

women's worldwide

On May 10, 2006 the Constitutional Court in Colombia issued an historic decision. It ruled that abortion should not be considered a crime under three circumstances: when the life or health (physical or mental) of the woman is in danger; when pregnancy is a result of rape or incest; or when grave fetal malformations make life outside the uterus unviable. Not only is the decision historic for women's rights but also the language utilized by the Court is groundbreaking in the acknowledgement of women's reproductive rights and the implementation of international human rights standards in a national context.

The decision was the result of the challenge brought by Women's Link Worldwide as part of its project LAICIA (High Impact Litigation in Colombia: The Unconstitutionality of Abortion Law).

Before this decision, Colombia had one of the most restrictive abortion laws in the world. At the same time over 350,000 illegal abortions were performed annually, endangering the life, health and integrity of girls and women — particularly those in the most vulnerable situations.

This publication provides excerpts of the Court's 600-page decision in Spanish and English as selected by Monica Roa, Programmes Director at Women's Link and the attorney who filed the challenge in her name as a Colombian citizen.

Viviana Waisman
Executive Director

We would like to thank all those persons and organizations that supported our work and made this project a reality, particularly Janet Benshoof who from the onset believed in us unconditionally. Thank you also to Maria Catalina Rodríguez for the translation of the Court's text, and to Bonnie Scott Jones and Nicole Lisa for their review of the translation.

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TABLE OF CONTENTS

FOREWORD by Rebecca J. Cook.....

C-355/2006. EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA

Non-existence of substantive or procedural *res judicata* with regard to prior decisions of this Court

"Life" as a relevant constitutional value that must be protected by the Colombian state and as distinguished from the "right to life"

Life and international treaties on human rights; part of the *Constitutional Bundle*

Fundamental rights of women under the Colombian National Constitution and international law

Limits on legislative discretion over criminal matters

The fundamental right to dignity as a limit on the legislature's discretion over criminal matters

The right to the free development of the individual as a limit on the legislature's discretion over criminal matters

Health, life and bodily integrity as limits on the discretion of the legislature over criminal matters

The *Constitutional Bundle* as a limit on the legislature's discretion over criminal matters

Proportionality and reasonability as limits to the legislature's discretion over criminal matters

The issue of abortion in comparative law	48
The case before the Court	48
The unconstitutionality of a total prohibition of abortion	48
The constitutionality of the expression " <i>or on a woman of less than 14 years of age</i> " in article 123 of the Penal Code	61
On the constitutionality of article 124 of the Penal Code	66
Final considerations	66
Decision	69

FOREWORD

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The May 10, 2006 decision of the Constitutional Court of Colombia, which extended the grounds for legal abortion, is historic. The Court decided, in case C-355/06, that the criminal prohibition of abortion in all circumstances violates women's fundamental rights. These rights were found protected by the 1991 Colombian Constitution and by international human rights law. The Court explained that the absolute ban to protect fetal interests places a disproportionate burden on women's exercise of their human rights. The Court ruled that abortion is legally permitted in the following circumstances:

- When the continuation of pregnancy presents a risk to the life or physical or mental health of the woman,
- When there are serious malformations that make the fetus nonviable, and
- When the pregnancy is the result of a criminal act of rape, incest, unwanted artificial insemination or unwanted implantation of a fertilized ovule.

The Court explained that a medical doctor must certify whether either of the first two indications is met. Moreover, the alleged criminal act must be reported to appropriate authorities, but need not be incontrovertibly established as a precondition to an abortion.

The Court recognized the constitutional value of life, including fetal life, but drew the distinction between the value of life and the claimed legal right to life. The legal right to life was ruled to be limited to a born human being, while the constitutional value of life can be protected before a fetus has been born. The Court explained that the state can protect prenatal life, but it may do so only in a way that is compatible with the rights of women, including their rights to life

and health protected by the Colombian Constitution and, for example, the International Covenant on Economic, Social and Cultural Rights. Measures that the state may take to protect prenatal interests compatibly with women's constitutional and human rights include measures to prevent recurrent miscarriage of wanted pregnancies, the improvement of prenatal and emergency obstetric care, and efforts to prevent child marriage in order that women are sufficiently mature to be capable of safely bearing children.

Often, societies have used the occasion of a woman's pregnancy to suspend her human rights. Indeed, in some countries legislatures and some courts continue to use women's pregnancies as an opportunity to subordinate women's human rights in order to demonstrate allegiance to protection of the professed higher value of unborn life. In contrast, the Constitutional Court of Colombia demonstrated that it takes the rights of pregnant women seriously. The Court emphasized that the rights of *all* pregnant women have to be protected, including adolescent, poor, rural and indigenous women, and those women displaced by violence. All women possess a full entitlement to their human rights, which include their rights to:

- Dignity, liberty and free development of the individual person,
- Health, life, bodily integrity and reproductive autonomy, and
- Equality with men.

These rights constitute reproductive rights, and are protected by the 1991 Colombian Constitution and Colombia's adherence to international and regional human rights treaties. The Court adopted the internationally recognized repro-

ductive rights of women and the international definition of reproductive health, recognized at the 1994 United Nations International Conference on Population and Development, and reaffirmed at the 1995 United Nations Fourth World Conference on Women. The Court invoked “the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so.” The Court explained that women therefore cannot be treated as “a reproductive instrument for the human race,” since women warrant respect as independent agents of their own destiny. They cannot be subjected to third party authorization requirements for access to reproductive health services, such as spousal/partner or parental authorization. The Court explained that treating women with dignity includes respect of their confidentiality, which would be violated, for instance, by health care providers’ legal duties or discretions to report evidence of abortion to public authorities.

The rights of health care providers were also considered entitled to respect, so that medical practitioners’ conscientious objection to participation in abortion procedures should be protected to the fullest possible extent. It was noted, however, that conscientious objection is a right only of human individuals, not of institutions or the state itself. Accordingly, neither health care institutions nor the state can invoke conscientious claims to deny provision of legal abortion services. Further, objecting medical practitioners cannot deny the rights of their women patients to exercise their own conscience to choose a lawful abortion, but must immediately refer them to other non-objecting medical practitioners who will perform the procedures. A duty of professionalism transcends individual conscience, so that health care providers accept, as an aspect of their professionalism, that

they may have to participate in procedures to which they object. This duty is the same as that, for instance, of fire fighters who cannot object to enter burning buildings, and of police officers who may have to protect individuals and premises of institutions to whose works they object on personal grounds.

The Court was careful to ensure that it interpreted the Colombian Constitution consistently with the state’s human rights treaty obligations, including its ratification of such international treaties as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the International Covenant on Civil and Political Rights. The Court noted that criminalizing health care that only women need, such as all abortion services, is a violation of the right to sexual nondiscrimination under CEDAW. High rates of maternal mortality, such as Colombia has experienced in significant part due to unsafe abortion, are a clear indication that the state is neglecting women’s health care, which discriminatory neglect the state is obligated to remedy. The Court relied on CEDAW to call for the elimination of all forms of gender discrimination that stereotype women into child-bearing service roles, inhibiting their ability to make free and informed decisions as to whether and when to found a family.

The Court further invoked the Convention on the Rights of the Child, which defines a “child” as a person under 18 years of age. The Court accordingly upheld respect for parental rights, but subject to the evolving capacity of the child to make her own decisions on enjoyment of her human rights, including to health, life, bodily integrity and reproductive autonomy. The Court, therefore, declared unconstitutional a Penal Code provision that penalized abortion performed on a woman of less than 14 years of age, even with her competently provided consent.

The Court relied on the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) to explain that prevention of sexual violence against women resulting in unwanted pregnancy, and of its consequent compelled continuation of pregnancy, is the responsibility of states. This is so irrespective of whether the violence was perpetrated by public or private actors. States, at a minimum, have an obligation to mitigate the effects of sexual violence by providing abortion and other protective health services to save women from being forced to endure unwanted gestation. Accordingly, the Court held that provision of abortion services in the cases of rape and incest is a constitutional requirement. It drew support from the American Convention on Human Rights to underscore the living nature of rights and the importance of contextual interpretation of human rights treaties and constitutional norms.

This decision of the Constitutional Court of Colombia warrants wide and serious attention. It sets a new standard for jurisprudence that respects the human rights of women. Courts in Colombia and beyond will want to consider the reasoning with great care, and how the Colombian Constitutional Court applied international human rights obligations and jurisprudence to guide its reasoning. Governments considering the use of punitive powers will need to read and reread this decision to ensure that they apply the punitive powers of the state only compatibly with the dignity of women. Legislatures, sovereign under the rule of law, will no longer be able to place disproportionate restrictions on the legally protected constitutional and human rights of women, including their reproductive rights.

