

### **Judgment T-209/08**

ABORTION – Basis for prohibition

ABORTION – Absolute ban is unconstitutional

*The Court found that to punish abortion in all circumstances implies a prevalence of one of the legal assets at play – the life of the fetus, and the consequent absolute sacrifice of all fundamental rights of the pregnant woman. This is unconstitutional in any light.*

ABORTION – Cases where it is exempt from constituting a crime

*When the pregnancy is the result of conduct that constitutes carnal penetration or the unconsented and abusive sexual act, of unconsented artificial insemination or transfer of a fertilized egg, or incest. Penalizing abortion in those cases in which the pregnant woman's life and physical and mental health are threatened is also disproportionate, as we cannot order the sacrifice of a life that has already been created over the protection of life that is being created. Indeed, there is no equivalence between the right to life and women's health as compared to the protection of the embryo's life. And, in the last hypothesis, with respect to medically certified birth defects, when these make the fetus unviable,*

ABORTION – Effects of Judgment C-355 of 2006

ABORTION – Requirements to certify to the applicability of an abortion in each of the three cases exempt from crime

*When continuing the pregnancy constitutes a danger to the woman's life or health, certified by a physician; (ii) When the fetus has a serious malformation that makes its life unviable, certified by a physician; and, (iii) When the pregnancy is the result of properly reported conduct that constitutes unconsented, abusive, carnal penetration or sexual act, unconsented artificial insemination or transfer of the fertilized egg, or incest.*

ABORTION – Absence of complaint cannot be a pretext for abortion when a woman under 14 years of age has been raped

ABORTION – Individual and autonomous nature of each of the events where abortion does not constitute a crime, pursuant to Judgment C-355 of 2006

*In these cases, a party who undergoes an abortion is exempt from the crime of abortion. Each case is individual and autonomous. Indeed, in the case of rape or incest, one cannot require that the mother show that, in addition to the threat to her life or health, the fetus must be unviable. This is because, in the case of rape or incest, we must presume the good faith and responsibility of the woman who reported the crime, and, from a constitutional perspective; it is enough for the party to show the doctor a copy of the properly filed police report.*

ABORTION – Requirements demanded from healthcare professionals of the General Social Security Health System to practice a voluntary abortion in the cases in which abortion is exempt from a crime

*Once the pregnant mother has requested an abortion, having proven that she falls into one of the exemptions from the crime of abortion, the healthcare professionals of the General Social Security Health System must perform the abortion, (i) in a timely fashion, that is, within five (5) days of the request, pursuant to Resolution 004905 of 2006, issued by the Ministry of Social Protection; (ii) her treatment must be*

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*comprehensive and high-quality; and (iii) it shall be performed subject to the technical-administrative rules issued by the Ministry of Social Protection, which are mandatory and while they are issued, the providers must comply with the rules of Decree 444 of 2006, pursuant to guidelines “Safe abortion: Technical and policy guidelines for health systems” issued by the World Health Organization (2003).*

ABORTION – International documents adopted by Judgment C-355 of 2006 that provide for the respect and guarantee of women’s rights

CONSCIENTIOUS OBJECTION – Legal persons have no right to claim/  
INSTITUTIONAL CONSCIENTIOUS OBJECTION IN ABORTION – Inapplicability / CONSCIENTIOUS OBJECTION BY DOCTOR – Claiming to refuse performing abortion

CONSCIENTIOUS OBJECTION BY DOCTOR – Professional’s obligation when refuses to perform abortion, to immediately refer to another professional equipped to interrupt the pregnancy

CONSCIENTIOUS OBJECTION – Prohibition against discriminatory practices against pregnant women who seek abortions in the cases exempt from crime and for healthcare professionals who do not claim it against performing the abortion

CONSCIENTIOUS OBJECTION BY PHYSICIAN – Oslo Declaration of the World Medical Association regarding therapeutic abortion

CONSCIENTIOUS OBJECTION BY PHYSICIAN – Must be claimed in writing, duly justified, in the case of abortion request

CONSCIENTIOUS OBJECTION BY PHYSICIAN – Physician’s obligation to immediately refer the mother to a doctor who can perform the abortion

ABORTION – Duty of administrative authorities to guarantee an adequate number of providers who are equipped to provide abortion services

ABORTION – Duty of EPS to perform the efforts conducive to identifying, in advance, the location of IPS with professionals equipped to perform voluntary abortions

CONSTITUTIONAL ACTION – healthcare entities and institutions and healthcare institutions violate fundamental rights of a fourteen year old minor because they denied her access to the legal abortion service in violation of Judgment C-355/06

CONSTITUTIONAL ACTION – Jurisdiction of a constitutional judge to order payment of compensation from EPS and the IPS of its network and healthcare professionals for harm caused to a fourteen-year-old minor upon denying her access to legal abortion services

CONSTITUTIONAL ACTION – Professionals refused to perform abortion on fourteen-year-old minor who was raped, claiming conscientious objection without satisfying the requirements for it to apply

CONSTITUTIONAL ACTION – Professionals failed to perform their obligation to subsequently and immediately refer the applicant to a professional equipped to practice the abortion

CONSTITUTIONAL ACTION – EPS, IPS and healthcare professionals who refused to perform an abortion on a 14-year-old minor must compensate her for harm caused

ABORTION – Requirements for abortion to be exempt for crime and for a doctor to abstain from performing it by claiming the conscientious objection

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*The requirements for a criminal exemption for an abortion and for a doctor to be able to abstain from performing an abortion claiming the conscientious objection are as follows:*

- 1. – Abortion does not constitute a crime when it is voluntarily requested by a woman who submits a police report that is properly formulated if she is the victim of unconsented carnal penetration, unconsented artificial insemination, unconsented transfer of a fertilized egg or incest, a medical certification that the mother's life is in danger, or a medical certification of the unviability of the fetus.*
- 2. Healthcare professionals at every level have an ethical, constitutional and legal obligation to respect women's rights.*
- 3. Physicians or administrative staff cannot demand additional documents or requirements, in addition to those referenced in the first numeral, to abstain from performing or authorizing an abortion.*
- 4. The conscientious objection is not a right held by legal persons.*
- 5. The conscientious objection is a right that is only held by natural persons.*
- 6. The conscientious objection must be individually claimed through a writing that properly sets forth its reasoning.*
- 7. The conscientious objection cannot be submitted as a collective objection.*
- 8. The conscientious objection must be based on a religious conviction.*
- 9. The conscientious objection cannot be based on a physician's opinion regarding whether he or she agrees with the abortion.*
- 10. The conscientious objection cannot violate a woman's fundamental rights.*
- 11. The physician who abstains from performing an abortion claiming the conscientious objection has the obligation to immediately refer the woman to another physician who can carry the abortion out. In the event of IPS, they should have a previously defined list identifying the physicians who are equipped to practice an abortion.*
- 12. When a physician claims the conscientious objection, another physician who is equipped to carry out the abortion must perform it, without prejudice to a subsequent determination regarding whether the conscientious objection applied and was pertinent, through the mechanisms established by the medical profession, or, if not available, by the Ministry of Social Protection pursuant to pertinent rules.*
- 13. The Social Security Health System must guarantee an adequate number of providers who are equipped to perform abortions.*
- 14. Women have a right to real, timely and quality access to the Social Security Health System when they request the abortion, in all degrees of complexity thereof.*
- 15. The Social Security Health System cannot impose administrative barriers that unnecessarily delay provision of the abortion service.*

16. *Breach of the above provisions gives rise to the penalties provided by  
the Social Security General Health System.*

Reference: Case T- 1673450

Constitutional action filed by  
Gladys Belén Arias Becerra vs.  
EPS Coomeva and Hospital  
Universitario Erasmo Meoz de  
Cucuta

Majority Opininin: Hon.  
CLARA INÉS VARGAS  
HERNÁNDEZ

Bogotá, D.C. twenty-eighth (28) of February of two-thousand and eight (2008)

The Ninth Review Chamber of the Constitutional Court, composed of Judges Clara Inés Vargas Hernández, Jaime Araujo Rentería and Manuel José Cepeda Espinosa, in the exercise of their constitutional and legal powers, specifically those provided by articles 86 and 241, numeral 9 of the Constitution and Decree 2591 of 1991, order the following:

## JUDGMENT

### I. BACKGROUND

#### 1. Facts set forth by the complaint.

The plaintiff claims that her 13-year old daughter Eli Johanna Palencia Arias, was the victim of violent carnal penetration perpetrated by Luis Enrique Panqueva Contreras on February 16, 2007 and that, as a result of this aggression, she became pregnant; she was also infected with a sexually-transmitted disease and she suffered psychological harm that even led her to attempt to commit suicide by slitting her wrists; she suffers from insomnia and, after the aggression, she continued to receive phone calls threatening her if she reported the crime.

The referenced aggravated sexual assault was reported to the Crime Unit for offenses against liberty, integrity and sexual development and it was assigned to the Center for Comprehensive Treatment for Rape Victims (CAIVAS, for its initials in Spanish) at the State Prosecutor General's Office, assigned No. 140,559.

The referenced minor has been a member of Coomeva since July 25, 2005 as her father's beneficiary, Guillermo Palencia Soto and, although she has received therapy and psychological help both from the Prosecutor as well as Coomeva, this EPS denied the abortion ordered by the Center for Comprehensive Treatment for Rape Victims (CAIVAS) of the Prosecutor General's Office, claiming that its staff of gynecologists had invoked the conscientious objection and referring the minor to the Hospital Universitario Erasmo Meoz de Cúcuta.

At this hospital – after a series of bureaucratic proceedings and after stating that it had no contractual relationship whatsoever with Coomeva to provide its services, and that

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this was not an urgent matter that endangered the patient's health, on April 10, 2007, the Department of Gynecology sent an official letter signed by all the gynecologists at the entity claiming their objection to performing the abortion.

## 2. Answer from Hospital Universitario Erasmo Meoz de Cúcuta

The assistant healthcare services manager of Hospital Universitario Erasmo Meoz de Cúcuta states that, in order to help solve this case, and although the hospital has no contractual relationship whatsoever with Coomeva EPS, and given that this is not an urgent situation that endangers the minor's life, the request to suspend her pregnancy was sent to the Gyno-Obstetrics Department, emphasizing that the user should be physically, mentally and emotionally assessed.

He notes that Official Letter No. 0315 sent by the Center for Comprehensive Treatment for Rape Victims dated April 2, 2007, was received on April 3, 2007 informing of this office's knowledge of the abortion request and instructing on the way to recollect the material that would be removed; he also adds that they received Official Letter DPRNS-501 No. 071042 from the Ombudsman on April 10 that also requested interruption of the pregnancy and that they had received an answer from the Gyno-Obstetrics Department, signed by all the hospital's gynecologists, who claimed the conscientious objection to performing the abortion on the minor.

He states that this center has always provided the minor's treatment, as she is affiliated to the contributory regime and is a member of Coomeva EPS, S.A. – the entity responsible for the minor's health treatment and, as a result, it is also responsible for performing the abortion through one of the IPS in its national network of service providers.

## 3. Answer from Coomeva EPS

Coomeva EPS states: i) That the minor Eli Johanna Palencia Arias was affiliated as a beneficiary since February 27, 2007, that she has a level 1 and her membership is still current, ii) that because of her abortion request, she was approved for a gyno-obstetrician doctors' assessment in March 2007; iii) that she requested an abortion from her healthcare services network, and she was denied this treatment because of the conscientious objection; iv) that she had yet to receive a response from the other healthcare providers to whom she had sent her abortion request and v) that the Prosecutor's voluntary abortion order to the entire network of Coomeva EPS service providers was satisfied.

Subsequently, she reported that, as to her abortion request, Coomeva EPS' request to the IPS with whom it has a healthcare services contract yielded a negative response from the gyno-obstetrics department, based on the conscientious objection, for religious reasons.

## 4. Actions of the Ombudsman

The Regional Ombudsman of Cucuta stated that it was supporting the constitutional protection action filed by Gladys Belen Arias, based on the Center for Comprehensive Treatment for Rape Victims' order to Coomeva, ordering an abortion pursuant to Resolution 4905 dated December 14, 2006 and Decree 4444 dated December 13, 2006, in order to guarantee the fundamental rights protected by Judgment C-355 dated 2006.

It adds that the contributory regime and the subsidized regime provide for the voluntary abortion through Agreement No. 350 dated December 22, 2006 in their

mandatory health plan, and that the mandatory health plan already covers uterine curettage, using code 12111, in article 67 under POS activities, proceedings and interventions, adopted via Resolution No. 5261 of 1994. It can be used for an abortion under the technical rules of the Ministry of Social Protection.

### **Evidence in the record**

- A copy of the I.D. card that corresponds to minor Eli Johanna Palencia Arias.
- A copy of the formal complaint presented by the plaintiff against Luis Enrique Panqueva Contreras before the Criminal Unit against liberty, integrity and social development.
- A copy of the technical report, legal sexual medical report, corresponding to the exam carried out on minor Eli Johanna Palencia Arias on March 21, 2007, at the National Institute of Legal Medicine and Forensic Science, Northeast Regional Direction, Northern Section of Santander, Basic Unit of Cúcuta.
- A copy of the tests results of the pregnancy test performed on minor Eli Johanna Palencia Arias, on March 16, 2007, at the Medical Surgical Clinic of Cucuta.
- A copy of the certification of the criminal investigation regarding the offense claimed by the plaintiff, issued on April 10, 2007 by the Center for Comprehensive Treatment for Rape Victims of Cucuta.
- Copy of the medical record of minor EJAP regarding her outpatient treatment at IPS VIHONCO.
- Copy of the medical record developed through the outpatient treatment provided by UBA Caobos, dated March 23, 2007.
- A copy of the letter addressed by Coomeva EPS, on March 30, 2007, at University Hospital Erasmo Meoz, requesting the abortion, because of a conscientious objection made by the physicians of EPS Coomeva.
- A copy of the HIV test results from the tests performed on Eli Johanna Palencia Arias, dated March 26, 2007, at Centrolab of Cucuta.
- Copy of the minutes of the public hearing held on April 12, 2007 by the Labor Court of the Cucuta Circuit, at the premises of the University Hospital Erasmo Meoz.
- A copy of the written document containing the abortion request, issued on March 22, 2007 by the plaintiff to Coomeva EPS. (Page 28).
- Copy of ultrasound report submitted on March 24, 2007 by Somediag, confirming the 16-week pregnancy presented by Eli Johanna Palencia Arias.
- A copy of the minutes of the meeting held on March 29, 2007 by the physicians at the Medical Surgical Clinic of Cucuta, which references the inconsistencies between the date of the child's last menstrual period and the date of the violent carnal penetration claimed by the patient; with clinical and ultrasound findings in her medical history, as well as the conscientious objection claimed by the professionals assembled therein.
- Copy of Official Letter DPR- NS 5015 RGG 071041 dated April 9, 2007 in which the Ombudsman of Cúcuta requests that Coomeva EPS authorize the respective party to perform the abortion on Eli Johanna Palencia Arias.

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- Copy of Official Letter No. 0002488 dated April 12, 2007, in which Hospital Erasmo Meoz requests that Coomeva EPS relieve it from performing the abortion because of the conscientious objection issued by its medics.
- Copy of Official Letter FGN CAIVAS No. 248 dated March 21, 2007 in which the Center for Comprehensive Treatment for Rape Victims informed the director of Coomeva EPS of the refusal to perform the abortion.
- Copy of the letter dated April 10, 2007 from the Coordinating Prosecutor of Center for Comprehensive Treatment for Rape Victims to Coomeva EPS, regarding certain inconsistencies in the data of the complaint presented by the minor's mother.
- Copy of Resolution No. 4905 dated December 14, 2006, issued by the Ministry of Social Protection, adopting the technical rule to perform the voluntary adoption – IVE- as well as Resolution 1896 of 2001 and other provisions, with Attachment No. 1 for degrees of complexity and technical appendix.
- Copy of Decree No. 4444 dated December 13, 2006, issued by the Ministry of Social Protection regulating the provision of sexual and reproductive services, with Annex No. 2 regarding tools, medication and physical requirements to perform a voluntary abortion.
- Copy of the minutes of the public hearing carried out by the Second Labor Court of Cúcuta on April 13, 2007 at Coomeva EPS' facilities, at which EPS references the efforts regarding the voluntary abortion request of minor Eli Johanna Palencia Arias.
- Copy of the Agreement issued on December 22, 2006 by the National Social Security Health Council, ordering inclusion of the uterine evacuation by aspiration procedure to perform an abortion, in the mandatory contributory and subsidized health regimes, as an alternative to the curettage technique that was already included for certain services in the obligatory health plan.
- Copy of Official Letter DPR NS- 5015 RGG 071112 dated April 12, 2007 in which the Ombudsman of Cúcuta co-signs the constitutional action filed by the mother of Eli Johanna Palencia Arias before the Second Labor Judge of the Circuit.
- Copy of the psychological assessment practiced on minor Eli Johanna Palencia Arias, sent on March 22, 2007 to Center for Comprehensive Treatment for Rape Victims.
- Copy of the minutes of the public hearing held by the Second Labor Court of the Circuit of Cúcuta on April 13, 2007 at the facilities of the Center for Comprehensive Treatment for Rape Victims, receiving the declaration of the Center's Coordinating Prosecutor.
- Copy of Official Letter No. S.S.S. – 30000 – 0759-07 dated April 11, 2007, in which the assistant healthcare services manager of Hospital Erasmo Meoz requests an opinion from its legal adviser regarding the conscientious objection presented by the hospital's physicians.
- Copy of the official letter dated April 9, 2007, through which the gynecologists of Hospital Erasmo Meoz claim their conscientious objection to

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the assistant healthcare services manager of the hospital, regarding the abortion of patient Eli Johanna Palencia Arias.

- Copy of official letter No. 0315 dated April 2, 2007, in which the Coordinating Prosecutor of CAIVAS requests that once the procedure is performed on Eli Johanna Palencia Arias, that the manager of the Hospital Erasmo Meoz must send the removed product to legal medicine, so as to carry out a DNA analysis on the remains.
- Copy of the description of the patient's development, performed by Hospital Erasmo Meoz on April 3, 2007.
- Copy of the ultrasound and obstetric report performed at Hospital Erasmo Meoz on April 3, 2007, with respect to the pregnancy of Eli Johanna Palencia Arias.
- Certification issued by Coomeva with respect to the membership of Eli Johanna Palencia Arias, as beneficiary, and with respect to the weeks of gestation.
- Copy of the official letter dated March 29, 2007, through which the Medical Surgical Clinic of Cúcuta informs Coomeva EPS of the objection submitted by its gyno-obstetricians with respect to the Eli Johanna Palencia Arias's pregnancy.
- Copy of the official letter addressed to Coomeva EPS by Fundación Mario Gaitán Yanguas on April 14, 2007, informing of its refusal to carry out the abortion on minor Eli Johanna Palencia Arias, because of the conscientious objection of its gyno-obstetricians.
- Copy of the official letter addressed to Coomeva EPS by Clínica San José de Cúcuta on April 17, 2007, informing of its refusal to carry out the abortion on minor Eli Johanna Palencia Arias, because of the conscientious objection of its gyno-obstetricians.
- Copy of the official letter addressed to Coomeva EPS by Clínica Norte S.A. on April 16, 2007, informing of its refusal to carry out the abortion on minor Eli Johanna Palencia Arias, because of the conscientious objection of its gyno-obstetricians.
- Copy of the expansion of the technical-legal-medical report dated April 18, 2007, corresponding to the vaginal smear test performed on minor Eli Johanna Palencia Arias, on March 27, 2007 at the National Institute of Legal Medicine and Forensic Science, Regional Northeast Direction, Northern Section of Santander, Basic Unit of Cúcuta.
- Copy of the laboratory supplement to the technical – medical – legal report dated April 18, 2007, with respect to the absence of sperm cells reported by the forensic biology laboratory.

Because of the evidence ordered by the Ninth Review Chamber via Order dated November 20, 2007, the following documents were received at this office:

- Official Letter No. 01409 dated December 3, 2007, in which the director of the Departmental Health Institute of the Norte de Santander describes the activities performed to comply with Judgment C-355 of 2006.



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- Official Letter No. 8026-1-0353909 dated November 26, 2007, in which the National Health Superintendence references the inspection, vigilance and monitoring visits for public health reasons performed between August 9 and November 8, 2007 and reports that no complaints have been filed regarding the alleged breach of the matters noted in Judgment C-355 of 2006 or Decree 4444 of 2006 by public and private healthcare providers.
- Official Letter No. 269 dated November 21, 2007 in which the Medical Ethics Tribunal of Norte de Santander informs that it has not set forth or failed to perform any proceedings regarding the conscientious objection that any physician may claim with respect to the voluntary abortion request.
- Official Letter 867 – 2007 dated December 11, 2007, in which the National Medical Ethics Tribunal states that Law 23 of 1981 does not provide the figure of a conscientious objection, nor does it provide any mechanisms to determine the applicability and relevance of said objection and it adds that said tribunals cannot respond to an inquiry. For this reason, they cannot issue opinions regarding the case.
- Official letter dated January 17, 2008, in which Coomeva EPS references the various actions carried out at said EPS with respect to the request for the minor's abortion.
- Official Letter No. S.S.S. 30000 – 0065-08 dated January 17, 2008, through which the university hospital Erasmo Meoz lists the various actions carried out at said entity with respect to Eli Johanna Palencia Arias's abortion request.

## **5. The judgments reviewed**

### **5.1 Trial judgment**

The Second Labor Court of the Cúcuta Circuit, via judgment dated April 20, 2007, denied the constitutional action because although it is true that minor Eli Johanna Palencia Arias is pregnant and the alleged unconsented sexual act was reported and gave rise to the Prosecutor's criminal investigation, it is also true that the plaintiff did not prove that the pregnancy was caused by the rape, because of certain inconsistencies between the date on which the alleged rape occurred and the date of conception.

The court noted an inconsistency between the police report's date of the punishable offense on February 16, 2007, while the medical assessments and ultrasound dated March 24, 2007 show that the pregnancy was 16 weeks and 5 days along. The dates do not match, as one can state that the minor was already pregnant even before February 16, 2007. The Court also references the physicians' statements at the Medical Surgical Center of Cucuta when they submitted the conscientious objection with respect to the abortion, regarding certain inconsistencies between the date of the last period and the date of the alleged rape.

The Court also references the letter dated April 10, 2007 sent by the director in charge of the office of Coomeva to the Coordinating Prosecutor of CAIVAS, noting that, pursuant to the ultrasound, the minor's pregnancy began in December 2006 at least – all of these circumstances lead the Court to believe that, despite the existence of the criminal complaint, it cannot conclude that the pregnancy is a product of the rape, to fall into one of the situations noted by the Constitutional Court as giving rise to the possibility of voluntary abortion.

Moreover, the Court notes that there is no evidence of a serious birth defect of the fetus that causes its life to be unviable and that, on the contrary, the medical assessments show that the patient has a good mental condition and shows a normal pregnancy. For this reason, given that the Court's cannot find a factual pattern that agrees with those specified by the Constitutional court as necessary for an abortion, it must deny the claimed constitutional protection action.

