Law itself repeatedly refers to CCJ 53/1985, in an attempt to justify that the rule is in line with its provisions, which shows that the legislator does not consider that it has lost its validity due to the passage of time, nor due to the alleged change in the social reality to which it was to be



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applied.

On the other hand, it is incongruous to state that the case-law of CCJ 53/1985 is not applicable, then cite it in a fragmentary manner in other points of the decision, and finally reaching conclusions that differ from those drawn therefrom, which I do not agree with either, as I will point out later.

Therefore, instead of departing without sufficient justification from our case-law, the judgment should have examined the constitutionality of the contested provisions taking the constitutional value of human life and its protection as a starting point, particularly the life of the unborn child. Then, it should have referred to the limits and guarantees of this protection in situations of conflict between rights and legal interests, and finally, to the suitability and sufficiency of the measures contained in the Law as an instrument for the preservation of the life of the unborn child.

6. I disagree with the grounds and the judgment concerning the constitutionality of Articles 14, 17 and 12 of Organic Law 2/2010.

The judgment goes beyond the examination of the provisions challenged by the appellant and, ignoring the fact that the appeal in respect of those provisions has lost its legitimate object, declares the time-limit system to be generally constitutional.

The speech starts from dogmatic claims that begin by saying that “the State does not renounce the protection of prenatal life during the first fourteen weeks”.

In support of this thesis, which is devoid of content, only the Preamble of the law is cited, stating that it “recognises prenatal life as a legal right worthy of protection, and seeks to make this protection compatible with the guarantee of the constitutional rights of the pregnant woman, whom it conceives as an adult, responsible person and holder of fundamental rights, the content of which must also be respected”. It is added that the Preamble establishes as a principle that “the competing rights and interests involved in regulating voluntary termination of pregnancy are not absolute” and recognises its duty to “balance the protected legal interests and rights at hand and attempt to harmonize them if possible, or if not, spell out the conditions and requirements for one of them to prevail”.

Based on this purely theoretical approach, the judgment concludes, without further argument, that “[f]rom this starting point, the legal design of a gradual protection of

prenatal life correlated to a gradual limitation of women's fundamental rights - examined in detail in the fourth Point of Law of this judgment - is fully in line with the Constitution".

In other words, from the mere recognition by the legislator that the life of the unborn child is a constitutionally protected good, followed by the denial of the absolute nature of the rights in conflict in the Preamble, which lacks regulatory value, the judgment goes directly to declaring constitutional, without further justification, a regulation which not only does not provide any real protection for the rights of the unborn child, but which, contradicting the previous statements, gives absolute preponderance to the rights of women. To this end, it refers to the examination carried out in PoL 4, in which a pseudo-fundamental right of women to self-determination of the voluntary termination of pregnancy is constructed for this purpose, thus closing the circle, to conclude that the legislator designs "gradual protection of prenatal life correlated to a gradual limitation of women's fundamental rights" fully in line with the Constitution, a conclusion which I cannot share.

It is established that the life of the conceived child has an intrinsic, substantive and individualised value, as it is not only a matter of life, but of human life in the gestation phase, which is considered a constitutionally protected legal right. What is called "gradual protection of prenatal life correlated to a gradual limitation of women's fundamental rights" is nothing more than a time-limit system, which is declared constitutional as a whole, where the lack of protection or the protection of the unborn child is based exclusively on the time elapsed since the beginning of gestation.

It is enough to examine this alleged "gradual protection" to conclude that it is fictitious and that it conceals the total lack of protection of the gestating human life during the first fourteen weeks.

The reality is that, in this period, the unborn child has no protection whatsoever and not only is there no limitation whatsoever on the woman's decision, but the destruction of the foetus is left to her free will, as if it were an unwanted part of her body, which she can dispose of at will, without conditions of any kind and leaving the potential father out of the decision, whose DNA is also carried by the fertilised embryo and in relation to whose legitimisation the ECtHR has declared that "a potential father" can present himself as the victim of an abortion performed on his unborn child (*case Boso v. Italy*).



After referring to the construction previously made in PoL 4 of the fundamental right of women, the judgment attempts to refute the arguments of the appellant. It begins by indicating that the State has not renounced criminal sanctions during the first fourteen weeks and that the protection of prenatal life continues to be articulated by criminal law in all those cases in which the termination of pregnancy is carried out without respecting the conditions and requirements demanded by the Organic Law, especially when it is carried out without the free consent of the pregnant woman. It does not specify the conditions and requirements demanded, a specification that is obviously impossible because in this period no requirements or conditions are established, but mere formal procedures that, as I will mention later, lack any effectiveness for the protection of the gestating human life. It is clear from the paragraph “especially when it is carried out without the free consent of the pregnant woman” that the only abortion punishable during the first fourteen weeks would be that carried out without the free consent of the pregnant woman, which, by the way, would no longer be a voluntary termination of pregnancy, which is the object of decriminalisation by the law. On the contrary, it is clear that during that fourteen-week period abortion is free for the woman.

