

**SEPARATE OPINION OF JUDGE SERGIO GARCIA RAMIREZ IN THE
JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE
CASE OF DE LA CRUZ FLORES OF NOVEMBER 18, 2004.**

1. In this *separate opinion* I refer to only one issue examined in the judgment delivered by the Inter-American Court of Human Rights on November 18, 2004, in the *Case of De La Cruz Flores*: the medical act and criminal legislation, from the perspective of human rights and in the circumstances ratified in this case. I refer to the expression 'medical act' as it is used in the judgment, which borrows the definition from article 12 of the Code of Ethics and Deontology of the Doctors' Professional Association of Peru (the State referred to in the matter *sub judice*), which includes generally accepted concepts: "a medical act is any activity or procedure carried out by a doctor in the exercise of the medical profession. It includes the following: acts of diagnosis, therapeutics and prognosis performed by a doctor when providing comprehensive care to patients, and also acts deriving directly therefrom. Such medical acts may only be exercised by the members of the medical profession."

2. A clear distinction should be established between this activity (which falls within the framework of the exercise of a profession and responds the corresponding purposes and methods), from any other activity that is penally typical or atypical, and that is subject to its own type of regulation and to the legal consequences established by law, including those of a penal nature. It should not be forgotten that, at times, it may be difficult to make a distinction and that some situations may suggest the existence of a criminal violation behind an alleged medical procedure. However, these practical problems do not invalidate the significance of the affirmation contained in this *opinion*, which supports the judgment delivered by the Court. On the one hand, there are the characteristics of each fact, act or conduct, which must be assessed in their own terms, and on the other hand, the problems involved in the investigation and identification of the facts. The former is a matter for the legislator and the judge, and the latter for the investigator. The Court must avoid a flawed investigation, with uncertain or erroneous results, contaminating its assessment of the nature of the conduct and the appropriate legal response.

3. It is obviously possible that someone exercising the medical profession may, independent of this, perform acts that might be established in criminal legislation and therefore merit different types of penalties. This leads us to insist on the need to trace a borderline, as precisely as possible – at the threefold level of legal classification, investigation and prosecution – between such punishable conducts and others that are performed exclusively within the framework of the medical act; that is, within the framework of the activities of a professional in the field of medicine, using his knowledge and expertise in this discipline to safeguard the lives and health of others. In brief, this is the purpose of the medical act, which contributes to its legal classification.

4. For the purpose of establishing penalties, criminal legislation must include certain behaviors that gravely affect the most relevant juridical rights. The idea of a minimum criminal law, associated with guaranteeism which today faces attacks from different sources, supposes the incrimination of such unlawful behaviors, in view of their gravity and the harm they produce, when there are no alternate social or legal means to avoid them or punish them. According to this concept, criminal legislation should be used as a last resort for social control, and focus on those behaviors of

extreme gravity. Even when classifying certain behaviors as crimes is justified, this must be done objectively and prudently – which could be called “Beccarian prudence” – fitting the penalties to the gravity of the offence and to the guilt of the perpetrator, without losing sight of the possible differences within the same category – murder and culpable homicide, for example - which call for a different sanction. This matter has been examined in the Inter-American Court’s case law, with regard to Article 4(2) of the American Convention – concerning protection of the right to life – in the judgment delivered in *Hilaire, Constantine y Benjamin et al. v. Trinidad and Tobago*, on June 21, 2002. I refer to what I said in my *separate opinion* accompanying that judgment.

5. If, when incriminating unlawful conducts, the penal legislator must distinguish between the different possible hypotheses and deal with each one appropriately, rationally and specifically, with all the more reason must he avoid incriminating conducts that are not unlawful. The fact that a conduct is objectively established in a category of crime included in the relevant legislation does not imply that this automatically satisfies the requirement of the legitimacy of criminal laws. Otherwise, one could justify accepting acts, which are materially admissible and even plausible, established by authoritarian regimes to combat dissent, differences and discrepancies, an occurrence that is well known throughout history and widely condemned. The Inter-American Court has ruled on this issue also when examining the characteristics of legislation that provides for limitations or restrictions to the exercise of rights. The rulings contained in *Advisory Opinion OC-6/86* of May 9, 1986, on “*The Word “Laws” in Article 30 of the American Convention of Human Rights,*” should be recalled, in this respect.

6. When a conduct is carried out with the intention of harming a juridical right, the application of a penalty to the author can be justified – with the abovementioned limitations. However, the situation is very different when the intention of the agent is to preserve a high-ranking juridical right whose protection also constitutes an immediate and direct obligation of the person executing the behavior. It must be borne in mind that the safeguard and development of the lives of the individual and the group have led to identifying, encouraging and regulating the performance of certain activities – scientific, technical, artistic, relating to public or social service, etc. – which are considered to be socially useful and even necessary, and which are generally surrounded by appropriate guarantees. The systematic recognition of these activities, at times converted into social functions, constitutes a point of reference to quality their lawfulness and establish the pertinent legal consequences.

