The Constitutional Court of Colombia Endorsed Discrimination

Against People With Disabilities

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In Colombia, voluntary termination of pregnancy is considered criminally reprehensible conduct. The Constitutional Court has repeatedly "held that one of the ways in which the legislator protects the life of the unborn is through the criminalization of abortion."[2] However, through Judgment C-355 of 2006, the same Court established that an abortion offense would not be incurred if the termination of pregnancy occurred in any of the following cases: (i) when the continuation of pregnancy constitutes danger to the life or health of women, certified by a doctor; (ii) when there is a serious malformation of the fetus that makes his life unfeasible, certified by a doctor; and, (iii) when the pregnancy is the result of a conduct, duly denounced, constituting rape (carnal access or sexual act without consent), abusive or artificial insemination or transfer of fertilized ovum not consented, or incest[3].

The second cause described, as indicated by the Court in 2006, is due to a *"completely different hypothesis than the simple identification of a disease in the fetus that can be cured before or after childbirth."* Apparently, it was clear that it was a cause that origins in extreme cases and that, in order to materialize, there has to be a medical certification, both of the existence of a serious malformation, and of the unfeasibility of the life of the unborn.

However, in October 2018, the Colombian Constitutional Court tacitly abolished the requirement to demonstrate, through medical certification, the unfeasibility of the unborn child in Judgment SU 096 of 2018[4], the Court changed its precedent given that it

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[2] Constitutional Court of Colombia, Judgment SU 096 of 2018 (MP José Fernando Reyes Cuartas; SV Cristina Pardo Schlesinger).

[3] Complete report of judgment C-355 of 2006: The Power of Warlocks: The Traps of the Colombian Constitutional Court in Abortion. By Andrés Balcázar González and Gabriel Mora - Restrepo. Available in: https://aul.org/wp-content/uploads/2019/02/2015-05-El-Power-De-Los-Brujos-Las-Trampas-De-La-Corte-Constitucional-Colombiana-En-Materia- De-Abortion.pdf

[4] Constitutional Court of Colombia, Judgment SU 096 of 2018 (MP José Fernando Reyes Cuartas; SV Cristina Pardo Schlesinger).Release No. 42, October 17, 2018: "The Constitutional Court repited the jurisprudential line in relation to the application of voluntary termination of pregnancy (VTP) in the three cases established in Judgment C-355 of 2006. Similarly, reaffirmed the duty to eliminate the barriers that women have in the health system to access this procedure and urged the Congress of the Republic to regulate the matter, in the exercise of their legislative configuration power. (…) Judge Cristina Pardo

assumed that the requirements for the provenance of the decriminalization were met under the second ground established by judgment C-355 of 2006, but omitting the certification requirement medical about the unfeasibility of life. Apparently, the Court "changes its mind", as it usually does, and changed the motives that justified the modifications of its approaches.

For more than ten years, the Court held that it was essential to have a medical certification of life[5] unfeasibility in order not to penalize abortion; under these precise circumstances, the protection of women's rights to life and integrity prevailed, which meant that the voluntary termination of pregnancy was no longer criminally reprehensible[6].

However, although the Court added to the file the medical certification that explicitly established that the malformation detected "was compatible with life, with a variable degree of disability" [7], the Court decided to conclude that the voluntary termination of pregnancy, based on the second cause.The Court did not use the opportunity to weigh the rights of the unborn in a condition of disability with the rights of the pregnant mother. It solved an extremely relevant constitutional problem without addressing it with adequate rigor, and without taking into account its own case law.

From what was resolved by the Court in Judgment SU 096 of 2018, a serious discriminatory precedent followed because it allowed considering those people who have functional deficiencies, automatically as beings with life infeasibility. This decision

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Schlesinger and magistrates Carlos Bernal Pulido and Luis Guillermo Guerrero Pérez expressed their vote rescue". Judgment available at: www.corteconstitucional.gov.co/relatoria/2018/SU096-18.htm

[5] Constitutional Court, Judgment C-355 of 2006 (MP Jaime Araújo Rentería; Clara Inés Vargas Hernández; SV Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Álvaro Tafur Galvis; AV Manuel José Cepeda Espinosa). Constitutional Court, judgment T-171 of 2007 (MP Jaime Córdoba Triviño). Constitutional Court, judgment T-388 of 2009 (MP Humberto Antonio Sierra Porto). Constitutional Court, judgment T-301 of 2016 (MP Alejandro Linares Cantillo). Constitutional Court, judgment T-301 of 2016 (MP Alejandro Linares Cantillo).

[6] Constitutional Court of Colombia, Judgment SU 096 of 2018 (MP José Fernando Reyes Cuartas; SV Cristina Pardo Schlesinger). Since then and in repeated jurisprudence the Constitutional Court has held that one of the ways in which the legislator protects the life of the unborn is through the criminalization of abortion, but, that such penalty is excluded in cases where (i) the pregnancy endangers the life or health of the pregnant mother, (ii) the fetus is unfeasible and (iii) the pregnancy is the result of a violation, since penalizing the termination of pregnancy in these cases could always imply that the concrete circumstances demonstrate it, annul the fundamental rights to life, integrity and dignity of women. Constitutional Court, Judgment T-388 of 2009 (MP Humberto Antonio Sierra Porto).

[7] Constitutional Court of Colombia, Judgment SU 096 of 2018 (MP José Fernando Reyes Cuartas; SV Cristina Pardo Schlesinger). Since then and in repeated jurisprudence the Constitutional Court has held that one of the ways in which the legislator protects the life of the unborn is through the criminalization of abortion, but, that such penalty is excluded in cases where (i) the pregnancy endangers the life or health of the pregnant mother, (ii) the fetus is unfeasible and (iii) the pregnancy is the result of a violation, since penalizing the termination of pregnancy in these cases could always imply that the concrete circumstances demonstrate it, annul the fundamental rights to life, integrity and dignity of women. Constitutional Court, Judgment T-388 of 2009 (MP Humberto Antonio Sierra Porto).

promotes a "culture of waste" of people with disabilities, in which the medical tradition of protecting, above all, human life, loses relevance.

The decision is discriminatory because it is based on a restrictive and unjustified differentiation in the protection of life of human beings who do not present anomalies and those who present possible organic, mental and functional deficiencies. This not only generates social and legal inequities, but also promotes the existence of barriers, prejudices and stereotypes in relation to people with disabilities.

The Court, by opening the possibility of decriminalizing abortion, with the simple presentation of medical certification attesting to the existence of some type of malformation, established a clear discriminatory differentiation in the jurisprudential precedent. On the one hand, the State must maintain the punitive responsibility of those who interrupt the pregnancy of an unborn child that does not present deficiencies, thus protecting its life and, on the other hand, the State promotes the termination of the pregnancy against the *nasciturus* that shows some disability, such as if this were less and did not deserve, in any measure, the protection of the State.

Both article 13 of the Colombian Political Constitution and the Convention on the Rights of Persons with Disabilities, which is part of the constitutional block, oblige the Colombian State to protect, promote and guarantee the free and equal exercise of rights of people with organic or functional limitations. Under these assumptions, it is worth mentioning that constitutional magistrates Marco Gerardo Monroy Cabra and Rodrigo Escobar Gil have been warning since 2006 about the violation of the premises of equality, if the voluntary interruption of pregnancy was allowed, only by the fact of presenting malformations in the *nasciturus*:

"It was not possible to justify the elimination of an unborn human person affected by malformations, under the argument that the anticipation of his death would reduce the affectation of the freedom of another human being: his mother. This pragmatic argument implies constitutionally justifying the early elimination of the weakest, in order to not bother those who are, for factual reasons, in a situation of material physical superiority. The acceptance of this possibility puts at risk the most precious foundations of the State and the Law, such as human equality without distinction of conditions, and the solidarity that requires responding with concrete actions, aimed at defending the fundamental rights of the weakest. The majority decision opens the door to the acceptance of the elimination of those beings who, in one way or another, due to their special condition of disability restrict the orbit of our freedom, by requiring us, for constitutional reasons of solidarity, to meet their vital needs. [8]"

Hence, what is really relevant, when there is a malformation of the fetus, is not the existence of it in itself, but that such a circumstance makes the life of the fetus

[8] Constitutional Court of Colombia, Judgment C-355 of 2006 (MP Jaime Araújo Rentería; Clara Inés Vargas Hernández; SV Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Álvaro Tafur Galvis; AV Manuel José Cepeda Espinosa).

unfeasible. To consider that the simple accreditation of the existence of a malformation is sufficient to avoid criminal justice is discriminatory because, as it has been established, people with malformations are equally worthy and have the right to enjoy the governmental protection of their right to life.

In conclusion, it would be worthwhile that, as a reflection, the Colombian Constitutional Court read its own jurisprudence, according to which "(…) *discrimination against peoples with functional or organic diversity is also artificial and dangerous, because part of assumptions wrong about human nature, ignores the infinite diversity of the species, the multiple human capacities and their different forms of development and, instead, leads to theorize about functional or organic parameters that are only useful to exclude, as is the case with eugenic theories . The functioning of the organs has no relation to access to rights, if the State responds efficiently to the requirements of all social groups, functional diversity should not prevent adequate development of the individual life project. The problem is not in the functionality of the organs of each human being, but in the barriers that society and the State put on certain people"*[9]

[9] Constitutional Court of Colombia, Judgment C-042 de 2017 (MP Aquiles Arrieta Gómez).