Next, in order to address the alleged absolute lack of protection for the life of the unborn child during this first phase of pregnancy, the judgment mentions that “the law establishes a social, welfare and health model of a preventive nature in a twofold direction: (a) through public policies promoting responsible and safe sexuality and family planning techniques, aimed at reducing the number of unwanted pregnancies; and (b) through maternity-support policies that contribute to reducing recourse to voluntary termination of pregnancy for reasons linked to the socio-economic difficulties associated with caring for a child”.

Contrary to this dogmatic assertion, it should not be forgotten that such policies fall within the scope of social rights, the effectiveness of which, according to Article 53(3) SC, is subject to subsequent legislative development.

In this sense, this Court has held on numerous occasions that the guiding principles of social and economic policy contained in our Constitution (the so-called social rights) do not constitute fundamental rights in their own right, but rather mandates to the legislator

to guide social and economic policy, serving as a parameter of constitutionality of the laws to that effect (CCJ 75/1998, among others). Although these principles do not generate subjective rights in themselves in favour of citizens, women in this case -unless the law recognises them-, or rights susceptible of constitutional protection, they do constitute constitutional content which the legislator and the rest of the public authorities cannot ignore (CCJ 88/1988, which reiterates previous case-law on the subject), and which are a concrete expression of the Social State clause with which Art. 1 SC defines our political form, as well as of the obligation which Art. 9(2) SC imposes on the public authorities.

I cannot agree that the mere enunciation of public policies on sexual and reproductive health aimed at the prevention of unwanted pregnancies is sufficient for the protection of the conceived and unborn child, especially given the scarce regulatory density of the provisions dedicated to sexual and reproductive health, as well as the singularity of their addressees; it being clear that the main object of regulation is the voluntary interruption of pregnancy.

In any case, the law limits itself to a declaration of intentions, but does not contain an effective regulation of concrete policies for the prevention of unwanted pregnancies, limiting itself to providing for the elaboration of what is called a “Sexual and Reproductive Health Strategy”.

Beyond the invocation of these policies, there is no provision of services by the public authorities that is coherent with their function of protecting and guaranteeing human life and with the aim announced in the law of reducing the number of unwanted pregnancies through education, training and information in the area of sexual and reproductive health.

Similarly, with regard to active social policies to support pregnant women and motherhood in various areas (health, employment, public benefits and aid for childcare, tax benefits and other incentives), I reiterate that this mere enunciation is not accompanied by a detailed regulation of the scope of these measures or sufficient budgetary allocations to support motherhood.



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In both cases, the effectiveness of such policies will depend on their legislative development to include real and effective measures, at the risk of being unsuccessful and merely rhetorical. Thus, if these measures are not a deterrent to voluntary termination of pregnancy, it cannot be argued that the State has provided the necessary guarantees to protect the life of the unborn child.

On the other hand, any deterrent effect on abortion that might be expected from the stated policies of support for pregnant women and motherhood is limited by the law itself, which in Article 17 limits itself to making stereotyped information available to women in writing and in a sealed envelope, instead of opting for verbal information, in which the pregnant woman could be informed in a comprehensible manner of the existing alternatives in her specific case and raise any doubts she might have, with a sufficient period of reflection after comparing the real help that might be available to her.

As I have stated above, the judgment should have set aside unproven dogmatic assertions and carried out the examination of the constitutionality of the contested provisions (which, I insist, should have been limited to those that have not lost their legitimate object after Organic Law 1/2023), starting, in any case, from the essential pronouncements of CCJ 53/1985, reiterated in other subsequent judgements.

It stated that, despite the fact that Article 15 SC does not derive the ownership of the right to life of the conceived and unborn child, nor does it mean that the latter lacks or does not deserve constitutional protection. The protection of the conceived child is based on the recognition that gestating life is a constitutionally protected legal right, which “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” (CCJ 53/1985, PoL 7).

The Court recalled that fundamental rights are not exclusively configured as subjective rights of defence of individuals against the State, or as negative freedoms which only require the State to abstain from intervention (legal obligations for citizens, which the State

must endeavour to satisfy, and which impose legal duties of action and performance on the State in favour of citizens (obligations to act). This is where the previous declaration contained in Judgement 53/1985 could be situated, and which the Court summarises in PoL 4 when it states that “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”.

Similarly, in PoL 9 of CCJ 53/1985, the court stated that “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”, which cannot be compared to any other, in so far as it has “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”.

Therefore, in the examination of the constitutionality of Organic Law 2/2010, the essential premise contained in CCJ 53/1985 should not have been ignored, namely that “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” (PoL 9).

Thus, in the recent CCJ 66/2022 PoL 6, it was once again recalled that “the unborn child constitutes a legal right whose protection finds constitutional basis in Art. 15 SC, insofar as it embodies the fundamental value of human life, guaranteed in said constitutional provision”.