### **The challenge filed by the minor's mother**

The mother of minor Eli Johanna Palencia Arias challenges the above decision because she believes that it denies the protection specified by the Constitutional Court in Judgment C-355 of 2006 to protect women's rights when a woman is a victim of rape, such as her daughter. She claims that the case falls into one of the three situations specified by the above Court, as subject to protection and granting the power to voluntarily undergo an abortion.

The appellant requests review of the facts reported in March 22, 2007 before the State Prosecutor General, Center for Comprehensive Treatment for Rape Victims and the fact that the aggressor is currently detained at the National Model Penitentiary of the city of Cúcuta.

### **The State Attorney General's Co-sponsorship of the appeal**

The 91 Judicial II Criminal Attorney General of the city of Cúcuta co-sponsors the appeal against the trial order, stating that he does not share the lower court's conclusions when it demands clear evidence or a showing that the pregnancy has been caused by the rape. He finds that this is disproportionate, especially if one bears in mind that Coomeva's physicians, in addition to submitting the conscientious objection, claim an inconsistency between the date of the last period and the date of the rape, and this constitutes an unlawful and abusive interference, that violates the scope, meaning and application of judgment C-355 of 2006.

The Attorney uses certain sections of this Judgment to conclude that if the legislator cannot impose any requirements or barriers, much less can a judicial or administrative authority, such as the Second Labor Court, EPS Coomeva and Hospital Erasmo Meoz. He adds that Coomeva EPS should establish whether all the specialists of the various IPS submitted a conscientious objection to the minor's abortion.

### **The State Ombudsman's Co-sponsorship of the appeal**

The Regional Ombudsman of Norte de Santander also makes an appearance to sponsor the appeal against the trial ruling. The Ombudsman claims that, because of her state of anguish and desperation, the minor's mother did not stop to determine the date of the rape and adds that the mother was informed of the events on Friday, March 16, 2007 and submitted the complaint on Tuesday, March 20, 2007 because March 19 was a holiday. This matter led the trial judge to doubt the truth of the facts and deny protection, without stopping to analyze the assessments of each of the interested parties in the case.

The Ombudsman asks the Labor Chamber of the Superior Court of Cúcuta to request that CAIVAS expand the declaration of Eli Johanna Palencia Arias, in order to establish the truth of the facts claimed with greater certainty. He argues that the Court overlooked the minor's claims with respect to the threats received from the aggressor, as to killing her mother and the minor if they reported the events and he states that this circumstance led the minor to delay submitting the complaint on the same day as

the date of the rape. It thus gave rise to the inconsistency between the date of the complaint and the date of the alleged commission of the punishable offense.

He adds that the claims of EPS Coomeva address the conscientious objection presented by the gynecologists of certain entities and for this reason, once the doubts and inconsistencies have been clarified, and given the other pieces of evidence, as well as the minor's declaration and the results of the psychological assessment that can be requested from Coomeva, CAIVAS and the Health Secretariat, the record will contain sufficient factual elements to demonstrate the source of the minor's harm, to develop certainty of its occurrence and to demand the adoption by the respective entity of urgent measures that cannot be delayed, given the pregnancy's evolution.

## **5.2 Appellate decision**

The Labor Chamber of the Superior Court of Cúcuta – via Judgment dated May 7, 2007 – affirmed the challenged decision, noting, in the first place, that neither the Constitutional Court – in Judgment C-355 of 2006, nor the regulatory voluntary abortion decree specify the relevant judicial proceedings that the pregnant woman or her representatives must follow in the event that EPS refuses to perform the respective medical procedure.

The Court agrees with the probative analysis performed by the lower court, to the extent that if the plaintiff claims the abortion request applies because the pregnancy was caused by the rape that took place on February 16, 2007 and the ultrasound performed on the minor shows that the minor was already pregnant when she was raped, at a minimum, the constitutional judge must deny the protection.

The Court specifies that if the Constitutional Court had established that abortion is not a crime when the pregnancy is a product of rape, this means that an abortion that is not the product of rape is a crime. This Court cannot accept the Attorney General's statements, in the sense that it is not enough to determine whether a criminal investigation exists, since one must first confirm the existence of a right and then confirm the existence of the threat or violation.

The Court adds that it does not believe that the defendants and the trial judge considered the weeks of gestation on the date the plaintiff reported the rape, to deny the abortion as one of the forbidden behaviors specified by the Constitutional Court in Judgment C-355 of 2006, because these were “disproportional burdens” and states that, in the opinion of the Chamber, the Constitutional Court did not intend to eliminate abortion as a crime when it is apparent that the pregnancy was not caused by rape.

With respect to the exercise of the tests requested by the Ombudsman, the Court states that the respective brief was received when the appeal's ruling was already being printed; that the Chamber believes that the psychological diagnosis performed by CAIVAS is sufficient and that requesting a copy of the amended complaint would change the action's arguments and the ruling, thereby violating the parties' due process.

## **II. CONSIDERATIONS AND ARGUMENTS**

### **1. Jurisdiction**

The Ninth Review Chamber of the Court is competent to review the ruling subject to challenge, pursuant to articles 86 and 241-0 of the Political Constitution, at articles 31 to 36 of Decree 2591 of 1991 and the other relevant provisions.

## **2. Legal problem**

The plaintiff claims protection of the fundamental rights of her minor daughter, for having failed to respond to her abortion request, despite having stated that the pregnancy is a product of rape and having filed the respective criminal complaint. She states that her case falls within one of the three situations referenced by C-355 of 2006, in which the Constitutional Court has ruled that a woman cannot be required to continue with her pregnancy, since this implies the complete annulment of her fundamental rights.

In turn, the defendants claim that despite having had the will to perform the abortion on the minor, all of their physicians submitted a conscientious objection.

In turn, the lower court considered that the protection requested did not apply, because although it is true that the minor is pregnant and that she reported carnal penetration or an unconsented or abusive sexual act, that gave rise to the Prosecutor's criminal investigation, it is also true that she did not prove that her pregnancy was caused by the rape, and thus, there are discrepancies between the date of the alleged rape and the date of conception.

Given this situation, the Chamber must study whether the generalized conscientious objection claimed by the healthcare professionals who were requested to perform the abortion and who failed to immediately refer the pregnant mother to another available professional, and the fact that the Court demanded that the plaintiff provide evidence above and beyond her police report against the alleged rapist, invalidates constitutional judgment C-355 of 2006, thereby violating the minor's fundamental rights because her abortion was refused despite the fact that she fell into one of the exceptions for abortion as a crime.

For this purpose, the Chamber shall review three matters: (i) Judgment C-355 of 2006 and the requirements for timely response to an abortion request. National and international law on this matter; (ii) the conscientious objection is not an absolute right; and, (iii) lastly, the case will be resolved and other determinations shall be made.

## **3. Judgment C-355 of 2006 and the requirements for timely response to an abortion request. National and international law on this matter.**

3.1. This court, via Judgment C-355 of 2006 issued pursuant to the complaint of a citizen, performed the constitutional review of articles 32-7, 122, 123 (partial) and 124 and the latter three were modified by article 14 of Law 890 of 2004, law 599 of the Criminal Code of 2000, with respect to the punishment for abortion. This ruling was set forth pursuant to the power to exercise jurisdictional review and the *res judicata* that applies to precedent pursuant to article 243 of the Constitution.

3.2. In this regard, the Court considered that the legislator, via the claimed rules, decided to protect life by codifying the crime of abortion, a measure that the Court does not consider disproportionate. Nonetheless, the Court found that to punish abortion in all circumstances implies a prevalence of one of the legal assets at play – the life of the fetus, and the consequent absolute sacrifice of all fundamental rights of the pregnant woman. This is unconstitutional in any light.

For this Court, the legislation's decision to penalize abortion when the pregnancy is the result of conduct that constitutes carnal penetration or the unconsented and abusive sexual act, of unconsented artificial insemination or transfer of a fertilized egg, or incest, is manifestly disproportionate and unreasonable. It constitutes a State's

interference having such a magnitude that it precludes the free development of human personality and the dignity of women. It considers women a mere receptacle for reproduction and does not require their consent to such an important matter such as giving life to a new being, assuming a commitment or obligation that will deeply affect their lives in all senses.

Penalizing abortion in those cases in which the pregnant woman's life and physical and mental health are threatened is also disproportionate, as we cannot order the sacrifice of a life that has already been created over the protection of life that is being created. Indeed, there is no equivalence between the right to life and women's health as compared to the protection of the embryo's life.

And, in the last hypothesis, with respect to medically certified birth defects, when these make the fetus unviable, penalizing abortion was also considered disproportionate because the State's duty to protect life loses importance and would give rise to an imposition of a certain conduct on women that oversteps the conduct that is normally required from the mother. Hence, the mother would bear the burden of a pregnancy, and then the loss of life of the being that is unviable because of its malformation. This would subject her to cruel, inhuman and degrading treatment that leads to pain and suffering and affects her right to human dignity.

Indeed, the Court was clear when it considered that an undistinguished penalty against abortion, ascribing absolute protection to the life of the fetus, violates women's fundamental rights. Therefore, the Court's review of the respective criminal rules requires an adjustment to the constitutional framework, per judgment C-355 of 2006, which determined the possibility of an abortion without giving rise to the crime of abortion.

3.3. It is worth recalling that the Court held the following in judgment C-355 of 2006, *inter alia*:

(i) Declaring article 32, numeral 7 of Law 599 of 2000 enforceable, as a ground for relief from responsibility, when one acts from the need to protect one or another's right from actual or imminent danger – inevitable – that the agent has not intentionally or recklessly caused and where the party does not have a legal duty to confront.

(ii) Regarding article 122 of Law 599 of 2000, that codified the crime of abortion in every circumstance, the Court held that a woman shall not commit the crime of abortion when she undergoes a voluntary abortion in the following cases: (i) When continuing the pregnancy constitutes a danger to the woman's life or health, certified by a physician; (ii) When the fetus has a serious malformation that makes its life unviable, certified by a physician; and, (iii) When the pregnancy is the result of properly reported conduct that constitutes unconsented, abusive, carnal penetration or sexual act, unconsented artificial insemination or transfer of the fertilized egg, or incest.

(iii) Declaring the clause unenforceable, *or in a woman under fourteen years of age*, contained in article 123 of Law 599 of 2000; abortion is thus codified when it is performed without the woman's consent, regardless of her age.

(iv) Declaring article 124 of Law 599 of 2000 unenforceable, which provided that the judicial officer could forego the penalty when it was not necessary in the concrete case, if the abortion were performed in justified extraordinary abnormal conditions, when the pregnancy results from the carnal penetration or the unconsented and

abusive sexual act, of unconsented artificial insemination or transfer of a fertilized egg, or incest.

3.4. The referenced Court decision harmonizes the challenged rules with the Constitution, for the following legal reasons:

- (i) The 1991 Constitution provides a general protection for life. Indeed, in the constitutional framework, life enjoys various different treatments. It is an asset that enjoys constitutional protection and it is also a fundamental right.
- (ii) The right to life implies ownership, and said ownership, as with all rights, is limited to the human being. However, the protection of life even protects those who have not fully acquired this condition.
- (iii) Life, as a constitutional asset, is a limit on the legislator's freedom.
- (iv) Life is not a value or a right with an absolute nature and it must be weighed against other constitutional values, principles and rights.
- (v) Based on the 1991 Constitution, women's rights acquired constitutional relevance and today, women are constitutional beings that enjoy special protection.
- (vi) Women's sexual and reproductive rights are human rights, and thus, comprise a part of constitutional law.
- (vii) The legislator's power to legislate in criminal matters is limited by fundamental rights, constitutional principles and the constitutional block of rights.
- (viii) The legislator, in order to protect life in the exercise of its power to legislate, decided to ascribe a different treatment to any attacks against life, responding to various specifications, modalities and stages throughout a vital course; and thus, birth is a relevant fact to determining the intensity of protection via the gradation of the penalty's duration.

