Ruling Allowing Induced Abortion in Colombia: a Case Study

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1. Introduction

The aim of this work is to present and examine the ruling on which the Colombian Constitutional Court declared the blanket criminalization of induced abortion to be unconstitutional: ruling C-355/06\(^1\); all of this based in the understanding I have achieved of the Courts’ reasoning. I wish to add a new voice to the dialogue of the international community on this matter, especially since this legal decision changed seventy years of Colombian history, for the blanket prohibition of induced abortion had been standing since 1936. This, then, will be a case study of descriptive Ethics which will keep us very close to the Courts’ reflections on the issues raised by the Colombian Legislator’s radical approach to the practice of abortion. Some of these issues, however, have too much of a legal technical nature and, given that this is not the main area of interest for a reflection on Applied Ethics, I will leave them aside. Hence, I will only approach those issues with a direct or highly relevant ethical impact.

This presents a first problem, since my selection of the ethical issues presupposes both an interpretation of the Court’s ruling and a notion of the matters susceptible of an ethical analysis. Both activities can render different results and are open to a critical review that can at least establish some limits to what is a plausible interpretation and to which issues are ethically relevant. To me it is clear, for example, that one of the issues that lacks ethical relevance for the case of abortion is the Court’s decision to declare article 32.7 of Law 599/00 in agreement with the Constitution, since the applicability of that article is not limited to the crime of abortion. Another such issue is the Court’s decision to take article 124 of the same law out of the legal system by declaring it unconstitutional since its precepts (the mitigating circumstances of abortion) are taken by the Court among the reasons to declare the non-existence of such a crime in the first place, as I will show in §2, and §3.1. Thus, they cannot be mitigating circumstances for a crime that has ceased to exist. For more details on these manoeuvres of legal logical interpretation, the curious reader may turn to §10.4 and §10.3 of C-355/06\(^2\).

\(^1\) In §2 I will give a brief explanation of the nature of the ruling, as well as of the nomenclature used by the Court.

\(^2\) The complete text of this ruling by the Constitutional Court can be found on-line at [http://www.despenalizaciondelaborto.org.co/data/documentos/200609250819350.sentenciacorte.pdf](http://www.despenalizaciondelaborto.org.co/data/documentos/200609250819350.sentenciacorte.pdf) (accessed on December 16, 2006). Unsurprisingly, I was unable to find any translation of the ruling, so
It is also important to share the questions that gave rise to this work, for they will allow the reader to have a clear understanding of its scope and limits. I have kept the following questions in mind in order to proceed with the examination of the ruling:

1. How was abortion legally handled before the Court’s decision?
2. What was the Court’s decision regarding the legal handling of abortion?
3. How did the Court manage to reach such decision?
   a. What were the main arguments unfolded by the Court?
   b. What were the main elements put into play in those arguments?
4. Which are the presuppositions of the Court’s arguments?
5. How good (solid/consistent/coherent) were those arguments?
6. Which are some of the problems within the Court’s arguments?
7. Is the decision reached by the Court an acceptable one?

These questions have intertwined one another in the weaving of this text and, therefore, are neither necessarily explored in that order nor devoted a single section each one. They were my beacon and have been followed throughout the text. In this first section I will present the norms that constituted the blanket prohibition of abortion, as well as the likely situation of its practice, both by the time the Constitutional Court took up the analysis of the former. This will provide a good understanding of the importance of the ruling and its starting point.

In the second section I will put forth the general nature of the Court and its rulings, inscribed in the Colombian social, political and legal transformation brought by the 1991 constitutional change. I will also bring in the specific decisions the Court made regarding the conditioned constitutionality of induced abortion and the unconstitutionality of the legal expression that equated an abortion performed on a woman less than fourteen years of age to an abortion without consent, thus punishing it harder than a consented one. Such verdict is the starting point of an effort to trace, present and examine the ethical arguments the Court has woven to reach it, all of which will be undertaken in the third section.

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this text in Spanish has been the main source for this work and for my translations of its most relevant passages.
In the fourth section I shall elaborate on two of the common ethical elements that work as cornerstones for the Court’s arguments: human dignity and the belief that fundamental rights and constitutional protected goods are not absolute; I will particularly point out how they play a role in the Court’s argumentation. As a conclusion I will offer a final general appraisal of the Court’s work. But it is now time to explore both the norms and the practice that were examined by the Colombian Constitutional Court.

1.1. The norms targeted by the constitutionality action

Before May 10th, 2006, the day on which the Colombian Constitutional Court proffered ruling C-355, the legal regulation of abortion in Colombia was what I consider a quite simple and radical one: abortion was regulated from the criminal perspective, which set down a blanket, complete prohibition to it. This complete forbiddance was still in effect in the latest reform of the Colombian Criminal Code, Law 599 of 2000:

Article 122. Abortion. The woman who causes her own abortion or permits another person performing it will be punished with imprisonment from one (1) to three (3) years. This same sanction will be applied to he who, with the consent of the woman, carries out the action noted in the prior paragraph.

Article 123. Abortion without consent. He who causes an abortion without the consent of the woman or in a woman less than fourteen years of age will be punished with imprisonment from four (4) to ten (10) years.

Article 124. Mitigating circumstances. The punishment indicated for the crime of abortion will be lowered by three fourths when the pregnancy is the result of a conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum.

Paragraph: In the events of the prior paragraph [article 124], when the abortion is carried out in extraordinary situations of abnormal motivation, the judicial officer may forego the punishment when it is unnecessary in the concrete case at hand.3

To better understand the implications of such normative approach, I will set forth the main characteristics of these legal norms. First, the crime of abortion is that of induced abortion, i. e. the abortion willingly caused by either the pregnant woman herself or someone else.

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3 I have translated these legal texts following the translation done by Human Rights Watch, one of the international organizations that supported the unconstitutionality action. The text is available at: http://hrw.org/women/abortion/colombia.html (accessed on February 22, 2007). I have added some modifications according to legal Spanish common use and have replaced the amount of punishment with the one quoted by the Court in the ruling. The difference in the punishment quoted by Human Rights Watch and the Court is explained by Law 890/04, which increased the penalties for some crimes, including that of abortion. Strictly speaking, I believe the Court should have quoted these texts using the new punishments, but since Law 890/04 did not alter in any way the definitions of the crimes, which is the matter the Court is to examine, I am sure this slip can be forgiven.
Involuntary abortion is, thus, not punished; a miscarriage is not covered by these criminal regulations, unless it would be willingly caused by either the pregnant woman or another person, hence falling in the criminal type of article 122. For example, a pregnant woman could engage in activities that put the pregnancy at risk in order to produce an abortion that could be seen as a non-induced one; but the pregnant woman’s purpose would allow for criminal prosecution to be filed against her for abortion, since the pregnant woman was engaging in those activities to cause the abortion.

The second characteristic of the challenged legal norms is that they prescribe a punishment both for the pregnant woman and the performer of the abortion, if it is not caused by the pregnant woman herself. This means that the fear of criminal prosecution played a significant role for a pregnant woman grappling with a non-consented or risky pregnancy, and for a doctor striving to fulfil his or her duties towards her patient. In both cases, abortion was not to be considered an option. Hence, if both pregnant women and doctors were to be strict law-abiding citizens, the former would have to carry on with a non-consented or risky pregnancy, while the latter would have to assume the health risks the pregnancy caused on his or her patient and hope for the best.

But, I wonder, what if that were not the case? What if pregnant women and doctors were not such law-abiding citizens? Then a pregnant woman could ask her doctor to perform an abortion, or a doctor could get a pregnant woman’s consent to perform one. Both of them, then, would be facing the consequences prescribed by the criminal law and, in the case of doctors, it would pretty much amount to the end of their careers. Therefore, not many doctors were willing to disobey the law. This, however, did not stop pregnant women who wanted to terminate their pregnancy: they would either try to do it themselves, usually following traditional home-made recipes and techniques\(^4\), or going to the black-market of illegal unsafe abortion. At its best, this market is made up of so-called ‘rogue’ doctors, nurses and midwives,\(^5\) but also of people with no solid medical training who are just seeking to make a living. Furthermore, many of the procedures are carried out in purported ‘garage’ practices or clinics, establishments lacking the required clinical environment. Both of these traits, the lack of

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\(^4\) Some of this recipes and techniques are mentioned in the report of the Alan Guttmacher Institute (1999, p. 37).

\(^5\) To use these services, though, is much more expensive, keeping them out of reach from a huge portion of the population. This creates a gap between those who can and who cannot pay for them, thus deepening social problems such as marginalization.
proper medical background of the persons performing the abortion and the lack of a clinical environment in the places where it is performed, turn the black-market into a public health hazard for the pregnant woman willing to terminate the pregnancy. This was, in fact, the general situation in Colombia, as I will show in the next section.

I still have to consider one more possibility that the legal norms whose constitutionality was challenged allowed for. What if the abortion were to be performed without the pregnant woman’s consent? Let us say, for example, that the man responsible for the pregnancy is not willing to face it. He, then, can trick the pregnant woman to give herself to the care of someone who has been hired to perform the abortion, or he can even try to perform the abortion himself by reducing the pregnant woman by means of force or chemicals. Such cases have been contemplated by the criminal law in article 123, which punishes them with longer imprisonment. Interestingly enough, article 123 equates the case of non-consented abortion to that of abortion performed on a woman less than fourteen years of age, which implies that these women would not be able to consent to an abortion. This assumption of the Legislator, combined with the mitigating circumstances in article 124 left women less than fourteen years of age in an even worse position: given that whoever performed an abortion on them would be punished with longer imprisonment, the mitigating circumstances would only amount to leaving the punishment as that of a consented abortion (one to three years). So, the performer of an abortion to a pregnant woman less than fourteen years of age would still be punished as the performer of a consented abortion even if the pregnancy was caused by what I consider such horrible actions as abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum. However, the punishment to the performer of a non-consented abortion could be foregone by the judicial officer, which brings us to a closer examination of the mitigation circumstances of article 124.

The mitigating circumstances for the crime of abortion can be applied to the punishments for both consented and non-consented abortion, but they only relate to the mentioned circumstances in which the pregnancy started. Nonetheless, in such circumstances, punishment could be foregone according to the criteria of the judicial officer. The Legislator, then, recognized a few circumstances in which abortion did not need to be punished as hard or even not punished at all. What I thought to be sad enough was that these circumstances would only apply once the criminal prosecution was already on its way, submitting the abortion performers and the pregnant women who consent to it to the hassles of the criminal system.
and its social implications; and the full foregoing of the punishment was only a possibility pending on the decision of the judicial officer following the case, not an obligation to him or her.

These were the legal norms in force when the Colombian Constitutional Court took their analysis. These were the legal norms that wove the blanket criminal prohibition of abortion in Colombia. These were the legal norms that pregnant women and medical staff had to face when considering the induced termination of a pregnancy. These were the legal norms that opened the black-market for abortion. These were the legal norms the Constitutional Court changed.

1. 2. Some data on induced abortion in Colombia

To give an idea of the social practice of abortion that the norms analysed in the previous section were to address, I will now provide some relevant data on it. But I feel obliged to make two previous comments on that. The first one regards the difficulties encountered while literally hunting for such data; particularly through on-line services. To begin with, it seems there is no direct source for official data regarding induced abortion in Colombia, which is substantiated by the methodological notes of the papers that present the data: they refer to sources embedded in the Ministry of Health (now Ministry of Social Protection) who supplied unpublished data; or to smaller statistical surveys undertaken by universities or NGOs. This difficulty can be partly explained by the legal handling of abortion as a crime, which makes it more difficult to bring such data into the light, given the fear of prosecution and social stigma. My sources, then, are non-official: they are a set of articles and reports published by the American Alan Guttmacher Institute, the World Health Organization, Profamilia (a Colombian Non-Government Organization offering programs on sexual and reproductive health, and family planning) and Proyecto Estrategia Integral de Incidencia por la Despenalización del Aborto en Colombia (Integral Strategy of Incidence Project Towards the Decriminalization of Abortion in Colombia, run by three NGOs on women issues). These articles and reports where published between 1994 and 2006, but the data they present ranges from 1989 to 2005, as can be seen on the table in the appendix.

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6 All the data in this section refers to the one summed up on that table.
The appendix table also shows a second difficulty: that of following the exact same indicator through different years. I think this is caused both by the already-mentioned difficulties to renew the data and by the different population samples used. The only exception to this hardship is the indicator of the place of induced abortion as a cause of maternal death: from being its second reason in 1994 (Zamudio 2005, p. 5) it slid to third place by 2001 (Ministry of Social Protection 2004, p. 3). However, since its percentage incidence remained the same, it is hard to say if this change is connected to changes on abortion data or if it is rather due to a worsening of the other causes of maternal death. Despite this inconvenience in trying to follow the development of induced abortion through time, three years bear special importance: 1989, 1999 and 2005. 1989 is the year where most of the data comes from and which is systematically quoted as a source in the studies that followed. 1999 and 2005 offer data on observed and desired fertility and women’s behaviour towards it, which is very useful to understand a general disposition to abortion.

I believe those difficulties advise a certain level of caution when approaching the data, but a complete scepticism would not be justified. I am sure that the retrieved data can be used to paint a general picture of the abortion situation in Colombia, which lends a hand in understanding the importance, relevance and limits of the ruling by the Constitutional Court on such issue. But I also want to make a second comment regarding the data. We are not to get lost in numbers. I believe that to really grasp the significance of abortion we are to keep in mind that behind all those numbers there are the flesh and bones of pregnant women and foetuses, their life stories and the grappling of the former with a life-changing decision. This is the frail humanity from which the data emerges. We should not forget that.

The first interesting set of data regards the average number of children per women between fifteen and forty nine years old, calculated by decade. As the Alan Guttmacher Institute shows in its 1999 report Sharing Responsibility: Women, Society and Abortion Worldwide, in Colombia this number has been decreasing steadily since the 1970s (4,1), through the 1980s (3) and reaching an average of 2,5 children in the 1990s (p. 14). I believe this data shows in general that women are performing a tighter control of their reproductive life, but it might be even somewhat higher, since the average was calculated for ever-married women, excluding, e. g., single mothers; besides, it is also not clear if the marriage condition included women living in a civil union but not a marriage (even a civil one). Thankfully, the most recent data
obtained by Profamilia’s National Survey on Demography and Health 2005\(^7\) overcomes these difficulties by not taking into account the civil status of the women. According to this data the average number of children for women between fifteen and forty nine years old is of 2,4 (p. 174).

Regardless of that decline in fertility, the data also shows that there is a gap between the number of children women want and the number of children they actually have. And this difference is not one that shows that they want more children than they have; it rather shows that women have more children than they want. According to the already-mentioned 1999 report of the Alan Guttmacher Institute (p. 13), by that year the wanted fertility rate was approximately of 2,2 children, while the actually observed fertility rate was of approximately 3 children per women. By 2005 Profamilia’s survey (p. 174) showed that despite the decrease in the observed fertility rate to 2,4 children, the gap with the wanted fertility rate was still pretty much at the same level, since the latter had also decreased to an average of 1,7.\(^8\)

The gap between the wanted and the observed average of children turns into a number of unwanted births. This indicator is also revealed by the 2005 Profamilia survey (p. 172): a surprising 46% of births from women between thirteen and forty nine years old were unwanted ones. This constitutes a wide population susceptible of choosing induced abortion as a means to terminate an unwanted pregnancy. This population seems to have been growing, since a similar survey done in 1990 showed that 33,6% of women between fifteen and forty nine years old had an unwanted birth (Ordoñez Góm ez 1991, p. 106).\(^9\) Furthermore, the only available data that explicitly includes induced abortions among the unwanted pregnancies is that of Susheela Singh and Deirdre Wulf in *Estimated Levels of Induced Abortion in Six Latin American Countries*, which was published in 1994 but its data refers to 1989. In that year the percentage of women between fifteen and forty nine years old that bore an unwanted pregnancy was an staggering 49,9% (p. 10). But this data can be detailed even further: that percentage is calculated by adding the 26% of those pregnant women who decided to have an

\(^7\) The title translation is mine. The original title reads: *Encuesta Nacional de Demografía y Salud 2005*.
\(^8\) Both changes in the data can be due to different sampling populations, since I could not stablish whether that from the Guttmacher Institute’s report is the same as that of Profamilia’s survey. But whatever the case may be, the interesting fact is that the gap pretty much remained constant.
\(^9\) Though the sampled population is not exactly the same, I find it difficult to believe that such a wide difference can only be due to the two additional years included in the 2005 survey. I do therefore believe that the data can be comparable.
induced abortion (ibid.), with the 23.9% who chose to give birth to an unwanted child (ibid.). This means that, though by a slight margin, induced abortion was already being considered by pregnant women as a viable alternative to a troublesome pregnancy, despite its full legal criminalization.

