



## Case C-355/06

Sentencia C-355/06

**Country:** Colombia

**Region:** Americas

**Year:** 2006

**Court:** Corte Constitucional [Constitutional Court]

**Health Topics:** Child and adolescent health, Health systems and financing, Mental health, Poverty, Sexual and reproductive health, Violence

**Human Rights:** Freedom from discrimination, Freedom from torture and cruel, inhuman or degrading treatment, Right to bodily integrity, Right to development, Right to health, Right to liberty and security of person, Right to life

### Facts

Women petitioners brought a tutela action (appeal for legal protection) requesting that the Court declare unconstitutional particular provisions of the Penal Code (Articles 122 (criminalized abortion), 123 (criminalized abortion without consent), and 124 (mitigating circumstances)) that criminalized abortion, claiming that, first, the doctrine of res judicata did not apply to them with regards to previous decisions and that, second, said provisions violated a number of the claimants' rights as enshrined in the 1991 Colombian Constitution, namely the right to dignity (Constitutional Preamble and article 1), right to life (article 11), right to bodily integrity (article 12), right to equality and general right to liberty (article 13), right to free development of the individual (article 16), right to reproductive autonomy (article 42), and state obligations under international human rights law (article 93). The claimants argued that the cited articles "disproportionately and unreasonably limit the rights and liberties of pregnant women," including those under 14 years of age.

### Decision and Reasoning

The Court held that although the Court has the obligation to be consistent with prior decisions under the doctrine of res judicata, the Court could diverge from previous decisions because the doctrine must be understood as a "mechanism that aims to ensure respect for precedent" because the contrary could result in unacceptable injustices. Following this principle, the Court distinguished between the constitutional value of life and legal right to life. The Court held that while the legal right to life applied only to born human beings, the constitutional value of life protected the fetus before birth. However, the Court held that while the State could protect the fetus before birth, the State could do so only in a manner that respected the rights of women, such as the right to life and the right to health.

Ultimately, based on principles of human dignity, proportionality, autonomy and placing emphasis on human rights standards set in various international treaties (referred to by the Court as the "Constitutional Bundle"), including the right to health, the Court held that Article 122 of the Penal Code was constitutional "with the understanding that abortion is not criminal" when: "a)... 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."

The Court also held that Article 123 was unconstitutional because it violated the pregnant minor's fundamental rights to free development of the individual, autonomy, and dignity.

Because the Court declared abortion not to constitute a crime and, therefore, the circumstances no longer existed to constitute a crime, the Court ordered the deletion of the article 124 from the Code.

### Decision Excerpts

"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 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." Sec. 5.

"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. [...]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" (Citing Decision C-028, 2006)." Sec. 6.

"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...." Sec. 7.

"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." Sec. 7.

"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." Sec. 7.

"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) [...] and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) [...]. 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." Sec. 7.

"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." Sec. 7.

"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 reproductive 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." Sec. 7.

"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." Sec. 7.

"[W]omen'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." Sec. 7.

"[N]either 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." Sec. 7.

"[T]he 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." Sec. 8.1.

"[W]hen 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." Sec. 8.1.

"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." Sec. 8.2.

"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." Sec. 8.3.

"The right to health is an integral right that includes mental and physical wellbeing. 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...." Sec. 8.3.

"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." Sec. 8.3.

"[T]he 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." Sec. 8.3.

"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." Sec. 8.3.

"[T]he 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. [...] The right also implies a prohibition of state-condoned practices such as forced sterilization, violence and sexual abuse...." Sec. 8.3.

""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." (Citing Decision C-205, 2003)."

#### Sec. 8.4.

"[I]nternational 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 Convention 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...." Sec. 8.4.

"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." Sec. 10.1.

"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." Sec. 10.1.

"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." Sec. 10.1.

"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." Sec. 10.1.

"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." Sec. 10.1.

"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." Sec. 10.1.

"[C]onscientious 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." Sec. 10.1.

"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." Sec. 10.1.

"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." Sec. 10.1.

"[E]ven 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." Sec. 10.1.

"[C]onstitutional 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." Sec. 10.2.

"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." Sec. 11.

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