We also pointed out in the aforementioned CCJ 66/2022, FJ 5, citing CCJ 76/2019, of 22 May, PoL 5(d), that “although this court has stated that the Constitution does not prevent the State from protecting rights or legal assets at the cost of sacrificing others that are equally recognised and, therefore, that the legislator may impose limitations on the content of fundamental rights or their exercise, we have also specified that, in such cases, these limitations must be justified in the protection of other constitutional rights or assets (CCJs 104/2000, 13 April, PoL 8, and those cited therein) and, furthermore, they must be proportionate to the end pursued with them”.



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In the present case, I believe that it is not possible to consider that the legislator has adequately weighed the conflicting rights and interests and has provided the right or interest that may be postponed with sufficient guarantees to justify its undermining for the sake of an alleged overriding interest.

Bearing in mind that human life, including gestating human life, is a superior value of the constitutional order and forms an essential and core fundamental right, insofar as it is the ontological assumption without which the other rights would have no possible existence, it is obvious that the aforementioned requirements derived from the principle of proportionality are not respected in the present case.

The object of protection represented by the unborn child is not just another ordinary right, which can be subjected to the arbitrary quasi-patrimonial availability of a person with the power to preserve or destroy it.

It is untenable to affirm that the destruction of a human life is a suitable measure to guarantee the dignity of the woman or her physical and moral integrity, that there is no less burdensome or damaging measure or that the sacrifice of the unborn child brings more benefits to the general interest than disadvantages or harm to other rights or interests, taking into account the seriousness of the interference and the personal circumstances of the person who suffers it, without forgetting, when carrying out the due weighing, the situation of greater weakness and total defencelessness of the unborn child, who is permanently dependent on the mother's womb.

7. I disagree with the analysis made in the judgment with regard to the challenge to Article 17 of the contested Organic Law.

To avoid the application of the canon of proportionality, which would have led to the declaration of unconstitutionality of Article 14 in conjunction with Article 17 of the Organic Law, the judgment from which I disagree constructs an alleged fundamental right of women to self-determination; then it departs unjustifiably from the case-law set out in CCJ 53/1985 and subsequent judgments; later on, it puts forward what it calls "gradual protection of prenatal life", which, as I have said, masks a total absence of protection in the first fourteen weeks; finally, it refers to public policies relating to sexual and reproductive health and support for women, whose inadequacy as a real safeguard of the

gestating human life I have already referred to, and last, it examines the adequacy of the information referred to in the aforementioned Article 17.

I cannot agree with the judgment's analysis of the above-mentioned information in order to finally affirm its sufficiency. For this information to be considered at least minimally effective, it should not be reduced to a generic, formal, protocolary act. On the contrary, it should be individualised, adapted to the specific characteristics, circumstances and conditions of each pregnant woman and, on this basis, propose precise and effective social measures that the pregnant woman can benefit from.

Thus, to serve any protection of prenatal life, the information should have been comprehensive, comprising detailed clinical information on the pregnant woman's condition and gestational process, rigorously describing the development of the conceived child when the abortion is contemplated. Information on the physical and emotional risks and possible consequences of an abortion for the mother, as well as on its possible consequences, should have been equally sufficient, and should have included a personal counselling procedure with specialised doctors, both on the physical and psychological aspects of the abortion procedure.

CCJ 53/1985 itself alluded to the need to prove an effective provision of services by the public authorities, as a requirement for the eugenic indication then examined, which would be applicable a fortiori in this decision with immediate effect, in coherence with the function of this information, which is the protection and guarantee of human life, with the purpose announced in the Law of reducing the number of voluntary terminations of pregnancy, through educational action.

In contrast, the information referred to in Article 17(2) on public support available for pregnant women and health coverage during pregnancy and childbirth is clearly insufficient; labor-related rights accruing to pregnant women and new mothers, available childcare services and assistance, government benefits, and other relevant childbearing incentive and assistance information on the centres where women can receive voluntary counselling before and after termination of pregnancy.

The provision opts for the delivery of the written information in a sealed envelope and



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contemplates the possibility of this information being also offered verbally, only if the woman requests it, an offer that is not made personally at the time of delivery of the sealed envelope, but is included among the documentation contained therein. Interestingly, the rule does provide that, together with the information contained in a sealed envelope, pregnant women will be issued a certificate attesting to the date information was provided. In other words, the legislator ensures documentary proof of the delivery of the information in a sealed envelope, but not of the pregnant woman's effective knowledge of it and, even less, that, before taking a responsible decision on an irreversible measure that will put an end to the life of the embryo she is carrying in her womb, she is aware of the state of development of the pregnancy, nor of the possible alternatives in her specific case, taking into account the individual circumstances, physical and psychological, of each applicant.

On the other hand, with regard to the preparation, content and format of such relevant information, the law refers to regulatory development by the government.

The only pseudo-protection of prenatal life is the delivery of stereotyped and insufficient information in a sealed envelope, whose exact content and format are not included in the law and are referred to the Government's regulations, which does not guarantee the pregnant woman's effective knowledge of the alternatives in her specific case, nor does it allow her to raise any doubts she may have and, furthermore, without a sufficient period of reflection once the real aid available to her has been checked, as I have explained above.