This publication helpfully provides excerpts, in both Spanish and English, from the 600 page majority judgment of the Court. Women's Link Worldwide makes this landmark decision more easily accessible. The full judgment (available only in Spanish) as well as many of the documents submitted to the Court, including the friends of the court (amicus curiae) briefs, are available in Spanish, and some in English, at: www.womenslinkworldwide.org.

C-355/2006

EXCERPTS OF THE CONSTITUTIONAL
COURT'S RULING THAT LIBERALIZED
ABORTION IN COLOMBIA

Bogotá, D. C., May 10, 2006¹

Exercising its constitutional jurisdiction in compliance with procedural and substantive requirements found in Decree 2067 of 1991, the full chamber of the Constitutional Court issues the following:

DECISION C-355/06

Writing for the majority of the Court:

Honorable Justice JAIME ARAÚJO RENTERÍA

Honorable Justice CLARA INÉS VARGAS HERNÁNDEZ

...Colombian citizens Mónica del Pilar Roa López, Pablo Jaramillo Valencia, Marcela Abadía Cubillos, Juana Dávila Sáenz and Laura Porras Santillana (“the Plaintiffs”) request in separate complaints that this Court declare unconstitutional paragraph 7 of article 32, articles 122 and 124, as well as the expression “*or on a woman of less than 14 years of age*” contained in article 123 of Law 599, 2000 “by which the Penal Code is enacted.”

The Plaintiffs assert that the articles and paragraphs in question violate the following constitutional rights: the right to dignity (Constitutional Preamble and article 1 of the Constitution); the right to life (article 11 of the Constitution); the right to bodily integrity (article 12 of the Constitution); the right to equality and the general right to liberty (article 13 of the Constitution); the right to the free

¹ Editor’s note: the footnotes from the original text are omitted for the sake of brevity.

development of the individual (article 16 of the Constitution); the right to reproductive autonomy (article 42 of the Constitution); the right to health (article 49 of the Constitution) and obligations under international human rights law (article 93 of the Constitution).

First, the Plaintiffs argue that their complaints are viable because the doctrine of *res judicata* does not apply to either the form or the substance of their claims with regard to Decisions C-133, 1994; C-013, 1997; C-641, 2001 or C-198, 2002. The Plaintiffs then established their arguments regarding the challenged articles, which are explained extensively in the first part of this decision. However, in order to set the parameters of the constitutional debate, this decision will first briefly present the Plaintiffs’ arguments, as well as the position of the interveners and the legal opinion of the Attorney General.

In general, the arguments of the Plaintiffs revolve around the fact that the articles of the Penal Code that criminalize abortion (article 122) and abortion without consent (article 123), together with the mitigating circumstances therein (article 124), are unconstitutional because they disproportionately and unreasonably limit the rights and liberties of the pregnant woman, including when she is a minor of less than 14 years of age.

The Plaintiffs also assert that the articles in question violate various international human rights law treaties, which are part of the *Constitutional Bundle*² in ac-

² Translator’s note: the term employed by the Court in Spanish is “Bloque de Constitucionalidad” — referring to all the legal norms that are considered incorporated and thus form part of the Constitution.

cordance with article 93 of the Constitution, as well as with the opinions issued by the various bodies charged with interpreting and applying such international treaties. In particular, the challenge to paragraph 7 of article 32 of the Penal Code revolves around the fact that the state of necessity prescribed therein breaches a woman's fundamental right to life and physical integrity because she is forced to resort to a clandestine abortion "*which is humiliating and potentially dangerous to her integrity.*"

Numerous amicus briefs were filed both supporting the arguments of the Plaintiffs as well as opposing them. The amici arguing that the challenged articles are unconstitutional put forward very similar reasons to those presented by the Plaintiffs. On the other hand, those defending the constitutionality of the challenged articles assert that the articles have the purpose of protecting the fetus' right to life; protection that is warranted under article 11 of the Constitution and international human right treaties, which are part of the *Constitutional Bundle*. Many of those who argue that the articles in question are constitutional assert that it is the legislature's prerogative, in its discretion over criminal matters, to legislate in order to protect fundamental rights, and that this is end is served by articles 122, 123 and 124. Furthermore, amici defending the challenged articles coincide in stating that the pregnant woman's constitutional rights are not absolute and are legitimately limited by the fetus' right to life. Finally, some of the interveners affirm that there is indeed substantive and procedural *res judicata* with regard to prior decisions of this Court and that this Court should abide by what was already decided in Decisions C-133, 1994; C-013, 1997; C-641, 2001 and C-198, 2002.

On the other hand, representatives of some state entities as well as representatives of scientific associations appeared as amici to highlight the fact that in-

duced abortion is a serious public health problem in Colombia which primarily affects adolescents, displaced victims of the internal armed conflict, and those with the lowest levels of education and income. This is due to the fact that induced abortions constitute a crime and are therefore often performed in unhygienic and perilous conditions, which endanger the life and physical integrity of the woman.

The office of the Attorney General shares the opinion of the Plaintiffs that there is no substantive or procedural *res judicata* with regard to prior decisions of this Court, and he requests a declaration of conditional constitutionality of article 122 of the Penal Code and a declaration of unconstitutionality of article 124 and of the expression "*or on a woman of less than 14 years of age*" in article 123 of Law 599, 2000. In the judgment of the Attorney General, voluntary termination of a pregnancy should not be criminalized in the following circumstances: i) when conception was not consented to by the pregnant woman; ii) when the pregnancy poses serious risk to the life or the physical or mental health of the woman; and iii) when a medical certificate evidences serious illness or malformations that make a fetus unviable. After an extensive analysis of the principle of human dignity in the Constitution of 1991 and of the rights to life and liberty embodied in this principle, value and fundamental right, the Attorney General concludes that criminalizing abortion in the circumstances enumerated above constitutes an irrational and disproportionate punishment for women who decide to terminate their pregnancy, which violates women's fundamental rights and exceeds the legislature's discretion over criminal matters. Therefore, the Attorney General concludes that it is necessary to decriminalize abortion in the circumstances described above. The Attorney General asserts

that the mitigating factors, as well as the exceptions from criminal punishment, contained in article 124 are unenforceable because in the enumerated circumstances, it is not useful, proportionate, or necessary to bring criminal charges against a woman who undergoes an abortion. Finally, the Attorney General asserts that the aggravating circumstances contained in article 123 of the Penal Code do not protect the interests of the minor, and limit in a disproportionate manner the autonomy of women of less than 14 years of age, thus necessitating a declaration of unconstitutionality of the expression "or on a woman of less than 14 years of age" contained in said article....

4. Non-existence of substantive or procedural *res judicata* with regard to prior decisions of this Court

...It is worth noting that constitutional jurisprudence has distinguished amongst several conceptual categories that limit the reach of the doctrine of *res judicata* in order to equally satisfy both the objective of jurisprudential stability, which this doctrine aims to preserve, as well as citizens' guarantees within the constitutional process and the need for change and evolution of the legal jurisprudence.

The jurisprudence of this Court has remained consistent in linking substantive *res judicata* with the concept of precedent. In particular, this refers to the obligation of the constitutional judge to *be consistent with prior decisions*, a duty that arises *not only from basic considerations surrounding the rule of law — that is, the judges' decisions must be reasonably predictable — but also from the principle of equality; it is not fair that similar cases be decided in a different manner by the same judge.... Therefore, the Court must be very consistent and*

careful in following criteria established by the jurisprudence, which have served as the basis (ratio decidendi) for its previous decisions. However, the concept of *res judicata* cannot be understood as the *petrification of jurisprudence*, but *instead* as a mechanism that aims to ensure respect for precedent, because the contrary could *result in unacceptable injustices*. Therefore, when there are serious reasons to support a change in jurisprudence — such as a new factual or legal context — the Constitutional Court may distance itself from arguments set out in prior decisions. The Court may even reach the same conclusion as in a prior decision, but for additional or different reasons....

Once the issue of the admissibility of the constitutional challenges is resolved, finding that the doctrine of *res judicata* does not apply in either of its manifestations to any of the articles challenged, the Court will undertake analysis of articles 32-7, 122 and 124 of the Penal Code, as well as of the expression "or on a woman of less than 14 years of age" contained in article 123. For this purpose, the Court will begin by making reference to "life" as a relevant constitutional value and to the difference between this value and the fundamental right to life. The Court will also refer to the international treaties which are part of the *Constitutional Bundle* and it will refer to the fundamental rights of women found in the 1991 Constitution and in international law, which, in this case, must also be given consideration in order to establish if they collide with the right to life and the duty to protect life. Then, the Court will address to the limits of the legislature's discretion over criminal matters, in particular over matters related to the fundamental rights to human dignity, the free development of the individual, and health, as well as the *Constitutional Bundle*, and issues of reasonableness and proportionality. Finally, the Court will determine the consti-

tutionality of the articles in question by weighing the different rights at issue against the obligation to protect life.