3.5. Indeed, since judgment C-355 of 2006, there are three circumstances in Colombia that allow an abortion, without incurring any criminal liability therefor. For these, the pregnant mother must prove that she fits into one of these categories by submitting the minimum required evidence per case, pursuant to judgment C-355 of 2006:

- (i) When continuing the pregnancy constitutes a danger to the woman's life or health, this situation must be certified by a physician;
- (ii) When the fetus has a serious malformation that makes its life unviable, this situation must be certified by a physician; and,
- (iii) When the pregnancy is the result of properly reported conduct that constitutes unconsented, abusive, carnal penetration or sexual act, unconsented artificial insemination or transfer of the fertilized egg, or incest. the party must only prove that the respective punishable act was properly reported before the competent authority.

Of course, when the rape is presumed, as when the woman is under fourteen (14) years of age, the submission of the report is a mere formality and the absence thereof cannot be a pretext to delay the abortion, if the woman request performance of an abortion.<sup>1</sup>

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<sup>1</sup> Clarification of the opinion of Magistrate Manuel José Cepeda Espinosa to judgment C-355 of 2006.

3.6. In these cases, a party who undergoes an abortion is exempt from the crime of abortion. Each case is individual and autonomous. Indeed, in the case of rape or incest, one cannot require that the mother show that, in addition to the threat to her life or health, the fetus must be unviable. This is because, in the case of rape or incest, we must presume the good faith and responsibility of the woman who reported the crime, and, from a constitutional perspective; it is enough for the party to show the doctor a copy of the properly filed police report.

It is worth recalling that the requirements to prove that abortion applies in each of the three exemptions from a crime, pursuant to judgment C-355 are exhaustive in nature. Thus, *if the legislator does establish any requirements that constitute undue burdens on the rights of women or barriers to performing an abortion,*<sup>2</sup> then healthcare professionals cannot demand other additional requirements that impose administrative barriers to access to the legal abortion service and that are contrary to the Constitution and other national and international regulations on the subject.

3.7. In Colombia, judgment C-355 of 2006 removed a legal barrier that implied the practice of unsafe abortions that threatened a woman's life and health. Therefore, since judgment C-355 of 2006 was issued, women are authorized to access healthcare services and request an abortion when they prove that they fall within one of the three circumstances in which this practice is not a crime. Every person must respect a woman's decision to undergo an abortion, especially healthcare professionals, who must perform the abortion through the General Social Security Healthcare System, as a guarantee for women's fundamental rights, so as to protect their life and health.

Once the Court removed this legal barrier, healthcare professionals cannot disregard this constitutional determination. Given a request for an abortion, they do not have the power to demand an authorization or consensus from a series of physicians, the pregnant woman's husband, parents or other relatives, or judges or tribunals; further, they cannot impose waiting lists for treatment; they cannot abstain from immediately referring the woman to another profession that is competent to perform the procedure when they claim the conscientious objection; moreover, they must protect confidentiality, among other matters.

3.8. Indeed, once the pregnant mother has requested an abortion, having proven that she falls into one of the exemptions for abortion as a crime, the healthcare professionals of the General Social Security Health System must perform the abortion, (i) in a timely fashion, that is, within five (5) days of the request, pursuant to Resolution 004905 of 2006, issued by the Ministry of Social Protection; (ii) her treatment must be comprehensive and high-quality; and (iii) it shall be performed subject to the technical-administrative rules issued by the Ministry of Social Protection, which are mandatory and while they are issued, the providers must comply with the rules of Decree 444 of 2006, pursuant to guidelines "Safe abortion: Technical and policy guidelines for health systems" issued by the World Health Organization (2003).

3.9. Now, Judgment C-355 of 2006 names certain international documents that seek the protection of women's human rights, and have been issued pursuant to certain United Nations conferences.

The Colombian State is deemed to have acquired international obligations because it is a member of human rights organizations created to protect. It must internally adopt

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<sup>2</sup> Judgment C-355 of 2006

measures that are necessary to promote removing barriers that prevent access to abortion because of the presence of legal barriers associated with the stigma of abortion, such as its absolute criminalization or administrative barriers, as well as the disapproval expressed by healthcare providers in hospital or clinics, when women are faced with undesired pregnancies. These factors lead women to undergo clandestine abortions that can be performed by unqualified persons in unhealthy conditions and, in many cases, discourages them from seeking specialized treatment for the complications that can stem from abortion, with the serious risks that said circumstances entail for their lives.

Indeed, a series of international conferences, as well as the Technical and Policy Guidelines for Health Systems .... have corroborated that unsafe abortions are one of the main causes of maternal mortality and morbidity, and a public health problem.<sup>3</sup> Because of this, United Nations member states recognized that in such cases where abortions do not violate the law, they must be performed so as to prevent a risk to the mother's life and health.<sup>4</sup>

It is also worth recalling that at the International Conference on Population and Development (ICPD) held in El Cairo in 1994, governments agreed to address the health impact of abortions practices in risky conditions as a serious public health problem because, as in the 4<sup>th</sup> World Conference on Women (FWCW) held in Beijing in 1955 [*sic*], *they the human rights of women in the area of sexual and reproductive health, which are based on the recognition of the basic rights of all couples and individuals to decide freely and responsibly the number of children they want, the interval between them and when to have them and to access the information and means to do so, as well as the right to obtain the highest standard of sexual and reproductive health ....*<sup>5</sup>

In Beijing, governments agreed that, *"The 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. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences."*<sup>6</sup>

At the conference held in El Cairo, the world's governments recognized that unsafe abortions were one of the greatest public health concerns and guaranteed their commitment to decreasing the need for abortions through the expansion and improvement of family planning services, while at the same time, they recognized that, in the cases that do not violate the law, abortion should not have any risk.<sup>7</sup> In 1996, the Beijing Conference affirmed these agreements and called on governments

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<sup>3</sup> International Conference on Population and Development (CIPD) held in El Cairo in 1994

<sup>4</sup> United Nations 1995, paragraph 8.25, See also United Nations General Assembly, paragraph 63.iii

<sup>5</sup> United Nations 1995, paragraph 7.3 Unofficial translation

<sup>6</sup> United Nations 1996, paragraph 96

<sup>7</sup> United Nations 1996, paragraph 8.25



to review the laws containing punitive measures against women who underwent illegal abortions.<sup>8</sup>

The United Nations 1999 General Assembly reviewed and evaluated the implementation of matters addressed at the 1994 International Conference on Population and Development and governments agreed to undertake actions to ensure that the countries where abortion is not against the law adopt all measures so that it is accessible and does not pose risks, and health systems must train and equip healthcare providers and undertake additional measures to protect women's lives.<sup>9</sup>

Further, as noted previously, the World Health Organization (WHO) has developed a technical guide to prevent unsafe abortions and treat their complications,<sup>10</sup> in order to help governments fulfill their commitments of bringing an end to unsafe abortions and which will be addressed in the following chapter of this document.

3.10. International documents are not only binding for the Republic's government and judges, but they are also binding for healthcare professionals at every level, who have an ethical, constitutional and legal obligation to respect women's rights and ensure their effective enjoyment allowing them access to all legal healthcare services, respecting the Constitution and all rulings that set constitutional precedent, such as judgment C-35 [sic] of 2006, as this contributes to a significant reduction of the high maternal mortality and morbidity rates due to the practice of unsafe abortions.

**4. The conscientious objection is not an absolute right.  
Healthcare professionals must timely treat abortion requests pursuant to  
judgment C-355 of 2006; it imposes an obligation to immediately refer the  
pregnant woman to a healthcare professional who can perform this procedure.**

4.1. The conscientious objection is based on article 18 of the Constitution, that guarantees the freedom of conscience and provides that no one can be forced to act against it.

4.2. This court has ruled on the conscientious objection on various occasions, in matters such as military service,<sup>11</sup> education,<sup>12</sup> the obligation to swear an oath,<sup>13</sup> in matters of work obligations,<sup>14</sup> and in health matters,<sup>15</sup> among others.

4.3. With respect to voluntary abortions, in judgment C-355 of 2006, this court considered healthcare professionals' right to the conscientious objection. Nonetheless, the Court determined that *neither legal persons nor the State can claim the conscientious objection. Only natural persons can exercise this right; therefore, clinics, hospitals, healthcare centers or any institution with such a name, cannot claim a conscientious objection against performing an abortion when the pregnant woman falls into the grounds defined by its judgment. With respect to natural persons, it is*

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<sup>8</sup>United Nations 1996, paragraph 106

<sup>9</sup>United Nations 1996, paragraph 63, iii

<sup>10</sup> The World Health Organization published the Report in 2003.

<sup>11</sup>Judgments T-409 of 1992, C-511 of 1994, C-561 of 1995, T-363 of 1995, C-740 of 2001, T-355 of 2002, T-332 of 2004.

<sup>12</sup>Judgments T-539a of 1993, T-075 of 1995, T-588 of 1998, T-877 of 1999, T-026 of 2005.

<sup>13</sup>Judgments T-547 of 1993, C-616 of 1997.

<sup>14</sup>Judgments T-982 of 2001, T-332 of 2004.

<sup>15</sup>Judgments T-411 of 1994, T-744 of 1996, T-659 of 2002, T-471 of 2005.

*worth noting that the conscientious objection references a duly supported religious conviction, and therefore, it does not apply when a physician disagrees with abortion, nor can it justify disregarding women's fundamental rights; thus, in the event that a physician claims the conscientious objection, he or she must immediately proceed to referring the woman who falls into the hypothetical conditions to another physician who can perform the abortion, without prejudice to a subsequent determination regarding whether the conscientious objection did apply and was pertinent, through the mechanisms established by the medical profession.*

4.4. Therefore, pursuant to Judgment C-355 of 2006, article 2 of Decree 444 of 2006 provides that, in order to ensure the essential provision of healthcare, avoid barriers to access and preventing the violation of fundamental rights protected by this judgment, the conscientious objection is an individual decision and not an institutional one, that exclusively applies to direct providers and not to administrative staff.

4.5. Thus, with respect to the conscientious objection, we have determined that (i) clinics, hospitals, healthcare centers or any such institution cannot pose a conscientious objection to the practice of an abortion when the conditions noted by this judgment are satisfied; (ii) with respect to the subjective situation of healthcare professionals who are not willing to practice an abortion because of their conscience, they are guaranteed the power to resort to the figure identified as the conscientious objection; (iii) they can resort to the conscientious objection provided that it is truly a "*duly supported religious conviction*," because we are not trying to play upon the physician's opinion regarding whether he or she agrees with abortion; and, (iv) the conscientious objection is not an absolute right and its exercise is limited by the Constitution itself to the extent that it grants fundamental rights held by women that cannot be overlooked.

4.6. Indeed, as a mechanism to harmonize the full guarantee of pregnant women's fundamental rights, on one hand, and physician's right to claim a conscientious objection, on the other, judgment C-355 of 2006 expressly provided that the physician who claims a conscientious objection to the practice of an abortion is **obligated** to immediately refer the pregnant woman to another physician who is willing to perform this procedure, without prejudice to a subsequent determination regarding whether the conscientious objection applied and was pertinent, through the mechanisms established by the medical profession.