I reiterate that the system shows that the legislator, instead of proposing effective measures that could favour the option of continuing the pregnancy and safeguarding prenatal life, opts for free abortion in the first fourteen weeks. It is limited to formally accrediting the delivery of the information, but not its actual knowledge. Moreover, the time allowed for the surgery to be carried out is a meagre three days, which is insufficient for an adequate and well-informed reflection, exhaustive and adjusted to the specific case, in the face of an irreversible decision to give traumatic death to a human life in a situation of total defencelessness. As I have also indicated, the real effectiveness of the announced measures to support pregnancy and motherhood is impossible if they are not accompanied by sufficient budgetary resources. It should not be forgotten that the amount of funds earmarked for this purpose is significantly lower than the cost of abortions carried out

since the law came into force.

8. I also disagree with the reasoning and the operative part of the judgment regarding the objection to Article 12 of the Organic Law under appeal.

As I have pointed out when examining Articles 14 and 17 of the Law, the legislative option embodied in these articles is to guarantee free abortion during the first fourteen weeks of gestation, instead of establishing measures that truly dissuade abortion and without taking into account the constitutional protection of prenatal life.

This is also evident in Article 12 of the Organic Law, which tends to guarantee abortion as if it were just another ordinary health service.

Indeed, Chapter I, under the title “Conditions for Voluntary Termination of Pregnancy”, begins with Article 12, entitled “Guaranteed Access to Voluntary Termination of Pregnancy”, which states: “Access to voluntary termination of pregnancy is guaranteed in the conditions set out herein. These conditions will be interpreted in the manner most favourable to the protection and effectiveness of the fundamental rights of women requesting the procedure, in particular their right to personal growth and development, life, physical and moral integrity, privacy, freedom of thought, and freedom from discrimination”.

This statement undoubtedly implies that the legislator, despite having recognised in the Preamble that he was obliged to protect prenatal life and to weigh up the rights and interests that come into conflict in the voluntary termination of pregnancy, clearly chooses not to carry out any weighing up in the case regulated in Articles 14 and 17 in the specific regulation it opts for, and gives more relevance to the decision of the pregnant woman in the whole regulation.

It cannot be argued that two opposing interests have been weighed up, when the most favourable interpretation is based on the exclusive protection of one of them while simultaneously omitting any minimally effective guarantee of the other. It also disregards the fact that the interest being ignored affects the right to life, which has a central character



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in the constitutional system and that the gestating human life is a constitutionally protected right, as this Court has repeatedly declared and as the legislator himself recognises.

Consequently, I cannot agree with the declaration of constitutionality made in the judgement of Article 14 of Organic Law 2/2010 in relation to Articles 17 and 12 of the same law, which mean that during the first fourteen weeks of gestation the voluntary termination of pregnancy is subject to the exclusive will of the woman, leaving the unborn child totally unprotected.

9. Discrepancy concerning the challenge to Art. 15(a). Need for a compliant interpretation.

Although I have no objection to the constitutionality of the termination of pregnancy due to medical reasons - the constitutionality of which has already been declared by CCJ 53/1995, given that the provision speaks of “serious risk to the life or health of the pregnant woman” and Article 2 (Definitions) indicates that, for the purposes of the provisions of this Law, “health” is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” in order to prevent the cause referred to in the aforementioned Article 15(a) from being understood as referring not only to the serious danger to the life or physical or mental health of the pregnant woman, but also extending to a supposed “serious risk to the woman’s social welfare -, I consider that the arguments of the judgment excluding this possible extension should have given rise, at least, to a conforming interpretation of that provision, which should have been taken into account in the operative part of the judgment, so as to prevent a fraudulent extension of the fourteen-week period provided for in Article 14 to the twenty-two-week period established in Article 15(a), which would not be consistent with the State’s obligation to preserve the life of the child as a constitutionally protected value.

10. *I also disagree with the arguments contained in the judgment to reject the challenges relating to the voluntary termination of pregnancy in the cases that the appellants describe as “eugenic indication” and the judgment as “embryopathic indication”.*

With regard to the imprecise terminology used, which could lead to legal uncertainty in the application of the rule, the judgment considers that such a defect does not exist, because although the terms contain “a margin of appreciation”, they are susceptible to being defined in a manner “in accordance with the general idiomatic meaning”. It then cites CCJ 53/1985, the applicability of which had already been ruled out in the decision itself as an applicable canon of constitutionality, to exclude the weighting required when analysing the constitutionality of Articles 14 and 17 and which it will refuse again, in order to reject the complaints relating to possible discrimination against unborn babies with serious anomalies. In this case of eugenic indication, it is stated that abortion “not only finds its constitutional legitimacy in the ‘non-requirement of other conduct’ from a legal-criminal point of view, but also in the exceptional impact on the constitutional rights of the woman that derives from the detection of such anomalies in the foetus”.

Well, as far as terminological imprecision is concerned, it should not be forgotten that in its paragraphs (b) and (c), Article 15 of the Law provides for three different cases of eugenic indication, from less to more serious and, consequently, establishing different and progressively stricter requirements, demands and guarantees. However, this scheme may have undesirable effects, given the imprecision and vagueness of the terms used to determine the factual conditions of applicability of each of them. The term “anomaly” is used both in subparagraph (b) and in the first case included in subparagraph (c). Certainly in the first case these are qualified as “severe foetal anomalies”, and in the second as “foetal anomalies incompatible with life”. It seems that the latter, those incompatible with life, which can also be included in the first case, would be serious, logically, but not the other way round: serious anomalies do not have to be incompatible with life. The same applies to the expression “extremely serious and incurable disease”. The question arises as to whether the anomaly is a disease and whether there is a scientific criterion to distinguish one from the other. If there are scientific criteria that serve to clarify the concepts, and which are not subject to controversy due to their acceptance by the scientific community, they should be incorporated into the normative text, as the use of basically the same term, or of concepts that encompass others, also included in the same regulatory text, poses the risk of misapplication of the cases contemplated in the norm, especially in situations where



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the line between one case and the other is blurred. There will be cases that do not raise doubts, but there will also be others that give rise to doubts, and it is these that must be taken into account, especially in matters such as the one we are dealing with here. It cannot be ignored that this affects legal certainty and legality, as non-compliance with the law entails criminal liability.

On the other hand, it is striking that in Article 2, dedicated to definitions, only those relating to health, sexual health and reproductive health are included, the first of which, as stated above, has not been interpreted in accordance with this court. This could lead to an unacceptable extension of the concept of the health of the pregnant woman to cases of loss of social well-being, but omits the definition of the terms that are decisive for the extension of abortion to cases in which the fourteen weeks of gestation have been exceeded and which are not even subject to a time limit.

I cannot agree with the arguments contained in the judgement in relation to the voluntary termination of pregnancy in the case of risk of serious foetal anomalies referred to in Article 15(b) of the law.

As I have pointed out above, the judgment cites CCJ 53/1985, recognising, initially, that the *ratio decidendi* for the declaration of conformity with the Constitution relating to the waiver of the criminal sanction on voluntary termination of pregnancy in cases of embryopathic indication was the unenforceability of the conduct (continuation of the pregnancy), due to the existence of an exceptional circumstance (the fact that the foetus had serious physical and mental disabilities).

However, the judgement then rejects the canon of judgement 53/1985 as the canon applicable to the judgement of constitutionality, apodictically declaring that the new framework set out above is based on the fundamental right of women to physical and moral integrity in connection with their dignity and the free development of their personality. It adds that the voluntary termination of pregnancy from the fourteenth week to the end of the twenty-second week regulated in section (b) of Article 15 not only finds its constitutional legitimacy in the “non-requirement of other conduct” from a legal-criminal point of view, but also in the exceptional impact on the constitutional rights of the woman that derives from the detection of such anomalies in the foetus. Likewise, it reiterates that in this case the aforementioned fundamental rights “protect the recognition of a woman’s reasonable freedom in

which she can adopt, autonomously and without coercion of any kind, the decision she considers most appropriate as to whether or not to continue with the pregnancy, assuming the consequences derived from one or the other decision in a conscious and meditated manner”. It concludes the argument by stating: “It is clear that the detection of serious anomalies in the foetus is an extraordinarily influential variable in the decision making process, completely altering the decision-making scenario prior to the decision”.

As I have already stated, I cannot agree with the aforementioned arguments that support the decision to terminate the pregnancy in the case of Article 15(b), no longer on the basis of the non-existence of other conduct from the legal-criminal point of view, but on the basis of the pseudo-fundamental right previously created in PoL 4 of the decision, in order to petrify the time-limit system and to condition any pronouncement on the subsequent reform operated by Organic Law 1/2023.

The decision alludes, on the one hand, to the fact that the detection of serious anomalies in the foetus completely alters the decision-making scenario prior to it and, on the other hand, to the recognition of a woman’s reasonable freedom in which she can adopt, autonomously and without coercion of any kind, the decision she considers most appropriate as to whether or not to continue with the pregnancy, assuming the consequences derived from one or the other decision in a conscious and meditated manner.

Apart from the discrepancy on the completely anew creation of a non-existent fundamental right, which I have already reiterated, I must point out, on the one hand, that the consequences derived from one or other decision adopted by the woman will not have to be assumed exclusively by her, but will directly and irreversibly affect the life of the foetus suffering from the anomalies referred to. On the other hand, I should also point out that the additional prior information that the woman must receive in the case contemplated in Article 15(b) [in accordance with Art. 17(3)] regarding existing rights, benefits and public aid to support the autonomy of persons with disabilities, as well as the network of social organisations that assist such persons, will also be provided in writing, as in the case of Art. 17(2) with the provision in the last paragraph of Article 17(5) also being applicable to this case, which establishes that the documentation provided will state that this information may also be offered orally if the woman so requests.



Therefore, on this point, I reiterate the objections I have previously raised regarding the insufficiency of the written information and its stereotyped nature and the insufficient guarantee for the life of the unborn child that the omission of complete verbal information adapted to the specific circumstances of the case entails, which in this case should focus, in addition to the situation of the woman, on the specific anomalies detected in the foetus, their consequences, their possible impact on its vital development and the specific benefits, aid and social assistance for the specific pathology suffered.

The lack of sufficient information makes one wonder if the consent to a surgery that will put an end to human life will be really informed and free.

As already pointed out in CCJ 53/1985, PoL 8, as the development of the social welfare State progresses in terms of the rights of people with disabilities, provisions of this type will become less necessary, as these situations will be decisively reduced.

I consider that the judgment with which I disagree should not have played down the significance of those considerations, nor should it have played down the terminological vagueness contained in Article 15(b) and (c), which could lead to a non-strict extension of time limits. The aforementioned strict application of these assumptions is necessary to guarantee the protection of people with disabilities, and thus avoid the risk of going back to the times of eugenic policies.

On the contrary, instead of insisting on the consideration of the unborn child as a constitutionally protected right and on the protection that a foetus suffering from serious anomalies deserves, the judgment focuses its reasoning on the margin of freedom that must be guaranteed to the mother, again omitting any reference to the father and endeavouring to point out that “the unborn child is not the holder of the rights proclaimed by or derived from Articles 14, 43 and 49 of the Constitution”. It also adds that this conclusion is not contrary to the international treaties signed by Spain, which attribute to the “person” the ownership of the rights proclaimed therein, specifically the right to equality and the right not to suffer discrimination, although the exception contained in Article 10 of the United Nations Convention on the Rights of Persons with Disabilities, signed in New York on 13 December 2006, which speaks of the right to life “of every human being”, is recognised.

In relation to the provision of Article 49 SC which requires the public authorities to implement “a policy of preventive care, treatment, rehabilitation and integration of the physically, sensorially and mentally handicapped who shall be given the specialised care that they require, and be afforded them special protection in order that they may enjoy the rights conferred by this Title upon all citizens”, I must reiterate that the real protection of the unborn child with disabilities that the State must guarantee depends on the effectiveness of the development of these policies and their economic provision, and that the mere enunciation of these measures is not enough to understand that the aforementioned duty of protection has been fulfilled.

On the other hand, the arguments of the judgment, which tend to deprive the foetus in which serious anomalies are detected of the protection enjoyed by the person, clash not only with the evolution of international regulations, but also with domestic regulations, which in recent years have made significant progress in the recognition of the rights of persons with disabilities and a notable increase in public assistance work.

This new integrative perception of disability is reflected in the legislative evolution that has given effectiveness to the provision of Judgement 53/1985, referring to “progress is made in enforcing preventive policy and in the generalisation and intensity of the assistance in a social State”, in order to prevent and avoid the situation that is at the basis of decriminalisation (eugenic indication, PoL 11).

Consequently, I consider that the judgment, instead of insisting on the lack of protection of the fundamental rights of the unborn child suffering from serious anomalies, should have limited itself to analysing whether the specific regulation of Article 15 of Organic Law 2/2010 complies with the canon of the CCJ 53/1985. Furthermore, the consequences of the terminological lack of accuracy and the shortcomings of the information system contained in Article 17(3) to which I referred earlier should have been taken into account.

With regard to the analysis of the constitutionality of paragraph (C), even though the law only refers to incompatibility with life, I can accept the reasoning of the judgment, given that it must be understood systematically that this case covers both the non-viability of intrauterine life at a stage beyond 22 weeks, as well as life independent of the womb itself. Thus, the subparagraph being applicable only to the case in which the foetal anomaly inexorably entails the intrauterine death of the foetus, or the impossibility of any vital



autonomous development, the enabling title referred to in the first indent of Article 15(c) is present, which, unlike those referred to in paragraph (b) and in the second indent of paragraph (c), has the particularity that it does not raise the possible conflict that arises in those, namely the conflict of interests between the rights of the pregnant woman and the protection of the unborn child.

For this reason, the constitutional case-law set out in CCJs 212/1996 and 116/1999 is applicable to this case by extension.

However, I consider it incongruous that the judgment from which I disagree only cites those decisions insofar as they are in agreement with the rejection of the challenge in this specific case, displacing the case-law contained therein, which reproduces that of the CCJ 53/1985 in the analysis of the remaining challenges and, specifically, that of Article 14 in the application of the weighting canon which would have led to pronouncements contrary to those finally reached in the decision.

I consider that the challenge relating to the second case of paragraph (c) of the article, namely that of “extremely serious and incurable disease of the foetus” detected at the time of diagnosis, should have been upheld. It should be borne in mind that, unlike the case under paragraph (b) (serious foetal abnormalities), the cases under (c) are no longer subject to a time limit. After 22 weeks, we are therefore faced with a case where abortion is permitted, but which would really be a pre-term birth, in which the termination of the pregnancy could take place without destroying foetal life in a case in which, in contrast to the first indent of paragraph (c) (foetal anomalies incompatible with life), once the foetus is born preterm, it would be susceptible to life independent of the mother, which, applying the case-law contained in CCJs 212/1996 and 116/1999, would lead us to a decision opposite to that reached in the judgment.