Such favourable approach to induced abortion can be further attested to by the increase of the abortion rate per 1000 women from 1989 to 1992, as well as with its comparison to another Latin American country. In their 1994 article Singh and Wulf presented a 33.7 rate of induced abortion per 1000 women for 1989 (p. 8), which climbed to around 37 by 1992, according to the Alan Guttmacher Institute 1999 report (pp. 27-28).10 When compared to the Mexican rate for that same year, Colombia shows an eleven point increased difference, since the latter rate is of approximately 26 (ibid.). Induced abortion, then, would be more practiced in Colombia than in Mexico. It is actually so high that more than half the abortions in Colombia are estimated to be induced ones: according to Palacio, almost 60% of the cases admitted to healthcare institutions because of abortion complications are caused by unsafe induced abortions (Ministry of Social Protection 2004, p. 3).

In 1989 alone 57.679 women between the ages of fifteen and forty nine were admitted to healthcare institutions because of complications related to unsafe abortion (Singh and Wulf 1994, p. 6). To me this already turns induced abortion to a public health issue, particularly in a context that criminalized induced abortion, thus making illegal unsafe abortion procedures the main alternative. That data also allowed Singh and Wulf to calculate the estimated number of women in that same population that would have had an induced abortion in that same year: a staggering 288.400 (ibid., p. 8). And yet another grim statistic: out of a thousand pregnancies, 260,2 would end in induced abortion (ibid., p. 10), i. e. around 26%.

Despite all this, Colombia was one of three Latin American countries which completely banned induced abortion; the other two are Chile and El Salvador (González Vélez 2005, p. 624). I believe González Vélez very well captured the reality of a society that, on one hand forbids induced abortion in all cases by turning it into a crime and considers it something to be averted at all costs, while on the other hand practices induced abortion despite its prohibition. Her article is entitled Current situation with abortion in Colombia: between illegality and

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10 This increase, however, could also be explained by the exclusion of women between forty five and forty nine years old from the most recent sample.
Induced abortion is a reality that cannot be approached just by turning it into a crime. What would it be like if in order to control the illegal practice of abortion the health, police and judicial authorities were to follow the law? According to Zamudio this is what would happen:

> [...] taking as a reference population that of the 1993 census, we are speaking in Colombia of almost a million and a half women in cities with more than 1000,000 inhabitants who declare having violated the law one or more times; of more than a million and a half people who have performed abortion to them (it is sometimes performed by two people); and almost 500,000 men, which corresponds to 30% of husbands or partners who pressed their wives or partners to have an abortion. A total of near three and a half million people who, according to the norm in Colombia, should have served between 4 and 36 months of prison.11 (Zamudio 2005, p. 7).

The Constitutional Court’s ruling somewhat changed this weighty picture. But, as I will show in §3.1., it only focused in three of the possible circumstances of induced abortion, thus leaving a great deal of them still forbidden by the Criminal Code; specially the cases in which induced abortion is used to terminate an unwanted pregnancy because of financial or social reasons, or simply because it is not planned.12 Nonetheless, at least after the Court’s ruling the practice of abortion is partly recognized as a legitimate procedure. I can only hope this opens the way for a wider understanding of the situation of the many women presented through the data in this section. In the following segment I will focus on a presentation and internal analysis of the Court’s arguments.

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11 The translation is mine. The original text reads: “[…] tomando como población de referencia la del censo de 1993, en Colombia estamos hablando de cerca de millón y medio de mujeres de ciudades de más de 100.000 habitantes, que declaran que han violado la ley una o más veces; de más de millón y medio de personas que les han practicado el aborto (a veces se practica por dos personas); y de cerca de 500.000 hombres, cifra que corresponde al 30% de maridos o compañeros que presionaron a sus cónyuges o compañeras para que se practicaran el aborto. Un total de cerca de tres millones y medio de personas que, según la norma en Colombia, deberían haber cumplido entre 4 y 36 meses de arresto”. Zamudio is calculating the prison punishment based on the old Criminal Code, which was replaced by Law 599/00 and modified by Law 890/04. The new punishment was much harder: from sixteen to fifty four months.

12 The retrieved studies on induced abortion do not tackle the problem of the reasons for it. Nonetheless, I believe that their emphasis on the decreasing average number of children and the gap between the wanted and observed fertility rates points at the use of induced abortion as a contraceptive for reasons that go beyond those sanctioned by the Court. Some women recur to abortion in order to tighten their control over their reproductive life.
2. Presentation of the Colombian Constitutional Court and ruling C-355/06

In 1991 Colombia adopted a new Constitution, formally known as the Political Constitution. This Constitution was the result of the deliberation of an independent, democratically elected body, the National Constituent Assembly. The fact that its members were directly elected by the people allowed for a wide variety of representatives, including those of racial and ethnic minorities (such as Afro-Colombians and Native-Colombians), political and religious beliefs that went beyond those of the two traditional political parties (Liberal and Conservative) and the Catholic Church, and even representatives of a rebel group (M-19) that turned its weapons in to take part in the founding of the new republic.

One of the most welcomed elements introduced by the Constituents was that of fundamental rights and their protection mechanisms. One of such mechanisms can be raised before any judge in the country, must be resolved by him or her in a short period (ten work-days) and, if protection is granted, the ruling also has to be carried out as soon as possible (usually within the next forty eight hours). This protection scheme is called the tutelage action, also introduced in the Constitution (art. 86). Given the importance of this writ of protection, its formalities were kept to a minimum when its details were developed by the law (Decree 2591/91); to file the action, for example, no lawyer is needed, the plea can be verbally done, and the judge is to help the petitioner in formulating his or her case.

The Constitutional Court was created as the head of this new jurisdiction (the constitutional jurisdiction), with faculties to review any tutelage ruling (Political Constitution, art. 241). But it also received the powers previously invested in the Supreme Court of Justice to be the Constitution’s guardian and interpreter, thus having to rule whether and how some type of laws are in accord with the Constitution, and doing the same when a citizen raises such a question regarding any of the laws in force, which can be done through a public legal action called “the unconstitutionality action”. Thus, the Court generally proffers two types of rulings: those for the tutelage action and those for the unconstitutionality action; the former ones are labelled with a ‘T’ while the later ones are marked with a ‘C’, both of them followed by a consecutive number and the year in which the ruling is proffered.
As I have pointed out in §1., the crucial ruling on abortion is ruling C-355/06, which means it is a decision regarding the analysis of whether some legal norms are in agreement to those norms contained in the Colombian Political Constitution. In this case, some of the legal norms whose constitutionality was challenged were those of the Criminal Code which weaved the blanket prohibition on abortion: articles 122, 123 and 124 of Law 599/00, as I showed in §1. 1.

The challenge was raised by a group of independent citizens, four women and one man: Mónica del Pilar Roa López, Pablo Jaramillo Valencia, Marcela Abadía Cubillos, Juana Dávila Sáenz y Laura Porras Santillana. In the same ruling the Court summarized the arguments presented by them in the following manner:

In general, the reasons formulated by the claimants revolve on that the normative declarations of the Criminal Code that typify the crimes of abortion (art. 122), non-consented abortion (art. 123) and the mitigating circumstances of the abortion crime (art. 124) are unconstitutional because they limit in a disproportionate and unreasonable manner the rights and freedoms of the pregnant woman, even when they are less than fourteen years of age. They also assert that the challenged legal declarations are contrary to different treaties of international law on human rights which are part of the constitutionality block, according to article 93 of the P. C. [the Colombian Political Constitution], and to opinions issued by the organisms in charge of interpreting and applying such international instruments. (pp. 202-203).

The unconstitutionality charges against the criminal blanket prohibition of abortion were, then, twofold: 1) it limited the rights and freedoms of pregnant women, regardless of their age, and 2) it was a violation of international treaties on human rights. The Court analyzed both complaints for each of the challenged legal norms, and thus reached its verdict. A way to examine such procedure is to follow the Court’s steps, but due to the extensiveness and complexity of the Court’s reasoning I have sought an alternate approach. In order to achieve the clarity that the ruling lacks in some aspects, I have found that it is better to set down the Court’s decision and then work backwards, uncovering the arguments for each of its segments. Our starting point for this backward analysis of the Court’s reasoning will then be the Court’s final section of the ruling, where the different elements of the decision itself are to be found. The elements that directly deal with the constitutionality of the challenged norms that criminalized abortion are the following:

13 The translation is mine. The original text reads: “En general las razones formuladas por los demandantes giran en torno a que los enunciados normativos del Código Penal que tipifican el delito de aborto (Art. 122), de aborto sin consentimiento (art. 123) y las circunstancias de atenuación punitiva del delito de aborto (art. 124) son inexequibles porque limitan de manera desproporcionada e irrazonable los derechos y libertades de la mujer gestante, inclusive cuando se trata de menores de catorce años. Afinan también que los enunciados normativos demandados son contrarios a diversos tratados de derecho internacional de los derechos humanos que hacen parte del bloque de constitucionalidad, de conformidad con el artículo 93 de la C. P., y a opiniones emitidas por los organismos encargados de interpretar y aplicar dichos instrumentos internacionales”.

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Third. To declare CONSTITUTIONAL article 122 of Law 599 of 2000, in the understanding that there is no abortion crime when the will of the woman is present in the interruption of pregnancy in the following cases: (i) when continuing the pregnancy constitutes a danger to the life or health of the woman, certified by a doctor; (ii) when there is a grave foetal malformation that makes his life unviable, certified by a doctor; and (iii) when pregnancy is the result of a duly denounced conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum, or incest.

Fourth. To declare UNCONSTITUTIONAL the expression “[…] or in a woman less than fourteen years of age […]” contained in article 123 of Law 599 of 2000.


When a legal norm is found to be unconstitutional, as two of the challenged norms were, the effect of such judgement is to cease its existence. Hence the expression “[…] or in a woman less than fourteen years of age […]” contained in article 123 of Law 599 of 2000 is to be taken as never written, returning the capability of consenting to an abortion to women less than fourteen years of age, though nonetheless keeping the crime of non-consented abortion. But the unconstitutionality does not only have to be a full one; it can also be a partial one. In such case, the Court points out the interpretation of the norm that makes it a constitutional one, i. e. that makes it agree with the Constitution; any other interpretation of the norm is contrary to the Constitution and, thus, cannot be applied. This conditioned constitutionality is the case with the article that considers consented induced abortion as a crime (art. 122): according to this constitutional interpretation consented induced abortion is still a crime, but not in the three cases expressly pointed out by the Court.

What about the unconstitutionality of the article contemplating the mitigating circumstances to the crimes of abortion (art. 124)? Having already pointed out the lack or ethical relevance of this part of the decision, I will only comment on it to show its connection with the conditioned constitutionality of the abortion crime. I believe that since the mitigation circumstances were absorbed by the stronger determination of the Court not to have them considered under the

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14 The translation is mine. The original text reads: “Tercero. Declarar EXEQUIBLE el artículo 122 de la Ley 599 de 2000, en el entendido que no se incurre en delito de aborto, cuando con la voluntad de la mujer, la interrupción del embarazo se produzca en los siguientes casos: (i) Cuando la continuación del embarazo constituya peligro para la vida o la salud de la mujer, certificada por un médico; (ii) Cuando exista grave malformación del feto que haga inviable su vida, certificada por un médico; y, (iii) Cuando el embarazo sea el resultado de una conducta, debidamente denunciada, constitutiva de acceso carnal o acto sexual sin consentimiento, abusivo o de inseminación artificial o transferencia de óvulo fecundado no consentidas , o de incesto.

Cuarto. Declarar INEXEQUIBLE la expresión «… o en mujer menor de catorce años …» contenida en el artículo 123 de la Ley 599 de 2000.

Quinto. Declarar INEXEQUIBLE el artículo 124 de la Ley 599 de 2000”.
crime of abortion, article 124 not only turns useless but rather contrary to the Court’s ruling, therefore becoming unconstitutional. To me it is clear that the effect of the Court’s decision is farther reaching than that of the mitigating circumstances: these would only apply when the criminal prosecution had already started, which was also the case with the decision of the judicial officer to forego the punishment; but under the Court’s ruling, there is no need to even begin a criminal prosecution, hence freeing the performers of abortion from the heavy burdens imposed by the criminal system and its social correlates.

In short, the Court introduced two major changes in the way Colombia regulated abortion. First, it opened a couple of holes in the traditional blanket criminal prohibition of abortion: abortion is not a crime in the three specific cases signalled by the Court. Second, the Court considered that women less than fourteen years of age are capable of giving consent when facing abortion. How did the Court achieve these historic decisions? That is what I will examine in the next section.
3. The main arguments used by the Court

In this section I will rearticulate the arguments put forth by the Court to reach its decisions on each of the challenged legal norms, starting with that of article 122: the blanket criminalization of abortion. This rearticulation consists of identifying the building blocks of the Courts’ arguments, as well as presenting them in a clearer, more concise, structured and explicit way than they appear in the ruling. As this is being done, as a clearer picture of the Court’s reasoning becomes available, I will be able to point out and discuss some interesting ethical issues that arise from the Court’s position. Though the reader should be advised that I generally agree with the Court’s handling of the issues, unless otherwise noted.

3. 1. The conditioned constitutionality of abortion (art. 122, Law 599/00)

I believe that the Court was fully aware of the magnitude of its decision in a country where the criminal punishment of abortion had a very stable history, as I pointed out in §1., and a country whose culture has formal religious roots, particularly in the Roman Catholic Church. Hence the Court was especially careful to present the main arguments of all persons who decided to take part in the process; and even those who approached the Court after the deadline for public participation had arrived or who lacked the legal capacity to participate (such as teenagers and children without due legal representation) were given due account of (C-355/06, pp. 20-150).

Furthermore, I am sure that the Court was also aware of the problems that it had had in the past when ruling about sensible issues: the Legislator (be it Congress or Government) would not see with good eyes that the Court ‘destroyed’ or ‘altered’ its work and would ‘accuse’ it in the media arena of taking over the functions of non-judicial organisms, of usurping the powers of other branches of the State, thus violating the centuries-old tradition of the division or separation of powers. Another common accusation has been that of creating legal uncertainty by suddenly changing the ‘rules of the game’, the norms by which citizens regulate their lives; this is worse since such a change comes from a group of people that, like the magistrates of the Court, are not even politically accountable for their decisions.
I think that to mitigate the highly probable negative effects of its ruling, the Court began its argument to justify the conditioned constitutionality of article 122 with a group of propositions that would seem undisputed. One of them is to uphold the legal principle of law conservation (C-355/06, p. 276), under which the legal system is to be kept as whole as possible, keeping its pieces (single legal norms) as functional as it may be. In practice, this leads the legal interpreter to look for a way in which the meaning of a legal disposition fits in harmony with the rest of the legal system, instead of just pulling it out of the system as a first and only step. I believe that this not only shows respect for the work of the Legislator and assumes it as a rational entity, but also helps to warrant legal certitude and citizens’ peace of mind: they can be certain under which legal norms their activities take place.

