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Judgment C-055-22
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COURT DECLARES ENFORCEABLE THE CRIMINALIZATION OF THE CRIME OF CONSENT ABORTION, IN THE SENSE THAT THE CRIME IS NOT CONFIGURED WHEN THE CONDUCT IS PRACTICED BEFORE THE 24TH WEEK OF GESTATION AND, WITHOUT SUBJECT TO THIS LIMIT, WHEN THEY PRESENT THE GROUNDS ADDRESSED BY JUDGMENT C-355 OF 2006.

FINALLY, THE COURT EXHORTED THE CONGRESS OF THE REPUBLIC AND THE NATIONAL GOVERNMENT TO FORMULATE AND IMPLEMENT A COMPREHENSIVE PUBLIC POLICY ON THE SUBJECT.

1. Accused Norm

"LAW 599 OF 2000
By which the Penal Code is issued
"**Article 122. Abortion.** The woman who caused her abortion or allows another to cause it, will incur in prison from sixteen (16) to fifty four (54) months. || to the same penalty will be subject who, with the consent of the woman, carry out the conduct foreseen in the previous paragraph". This provision had been declared conditionally enforceable by the Constitutional Court in Judgment C-355 of 2006, "with the understanding that no crime of abortion, when with the will of women, termination of pregnancy occurs in the following cases: (i) When the continuation of the pregnancy constitutes danger for the life or health of the woman, certified by a doctor; (ii) When there is serious malformation of the fetus that makes it unviable life, certified by a doctor; and, (iii) When the pregnancy is the result of a conduct, duly reported, constitutive of carnal access or sexual act without consent, abusive or insemination artificial or fertilized egg transfer non-consensual, or incest".

2. Decision

First. Declare the CONDITIONED ENFORCEABILITY of article 122 of the Law 599 of 2000 "by which the Penal Code is issued", in which sense that the conduct of abortion foreseen therein will only be punishable when performed after the twenty-fourth (24) week of gestation and, in In any case, this time limit will not apply to the three cases in which that Judgment C-355 of 2006 established that the crime of abortion, that is, "(i) When the continuation of the pregnancy constitutes a danger for the life or health of the woman, certified by a doctor; (ii) When there is serious malformation of the fetus that makes her life unviable, certified by a doctor; and, (iii) When the pregnancy is the result of a conduct, duly denounced, constituting carnal access or act sexual without consent, abusive or artificial insemination or transfer of non-consensual fertilized ovum, or of incest".

Second. EXHORT the Congress of the Republic and the national government, so that, without prejudice to the immediate fulfillment of this sentence and, in the shortest time possible, formulate and implement a public policy comprehensive – including the legislative and administrative measures that are required, depending on the case–, which avoids the wide margins of lack of protection for the dignity and rights of pregnant women, described in this providence and, in turn, protect the legal right of life in gestation without affect such guarantees, based on the conditioning referred to in the previous resolution. This policy must contain, at a minimum, (i) the clear disclosure of the options available to the pregnant woman during and after pregnancy, (ii) removal of any obstacles for the exercise of sexual and reproductive rights that are recognized in this sentence, (iii) the existence of instruments for the prevention of pregnancy and planning, (iv) the development of education programs in matter of sexual and reproductive education for all people, (v) accompaniment measures for expectant mothers that include adoption options, among others and (vi) measures that guarantee the rights of those born in circumstances of pregnant women who wished abort.

3. Synthesis of the fundamentals

The Court decides the claim of unconstitutionality filed against of article 122 of Law 599 of 2000, which establishes the crime of abortion consented, based on six charges of unconstitutionality.

Before addressing the substantive issue and in response to the arguments of some of the interveners and the Attorney General of the Nation, the Court examines some previous questions and concludes that: there is no absolute legislative omission in the terms proposed by the Attorney General of the Nation, only four of the six positions that were proposed are suitable and despite the existence of Judgment C-355 of 2006, it is from a pronouncement on the merits regarding the four charges suitable, since (i) the phenomenon of res judicata does not occur constitutional, to the extent that they are charges that were not valued by the Court in the aforementioned judgment and, in any case, (ii) shows a change in the material meaning of the Constitution and (iii) a variation in the normative context in which the defendant norm is inserted.

• **Study of the phenomenon of res judicata** Despite the existence of Judgment C-355 of 2006, a pronouncement on the merits regarding the four eligible charges since (i) these are charges that, strictly speaking, were not assessed by the Court in the aforementioned sentence and, in any case, (ii) there is evidence of a modification in the material meaning of the Constitution in terms of understanding the constitutional problem that supposes the crime of consented abortion and (iii) a change in the regulatory context in which article 122 of the Penal Code. These last two circumstances, as specified by repeatedly the Chamber, allow a substantive pronouncement regarding of suitable charges, despite the fact that a provision is demanded that was object of prior constitutional control –formal res judicata–.

The Chamber evidences a change in the material meaning of the Constitution in terms of understanding constitutional problems involved in the crime of consented abortion, as a consequence of the following four events.

In the first place, a deep jurisprudential transformation can be seen about the consideration of the right to health as a right fundamental autonomous, in terms of, in particular, judgments T 760 of 2008, C-313 of 2014 and T-361 of 2014. Secondly, after the year 2006 and through the resolution of specific cases, the jurisprudence Constitution has broadened its understanding of the problem constitutional presupposition of consented abortion, based on the close relationship that occurs between the behaviors that continue to constitute a alleged criminal and those that do not.[1] Third, as pointed out by the plaintiffs, there are international documents of different value regulations, which, unlike in 2006, have advocated for the decriminalization of abortion beyond the three grounds defined in the Judgment C-355 of 2006 and, therefore, affect a new understanding constitution of the phenomenon. Hence, as they point out, such claim find sufficient support in the International Law of Human Rights Humans. Finally, after 2006, it has been outlined with greater precision a constitutional jurisprudence to assess the violence of gender against women, of which women are especially repositories, the

[1] In this regard, the jurisprudential line constituted by judgments T-171 of 2007, T-988 of 2007, T-209 from 2008, T-946 from 2008, T-388 from 2009, T-585 from 2010, T-636 from 2011, T-959 from 2011, T-841 from 2011, T-627 of 2012, T-532 of 2014, T-301 of 2016, T-731 of 2016, T-697 of 2016, T-931 of 2016 and SU-096 of 2018 –as of as in judgments C-754 of 2015 and C-327 of 2016–,

judgments C-297 of 2016, C-539 of 2016, C-117 of 2018, C-519 of 2019, C 038 of 2021 and SU-201 of 2021.

There is evidence of a change in the normative context in which the article 122 of the Penal Code, as a consequence of the following four phenomena: (i) the issuance of the Statutory Health Law, of the year 2015. (ii) After Judgment C-355 of 2006, multiple organizations international organizations –including the Human Rights Committee Economic, Social and Cultural Rights, the Special Rapporteur on the right to everyone to the enjoyment of the highest attainable standard of health and the Committee for the elimination of all forms of discrimination against women – have raised the need to decriminalize abortion as a measure in favor of the sexual and reproductive health and rights of this population, as well as a way of acting against violence against women. (iii) The issuance of Law 1257 of 2008, in order, among others, to comply the international commitments of the State with respect to freedom, autonomy and sexual and reproductive health. Finally, (iv) the system of health has undergone profound changes in its structure and criminal policy has seen a reassessment of the sense of proportionality and the purposes of pain.

• Legal problem

It is up to the Court to determine whether, despite the conditioning contained in the third resolution of Judgment C-355 of 2006, the criminalization of consented abortion, in the terms of article 122 of the Penal Code, (i) is contrary to the obligation to respect the right to reproductive health and rights of women, girls and individuals pregnant women (articles 49, 42 and 16 of the Constitution); (ii) violates your freedom of conscience, especially in the face of the possibility of acting according to their convictions in relation to their reproductive autonomy (article 18 of the Constitution); (iii) is incompatible with the preventive purpose of the sentence and does not satisfy the constitutional requirements ascribed to the character of ultimate ratio of criminal law (preamble and articles 1 and 2 of the Constitution) and (iv) ignores the right to equality of women in situations of vulnerability and in an irregular migratory situation (articles 13 and 93 of the Constitution, 1 of the CADH and 9 of the Convention of Belem do Pará).

• **Specific case study**

In order to resolve the legal problem, as specified below, given that the protection of the legal right of life in gestation is a purpose constitutional imperative, it is up to the Chamber to assess whether the reasons that are adduced in relation to the four eligible charges actually present; that is, if, in effect, the current classification of the crime of abortion – which includes the conditioning to which he was subjected in Judgment C-355 of 2006– affects the constitutional guarantees that are alleged. If so, to least in one of the cases, what is appropriate is to assess whether it is a disproportionate impact –which, in principle, would justify the declaration of unenforceability of the provision – or if it is found justified in the protection of the constitutional purpose that it intends achieve: protect life in gestation – which would justify the declaration of enforceability of the rule with the Charter. It may also happen that, Despite evidence of such an affectation of those guarantees, the declaration of unenforceability generates a lack of protection for the compelling constitutional purpose that seeks to protect the criminal type, reason why a declaration of enforceability would be justified conditioned.

1. **The protection of the legal interest of life in gestation is an objective constitutional imperative (articles 11 of the CP and 4.1 of the ACHR)**

Article 122 of the Criminal Code pursues a constitutional purpose imperative that consists in protecting the juridical right of life in gestation, because by threatening to impose a prison sentence on the woman "That he caused her abortion or allowed another to cause it", as well as "whoever, with the consent of the woman, performs the conduct", intends that this is not carried out and, therefore, seeks that the pregnancy culminates with delivery, that is, with the birth of a new being.

The imperative nature of this purpose derives from the provisions of the Articles 11 of the Constitution and 4.1 of the American Convention on Human rights. In accordance with the first, "The right to life is inviolable" and according to the second, "Everyone has the right to that his life be respected. This right shall be protected by law and, in Generally, from the moment of conception. These provisions seek to protect life, including that which is in formation during the gestation stage. This is how things are, given that the norm defendant intends to discourage the practice of abortion, as a measure

conducive for the pregnancy to culminate in delivery, it is logical infer that it intends to carry out an imperative constitutional purpose, which is that of protecting life, in one of its stages of development. However, as the constitutional jurisprudence has specified and Inter-American law, life is a legal right that is protected in all stages of their development, but not with the same intensity.

This is why your protection through criminal law, as a constitutional purpose compelling, it is also gradual and incremental, depending on the stage of development in which an attack against her is presented and the circumstances concomitant with it.

Starting from this characterization of life in gestation as a constitutional imperative and meritorious of criminal protection, it corresponds assess to the Court how the protection of the aforementioned guarantee can enter in conflict with those constitutional provisions that serve as legal support to each of the four positions that were considered suitable.

2. **First charge: alleged violation of the right to health (article 49 of the COP) and the reproductive rights of women, girls and pregnant people (articles 42 and 16 of the CP)**

The duty to respect the right to health at the head of the State implies, among other things, the obligation to remove the regulatory obstacles that impede access to services necessary for women, girls and pregnant people enjoy reproductive health. As pointed out by many international human rights organizations, one of these barriers constitutes the criminalization of the voluntary interruption of pregnancy in the terms of article 122 of Law 599 of 2000, for having an impact on the practice of unsafe abortions in which health, integrity and life of this population are in danger.

Therefore, despite seeking to achieve a constitutional purpose imperative, such as the protection of the legal right of life in gestation, the provision demanded intensely affects the right to health referred to in article 49 above and reproductive rights, whose recognition is found in articles 42 and 16 of the Constitution, despite to exist more effective means to protect, respect and guarantee that constitutional purpose and that do not generate such an intense affectation in these rights, such as the adoption of public policies aimed at protect unborn life by other means that provide true

alternatives to the interruption of pregnancy, as well as for carrying out this procedure within the framework of reproductive health services. Is In other words, the Legislator, faced with a factual reality that intensely affects fundamental rights, has other legal alternatives, other than the criminal route –without excluding it in certain cases[2]–, less harmful for those rights and that, therefore, are proportional.

3. Second charge: alleged disregard of the freedom of conscience (article 18 of the CP)

The power of the Legislator in criminal matters is not absolute and its limits are become more evident when the typification of behaviors as crimes interferes with the exercise of freedoms intrinsically associated with human dignity, including freedom of conscience, disposition constitutional autonomy, under the terms of its article 18.

To assess whether a person, in the abstract, can legitimately act or refrain from doing so in order to preserve his system of convictions and beliefs, the importance of the legal asset that is wanted must be assessed preserve, in the face of the sacrifices that derive from the provision that interfere with that decision. In this exercise, the guarantee and the weight of the freedom of conscience will be greater the more intense the connection with bodily, physical and emotional integrity of the person who alleges their protection of him, and with his human dignity.

Freedom of conscience, regarding the decision to procreate or not doing so is a very personal, individual and non-transferable matter that corresponds to one of the dimensions of reproductive rights, specifically, reproductive autonomy, with respect to which it is It is forbidden to intervene in the State or in individuals using the coercion or violence. The decision to carry a pregnancy to term or of not doing it is a matter that impacts who is gestating in a way very personal because it affects your life project; It's an individual matter because it has physical and emotional consequences on their own existence and is non-transferable because the autonomy of the decision cannot be transferred to a third party, except in exceptional cases in which a prior consent or there are strong reasons to infer it. It is, then, a decision intimate and closely linked to the system of personal values

[2] Inter alia, the practice of abortions without the consent of the pregnant person or the injuries that violate the fetus. At present, the first conduct is typified in article 123 of the Penal Code and the second in articles 125 and 126.

of someone who can gestate and constitutes one of the main expressions of the human nature, and both those who decide to procreate voluntarily, how those who decide not to exercise their sexual and reproductive freedom and in it they put into practice their individual system of beliefs and values. This decision, obviously intimate, constitutes a manifestation of the reproductive autonomy, even of couples, closely linked to the system of personal values of who can gestate.

The norm demanded allows judging and sanctioning someone who decides act in accordance with her moral judgments or intimate convictions, which affects intensely the aforementioned freedom since it gives rise to the imposition of a specific way of proceeding, which in this case implies having to assume maternity –ultimate purpose that the criminal type intends to carry out, even in against one's own will, an aspect that intensely affects the freedom of conscience of women, girls and pregnant people.

4. Third charge: alleged ignorance of the constitutional purpose of general prevention of the sentence and the constitutional characteristic ascribed to criminal law as an ultima ratio mechanism (preamble and articles 1 and 2 of the CP).

Criminal policy comprises the set of responses that the "State considers it necessary to adopt to deal with behaviors considered reprehensible or causing social damage in order to guarantee the protection of the essential interests of the State and the rights of resident in the territory under its jurisdiction."[3] One of the means for concreteness is constituted by the exercise of legislative competence to define what behaviors constitute crimes and what the penalties should be applicable, as suitable, necessary and proportional measures to protect certain legal assets.

In accordance with the jurisprudence of this Court, that competence finds formal and material limits of a constitutional nature, which can be redirected to the requirements of the preamble and articles 1 and 2 of the Charter, which establish human dignity as the foundation of the State and to the protection of the rights of the people its essential purpose, of there that it is two fiduciary mandates in the exercise of the competences of the authorities, among them, the Legislator, when typifying the crimes.

[3] Judgment C-646 of 2001, reiterated, among others, in judgments C-936 of 2010 and C-224 of 2017.

Presumed ignorance of the constitutional purpose of prevention of the penalty by article 122 of the Penal Code. The actual classification of the crime of abortion is not conducive to achieving the purposes of the sentence, since, despite the fact that the criminal type seeks to protect the life in gestation, it is not clear that the current form of criminalization of conduct is effectively conducive – that is, suitable – for the achievement of those purposes, in particular that of general prevention, as yes, the intense affectation that it produces in the rights to health is evident, reproductive rights and freedom of conscience that has been made reference. In other words, the criminalization of consented abortion does not is effectively conducive to protect the legal right of life in gestation, if one takes into account its low incidence in compliance of the purpose of general prevention of the penalty ascribed to its typification.

Alleged contradiction of article 122 of the Criminal Code with the character of ultima ratio of criminal law, a constitutional characteristic attached to its setting. The subsidiary nature of criminal sanctions requires that, Before resorting to the punitive power of the State, resort to "other controls less burdensome"[4]; therefore, if there are "other preventive means equally suitable, and less restrictive of freedom"[5], the intervention penalty is disproportionate.[6] In the present case, although the provision defendant seeks to achieve an overriding constitutional purpose, which is to protect the legal right of life in gestation, makes a primary use ratio of criminal law incompatible with the Constitution, for four fundamental reasons.

(i) The gaps in the regulation to protect the legal interest that currently it is intended to protect with the criminalization of abortion consent – exclusively by recourse to criminal law – have given rise to wide margins of lack of protection for this and for the dignity and rights of women, including couples. The way of current regulation of this social problem, in the terms of article 122 of the Penal Code, supposes a resignation to the democratic exercise in one one of the most sensitive issues for Colombian society, which is far from its compatibility with an adequate constitutional exercise of the right penal as *ultima ratio*.

[4] Cited in Sentencia C-742 de 2012
[5] Sentencia C-070 de 1996.
[6] Cfr., in particular, las Sentencias C-897 de 2005 y C-575 de 2009, reiterated in Sentencia C-233 de 2019

(ii) The lack of positive legislative regulation of the social problems that supposes the practice of consented abortion has been more evident with after the issuance of Judgment C-355 of 2006, since it has given rise to barriers to access for the voluntary termination of pregnancy in the three cases in which the Court partially found Article 122 of the Penal Code is incompatible with the Constitution, circumstance that, in turn, conflicts with the dignity of women and, therefore, with the character of ultima ratio that must characterize the penal regulation.

(iii) The defendant provision supposes the exercise of the punitive power of the State as a prima ratio since it does not value in the typification of conduct consented abortion the following constitutional reasons relevant: (a) human dignity – in particular, of women and girls – , as a material criterion that explains the character of ultima ratio of the right and (b) that the classification of the conduct is based on a criterion suspected of discrimination: sex.

In relation to the first, the choice of a life plan "constitutes a limit to the freedom of configuration of the legislator in criminal matters"[7] and, therefore, Therefore, its assessment is necessary for the purposes of typifying a behavior penal as that of consented abortion. The opposite can lead to tolerating and perpetuate discriminatory conduct against women and girls, whether that due to their reproductive and gestational capacity are qualified as active subject of the crime -aspect referred to below- [8]. In relation to the second, recognizing the dignity of women and girls and implement measures for its effectiveness leads to materialize a commitment that the Colombian State has assumed[9] in consideration of the historical discrimination that they have suffered and that has based the adoption of measures to guarantee their legal protection, which, in addition, must be consistent and compatible with the exercise of criminal law as last ratio. Therefore, in the criminalization of consented abortion, the

[7] Judgment C-355 of 2006.
[8] Cf., in what is pertinent, I/A Court HR. Case of Artavia Murillo et al. ("In Vitro Fertilization") vs. Costa Rica, Judgment of November 28, 2012, fj. 142.
[9] This is guaranteed in articles 13 and 43 of the Constitution and in the conventions on the Elimination of All Forms of Discrimination Against Women –ratified in Colombia through Law 51 of 1981– and the Inter-American Convention to Prevent, Punish and Eradicate violence against woman, Convention of Belém Do Pará –ratified in Colombia through Law 248 of 1995–.

Legislator must weigh, in addition to the requirements arising from the dignity of women and girls –referred to above– that the typification of the conduct is based on a criterion suspected of discrimination: the sex, in the terms provided by article 13, paragraph 1, of the Constitution. This form of penalty ignores that any distinction originating in the sex, which undermines or annuls the exercise of other rights, can be a discriminatory measure and ignore that the State must guarantee the women a life free of violence. Therefore, the distinctions made by the Legislator based on this element constitute a "suspicious" criteria, which, prima facie, "are presumed unconstitutional",[10] except in the case of measures that promote material equality.[11] In relation to this aspect, the precedents are especially relevant. contained in judgments C-117 of 2018, C-519 of 2019 and C-038 of 2021. Not considering this relevant circumstance for the definition of the criminal type supports the thesis that in the current typification of the crime, the criminal law as a prima ratio mechanism.

(iv) The criminalization of consented abortion, in the terms of article defendant, is not in all cases a necessary measure, since there are less damaging alternative mechanisms to achieve an analogous standard of protection that the one that provides the exercise of criminal law and more benign with the rights to health, reproductive rights and freedom of conscience enshrined in the Constitution, as well as with the achievement of the purposes of the sentence, in particular that of general prevention.

5. Fourth charge: alleged violation of the right to equality of women in a situation of vulnerability and in an irregular migratory situation – Articles 13 and 93 of the CP, 1 of the ACHR and 9 of the Convention of Belém do Para.

The criminalization of consented abortion is in force from the first Penal Code of 1837, issued shortly after the formation of Colombia as an independent republic. That is, it was regulated when the representation of women in legislative bodies was null and, from then, it has remained in the legal system only with a few variations. Currently, except for very exceptional cases identified by the constitutional judge –those provided for in Judgment C-355 of 2006–, in the exercise of the state ius puniendi maintains the policy of submitting the

[10] 10 Judgment C-519 of 2019.
[11] 10 Judgment C-519 of 2019.

> woman to a custodial sentence if she decides not to continue with the gestation process, penalization that has a differential impact – most obviously disproportionate – to the most vulnerable women, among these those in a situation of irregular migration, as evidenced of the information provided to the process. As derived from this information official, women denounced for the crime of consented abortion and those who more serious consequences they suffer in their health are exposed to factors intersectional patterns of discrimination that make them even more vulnerable. By these intersectional factors, the categorical prohibition of abortion consent, foreseen in the normative content object of control, affects in a particularly serious and evident manner to this population, whose penalization further exacerbates their situation of vulnerability.

6. Although the reasons stated in relation to each of the charges show a prima facie contradiction of article 122 of the Criminal Code with the Constitution, and that would justify the immediate exclusion of the provision of the legal system, finds the Chamber that said consequence would absolutely sacrifice the constitutional purpose imperative that it intends to carry out: to protect the legal right of life in gestation. Consequently, what is appropriate is to adopt a measure that, without sacrificing the protection of this legal asset, avoid wide margins of lack of protection for the rights and constitutional principles referred to in the four charges analyzed.

In this case they are in tension, on the one hand, the constitutional purpose imperative that article 122 of the Criminal Code intends to carry out, including the conditioning to which he was subjected in Judgment C-355 of 2006: protect the legal right of life in gestation, by penalizing of consented abortion – except in the three cases dealt with in the aforementioned sentence–, with the values and constitutional principles to which it was made reference in each of the fourth suitable positions and widely developed.

For the reasons stated in the analysis of each of these charges, in the Currently, despite the conditioning that article 122 was subject to of the Criminal Code in Judgment C-355 of 2006, the provision demanded gives rise to intense effects on fundamental rights, values and constitutional principles on which the aforementioned charges are based. Ignoring this constitutional reality supposes granting a preference tacit to the imperative constitutional purpose that the demanded provision.

Consider the case as a comparison of intensities, in which you have constitutional preference that which is affected in a way more intense –in this case the guarantees represented by the four charges analyzed–, in comparison with the protection granted by the provision sued to the legal asset that it intends to protect –life in gestation–, is to oversimplify the competence of constitutional control that exercised by the Court, and to sacrifice in a high degree the Legislative competence, so towards the rule of law.

This constitutional tension cannot be resolved by preferring of any of these magnitudes because it would mean the absolute sacrifice of the other. In other words, the preference of one of these extremes generates the absolute sacrifice of the other which, without a doubt, reduces material effectiveness to the Constitution, regardless of which of them corresponds to the preference. If the preference corresponds to life in gestation –and, therefore, Therefore, the declaration of simple enforceability of the norm is justified–, it is fail to consider the important reasons set forth in analyzing the four suitable charges, which show the intensity in which the current typification of abortion crime –including the conditioning to which she was subjected in the year 2006 – affects fundamental rights, principles and values constitutional that each one of them supposes. If the preference is given to the latter, for the very powerful reasons developed when analyzing each one of these charges –and, therefore, the declaration of unenforceability will be justified with immediate effect of the disposition–, a measure of protection that has been considered relevant to discourage the practice of consented abortions that ultimately frustrates the expectation of the birth of a new being.

These reasons justify the need not so much to opt for the declaratory of simple enforceability of the demanded provision, or of its immediate non-enforceability, but to achieve an intermediate formula that gives relevance to each of the magnitudes in tension, in such a way that, at difference of subtracting constitutional protection -because of the result would follow from granting preference to one of these extremes– a greater realization of the totality of values in tension. In other terms, it obtains a constitutional optimum when instead of sacrificing completely one of the ends in tension, a formula is sought which, despite their reciprocal sessions, gives rise to a better aggregate constitutional result: that it avoids the wide margins of lack of protection for the guarantees dealt with by the four positions analyzed

and, in turn, protect the legal right of life in gestation without affecting such guarantee.

The starting point of this constitutional optimum, due to the particular circumstances of this case, is the conditioning to which he was subjected the standard demanded in Judgment C-355 of 2006. This standard, which contains a timeless causal system-in the sense that, proving the cause, regardless of the time of gestation, is from the voluntary interruption of pregnancy–[12], must integrate the optimal constitutional since it was established by the jurisprudence from the idea that these assumptions constitute the "extreme hypotheses of affectation of [the] dignity" of women.[13]

Now, given this starting point, in particular, there can be two elements that complement the constitutional optimum, through an additional intervention of the Court in the requested provision: (i) the definition of a system of deadlines for the practice of abortion consent is not considered typical behavior or (ii) a regulation of public policy that contemplates measures related, among others, to sexual and reproductive health and education; pregnancy prevention not wanted; family planning and the responsible definition of time to procreate and the desired number of children; motherhood without risks and prenatal assistance and the different alternatives for women, girls and pregnant people who are in conflict with pregnancy.

Both correspond to alternatives that they consider relevant. constitutional the arguments of the four charges analyzed and that, Therefore, they seek a better balance than the current institutional arrangement defined by article 122 of the Penal Code. The first alternative allows resolve in a more adequate way the abstract constitutional tension that is presented, as specified below, and that bases the declaration of conditional enforceability of the provision. The second justify the warrant that is made in the operative part to the Legislative and the National government

[12] This has been the interpretation that constitutional jurisprudence has granted to such grounds in the exercise of its competence to review guardianship, in particular, in judgments T-946 of 2008, T 841 of 2011, T-301 of 2016, T-731 of 2016 and SU-096 of 2018. In the latter, emphatically, if points out: "The jurisprudence in force does not impose limits on the gestational age for carrying out the pregnancy termination procedure [in the three cases dealt with in Judgment C-355 of 2006]".
[13] Judgment C-355 of 2006.

In the system of terms, there are essentially two normative concepts, with constitutional relevance, which serve as a foundation for models alternatives to resolve the tension between the legal rights to which referenced:

(i) The concept of existence, which is associated with the idea of prohibiting practice of consented abortion from the moment life begins, that can be based on the notions of "fertilization" – moment of the fusion of the ovum and the spermatozoid–, "conception" – moment in which the zygote is formed, a process that is estimated to culminate in 23 hours after fertilization– and "implantation" or "nesting" – process in which the zygote advances through the fallopian tubes, enters the uterus and is implanted there, which can last around 14 days after the fertilization.[14]

(ii) The concept of autonomy, which is associated with the idea of prohibiting practice of abortion with consent at the moment in which it is possible consider that the dependency of the life in formation of the pregnant person, that is, when a greater probability of extrauterine autonomous life (close to 50%), a circumstance that has been evidenced with greater certainty from the 24th week of gestation, which corresponds to the most advanced stage of embryonic development. [15]

For the Chamber, the concept that allows a constitutional optimum to resolve the tension to which reference has been made is that of autonomy, which corresponds to the moment in which there is a greater probability of life extrauterine autonomous of the fetus and, in addition, it is the one that best corresponds with the idea of gradual and incremental protection of life in gestation, referred to above.

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[14] Cf., in what is pertinent, I/A Court HR. Case of Artavia Murillo et al. ("In Vitro Fertilization") vs. Costa Rica, Judgment of November 28, 2012, fj. 180.

[15] This gestational limit for the practice of abortion has been adopted, among others, in the Netherlands, in several states in the United States – recently, for example, in the State of New York, in the year 2019–, in several of the provinces and territories of Canada, in Singapore and in some states of Australia, as in the state of Victoria. This concept, also associated with the voice of "viability", was decisive for the definition of the limit in which the interest was considered justified state in protecting life in gestation and, therefore, allow the states of the federation to prohibit the practice of abortion, even with the consent of the pregnant person, in the cases Roe vs. Wade (1973) and Planned Parenthood v. Casey (1992), of the Supreme Court of the United States. In the first, In view of the state of the art at that time, the term "feasibility" was set at the week 28 of gestation; in the second, as a consequence of advances in medical technology, such term was considered to occur sometime between weeks 23 and 24 of gestation.

The other concept, that of existence, does not allow for a constitutional optimum, given that it does not give adequate relevance to the reasons that substantiate the four charges of unconstitutionality that were extensively analysed. In addition, a problem of indefiniteness is inherent to it, of moral character, about when life begins; equally, in any of the assumptions that serve as its foundation, it is the most restrictive, not only because of the imminence of time for its configuration, but due to the lesser possibility that the pregnant person knows her status, as well as in the aforementioned stages of gestation are the ones in which the highest percentage of miscarriages, and in those with no interferes with the will of the pregnant person, which severely restricts intense possibility that it makes autonomous decisions before said moment.

If a constitutional optimum is sought, which abstractly protects both magnitudes in tension, the fundamental point of the distinction is not may be other than the one in which it is possible to consider that the dependency of the life in formation of the pregnant person. Given the greater probability of extrauterine independent life, the preference of the protection of the imperative constitutional purpose that the article 122 of the Penal Code is maximized. This is so, since there will be a greater probability of protection of the imperative constitutional purpose that the criminal type intends to achieve: that the pregnancy culminates with delivery, that is, with the birth of a new being. if it happens preference to the protection of life in formation in earlier stages, constitutional protection to the bundle of rights, principles and values that underlying the four charges of unconstitutionality analyzed are intensely affects.

This idea of privileging the concept of autonomy is equally consistent with the thesis widely developed above, according to which, the life is a legal asset that is protected at all stages of its development, but not with the same intensity, [16]since it is not a right absolute. [17] This is why its protection through criminal law, as

[16] Cf., in this regard, the judgments cited therein and the interpretation contained therein of articles 11 of the Constitution and 4.1 of the ACHR: judgments C-355 of 2006, C-327 of 2016 and judgment of 28 of November 2012 of the Inter-American Court in the case of Artavia Murillo and Others (“In Vitro Fertilization”) vs. Costa Rica.

[17] The Chamber ruled in this regard in judgments C-239 of 1997, C-177 of 2001, C-251 of 2002, C-899 of 2003, C-355 of 2006, C-233 of 2014, C-327 of 2016, C-430 of 2019 and C-233 of 2021.

compelling constitutional purpose, is also gradual and incremental. is this double condition that allows a legal – and not moral – solution to the tension that is evident and that allows a constitutional optimum to the situation of lack of protection of the rights and guarantees of women, girls and pregnant people, and the ineffectiveness of the criminal response to protect the legal right of life in gestation.

For the reasons stated, the constitutional optimum that has been made reference is obtained by declaring the conditional enforceability of the norm that is demanded.

Finally, the Court cannot ignore -because that is how it was accredited in the process – that women, girls and pregnant people currently suffer a lack of protection regarding their rights to sexual health and reproductive health, which goes beyond the barriers to access to the interruption voluntary pregnancy in the three hypotheses provided for in Judgment C-355 of 2006, and that have been identified by this corporation in sentences of guardianship review. Furthermore, it cannot ignore the absence of policies specifically aimed at guaranteeing the protection of the legal interest of the life in gestation that, in contrast to the penal sanction that is declared conditionally enforceable in this sentence, are respectful of the rights of women, girls and expectant mothers and provide true alternatives to voluntary termination of pregnancy. Due to the serious omission of the Legislator in regulating the matter, despite the exhortations made by this Court, the Court reiterates its call and extends it to the national government to that, without prejudice to the immediate fulfillment of this sentence and, in the in the shortest possible time, formulate and implement a comprehensive public policy in the matter.

4. Salvage or vote clarifications

Judges PAOLA ANDREA MENESES MOSQUERA, GLORIA STELLA ORTIZ DELGADO AND CRISTINA PARDO SCHLESINGER, as well as Judge JORGE ENRIQUE IBÁÑEZ NAJAR saved their votes in the decision. Judge DIANA FAJARDO RIVERA, the Judge ALBERTO ROJAS RÍOS and Associate Judge JULIO ANDRÉS OSSA SANTAMARÍA clarified their votes, while Judge JOSÉ FERNANDO REYES CUARTAS reserved the possibility of clarifying his vote.

Judge JORGE ENRIQUE IBÁÑEZ NAJAR withdrew from the decision adopted majority by the Plenary Chamber of the Constitutional Court in this process. In the first place, as regards the preliminary issues of the

case, he considered that the phenomenon of res judicata was configured in in relation to what was decided in Judgment C-355 of 2006, since it warns identity of object and charges. Additionally, he adds that in this opportunity does not demonstrate any assumption that allows flexibility in this concept, in accordance with the provisions of this Corporation from of Judgment C-007 of 2016.

Secondly, regarding the merits of the matter, in the opinion of the magistrate Ibáñez Najar, in accordance with the Declarations, Conventions, International Human Rights Treaties and Covenants and the Constitution Policy of 1991, there is no higher good more important than human life which is the foundation of all other rights, so not even a judicial court, international or national, can claim the right to determine since when a life deserves constitutional protection per se. As the jurisprudence and legal doctrine have recognized universally accepted, there is no more universal good or right than of the fundamental right to life. Human life is prior to law. Without the existence of human life there can be no rights, no freedoms, No duties, no obligations. Human life must be respected and are valid the exceptions admitted in Judgment C-355 of 2006.

Thus, Judge Ibáñez Najar indicated that without prejudice to guaranteeing as should be done, the rights of women to life, to a dignified life, to equality, to the free development of her personality, to sexual freedom and reproductive health, to health, to education, to the free development of personality and other related rights of which they are holders, the decriminalization of abortion based on a system of deadlines until the 24th week of gestation without any reason for unconstitutionality, unreasonably and disproportionately affects the constitutional and conventional obligation to protect the life of the is about to be born in that period and correlatively their rights to life, to human dignity and health, among others. The respectable arguments invoked in the judgment for this purpose do not constitute grounds for unconstitutionality and therefore could not be addressed by the Court to base on them a judicial decision in the exercise of control abstract of constitutionality, which is why they do not resolve the tension between the aforementioned obligations to protect the right to life and the statements of fundamental rights.

The right to life, in addition to being part of customary law international, is enshrined in numerous international treaties of

human rights. For example, the Universal Declaration of Rights Human Rights in its article 3 states that every individual has the right to life. In turn, its 6th article provides that "every human being has the right, in everywhere, to the recognition of his legal personality." For his part, the International Covenant on Civil and Political Rights states in its article 6.1 that "the right to life is inherent to the human person. This right will be protected by law. No one can be deprived of life arbitrarily."

In turn, the Declaration of the Rights of the Child indicates, in its principle number 4, that "[t]he **child** must enjoy the benefits of social security. He shall have the **right** to grow and develop in good health; to this end Both him and his mother should be provided with special care, **including prenatal care** and postnatal care."

In the same sense, the Convention on the Rights of the Child refers in different occasions to the protection of the right to life. So in his preamble states that, "[b]earing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, due to his physical immaturity and mental, needs special protection and care, including proper legal protection, both **before** and after birth.

In addition, in its article 6 it provides that "the States Parties recognize that all child has the intrinsic right to life", and in its article 24.2.d it states that States Parties must ensure prenatal and postnatal health care suitable for mothers.

Finally, at the regional level, the American Convention on Human Rights Human Rights provides, in its article 4.1, that "[e]veryone has the right to that her life be respected. This right shall be protected by law and**,** in general, **from the moment of conception**. No one can be deprived of life arbitrarily." Thus, international and regional instruments are different of human rights that consecrate the special and inherent protection of the right to life of the human being, and in particular, of the right to life of children and adolescents, as subjects that require special protection due to the special situation of vulnerability in which find.

The Court has repeatedly protected the rights to health and life of women and children. In particular, in the most recent case law, has provided that the authorities and individuals who provide the service public health, have the obligation by constitutional mandate to protect in a special way the subjects that are part of these two population groups, without differentiating between the rights of the **nasciturus** and those of children and adolescents.

From the earliest stages of constitutional jurisprudence, this Corporation has recognized the ownership of the fundamental rights of the **nasciturus** based on the Constitution and treaties international on the matter. Thus, he pointed out that the Constitution protects the unborn in the Preamble and in article 11 (of the right to life) directly, and indirectly in article 43 with the protection of the pregnant woman. In addition, he has pointed out that "[t]he obligation to ensure the life of the **unborn** does not respond to a simple food obligation, since the mother requires the care permanent, of a constant medical surveillance that guarantee him in minimal care delivery and early care of the child. (...)".[18]So, it is not necessary to ensure job stability parents, to guarantee decent living conditions to the moment of her birth, but also, women must be guaranteed pregnant woman the necessary medical care, before and after birth, in order to protect the life of the unborn child.

The Court has been emphatic in pointing out that the **nasciturus** "is protected by the spectrum of privileges that the Fundamental Charter reserves for the kids. [... this because] it is a subject of rights insofar as it is a individual of the human species."[19] Thus, the Court has recognized that they are several constitutional provisions that are responsible for their protection, while "article 43, when referring to the protection of pregnant women, and article 44, when it guarantees children the right to life, does not do nothing but strengthen the premise that individuals who have not yet they were born, for the simple quality of being human, they are guaranteed from the very moment of conception the protection of their rights fundamental (…)". However, this Corporation has also been clear in pointing out that, in any case, the constitutional judge must analyze in each specific case the alleged fundamental rights, to determine which

[18] Constitutional Court, Judgment SU-491 of 1993.
[19] Constitutional Court, Sentence T-223 of 1998.

can and cannot be required before birth.[20] The above, all time that, according to the jurisprudence, the patrimonial rights of legal order that hang over the nasciturus only become effective if the birth, while, on the contrary, the fundamental rights under the aforementioned conditions may be enforceable from the moment that the individual has been conceived.[21]

In the framework of the tension that arises between sexual rights and reproductive rights of women and the obligation to protect the right to life and the guarantee of the rights of the unborn, the solution adopted results in the total prevalence of one right over another, in the that any kind of value or importance is subtracted from life among the moment of conception understood in the terms indicated by the jurisprudence of the Inter-American Court of Human Rights and accepted by constitutional jurisprudence. This period established by the Full Chamber against the crime of abortion ignores the importance it has embryonic life, to guarantee only fetal life from the week 24. The Judgment debated and voted on on the date does not any reason that allows one to infer why the life of the person being protected is being protected. unborn child from the first day of the 24th week but the life of the unborn until the previous day. So this determination implies a regression in terms of protection of the rights of the unborn, as well as against the obligation to protect the life from conception provided for in article 4.1 of the Convention American Human Rights, in the terms indicated by the Court Inter-American Court of Human Rights and in articles 1, 11 and 44 of the Constitution, as foreseen by the reiterated jurisprudence of the Court Constitutional since 1993.

Although the Judgment warns of the need to protect the good juridical view of life in gestation as an imperative constitutional purpose (articles 11 of the CP and 4.1 of the ACHR), finally with the decision contained in the operative part he does not protect himself and what is said in the part motivates then becomes mere rhetoric that does not serve to justify the decision made.

In force of the 1991 Constitution, the Constitutional Court has admitted that the State is constitutionally empowered to criminalize abortion

[20] Constitutional Court, Sentence T-223 of 1998.
[21] Constitutional Court, Judgments T-223 of 1998 and T-588 of 2004.

in order to provide protection against human life, therefore, criminalize or decriminalizing abortion is a matter of the criminal policy of the State that corresponds to define the Congress of the Republic in exercise of the freedom of normative configuration; it is to this one that it is up to analyze, discuss and resolve this issue through a regulation with the force of law. For the same, the disposition of a system of terms against the crime of abortion as the one that has been indicated in the sentence, is part of the freedom of configuration of the Legislator, in accordance with the reiterated line jurisprudence that the Court has developed regarding jurisdiction and autonomy of the Congress of the Republic to adopt legal rules in this matter in development of the criminal policy of the State.

The Court, as a constitutional court, cannot then claim this competence of the legislator, it is a penalty to exceed the limits that Articles 113, 121 and 241 of the Constitution impose and this is not purged with I exhort the Congress of the Republic and the National Government to formulate or implement a comprehensive public policy that avoids the broad margins of lack of protection that the same decision-maker warns and recognizes who stand for both the dignity and rights of women, girls and pregnant people as for life in gestation.

Judge **CRISTINA PARDO SCHLESINGER saved her** vote by considering that there was res judicata with respect to the decision adopted by the Sentence C-355 of 2006. The sentence adopted by the majority in this occasion did not succeed in weakening this figure of res judicata, because: (i) It did not show that there was any change in the control parameter, while the Constitution and the constitutional bloc remain unchanged, with respect to those existing in 2006. (iii) Neither considered that it would mediate a social change that would require a evolutionary interpretation of the Constitution. (iii) Judgment C-355 of 2006 did address the issue of Criminal Law as a last resort and analyzed the violation of the rights to equality, liberty, freedom of conscience, and the sexual and reproductive rights of women, including reproductive self-determination, so on these rights there was a previous pronouncement of the Court that prevented the return to analyze the respective charges set forth in the new lawsuit.

Additionally, given that the majority decision adopted in this occasion decriminalized abortion in a general way before the twentieth fourth week, Judge Pardo defended the inviolability of human life from the moment of conception. She noted that the Court

has unknown biological phenomenon of human life of the nasciturus that appears from that moment (life that is human because it possesses the human genome composed of 23 pairs of chromosomes and independent for possessing a different DNA from that of his mother) and has conditioned his protection to be capable of independent extrauterine life.

With the foregoing, the Court has subordinated the protection of life to a condition (extrauterine viability) that does not determine the presence of life human. Indeed, the simply environmental dependency that can have the unborn human being with respect to his mother (or another environment, such as another womb other than its mother's or some technology that allows it to survive, such as an incubator) does not constitute an essential element to establish the presence of a human being and the necessary protection it deserves under the provisions of Article 11 of the Political Constitution. Nor the stage of life through which it passes a human being can be the basis for granting or denying protection. Human life, like biological life, is a process and must be respected in all its phases.

The right to dispose of a human life for the sole reason of having less than twenty-four weeks of gestation, arguing that the only freedom of the mother must prevail over the life of her son, it did not exceed, in Judge Pardo's opinion, no judgment of proportionality.

Justice **GLORIA STELLA ORTIZ DELGADO saved her vote** because she considers that the majority of the Chamber did not know what operated the phenomenon of res judicata constitutional. She believes that the Court does not have jurisdiction to pronounce again on the constitutionality of article 122 of the Penal Code, which was subject to control and decision in Judgment C-355 of 2006.

In particular, she explained that in the 2006 decision this Body studied: (i) the fundamental rights of women, in particular, the right to Voluntary termination of pregnancy in international law (legal basis 7); (ii) the limits to the freedom of configuration of the Legislator in criminal matters (legal basis 8); (iii) human dignity (legal bases 5 and 8.1.); (iv) the free development of the 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).

The direct confrontation between the Constitution and the charges raised in that opportunity led the Court to condition the criminal type of abortion and decriminalize the IVE in three particular circumstances, namely: (i) when the continuation of the pregnancy constitutes a danger to the life or health of the woman; (ii) when there is serious malformation of the fetus that makes it unviable her life; and (iii) when the pregnancy is the result of conduct constituting carnal access or sexual act without consent.

Judge Ortiz explained that, on this occasion, the charges subject to study by the Full Chamber coincide with those that were effectively analyzed by this Court in 2006. Specifically, at present it is studied the constitutionality of censures for violation: (i) to the right fundamental to the voluntary interruption of pregnancy, (ii) to equality in access to reproductive health, (iii) the right to freedom of conscience, and (iv) of the various minimum constitutional standards for the use of law criminal law and criminal policy (criminal law as the last ratio). Everyone the charges on which the Full Chamber ruled coincide with those that gave rise to the decriminalization of the IVE in the three cases already endorsed in the year 2006.

Contrary to the majority position, Justice Gloria Ortiz noted that she did not there was a change in the national and international regulatory context, likely to weaken res judicata. In effect, the control of constitutionality made in Judgment C-355 of 2006 took into account the block of constitutionality as a parameter of control and precisely the international instruments that are part of the block of constitutionality in the strict sense, served as the basis for the Court to establish in which cases the criminalization of abortion supposed the annulment of the fundamental rights of women and the ignorance of her dignity by reducing her to a mere receptacle of the gestation life. In the Magistrate's opinion, it was not shown that this regulatory context would have changed.

Similarly, the applicants did not show that another circumstance that demonstrates the weakening of res judicata.

Finally, Judge Ortiz highlighted that in Judgment C-355 of 2006, regarding which res judicata operated, the Court warned that the Legislator can determine that the crime of abortion is not incurred in other additional cases. This is a matter of public policy that must be fully regulated by the Congress of the Republic. In that sense,

for the magistrate it is clear that the decision on the total decriminalization of abortion, as well as determining the number of weeks allowed to practice it. This happens because they are the organs of democratic representation who, supported by science, must fully regulate the matter.

Finally, the magistrate **PAOLA ANDREA MENESES MOSQUERA saved the vote** in the Judgment C-055 of 2022. She On the one hand, she argued that the rape charge of the right to equality of women in an irregular migratory situation lacks substantial fitness. On the other, she considered that there is res judicata Constitution regarding the charges for violation of the rights to health and freedom of conscience and for violation of the principles constitutional provisions on the purposes of punishment and constitutional standards minimum criminal policy.

The charge for violation of the right to equality of women in a situation irregular migration lacks certainty, relevance and specificity. This for when it is based on practical circumstances that, according to the lawsuit, occur on the occasion of the migratory phenomenon, mainly of Venezuelan population. In that sense, the charge does not in itself question the normative content of article 122 of the Colombian Penal Code. Therefore, Judge Meneses Mosquera argued that the charge for violation of the right to equality of women in a migratory situation irregular should have been considered inept.

On the other hand, to the extent that there is identity of the object of control – art. 122 of the C.P.– and the same charges that were raised in the lawsuit sub examine were studied by the Court in judgment C-355 of 2006, there is constitutional res judicata with respect to the charges for violation of the rights to health and freedom of conscience and for violation of the constitutional principles on the purposes of punishment and the standards minimum constitutional provisions of criminal policy. Added to this, the magistrate disagreed that there is a change in the meaning material of the Constitution and a change in the normative context, in Contrast with the year 2006.

In sum, Judge Meneses Mosquera considered that the Plenary Chamber of the Constitutional Court should have followed the ruling in judgment C-355 of 2006.

Notwithstanding the foregoing, the magistrate also raised several objections essential against the foundations of the conditioned enforceability of the Article 122 of the Penal Code and the exhortation made to the Congress of the Republic and the National Government. Among others, she pointed out, first, that there lack of scientific evidence about the existence of other measures effective to protect, respect and guarantee life in gestation, circumstance that is widely reprehensible since it generates a special lack of protection of the fundamental right to life of the nasciturus without the minimum methodological guarantees that require inquiring about the existence of other means that retain the necessary character of the action that is analyzed. Thus, an unanswered question remains: if the clear affectation and ostensible to the right to life was the only way to safeguard the rights to health and freedom of conscience, with some basis rational based on measures that could have seriously and responsible contrast and certainly avoid, under the pretext of safeguarding these rights, the irreparable damage to the fundamental right to life.

As a second objection, Judge Meneses Mosquera argued that it is possible to affirm that the voluntary interruption of pregnancy, in any event, is a reproductive health service and, as a consequence, nor is it possible to maintain that not decriminalizing the practice of abortion constitutes an infringement of the right to health. all those claims distance themselves from a serious and indispensable argumentation, revealing under the appearance of building a sustainable mechanism of health protection, a clear and reprehensible means of unprotecting the life of the unborn, who by the decision of the majority is deprives that fundamental right which is an essential condition for the development of other constitutional rights.

Thirdly, she explained that the criminal type of abortion does not have the purpose to punish a woman for being a woman, but rather punish anyone that affects the legal right of life in gestation. It was decisive holistic and comprehensive analysis of the criminal type based on the protected legal right, the criminal policy strategies of the State to prevent and punish this crime; studies and scientific documents in the field of criminology, the technical, statistical, probabilistic and historical elements that would serve as support if what it was about was to define the suppression of the crime, the which today with a brush stroke comes to an end, despite its validity endorsed by the constitutionally protected values and principles that are evoked under the formula of the Democratic and Rule of Law State.

Fourth, in his opinion, the criminalization of abortion from the 24th week of gestation generates a lack of protection for the life of the unborn, who is owed protection from the moment of conception in accordance with the provisions of Article 4.1 of the American Convention of Human Rights.

Fifth, he stressed that the Court is not in a position to determine the weeks from which it is possible to perform an abortion, nor determine ex ante guidelines of public policy on the matter. On the one hand, Congress of the Republic, after democratic debate, is the call to establish the terms in which abortion is criminalized or decriminalized, even partial. On the other hand, it is up to the National Government to determine the policy public on the matter; moreover, magistrate Meneses Mosquera expressed that the Executive has indeed issued several measures aimed at preventing unwanted pregnancies, to promote sexual and reproductive education and to guarantee the Voluntary Interruption of Pregnancy in the foreseen events by the Court.

For his part, associate judge **JULIO ANDRÉS OSSA SANTAMARÍA** clarified his vote in in relation to the terms under which the claim was declared. conditional unconstitutionality of the rule. Although his decision to supporting the majority decision was based on the impossibility of accompanying those who intended to maintain the rule in its current wording, the associate judge held that the Constitutional Court cannot strip Congress of its competence of legislative configuration in the matter.

In the opinion of the associate judge, although it is unconstitutional to punish deprivation of liberty to the woman who aborts in the first 13 weeks of the pregnancy, and on the other hand it is constitutional that it be sanctioned when the nasciturus has exceeded 24 weeks, the Legislator retains a important configuration margin to determine what should be the legal – not criminal – treatment of abortion between week 14 and week 23. The foregoing by virtue of the gradual and incremental nature of the protection of the life of the unborn, and because the rulings of the Court must respect the freedom of configuration of the legislator in those scenarios of weighting in which there is no blatant violation of the rights at stake. In this sense, the position of Deputy Judge OSSA SANTAMARÍA advocated a staggered regulation of protection of the one that is yet to be born, gradualness to which the majority position does not made room.