5. "Life" as a relevant constitutional value that must be protected by the Colombian state and as distinguished from the "right to life"

...The Preamble of the Constitution establishes "life" as one of the values that the constitutional legal system aims to protect. Article 2 notes that the authorities of the Republic exist in order to protect the life of the people residing in Colombia. Article 11 affirms, along with other references in the Constitution, that *"the right to life is inviolable."* In the Constitution of 1991, these various references give "life" a multiplicity of functions, as both a value and a fundamental right...

Thus, it can be said that by virtue of the mentions "life" in various constitutional articles, the Constitution of 1991 is inclined to a general protection of life. From this point of view, all of the state's actions must focus on protecting life. This protection shall not be understood as an anthropocentric protection only. The duty to protect life as a constitutional value extends from the axiological sphere to the normative sphere and becomes a constitutional mandate with real obligations. Among those obligations is that all state authorities, without exception and to the extent of their abilities, act within their legal and constitutional discretion with the purpose of achieving appropriate conditions for the effective development of human life. Public authorities' duty to protect life is the necessary flip side of life as a constitutionally protected value, and as such it has given rise to multiple jurisprudential lines of argument from this Court...

Although it is Congress' role to determine and adopt ideal measures for complying with the duty to protect life, this does not mean that all norms aimed at that goal are justified, for, although "life" has constitutional relevance, it does not have an absolute value nor is it an absolute right; it must be weighed against other values and constitutional rights...

Within the legal system, life receives different normative treatments. For instance, there is a distinction between the right to life in article 11 of the Constitution and life as a value protected by the Constitution. The right to life requires that an individual be entitled to it and claim the right. As with all other rights, the right to life is restricted to human persons, while the protection of life can be afforded to those who have not yet reached the human condition...

Following this reasoning, "life" and "the right to life" are different phenomena. Human life passes through various stages and manifests in various forms, which are entitled to different forms of legal protection. Even though the legal system protects the fetus, it does not grant it the same level or degree of protection it grants a human person. These differences are notable in most legal systems where, for example, the criminal punishment for infanticide or for homicide is greater than the punishment for abortion. That is, the protected life is not identical in all cases and therefore the legal implications of the offence carry different degrees of reprisal and thus a proportional punishment.

These considerations must be taken into account by the legislature if it finds it appropriate to enact public policies regarding abortion, including imposing criminal penalties where the Constitution permits, while respecting the rights of women.

Following this reasoning, “life” and “the right to life” are different phenomena. Human life passes through various stages and manifests in various forms, which are entitled to different forms of legal protection. Even though the legal system protects the fetus, it does not grant it the same level or degree of protection it grants a human person.

6. Life and international treaties on human rights; part of the *Constitutional Bundle*

Some of the amici assert that under international human rights law, and particularly under the international instruments addressing matters in the *Constitutional Bundle*, the fetus is entitled to the right to life, and therefore the state is obligated to adopt legislation criminalizing abortion under all circumstances. In other words, they assert that the state’s obligation to ban abortion derives from those international treaties that form part of the *Constitutional Bundle*....

As this Court has held, international human rights treaties are not to be interpreted only literally; it is necessary to examine other factors, such as the context and the purpose of the norm in question. As was stated in Decision C-028, 2006:

In this sense, it is necessary to underscore that in recent years, interpreting international treaties by examining the context and the purpose of the norm in question has gained strength, as it permits for historical changes to be considered. Thus, the interpretation of a specific provision of an international treaty is not limited to reviewing the text of the instrument, rather the interpretation includes the examination of other diverse treaties on related matters; even if those other treaties form part of a different system of protection of international human rights. In other words, international treaties cannot be interpreted in an isolated manner. Instead, they should be interpreted in harmony with one another, in order to adequately take into account social

changes and adjust to the new challenges faced by the international community. This must be done following existing specific rules of interpretation, which will lead to a coherent understanding of current international public law.

Notably, the Inter-American Court of Human Rights, based on article 29 of the Pact of San Jose, Costa Rica, has stated, as has the European Court of Human Rights, that "the treaties on human rights are living instruments. Their interpretation must be in accordance with the evolution of the times and current social conditions." The Inter-American Court has also stated that "such evolving interpretation is in harmony with the general rules of interpretation found in article 29 of the American Convention, as well as with those established by the Vienna Convention on the Law of Treaties." Therefore, international treaties on human rights must be interpreted in harmony with one another, utilizing the decisions on said treaties by the international bodies charged with enforcing the rights and guarantees contained within them as a starting point.

In conclusion, it cannot be said that an absolute or unconditional duty to protect the life of the unborn fetus derives from the various international human rights treaties that form part of the *Constitutional Bundle*. A literal interpretation, just as a context-driven interpretation, requires weighing the unborn fetus' right to life against other rights, principles and values recognized in the 1991 Constitution and in other international human rights law instruments, an approach that has been followed by the Inter-American Court of Human Rights.

This approach requires identifying and weighing the rights at issue in conjunction with the duty to protect life, while taking into account the constitutional importance of the bearer of the rights; in these cases, the pregnant woman.

7. Fundamental rights of women under the Colombian National Constitution and international law

The Colombian National Constitution of 1991 brought important changes regarding the rights of women in Colombian society and in relation to the state....

The 1991 Constitution expressly sets out the goal of recognizing and enhancing the rights of women, as well as of reinforcing these rights by protecting them in an effective and decisive manner. Thus, women are now entitled to special constitutional protection and their rights must be recognized and protected by government authorities, including those within the legal system, without exception....

It is worth noting that there are situations that affect women differently and to a greater extent, like those that affect their lives and particularly those concerning their bodies, their sexuality and their reproduction.

Women's rights have achieved an important place in United Nations world conferences and the treaties that come out of these conferences. These conference documents provide an essential framework for interpreting the rights contained in the international treaties themselves.

In 1968, the First World Conference on Human Rights held in Teheran recognized the importance of the rights of women. For the first time, the basic human right of parents "to determine freely and responsibly the number and spacing of their children" was recognized.

Four years later, the United Nations General Assembly established 1975 as the International Year of the Women and convened a world conference in Mexico dedicated to improving women's conditions. Furthermore, the 1975-1985 decade was declared the United Nations Decade for Women.

Two other conferences were held during the Decade for Women to follow up and evaluate the results of the United Nations Decade for Women, the Copenhagen conference in 1980 and the Nairobi conference in 1985. However, real fundamental change for women's rights came with the World Conference on Human Rights in Vienna in 1993, where it was declared that "*The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights.*" The full and equal participation of women in political, civil, economic, social and cultural life and the eradication of all forms of discrimination on grounds of sex were also declared to be priority objectives for the international community.

The Programme of Action of the 1994 United Nations International Conference on Population and Development in Cairo put a great deal of emphasis on the human rights of women, and it was recognized that "*reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on*

the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so." This Programme also established that "*Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.*" It was also established that men, women and adolescents have the right "*to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice,*" as well as "*the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth.*"

The Fourth World Conference on Women (Beijing Platform) confirms the reproductive rights established in the Cairo's Program of Action.

In effect, various international treaties form the basis for the recognition and protection of women's reproductive rights, which derive from the protection of other fundamental rights such as the right to life, health, equality, the right to be free from discrimination, the right to liberty, bodily integrity and the right to be free from violence — all of which constitute the essential core of reproductive rights. Other fundamental rights, such as the right to work and the right to education — which are also affected when women's reproductive rights are violated — serve as parameters to protect and guarantee sexual and reproductive rights.

It must be noted that in addition to the protections for women's rights in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural

Rights; and the American Convention on Human Rights, special protection for the rights of Latin American women are found in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which entered into force in Colombia on February 19, 1982, with the passage of Law 51, 1981, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), which entered into force in Colombia on December 15, 1996, by means of Law 248, 1995. These documents, together with those signed by the governments of the signatory countries in the World Conferences, are fundamental to the protection and guarantee of the rights of women as they form the point of reference for establishing concepts which contribute to their interpretation both in the national and international spheres.

The right to health, which includes the right to reproductive health and family planning, has been interpreted by international bodies on the basis of international treaties, including CEDAW, to include the duty of all states to offer a wide range of high quality and accessible health services, which must include sexual and reproductive health services. Furthermore, these international bodies also recommend that a gender perspective be included in the design of public health policies and programs. These same international bodies have also expressed concern for the health of women living in poverty, women living in rural areas, indigenous women and adolescents, as well as with obstacles to access to contraceptive methods.

In the area of health, all states should also eliminate all obstacles that impede women's access to services, education and information on sexual and reproduc-

tive health. CEDAW has emphasized that laws criminalizing medical interventions that specially affect women constitute a barrier to women's access to needed medical care, compromising women's right to gender equality in the area of health, and amounting to a violation of states' international obligations to respect those internationally recognized rights.

The international community has also recognized that violence against women infringes on human rights and fundamental freedoms, and has established, specifically, the right of women to live free from violence based on sex or gender.