The other propositions that would seem undisputed pertain to a belief on the status of the foetus, as well as its impact on the public sphere and are linked in an argument. They are: 1) the recognition of the foetus’ life as a constitutional protected good; such recognition grounds 2) the public interest implied in a woman’s pregnancy or its termination; and the consequent 3) legitimacy of the Legislator to adopt legal measures to protect the foetal life (C-355/06, p. 266). This allowed the Court to be very explicit about its limits while analysing the constitutionality challenge raised against the crime of abortion: it is not the role of the Court to decide which are the best mechanisms to use in order to protect the constitutional goods; that is a political decision to be made by the Legislator. Thus, the selection of criminal law to do so is legitimate. But the way it was done can raise issues to be examined by the Court, since the foetus’ life is not the single thing in play: the pregnant woman is also to be taken into account, and not only as a potential criminal. In the Court’s own words:

[…] while the protection of the nasciturus through measures of criminal law is not disproportionate and, in consequence, the forbiddance of abortion is in agreement with the Political Constitution, the criminalization of abortion in all circumstances implies the complete pre-eminence of one of the legal goods in play, the nasciturus’ life, and the following absolute sacrifice of all the pregnant woman’s fundamental rights, which without a doubt is clearly unconstitutional. (C-355/06, p. 268).

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15 This does not mean, as I will show in §3.1.1., that the foetus is entitled to a constitutional right.
16 In the Colombian legal system, this word can be used as a synonym of ‘foetus’, since the latter is considered a human person retrospectively from his birth. I will explain this in detail in §3.1.1.
17 The translation is mine. The original text reads: “[…] si bien no resulta desproporcionada la protección del nasciturus mediante medidas de carácter penal y en consecuencia la sanción del aborto resulta ajustada a la Constitución Política, la penalización del aborto en todas las circunstancias implica la completa preeminencia de uno de los bienes jurídicos en juego, la vida del nasciturus, y el consiguiente sacrificio absoluto de todos los derechos fundamentales de la mujer embarazada, lo que sin duda resulta a todas luces inconstitucional”.
Given the possibility of a clash between the constitutional protected good of the foetus’ life and the pregnant woman’s constitutional fundamental rights, I think that the Legislator should have thought of the circumstances in which a pregnant woman should not have to continue the pregnancy. But since such balancing has not been duly accomplished by the Legislator, it was a task for the Court to point out the circumstances in which the pregnant woman’s fundamental rights are to be respected over the life of the foetus.

In short, the Court justifies the need for a conditioned constitutionality of the crime of abortion (art. 122, Law 599/00) in an argument linking 1) the principle of law conservation, 2) the recognition of the Legislator’s legitimacy to adopt protection measures in criminal law for the foetus’ life, and 3) the recognition of the need to protect the pregnant woman’s fundamental rights in some specific circumstances. Such circumstances are 1) when continuing the pregnancy constitutes a danger to the life or health of the woman, certified by a doctor; 2) when there is a grave foetal malformation that makes his life unviable, certified by a doctor; and 3) when pregnancy is the result of a duly denounced conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum, or incest. In the following sections I will examine the Court’s reasoning to justify each of them.

3.1.1. When continuing the pregnancy constitutes a danger to the life or health of the woman, certified by a doctor

Life and health play different roles in the Colombian legal system. Both are constitutional protected goods and constitutional fundamental rights, but health is also a public service. I will now clarify these distinctions, following the sequence in which I have just introduced them.

Being a constitutional protected good means that there is an obligation on the State to adopt measures to defend them and a duty on particular individuals to do the same. Being a constitutional fundamental right means that there are specific legal mechanisms at the hands of the people (such the tutelage action I have already mentioned) to claim their protection if the State or particular persons are not fulfilling their obligations or duties. In this matter, however, there is a difference between the right to life and the right to health: while the first one is a directly claimable right, the second one can only be claimed when the health problems
are so grave that the right to life itself is being threatened; i.e. the fundamental right to health can only be claimed when it is connected with the fundamental right to life (C-355/06, p. 249).

Yet this does not mean that the right to health is to be claimed only on the verge of death, since the life being protected is a dignified one, one in accordance to human dignity. Hence, the right to health can be claimed, for instance, to assure due treatment of a dental problem, since loosing one’s teeth without being able to do something about it is not part of a dignified human life. Can a pregnant woman lead a dignified human existence if it is threatened by something that can be helped? The Court believes some pregnant women can do it: they are heroes; but that does not mean that all pregnant women can do it and, even less, that all of them should do it:

[…] the State cannot force a private person, in this case the pregnant woman, to assume heroic sacrifices and offer her own rights in benefit of third parties or of the general interest. An obligation of such magnitude is unexactable, even when pregnancy is the result of a consented act, even more when there is the constitutional duty on each person to adopt measures for taking care of the proper health, according to article 49 of the Constitution. (C-355/06, p. 272)

As far as I understand, the Court is presupposing a difference between obligations and supererogatory actions. This distinction is stronger in the case of a direct threat to the life of the pregnant woman: “[…] it is clearly excessive to require the sacrifice of the already shaped life for the protection of the life in shaping” (C-355/06, p. 271). To me this also means that the Court is using the stage of a life’s development as a criterion to balance the conflicting two instances of the same constitutional protected good: life, that of the pregnant woman and that of the foetus. But, according to the Court, the defense of the constitutionally protected good of

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18 I will develop the notion of human dignity in §4. 1. For now let me just say that both the material content or concrete object of protection of human dignity (autonomy; physical, moral, psychic and spiritual integrity; and minimal material conditions of existence) and its anthropological perspective based on Kant’s philosophy, justify this position.

19 I believe this explains the Court’s selection of the logical conjunction in “life and health” instead of the possible disjunction of “life or health”: for abortion to be accepted, the pregnant woman is to find herself in such circumstances that the foetus threatens her health in such a way that she can no longer lead a dignified human life.

20 In §3. 1. I explained how and why the Court recognized the public interest regarding pregnancy.

21 The translation is mine. The original text reads: “[…] el Estado no puede obligar a un particular, en este caso la mujer embarazada, a asumir sacrificios heroicos y a ofrendar sus propios derechos en beneficio de terceros o del interés general. Una obligación de esta magnitud es inexigible, aun cuando el embarazo sea resultado de un acto consentido, máxime cuando existe el deber constitucional en cabeza de toda persona de adoptar medidas para el cuidado de la propia salud, al tenor del artículo 49 constitucional”.

22 The translation is mine. The original text reads: “resulta a todas luces excesivo exigir el sacrificio de la vida ya formada por la protección de la vida en formación”.

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life is to be granted according to the stages of human life and the different ways in which it manifests itself (C-355/06, p. 219). Therefore, the life of the pregnant woman, being one that has developed further than the one of the foetus is to be granted further protection, even if this entails an infringement\(^\text{23}\) of the protection to the foetus’ life. The issues facing the use of these two criteria (the distinction between obligations and supererogatory actions, and the development stage of human life and its various manifestations), which are not dealt with by the Court, will be dealt with further on, when placing closer attention to the central elements of the Court’s arguments (§4, and §4. 2).

Now let us return to the matter of health. What does the right to health cover? According to the Court, the right to health covers both physical and mental integrity (which in turn are part of the conception of human dignity, as I will show later in §4. 1.). Thus, following the Court, the right to health starts to branch into or link with other rights, such as the right to reproductive health (p. 250), to personal autonomy and free personal development (p. 251), to plan the own family (p. 251), to be free of all forms of violence and coercion which affect sexual or reproductive health, and to personal integrity (p. 252). I should now point out that this highly tied knot of rights has a double legal function.\(^\text{24}\) To begin with, it entails the individual faculty of a person to start a legal action in order to claim the protection of any of those rights, or to claim that the State or the particulars fulfil their obligations or duties in order to provide for those rights. This can be called the ‘positive freedom’ side of rights, the first notion that pops-up into our minds as we consider what a right is: the faculty to demand something to be provided. A woman, for example, can file a tutelage action to have a pregnancy control appointment be carried out if it has been postponed too many times and her health is being jeopardized.

But there is another legal function fulfilled by such rights, another side to them. This other side is that of a ‘negative liberty’, which turns those rights to ‘defensive rights’. From this perspective, the right(s) to health can be appropriately used to reject the intervention of State or other third parties in the areas covered by them, even if such interventions are meant to defend constitutional protected goods on behalf of others. In the case of abortion being

\(^{23}\) An infringement is not a violation: the former has reasons to justify it, while the latter does not (Beauchamp and Childress 2001, p. 358).

\(^{24}\) This double function can also be understood through the difference between positive and negative rights compiled by Beauchamp and Childress 2001, p. 358.

\(^{25}\) This is known in Colombia as the ‘prestational content’ of rights and will reappear when discussing the core concept of human dignity in §4. 1.
examined, what we have is a pregnant woman whose life and health are being threatened by the life of the foetus. The solution of the Legislator was to defend this latter constitutional protected good by turning abortion into a crime. From the Court’s perspective, this is an intervention of the State in the realm of the right to health of the pregnant woman, an intervention that can be countered by the defensive side of those rights. The pregnant woman, then, can legitimately reject the obligation of bearing a child that threatens her own life and health; and such rejection is further justified by the constitutional duty of every person to take steps towards protecting their own health. In the Court’s own words:

 [...] the constitutional right to health, besides its prestational content, also has a defence right trait in front of State’s or third parties’ interventions that threaten or transgress it. This side of the right to health, as a defence right or negative liberty, is closely linked with the individuals’ duty to pursue health’s integral care. From this perspective, the measures adopted by the Legislator which disproportionately restrict a persons’ right to health may be unconstitutional, even if adopted to protect constitutionally relevant goods entitled to third parties.

As a matter of fact, it is prima facie neither proportionate nor reasonable that the Colombian State imposes to a person the obligation of sacrificing her own health, in order to protect third parties’ interests even if these are constitutionally relevant.26 (C-355/06, p. 251).

As it can easily be seen all of the above arguments focus on the pregnant woman. Thus, I imagine some people might ask whether this is fair. After all, the case of abortion does not only focus on the pregnant woman. Those who sought to justify the blanket prohibition of abortion as the ultimate mechanism to warrant respect for the foetus’ life might be wondering what happened to him. Has the foetus no rights? Has the foetus no right to life? I am afraid I now have to dwell into an issue that the Court merely assumes but does not discuss. Bluntly put, the foetus has no rights. Why is that? Because the foetus is not a person and rights are only to be held by persons. This position is settled in articles 90 and 93 of the Civil Code:

Article 90. <Legal existence of persons>. The legal existence of each person starts at birth, that is, when being completely separated from her mother.

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26 The translation is mine. The original text reads: “[…] el derecho constitucional a la salud, además de su contenido prestacional, también tiene el carácter de un derecho de defensa frente a injerencias estatales o de terceros que lo amenacen o vulneren. Esta faceta del derecho a la salud, como derecho de defensa o libertad negativa está estrechamente ligado con el deber de los individuos de procurar el cuidado integral de la salud. Desde esta perspectiva pueden resultar inconstitucionales las medidas adoptadas por el legislador que restrinjan desproporcionalmente el derecho a la salud de una persona, aun cuando sean adoptadas para proteger bienes constitucionalmente relevantes en cabeza de terceros. En efecto, prima facie no resulta proporcionado ni razonable que el Estado colombiano imponga a una persona la obligación de sacrificar su propia salud, en aras de proteger intereses de terceros aun cuando estos últimos sean constitucionalmente relevantes”.

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The creature that dies in the motherly womb, or that perishes before being completely separated from her mother, or that has not survived the separation for even an instant, will be reputed as never having existed.

Article 93. <Rights postponed to whom is to be born>. The rights that would be granted to the creature in the motherly womb, if she had been born and lived, shall be suspended until birth takes place. And if birth constitutes a start of existence, the newly born shall enjoy such rights, as if she had existed when those rights were defined.

In the case of the second paragraph of article 90 those rights shall pass to other persons, as if the creature would have never existed.27

Since these legal norms have not been challenged before the Court, I believe it can legitimately refrain from their examination and, thus, from taking up the thorny reflection on the moral status of the foetus. The Court has taken such issue for granted, given the legal standing of the quoted norms. It is true, however, that such debate is to be given; it is just not to be given by the Court at this time. A general debate on the moral status of the foetus is an issue to be discussed in a public political arena, given its profound effects in the daily lives of persons. The Court cannot dwell into it unless the matter would be expressly taken up to it. Furthermore, the Court finds an alternative legitimate way to address some of the concerns of those who believe the foetus to be a human person and, therefore, to have some rights, specially the right to life. I think that the foetus is not a person does not mean that he is something to be freely disposed of or treated in any way. This concern was already present in the same Civil Code, almost a century before the right to life found its way to the 1991 Political Constitution:

Article 91. <Protection to whom is to be born>. The law protects the life of whom is to be born.
The judge, in consequence, shall take, at the petition of any person, or by himself, the providences that seem convenient to protect the existence of the unborn, whenever he believes it to be endangered.28

27 The translation is mine. The original text reads: “Artículo 90. <Existencia legal de las personas>. La existencia legal de toda persona principia al nacer, esto es, al separarse completamente de su madre. La criatura que muere en el vientre materno, o que perece antes de estar completamente separada de su madre, o que no haya sobrevivido a la separación un momento siquiera, se reputará no haber existido jamás.

Artículo 93. <Derechos diferidos al que está por nacer>. Los derechos que se diferirían a la criatura que está en el vientre materno, si hubiese nacido y viviese, estarán suspendidos hasta que el nacimiento se efectúe. Y si el nacimiento constituye un principio de existencia, entrará el recién nacido en el goce de dichos derechos, como si hubiese existido al tiempo en que se definieron.
En el caso del inciso del artículo 90 pasarán estos derechos a otras personas, como si la criatura no hubiese jamás existido”.

28 The translation is mine. The original text reads: “Artículo 91. <Protección al que está por nacer>. La ley protege la vida del que está por nacer.
The Court itself has recognized the foetus as worthy of *some* protection; after all, he is a form of life and life itself is a constitutional protected *good*. True, it is also a fundamental constitutional *right*, but since the foetus is not a person, he can bear no rights whatsoever, not even the fundamental ones. The distinction is drawn by the Court in the following words: “The right to life implies its holding for its exercise, and such holding, as that of all rights, is restricted to the human person, while the protection of life is predicated even of whom have not achieved such condition”\(^{29}\) (C-355/06, p. 217). I believe that to avoid a possible conflict in this regard with the Legislator (since some could argue that the crime of abortion was conceived to protect the person of the foetus or to protect the foetus’ right to life), the Court is swift to offer a charitable and suitable interpretation of the Legislator’s work: “[…] the forbiddance of abortion is rooted in the Colombian State’s duty to protect the life in gestation and not in the character of the *nasciturus* as a human person and as such a holder of the right to life”\(^{30}\) (C-355/06, p. 217). This is why abortion cannot be allowed in all circumstances, and this is how the Court creatively manages to fulfil the moral claim to still protect the foetus’ life (though not in all circumstances) even if his moral status is not that of a human person.

Summing all up, to declare that an abortion is not a crime if the life and health of the pregnant woman are at risk, the Court has put forth the following arguments:

- There is a constitutional duty for every person to take care of her own health.
- Based on the distinction of obligations and supererogatory actions, the Court assesses that from the fact that some pregnant women can lead a dignified human life while bearing a pregnancy that risks their life and health, it does not follow that all women can and, therefore, that all women should. Women that cannot reach such an ideal moral standard are not to be punished with prosecution under the abortion crime.

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\(^{29}\) The translation is mine. The original text reads: “El derecho a la vida supone la titularidad para su ejercicio y dicha titularidad, como la de todos los derechos está restringida a la persona humana, mientras que la protección de la vida se predica incluso respecto de quienes no han alcanzado esta condición”.

