



Summary of the Press Release on

Constitutional Court Ruling C-055 of 2022

(February 21, 2022)

I. RULING (RESOLVES):

Conditional enforceability of Article 122 of the Penal Code in the sense that abortion will be a crime when performed after the 24th week of pregnancy and, in all cases, this time limit will not apply to the three exceptions to the crime of abortion as stipulated in Ruling C-355 of 2006.

Additionally, the Court urged “Congress of the Republic and the national government to, without prejudice to the immediate execution of this ruling and in the shortest time possible, formulate and implement a comprehensive public policy—including the required legislative and administrative measures, as the case may be—to prevent the wide gaps in the protection of dignity and the rights of pregnant women as described in this ruling, and, in turn, protect the legal good of prenatal life (*bien jurídico de la vida en gestación*) without affecting such guarantees, based on the conditions referred to in the previous ruling.

“This policy must contain, at a minimum, (i) clear disclosure of the options available to pregnant women during and after pregnancy; (ii) the elimination of any obstacles to exercise the sexual and reproductive rights recognized in this ruling; (iii) the existence of pregnancy prevention and planning methods; (iv) sexual and reproductive education programs for all people; (v) accompanying measures for pregnant mothers that include adoption options, among others; and (vi) measures that guarantee the rights of those born in circumstances in which pregnant women wished to have an abortion.”

***It should be noted that the Court did not condition compliance with the ruling on the issuance of the comprehensive public policy. In addition, it defined the aim of the policy as guaranteeing women’s dignity and rights and, in turn, established “minimum” issues or guidelines that this policy must consider. Thus, it is understood that the ruling must be implemented immediately, and any regulations made by the government or Congress may not contradict or roll back that which has been recognized by the Court in this decision. The Court also did not establish a deadline for this policy’s formulation and implementation.

II. RES JUDICATA:

The Court determined that a substantive decision was appropriate because (i) the charges filed in the lawsuit were not evaluated in Ruling C-355 of 2006, and (ii) additionally, there was a change in



the constitutional interpretation of abortion and the legal context in which Article 122 of the Penal Code is situated.

III. LEGAL PROBLEM:

“It falls to the Court to determine if, despite the exceptions contained in the third resolutive paragraph of Ruling C-355 of 2006, the typification of consensual abortion, in the terms of Article 122 of the Penal Code, (i) is contrary to the obligation to respect the right to health and the reproductive rights of women, girls, and pregnant individuals (Articles 49, 42, and 16 of the Constitution); (ii) violates an individual’s freedom of conscience, particularly regarding the ability to act according to one’s convictions on reproductive autonomy (Article 18 of the Constitution); (iii) is incompatible with the preventive purpose of the punishment and does not meet constitutional requirements assigned to the *ultima ratio* character of criminal law (preamble and Articles 1 and 2 of the Constitution); and (iv) fails to recognize the right of equality for women in vulnerable situations and women with an irregular migrant status (Articles 13 and 93 of the Constitution, Article 1 of the American Convention on Human Rights [ACHR], and Article 9 of the Belém do Pará Convention).”

IV. GROUNDS:

1. Protecting the legal good of prenatal life is an imperative constitutional purpose (Article 11 of the Constitution and Article 4.1 of the ACHR).

Although the Court recognizes that (i) the aim of the crime of abortion is to protect the prenatal life through the threat of imprisonment and that (ii) this aim is constitutionally imperative, it emphatically indicates that the protection of this legal good does not have the same force during all stages of development and that, therefore, protection is gradual and incremental.

2. First charge: Alleged violation of the right to health (Article 49 of the Constitution) and the reproductive rights of women, girls, and pregnant individuals (Articles 42 and 16 of the Constitution)

The Court recognizes that the state’s duty to respect the right to health entails an obligation to remove obstacles, including legal ones, that hinder access to sexual and reproductive health services. Thus, the Court understands that the crime of abortion is precisely a barrier that limits access to the voluntary interruption of pregnancy (VIP), given the impact criminalization has on the practice of unsafe abortions that endanger the health, integrity, and life of women, girls, and pregnant individuals. In this regard, the Court notes that the crime of abortion acutely affects the right to health and that other means or legal alternatives, different than the criminal



option, are more effective in respecting and guaranteeing the protection of the legal good of prenatal life and are less harmful to women's rights.