The diverse forms of gender violence constitute a violation of women's reproductive rights, due to the fact that violence affects women's health as well as their reproductive and sexual autonomy. Sexual violence infringes on women's reproductive rights, particularly the right to bodily integrity and the right to control their sexuality and reproductive capacity. Sexual violence also threatens women's right to health, not only physical health but also psychological, reproductive and sexual health.

CEDAW declared that "*Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.*" The Convention of Belém do Pará, in force since March 5, 1995, and in force in Colombia since December 15, 1996 — Law 248, 1995 — is one of the most important instruments for protecting women's rights against the various forms of violence faced by women in diverse spheres of their lives. The Convention establishes two elements that make it particularly effective.

First, it defines violence against women both in the public and private spheres as a violation of women's human rights and fundamental freedoms. Second, the Convention establishes the state's responsibility for perpetrating or tolerating any such violence, regardless of where it occurs.

It is also important to highlight that the Rome Statute establishes, among other things, that violence and other reproductive and sexual crimes are at the same level as the other most atrocious international crimes, and may amount to torture and genocide. The Rome Statute also recognizes for the first time that violations of women's right to reproductive autonomy, both by means of forced pregnancy and forced sterilization, are amongst the most serious crimes under international human rights law.

One of the essential components of reproductive and sexual rights is women's right to choose freely the number and spacing of children. This is based on the principles of human dignity and the right to autonomy and intimacy, as has been recognized by various international conventions.

CEDAW has established that a woman's right to reproductive autonomy is infringed upon by obstacles to her access to the means of controlling her fertility. Thus, non-consensual sterilization and imposed birth control methods constitute serious violations of this right. Similarly, various committees have stated that the right to freely decide the number of children is directly linked to women's right to life when there are highly restrictive or prohibitive abortion laws that result in high maternal mortality rates.

Other sexual and reproductive rights are based on the right of freedom to marry and start a family. The right to privacy is also connected to reproductive rights and is infringed upon when the state or private citizens interfere with a woman's right to make decisions about her body and her reproductive capacity. The right to privacy includes the right of a patient to have her confidentiality respected by her doctor. Therefore, the right to intimacy is infringed upon when the doctor is legally obliged to report a woman who has undergone an abortion.

With regard to the right to equality and to be free from discrimination, the Women's Convention (CEDAW) establishes women's right to enjoy human rights in conditions of equality with men. It also prescribes the elimination of barriers impeding women's effective enjoyment of their internationally recognized rights, as well as of those found in national legislation. It also establishes measures to prevent and sanction acts of discrimination.

Finally, the right to education is closely linked to reproductive rights at various levels. Having access to basic education empowers women within their families and their communities, and it raises their consciousness regarding their rights. Furthermore, the right to an education includes education on reproductive health and on the right to choose freely and responsibly the number of children and the spacing between them.

To conclude, women's sexual and reproductive rights have finally been recognized as human rights, and, as such, they have become part of constitutional rights, which are the fundamental basis of all democratic states.

Sexual and reproductive rights also emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity's advancement towards social justice.

Nonetheless, neither a mandate to decriminalize abortion nor a prohibition on the legislature's adoption of criminal abortion laws derives from international treaties or constitutional articles on the topic. Congress has a wide range of discretion to adopt public policies on abortion. However, this discretion is not unlimited. As this Court has held, even in criminal matters, the legislature must respect two constitutional limits. First, the legislature cannot disproportionately encroach upon constitutional rights. Second, the legislature must not leave certain constitutional values unprotected. At the same time, the legislature must recognize the principle that criminal law, due to its potential to restrict liberties, must always be a measure of last resort.

Below, the Court will set out the limits to the legislature's discretion to utilize criminal law to penalize abortion, first examining the more general limits and then turning to the particulars of the case before it.

8. Limits on legislative discretion over criminal matters

...In summary, it is the legislature that must pass criminal laws for the protection of constitutional values such as life. However, fundamental rights and other constitutional principles establish limits on the legislature's discretion and it is the Cons-

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titutional Court that *as guardian of the integrity and supremacy of the Constitution, must oversee the limits imposed by the Constitution on the legislature. The Court must examine whether the legislation validly infringes upon constitutional rights.*

Congress may introduce variations in the criminalization and punishment of different conducts that threaten life, a value found in the Constitution. Colombia's legal system includes various laws that aim to protect life, such as laws against genocide, homicide, abortion, abandoning a minor or a person with disabilities, or genetic manipulation. Another example is failing to aid a person at risk. The criminalization of these acts all aim to protect life. Although all these laws have the same objective, that of protecting life, the penalties assigned are different, in accordance with the specific situation and the stage of life in question. In this manner, birth is a relevant event in determining the protection accorded by the law, as is reflected in the penalty associated with the crime.

8.1. The fundamental right to dignity as a limit on the legislature's discretion over criminal matters

As with "life," the concept of "dignity" has various functions in Colombian constitutional law, as has been recognized by constitutional jurisprudence. This Court has stated that "human dignity" has three different roles: (i) it is a foundational principle of the legal system and as such, it has an axiological dimension as a constitutional value; (ii) it is a constitutional principle; and (iii) it is a fundamental right....

[T]he rules which flow from the concept of human dignity — both the constitutional principle and the fundamental right to dignity — coincide in protecting the same type of conduct. This Court has held that in those cases where dignity is used as a criterion in a judicial decision, it must be understood that dignity protects the following: (i) autonomy, or the possibility of designing one's life plan and living in accordance with it (to live life as one wishes); (ii) certain material conditions of existence (to live well); and (iii) intangible goods such as physical integrity and moral integrity (to live free of humiliation)....

Human dignity warrants a sphere of autonomy and moral integrity that must be respected by public authorities and by private citizens. The sphere of protection for women's human dignity includes decisions related to their choice of life plan, among them decisions regarding reproductive autonomy. This protection also includes a guarantee of their moral integrity, which manifests itself in prohibitions against assigning women stigmatizing gender roles or imposing deliberate moral suffering.

According to constitutional jurisprudence, the concept of dignity, understood as protecting individual autonomy and the right to choose one's life plan, places a limit on the legislature's discretion over criminal matters....

In this way, the need to respect human dignity places a limit on the legislature's discretion with regard to criminal matters, even in circumstances where the legislature aims to protect other relevant constitutional values such as life.

Therefore, when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.

8.2. The right to the free development of the individual as a limit on the legislature's discretion over criminal matters

The right to the free development of the individual stems from axiological considerations: the principle of human dignity and the strong libertarian characteristics of the 1991 Constitution. This right is understood as the necessary result of a new conception of the state's role. In this new role, the state is "an instrument at the service of the citizens, as opposed to the citizen as a servant of the state." In this new light, individual autonomy — understood as the vital sphere of matters solely within the decisional ambit of the individual — becomes a constitutional principle, binding on public authorities, who are therefore prevented from infringing on this private sphere and making decisions on behalf of citizens because such infringement would amount to "a brutal usurpation of a citizen's ethical condition, reducing him/her to the condition of an object, converting him/her into a means to ends imposed from outside...."

The substance of the right is found within the realm of an individual's private decisions, which result in a person's life plan or in an individual's ideal of personal achievement. Throughout time, constitutional jurisprudence has identified a spectrum of conduct that is protected under the right to the free development

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of the individual, among which the following must be mentioned due to their importance in the present analysis.

The freedom of every individual to choose his or her marital status without coercion of any type; this includes, among others options, the freedom to choose whether to marry, to live in a common law relationship or remain single.

The right to be a mother, or in other words, the right to opt for motherhood as a "life choice," is a decision of the utmost private nature for each woman. Therefore, the Constitution does not permit the state, the family, the employer or educational institutions to introduce any regulation or policy that infringes upon the right of a woman to choose to be a mother or that interferes with the rightful exercise of motherhood. Any discriminatory or unfavorable treatment of a woman on the basis of special circumstances she might be facing at the time of making the decision of whether to be a mother (for example, at an early age, within marriage or not, with a partner or without one, while working, etc.) is a flagrant violation of the constitutional right to the free development of the individual.

The right to a personal identity from which the following rights derive: (i) the right to a name as an expression of individuality. The Court understands this right in a "legal sense" as "the ability of an individual to proclaim his or her uniqueness;" (ii) the right to freely choose one's sexuality. The Court has stated in various decisions that "sexual orientation and the assumption of a sexual identity are at the core of the right to the free development of the individual...;" and (iii) the right to make choices about one's appearance. The Court has said

that a certain standard of esthetics cannot be imposed by educational institutions, the state or private citizens. For instance, decisions about what dress, hair length or whether to use cosmetics cannot be determined by educational institutions. Government entities are also proscribed from establishing regulations that prevent access to certain public employment based on esthetics. Similarly, penal institutions are prevented from imposing rules that prevent visits to inmates based on personal appearance.