The above means that the conscientious objection is not an absolute right, and its exercise is limited by the Constitution itself. In other words, it cannot violate women's fundamental rights. Indeed, given a voluntary abortion request, (i) when the mother's life is in danger, (ii) when the fetus is unviable, certified by a physician, (iii) or when the pregnant woman states that the pregnancy is the result of carnal penetration or the unconsented and abusive sexual act, of unconsented artificial insemination or transfer of a fertilized egg, or incest, reported to the authorities; in the case of a woman under fourteen years of age, rape is presumed, and the submission of the report becomes a mere formality. Absence thereof cannot be a pretext to delay the abortion; General Social Security Health System professionals must perform the abortion; and, if the respective physician refuses to perform it, claiming the conscientious objection, his or her activity is not limited to this statement, but rather, he or she has the subsequent obligation to immediately refer the pregnant mother to another professional who is willing to perform this procedure, and the former is

subject to a determination regarding whether the conscientious objection applied and was pertinent, through the mechanism established by the medical profession.

4.7. In summary, the exercise of the right to the conscientious objection is subject to the legal framework and, therefore, it cannot become a mechanism for discrimination against women or violation of their rights. Indeed, healthcare professionals have the ethical and legal obligation to respect the Constitution as well as judgments set forth by this court in its constitutional review, that have *res judicata* effect and are *erga – omnes* in nature. Thus they are binding on all persons.

4.8. Now, with respect to the right to claim the conscientious objection, healthcare professionals have the right to claim it, but they also have the right not to do so. In either case, whether they claim or do not claim the conscientious objection, all persons must respect their decision and they cannot be the subjects of any discrimination.

In this regard, Decree 4444 of 2006, in agreement with article 13 of the Constitution, bans discriminatory practices against pregnant women, healthcare professionals, and healthcare service providers, through: (i) claiming the conscientious objection; (ii) not claiming the conscientious objection; and, (iii) in the event of having performed a voluntary abortion, in the terms of the referenced decree.

Therefore, under this decree, the cited information cannot be a requirement for: (i) admission or permanence in educational, sports, social or rehabilitation centers; (ii) Access to any work activity or permanence thereof, except in the event that a party wishes to employ staff to directly provide the services regulated by this Decree, (iii) Membership in a Healthcare Promotion Entity or a Subsidized Regime Administrator and access to healthcare services; (iv) Entry, permanence or performance of any cultural, social, political or economic activity; and, (v) Contracting of healthcare services that are unrelated to the provision of services addressed by this Decree.

4.9. The prohibition against discriminatory practices against the pregnant woman, and healthcare professionals who do not claim a conscientious objection against practicing the voluntary abortion as well as the obligation to immediately refer the woman to another professional who is equipped to perform the voluntary abortion are mechanisms that guarantee the full protection of the Constitution and enforce women's human rights, and satisfy the commitments that Colombia has acquired internationally.

4.10. Indeed, international instruments such as the "Declaration of Oslo of the World Medical Association on therapeutic abortion," adopted by the 24<sup>th</sup> World Medical Association, Oslo, Norway, in August 1970 and amended by the 35<sup>th</sup> World Medical Association, Venice, Italy, October 1983, expressly provide that if a physician convictions do not allow him or her to recommend or perform an abortion, he or she can withdraw, provided that he or she guarantees that a qualified colleague will continue providing medical treatment. This statement expressly provides:

*"1. The first moral principle imposed upon the doctor is respect for human life from the time of conception."*

*2. Circumstances which bring the vital interests of a mother into conflict with the vital interests of her unborn child create a dilemma and raise the question whether or not the pregnancy should be deliberately terminated.*

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*3. Diversity of response to this situation results from the diversity of attitudes towards the life of the unborn child. This is a matter of individual conviction and conscience, which must be respected.*

*4. It is not the role of the medical profession to determine the attitudes and rules of any particular state or community in this matter, but it is our duty to attempt both to ensure the protection of our patients and to safeguard the rights of the doctor within society. (emphasis added)*

*5. Therefore, where the law allows therapeutic abortion to be performed by a doctor competent to do so in premises approved by the appropriate authority.*

*6. If the doctor considers that his convictions do not allow him to advise or perform an abortion, he may withdraw while ensuring the continuity of (medical) care by a qualified colleague.*

*7. This statement, while it is endorsed by the General Assembly of the World Medical Association, is not to be regarded as binding on any individual member association unless it is adopted by that member association.”*

4.11. Further, the report, “Safe abortion: Technical and policy guidelines for health systems”, published by World Health Organization in 2003, Second Chapter, point 2.4. 1, ***“Individual health-care providers have a right to conscientious objection to providing abortion, but that right does not entitle them to impede or deny access to lawful abortion services because it delays care for women, putting their health and life at risk. In such cases, health-care providers must refer the woman to a willing and trained provider in the same, or another easily accessible health-care facility, in accordance with national law.”***

Chapter Two of this document, final subsection, also provides that: ***“When a hospital, clinic or health center has been designated as a public institution that offers services permitted by the law, the life or health of a woman cannot be put at risk by denying these services. It must provide the abortion services to the extent permitted by the law.”*** [TN: unofficial translation – the official text was not found at the indicated marker]

4.12. Now, the right to a conscientious objection and the mother’s guarantee to respect for her fundamental rights must be protected, pursuant to judgment C-355 of 2006 and Decree 4444 of 2006; in order to adopt measures towards the respect, protection and satisfaction of the rights to women’s healthcare treatment, eliminating barriers that prevent access to voluntary abortion services, sexual and reproductive education and information is necessary in conditions of safety, timeliness, and quality, setting the necessary requirements; public healthcare entities in the network and Healthcare Promotion Entities, Subsidized Regime Managers, Adapted Entities, and those entities responsible for exception regimes must **guarantee an adequate number of providers who are equipped to provide abortion services** pursuant to the provisions, for the real access and timely treatment of pregnant women who need abortion services and at all levels of complexity, in accordance with the Mandatory Quality Assurance System and technical rules issued by the Ministry of Social Protection on the subject.

4.13. In this regard, Decree 444 of 2006, in force as of January 29, 2007, provides:

*Article 1: SCOPE OF APPLICATION. The provisions of this decree apply, as relevant, to Healthcare Promotion Entities, Subsidized Regime Managers, Adapted Entities, Prepaid Medicine Companies, Departmental, District and Municipal Healthcare Entities, the entities responsible for exception regimes addressed by article 279 of law 100 of 1993 and Law 647 of 2001 and Healthcare Service Providers.*

*Voluntary abortion services, in the cases and under the terms set forth by Judgment C-355 of 2006, shall be available in our national territory to all women, regardless of their ability to pay and membership to the General Social Security Health System – SGSSS.*

*The healthcare services that are needed by members of the General Social Security Health System at Healthcare Promotion Entities, Subsidized Regime Managers and Adapted Entities shall be provided at healthcare service provision institutions with which the former hold an agreement or contract, or without an agreement in the case of emergency care. The healthcare services needed by the poor population, as to matters that are not covered by subsidies, shall be effected through public Healthcare Providers or private ones with a contract with Departmental, District and Municipal Health entities.*

*Healthcare services that are needed by members of the exception regime contemplated by article 279 of Law 100 of 1993 and Law 647 of 2001 shall be provided through Healthcare Providers of the entities responsible for said regimes.*

*Article 2: AVAILABILITY OF THE SERVICE. The provision of safe abortion services that are exempt from being categorized as a crime shall be available at all the levels of complexity required by the pregnant woman, at the healthcare provision institutions that are equipped to do so, pursuant to the foregoing rules and other provisions of this Decree.*

***Departmental, District and Municipal Health Entities, within the scope of their powers, shall assure that the public healthcare provider network of their jurisdiction offers sufficient availability to ensure real access and timely treatment for pregnant women who need abortion services at all levels of complexity.***

***The Healthcare Promotion Entities, the Subsidized Regime Managers, Adapted Entities and entities responsible for exception regimes addressed by article 279 of Law 100 of 1993 and Law 647 of 2001 must guarantee an adequate number of providers who are equipped to provide the services addressed by this Decree and according to its provisions, pursuant to the Mandatory Quality Assurance System and the technical rules issued by the Ministry of Social Protection on the subject.***

*The entities subject to this Decree and healthcare providers must ensure the operation of referral and counter-referral services, so as to assure the timely referral of pregnant women to medium and highly complex services when complications arise or when the woman's gestational age or health condition requires it. They must also assure the counter-referral to sexual and reproductive healthcare services and family planning services to the levels of low complexity.*

**PARAGRAPH.**

*(...) ARTICLE 5. – REGARDING THE CONSCIENTIOUS OBJECTION.  
– In order to assure essential public healthcare, prevent barriers to access and prevent violations of fundamental rights protected by Judgment C-355/06, the conscientious objection is an individual decision and not an institutional decision; it solely applies to direct providers and not to administrative staff.*

**ARTICLE 6. PROHIBITION AGAINST DISCRIMINATORY PRACTICES.**  
*– Claiming the conscientious objection, not claiming the conscientious objection or having performed a voluntary abortion in the terms of this Decree cannot constitute a discriminatory circumstance against the pregnant woman, healthcare professionals, and healthcare providers. This information cannot be required for (a) admission or permanence in educational, sports, social or rehabilitation centers; (b) Access to any work activity or permanence thereof, except in the event that a party wishes to employ staff to directly provide the services regulated by this Decree, (d) Membership in a Healthcare Promotion Entity or a Subsidized Regime Administrator and access to healthcare services; (d) Entry, permanence or performance of any cultural, social, political or economic activity; and, (e) Contracting of healthcare services that are unrelated to the provision of services addressed by this Decree.*

**ARTICLE 7. - PENALTY REGIME.** – *Breach of the provisions of this decree shall give rise to the application of the penalties contemplated by the Mandatory Quality Assurance System of the General Social Security Health System and those established by article 49 of Law 10 of 1990 and Law 100 of 1993, as applicable, which shall be imposed by the authorities who are competent for the exercise of inspection, vigilance and monitoring.*

*The proceedings to impose penalties shall be commenced ex officio, at the request of an interested party, by information of the public officer, by report, or report filed by any person or pursuant to taking a safety or preventive measure.*

*If the facts subject to the penalty regime constitute a crime or disciplinary offense, the competent authority shall be informed of them, accompanied by the relevant evidence.*

4.14. Pursuant to Decree 4444 of 2006, the Ministry of Social Protection issued Resolution Number 004905 of 2006 (December 14), adopting the Technical Rule for the Abortion Treatment – IVE-. Resolution 1896 of 2001 is added to the above and other provisions are issued, and they are expressly attached to the report “Safe abortion: Technical and policy guidelines for health systems” published by the World Health Organization in 2003. In this regard, this Resolution provides:

**Article 5- SPEED IN THE PROVISION OF VOLUNTARY ABORTIONS:** *The provision of voluntary abortions must be performed within the first five days following the request, to the extent possible, and upon submission of an informed consent by the pregnant woman and submission of the medical certification or copy of the criminal report, as applicable.*

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**Article 7. – PUBLIC HEALTH MONITORING.** - *The Ministry of Social Protection and the territorial entities in the scope of their powers, shall monitor voluntary abortions, including monitoring their complications and maternal mortality, pursuant to the instruments defined by the Public Health Monitoring System SIVIGILA.*

4.15. In summary, in order to safeguard women's fundamental rights, protected by the Constitution and Judgment C-355 of 2006, assuring the provision of the essential and legal public healthcare— abortion – and preventing barriers to access thereof, the conscientious objection is an individual and not an institutional decision, or a collective one at that, that solely applies to direct providers and does not apply to administrative staff; further, the conscientious objection must be submitted in writing, duly supported; the physician has a subsequent obligation to immediately refer the mother to a doctor who is equipped to perform the procedure, so as to prevent this from becoming a barrier to access to the essential healthcare service of voluntary abortion.

4.16. In light of the foregoing, the healthcare administrative authorities must fulfill Decree 4444 of 2006 as well as Resolution 004905, that provide that all entities or institutions in the Healthcare System must guarantee an adequate number of providers who are equipped to perform voluntary abortions pursuant to its provisions, for the real access and timely treatment of pregnant women who need voluntary abortions at all levels of complexity; voluntary abortion services must be performed, to the extent possible, within the first five days of the request and with the informed consent of the pregnant woman and the submission of a medical certification or copy of the criminal report, as applicable, to avoid any penalties.

4.17. The foregoing implies both EPS' obligation to perform all actions conducive to identifying the location of the IPS with professionals equipped to perform the voluntary abortion procedure, as well as to immediately and effectively respond to the woman who legally requests this procedure, and to avoid the violation of her rights due to the passage of time. Indeed, the EPS must directly refer the requesting woman to the professional who is equipped to perform the voluntary abortion proceeding; and, in the event that the woman requests the procedure directly from an IPS, the healthcare professional who treats the case and claims the conscientious objection must immediately refer the woman to an equipped professional to perform this procedure, whose availability must be known in advance in a list determined by public and private entities.

## **5. Analysis of the concrete case**

5.1 In the instant case, a constitutional protection action was brought against COOMEVA EPS and Hospital Universitario Erasmo Meoz de Cúcuta, because it denied to perform an abortion on Eli Johanna Palencia Arias, a victim of a carnal penetration that was properly reported to the State General Prosecutor.

5.2 Pursuant to article 86 of the Constitution, any person may submit a constitutional action to protect his or her fundamental rights, when these have been violated by an action or omission of any public authority. This action also proceeds against private parties in charge of providing a public service, in the manner established by law. In this sense, Decree 2591 of 1991, article 42, provides that the constitutional protection action shall apply against the actions or omissions of private parties, among others, *when the action is against the party responsible for providing the public healthcare service.*

5.3 The Court observes that, under the Constitution and judgment C-355 of 2006, in the instant case, both the defendant entities as well as the physicians assigned to the case violated the fundamental rights of the 13-year old girl Eli Johanna Palencia Arias because, despite the fact that she requested an abortion and submitted a copy of the police report in which she claimed to have been raped, they limited themselves to stating that they were unable to perform this procedure because of a generalized conscientious objection by the healthcare professionals who treated the case.

5.4 Based on the evidence in the file, we can conclude that the minor was referred to over five healthcare institutions and none of them performed the abortion procedure, claiming that the physicians used the conscientious objection. Further, none of them performed any effort whatsoever to immediately refer the pregnant minor to a physician who was equipped to perform this procedure.

5.5 Indeed, the record contains (i) the police report submitted by Ms. Gladys Belen Arias, mother of minor Eli Johanna Palencia Arias, alleging the rape of her daughter;<sup>16</sup> (ii) a laboratory test that was positive for pregnancy;<sup>17</sup> (iii) certification of the Coordinator of the Prosecutor's Office regarding the active criminal investigation into the aggravated violent carnal penetration, naming the referenced minor as the alleged victim;<sup>18</sup> (iv) official letter sent by the Prosecutor to Coomeva EPS, requesting an abortion, as requested by the minor,<sup>19</sup> because the minor was a member of this EPS.

5.6 Further, the record shows that Coomeva EPS referred the minor to The Medical Surgical Clinic, to undergo the procedure, but it was not performed therein<sup>20</sup> because the director physician, auditing physician, four gyno-obstetricians, the chief nurse and the quality auditor, all at the same Clinic, held a meeting on March 29, 2007 at 8:00 p.m. in order to analyze, discuss and determine their actions in the case of patient Eli Johanna Palencia Arias, member of Coomeva EPS. The meeting was specifically held to determine the actions to perform the abortion requested because of the patient's rape. The conclusions of the meeting were (i) the case satisfied the requirements of decree 4444 of 2006; (2) there is an inconsistency between the date of the minor's last period and the date of the violent carnal penetration reported by the patient, as compared to the clinical and ultrasound findings in her medical history; (iii) the conscientious objection allows gyno-obstetricians to refuse to perform the procedure, and the signing physicians claim this objection; and, (iv) the surgical clinic and its specialized staff do not assume the responsibility for performing and will not perform the abortion. Coomeva EPS S.A. was informed of these conclusions.

5.7 Given the Surgical Clinic's response, Coomeva sent the patient to Hospital Universitario Erasmo Meoz de Cúcuta, Social State Company, to perform the procedure.<sup>21</sup> However, this hospital claimed that it did not have a contract with Coomeva, and it also claimed that it could not perform the procedure because its doctors claimed the conscientious objection.<sup>22</sup>

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<sup>16</sup> Page 2 and 3, vol. 1

<sup>17</sup> Page 6, vol. 1

<sup>18</sup> Page 7, vol. 1

<sup>19</sup> Page 35, vol. 1

<sup>20</sup> Page 110 and 111, vol. 1

<sup>21</sup> Page 112, vol. 1

<sup>22</sup> Page 113, vol. 1



5.8 Again, Coomeva sent the patient to Fundación Mario Gaitán Yaguas, and it answered through its Medical Treatment Manager that the gyno-obstetricians at that institution had been individually asked to perform the abortion but they had unanimously claimed the conscientious objection, thereby refusing to perform the procedure.<sup>23</sup>

5.9 Coomeva also sent the minor to Clínica San José de Cúcuta and it answered through its Administrative Manager, that it would not treat the request because its medical gyno-obstetrician staff claimed the conscientious objection on account of their religious beliefs.<sup>24</sup>

5.10 This very thing occurred at Clínica Norte S.A. through its Scientific Director.<sup>25</sup> And, at Clínica Santa Ana S.A., the manager stated that they had availability to treat the patient in terms of operating room services, anesthesia, medication and hospitalization but reported that their team of physicians specialized in gynecology and obstetrics claimed the conscientious objection against performing this procedure.<sup>26</sup>

5.11 Based on this evidence, the Court concludes that EPS COOMEVA, the public and private hospital and clinical centers to which the minor resorted to undergo an abortion, as well as the physicians at said healthcare institutions violated the minor's fundamental rights when they refused to perform this procedure. They also violated the Constitution, Judgment C-355 of 2006, the law and the regulations issued by the National Government because, although it is true that all the gynecologists and obstetricians claimed the conscientious objection, this does not satisfy the requirements of judgment C-355 of 2006 or Decree 4444 of the same year and Resolution 004905 of 2006 issued by the Ministry of Social Protection, nor did they fulfill the obligation to immediately refer the minor to a healthcare professional who was equipped to perform the respective procedure.

5.12 Indeed, the evidence in the record does not confirm that each of the doctors who received the case submitted an individual, free and autonomous conscientious objection because, although the answers sent to Coomeva by the respective Managers or Directors did announce this, on the contrary, we are able to infer that the conscientious objection was assumed collectively as an institutional decision. With respect to the Surgical Clinic of Cúcuta,<sup>27</sup> it is clear that the decision regarding the conscientious objection was made collectively and with the intervention of administrative staff. Further, it is also clear that this decision was not made pursuant to religious reasons, but pursuant to an analysis of the reported facts.

5.13 With respect to the record's evidence, it is worth recalling that healthcare professionals cannot limit themselves to claiming the conscientious objection to be exempt from practicing the abortion procedure, and thus assume they are exempt from any responsibility. Instead, they must satisfy the additional obligation that requires them to immediately refer the requesting woman to another professional who is equipped to perform this procedure. Public health networks as well as healthcare

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<sup>23</sup> Page 114, vol. 1

<sup>24</sup> Page 115, vol. 1

<sup>25</sup> Page 119 and 120, vol. 1

<sup>26</sup> Page 121, vol. 1

<sup>27</sup> Page 110 and 111, vol. 1

promotion companies must guarantee this, pursuant to the regulation issued on the subject by the National Government.

In other words, although healthcare professionals have the right to claim the conscientious objection, they cannot abuse it, using it as an excuse to avoid performing an abortion, either collective or institutionally, abstaining from immediately referring the pregnant woman to another physician equipped to perform it; and, the promoting entities or healthcare providers cannot abuse their dominant position by imposing an order on their medical staff to deny the service that women have a legal right to, such as in the instant case.

5.14 In summary, in this case, both public and private healthcare entities as well as the physicians who treated the case and jointly and unanimously claimed the conscientious objection, disregarded the Constitution, judgment C-355 of 2006 and the regulatory decrees issued by the National Government on the subject and they violated the fundamental rights of minor Eli Johanna Palencia Arias.

5.15 Now, in order to guarantee the right to the conscientious objection, but balance this against women's fundamental rights as well, when claiming the referenced conscientious objection, healthcare professionals must immediately refer the pregnant mother to another professional who is equipped to perform the procedure. And for healthcare professionals to be able to satisfy this obligation, both healthcare promotion companies as well as the public healthcare services network entities must guarantee their members an adequate number of providers who are equipped or available to perform the abortion service, pursuant to Decree 4444 of 2006.

Indeed, after Decree 4444 of 2006 was issued, healthcare promotion companies as well as healthcare provision institutions, both private and public, can no longer shield themselves by claiming the conscientious objection to abstain from guaranteeing women access to the legal service of voluntary abortion and, on the contrary, they must satisfy the referenced regulations by guaranteeing an adequate number of providers who are equipped to perform the voluntary abortions in the required cases. In this sense, both EPS as well as IPS must understand that while the conscientious objection is being resolved, they must have a clear and defined list of healthcare professionals who are equipped to perform the procedure and the IPS at which they are found, so that the passage of time does not make women's fundamental rights ineffective.

5.16 Based on the record's evidence we conclude that, in this case, both EPS Coomeva, the minor plaintiff's healthcare insurance provider, as well as the network's healthcare providers, and the public entity – Hospital Universitario Erasmo Meoz de Cúcuta, also flagrantly violated the fundamental rights of minor Eli Johanna Palencia Arias, in failing to provide healthcare professionals who were equipped to perform the voluntary abortion procedure. Thus, the constitutional judges should have granted immediate protection to the plaintiff.

5.17 Once the violation of the fundamental rights of minor Eli Johanna Palencia Arias was established, the constitutional judges should have immediately provided her the protection requested. However, they did not act appropriately and they denied her the protection, based on their assessment of the reported facts, concluding that it was impossible to clearly determine that the pregnancy was a product of violent carnal

penetration despite the fact that it had been reported<sup>28</sup> and because they had found inconsistencies between the date of the alleged rape and the date of conception.

With respect to the foundation of the lower court judgments in this constitutional action, the Court considers that the judgments did not perform an advance analysis of the violations of fundamental rights violated pursuant to the Constitution and judgment C-355 of 2006. When the judges reviewed the reported facts, they did not act as constitutional judges, but as ordinary judges instead – the former cannot decide on reported criminal facts under the respective investigation. These judges acted outside of their powers because their review of the reported facts and disregarded the Criminal Code, as stated below.

5.18 According to the record's evidence record, the child who requested the abortion was thirteen (13) years old, and she claimed having been rape, submitting the respective complaint. Law 599 of 2000, Criminal Code, article 208, codifies an abusive carnal penetration as a crime when a person under 14 years of age is a victim thereof. Said rule expressly provides: *[Any person who carnally penetrates a person who is under fourteen (14) years of age, shall be punished by imprisonment between four (4) and eight (8) years. It specifies that causing pregnancy is an aggravating circumstance.*(Art. 211 *ibid.*)

The lower court judges, despite the fact that their records contained evidence that confirmed the age of the minor requesting protection of her fundamental rights, overlooked the criminal rule that presumes rape in women under fourteen years of age. They also ignored the circumstance timely highlighted by the Ombudsman, in the sense that, in addition to the sexual violence that the minor was subjected to, she was also forced to suffer the accused party's continuous threats so that she did not report the crime – and this circumstance also deserved their consideration.

5.19 The judges' conclusions, in addition to departing from the rules of the Criminal Code, also ignored the Constitution and judgment C-355 of 2006, binding because of its force as precedent. It is worth recalling that, pursuant to article 243 of the Constitution, authorities cannot copy the substantive content of the legal act that has been declared unenforceable for lack of merit, while it continues to hold provisions that weigh the ordinary rule versus the Constitution. Further, by virtue of the principle of good faith, in cases where the victims request voluntary abortion and where the party claims being a victim of sexual violence, the pregnant mother shall only be required to submit the duly submitted police report, in order to undergo an abortion, especially when the case involves a thirteen-year old child who is deemed to have suffered abusive and criminal carnal penetration.

5.20 Thus, given the evidence of the healthcare entities and institutions' violation of fundamental rights, as well as the healthcare professionals, the Chamber holds that the constitutional action invoked by Ms. Gladys Belen Arias Becerra, as representative of her minor child Eli Johanna Palencia Arias should have been sustained, given the violation of the lower court judges who denied the protection requested.

5.21 Therefore, the Court must reverse the rulings under review. Further, the Court orders the investigation of judges who acted, both at the trial level as well as the appellate level, in order to establish the possible disciplinary offenses that they could have committed, pursuant to the foregoing considerations. Thus, the Secretary

General of this court shall send copies of the record to the Sectional Council – Disciplinary Chamber – of Norte de Santander and the State Attorney General must monitor these disciplinary proceedings. Also, the National Prosecutor General must investigate whether these judges could have also committed the crime of breach of duty of loyalty and, for these purposes, the Secretary General shall send a copy of the entire record.

5.22 Now, as we cannot guarantee the aggrieved party full enjoyment of her fundamental rights, by ordering that things be restored to the state prior to the violation, as the challenged act was consummated in a way that we are not able to order the reestablishment of the violated rights, the Court must issue a ruling on the merits regarding the harm caused to the plaintiff minor by the omission subject to this constitutional action.

5.23 Indeed, in the instant case, we determined that the ultrasound carried out on the minor Eli Johanna Palencia Arias on March 24, 2007,<sup>29</sup> showed that she was 16 weeks and five days pregnant, and this allows us to determine that the probable date of conception was November 27, 2006. As a result, if we take this diagnosis as a point of reference, which is most likely given the certification as having been performed using high definition equipment, or if we use the probable dates of the pregnancy from the other test results, we must conclude that the time of a normal pregnancy has transpired and the minor should have given birth by now.

5.24 With respect to compensation for harm, Decree 2591 of 1991, article 25, provides:

“ART. 25. – INDEMNIFICATION AND FEES. When an affected party has no other means of judicial defense, and the violation of the right is manifest and a consequence of a clear and indisputably arbitrary action, in addition to the matters provided by the foregoing articles, the constitutional judge, *ex officio*, has the power to order compensation for consequential harm caused, in abstract, if this was necessary to ensure the full enjoyment of the right, as well as the costs for the proceedings. Settlement thereof and compensation for the remaining damages shall be made through the contentious administrative jurisdiction or before the competent judge through the incidental process, within the following six months and, for this purpose, the judge assigned to review the protection action shall immediately provide a copy of the record.

The referenced judgment shall be against the entity on which the defendant depends, and joint and severally against the latter, if the court conclude that his or her actions were negligent or reckless, all of this without prejudice to other administrative, civil or criminal liability.

If the constitutional action were rejected or denied by the judge, he or she shall judge the plaintiff to payment of costs when the judge determines, based on well-founded evidence, that the plaintiff incurred in harassment.”

5.25 The instant case satisfied the conditions to impose a judgment in the abstract, as provided by the foregoing provision. Indeed, (i) the minor’s fundamental rights were obviously affected; (ii) the violation was a consequence of a clear and arbitrary action; and, (ii) the minor has no other means of judicial defense to request the

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<sup>29</sup> Ultrasound report signed by the radiologist of Somediag, Dr. Carlos Alberto Carvajal F., p. 30.

damages caused to her by the refusal of access to the abortion that she requested, satisfying the requirements of judgment C-255 of 2006.

5.26 It is worth recalling that, as previously explained, violence against women, in its various expressions, especially sexual violence, constitute human rights violations and public health problems; that although the healthcare professionals who treated the case claimed the conscientious objection, they did not satisfy the requirements for it to apply because they did not claim it individually or based on religious convictions. Moreover, these professionals did not satisfy the subsequent obligation to immediately refer the patient to a professional who was equipped to practice the procedure.

5.27 The damages must be redressed in their integrity to ensure an effective enjoyment of the rights, and the judge who decides this must consider this matter. Thus, the judge must take into account that the plaintiff is a minor, and her pregnancy was caused by rape because she was carnally penetrated when she was under fourteen years of age. The judge must also consider that the rape, in addition to being a violent act of aggression, humiliation and subjugation, does not limit itself to short-term consequences, but it also leads to long-term emotional, existential and psychological suffering, and the pregnancy and sexually-transmitted disease have harmed the minor's health.

Also, the judge shall also take into account that sexual aggression or violence is an act that affects women, not only their personal integrity, but their social, sexual and existential being. It alters her history and her life plan, and it becomes an intense emotional shock that triggers a series of illnesses because women must bear an excessive personal, social, emotional, physical and psychological burden.

5.28 The harm that minor Eli Johanna Palencia Arias suffered must be subject to comprehensive redress by Coomeva EPS, and joint and severally by the IPS of its network and the healthcare professionals who treated the case. Coomeva can subsequently claim reimbursement against all of these once it has settled the award in its entirety.

5.29 The settlement of damages shall be performed by an administrative judge of Cúcuta, through incidental proceedings and shall be decided within a six-month term (6) following the receipt of the respective communication. For this purpose, the Secretary General of this Court shall immediately issue copies of the record.

The State Attorney General shall monitor this incidental proceeding. For this purpose, the Secretary General shall send copies of the record.

The Ombudsman shall assist minor Eli Johanna Palencia Arias in this proceedings, and, for this purpose, the Secretary General shall send a copy of the record.

## **6. Other determinations that the Court must adopt**

6.1 In the instant case, the abortion was not performed on minor Eli Johanna Palencia Arias, because all of the physicians of the IPS in EPS Coomeva's network, as well as the public IPS, Hospital Universitario Erasmo Meoz de Cúcuta, claimed the conscientious objection and failed to immediately refer the minor to another healthcare professional who was equipped to perform the procedure. The Court must therefore make certain determinations with respect to the failure to perform this obligation, as well as the violation of Decree 444 of 2006.

6.2 Indeed, judgment C-355 of 2006 expressly provided the power to determine, after a personal claim of the conscientious objection “whether the conscientious objection applied and was pertinent, through the mechanisms established by the medical profession.” Based on this provision, and given the instant case, the Chamber ordered the National Medical Ethics Tribunal, as well as the Medical Ethics Tribunal of the North of Santander to inform of the mechanism that the medical profession has provided to determine whether the conscientious objection applied and was pertinent. The Court requested information regarding whether these mechanisms had been used with respect to the conscientious objection for the voluntary abortion, pursuant to Judgment C-355 of 2006 as well as its results.

In letter no. 867 – 200y dated December 11, 2007, the National Medical Ethics Tribunal stated that “*Law 23 of 1981 does not provide for the conscientious objection nor does it provide mechanisms to determine the applicability and pertinence of this objection,*” and, with respect to the eventual use of these mechanisms and the results obtained thereby, the referenced Tribunal stated that “*These Ethical Medical Ethical tribunals cannot perform an Inquiry, and we thus cannot issue an opinion on the matter that you have referenced.*”

In turn, the Medical Ethics Tribunal of the North of Santander stated that it had not investigated or ruled upon any case that reviewed a claim of conscientious objection by any physician with respect to an abortion request and it stated that it did not have any knowledge regarding the scope of the medical reservations that led to the conscientious objection.

6.3 As a result, the Court first specifies that, although Law 23 of 1981 “*establishes medical ethics rules*” it does not expressly reference the conscientious objection, judgment C-355 of 2006 or international rules issued by the World Health Organization and the World Medical Association, as to the requirement that the healthcare professional claiming the conscientious objection must immediately refer the applicant to another physician who is equipped to perform the an abortion, without prejudice to a “*...subsequent determination regarding whether the conscientious objection applied or was pertinent...*” through the mechanisms established by the medical profession, constitutes a *per se* basis to act accordingly. Therefore, this Court can use the respective general rules.

Moreover, in accordance with Law 23 of 1981, the National Medical Ethics Tribunal<sup>30</sup> and the Sectional Professional Ethics Tribunals<sup>31</sup> are responsible for reviewing “disciplinary ethical cases involving exercise of medicine in Colombia” and these entities “perform a public duty”<sup>32</sup> and perform the procedure established in this Law<sup>33</sup> to determine the possible disciplinary liability of healthcare professionals.

It is worth recalling that Law 23 of 1981 provides that one of the founding principles for the development of medical ethics indicates that the medical profession seeks man’s health and promotes the prevention of illnesses, perfecting the human species and the improving the community’s life patterns, without distinction of nationality, or socio-economic, racial, political and religious profile. The physician must acknowledge and swear an oath to perform these with loyalty and honor, disregarding

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<sup>30</sup> Article 63.

<sup>31</sup> Article 67.

<sup>32</sup> Article 73.

<sup>33</sup> Article 74 *et seq.*

differences in political and religious creed, nationality, race, social matters, preventing their interference with his or her professional services and the patient. Similarly, pursuant to the declaration adopted by the 3<sup>rd</sup> General Assembly of the AMM, London, England, October 1949, as amended by the 22<sup>nd</sup> Global General Assembly, Sydney, Australia, August 1968 and the 35<sup>th</sup> Global Medical Assembly, Venice, Italy, October 1983, physicians must always maintain the highest level of professional conduct. In the Geneva Declaration, adopted at the 2<sup>nd</sup> General Assembly of the World Medical Assembly in 1948, the countries affirmed that doctors must swear an oath that they will not allow considerations regarding political affiliation, social class, creed, age, illness or incapacity, nationality, ethnic origin, race, sex or sexual orientation to interfere with their duties and the patient's care.

And, although it is also true that to abstain from performing an abortion procedure, physicians have a right to individually claim the conscientious objection, duly based on religious convictions, it is no less true that Medical Ethics Tribunals must determine whether a specific physician claimed the conscientious objection but breached his or her ethical and legal obligation to respect a woman's rights, by failing to refer her to another healthcare professional equipped to perform the abortion.

Indeed, Medical Ethics Tribunals use domestic and international rules that govern the exercise of the profession, pursuant to which they can decide whether the conscientious objection claimed by a physician applies or is pertinent regarding a particular case that denied an abortion and did not immediately refer the woman to another professional equipped to perform the abortion. Nonetheless, via the self-regulation procedure, the National Medical Ethics Tribunal can approve a procedure that is different from the one specified by law and that expressly defines a protocol to claim the conscientious objection, as well as the procedure to determine its applicability or relevance to a specific case, and refer the woman to another healthcare professional who is equipped to perform the procedure. This procedure must be made public and all Sectional Ethical Tribunals of the country shall be informed of it.