\(^{30}\) The translation is mine. The original text reads: “[…] la prohibición del aborto radicó en el deber de protección del Estado colombiano a la vida en gestación y no en el carácter de persona humana del *nasciturus* y en tal calidad titular del derecho a la vida”.

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• The foetus is not a person and, therefore, has no right to life, though he is entitled to some degree of defence of his life as a constitutional protected good.

• Giving more weight to the fully shaped life of the pregnant woman over the life in shaping of the foetus, the Court resolves the balancing of the two conflicting constitutional protected goods in favour of the pregnant woman’s life. Therefore, when the latter is put at risk, abortion is not to be treated as a crime.

• Based on the defensive side of the right(s) to health, the Court considers that a pregnant woman whose life and health are at risk is legitimated to reject the obligation endorsed by the punishment of abortion to carry on with the pregnancy.

In this case, then, abortion is no longer a crime but a medical procedure that can be legally carried out when the life and health of the pregnant women are at risk due to the pregnancy. Since such a thing can only be judged by an appropriate doctor, the Court requires that such a state be certified by one as a requirement for the legality of the procedure. Furthermore, in order to stay completely clear of the crime of abortion, to follow the standards in medical procedures, and to comply with the recognition of autonomy and freedom of personal development, the pregnant woman’s informed consent is to be acquired:

[…] the right to health has a sphere where it closely connects with personal autonomy and free personal development, in what is related to the power of deciding over one’s own health. Thus, the Constitutional Court has understood that every person has autonomy to make decisions relative to their health, and hence the patient’s informed consent prevails over the considerations of the treating doctor or society’s and State’s interest in preserving people’s health. From this perspective, all treatment, intervention or medical procedure is to be carried out with the patient’s consent, apart from exceptional cases.\(^{31}\) (C-355/06, p. 251).

This requirement will be held for the other two cases in which the Court has considered that abortion is not to be treated as a crime: when there is a grave foetus malformation that makes unviable his or her life; and when pregnancy is the result of a duly denounced conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum, or incest. But I consider that the contemplation of the exceptional cases in which the patient’s consent is not to be required poses a problem

\(^{31}\) The translation is mine. The original text reads: “[…] el derecho a la salud tiene una esfera en la que se conecta estrechamente con la autonomía personal y el libre desarrollo de la personalidad, en lo que hace relación a la potestad de tomar decisiones sobre la propia salud. Así, la Corte Constitucional ha entendido que toda persona tiene autonomía para tomar decisiones relativas a su salud, y por lo tanto prevalece el consentimiento informado del paciente sobre las consideraciones del médico tratante o el interés de la sociedad y el Estado en preservar la salud de las personas. Desde esta perspectiva todo tratamiento, intervención o procedimiento médico debe hacerse con el consentimiento del paciente, salvo en caso excepcionales”.
for the Court, since one of them is if the patient is a minor\textsuperscript{32} (C-355/06, p. 251). The Court, then, will have to find a way to overcome this in order to recognize the capacity to consent to an abortion to pregnant women less than fourteen years of age. I will tackle this issue in §3. 2., when working out how the Court justifies this part of its decision, but let me just point out that the Court is already opening a window of opportunity to do so: “Nonetheless, even under such assumptions [the exceptional cases in which patient’s consent is not required] it must be tried to reconcile the patient’s right to self-determination with the protection of health”\textsuperscript{33} (C-355/06, p. 251).

Finally, the Court’s ruling also points out that health is a public service, which task is, in connection with health being a constitutional protected good as well, to warrant the enjoyment of such good to the population. The State, then, has to take all measures to secure the adequate functioning of the healthcare system. Now, since abortion has become a legal medical procedure, it is the State’s obligation to manage its availability within the system. This position is strengthened by the intervention of the Colombian National Medicine Academy and the Colombian Institute for Family Wellbeing (ICBF, for its name in Spanish), both of which presented abortion as a public health issue to be tackled by measures different from its criminal penalization (C-355/06, §4. 1. 1. and §4. 1. 8.). It took the Colombian Government seven months after the setting of the ruling to comply with the mentioned obligation by releasing Decree 4444/06 and the Technical Norm for Attending the Voluntary Pregnancy Interruption (VPI), adapted from the Spanish version of Safe Abortion: Technical and Policy Guidance for Health Systems by the World Health Organization in 2003.

\textbf{3. 1. 2. When there is a grave foetal malformation that makes his life unviable, certified by a doctor}

On page 274 of the C-355/06 ruling the Court expresses its belief that the State cannot oblige a woman to continue the pregnancy of a \textit{nasciturus} that will most likely not live on, due to a grave malformation that has been certified by a doctor. Given the unlikelihood of the independent life of the newborn, as required by article 90 of the Civil Code, the State’s obligation to protect life looses weight in front of the pregnant woman’s rights. I think that the

\textsuperscript{32} The other two exceptional cases are if the mental state of the patient is abnormal, and if the patient is unconscious.

\textsuperscript{33} The translation is mine. The original text reads: “Sin embargo, aún en estos supuestos debe intentarse conciliar el derecho del paciente a la autodeterminación con la protección a la salud”. 

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Court, then, is balancing the need the State has to defend the constitutional protected good of the foetus’ life, on one hand, and a particular set of the pregnant woman’s rights, on the other.

Two things are worth noting. First, the constitutional protected good whose protection is sought through the criminalization of abortion (i.e. the foetus’ life) is, in this case, one that is already damaged: it is unviable. The constitutional protected good that grounds the State’s obligation is therefore in question: it might very well disappear in the course of the pregnancy. To me this, in itself, seems enough to object to the legitimacy of the criminal prohibition of abortion: why oblige a woman to carry on a pregnancy when the foetus will most likely not live? At least this does not seem to make sense for a consequentialist ethical theory such utilitarianism, which in this case could very well be where the Court argues from. What good is to come out of an action to protect something which is already in its way of getting lost? Especially if the costs of trying to protect it are so high: the healthcare expenses according to the condition of the foetus; the psychological, moral and spiritual negative impact of a pointless pregnancy on the pregnant woman, as well as that of not having a say in the matter; and the ‘infringement’ of the pregnant woman’s constitutional protected goods and constitutional fundamental rights, which would actually be violated, since the overruling power of the State’s obligation to protect the foetus’ life is in question. The alternate approach to the affair, allowing the pregnant woman to have an induced abortion, does not seem to carry such weighty consequences.

The second thing to be noticed is precisely the nature of the pregnant woman’s rights that are threatened in this case. They are not those to life and health, which already have been secured when the pregnancy puts them at risk, as I have shown in the previous section. Besides, in the case at hand it is not the life of the pregnant woman that is at risk, but rather the life of the foetus. According to the Court, the set of rights that are at risk are those of the pregnant woman not being subject to cruel, inhumane and degrading treatment or punishment, set forth in article 12 of the Colombian Political Constitution34, and the right to human dignity, identified by the Court, as I will show in §4.1; then it will be clear that this set of rights

34 The article reads: “No one will be subjected to forced disappearance, nor submitted to torture or cruel, inhuman or degrading treatment”. My translation of the Constitution is based on an unofficial one provided by the University of Richmond (http://confinder.richmond.edu/admin/docs/columbia_const2.pdf), but I have added some changes according to legal Spanish common use. The original text reads: “Nadie será sometido a desaparición forzada, a torturas ni a tratos o penas crueles, inhumanos o degradantes”.

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follows from a rights-based theory of liberal individualism based on a deontological reading of human dignity. In the meantime let me just say that, for the Court, the violation of those rights is the result of having a legal norm that obliges a pregnant woman to continue the pregnancy, even when knowing that it will not have a happy end. Furthermore, this is another case of a supererogatory action and, thus, cannot be considered as an obligation: are we to oblige a pregnant woman to carry a pregnancy that will deliver a dying baby at its best? Sure, we might admire those who do it, rooted in a firm belief of hope or miracle, but are we to punish those who do not do it? Are we to oblige all pregnant women to believe in miracles? I consider that this does not seem reasonable in a society that, like the Colombian one, continues to grapple with religious, ethnic and cultural pluralism.

The Court, then, decriminalizes abortion when there is a foetal malformation that turns the foetus unviable with the following arguments:

- The State’s duty to defend the constitutional protected good of the foetus’ life ceases to exist, given that such good also will.
- The pregnant woman’s right not to be submitted to cruel, inhumane and degrading treatment or punishment, as well as her right to human dignity are to be upheld.
- A pregnant woman who decides to continue her pregnancy in such conditions is someone to be admired, but the pregnant women in the same circumstances who do not meet such decision are not to be punished for it.

In this case, as in the one dealing with the threat to the pregnant woman’s life and health, a medical certification of the foetal malformation is required, as well as the pregnant woman’s consent to the abortion procedure.

3. 1. 3. When pregnancy is the result of a duly denounced conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum, or incest

The Court starts by recognizing the will of the Legislator to punish less drastically an abortion when the pregnancy was not the result of a free and consented decision, but rather the outcome of an arbitrary conduct that ignores the woman’s character as an autonomous subject of
rights. The Legislator’s will follows from the fact that article 124 of Law 599/00 introduced mitigating circumstances for the punishment of abortion, lowering it by three fourths when pregnancy had its cause in abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum. Furthermore, the same norm also allowed a judicial officer to completely forego the punishment when abortion was performed in extraordinary situations of abnormal motivation.

But, as I pointed out before, such circumstances and such punishment foregoing would only take place during a criminal prosecution, thus subjecting the woman and the abortion performer (were she different from the pregnant woman herself) to it. The Court finds that this should not be the case and, therefore, that the prescriptions of article 124 of Law 599/00 are not enough. The Legislator’s will, then, is to be taken further: in such circumstances the woman and the abortion performer should not even be prosecuted, their freedom should not hang on the decision of a judicial authority, and abortion should not be a crime.

How does the Court go about justifying this part of its decision? The balancing of the pregnant woman’s constitutional rights and the defence of the constitutional protected good of the foetus’ life is handled by an appeal to her right to a free personal development, deeply connected with her condition as an autonomous subject, i. e. to one (if not the most important one) of the interpretations the Court developed for the concept of human dignity and which will be examined in §4.1. For now let me just point out that the Court rightly believes that a pregnant woman should not bear the weight of a pregnancy caused in direct denial of her autonomy. Such thing takes away the right of the woman to choose and decide her own way of life, her own plan for her life, specially in such a life-changing experience as that of becoming a mother; and under the circumstances, a mother not because of an act of love but of a crime. Not to recognize this would turn a woman into a mere reproductive tool, an instrument, a means to the reproductive end.

35 This recognition keeps in line with the Court’s approach not to catch a fight with the Legislator, which I already pointed out in §3.1. The Court starts by acknowledging what the Legislator has rightly achieved. This section focuses on pages 269 through 271 of C-355/06.
36 It has been brought to my attention that in the international discussion the reference to these procedures as being “artificial” is no longer used; they are now referred to as “assisted reproductive technologies”. Colombia’s Criminal Code is a recent one, having been sanctioned in the year 2000, but it still refers to such procedures as “artificial”. It would be interesting to trace the reasons for this selection of concepts, but it is something that will have to be done elsewhere, for it slips away from the purpose of the present work.
Furthermore, the Court also resorts to the already used distinction between supererogation and obligation. On ruling C-647/01, four of the Court’s judges (including the first woman magistrate) added a clarification in order to qualify a pregnant woman who continues a pregnancy started in a criminal conduct against her either as a heroine or as someone indifferent to her own value as a subject of rights. Now, while the latter is a condition that is clearly to be avoided, given that some rights are not to be abandoned, even by their holders; the former condition is something so high that it cannot be required of every woman, especially given the poor conditions warranted by the State in such cases. Hence, obliging women to carry on a pregnancy under these circumstances is disproportional and unreasonable and, thus, it is not to be done. This precedent was incorporated in the C-355/06 reasoning:

The woman who as a consequence of a damage of such magnitude to her fundamental rights were pregnant cannot be legally obliged to adopt heroic behaviours, as it would be to assume on her shoulders the enormous vital load that continuing a pregnancy implies, nor indifference towards her value as a rights subject, as it would be to impassiblemently endure that her body, against her conscience, be subordinated to being a useful procreation tool. What is normal and ordinary is that she is not a heroine and someone indifferent. Every time that a woman has been raped or used as a tool to procreate, that which is exceptional and admirable consists in adopting the decision to continue the pregnancy until giving birth. Even though the State does not give her or the future child any assistance or social security help, the woman has the right to decide to continue her pregnancy, if she has the courage to do so and her conscience, after reflection, so points out. But she cannot be obliged to procreate or become an object of criminal punishment for claiming her fundamental rights and trying to reduce the consequences of her rape or subjugation.37 (C-355/06, p. 270).

The Court even takes a step further. Following the path of the Legislator by granting that an abortion prompted by a pregnancy having started in a conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum is to be treated exceptionally, the Court adds one more case: that of incest. But, is the Court justified doing it? I believe it is, for the following reasons. Upon closer examination it becomes clear that all the cases that had been contemplated in article 124 of

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37 The translation is mine. The original text reads: “La mujer que como consecuencia de una vulneración de tal magnitud a sus derechos fundamentales queda embarazada no puede jurídicamente ser obligada a adoptar comportamientos heroicos, como sería asumir sobre sus hombros la enorme carga vital que continuar el embarazo implica, ni indiferencia por su valor como sujeto de derechos, como sería soportar impasiblemente que su cuerpo, contra su conciencia, sea subordinado a ser un instrumento útil de procreación. Lo normal y ordinario es que no sea heroína e indiferente. Siempre que una mujer ha sido violada o instrumentalizada para procrear, lo excepcional y admirable consiste en que adopte la decisión de mantener su embarazo hasta dar a luz. A pesar de que el Estado no le brinda ni a ella ni al futuro niño o niña ninguna asistencia o prestación de la seguridad social, la mujer tiene el derecho a decidir continuar su embarazo, si tiene el coraje para hacerlo y su conciencia, después de reflexionar, así se lo indica. Pero no puede ser obligada a procrear ni objeto de sanción penal por hacer valer sus derechos fundamentales y tratar de reducir las consecuencias de su violación o subyugación".
Law 599/00 share some characteristics: 1) they are criminal conducts, which implies that they are not consented; 2) they turn the woman to a mere tool, be it of pleasure, satisfaction or procreation; and 3) they can manage to get a woman pregnant. But there still is another crime that shares all such traits: that of incest, though it seems the Legislator forgot about it. I believe, then, that by appealing to a non-explicit analogy the Court rightly includes incest to the cases already contemplated by the Legislator. A woman pregnant of an ascendant, descendant, adoptee, adopted, or brother (art. 237, Law 599/00) is not obliged to continue the pregnancy and is not to be punished with the crime of abortion.

Thus, the Court’s arguments to allow abortion when pregnancy is the result of a duly denounced conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum, or incest are:

- The defence of the pregnant woman’s right to her personal free development, since she has not consented to such a life-changing decision as motherhood.
- The defence of the pregnant woman’s human dignity, which was violated with the disregard to her autonomy in the acts that resulted in the pregnancy.
- The distinction between the acts of a heroine and those of a regular woman trying to get her life back on track after the damage caused by the criminal acts.
- The relevant similitude of incest with the other criminal actions contemplated by the Legislator.

In these cases the consent of the pregnant woman is also required in order to perform the legal abortion, but no medical certificate is needed, since the alleged causes for such request are of a different nature to a medical one: they are of a legal criminal nature. That is why the Court requires that, in order for the abortion to be a legal one, the pregnant woman goes to the appropriate authority to file a legal claim for the crime to which the pregnancy can be traced.

3. 2. The unconstitutionality of the expression “[…] or in a woman less than fourteen years of age […][…” (art. 123, Law 599/00)

After having granted the legal possibility for abortion in the three cases already studied, I believe the Court faces a problem. As I have shown, the Court’s argumentation has relied heavily on the notion of human dignity, specifically on its interpretation regarding autonomy
and personal integrity, and that of the gradual development of human life. Both reasons have allowed the Court to seek a balance between the foetus’ life as a constitutional protected good and that of the pregnant woman’s, combined with her fundamental constitutional rights (of which the foetus is deprived, as shown in §3.1.1). Both reasons have allowed the Court to rule that the latter prevail. This, then, would mean that the pregnant woman is regarded as autonomous (or autonomous enough, given the notion of gradual development used by the Court) to consent to an abortion procedure in any of the former cases.

However, both the wording of article 123 of Law 599/00 and the Court’s previous considerations of patient’s consent seem to pose a problem for the autonomy and personal integrity of pregnant women of a certain age. Specifically, the mentioned article stated: “Abortion without consent. He who causes an abortion without the consent of the woman or in a woman less than fourteen years of age will be punished with imprisonment from four (4) to ten (10) years”. My interpretation of this article is that the Legislator equated pregnant women less than fourteen years of age with pregnant women who do not consent to abortion. The Legislator had decided for them, it had not recognized the possibility of such pregnant women to have a say in the matter. This inability to consent assumes that a pregnant woman less than fourteen years of age has no autonomy (or not enough autonomy) to decide over her own personal integrity. Besides this, I have shown that the Court itself had stated that one of the exceptions to the requirement of patient’s consent was that of being under-aged (C-355/06, p. 251). Applying such exception in the case of abortion it would mean that under-aged pregnant women would have no say in the matter of their own pregnancy, thus justifying the blanket prohibition of abortion and the similar treatment specified to abortion without consent and abortion in pregnant women less than fourteen years of age given by the Legislator.

How does the Court go about facing such a problem? As it has previously done, it begins with a kind interpretation of the troublesome article by pointing out the special protection the Legislator sought to provide to such vulnerable women: whoever performed an abortion on them would be punished more severely (C-355/06, p. 277). The problem is that by providing such radical protection, other elements that come into play when considering the person of a pregnant woman are damaged: her human dignity, given the challenge to her autonomy, and her right to free personal development, which is connected to her personal integrity (also a way of understanding human dignity, as I will show in §4.1.). The Court believes that regardless of age, all persons are entitled to fundamental constitutional rights, since the only
thing required to be a rights-holder is to be born, as I have already shown. Nonetheless, it is clear that not all rights-holders hold all rights in the same manner all the time, since that depends on the stage of development in which every rights-holder finds herself. For example, the fundamental right to choose a partner or to start a family is only formally recognized for a baby, since he has no way of exercising them, due to his early stage of life. As he grows, however, he will acquire the capabilities, abilities and maturity to exercise those rights.

The question then, is not whether a pregnant woman less than fourteen years of age has some rights, but rather to what degree she has them. And in answering this question age is not an absolute criterion. Rather the capabilities, abilities, and degree of maturity are what have to be taken into account; age just becomes a tentative indicator in assessing them, especially the degree of maturity that has been achieved. This immediately prompts questions in my mind: to what extent have such indicators developed in a pregnant woman less than fourteen years of age? How does such degree of development affect her rights to autonomy, free personal development and human dignity? But in this matter the Court takes what I consider a rather unfortunate turn: instead of facing these issues (as thorny as they may be), it relies on stating the State’s obligation to comply with international treaties regarding Human Rights. This time the international treaty that should be complied with is, according to the Court, article 12 of the Convention on Children’s Rights, ratified by Colombian Law 12/91 (C-355/06, pp. 279-280). Such article contains three legal dispositions in agreement with the Court’s position: 1) the recognition that children may be able to have their own judgement, which grounds 2) the right of such children to express such judgement and 3) the duty of whoever this judgement is being expressed at to take it into account when proceeding on the issue that prompted the judgement. In the case of pregnant women less than fourteen years of age the Court just assumes that they are mature enough to achieve a proper judgement regarding whether or not to continue their pregnancy and, therefore, their judgement is to be respected.

38 Note that this is another use of the criterion of development of human life, which the Court also uses to balance the life and health of the pregnant woman and the foetus’ life.
39 However, this can very well be the case in simplified and extreme cases such as the one presented in last paragraph’s example.
40 This obligation is set down in the first paragraph of article 93 of the Colombian Political Constitution (P. C.): “International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically”. As with all translations of extracts from the Colombian Constitution, this one follows the translation from the University of Richmond.
The only explicit reason the Court provides for its assumption about the adequate degree of autonomy of pregnant women less than fourteen years of age is that “[…] the national and international judicial practice has recognized autonomy to many minor adults to directly make certain medical decisions, even against their parents’ opinion”\(^{41}\) (C-355/06, p. 280) and such tendency is even present in the particular case of abortion procedures, for which the Court quotes the ruling of the United States’ Supreme Court City of Akron v. Akron Center for Reproductive Health 462 V. S. 416 (1983). The combined effect of the decriminalisation of abortion and the just quoted reasons is as follows: the Court is already considering abortion as a legal medical procedure (since it has been found to be such in the three previously discussed cases) and, since the national precedent\(^{42}\) shows that autonomy has been granted to minors regardless of their age of consent to (or abstain from) medical procedures, there seems to be no good reason to make an exception in the case of abortion. The Court seeks to strengthen its argument by introducing a decision in the same direction proffered by the United States’ Supreme Court. The weight of this move not only depends on the relevance of the decision to the Court’s analogy; it also depends on the rhetorical force of aligning with the highest judicial authority of one of the World’s superpowers and that which reigns in America. Even so, I believe that the use of authority arguments in moral reflection is to be handled more carefully than in other fields, since it can very easily undermine the capabilities of a moral agent to undertake such reflection and turn a reflective activity into the spreading of a dogma.

Nonetheless, I think that the Court’s decision to recognize the autonomy of pregnant women less than fourteen years of age and to allow them to lend their consent to abortion in the three cases under which the same Court considers it to be a legitimate alternative to the pregnancy, may have a non-explicit reason to be found in other considerations made by the Court in C-355/06. These considerations keep in line with the ones already expressed: they are deontological, having to do with the being of the pregnant woman as a person. When analysing abortion for a pregnancy caused in a duly denounced conduct constituting abusive or

\(^{41}\) The translation is mine. The original text reads: “[…] la práctica judicial, nacional e internacional, ha reconocido autonomía a muchos menores adultos para tomar directamente ciertas decisiones médicas, incluso contra la opinión de los padres”.

\(^{42}\) Sadly enough, the Court does not offer any details regarding this precedent, except the fact that it has been used in ruling SU337/99 “[…] on the validity of a minor’s consent to treatments or interventions that impact his sexual definition” (C-355/06, p. 279). The translation is mine. The original text reads: “[…] sobre la validez del consentimiento del menor frente a tratamientos o intervenciones que inciden en su definición sexual”.

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non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum, or incest the Court recognized the huge impact that the pregnancy had in the life of a woman: it has the power to turn her into a mere object for reproduction. The Court rejected this way to nullify the pregnant woman’s human dignity, giving her back the ability to make an autonomous decision regarding her pregnancy. I wonder if younger women in similar conditions should be treated differently. Should they be subject to reification? It seems to me that there is no substantive difference relevant enough to grant such distinction. Would there be one for the other two cases? Should the life and health of younger women be threatened? Should they carry the weight of an unviable foetus? I can’t seem to find a reason to answer affirmatively to these questions.

But I also believe that there is another set of reasons of a more consequentialist nature to recognize pregnant women less than fourteen years of age as being able to consent to an abortion. Giving life to a new being deeply affects the woman’s own life in all its senses (C-355/06, p. 271), not only from a deontological perspective. Her body changes dramatically; her social, friendship and family relations may be shattered; and her work and study opportunities and facilities diminish. These dangers increase (except, naturally, the ones regarding work) as the age of the pregnant woman decreases. Thus, given the heavy consequences of an early pregnancy, young women should be in a position to autonomously choose their life plan. However, the Court did not go as far: it limited itself to recognizing their autonomy in the three cases being examined. In such circumstances, the Court found that the increased protection sought by the Legislator towards minor pregnant women would, in fact, turn against them (C-355/06, p. 281). Since no law-abiding person would risk a criminal prosecution, younger pregnant women would be left to face the heavy burdens of death or illness, shame, mockery or even hate.

In short, the Court argues for the unconstitutionality of the expression that in article 123 of Law 599/00 deprived pregnant women less than fourteen years of age of the ability to consent to abortion. To do so, on the one hand the Court reaffirms the judicial precedent that allows it to gauge the maturity of an under-aged person so that she can make sound judgements regarding medical interventions, including that of abortion. This argument is further strengthened by the deontological considerations regarding the human dignity of the pregnant woman, even if she is not yet an adult. On the other hand, the Court displays consequentialist considerations to show that even if the will of the Legislator was to offer special protection to
under-aged pregnant women, assuming their impossibility to consent to an abortion would, in fact, leave them in a far more difficult position than that of adult pregnant women.
4. Two common elements of the Court’s arguments

In the past section I examined the arguments with which the Court justifies its decision to decriminalize abortion in three particular cases and to recognize pregnant women less than fourteen years of age a sufficient degree of autonomy to consent to it. In doing so it became clear to me that the Court relies in some very specific concepts, notions and argumentative practices. First and most important is the notion of human dignity. The second element is the belief that neither fundamental rights nor constitutional protected goods are absolute and, thus, they need to be balanced against each other. The third one is the distinction between obligations and supererogatory actions, and the fourth element is the combined use of consequentialist and non-consequentialist arguments, such as deontological and rights-based ones. In this section we shall approach them, but I will focus on the two first common elements: how the notion of human dignity has been developed and used by the Court, as well as the justification of the balancing need and the way it is carried out.

Nonetheless, before dwelling into those two issues, I think it is important to take a brief look at the other two elements (the distinction between obligations and supererogatory actions, and the combined use of consequentialist and non-consequentialist arguments) in order to get a more well-rounded view of the Court’s work. As I have shown, the Court systematically, though not explicitly, appeals to the difference between obligations and supererogatory actions, depicted, among others, by Beauchamp and Childress (2001, pp. 40-44). The Court believes that a pregnant woman is not to be obliged to sacrifice her life and health to benefit anyone, including the foetus, and even less the abstract common good; or to submit herself to cruel, inhumane and degrading treatment or punishment and surrender her right to human dignity as specified in the right to autonomy and psychical, moral or spiritual integrity. Any pregnant woman that chooses to do so in order to guard the constitutional protected good of the foetus’ life is to be deemed a heroine, she is to be admired for being able to live up to the highest moral standards. But this does not mean that those who cannot do it are to be considered wrongfully acting and, therefore, punished. I think that the distinction between obligations and supererogatory actions is a very important tool in a democratic, plural society, where everyone is not to be gauged by the same moral standards. I believe that the Court rightfully uses this conceptual distinction to gain some flexibility between what is morally
desirable and that which is morally required, which allows it to tune the challenged norms according to the latter rather than to the former.

I have also shown how the Court argues both from consequentialist and non-consequentialist perspectives. The consequentialist perspective allows the Court to judge the best possible course of action by comparing the results of allowing or not allowing induced abortion in each of the examined cases in terms of the positive value they render. Such considerations include e. g. whether the pregnant woman’s constitutional protected goods and constitutional fundamental rights would be violated or infringed, or if special protection to pregnant women less than fourteen years of age would be better served by allowing them to consent to an abortion or not. I think that incorporating this ethical perspective is responsible for a body that is fully conscious of the obligatory application of a decision based on ethical considerations and, thus, of the deep social impact the ruling would have. Hence, to explore such impact and use it in the argumentation seems to me to be well fitting.

But the Court also appeals to non-consequentialist elements, such as the notion of human dignity and the holding of certain rights, both recognized to the person of the pregnant woman. This appeal is justified by the normative system itself, which has raised human dignity to the foremost value of Colombia as a legal social State, as I will show in the next section. In it I will also show how most of the rights recognized to the pregnant woman actually follow from the notion of human dignity. Furthermore, I believe that this connection between human dignity and rights, both non-consequentialist concepts, links with the consequentialist perspective, since the set of rights taken into consideration by these arguments follows from a rights-based theory of liberal individualism based on a deontological reading of human dignity. The consequentialist reflections, then, would be based on the deontological considerations, which very much are the cornerstone of the Court’s reasoning. This said, it is time to focus on the most important of such considerations: the notion of human dignity.

**4. 1. Human dignity**

I have shown that pretty much the central element in the Court’s argument for granting a conditioned constitutionality to the legal norm that criminalized abortion and recognizing the ability to consent to women less than fourteen years of age is that of human dignity. I believe
this is the main building block to the deontological arguments displayed by the Court. But, what does the Court understand under such volatile concept? This is what I will now elaborate.

Regarding the issue of human dignity, the Court has approached it both in tutelage and unconstitutionality rulings, though the tutelage ones are the most common. This is because, as I will show, the Court considers human dignity both as a constitutional principle and a fundamental right, allowing it to be used in settling all kinds of cases in which it is directly compromised or compromised indirectly by the violation of other fundamental rights. In the case of abortion, the direct threat is that which constrains autonomy and personal integrity, while the indirect threat is composed by the violation of the rights to life, health and free personal development, as I have shown in §3.

As the result of a short jurisprudential analysis, this section will focus on two rulings: T-881/02 and T-133/06, which are the most recent and central in which the Court, in order to solve the cases at hand, takes on a theoretical reflection on human dignity. T-881/02 contains a full-fledged presentation of the judicial precedent on human dignity that the Court has been building since 1992, and T-133/06 adds to it a clarification of the notion of human dignity as a prestational right, which will be clarified in due time but that follows the already explained difference between the positive and negative sides of rights; the former are considered prestational rights while the latter are taken as defensive rights.

How has the Court managed to put together an interpretation of human dignity? I believe that the Court has done it by using two different interpretation methods: the grammatical or literal one, and the systematic one. The grammatical or literal method is based on a careful reading of

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43 This includes all the already noted connections to other rights, as discussed in §3. 1. 1. of this work.
44 The analysis followed Diego López’ theory of judicial precedent set down in his book The Judges’ Law: Obligation of the Constitutional Precedent, Analysis of Rulings and Jurisprudential Lines and Theory of Judicial Law. Original title: El derecho de los jueces: Obligatoriedad del precedente constitucional, análisis de sentencias y líneas jurisprudenciales y teoría del derecho judicial. First, a search of rulings under the “dignidad humana” (human dignity) descriptor was carried out. Of the 210 found descriptors, 33 described a theoretical approach to the issue: 4 on the right to human dignity, 15 on various aspects of human dignity (as a concept, as a principle, as a value, some of its characteristics, etc), and 14 on the principle of human dignity. After cross referencing the different rulings on each category, five of them were found to be continually quoted (C-695/02, T-881/02, C-205/03, T-1134/04 and T-133/06). The study of the rulings began by the most recent one and continued backwards, identifying the sources of the arguments, which frequently enough led to T-881/02. When getting to this ruling, it was clear that it was the core of the judicial precedent, but that it had been complemented by T-133/06.
45 The reader may turn to §3. 1. 1. of this work to review these concepts.
the text to be interpreted, in this case the Constitution. From there the interpreter, in this case the Court, should be able to understand what is prescribed. This has led the Court to recognize the existence and central role of human dignity in the Constitution, for it explicitly appears in articles 1, 25, 42 and 51. But it is clear to me that the varied use it has does pose some problems. Is the Constitution always referring to human dignity? Is there a unified concept of human dignity on which all others draw? What kind of notion is that of human dignity? What does it imply and presuppose?

The Court explicitly focused on the last two issues. But since such questions could not be answered by merely using the grammatical or literal method, the Court also took a systematic approach: an analysis of the relations between different norms, in this case contained in the many articles of the Constitution. In the Court’s own words:

[…] for constructing the norms in function of the delimited object of protection, the Court has not only used the normative declarations of articles 1, 25, 42 and 51, in which the words “dignity” and “dignified”, as a noun or as an adjective, appear in a literal way. On the contrary, the Court has recurred to the […] contexts of protection regarding multiple normative declarations or constitutional dispositions.46 (T-881/02, p. 22).

This has allowed the Court to extract the first three meanings of human dignity, which are grouped under the concept of the *material content or concrete object of protection* of human dignity. These are: 1) Human dignity as physical and moral integrity (which also entails psychical and spiritual integrity, according to T-499/92 quoted in T-133/06, p. 13); 2) human dignity as a set of minimal material conditions of existence; and 3) human dignity as autonomy. Already at this point I believe it becomes clear that a blanket prohibition of abortion conflicts with the content of the pregnant woman’s human dignity, at least in its first and third elements; the second element, however, can very well be used to justify the inclusion of the abortion procedure in public healthcare provided by the social security scheme. The Court has inferred such content by establishing the systematic relations between respect of human dignity as a founding element of the Republic (P. C., art. 1) and other constitutional norms:

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46 The translation is mine. The original text reads: “[…] para la construcción de las normas en función del objeto de protección delimitado, la Corte no se ha valido únicamente de los enunciados normativos de los artículos 1, 25, 42 y 51 en los cuales las palabras “dignidad” y “dignas”, ya como sustantivo, ya como adjetivo, aparecen de manera literal. La Corte, por el contrario, ha recurrido a la delimitación de los referidos ámbitos de protección a partir de múltiples enunciados normativos o disposiciones constitucionales”.

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Illustrative is the case of that contained in article 12 (“No one will be subjected to forced disappearance, nor submitted to torture or cruel, inhuman or degrading treatment”), from which the Court, together with the normative declaration of “respect of human dignity”, has extracted the norm consisting in the fundamental right to physical and moral integrity.

Illustrative as well is the case of the normative declaration contained in article 13 (“The State will promote the conditions in order that equality may be real and effective […]”), which together with the normative declaration of “respect of human dignity” has served to perfect the protection object of dignity understood as the real possibility to accede to certain material goods or services, or to enjoy certain life conditions, situations which in principle must be guaranteed by the State through the distribution of goods and services.

In the same sense, the case of the normative declaration contained in article 16 (“All persons are entitled to their free personal development […]”) can be shown, from which the Court, together with the normative declaration of “respect of human dignity”, has delimited the protection object of dignity understood as a possibility for self-determination according to one’s own destiny or one’s particular idea of perfection, with the aim of giving meaning to one’s own existence.\(^\text{47}\) (T-881/02, p. 22).

By carrying out such interpretation, some of the problems I pointed out, posed by the grammatical or literal interpretation, can be solved. Dignity is something to be treasured, protected, valued; something related with the nature of human beings, with the way we are and, most importantly, with the way we encounter and treat one another. I believe this allows for at least a more unified notion of human dignity, even if it is tripartite. I think this interpretation also reveals the general character of the Court’s point of view: that of an anthropological perspective of the Constitution. This position is based on Kant’s philosophy, which clarifies the emphasis the Court places on autonomy:

\[\ldots\] This “anthropological conception” arises in the interpretation the Constitutional Court has made of the normative declaration of human dignity, in tight relation with the third of the Kantian categorical imperatives, which postulates one of the basic principles of Kantian practical philosophy: “act in such a way that your acting maxim is oriented to treating humanity in yourself and in any other as an end and never as a mean” from which the Court has extracted the idea that “mankind is an end in herself”, which has practically meant an

\[^{47}\text{The translation is mine. The original text reads: “[…] Ilustrativo es el caso de la contenida en el artículo 12 (<<Nadie será sometido a desaparición forzada, a torturas ni a tratos o penas crueles inhumanos o degradantes>>) de la cual la Corte, junto con el enunciado normativo del <<respeto a la dignidad humana>> ha extraído la norma consistente en el derecho fundamental a la integridad física y moral. Igualmente ilustrativo es el caso del enunciado normativo contenido en el artículo 13 (<<el estado promoverá las condiciones para que la igualdad sea real y efectiva>>), el cual junto con el enunciado normativo del <<respeto a la dignidad humana>> ha servido para perfeccionar el objeto de protección de la dignidad entendida como posibilidad real de acceder a ciertos bienes o servicios materiales o de disfrutar de ciertas condiciones de vida, situaciones que en principio deben ser garantizadas por el Estado mediante la distribución de bienes y servicios. En el mismo sentido se puede mostrar el caso del enunciado normativo contenido en el artículo 16 (<<todas las personas tienen derecho al libre desarrollo de la personalidad>>) del cual la Corte junto con el enunciado normativo del <<respeto a la dignidad humana>> ha delimitado el objeto de protección de la dignidad entendida como posibilidad de autodeterminarse según el propio destino o la idea particular de perfección, con el fin de darle sentido a la propia existencia”.}\]
I am sure this anthropological conception also helps to understand that the notion of dignity in the Colombian Constitution is that of human dignity. There is no conception of the dignity of other creatures.\(^49\) As I have also shown, the Kantian reading of human dignity is moreover at the base of one of the main arguments used by the Court to decriminalize abortion when pregnancy is the result of a duly denounced conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum, or incest: the pregnant woman is not to be conceived or treated as a mere instrument for reproduction.\(^50\) But the anthropological conception of the Constitution adds one more characteristic to the notion of human dignity. It opens a very direct way in which human dignity fits into the legal system: as a fundamental right. I believe this is so because conceiving of a human being as the interpretative key of the Constitution obliges us to take into account his social nature, the different ways in which human dignity can be expressed in the social world, in relation to others, the possibility of dignity being ignored and, thus, the opportunity to protect it. This is justified by the Court in a rather intricate way:

\[
[[...]] \text{ the path opened by the Court has a special importance in the development of the fundamental rights’ efficacy principle and the realization of the ends and values of the Constitution, even more regarding the anthropological conception of the legal social State. Because if the Court has identified three concrete protection am\}bits based on the normative declaration for “respect of human dignity”, am\}bits equally shared by other normative declarations of the Constitution (arts. 12 and 16), a more comprehensive interpretation of the Constitution allows and requires identifying new protection am\}bits that justify the jurisprudential treatment of the declaration on dignity as a true fundamental right.}
\]

In this sense the Court considers that to broaden human dignity’s content, in order to switch from a naturalist or essentialist conception referred to certain intrinsic conditions of the human being, to a normative or functional conception that completes the concept of the former with those proper to the social dimension of the human person, is of special importance, at least for three reasons: first, because it allows to rationalize the normative handling of human dignity; second, because it presents it more harmoniously with the axiological content of the 1991

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\(^48\) The translation is mine. The original text reads: “Esta llamada <<concepción antropológica>> surge de la interpretación que ha realizado la Corte Constitucional del enunciado normativo de la dignidad humana, en estrecha relación con el tercero de los imperativos categóricos kantianos, en el que se postula uno de los principios básicos de la filosofía práctica kantiana así: <<obra de tal forma que la máxima de tu actuación esté orientada a tratar a la humanidad tanto en tu persona como en la persona de cualquier otro como un fin y nunca como un medio>>, del cual la Corte ha extraído la idea según la cual el <<hombre es un fin en sí mismo>>, lo que ha significado prácticamente una concepción antropológica de la Constitución y del Estado, edificada alrededor de la valoración del ser humano como ser autónomo en cuanto se le reconoce su dignidad [...]].”

\(^49\) Nonetheless, this does not mean that animals and plants are given no value. Their value, however, is as part of the environment, which the Constituents raised to a collective right (P. C., art. 79) susceptible of protection by a sister of the tutelage action: the popular action (P. C., art. 88).

\(^50\) The more detailed argumentation can be found in §3. 1. 3. of this work.
Constitution; and third, because it opens the possibility to more clearly concrete the 1991 Constitution’s mandates.

This is not to deny the natural substrate of the concrete referent of human dignity (individual autonomy and physical integrity, basically), but to add a series of qualities in relation with the person’s social environment. In this way a normative concept of human dignity would integrate, besides its natural referent, certain aspects of a circumstantial order determined by social conditions, that allow giving it an appropriate, functional and harmonic content with the requirements of the legal social State and the characteristics of today’s Colombian society.

In conclusion, human dignity’s protection ambits will have to be appreciated not as abstract contents of a natural referent, but as concrete contents in relation with the circumstances in which the human being ordinarily develops.  

By establishing this interpretative basis, founded in the anthropological conception of the Constitution in order to understand human dignity as a fundamental right, the Court can reinterpret the already defined protection ambits of human dignity (autonomy; minimal goods and services; and physical, moral, psychical and spiritual integrity) as contents of the new fundamental right to human dignity. Human dignity, then, is not only a collection of things to be treasured, but a right in itself:

[...] In such way the legal notion of human dignity (in the individual autonomy ambit) integrates the freedom of choosing a concrete life plan in the framework of the social conditions in which the individual develops. Freedom that implies that each person should have the maximum liberty and the minimum possible restrictions, in such a way that both the State’s

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51 The translation is mine. The original text reads: “[...] Sin embargo, el cauce abierto por la Corte tiene una especial importancia en el desarrollo del principio de la eficacia de los derechos fundamentales y de la realización de los fines y valores de la Constitución, sobre todo en lo relativo a la concepción antropológica del Estado social de derecho. Porque si bien la Sala ha identificado tres ámbitos concretos de protección a partir del enunciado normativo del <<respeto a la dignidad humana>> ámbitos igualmente compartidos por otros enunciados normativos de la Constitución (artículos 12 y 16), una interpretación más comprensiva de la Constitución permite y exige la identificación de nuevos ámbitos de protección que justifican el tratamiento jurisprudencial del enunciado sobre la dignidad como un verdadero derecho fundamental.

29. En este sentido, considera la Corte que ampliar el contenido de la dignidad humana, con tal de pasar de una concepción naturalista o esencialista de la misma en el sentido de estar referida a ciertas condiciones intrínsecas del ser humano, a una concepción normativista o funcionalista en el sentido de completar los contenidos de aquella con los propios de la dimensión social de la persona humana, resulta de especial importancia, al menos por tres razones: primero, porque permite racionalizar el manejo normativo de la dignidad humana; segundo, porque lo presenta más armónico con el contenido axiológico de la Constitución de 1991; y tercero, porque abre la posibilidad de concretar con mayor claridad los mandatos de la Constitución.

Con esto no se trata de negar el sustrato natural del referente concreto de la dignidad humana (la autonomía individual y la integridad física básicamente), sino de sumarle una serie de calidades en relación con el entorno social de la persona. De tal forma que integrarían un concepto normativo de dignidad humana, además de su referente natural, ciertos aspectos de orden circunstancial determinados por las condiciones sociales, que permitan dotarlo de un contenido apropiado, funcional y armónico con las exigencias del Estado social de derecho y con las características de la sociedad colombiana actual.

En conclusión, los ámbitos de protección de la dignidad humana, deberán apreciarse no como contenidos abstractos de un referente natural, sino como contenidos concretos, en relación con las circunstancias en las cuales el ser humano se desarrolla ordinariamente".

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authorities and the particulars must abstain from prohibiting or even discouraging, by any
mean, the possibility of a true vital self-determination of the persons, under the indispensable
social conditions that allow their complete development.
The legal notion of human dignity also integrates (in the material conditions of existence
ambit) the real and effective possibility of enjoying certain goods and services that allow every
human being to function in society according to his special conditions and qualities, under the
logic of inclusion and the real possibility to develop an active role in society. […]
The third ambit is also tinged by this new interpretation, and this is why the legal notion of
human dignity (in the ambit of the intangibility of a person’s immaterial goods, concretely her
physical and moral integrity) integrates the possibility that every person can keep socially
active. In such a way that conducts directed towards social exclusion mediated by an attempt
against or repudiation of the physical and spiritual dimension of persons are constitutionally
forbidden, being covered by human dignity’s normative predicates; equally, both State’s
authorities and particulars are obliged to set forth what is necessary to conserve those goods’
intangibility and, above all, to promote social inclusion policies based on the obligation to
correct the effects of situations already consolidated, in which those goods have been
compromised.
For the Court, human dignity’s new normative determined social dimension constitutes reason
enough to recognize its condition as an autonomous fundamental right […] 52 (T-881/02, p.
30).

Thus, human dignity as a fundamental right is a prestational one, it has a ‘positive freedom’
side as characterized when describing the functions of the right to health (§3. 1. 1.). The
fundamental right to human dignity has direct efficacy that creates specific obligations by the
State: “It is a right that implies, for the State, obligations of not doing as well as obligations of

52 The translation is mine. The original text reads: “[…] De tal forma que integra la noción jurídica de
dignidad humana (en el ámbito de la autonomía individual), la libertad de elección de un plan de vida
concreto en el marco de las condiciones sociales en las que el individuo se desarrolle. Libertad que
implica que cada persona deberá contar con el máximo de libertad y con el mínimo de restricciones
posibles, de tal forma que tanto las autoridades del Estado, como los particulars deberán abstenerse de
prohibir e incluso de desestimular por cualquier medio, la posibilidad de una verdadera
autodeterminación vital de las personas, bajo las condiciones sociales indispensables que permitan su
cabal desarrollo.
Así mismo integra la noción jurídica de dignidad humana (en el ámbito de las condiciones materiales
de existencia), la posibilidad real y efectiva de gozar de ciertos bienes y de ciertos servicios que le
permiten a todo ser humano funcionar en la sociedad según sus especiales condiciones y calidades,
bajo la lógica de la inclusión y de la posibilidad real de desarrollar un papel activo en la sociedad. […]
El tercer ámbito también aparece teñido por esta nueva interpretación, es así como integra la noción
jurídica de dignidad humana (en el ámbito de la intangibilidad de los bienes inmateriales de la persona
concretamente su integridad física y su integridad moral), la posibilidad de que toda persona pueda
mantenerse socialmente activa. De tal forma que conductas dirigidas a la exclusión social mediadas por
un atentado o un desconocimiento a la dimensión física y espiritual de las personas se encuentran
constitucionalmente prohibidas al estar cobijadas por los predicados normativos de la dignidad
humana; igualmente tanto las autoridades del Estado como los particulars están en la obligación de
adelantar lo necesario para conservar la intangibilidad de estos bienes y sobre todo en la de promover
políticas de inclusión social a partir de la obligación de corregir los efectos de situaciones ya
consolidadas en las cuales esté comprometida la afectación a los mismos.
Para la Sala la nueva dimensión social de la dignidad humana, normativamente determinada, se
constituye en razón suficiente para reconocer su condición de derecho fundamental autónomo […]
“
doing” (T-702/01 quoted in T-133/06, p. 14). I think that, as a right of the pregnant woman, human dignity is particularly important in the abortion ruling when contemplated in the ambits of individual autonomy and that of physical and moral integrity. Bearing a pregnancy and having a child is one of the most life-changing decisions a woman can make. Her life plan will be radically altered if such a decision had not been contemplated. The weight of an unwanted or threatening pregnancy can harm both the physical and moral integrity of the pregnant woman. Should her human dignity be sacrificed? I agree with the Court’s answer that it should not, and to assure it the Court reads the right to autonomy and to physical and personal integrity as elements of the right to human dignity. The right to certain material conditions of existence allows a woman that has decided not to continue with the pregnancy to claim public healthcare to include a procedure that helps get her life back on track, to claim abortion be provided in public healthcare.

I believe this is the way in which the Court begins to configure the other set of meanings in which human dignity is to be understood in the Colombian legal system: that of its normative function. This category groups three very specific, though non-excluding normative functions for human dignity: 1) the just presented human dignity as a fundamental right, 2) human dignity as the founding value of the State and the legal system, and 3) human dignity as a constitutional principle. Now, the Court argues that both the right to human dignity and the principle of human dignity share the logical-normative structure of principles, but each one is a different and autonomous normative entity with particular features (T-881/02, §23). For example, the constitutional fundamental right to human dignity is every person’s faculty to act when they feel their human dignity (or that of others) is being compromised; while the

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53 The translation is mine. The original text reads: “Es un derecho que implica tanto obligaciones de no hacer como obligaciones de hacer por parte del Estado”. Such obligations can be exacted from it through, for example, the tutelage action (T-427/97 quoted in T-133/06, pp. 19-20): “In ruling T-427 of 1992 the Court considered the following: <<[…] prestational rights […] seek to guarantee certain minimal conditions for the population, without which the principle of human dignity and social solidarity would end up being ignored, thus justifying its direct exaction from the State, if the Constitution’s explicitly established conditions are verified>> […] It follows that the right to dignity also enjoys a prestational content, […]”. The translation is mine. The original text reads: “En la Sentencia T-427 de 1992, la Corte consideró lo siguiente: <<[los] derechos prestacionales […] buscan garantizar ciertas condiciones mínimas para la población, sin las cuales acabaría siendo desconocido el principio de dignidad humana y solidaridad social, justificándose así su exigibilidad directa frente al Estado, si se verifican las expresas condiciones establecidas en la Constitución>> […] De lo anterior se desprende que el derecho a la dignidad igualmente goza de un contenido prestacional, […]”.

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The principle of human dignity is a guideline for everyone’s actions, both State authorities and private parties\textsuperscript{54}, from which duties to the protection and care of human dignity arise:

The principle of human dignity is constituted as a constitutional mandate, a positive duty or an action principle according to which all State authorities without exception must, as far as their legal and material possibilities, realize all the conducts related with their constitutional and legal functions with the purpose of achieving the conditions for the effective development of the protection ambits of human dignity identified by the Court: individual autonomy, material conditions of existence, and physical and moral integrity.\textsuperscript{55} (T-881/02, pp. 25-26).

Such differences would justify the distinction between human dignity as a constitutional principle and human dignity as a constitutional fundamental right. But what about the normative function of human dignity as a value? The Constitutional Court had some trouble handling this, given the positivist’s uneasiness when handling axiological issues within a legal system\textsuperscript{56}. So it found a way to dilute such problems by focusing on the practical side of the issue: What does it mean for a legal system to include the value of human dignity? What is the normative side of the value of human dignity? According to the Court, its normative side is that of being the founding element of the legal social State which was adopted by the 1991 Constitution; without it, there would not be such a State. This conception, however, raises yet another problem. Put this way, human dignity as a value seems very similar to human dignity as a constitutional principle:

\[\ldots\] The Constitution establishes a framework of values and material principles that are structured as the foundations of a truly axiological system. This system is based on human

\textsuperscript{54} T-881/02 quotes T-461/98: “[…] Respect of dignity is a mandate that obliges not only public authorities but the particulars, whichever the relation between them may be. It is, by itself, a minimum principle of living together and expression of tolerance” (p. 26). I find the last sentence very interesting, since by placing human dignity in the context of common life, it confirms the importance and fruitfulness of the expansion of the normative concept of human dignity through the anthropological interpretation of the Constitution. The translation is mine. The original text reads: “[…] El respeto a la dignidad es un mandato que obliga no sólo a las autoridades públicas sino a los particulares, cualesquiera que sea la relación que exista entre éstos. Es, en sí mismo, un principio mínimo de convivencia y expresión de tolerancia”.

\textsuperscript{55} The translation is mine. The original text reads: “El principio de dignidad humana se constituye como un mandato constitucional, un deber positivo, o un principio de acción, según el cual todas las autoridades del Estado sin excepción, deben, en la medida de sus posibilidades jurídicas y materiales, realizar todas las conductas relacionadas con sus funciones constitucionales y legales con el propósito de lograr las condiciones para el desarrollo efectivo de los ámbitos de protección de la dignidad humana identificados por la Sala: autonomía individual, condiciones materiales de existencia, e integridad física y moral”.

\textsuperscript{56} Legal positivism is one the most consolidated and used theories of Philosophy of Law, so much that many of the current legal theories have been created in a debate with positivism. Among other things positivism affirms that Law is a science and, thus, moral issues are rather external to it. Therefore, legal norms handling such things as moral values are usually not welcomed, since they raise all sorts of problems.
dignity as a principle that indicates that a person is a being that tends towards her own perfection by fully developing those which from nature were given as essential goods: life, health, well-being, personality, among others.\(^57\) (T-123/94, quoted in T-881/02, p. 24).

Nonetheless, despite the connection between human dignity as a constitutional *principle* and human dignity as a *value*, there is a difference: the former is a guide for State’ authorities and particular persons’ *actions*, while the latter is the core requirement for the *being* of the legal social State; without assuming human dignity as a value, there would not be such a State. Human dignity as a value in the legal system works as its cornerstone: all the weight to justify its existence comes down to the value given to human dignity. This credo of the Court’s metaphysics is expressed as follows:

\[
\text{[\ldots]} \text{Human dignity [\ldots] is truly a founding principle of the State (P. C., art. 1). More than a right in itself, dignity is the essential presupposition in the consecration and effectiveness of the entire rights and guarantees system contemplated in the Constitution. Dignity, as a founding principle of the State, has absolute value, non-capable of being neither limited nor made relative under any circumstance [\ldots]}\]

\(^{58}\) \(\text{(T-401/92, quoted in T-881/02, pp. 23-24).}\)

Thus, not only does the Court raise human dignity as a value to the highest place in the legal system, its own foundation, it also qualifies some of its characteristics. Such qualities mark the difference between this notion of human dignity and that of human dignity as a fundamental right: human dignity as a *value* is absolute and cannot be limited or made relative, while such operations can be justified for human dignity as a fundamental *right*. Take, for example, the restrictions imposed on a prisoner; his or her right to human dignity is restricted in the ambit of autonomy, though not on the other two (minimal material conditions of existence and physical and moral integrity). In the case of the foetus, no fundamental right is being violated, since, as explained, he does not have any proper rights. Nonetheless, the connection between human dignity as a *value* and human dignity as a fundamental *right* cannot be forgotten:

\[
\text{[\ldots]} \text{Of what has been exposed it follows that when the State, independent of any historical, cultural, political or social consideration, establishes substantive or procedural norms directed to regulating the freedoms, rights or duties of the individual, without taking into account the higher value of human dignity, they will be logically and sociologically inadequate regulations}\]

\(^{57}\) The translation is mine. The original text reads: “[\ldots] La Constitución establece un marco de valores y principios materiales, que se estructuran como fundamento de un verdadero sistema axiológico. Este sistema se basa en la dignidad humana, como principio que indica que el hombre es un ser que tiende hacia su perfeccionamiento, al desarrollar plenamente lo que por naturaleza se le ha dado como bienes esenciales: la vida, la salud, el bienestar, la personalidad, entre otros”.

\(^{58}\) The translation is mine. The original text reads: “21. [\ldots] La dignidad humana [\ldots] es en verdad principio fundante del Estado (C. P. Art. 1). Más que derecho en sí mismo, la dignidad es el presupuesto esencial de la consagración y efectividad del entero sistema de derechos y garantías contemplado en la Constitución. La dignidad, como principio fundante del Estado, tiene valor absoluto no susceptible de ser limitado ni relativizado bajo ninguna circunstancia [\ldots]”.
for the nature of the personal condition of the human being and, as such, contrary to the Constitution, as far as the fundamental rights would also be affected, since they constitute minimal conditions for the “dignified life” of the human being. As a matter of fact, when it is alluded to fundamental rights, it is referred to those values that are attached to human dignity.\(^{59}\) (C-521/98, quoted in T-881/02, p. 24).

I believe that the blanket condemnation of abortion as a crime is one of those substantive norms that regulate the freedoms, rights and duties of the pregnant woman, setting aside her human dignity. This is why such norms are deemed unconstitutional by the Court. It seems to me that the Legislator simply forgot that in order to protect the foetus’ life it had to take into account the person of the pregnant woman. A balance had to be struck in such a way that the human dignity of the latter would be respected. In order to do so I think the Legislator should have taken a closer look at the different circumstances in which abortion could be an alternative to continuing a pregnancy. Since it did not do so, the Court had to interpret the Legislator’s work in such a way that it would agree with the Constitutional notion of human dignity: identifying the three circumstances in which a pregnant woman should be able to request an abortion without it being a crime.

It is in this way that Colombia’s Constitutional Court has created, over fifteen years, the precedent on the content and function of human dignity in the legal system. It has worked with grammatical or literal and systematic interpretation methods, performing an anthropological reading of the Constitution, inspired by Kant’s third formulation of the categorical imperative. The result is a complex and dynamic conception of human dignity with six different notions organized in two clearly distinct categories. To sum it up, no one better than the Court itself:

10. For the Court, a summary of the jurisprudential configuration of the referent or the content of the expression “human dignity” as normative entity can be presented in two ways: from the concrete object of protection and from its normative functionality. Assuming the point of view of the object of protection of the “human dignity” normative declaration, the Court has identified three clear and distinguishable guidelines: (i) Human dignity understood as autonomy or the possibility to design a life plan and to be determined according to its characteristics. (ii) Human dignity understood as certain concrete material

\(^{59}\) The translation is mine. The original text reads: “[…] De lo expuesto fluye que cuando el Estado, independientemente de cualquier consideración histórica, cultural, política o social, establece normas sustanciales o procedimentales dirigidas a regular las libertades, los derechos o deberes del individuo, sin tener presente el valor superior de la dignidad humana, serán regulaciones lógica y sociológicamente inadecuadas a la índole de la condición personal del ser humano y, por contra, contrarias a la Constitución, en la medida en que se afectarían igualmente los derechos fundamentales, dado que éstos constituyen condiciones mínimas para la "vida digna" del ser humano. En efecto, cuando se alude a los derechos fundamentales se hace referencia a aquellos valores que son anejos a la dignidad humana”.

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conditions of existence (to live well). And (iii) human dignity understood as intangibility of the non-patrimonial goods, physical and moral integrity (to live without humiliations).

On the other hand, assuming the point of view of the functionality of the “human dignity” normative declaration, the Court has identified three guidelines: (i) Human dignity understood as the founding principle of the legal system and, therefore, of the State, and in this sense dignity as a value. (ii) Human dignity understood as a constitutional principle. And (iii) human dignity understood as an autonomous fundamental right.60 (T-881/02, p. 15).

However, being aware of its job as interpreter and of the limitations such a position encounters, the Court does not assign an immutable trait to its elaborate conception. On the contrary, the Court is more than happy to leave the door open for further interpretative work on the notion of human dignity, as well as to point out that the six different meanings, distributed in the two main categories, are related to each other in such a way that they work with one another rather than excluding each other:

11. These six aspects do not represent, in any way, a definitive and restrictive position on the protected object, the mandate of action, the normative reasons or the limits configuration in which the “human dignity” normative declaration is concreted. On the contrary, the Court finds and recognizes the conceptual and functional richness of human dignity as a normative concept, in such a way that the emphasis or the accent put in any of the meanings expressed to the effect of argumentation and in general of the legal-constitutional solution of concrete cases, does not imply the negation or the validity loss of the other meanings, even of those not referred to in this ruling. In this sense, to the effects of the validity-existence of the legal norm implicit in the “human dignity” normative declaration it will not matter that it be expressed as a fundamental right, a constitutional principle, or value; and in the same sense, that it appears as an expression of individual autonomy, of certain material conditions of existence, or of the intangibility of certain goods.61 (T-881/02, pp. 15-16).

60 The translation is mine. The original text reads: “10. Para la Sala una síntesis de la configuración jurisprudencial del referente o del contenido de la expresión “dignidad humana” como entidad normativa, puede presentarse de dos maneras: a partir de su objeto concreto de protección y a partir de su funcionalidad normativa. Al tener como punto de vista el objeto de protección del enunciado normativo “dignidad humana”, la Sala ha identificado a lo largo de la jurisprudencia de la Corte, tres lineamientos claros y diferenciables: (i) La dignidad humana entendida como autonomía o como posibilidad de diseñar un plan vital y de determinarse según sus características (vivir como quiera). (ii) La dignidad humana entendida como ciertas condiciones materiales concretas de existencia (vivir bien). Y (iii) la dignidad humana entendida como intangibilidad de los bienes no patrimoniales, integridad física e integridad moral (vivir sin humillaciones). De otro lado al tener como punto de vista la funcionalidad del enunciado normativo <<dignidad humana>>, la Sala ha identificado tres lineamientos: (i) la dignidad humana entendida como principio fundante del ordenamiento jurídico y por tanto del Estado, y en este sentido la dignidad como valor. (ii) La dignidad humana entendida como principio constitucional. Y (iii) la dignidad humana entendida como derecho fundamental autónomo”.

61 The translation is mine. The original text reads: “11. Estos seis aspectos no representan de manera alguna una postura definitiva y restringida del objeto protegido, del mandato de acción, de las razones normativas o de la configuración de los límites, en que el enunciado normativo de la <<dignidad humana>> se concreta. Por el contrario encuentra y reconoce la Sala la riqueza tanto conceptual como funcional de la dignidad humana como concepto normativo, de tal forma que el énfasis o el acento que resulte puesto en uno de los sentidos expresados para efectos de la argumentación y en general de la solución jurídico-constitucional de los casos concretos, no implica la negación o la pérdida de validez
Before moving on to the next section, let me just point out something that the Court is silent about: what the complex notion of human dignity means for a foetus in the case of abortion. As I have shown, the notion of human dignity the Court used (particularly that of human dignity as a constitutional fundamental right) was specifically recognized to the pregnant woman, while the Court kept silent about the foetus’ human dignity; it did not even approach the issue. The Court, then, did not take an explicit stand regarding the dignity of the human foetus, thus leaving the matter open for discussion. Such task, however, would drift us away from the set effort to conduct a descriptive internal analysis of the historical ruling and, therefore, will not be undertaken.

Nonetheless, I am certain that at least two of the meanings the Court has developed for human dignity cannot be recognized to the foetus: one is that of human dignity as a constitutional fundamental right, with its tripartite specification in the rights to autonomy, minimal material conditions of existence, and physical, psychical, moral and spiritual integrity; and the other is that of human dignity as the concrete object of protection of autonomy. The reasons for this certitude are found in the Court’s explicit reasoning that I have shown: human dignity as a constitutional fundamental right cannot be recognized to the foetus because rights are to be held by persons and the foetus is not a person; and autonomy as a constitutional protected good is not to be recognized to the foetus, given the Kantian perspective the Court assumes on this issue. Whether the other meanings of human dignity could be traced to the foetus and how it could be done is something the Court does not advance, thus leaving these questions open.

**4. 2. Fundamental rights and constitutional protected goods are not absolute**

In §6 of C-533/06 the Court traces the role life plays, both as a constitutional protected good and a Constitutional fundamental right, in the international treaties that form part of the constitutional block. By doing this, the Court seeks to find out whether the Colombian State
would have to allow abortion in some cases or if the Legislator’s blanket prohibition of abortion as a crime would follow from international obligations. According to the Court, the Colombian State is not obliged to either of these possibilities; i.e. none of the international treaties ratified by Colombia contains an obligation for it to allow abortion or to forbid it.

The arguments woven by the Court are both of a grammatical and systematic nature, and of such legal technicality and ethical non-relevance that I will not detail them here. Nonetheless, when examining the American Convention on Human Rights, the Court makes a declaration that sheds light on what I believe is one of its main assumptions: the way it conceives the legal system and how its elements interact with each other. In the Court’s own words:

[…] it is clear that none of the rights consecrated in the Convention can have an absolute character, since all of them are essential to the human person; hence their ponderation is necessary when collisions arise between them. The Convention cannot also be interpreted in a sense that leads to the automatic and unconditioned prevalence of a right or protection duty over the other rights consecrated in it, or protected by other instruments of Human Rights international law, or in such a way that unreasonable or disproportionate sacrifices to the rights of others be required, since in this way its purpose to promote an individual freedom and social justice regime would precisely be disowned.62 (C-355/06, pp. 222-223).

This conception has three elements. The first one denies the “absolute character” of any of the rights contained in the Convention. But, what does this mean? Does it mean that such rights are not universal? I do not think so, for the rights in the Convention are proclaimed, in line with the 1948 UN Declaration, for all persons. What the Court wants to point out, I believe, is that no single right excludes any of the other ones: all of them coexist as legal expressions of the moral central role of the human person; they are all parts of a system and, thus, work together. But, what happens when those parts conflict with one another? Since none of them has “absolute character” a balancing between the conflicting rights has to be found; this is the kind of “ponderation” the Court is referring to. Thus I believe the other two elements are mentioned as criteria for such balancing: firstly, there are no automatically prevalent rights, i.e. no right is given special value to be able to trump over the other ones; and, secondly, the

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62 The translation is mine. The original text reads: “[…] es claro que ninguno de los derechos consagrados en la Convención pueden tener un carácter absoluto, por ser todos esenciales a la persona humana, de ahí que sea necesario realizar una labor de ponderación cuando surjan colisiones entre ellos. La Convención tampoco puede ser interpretada en un sentido que lleve a la prelación automática e incondicional de un derecho o de un deber de protección sobre los restantes derechos por ella consagrados, o protegidos por otros instrumentos del derecho internacional de los derechos humanos, ni de una manera tal que se exijan sacrificios irrazonables o desproporcionados de los derechos de otros, porque de esta manera precisamente se desconocería su finalidad de promover un régimen de libertad individual y de justicia social”.

49
balancing cannot be done at the cost of turning other people into martyrs by sacrificing their rights.

The analysed conception is explicitly found in the exam the Court does of the American Convention on Human Rights, but as I have shown, it goes beyond that. The Court actually applies this balancing need and its two criteria to the norms involved in the case of abortion; norms that are not only expressed in the afore mentioned Convention, but rather in the Colombian Constitution, the Criminal Code and the Civil Code. But this conception of the Court is not only broader in the sense that it applies to norms contained in documents different from the Convention itself; it is also broader in the sense that the Court actually applies it to norms that not only contemplate rights: they also express values, constitutional protected goods and constitutional principles. Such conception, then, seems to me to be a general assumption of the Court on how to deal with conflicting norms. How is it applied in the abortion issue, I wonder? As we have worked our way through the Court’s arguments for each of the three circumstances in which abortion was decriminalized, I have shown it at work, but it is now time to focus on it and clarify it.

To begin with, it is clear to the Court that there is a conflict between the constitutional protected goods and the constitutional fundamental rights of the pregnant woman, on one hand, and the constitutional protected good of the foetus’ life, on the other. I believe that the blanket prohibition of abortion clearly protect the latter one, which could mean that the Legislator did not take into account the pregnant woman when crafting the penalization of this particular crime, i. e. the Legislator did not even consider the pregnant woman to have a say in the matter. To provide such bold omission as justifying the blanket prohibition of abortion would, however, be difficult to conciliate with the fact that the Legislator distinguished between consented and not consented abortion, punishing the latter with longer imprisonment⁶³. Since the consent of the pregnant woman was, in fact, relevant to typifying the crime, she was taken into account as an element of the conflict with the foetus. What, then, could justify the blanket criminalization of abortion? I think the justification is to be found in two erroneous assumptions the Legislator made: first, that the foetus has constitutional fundamental rights and constitutional protected goods; and, second, that they are automatically prevalent, thus turning them to trumping norms over those of the pregnant woman.

⁶³ Cf. Articles 122 and 123 of Law 599/00.
As far as I understand, the Court had to correct the wrong assumptions in order to provide an interpretation of the challenged norms that agreed with the Constitution; were this not to be possible, the norms would be declared unconstitutional and withdrawn from the legal system, infringing the principle of law conservation described in §3.1. I believe that to achieve the agreeable interpretation the Court followed the general balancing criteria it had proposed and added a couple more according to the norms being balanced. To begin with, the Court cleared up a common misconception regarding the foetus: that of his constitutional fundamental rights. The Court was unambiguous enough when remembering the reader of the ruling that any kind of rights, even the fundamental ones, are to be held by persons. But according to the regulations I have shown, the foetus is not a human person. The Court, then, was right to conclude that the foetus has no constitutional fundamental rights; not even that of human dignity, as concluded in the past section. Therefore, it is not possible to conceive constitutional fundamental rights of the foetus as conflicting with the normative elements of the pregnant woman’s position: her constitutional protected goods and constitutional fundamental rights. This does not mean, however, that the foetus is not to be taken into account. After all, the foetus has a constitutional protected good by his side: that of life. The conflict then appears between this constitutional protected good, for one part, and the constitutional protected goods and constitutional fundamental rights of the pregnant woman, for the other part.

When pregnancy is the result of a duly denounced conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum, or incest, the Court needs no auxiliary criterion to find the right balance between the foetus’ life as a constitutional protected good and the pregnant woman’s constitutional fundamental right to human dignity, particularly to its autonomy component. The weight given by the Court to the autonomy of the pregnant woman (in the Kantian sense that grounds the anthropological interpretation of the Constitution) cannot be superseded by the weight of the foetus’ life. To do otherwise would rob pregnant women of their value as human beings, reducing them to mere instruments of procreation. I am sure this becomes more problematic in the circumstances at hand, since such procreation has not even been consented by the woman. Her autonomy (in the sense of being able to plan her own life) has already been violated. Are we to take such violation even further by obliging her to bear the child conceived through it? I must agree with the Court and not dare to answer in an affirmative manner.
I am also sure that in each of the other two cases in which the Court ruled the crime of abortion to be unconstitutional, it provided auxiliary criteria to turn the balancing in favour of the pregnant woman. When there is a grave foetal malformation that makes the foetus’ life unviable, the Court appeals to the high probability of the foetus not becoming a living baby. I think this criterion is objectively sound, given the current state of medical knowledge. It can also be interpreted as being inscribed in some sort of potentiality argument: the Court would use the potentiality of the foetus to reach the other stages of human life as a criterion to grant protection to his life. Furthermore, I believe that even from a utilitarian perspective this criterion lends enough support to answer negatively to the question of whether a pregnant woman should continue a pregnancy that will not lead to a living baby; after all, what positive value comes out of obliging a woman to give birth to, at best, a dying baby? Does this produce less disvalue than the alternative of allowing induced abortion in this case? As far as I understand, it does not, especially since the latter option defends and promotes the pregnant woman. Thus, the fundamental constitutional rights of the pregnant woman are not to be overruled by respect to the constitutional protected good of a foetus’ life that will extinguish itself anyhow.

There are at least two objections that I think can be raised against this balancing act. The first one would be to say that the same criterion used by the Court could actually be used to terminate any pregnancy; after all, everyone is to be born only to die some time later. But such argument is flawed from its very formulation, since a) the criterion used by the Court specifically denotes the circumstances for its application and b) common sense alone is enough to point out that human finiteness is not to be considered a “grave foetal malformation”. This objection, then, can soon enough be discarded.

A second objection to a balancing lined by the criterion of grave foetal malformation would be one linking it to eugenics: some might say that the Court would is trying to cleanse and enhance human beings by allowing the disposal of the malformed. But I am sure this objection can also be tackled by closely looking at the kind of malformation the Court is considering. It is not any kind of malformation or defect; it is not a malformation that, e. g., would be responsible for a disabled child. It is a malformation that would most likely be responsible for the early death of a child, or even the death of the foetus before his birth. I

64 Such rights are those of autonomy, material conditions of existence and personal integrity, contained in the notion of human dignity conceived as a right (as I have shown in §4.1.).
think this sets clear limits to the autonomy of the pregnant woman regarding a request for abortion, limits that are legitimate given the public interest in the respect to the constitutional protected good of the foetus’ life. To me it seems that the Court, then, is not allowing pregnant women to abort foetuses that will most likely be disabled children; it is allowing them to abort foetuses that will most likely die in the womb or shortly after being born. However, I must agree that the former case is still possible, though not under the circumstances of the second case when abortion is allowed, i. e. grave foetal malformation. A pregnant woman can rather abort the foetus of a to-be-disabled-child appealing to the first case of allowed abortion: i. e., if the pregnancy puts at risk her mental health, certified by a doctor. Nonetheless, I believe that such possibility still can escape the charges of being a strategy to eugenics, since it is in no way a policy mandated by the Court, but the autonomous decision both of the pregnant woman and her doctor.

As I have shown, when continuing the pregnancy constitutes a danger to the life and health of the pregnant woman the Court balances two instances of the same constitutional protected good: that of life. On one hand, there is the life of the foetus, while on the other hand there are the life and health of the pregnant woman. I believe that here the Court also takes an auxiliary criterion to help with the balancing: the stages of human life and the different ways in which it manifests itself. This criterion would allow establishing the level of protection that would correspond to each stage and way of manifestation of human life. Though I deem this allows for a justification of the Court’s decision, it is not unproblematic. The Court does not make any efforts to clarify what it understands under “stages” of human life, and even less to what “ways of manifestation” refers to. The only hint is this:

Human life goes through different stages and manifests itself in different ways, which in turn have a different legal protection. Though it is true that the legal system protects the nasciturus, it does not protect him in the same degree and with the same intensity with which it protects the human person. This is so strong that in most legal systems the criminal punishment for infanticide or homicide is higher than that for abortion. That is, the protected legal good is not identical in these cases and, therefore, the legal reach of the social offence determines a different degree of reproach and a proportionally different punishment. (C-355/06, p. 219).

65 As I have shown in §3. 1. 1., the introduction of the issue of health is warranted by its connection to life, both as a constitutional protected good and a constitutional fundamental right.
66 The translation is mine. The original text reads: “La vida humana transcurre en distintas etapas y se manifiesta de diferentes formas, las que a su vez tienen una protección jurídica distinta. El ordenamiento jurídico, si bien es verdad, que otorga protección al nasciturus, no la otorga en el mismo grado e intensidad que a la persona humana. Tanto es ello así, que en la mayor parte de las legislaciones es mayor la sanción penal para el infanticidio o el homicidio que para el aborto. Es decir,
Here the Court uses the example of the same action (that of taking human life) perpetrated against human beings in different stages (child, adult and unborn) to show how their protection is not only different, but correlated to the stages. From this, then, I trust a vague notion of what the Court means can be inferred, but a more precise one seems to be needed. After all, many questions can still be asked. Are those three the stages of a human life? Why not distinguish between children and young adults? Why not distinguish between adults and elders? Is age the criterion to establish the stages of a human life? What about the level of maturity and self-consciousness that the Court has also taken up to solve the problem of the consent of pregnant women less than fourteen years of age? I would regard this one as a more coherent criterion, since I have shown that in it the subject of age is merely a rough guide.

But even if we were to be clear on the matter of the stages of human life (beyond the vagueness of common sense, which in this particular manner can be rather dangerous), we are still blank regarding the “different ways” in which human life manifests itself. I wonder: Is it something different from the stages of human life or just a poetic twist of the Court? If it is the former, what kind of manifestation is the Court pointing at? Could it be how useful, healthy or admirable a human life can be? If so, how could this be known in the case of the foetus? Pretty much only through a medical examination, which in case of troublesome results could, once more, open the doors to the objection of eugenics, thus taking us back to an already-discussed problem. Therefore, I believe that the Court got a bit carried away in its writing, rather than wanting to fix another criterion different from the one referring to the stages of human life. The Court must have been referring to one and the same thing when it stated that “[h]uman life goes through different stages and manifests itself in different ways”.

With all this balancing going on I believe the Court seems to hold a position similar to the methodological standpoint Beauchamp and Childress (2001, pp. 18-23) adopt in their widely used and recognized work. As I have shown, this calls for a wider use of balancing criteria when different norms conflict. And there is yet a last criterion to be taken into consideration: that which requires neither unreasonable nor disproportionate sacrifices to the legal norms expressing the moral status of the human person. This criterion tags on the distinction between obligations and supererogatory actions that the Court has been implicitly following. This
distinction is what grounds the Court’s aversion towards exacting unreasonable or disproportionate sacrifices to the rights of others, which comes into play in each of the three cases where the Court finds abortion to be acceptable.
5. Conclusion

In §1.2, I have shown that induced abortion was a real choice to many pregnant women, but one that was being handled in a way that turned to criminals those of them who opted for it and exposed them to the risks of unsafe abortion, thus promoting a public health quandary (all of this in §1.1.). As I understand it, the collected data on induced abortion, which links it to fertility rates and family planning, suggests that among the reasons to choose induced abortion over giving birth are some that go beyond the ones pointed by the Court. Women choose abortion as an extreme measure to warrant their reproductive autonomy. But as I have pointed out in §3., this possibility was not contemplated by the Court and, thus, the Court’s approach is limited; many pregnant women will still have to choose between bearing an unwanted pregnancy or becoming a criminal.

To me it is clear that taking such limited approach allows the Court to avoid two opposing extreme positions: that of ratifying the complete prohibition of abortion and that of allowing abortion under any circumstances, the latter of which would have been very difficult to justify from the common morality.67 Actually, in §3.1, I presented that the Court proceeds by drawing from this common morality and assuming the generally accepted belief that the foetus’ life is worthy of respect. But the Court draws limits to that respect in order to also grant respect to the pregnant woman. The Court has managed to do so by introducing the impact of the blanket prohibition of abortion on the constitutional fundamental rights of the pregnant woman, balancing it with the protection the State is legitimate in seeking for the constitutional protected good of the foetus’ life. This constitutional protected good is generally respected, unless it falls in any of the three exceptional circumstances in which it threatens the constitutional fundamental rights and constitutional protected goods of the pregnant woman.

The Court’s decision, then, has brought relief, better health and a more humane treatment (both social and medical) to many women in perhaps some of the most dire situations for a pregnancy: when it constitutes a danger to her life or health; when there is a grave foetal malformation that makes his life unviable; when it is the result of abusive or non-consensual

67 This limited approach also helps keep the Court safe from accusations of becoming a legislative body and making decisions outside the political arena, thus protecting its legitimacy and the people’s trust.
carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum, or incest; or, even more delicate, when a woman less than fourteen years of age finds herself pregnant under any of these circumstances.

I have made known that the Court displayed a mixed array of consequentialist and non-consequentialist arguments, which included the balancing of different criteria, to justify its decision regarding the afore mentioned cases of induced abortion. I have also shown a few of the problems regarding the definition and use of some of the involved concepts and criteria, as well as the objections that could be raised against a number of the Court’s arguments. But in general I think the Court managed to articulate its position through sound and defendable ethical concepts and arguments, though they were not always explicit.

Interestingly enough, I also think that such arguments and concepts could be used to go further than the Court did. After all, will the human dignity of a woman not be violated if she is obliged to bear the child of an unwanted pregnancy, no matter the reason for it? Will she then not be turned into a mere reproduction tool? Will her autonomy and reproductive rights not be compromised? Will she not be subjected to cruel treatment by the weight of the financial and social ordeals her new child will have to face? Does this not erase the distinction between duties and supererogatory actions? Are all those other women obliged to be heroes? I cannot see any morally relevant difference that would take me to answer affirmatively. But more time, education and discussion seem to be needed until common morality is ready to accept this logical widening of their own arguments. In the mean time, however, there still is a chance to avert all these problems: if any of these reasons turns into a threat to the psychical, moral or spiritual integrity or health of the pregnant woman, the abortion is to be granted.
## Appendix

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<td>Wanted fertility rate on women 13-49</td>
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<tr>
<td>Observed fertility rate on women 13-49</td>
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<td>2.4</td>
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### Sources:

B: (Singh and Wulff 1994, p. 10).
C: (Ojeda 2005, p. 172).
E: (Ojeda 2005, p. 174).
G: (Singh and Wulff 1994, p. 8).
I: (Zamudio 2005, p. 5).
J: (Ministry of Social Protection 2004, p. 3).
K: (Singh and Wulff 1994, p. 6).
References