The right to make decisions about one's health encompasses the right to pursue or refuse a particular medical treatment even when the patient may be suffering from a mental disorder (so long as the mental condition is not so severe as to impair the patient's judgment or impair the patient's expression of his or her wishes) and even when the patient's decision will not lead, in the expert's medical opinion or the opinion of others, to improvement of the patient's illness or the achievement of wellness.

Finally, it must be noted that our constitutional jurisprudence has also said, on various occasions, that the free development of the individual provides a clear limit on the legislature's discretion, not only in criminal matters but also in its general discretion regarding penalties and prohibitions. The Court has held that regardless of the constitutional values it is aiming to protect, the legislature cannot establish "perfectionist measures" that restrict the free development of the individual in a disproportionate manner.

Decision C-309/97 establishes a differentiation between "perfectionist measures" and "protective measures;" the latter are constitutionally valid when they aim to

preserve relevant constitutional values such as the right to life and the right to health. On this particular point, the Court stated:

In Colombia, perfectionist measures are not allowed as it is not permissible that a state that recognizes the right to individual autonomy as well as pluralism as a protected value permit its authorities to impose, with the threat of criminal penalties, a predetermined model of virtuous behavior or human excellence. In effect, perfectionist measures are policies that imply that the state only admits one ideal of what is commendable, which is totally incompatible with the notion of a plural society. Such measures also result in criminal sanctions against persons who have not infringed upon the rights of others, but instead have simply rejected the ideals imposed by the state, in flagrant violation of that individual's autonomy. Autonomy means precisely having the ability to establish one's own norms. On the other hand, protective measures that seek to protect the rights of the individual are not incompatible with the Constitution, nor with the recognition of a pluralist society, because these measures are not based on imposing a model of what is virtuous, rather, they aim to protect an individual's own interests and his or her own convictions.

In order to prevent a protective measure from becoming perfectionist policy, the protective measure must be proportionate and may not excessively restrict the rights at issue, among them, of course, the right to the free development of the individual.

In close relationship to the above, the Court concludes that the penalty for a violation of a protective norm cannot be excessive when weighed against the interest that the measure seeks to protect. Not only because proportionality in determining criminal sanctions is a guiding principle of criminal law, but also because having proportionality in the penalties imposed is a manner of guaranteeing that a protective norm will not become a perfectionist measure....

8.3. Health, life and bodily integrity as limits on the discretion of the legislature over criminal matters

...The Constitutional Court has said on various occasions that the right to health, even though it is not expressly found in the Constitution as a fundamental right, has a fundamental character when it is in *close relation* to the right to life. That is, when its protection becomes necessary in order to guarantee the continuity of life in dignified conditions.

The Court has also said that human life as protected in the Constitution refers not only to a biological existence, but also to life with a minimum degree of dignity. Human beings are multifaceted and their existence involves more than purely material aspects; it incorporates physical, biological, spiritual, mental and psychological factors, all of which must be taken into consideration when defining human dignity.

The right to health encompasses not only physical, but also mental health. As the Court has said, "*The Constitution proclaims the fundamental right to personal integrity, and by doing so, refers not only to the physical aspects of the person, but also to the broad range of elements that affect one's mental health and psychological well-being. Accordingly, both the physical and psychological aspects of integrity must be preserved. A threat to one or the other, by action or omission, infringes upon this fundamental right and endangers the right to life with a minimum degree of dignity.*"

The right to health is an integral right that includes mental and physical well-being. Furthermore, for women, it includes reproductive health, which is closely linked to both induced and spontaneous abortion. Induced abortions and miscarriages may in numerous circumstances put a woman's health or life at risk, or require medical intervention to preserve her reproductive capacity....

The constitutional right to health has a service provision dimension as well as an element of protection against government and third party intrusion or interference with this right. This latter dimension of protection from violation, or obligation on the state to not interfere, is closely related to the duty of every individual to be responsible for his or her own health. From this perspective, certain measures adopted by the legislature that disproportionately restrict the right to health are unconstitutional. This is so even when those measures are adopted in order to protect the constitutional rights of others.

Prima facie, it is not proportionate or reasonable for the Colombian state to obligate a person to sacrifice her or his health in the interest of protecting third parties, even when those interests are also constitutionally relevant.

Also, as mentioned above, the right to health has a dimension related to decision-making about one's own health, which is closely linked to the right to autonomy and the right to the free development of the individual. Thus, the Constitutional Court has understood that every person has the autonomy to make decisions related to his or her health, and that therefore the informed consent of the patient prevails over the views of the treating physician, and the interest of society and the state in preserving the health of the people. From this perspective, medical treatment or intervention should always take place with the consent of the patient, except in very exceptional circumstances.

The right to autonomy regarding one's own health encompasses other distinct rights, which are relevant here. These include the right to plan a family, the right to make free and non-coerced decisions regarding reproduction, and the right to be free from all forms of violence and coercion which affect sexual and reproductive health. Following is a brief analysis of each of these rights.

The right to plan a family has been defined as "*the possibility of all couples to freely choose in a responsible manner, the number and spacing of their children, and the right to access the information necessary to do so.*" This right places an obligation on the state to adopt measures to assist couples and individuals in reaching their reproductive objectives and to provide information on family planning and reproductive health.

The right to be free of interference in decision-making regarding reproduction requires access to the information necessary to make informed choices. This is closely related to the right to adequate sex education. This right also "*protects*

people from unwanted physical intrusions and from other non-consensual restrictions on their physical autonomy.”

It must be noted again that the right to be free from all forms of violence and coercion that affect sexual and reproductive health has a gender perspective which derives from various international human rights instruments, particularly the Convention on the Elimination of All Forms of Discrimination against Women. It implies the right to make decisions regarding reproduction without discrimination, coercion or violence, and therefore it is closely connected with the right to personal integrity. This right also requires the state to protect individuals, particularly women, from undue family, social and cultural pressures that diminish their ability to decide regarding sexual or reproductive matters. Such pressures include being forced into marriage at an early age without the full consent of both parties or the practice of female circumcision. The right also implies a prohibition of state-condoned practices such as forced sterilization, violence and sexual abuse....

8.4. The Constitutional Bundle as a limit on the legislature’s discretion over criminal matters

The *Constitutional Bundle* also limits the legislature’s discretion with regard to criminal matters, as was recognized by this Court in Decision C-205, 2003:

The legislature has a broad margin of discretion when it comes to defining social conduct that is so harmful to a greater protected good that it must become crime. This decision is within the legisla-

ture’s realm of action on the basis of democracy, and these norms reflect the predominant societal values at the time. However, this discretion is not unlimited as the Constitutional Bundle provides an axiological limit on the exercise of this discretion. Therefore, when defining which conduct constitutes a crime as well as defining issues of criminal procedure, the legislature must take into account the entirety of the legal system, and in particular, it must respect the rights and dignity of others, as has been held on various occasions and for some time now in the jurisprudence of this Court....

In a similar manner, the Constitutional Court has said that “*Under article 93 of the Constitution, constitutional rights and obligations must be interpreted in harmony with international human rights treaties to which Colombia is a signatory. This means that international jurisprudence from the tribunals in charge of interpreting those treaties constitute a relevant interpretation guide when establishing the meaning of fundamental constitutional rights.*” This position has been stated in numerous decisions, and permits the conclusion that international jurisprudence provides a relevant guide for interpreting those rights contained in international treaties that form part of the *Constitutional Bundle*. This is different from saying that such international jurisprudence is part of the *Constitutional Bundle*....

This distinction aside, international human rights treaties, which, according to constitutional jurisprudence, are part of the *Constitutional Bundle*, provide a clear limit on the legislature’s discretion over criminal matters. Accordingly, various articles of the International Covenant on Civil and Political Rights, the Con-

vention on the Elimination of All Forms of Discrimination against Women, and the International Covenant on Economic, Social and Cultural Rights, while neither dispositive nor preemptive of the legislature's discretion, are relevant in the analysis of the constitutionality of the total ban on abortion....

8.5. Proportionality and reasonability as limits to the legislature's discretion over criminal matters

...The political change from a liberal state, founded on national sovereignty and the rule of law, to a social state whose essential objectives are, among others, service to the community, the guarantee of fundamental constitutional principles, rights and duties, and the protection of constitutional rights and freedoms (article 2 of the Constitution) requires a renunciation of absolutist theories about the autonomy of the legislature with regard to criminal matters. The defendant's fundamental rights to dignity and integrity, which are protected by the Constitution (article 5 of the Constitution), limit society's ability to legislate in criminal matters. The axiological content of the Constitution limits the exercise of the power and responsibility of the public authorities (article 6 of the Constitution). The social aspect of the Constitution works to balance the public authority's restricting force so that free will is aligned with reason. Only a proportionate use of the state's punitive power with respect to constitutional rights and freedoms can guarantee a just social order, founded in human dignity and solidarity.