This judgement justifies the sacrifice of the life of a viable foetus if it is born pre-term, arguing that “the situation of conflict with the fundamental rights of the pregnant woman at stake, to which we refer in the third Point of Law and, particularly in these cases, the extraordinary impact that forcing a woman to carry her pregnancy to term in such circumstances would have on the free development of her personality [Art. 10(1) SC] and the fundamental right to moral integrity (Art. 15 SC)”. Then, the judgment states that “we are dealing with borderline cases, absolutely exceptional situations, which, if not covered

by Organic Law 2/2010, would fall within the scope of application of Article 145 of the Criminal Code, giving rise to a criminal sanction”.

Given what seems to me to be the weakness of the argument and in consideration of the fact that the termination of pregnancy after twenty-two weeks could occur with a pre-term birth that would not sacrifice the life of a viable unborn child, the judgment culminates the justification of the constitutionality of the provision by referring once again to the exceptional nature of the case, “referring to extremely serious and incurable alterations in the health of the foetus, which must also have an indisputable and very serious impact on the fundamental right to the physical and moral integrity of the child after birth”, a reasoning which shows that, surprisingly, the intention is to recognise the serious impact on the fundamental right to physical and moral integrity, while leaving aside or, rather, previously curtailing the fundamental right to life.

I cannot agree with these arguments which aim to justify the sacrifice of a viable human life, allowing the mother to end it by means of an abortion, excluding the possibility of a pre-term birth, compatible with the guarantee of respect for the life of the unborn child, a constitutionally protected right which, let us remember, the State must guarantee. Thus, giving as justification the extraordinary impact on the free development of the mother’s personality and moral integrity, the mother is allowed to decide to have an abortion, with the sole requirement of confirmation of the diagnosis by the clinical committee.

This occurs, once again, as in all the cases provided for in the law, without any intervention on the part of the father of the conceived and unborn child, which is even more serious given that we are dealing with a case of viability of the unborn child.

The idea embodied in the judgment with which I disagree allows the woman and the State to end the life expectancy of a viable human being in order to prevent it from being a burden on what the judgment calls “the woman’s life project”, when there are other care options that would make the mother’s rights compatible with safeguarding the best interests of the child’s life, even when the child suffers from a serious and incurable illness, which does not justify depriving it of protection, in view of the duties incumbent on the public authorities, in accordance with the provisions of Article 49 SC.

In addition, the terminology of the entire provision lack accuracy which, in this case, is decisive for the examination of constitutionality. The scenario making this possible is described as “an extremely serious and incurable disease” detected at the time of



diagnosis. It does not even consider whether the disease entails an irremediably fatal prognosis in the short term, or that it prevents a conscious life, or the limitations that the disease may entail for independent living, referring, moreover, to the moment of diagnosis, without taking into account that advances in medical science could increase the hope and quality of life of the human being who is deprived, through the abortion decided by the mother, of the right to be born and to obtain the protection that the public authorities must guarantee.

The vague terminology mentioned cannot be spared by the fact that the diagnosis must be confirmed by a clinical committee, which is the one that will give content to the indeterminate case of serious and incurable disease.

It should also be borne in mind that Article 16 provides that one of the three doctors who integrates the committee may be chosen by the mother. It is striking that, in a situation in which conflicting interests should be weighed, the holder of one of them is allowed to directly designate one of the specialists who must participate in the collegiate decision to confirm the diagnosis that allows the abortion to be carried out.

In my opinion, the inaccurate terminology and the legal regulation of this case, in addition to affecting the principle of legal certainty, entails discrimination against the unborn child on the grounds that at the time of diagnosis, the child is suffering from an extremely serious and incurable illness, which can be detected after 22 weeks of gestation, when the child is already capable of independent life.

11. I also disagree with the merits and the ruling of the judgment with regard to the challenge to the regulation of conscientious objection provided for in Article 19(2) of the Organic Law under appeal.

Once again, the judgment tries and rejects the challenge to an article that has lost its legitimate object after the entry into force of Organic Law 1/2023 and, furthermore, it does so by unjustifiably limiting the exercise of the right, ignoring the case-law established in this regard in CCJ 53/1985, which stated that “(...) 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 Article 16(1)

of the Constitution and (...) the Constitution is directly applicable, especially in matters of fundamental rights.” (PoL 14).