3. Second charge: Alleged disregard of freedom of conscience (Article 18 of the Constitution)

The Court recognizes that decisions about maternity and reproduction (i) have a very personal impact on women and girls because they affect their life plans; (ii) are individual matters because they have physical and emotional consequences on women and girls' existence; and (iii) are non-transferable decisions because autonomy over these decisions cannot be transferred to a third party. Likewise, the Court understands that the decision to interrupt, or not interrupt, a pregnancy is "*an intimate decision closely linked to the personal value system*" of those who can become pregnant and essentially constitutes an expression of their reproductive autonomy and the implementation of their individual system of beliefs and values.

Thus, the Court notes that the crime of abortion, by trying and punishing women and girls for acting in accordance with their moral judgments or intimate convictions, seriously impacts their freedom of conscience since it ultimately imposes on them a specific way of proceeding with respect to pregnancy and maternity.

4. Third charge: Alleged failure to recognize the constitutional purpose of generally preventing punishment and the constitutional characteristic assigned to criminal law as an *ultima ratio* mechanism (preamble and Articles 1 and 2 of the Constitution)

The Court notes that the crime of abortion does not recognize the constitutional aim of generally preventing punishment, since it does not effectively lead to the protection of the legal good of prenatal life. Likewise, this crime, and the consequent lack of regulations on the matter, goes against the *ultima ratio* character of criminal law as: (i) it has given rise to wide gaps in protecting the legal good of prenatal life and women's dignity and rights; (ii) it has produced access barriers for the voluntary interruption of pregnancy in the three circumstances decriminalized by Ruling C-355 of 2006; (iii) it goes against women's dignity and is based on a suspicious criterion of discrimination: sex; and (iv) additionally, there are alternative mechanisms to criminal law that are less harmful to women's rights and more conducive to protecting the legal good of prenatal life.

5. Fourth charge: Alleged violation of the right to equality of women in vulnerable situations and women with an irregular migrant status



(Articles 13 and 93 of the Constitution, Article 1 of the ACHR, and Article 9 of the Belém do Pará Convention)

The Court recognizes that the criminalization of abortion disproportionately impacts women in the most vulnerable contexts, such as women with an irregular migrant status and women in a situation of inequality (insofar as they are the most criminalized and those who face the consequences of unsafe abortion). Thus, for the Court, this crime further exacerbates their situation of vulnerability.

6. Although the reasons given in relation to each of the charges show a *prima facie* contradiction between Article 122 of the Penal Code and the Constitution, which would justify the immediate exclusion of this provision from the legal system, the Chamber finds that such a consequence would absolutely sacrifice the imperative constitutional purpose it seeks to achieve: to protect the legal good of prenatal life. Consequently, it is appropriate to adopt a measure that, without sacrificing the protection of this legal good, avoids the wide gaps in protection for the rights and constitutional principles referred to in the four analyzed charges.

The Court indicates that the constitutional tension that exists between women's rights and the protection of the legal good of prenatal life cannot be resolved by granting preference to one of these, since it would produce the "absolute sacrifice of the other." For this reason, the Court proposes an intermediate solution that gives importance to the rights and values in tension, does not strip them of constitutional protections, prevents the wide gaps in protecting women and girls' rights and, in turn, protects the legal good of prenatal life without affecting such guarantees.

This intermediate solution proposed by the Court has three components: the first is that it uses as its starting point the exceptions recognized in Ruling C-355 of 2006, as extreme hypotheses of impacts on women's dignity; the second is that a system of time limits in which abortion is not considered a crime must be defined; and the third component consists of the formulation and implementation of a comprehensive public policy that includes measures related to sexual and reproductive health and education.



When determining the system of time limits, which is the second component of this intermediate solution, the Court takes into consideration two concepts: existence and autonomy. They are defined as follows:

(i) The concept of existence, which is associated with the idea of prohibiting the practice of consensual abortion from the moment in which life begins, which may be based on the notions of “fertilization”: the moment of sperm-egg fusion; “conception”: the moment in which the zygote is formed, a process that is completed in an estimated 23 hours following fertilization; and “implantation” or “nesting”: a process in which the zygote advances through the Fallopian tubes, penetrates the uterus, and implants itself, which can take approximately 14 days after fertilization.

*(ii) The concept of autonomy, which is associated with the idea of prohibiting the practice of consensual abortion at the moment when it is possible to consider that the life in formation no longer depends on the pregnant individual, that is, **when a greater probability (close to 50%) of autonomous extrauterine life is confirmed: a situation that has been demonstrated with greater certainty starting at the 24th week of gestation,** which corresponds to the most advanced stage of embryonic development.*

In view of the foregoing, the Court decides to adopt the concept of autonomy, and not that of existence, to define the system of time limits. This is because the concept of autonomy, in the Court’s opinion, (i) is the one that best corresponds to the idea of a gradual and incremental protection of prenatal life; that is, with the idea that life is a legal good that is protected at all stages of its development, but not with the same intensity, since it is not an absolute right; and (ii) to a large extent, this concept also protects the rights and values in tension (the rights and guarantees of women, girls, and pregnant individuals, and the legal good of prenatal life).

On the other hand, the Court reiterates that the concept of existence is not appropriate to define a time limit because (i) it does not give importance to the lack of protection of women and girls’ rights; (ii) “there is a problem of vagueness and of moral character about the moment in which life begins”; and (iii) “it is the most restrictive concept, not only because of the imminent nature of its occurrence, but also due to the low probability that the individual knows of their pregnancy.”

Finally, the Court notes a deficiency in the protections for women on their rights to sexual and reproductive health, which goes beyond the barriers associated with the outlined exceptions, and also underscores the absence of policies specifically aimed at guaranteeing the protection



of the legal good of prenatal life that are respectful of the rights of women, girls, and pregnant individuals and provide real alternatives to the voluntary interruption of pregnancy. In this regard, without prejudice to the immediate fulfillment of this ruling, the Court reiterates its call to Congress and the national government to formulate and implement a comprehensive public policy on the matter in the shortest time possible.

V. DISSENTING OPINIONS:

The dissenting opinions of Justice Pardo, Justice Ortiz, and Justice Ibáñez will be summarized below, as well as the concurring opinion of Associate Justice (*conjuez*) Ossa. It should be noted that dissenting and concurring opinions are NOT binding.

JORGE ENRIQUE IBÁÑEZ:

- **There is *res judicata*:** “The doctrine of *res judicata* applies with respect to that which was decided in Ruling C-355 of 2006, since it indicates identity of the subject matter and identity of the charges at suit. Additionally, he adds that, on this occasion, there is no demonstrated premise that would allow this concept to become more flexible, in accordance with what this Court established as of Ruling C-007 of 2016.”
- **The right to life is an absolute right:** “In accordance with the declarations, conventions, treaties, and international covenants on human rights and the 1991 Political Constitution, there is no higher good that is more important than human life, which is the foundation of all other rights. Thus, no judicial, international, or national court may claim the right to decide from what point on a life deserves constitutional protection *per se*. Human life must be respected and the exceptions permitted in Ruling C-355 of 2006 are valid.”
- **Unborn children are holders of fundamental rights:** “From the earliest stages of constitutional jurisprudence, this Court has recognized that the *nasciturus* (unborn child) holds fundamental rights based on the Constitution and international treaties on the matter.” (...) “This decision entails a regression in the protection of an unborn child’s rights, as well as in the obligation to protect life from the moment of conception as is laid out in Article 4.1 of the American Convention on Human Rights, in the terms indicated by the Inter-American Court of Human Rights, and in Articles 1, 11, and 44 of the Constitution, according to that which is laid out in the Constitutional Court’s established case law since 1993.”
- **It falls to Congress, and not the Court, to decide this matter:** “To criminalize or decriminalize abortion is a matter of the state’s criminal policy that falls to Congress of the Republic in exercise of its freedom to formulate legislation; Congress is responsible for analyzing, debating, and resolving this matter through a regulation with the force of law.”



CRISTINA PARDO:

- **There is *res judicata*:** She “considered that *res judicata* applied with respect to the decision adopted in Ruling C-355 of 2006. The majority ruling adopted on this occasion failed to weaken this doctrine of *res judicata* as: (i) it did not demonstrate that there has been any change in the control parameters, as the Constitution and the constitutional body of law remain unchanged, compared to the 2006 versions. (ii) Nor did she consider that there was a social change that required an evolutionary interpretation of the Constitution. (iii) Ruling C-355 of 2006 did address the issue of criminal law as *ultima ratio* and analyzed the violation of women’s rights to equality, freedom, freedom of conscience, and sexual and reproductive rights.”
- **There is an absolute right to life from the moment of conception:** “Justice Pardo defended the inviolability of human life from the moment of conception. She noted that the Court has disregarded the biological phenomenon of human life of the unborn child that appears in that moment (a life that is human because it has the human genome composed of 23 pairs of chromosomes, and independent because it has different DNA than its mother) and has conditioned its protection on being capable of independent extrauterine life.”

GLORIA STELLA ORTIZ:

- **There is *res judicata*:** She “considers that the majority of the Chamber failed to recognize that the constitutional doctrine of *res judicata* applied. Her opinion is that the Court has no jurisdiction to rule again on the constitutionality of Article 122 of the Penal Code, which was the subject of control and decision in Ruling C-355 of 2006. In particular, she explained that, in the 2006 decision, this Court studied: (i) women’s fundamental rights, in particular, the right to voluntary interruption of pregnancy in international law (legal basis 7); (ii) limits on legislative discretion over criminal matters (legal basis 8); (iii) human dignity (legal bases 5 and 8.1.); (iv) the free development of personality and freedom of conscience (legal bases 5 and 8.2); (v) the right to equality (legal basis 7); and (vi) the right to health (legal basis 8.3).” (...) “Judge Ortiz explained that, on this occasion, the charges being studied by the full Chamber coincide with those that were effectively analyzed by this Court in 2006. Contrary to the majority position, Justice Gloria Ortiz noted that there was no change in the national and international legal context likely to weaken *res judicata*.”
- **It falls to Congress, and not the Court, to decide this matter:** “This is a public policy matter that must be comprehensively regulated by Congress of the Republic. In this regard, it is clear to the Justice that the decision about the total decriminalization of abortion falls to the legislature, which must also determine the number of weeks allowed for practicing an abortion. This is



because bodies of democratic representation are those that, in accordance with science, must fully regulate the matter.”

PAOLA ANDREA MENESES:

- **There is *res judicata*:** “insofar as there is identity of the subject matter (Article 122 of the Constitution) and the same charges raised in the present case were studied by the Court in Ruling C-355 of 2006, there is constitutional *res judicata* with respect to the charges of violation of the rights to health and freedom of conscience, and violation of constitutional principles on the purposes of punishment and minimum constitutional standards of criminal policy. In addition, the justice disagreed that there has been a change in the Constitution’s material meaning or a change in the legal context, compared to 2006.”
- **There are no alternative measures to criminal law to protect the unborn child’s fundamental right to life.** “There is a lack of scientific evidence on the existence of other effective measures to protect, respect, and guarantee the prenatal life, a circumstance that is widely reprehensible as it produces a special lack of protection for the unborn child’s fundamental right to life without the minimum methodological guarantees that compel investigation into the existence of other means that challenge the necessary nature of the action being analyzed.”
- **Voluntary interruption of pregnancy is not a reproductive health service and, therefore, the criminalization of abortion does not impact women’s right to health:** “Justice Meneses Mosquera argued that it is not possible to affirm that the voluntary interruption of pregnancy, in any case, is a reproductive health service and, as a consequence, it cannot be argued that not decriminalizing the practice of abortion constitutes an impact on the right to health.”
- **The crime of abortion is not discriminatory:** She “explained that the purpose of the criminal offense of abortion is not to punish a woman for being a woman, but to punish anyone who affects the legal good of prenatal life.”
- **There is an absolute right to life from the moment of conception:** “the criminalization of abortion as of the 24th week of pregnancy produces a failure to protect the life of the unborn child, who is entitled to protection from the moment of conception in accordance with the provisions of Article 4.1 of the American Convention on Human Rights.”
- **It falls to Congress, and not the Court, to decide this matter:** “the Court is not in a position to decide the number of weeks at which it is possible to practice an abortion, nor to decide *ex ante* about public policy guidelines on the matter. On the one hand, Congress of the Republic, after democratic debate, is the body called to establish the terms, even if partially, in which abortion



is criminalized or decriminalized. On the other hand, it is up to the national government to establish the relevant public policy.”

VI. CONCURRING OPINIONS:

Concurring opinions are ALSO NOT binding.

JULIO ANDRÉS OSSA:

- **Decriminalization should have been extended until week 13, and Congress should have established legal treatment between weeks 14 and 23:** “Although his decision to support the majority decision was based on the impossibility of supporting those who intended to maintain the legal provision in its current wording, the associate justice argued that the Constitutional Court cannot strip Congress of its power to create legislation on the matter. In the associate justice’s view, although it is unconstitutional to punish a woman who has an abortion in the first 13 weeks of pregnancy with a custodial sentence and, rather, it is constitutional to punish her when the unborn child has reached 24 weeks, the legislature maintains an important margin to determine what the legal—not criminal—treatment of abortion should be between week 14 and week 23. In this sense, the position of Associate Justice OSSA SANTAMARÍA advocated for a tiered regulation to protect the unborn child, a gradual approach that did not fit within the majority position.”