Thus, the type and length of a penalty are not matters entirely to be decided by democratic will. The Constitution imposes clear limits on the legislature (articles 11 and 12 of the Constitution). From the right to equality, principles such as reasonableness and proportionality follow and justify a different treatment depending on the particular circumstances of the case (article 13 of the Constitution), thus requiring an evaluation of the relationship between the ends and the means used to achieve those ends....

Thus, the legislature may choose from amongst the different available measures those that it considers the most adequate for the protection of legitimate ends, and it may adopt criminal laws penalizing conduct that threatens or infringes upon constitutionally protected values, rights or principles. However, the legislature's discretion is subject to various constitutional limits, including the principle of proportionality, which plays two different limiting roles. First, a criminal law cannot impose a disproportionate restriction on the fundamental rights in question. For example, it cannot constitute a perfectionist measure, by means of which the state seeks to impose an ideal model of conduct. Nor can it require a complete sacrifice of any individual's fundamental right in order to serve the general interests of society or in order to give legal priority to other protected values.

Second, the principle of proportionality must exist within the Penal Code because in a democratic state criminal sanctions, as the utmost infringement upon personal liberties and human dignity — both axiological grounds of a democratic state — must only be used when justified and necessary to punish serious and harmful conduct, and must also be proportionate to the crime....

An analysis of proportionality is necessary to determine whether the legislature, in aiming to protect the unborn fetus, affected the rights of women in a disproportionate manner and overstepped the limits within which it can exercise its discretion over criminal matters.

9. The issue of abortion in comparative law

[The court examines decisions from the constitutional courts of the United States, Germany and Spain]

...When constitutional tribunals have examined the constitutionality of laws governing the termination of pregnancy, they have coincided in the need to balance the various interests at stake; on one hand, the life of the fetus, which is constitutionally relevant and therefore should be protected, and on the other hand, the rights of the pregnant woman. Even though the various tribunals have differed on which of those interests must prevail in particular cases, they have shared common ground in affirming that a total prohibition on abortion is unconstitutional because under certain circumstances it imposes an intolerable burden on the pregnant woman which infringes upon her constitutional rights.

10. The case before the Court

10.1. The unconstitutionality of a total prohibition of abortion

...In the case at hand, as has been held numerous times, the life of the fetus is entitled to protection under constitutional law and therefore the decisions of the pregnant woman regarding the termination of her pregnancy go beyond

the sphere of her private autonomy and implicate the interests of both the state and the legislature...

It is not the role of the constitutional judge to determine the character or the nature of the measures that the legislature should adopt in order to protect a particular state interest. That is an eminently political decision reserved for the legislative branch, which has the legitimate democratic ability to adopt those measures. The intervention of the constitutional judge comes *a posteriori* and only in order to examine whether the legislature has exercised its powers within the limits of its discretion.

If the legislature decides to serve legitimate ends by adopting criminal measures, its margin of discretion is limited due to the severity of such measures and their potential to seriously impair human dignity and individual liberties. In the case of abortion, the decision is extremely complex because the crime impacts various rights, principles and values, all of which are constitutionally relevant. Accordingly, defining which should prevail and in what measure is a decision with profound social repercussions which may alter as society transforms and public policy changes. The legislature has the ability to modify its decisions in response to such changes, and it is the branch responsible for providing the state's response to competing constitutional rights, principles and values....

Even though the protection of the fetus through criminal law is not in itself disproportionate and penalizing abortion may be constitutional, the criminalization of abortion in all circumstances entails the complete pre-eminence of the life of the fetus and the absolute sacrifice of the pregnant woman's fundamental rights. This result is, without a doubt, unconstitutional.

In effect, one of the characteristics of constitutional regimes with a high degree of axiological content, such as the Colombian Constitution of 1991, is the coexistence of different values, rights and principles, none of which is absolute and none of which prevails over the rest. This is one of the fundamental pillars of proportionality that must be utilized as an instrument to resolve the tension amongst laws in a structured and principled manner.

Thus, a criminal law that prohibits abortion in all circumstances extinguishes the woman's fundamental rights, and thereby violates her dignity by reducing her to a mere receptacle for the fetus, without rights or interests of constitutional relevance worthy of protection.

Determining under which circumstances it is excessive to require a woman to continue a pregnancy because it results in an infringement of a woman's fundamental rights is an exercise within the legislature's sphere. Once the legislature has decided that criminal law is the most appropriate way to protect the life of the fetus, then the legislature must set out the circumstances under which it is not excessive to sacrifice the rights of the pregnant woman. Nonetheless, if the legislature does not establish those circumstances, it is then up to the constitutional judge to prevent a disproportionate infringement of the fundamental rights of the pregnant woman. This does not mean, however, that the legislature lacks discretion to deal with this matter within constitutional limits.

Even though the Penal Code contains a general prohibition of abortion, the articles in question demonstrate that under certain circumstances the legislature

did establish mitigating factors and even provided the judiciary with the discretion to not impose a penalty in a particular case. This exclusion relates to pregnancies resulting from rape, sexual abuse, non-consensual artificial insemination or implantation of a fertilized ovule. (article 124 of the Penal Code)

In these circumstances, the legislature decided that the penalty for abortion should be mitigated in light of the fundamental rights of the woman involved, such as her dignity and her right to the free development of the individual. However, the legislature decided that even in those circumstances, where the woman's dignity and free development were imperiled, she should be tried and sentenced as a criminal. A measure such as this is disproportionate because the conduct continues to be criminal, which seriously infringes on the constitutional rights of the pregnant woman.

This Court is of the view that under the enumerated circumstances, abortion does not constitute a crime. This is not only because that result was originally contemplated by the legislature, but also because the absolute prevalence of the fetus' rights in these circumstances implies a complete disregard for human dignity and the right to the free development of the pregnant woman whose pregnancy is not the result of a free and conscious decision, but the result of arbitrary, criminal acts against her in violation of her autonomy; acts that are penalized in the Penal Code.

With regard to the infringement of the right to human dignity and the autonomy of the pregnant woman, it is worth citing portions of the concurring opinion in Decision C-647, 2001 which stated:

When a woman is the victim of rape or she is the victim of any of the types of conduct described in the paragraph in question, her right to dignity, her right to intimacy and her right to autonomy and freedom of conscience are blatantly and arbitrarily infringed upon. It is hard to imagine a more serious violation of those rights and a conduct more blatantly against social harmony among equals. A woman who becomes pregnant as a result of rape cannot be legally required to act as a heroine and take on the burden that continuing with the pregnancy entails. Nor can her fundamental rights be disregarded as would be the case if she were required to carry the pregnancy to term against her will, turning her into a mere instrument of procreation. Ordinarily, a woman in this situation will not act indifferently or as a heroine. When a woman has been the victim of rape or has been utilized as an instrument for procreation, she may make the exceptional and admirable decision to carry the pregnancy to term. Despite the lack of government assistance for her or the future child, a woman has the right to decide to continue with the pregnancy if she has the strength to do so and her conscience tells her to do so. But she cannot be obligated to procreate nor be subjected to criminal sanctions for exercising her constitutional rights while trying to lessen the consequences of the crime of which she was a victim.

Taking the duty to protect the life of the fetus in these exceptional circumstances to the extreme of criminalizing the termination of pregnancy is to give

an absolute privilege to the life of the fetus over the fundamental rights of the pregnant woman, in particular, her right to choose whether or not to carry to term an unwanted pregnancy. Such an intrusion by the state on her right to the free development of the individual and her human dignity is disproportionate and arbitrary. A woman's right to dignity prohibits her treatment as a mere instrument for reproduction, and her consent is therefore essential to the fundamental, life-changing decision to give birth to another person.

Pregnancy resulting from incest should also be included within these exceptional circumstances because it represents another example of a pregnancy resulting from a punishable act, where, in most cases, the woman does not consent. Even when there is no physical violence involved, incest generally infringes on a woman's autonomy. It also affects the stability of the family (an institution protected by the Constitution) and results in a violation of the constitutional principle of solidarity, which is, as has been held previously by this Court, a fundamental guiding principle of the Constitution. The criminalization of abortion in this circumstance amounts to a disproportionate and unreasonable infringement on the liberty and dignity of women.

When the pregnancy is the result of rape, sexual abuse, non-consensual artificial insemination or implantation of a fertilized ovule, or incest, it is necessary that such criminal acts be reported accordingly to the competent authorities.

To this end, the legislature may enact regulations as long as the regulations do not preclude access to abortion and do not impose a disproportionate burden on the rights of women. For instance, the regulations cannot require forensic evi-

dence of actual penetration after a report of rape or require evidence to establish lack of consent to the sexual relationship. Nor can they require that a judge or a police officer find that the rape actually occurred; or require that the woman obtain permission from, or be required to notify, her husband or her parents.

The circumstances above are not the only ones in which it is disproportionate to criminalize abortion.