The judgement I disagree with - after reasoning that conscientious objection is not generally recognised in the Constitution, although it should be admitted exceptionally with respect to some specific duty - indicates that in cases of voluntary termination of pregnancy, the law must harmonise the right of the objector with the guarantee of health service provision and with the rights of the pregnant woman which may be compromised in these cases. It then points out that the legislator enjoys freedom in the configuration of this right, within the limits imposed by the Constitution, and that it can set reasonable and proportionate conditions for the protection of the interests affected. On the basis of this reasoning, the ruling rejects the claim of unconstitutionality regarding the restrictive and disproportionate nature of the regulation, as it is only recognised for “the health professionals directly involved”. It also reasons an already anticipated conclusion, based on the assertion that “conscientious objection, as an exception to a legal obligation and therefore of an exceptional nature, must be interpreted strictly”. After discarding the terminological lack of accuracy also alleged and which I consider to be present, the judgement gives a restrictive interpretation of the right, limiting conscientious objection to direct clinical interventions and excluding other auxiliary, administrative or instrumental support actions carried out by professionals. They also introduce an argument, which in my view is unreal, that they “do not need to know the nature and circumstances of the clinical intervention in question”. The judgment concludes by stating that these are reasonable and proportionate conditions for the exercise of the right, which do not infringe either Article 16(2) or Article 18(1) SC, and which are justified by organisational reasons to ensure the provision of the service, which the administration is obliged to guarantee.

Thus, the judgement makes a restrictive interpretation of the right that I cannot agree with, as it prevents even professionals who perform ancillary clinical activities in the practice of abortion from exercising it. This interpretation would entail imposing on health professionals a duty to provide a service that may affect their most deeply held convictions in an activity such as the practice of abortion. The exclusion of the right to conscientious objection of professionals who intervene in actions prior to the material termination of the abortion, such as the issuing of the reports referred to in Article 15, or membership of the clinical committee regulated in Article 16, represents an arbitrary



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limitation on the exercise of the right. It turns out equally extensive to the sanitary staff that prepares the instruments or performs auxiliary functions to the doctor who practises abortion, and to the one who intervenes after the surgery to collect and destroy the human remains.

Thus, despite arguing that the contested provision does not contain a limit to the right to object, but rather a mandate addressed to the public health administrations to adopt the necessary organisational measures to guarantee the provision, with the aim of making the exercise of the right to conscientious objection by health professionals compatible with the woman's right to access the service that they are obliged to guarantee, the judgement makes an arbitrary limitation of the right which shows that this right is subordinated to not undermining what is considered a priority, which is the woman's access to the service.

Conclusion.

Accordingly, I disagree almost entirely with the legal reasoning and the operative part of the judgment with the exceptions set out above.

1. I consider that the appeal has been decided by a Court that lost the proper appearance of impartiality, since four of its members, including myself, held a public office during which they had knowledge of the case which is the subject of the judgment.
2. The ruling should have declared the supervening loss of the legitimate object with respect to the articles of Organic Law 2/2010, which have been amended in Organic Law 1/2023. In failing to do so, the Court clearly exceeded its jurisdiction by examining the time-limit system as a whole, instead of limiting itself to an analysis of the constitutionality of the specific provisions challenged.
3. The Court has invaded competences that exclusively correspond constituent power, by creating an alleged fundamental right of the woman to self-determining the voluntary interruption of her pregnancy, which is not included in the Constitution and contradicts, violates or attempts against a constitutionally protected right as is the life of the unborn child. Moreover, it imposes the model set out in Organic Law 2/2010 as the only one constitutionally possible. In this way, the time-limit system is "boarded up", the possibility of any other legislative option is closed and the decision that may be adopted in challenges to Organic Law 1/2023 is prejudged.

4. The judgement unjustifiably departs from the canon of CCJ 53/1985, reiterated in other subsequent judgements, which should have been the starting point for the analysis of the constitutionality of the Law.

5. The judgment should have declared the supervening loss of the legitimate object in Articles 14, 17(2) and (5) and 12 of Organic Law 2/2010. If it had not done so, it should have declared these provisions unconstitutional, given that far from weighing the rights of the woman against the protection of the constitutionally protected right, which is the life of the unborn child, it leaves abortion in the first fourteen weeks of gestation to the exclusive discretion of the woman, without contemplating any effective protection of human life in the making, which is the ontological assumption without which fundamental rights would have no possible existence.

6. In relation to Article 15(a), a conforming interpretation should have been made to exclude women's social welfare from the concept of "health" for the purposes of the application of this provision.

7. I do not agree with the reasoning by virtue of which the constitutionality of paragraphs (b) and (c) of Article 15 is declared. I consider that the partial unconstitutionality of this provision should have been declared due to terminological lack of accuracy and, specifically, that of paragraph (c) in its second case of "extremely serious and incurable illness", given that it is not subject to a time limit and its regulation allows the life expectancy of a viable human being to be terminated. This cannot be justified on the basis of "the extraordinary impact" on the woman's rights, since there are other care options that would make the mother's rights compatible with safeguarding the best interests of the child's life, even when the child suffers from a serious and incurable illness, which does not justify depriving him or her of protection in view of the duties of the public authorities in accordance with the provisions of Article 49 SC.

8. To conclude, I consider that the supervening loss of the legitimate object of Article 19(2) of the Organic Law should have been determined, as it was not done, its unconstitutionality should have been declared, because it limits the exercise of conscientious objection by some health professionals, in the terms set out in section 11 of this dissenting opinion.

Based on the above, my opinion is hereby issued.



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Madrid, on eleventh May of two thousand twenty-three

Signed Concepción Espejel Jorquera.