6.4 Finally, with respect to fulfillment of decree 4444 of 2006, it is worth recalling that it provides that Health Departmental, District and Municipal entities, within the scope of their powers, must ensure that the public healthcare provider network in their jurisdiction provides sufficient availability to ensure real access and timely attention of pregnant women who need abortions in all their degrees of complexity. Moreover, the Healthcare Promotion Entities, the Managers of the Subsidized Regime, Adapted Entities and entities responsible for the exception regimes addressed by article 279 of law 100 of 1993 and Law 647 of 2001, shall guarantee an adequate number of providers who are equipped to provide the services contemplated by this Decree and pursuant to its provisions, according to the Mandatory Quality Assurance System and the technical rules issued by the Ministry of Social Protection on the subject.

Moreover, the entities regulated by this Decree and healthcare providers must guarantee the adequacy of their referral and counter-referral systems, such that these ensure a timely referral of pregnant women to medium and high complexity services in the event of complications or when the woman's gestational age or health condition merit this. They must also guarantee the counter-referral to low complexity sexual and reproductive healthcare and family planning services. Thus, the entities subject to the decree cannot impose administrative barriers that unnecessarily delay the provision of the services under this Decree, such as, authorizations from multiple

physicians, auditor review or authorization, waiting periods and lists and other proceedings that can imply an excessive burden for the pregnant mother.

6.5 Since these provisions are clear, this Decree establishes that breach of its provisions shall give rise to the penalties of the Mandatory Quality Assurance System under the General Social Security Health System, article 49 of Law 10 of 1990, and Law 100 of 1993, as applicable.

In turn, Decree 1011 of 2006 established the Mandatory Quality Assurance Method of the General Social Security Health System, applicable both to healthcare providers as well as healthcare promotion entities, among other operators in the healthcare sector,<sup>34</sup> and noted that the Ministry of Social Protection, the National Health Superintendence and departmental, district and municipal healthcare entities are responsible for the System's operation.<sup>35</sup>

Numeral 3, article 5 of this decree assigns departmental and district healthcare entities the obligation to *“fulfill and cause the fulfillment of the provisions established by this decree and the regulations issued by the Ministry of Social Protection in their respective jurisdictions, raise awareness of the provisions in this rule and provide assistance to Healthcare Providers and those defined as such, to obtain full satisfaction of operating rules.”*

Article 54 of Decree 1011 of 2006 assigns territorial healthcare entities the power to further the applicable procedures and apply the penalties pursuant to article 577 of Law 9 of 1979 and for this purpose, *“it will order sanitary measures,”* and the rules that modify or replace these.

Letter f) of article 9 of Law 10 of 1990 assigns the Ministry of Social Protection the duty to *“[m]onitor compliance with policies, plans, programs, projects and technical, administrative and quality assurance rules, adopted by the healthcare sector **and impose the applicable penalties.**”*

Article 178 of Law 100 of 1993 specifies the duties of healthcare promotion entities, including the duty to *“organize the manner and mechanisms pursuant to which affiliates and their families can access healthcare services throughout the entire national territory”<sup>36</sup>* and the duty to *“establish procedures to monitor **comprehensive, efficient, timely and quality treatment,** in the services provided by the Healthcare Institutions.”<sup>37</sup>*

Article 230 of Law 100 of 1993, with respect to the penalty regime, authorizes the National Health Superintendence to apply the pertinent penalties in the event of violation of articles 161, 168, **178**, 182, 183, 188, 204, 210, 225 and 227 of this Law, after a request for explanation.

6.6 Pursuant to the foregoing provisions, the Chamber will inform the Health Superintendence and the Ministry of Social Protection of the facts underlying this constitutional action. It will send a copy of the record so that these institutions can investigate and, if applicable, penalize Coomeva EPS and its contracting entities for the possible offenses that they could have committed when they refused to perform the abortions of its members that. Further, this should cover Hospital

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<sup>34</sup> Article 1.

<sup>35</sup> Article 5.

<sup>36</sup> Numeral 3.

<sup>37</sup> Numeral 6.



Universitario Erasmo Meoz de Cúcuta, a public network healthcare entity in Norte de Santander, for possible breach of the provisions contemplated in Decree 4444 of 2007.

6.7 The foregoing entities will also monitor compliance with Decree 4444 of 2007 regarding adequate implementation, permanent availability and timely provision of abortion services in the cases and conditions established by this court in judgment C-355 of 2006; both the National Health Superintendence as well as the Ministry of Social Protection shall monitor this compliance, not only at this province, but throughout the national territory.

6.8 Further, the State Attorney General shall be informed, so that it monitors the Ministry of Social Protection and the Health Superintendence's compliance with this decision, not only with respect to the administrative matters required to perform judgment C-355 of 2006 and its respective regulations, but also with respect to the investigation and imposition of penalties for breaches of these rules.

**Conclusion:**

In light of the foregoing, the requirements for a criminal exemption for an abortion and for a doctor to be able to abstain from performing an abortion claiming the conscientious objection are as follows:

1. – Abortion does not constitute a crime when it is voluntarily requested by a woman who submits a police report that is properly formulated if she is the victim of unconsented carnal penetration, unconsented artificial insemination, unconsented transfer of a fertilized egg or incest, a medical certification that the mother's life is in danger, or a medical certification of the unviability of the fetus.
2. Healthcare professionals at every level have an ethical, constitutional and legal obligation to respect women's rights.
3. Physicians or administrative staff cannot demand additional documents or requirements, in addition to those referenced in the first numeral, to abstain from performing or authorizing an abortion.
4. The conscientious objection is not a right held by legal persons.
5. The conscientious objection is a right that is only held by natural persons.
6. The conscientious objection must be individually claimed through a writing that properly sets forth its reasoning.
7. The conscientious objection cannot be submitted as a collective objection.
8. The conscientious objection must be based on a religious conviction.
9. The conscientious objection cannot be based on a physician's opinion regarding whether he or she agrees with the abortion.
10. The conscientious objection cannot violate a woman's fundamental rights.
11. The physician who abstains from performing an abortion claiming the conscientious objection has the obligation to immediately refer the woman to another physician who can carry the abortion out. In the

event of IPS, they should have a previously defined list identifying the physicians who are equipped to practice an abortion.

12. When a physician claims the conscientious objection, another physician who is equipped to carry out the abortion must perform it, without prejudice to a subsequent determination regarding whether the conscientious objection applied and was pertinent, through the mechanisms established by the medical profession, or, if not available, by the Ministry of Social Protection pursuant to pertinent rules.
13. The Social Security Health System must guarantee an adequate number of providers who are equipped to perform abortions.
14. Women have a right to real, timely and quality access to the Social Security Health System when they request the abortion, in all degrees of complexity thereof.
15. The Social Security Health System cannot impose administrative barriers that unnecessary delay provision of the abortion service.
16. Breach of the above provisions gives rise to the penalties provided by the General Social Security Health System.

### III. DECISION

In light of the foregoing, the Seventh Review Chamber of the Constitutional Court, administrating justice on behalf of the people and by mandate of the Constitution,

**First. – REVERSES** the judgment issued on April twenty 2007 by the Second Labor Court of the Circuit of Cúcuta, that denies the constitutional action for the protection of fundamental rights invoked by Ms. Gladys Belen Arias Becerra, as representative of the minor Eli Johanna Palencia Arias, as well as the judgment delivered on May seventh 2007 by the Labor Chamber of the Superior Tribunal of Cúcuta, confirming the trial decision.

**Second. – Judges** Coomeva EPS in abstract, and the IPS in its network, and the healthcare professionals who treated the case and failed to act pursuant to their obligations, joint and severally, to pay for the damages caused to minor Eli Johanna Palencia Arias, for the violation of her fundamental rights.

The administrative judge of Cúcuta, through incidental proceedings, shall perform its settlement. These proceedings must be initiated within ten (10) days from the receipt of the respective communication and will be decided in a term of the following six (6) months. For this purpose, the Secretary General of this court shall immediately send copies of the record to the respective Judicial Office. The administrative judge, who must rule on this matter, shall send a copy of the decision on the merits to this Office.

Once the judgment has been settled, COOMEVA EPS shall settle the obligation in its entirety and, subsequently, in accordance with the rules on joint and several liability, it may seek reimbursement from the IPS in its network and the physicians thereof who treated the case and refused the abortion. The administrative judge who will rule on this incident shall send a copy of the substantive decision to this Office.

**Third. –** The Secretary General of this court shall immediately inform the plaintiff and the Ombudsman of this resolution, so that the latter assists the former with the respective redress proceedings for damages in favor of the minor.

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**Fourth. – Orders** the State Attorney General to monitor the damages proceeding set forth in the second subsection. For this purpose, the Secretary General of this court shall send a copy of this order and the record.

**Fifth. – Informs** the Health Superintendence of this resolution, so that, in the exercise of its powers, it investigates and penalizes, if applicable, the possible faults committed by Coomeva EPS and the IPS of its network, as well as Hospital Universitario Erasmo Meoz de Cúcuta, a public entity, for breaching the provisions contemplated in Decree 4444 of 2007. Further, they should adopt all administrative determinations necessary to satisfy judgment C-355 of 2006 and the referenced decree throughout all the national territory. The Secretariat of this court shall send the respective copies.

**Sixth. – Inform** the National Direction of the Health System of the Ministry of Social Protection of this resolution, so that it investigates and penalizes Coomeva EPS and the IPS in its network, as well as Hospital Universitario Erasmo Meoz de Cúcuta, as applicable, for breaching the provisions of Decree 4444 of 2007. Further, so that it adopts the necessary administrative decisions to satisfy judgment C-355 of 2006 in all the national territory as well as the referenced decree. The Secretariat of this court shall send the respective copies.

**Seventh. – Inform** the State Attorney General of this resolution, so that it monitors the National Health System Direction of the Ministry of Social Protection and the National Superintendence of Health, to satisfy numerals fifth and sixth of this order and so that it monitors satisfaction of Decree 4444 of 2006 by every other decentralized center entity. The Secretary General of this court shall send a copy of the record.

**Eighth. – Inform** the National Medical Ethics Tribunal of this resolution. For this purpose, the Secretary General of this court shall send a copy of the record.

**Ninth. – Orders** the Secretary General of this court to send copies of this order and the entire record to the Sectional Judicial Council of the Norte de Santander- Disciplinary Chamber, so that it investigates the possible disciplinary offenses that the lower judges could have committed. It will also send these copies to the State General Prosecutor so that it investigates the conduct of the officers who ruled on this constitutional action at the trial and appellate level. A copy of the record shall also be sent to the State Attorney General to monitor the processing of these actions.

**Tenth. –** The National Health Superintendence and the National Health System Direction of the of the Ministry of Social Protections shall submit a report with this Office, within two (2) months from the communication of this order, regarding the actions performed to satisfy this judgment.

**Eleventh. – LIFTS** the stay of these proceedings.

**Twelfth. – RELEASES** the communication provided in article 35 of Decree 2591 of 1991.

Notification, communication, publication in the Constitutional Court Gazette and satisfaction are hereby ordered.

CLARA INÉS VARGAS HERNÁNDEZ

Judge

JAIME ARAÚJO RENTERÍA

Translation provided by the Lawyers Collective (New Delhi, India) and partners for  
the Global Health and Human Rights Database

Judge

MANUEL JOSÉ CEPEDA ESPINOSA

Judge

MARTHA VICTORIA SÁCHICA DE MONCALEANO

Secretary General