Also, when there is a risk to the health and life of the pregnant woman, it is clearly excessive to criminalize abortion since it would require the sacrifice of the fully formed life of the woman in favor of the developing life of the fetus. If the criminal penalty for abortion rests on valuing the life of the developing fetus over other constitutional interests involved, then criminalization of abortion in these circumstances would mean that there is no equivalent recognition of the right to life and health of the mother.

This Court has held on several occasions that the state cannot oblige a person, in this case a pregnant woman, to perform heroic sacrifices and give up her own rights for the benefit of others or for the benefit of society in general. Such an obligation is unenforceable, even if the pregnancy is the result of a consensual act, in light of article 49 of the Constitution, which mandates that all persons take care of their own health.

The importance of “life” as a constitutional value and the resulting obligation on the state to protect it imposes on the legislature the duty to enact protective measures through legislation. In Decision C-309, 1997, this Court held:

The Constitution is not neutral with regard to the values of life and health; rather, it clearly favors them. Thus, the state has a particular interest in seeing these values flourish in society’s day-to-day life. Authorities cannot be indifferent to a citizen’s decision that puts his or her life or health at risk. The state is authorized to act, through protective measures, even against the will of the citizens, in order to prevent an individual from harming him or herself. Protective measures are constitutional. This does not mean, however, that any measure of this nature is allowed, because, on occasion, the state, or society, in aiming to protect a person from his or her self, ends up infringing upon this person’s autonomy. This Court, in recognizing the constitutionality of these measures, has been very careful in stating that they will lose their constitutional character if they turn into “perfectionist” measures, that is, in the “unwanted imposition on a citizen of an ideal of life and an ideal of what is worthy and virtuous, which is contrary to the citizen’s beliefs, and is in violation of autonomy, dignity, and the right to the free development of the individual, all fundamental pillars of our legal system.”

For the present analysis, it is relevant to consider various international human rights bodies’ interpretation of international treaties that guarantee women’s right to life and health. For instance, article 6 of the International Covenant on Civil and Political Rights, article 12.1 of the Convention on the Elimination of All Forms of Discrimination against Women and article 12 of the International Covenant on Economic, Social and Cultural Rights, are all part of the *Constitutional Bundle* and

thus impose an obligation on the state to adopt measures to protect life and health. The prohibition of abortion where the life and health of the mother are at risk may therefore violate Colombia's obligations under international law.

These obligations do not pertain only where the woman's physical health is at risk, but also where her mental health is at risk. It must be noted that the right to health, under article 12 of the International Covenant on Economic, Social and Cultural Rights, includes the right to the highest achievable level of both physical and mental well-being. Pregnancy may at times cause severe anguish or even mental disorders, which may justify its termination if so certified by a doctor.

Some of the interveners argue that when the life or the health of the pregnant woman are at risk due to the pregnancy, article 32-7 of the Penal Code allows for the invocation of the necessity defense to avoid criminal liability. On this point, this Court must warn that the necessity defense does not resolve the constitutional tension at issue here for two reasons. First, application of the necessity defense presupposes that the legislature can completely criminalize abortion, which, as has been discussed here, is unconstitutional because it disregards the right to life and health of the mother in favor of protecting the fetus, regardless of the woman's particular circumstances. Second, for the necessity defense to apply under article 32-7, there must be actual and imminent danger which is not preventable in any other way, which was not willfully caused, and which the person does not have the legal duty to bear. These requirements do not clearly address the risks to the life or health of a pregnant woman and they impose an unreasonable burden on her.

A final circumstance that must be addressed involves medically-certified malformations of the fetus. Although there are different types of malformations, those extreme malformations incompatible with life outside the womb pose a constitutional issue that must be resolved. Those circumstances are different from having identified an illness of the fetus that may be cured during pregnancy or after birth. Rather, those circumstances involve a fetus that is unlikely to survive due to a severe malformation, as certified by a doctor. In these cases, the duty of the state to protect the fetus loses weight, since this life is in fact not viable. Thus, the rights of the woman prevail and the legislature cannot require her, under the threat of a criminal penalty, to carry a pregnancy to term.

An additional reason for the decriminalization of abortion in these extreme circumstances is that imposing a criminal penalty in order to protect the fetus results in the imposition of an unreasonable burden on the pregnant woman, who is forced to go through a pregnancy only to lose the growing life due to the malformation.

Furthermore, in a situation where the fetus is not viable, forcing the mother, under the threat of criminal charges, to carry the pregnancy to term amounts to cruel, inhumane and degrading treatment, which affects her moral well-being and her right to dignity.

In both cases described above, where the continuation of the pregnancy puts the life or health of the pregnant woman at risk or when there are serious malformations of the fetus incompatible with life outside the womb, there should be a medical certificate to validate the circumstances under which the abortion cannot be penalized.

It is not in the realm of the Court’s knowledge to stipulate when the continuation of a pregnancy puts the life or health of the mother at risk or when there are serious malformations of the fetus. Such determinations are to be made by medical practitioners acting within the ethical standards of their profession.

From a constitutional standpoint, if these requirements are met — a medical certificate or a report to the authorities, depending on the circumstances — neither the pregnant woman nor the doctor who performs the abortion can be the subject of criminal charges under the three circumstances in which article 122 has been found unconstitutional. Each of these three circumstances is independent from one another. Therefore, it cannot be required, for example, to establish after a rape that the life or health of the mother is at risk or that the fetus is not viable. In the case of rape or incest, the good faith of the woman who reports the incident to the authorities shall be presumed and it is enough for her to show a copy of the report to the doctor.

It must be noted that conscientious objection is not a right that legal entities or the state can exercise. It is only possible for natural persons to exercise this right. Hospitals, clinics or other health centers cannot raise a conscientious objection to performing an abortion when all the requirements established by this decision are met. When it comes to natural persons, it must be underscored that a conscientious objection relates to a religious belief and the opinion of the doctor with regard to abortion should not be questioned. However, women’s fundamental rights cannot be disregarded, thus, if the doctor raises a conscientious objection, the doctor must immediately refer the pregnant woman to another medical practitioner who can perform the abortion. That referral is without prej-

udice to a determination that may be made afterwards, through mechanisms established by the medical profession, regarding whether the objection was legitimate.

Even though regulations are not necessary for the immediate decriminalization of abortion in the three circumstances presented in this decision, the legislature or the authorities regulating social and health services are not prevented from adopting decisions within their discretion and in order to fulfill their duties with respect to the constitutional rights of women; for example, taking measures that will effectively ensure women access in conditions of equality and safety in the area of health and social services.

In these three circumstances, the legislature is proscribed from establishing requirements that limit access to abortion services or that amount to a disproportionate burden on the rights of women.

The above analysis demonstrates that even though the decision to criminalize abortion as a measure to protect the life of the fetus is constitutionally justified — although it is not the only option open to the legislature, as it can choose social service measures for this purpose — the total prohibition of abortion in all cases is a blatantly disproportionate measure as it infringes upon the rights of the pregnant woman, protected by the Constitution of 1991 as well as by the international human rights treaties that are part of the *Constitutional Bundle*.

The protection of women’s rights does not call for the complete invalidation of article 122, because this would leave life unprotected. Furthermore, it would

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prevent the legal system from regulating abortion in circumstances where the Constitution allows for it.

To conclude, under the principle that calls for the preservation of laws, it is necessary to declare the conditional constitutionality of the challenged article. In accordance with this decision, abortion will not be considered a crime in the circumstances described herein. In this manner, protection for the life of the fetus will not disproportionately override the rights of the pregnant woman.

The Court declares that article 122 of the Penal Code is constitutional with the understanding that abortion is not criminal in the following circumstances:

a) when the continuation of the pregnancy presents risks to the life or the health of the woman, as certified by a medical doctor; b) when there are serious malformations of the fetus that make the fetus not viable, as certified by a medical doctor; and c) when the pregnancy is the result of any of the following criminal acts, duly reported to the authorities: incest, rape, sexual abuse, or artificial insemination or implantation of a fertilized ovule without the consent of the woman.

10.2. The constitutionality of the expression "or on a woman of less than 14 years of age" in article 123 of the Penal Code

Article 123 of the Penal Code penalizes abortion when it is performed without the consent of the woman or when it is performed on a woman of less than 14 years of age. The challenged article established a presumption that a woman of less than 14 years of age is legally incapable of consenting to an abortion and therefore her consent is irrelevant from the perspective of the criminal law.

In this case, the article is challenged on the grounds that the presumption infringes on the human dignity, the right to the free development of the individual, the health and even the life of the pregnant woman of less than 14 years of age, because, according to the Plaintiffs, the minor is capable of giving valid consent to an abortion.

In order to address this portion of the constitutional challenge, it is necessary to briefly review the jurisprudence of this Court relating to the right to the free development of the individual and to informed consent by minors to medical interventions.

With regard to the right to the free development of the individual, this Court has held that even though all persons possess this right, autonomy involves decisions which affect a person "in those stages in life in which the person has enough judgment to make a decision" or, in other words, "the right to the free development of the individual must be evaluated differently at each stage of life." Accordingly, this Court has held that minors may be subject, in certain circumstances, to greater restrictions on their exercise of the right, just as are legally incompetent persons and other temporarily or permanently psychologically immature individuals.

These criteria have been subject to refinement through decisions dealing with the protection of constitutional rights. First, with regard to minors, the Court has accepted that the classification in article 34 of the Civil Code (infants, pre-adolescents and adolescents) is based on "the result of a process by which the individual advances gradually in the knowledge of him or her self and in the recognition and use of his or her potential and abilities, discovering his or herself as an au-

tonomous, singular and different being." This classification does not define who is entitled to the right to the free development, but it does permit certain specific restrictions on that right based on the degree of maturity of the person....

It is also relevant to consider the jurisprudential criteria established by this Court in decision SU-337 of 1999 regarding the validity of a minor's consent to treatment or medical interventions affecting one's sexual identity. The Court held:

On the other hand, a minor is not totally deprived of autonomy, and, in many circumstances, the minor's opinion must not only be taken into account but also respected. The Convention on the Rights of the Child, which was adopted by Colombia in Law 12 of 1991, and which therefore prevails in our legal system (article 93 of the Constitution), expressly establishes in article 12 that "state parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." Judicial decisions both nationally and internationally have recognized the autonomy of minors to make certain decisions relating to medical procedures, even if these decisions are not in agreement with the opinion of their parents.

This led the Court to conclude that the age of the minor is not an absolute criterion for authorizing treatments and medical procedures, even when these are of an invasive nature:

Lastly, not even age is a purely objective criterion because, given the aforementioned distinction between legal capacity and autonomy to make health care decisions, it is understood that the age of the patient serves as a guide for assessing the minor's intellectual and emotional maturity, but is not an element with an absolute quality. It is reasonable to assume that an infant is less autonomous than an adolescent and therefore the degree of protection of their right to the free development of the individual is different in the two cases. Personality is an evolving process of maturity, such that humans go from a state of almost total dependency at birth to full autonomy at adulthood. The access to autonomy is therefore gradual as it is "the result of a process by which the individual advances gradually in the knowledge of him or her self and in the recognition and use of his or her potential and abilities, discovering him or herself as an autonomous, singular and different being." This progressive development of personality and autonomy is to a great degree linked to age, which justifies distinctions such as those made by Roman law and the Civil Code among infants, preadolescents and young adults. Thus, the age of the patient can be taken as an indication of the degree of autonomy, but the number of years is not an absolute criterion, as minors of identical age may, in fact, show different capacities for self-determination, and therefore may enjoy different protections of the right to the free development of the individual. This Court has established that the protection given by this fundamental right "is stronger as the ability of self-determi-

nation of the minor increases, which — it is assumed — becomes fully developed at the age at which the law fixes the coming of age." There is then, an "inverse relationship of proportionality between the capacity of self-determination of the minor and the legitimacy of interventions into a minor's decisions; thus, the higher the degree of intellectual capacity, the lesser the legitimacy of interventions into the decisions of the minor."

Thus, constitutional jurisprudence has recognized that minors possess the right to the free development of the individual and may consent to medical treatments and interventions, even when they are of a highly invasive nature. Purely objective criteria such as age have been rejected as the only standard for determining whether minors can consent to medical treatments and interventions. With regard to abortion, the legislature, if it deems appropriate, may establish rules in the future regarding representation of minors or the assertion of minors' rights, which shall not invalidate the consent of a minor of less than 14 years of age.

From this perspective, any protective measure that nullifies the legal effect of a minor's consent, such as the challenged expression in article 123 of the Penal Code, is unconstitutional because it completely annuls the minor's rights to the free development of the individual, autonomy and dignity.

Furthermore, this protective measure reveals itself as a counter-productive and ineffective means of achieving its end in cases where it is necessary to perform an abortion to protect the health or life of the pregnant minor. Because of the presumption established by the legislature, any person who performs an abor-

tion on a minor of less than 14 years of age can be charged with violation of article 123 of the Penal Code, even where the abortion is necessary to protect the life or health of the minor and she has given her consent.

For the reasons explained above, the Court must conclude that article 123 of the Penal Code annuls the pregnant minor's fundamental rights to the free development of the individual, autonomy and dignity, and is inadequate to achieve its stated goals. It is therefore clearly disproportionate and unconstitutional. Hence, the expression "*or on a woman of less than 14 years of age*" is hereby declared unconstitutional.

10.3. On the constitutionality of article 124 of the Penal Code

All of the circumstances cited as mitigating factors in the challenged article are included, by virtue of this decision, together with those not expressly mentioned in the article, as circumstances under which abortion is not a crime.

As a consequence of this decision, the article in question and the paragraph in question are superfluous because the Court declares that, instead of constituting mitigating factors, the circumstances no longer constitute a crime. The article shall be deleted from the Code....

11. Final considerations

Having weighed the duty to protect the life of the fetus against the fundamental rights of the pregnant woman, this Court concludes that the total prohibition of

abortion is unconstitutional and that article 122 of the Penal Code is constitutional on the condition that the three circumstances described in this decision are excluded from its ambit and on the understanding that all three circumstances are autonomous and independent of one another.

However, the legislature in its discretion may decide that abortion is not penalized in additional circumstances. In the present decision, the Court has limited itself to the three extreme circumstances that violate the Constitution when the pregnant woman has consented to the abortion and the pertinent requirements have been met. However, aside from these circumstances, the legislature may foresee others in which public policy calls for the decriminalization of abortion, taking into consideration the circumstances under which abortions are performed, as well as socio-economic situations and other public health policy objectives.

For all legal purposes, including the application of the principle of favorability, the present decision shall enter into force immediately and the enjoyment of the rights protected in this decision do not require further legislation or regulations.

This does not prevent the authorities with discretion over the issues, if they so deem convenient, from issuing legislation establishing public policies in harmony with the present decision.

The Court must clarify that the present decision does not require women to choose to abort. Rather, in the event that a woman finds herself in one of the exceptional circumstances here mentioned, she can decide to carry the pregnancy to term and her decision is constitutionally protected. What the Court is

In the present decision, the Court has limited itself to the three extreme circumstances that violate the Constitution when the pregnant woman has consented to the abortion and the pertinent requirements have been met. However, aside from these circumstances, the legislature may foresee others in which public policy calls for the decriminalization of abortion...

establishing in the present decision is the ability of women in the described circumstances to choose to terminate their pregnancies without criminal consequences, so long as they so consent.

VII. DECISION

Based on the arguments expressed above, and in the name of justice on behalf of the people and under the authority given to it by the Constitution, the Constitutional Court, sitting in full chamber

DECIDES

First. To deny the requests for nullity as explained in point 2.3 of the present decision.

Second. To declare **CONSTITUTIONAL** article 32, paragraph 7 Law 599 of 2000, for the reasons explained in the present decision.

Third. To declare **CONSTITUTIONAL** article 122 Law 599 of 2000, with the understanding that abortion is not a crime when, with the consent of the woman, the termination of pregnancy is performed in the following circumstances: i) when the continuation of the pregnancy presents risks to the life or the health of the woman, as certified by a medical doctor; ii) when there are serious malformations of the fetus incompatible with life outside the womb, as certified by a medical doctor; and iii) when the pregnancy is the result of any of the following criminal acts, duly reported to the proper authorities: incest,

rape, sexual abuse, or artificial insemination or implantation of a fertilized ovule without the woman's consent.

Fourth. To declare **UNCONSTITUTIONAL** the expression "or on a woman of less than 14 years of age..." in article 123 of Law 599 of 2000.

Fifth. To declare **UNCONSTITUTIONAL** article 124 of Law 599 of 2000.

This decision is to be notified, communicated and inserted in the official publication of the Constitutional Court, complied with, and filed.

JAIME CÓRDOBA TRIVIÑO

President

SELF- RECUSED

RODRIGO ESCOBAR GIL

Vice-President

DISSENTING

JAIME ARAÚJO RENTERÍA

Honorable Justice

CONCURRING

ALFREDO BELTRÁN SIERRA

Honorable Justice

MANUEL JOSÉ CEPEDA ESPINOSA

Honorable Justice

CONCURRING

MARCO GERARDO MONROY CABRA

Honorable Justice

DISSENTING

HUMBERTO ANTONIO SIERRA PORTO

Honorable Justice

ÁLVARO TAFUR GÁLVIS

Honorable Justice

DISSENTING

CLARA INÉS VARGAS HERNÁNDEZ

Honorable Justice

MARTHA VICTORIA SÁCHICA DE MONCALEANO

General Secretary

You can find more information about the liberalization of abortion in
Colombia and our other projects on Women's Link Worldwide's
web page: womenslinkworldwide@org