7. One of the oldest and most noble activities is that designed to safeguard the life and health of the individual. In this case, what is involved is the protection of the highest-ranking rights, a condition for the enjoyment of all the others. Society as a whole has an interest in it and the State must protect it. This is precisely, the case of the medical profession, whose regulation includes an important ethical component, in addition to elements relating to the techniques to be applied in each case, in keeping with the duty to provide care inferred from the *lex artis*. The medical professional who takes care of the health of his fellow men and protects them from disease and death fulfills his natural obligation, and the law must protect this carefully. This task and this protection have their own meaning, totally independent of the political, religious or philosophical ideas of the doctor and his patient. If the State imposed on or authorized doctors to misuse their profession, as has occurred under totalitarian regimes, it would be just as censurable as if it prevented them from complying with their ethical and juridical duty, and even imposed penalties for

such compliance. In both cases the State would be harming the right to life and health of the individual, both directly and by intimidation or restrictions imposed on those who, due to their profession, are regularly obliged to intervene in the protection of those rights.

8. In my opinion, the State cannot violate the protection of health and life for which doctors are responsible, by norms or interpretations of norms that dissuade a doctor from complying with his duty, either because they threaten him with the application of a penalty (a threat that can prevent him from providing medical services), or because they induce him to make distinctions contrary to the principles of equality and non-discrimination, or because they oblige him to deviate from his proper functions and assume others that enter into conflict with the former, pose unacceptable dilemmas, or change the basis of the relationship between doctor and patient, as would happen if doctors were obliged to inform on the patients they treat. A similar situation would arise, if lawyers were forced to report the unlawful acts committed by their clients (which they learn about through their relationship of assistance and defense), or priests to reveal the secrets of the confessional.

9. This does not mean trying to prevent the legitimate prosecution of unlawful conducts, which must be combated with appropriate means, but rather maintaining each social relationship in its corresponding niche, not only for the benefit of the individual, but also for the benefit of society. Given their functions, the prosecutor and the investigator must ask the necessary questions. The doctor, the defense lawyer and the priest must do the same, fully protected by the State, in the exercise of their mission, and this is evidently not the investigation of offences and the prosecution of perpetrators. It is not necessary to describe the crisis that would occur if the professional and social roles were disrupted and doctors, defense lawyers and priests were tacitly incorporated into the ranks of the police. If confidential communications between the lawyer and the accused are protected from interference, and it is accepted that the priest is not obliged to violate the secret of the confessional (an essential characteristic of this specific communication, which believers consider a sacrament), the relationship between doctor and patient should receive, at least, the same consideration.

10. The concept that a doctor is obliged to attend all individuals equally without entering into considerations on their moral or legal status, and that healthcare is an obligation for the doctor and also a right, and acceptance of the confidential nature of the doctor-patient relationship as regards what the patient reveals, has long been recognized and has been firmly established in several of this profession's best-known ethical-juridical instruments, which include, *inter alia*, the particularities of the doctor-patient relationship and the characteristics of the loyalty that the doctor owes to his patient. Aesculapius wrote to his son: "Your door shall remain open to all [...] The evildoer shall have the same right to your help as the honorable man." The Hippocratic oath, which is still sworn by many young people when they receive their professional diploma in medicine, states: "What I may see or hear in the course of the treatment or even outside [...], which on no account must be spread abroad, I will keep to myself, holding such things secret."

11. The judgment, which this *opinion* accompanies, mentions the conclusive text of several principles of international humanitarian law. The reference to these texts is given merely for information because, as the Court's case law has indicated, it helps illustrate the interpretation given to the provisions that are directly applicable. Thus, Article 18 of the First Geneva Convention of 1949 indicates that, "No one may ever

be molested or convicted for having nursed the wounded or sick." Article 16 of Protocol 1 and Article 10 of Protocol II, both to the 1949 Geneva Conventions, state that "Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom."

12. The Declaration of Geneva of the World Medical Association (WMA), 1948-1968-1983, proclaimed the physician's promise that "The health of my patient will be my first consideration"; "I will respect the secrets which are confided in me" and "I will not permit considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient." The WMA International Code of Medical Ethics repeats that: "A physician shall preserve absolute confidentiality [...] about his patient even after the patient has died"; "A physician shall act only in the patient's interest when providing medical care which might have the effect of weakening the physical and mental condition of the patient."; "A physician shall owe his patients complete loyalty and all the resources of his science." The WMA Declaration of Lisbon on the rights of the patient of 1981-1995, states that: "All identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind, must be kept confidential, even after death." The WMA Declaration of Helsinki, 1964-1975-1983-1989-1996-2000-2002, states that: "It is the duty of the physician to promote and safeguard the health of the people. The physician's knowledge and conscience are dedicated to the fulfillment of this duty."

13. In brief, I consider that it is inadmissible – a consideration that coincides with the opinion of the Inter-American Court, as stated in the judgment in this case – to criminally penalize the conduct of a doctor who provides care designed to protect the health and life of other individuals, notwithstanding their characteristics, activities and beliefs, and the origin of their injuries or illnesses. I also consider it necessary to prohibit incriminating the conduct of a doctor who abstains from providing information to the authorities about his patient's punishable conduct, which he is aware of through information provided to him by the patient in connection with the medical procedure. In that case, there could be an absolutive excuse similar to that which protects the next of kin of the defendant in cases of concealment owing to kinship.

14. Once again, it should be emphasized that the considerations and decisions of the inter-American jurisdiction in the cases it has heard have never justified, in any case and for any reason, the committing of crimes established in legislation enacted in accordance with the principles and postulates of a democratic society. It is clear that the State must protect individuals and society from attacks on their juridical rights, and also safeguard democratic institutions. It is also evident, from the perspective of human rights, that this protection must be exercised observing the conditions that characterize the rule of law.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary