Judgment C-248/19

Reference: Case File D-12883

Lawsuit challenging the constitutionality of Article 370 of Law 599 of 2000 "*Whereby the Criminal Code is issued*."

Plaintiff: Felipe Chica Duque

Reporting Justice:
CRISTINA PARDO SCHLESINGER

Bogotá, D.C., June fifth (5) of two thousand nineteen (2019).

The Full Chamber of the Constitutional Court, in exercise of its constitutional authority and pursuant to the requirements and procedures established in Decree 2067 of 1991, issues the following

JUDGMENT

I. BACKGROUND

Exercising a public legal action on grounds of unconstitutionality, Felipe Chica Duque filed a lawsuit against Article 370 of the Criminal Code (Law 599 of 2000) alleging that it violates Articles 13 and 16 of the Constitution. By ruling of September seventeenth (17), 2018, the reporting justice found the complaint inadmissible and granted the petitioner the term set by law to correct it in accordance with the findings of such ruling. The plaintiff then filed a new pleading in which he stated that he had corrected the complaint filed initially. Given that this pleading was found to have adequately corrected the allegation of a violation of Article 13 of the Constitution, without having done so regarding the allegation of a violation of Article 16 *ibidem*, the reporting justice admitted the complaint on October eighth (8) of 2018 in regard to its first allegation (Article 13 of the Constitution), but rejected it in regard to the second (Art. 16 of the Constitution). Within the term set by law, the plaintiff filed a motion for reconsideration by the Full Chamber requesting the admission of the rejected allegation, which was granted by the Court in Ruling 739 dated November fourteenth (14) of 2018. In observance of the foregoing order, the reporting justice proceeded to admit both allegations set forth in the complaint.

Thus, in its Ruling of December tenth (10), 2018, the Court admitting the action in regard to its allegations of a violation of Articles 13 and 16 of the Constitution. Following all required formalities, the complaint was docketed by the Court Clerk's Office in order to permit citizen participation.

Several individuals linked to different entities filed *amicus curiae* briefs, to wit: (i) the National School of Public Health of the University of Antioquia [*Facultad Nacional de Salud Pública de la Universidad de Antioquia*]; (ii) the Center for the Study of Law, Justice and Society [*Centro de Estudios de Derecho, Justicia y Sociedad*] (Dejusticia), Diverse Colombia [*Colombia Diversa*] and Jaime Ardila; (iii) the Medical and Health Sciences Education Research Group of the School of Medicine and Health Sciences [*Grupo de Investigación "Educación Médica y en Ciencias de la Salud" de la Escuela de Medicina y Ciencias de Salud*] and the Human Rights Research Group of Rosario University [*Grupo de Investigación en "Derechos Humanos" de la Universidad del Rosario*]; (iv) the Ministry of Health and Social Protection [*Ministerio de Salud y de Protección Social*]; (v) the Mexican Network of Organizations against the Criminalization of HIV [*Red Mexicana de Organizaciones contra la Criminalización del VIH*]; (vi) the Public Action Group of Rosario University [*Grupo de "Acciones Públicas" de la Universidad del Rosario*]; (vii) the Ministry of Justice and the Law [*Ministerio de Justicia y del Derecho*]; (viii) the Colombian League Against AIDS [*Liga Colombiana de Lucha contra el Sida*]; (ix) the Somos Network Corporation [*Corporación Red Somos*]; and (x) the School of Law of the Free University of Bogotá [*Facultad de Derecho de la Universidad Libre de Bogotá*]. The Attorney General of the Nation [*Procurador General de la Nación*] also issued an opinion within its competence.

II. THE CHALLENGED LEGAL PROVISION

The text of the challenged Article 370 of Law 599 of 2000 is transcribed as follows:

"LAW 599 OF 2000
(July 24)
Official Journal No. 44,097 dated July 24, 2000.
"*Whereby the Criminal Code is issued*."

The Congress of Colombia

DECREES
"(…)

TITLE XIII
CRIMES AGAINST PUBLIC HEALTH
CHAPTER I
DANGERS TO PUBLIC HEALTH

> **ARTICLE 370.** ***Propagation of the human immunodeficiency virus or the hepatitis B virus.*** **Amended by Art. 3, Law 1220 of 2008.** Any person who, after having been notified that he/she is infected by the human immunodeficiency virus (HIV) or hepatitis B, engages in practices that may infect another person, or donates blood, semen, organs or anatomical components in general, shall be sentenced to a term of imprisonment of six (6) to twelve (12) years.
> (…)"

III. THE COMPLAINT

1. Allegation of a violation of Article 16 of the Constitution

The complaint began by alleging a violation of Article 16 of the Constitution in regard to the free development of the personality, in the aspect of the right to the full pursuit and enjoyment of sexuality. As the first basis for the allegation, the plaintiff charged, "*by codifying in law the sexual relations that a person with HIV or hepatitis B may have restricts the [aforementioned right]*" to such an extent that, for example, "*if a person knowingly wishes to have sexual relations with another person who is infected (sic) by either of these two viruses, the person carrying it would be committing a crime,*" even if "*preventive measures [were taken] such as the use of condoms or [of] medications that make disease transmission very unlikely today.*"

Further on, the plaintiff argues that, even if the challenged provision is aimed at protecting the collective right to public health, the defense of such right may not be attained at the cost of denying a group of individuals their sexual lives, for such restriction would be not only ineffective but also disproportionate. In this regard, the plaintiff concluded by indicating that "*the actual violation of the right to health of another person occurs when a disease is transmitted (in this case, sexually) to that person and NOT when there is a consensual relationship in which one of the parties had a disease but took precautions to prevent a transmission which, in fact, did not occur. This is obvious, because if the other person failed to catch any disease as a consequence of the sexual relationship, their health was not adversely affected, nor was public health adversely affected, because no new seropositive person resulted who could potentially*

transmit the disease to others."

2. Allegation of violation of Article 13 of the Constitution

Next, the plaintiff alleged a violation of Article 13 of the Constitution. In this regard, the complaint alleged that the challenged legal provision was discriminatory because it "*singles out two diseases (HIV and hepatitis B) and penalizes (...) members who have one of these diseases and engage in activities that are (...) not forbidden to other individuals, including those who have other sexually transmitted diseases*." He also argued that the particularized way in which the aforementioned diseases are treated under the provision is arbitrary, as there is no valid reason for such differential treatment. He illustrated such differential treatment further on by indicating that diseases other than those identified in the challenged provision are similarly transmissible but that those who live with them, in contrast to those who have the diseases identified in Article 370 of Law 599 of 2000, may indeed "*have sexual relations, donate blood, semen, organs or other anatomical components or, in general, engage in any other practice that may lead to the transmission of such diseases.*"

The complaint goes on to note that the differential treatment established in the challenged provision for persons who have HIV and/or Hepatitis B is disproportionate, since it fails the strict test of reasonableness that is applicable when, on the one hand, the provision adversely affects a group of individuals who have historically suffered discrimination, while at the same time jeopardizing fundamental rights such as equality, the right to be free of discrimination, the free development of the personality and the pursuit of sexual freedom. In order to demonstrate this claim, the plaintiff argued that the provision is neither suitable nor necessary for the protection of public health. It is not necessary to prevent the transmission of the diseases it singles out, nor is it proportional because it adversely affects the rights of individuals who have such diseases. In fleshing out his argument, the plaintiff explained the differences between the two diseases that the provision singles out, and between these two diseases and other sexually transmitted diseases, concluding that "*although there are other identical situations, the legislature established arbitrary treatment for individuals who have HIV or Hepatitis B*."

Finally, citing international scientific and organizational documents, the plaintiff argued that the provision was neither suitable, necessary nor proportional for purposes of protecting public health. Moreover, he argued, the directives and recommendations from the international community that the Court has adopted with regard to HIV/AIDS in labor settings must be expanded to include the realm of criminal law.

IV. *AMICUS CURIAE* BRIEFS

1. National School of Public Health of the University of Antioquia

The National School of Public Health of the University of Antioquia, through its dean, Juan Pablo Escobar Vasco, began its brief by stating that history has shown that societal efforts to penalize individuals who live with infectious diseases such as HIV/AIDS or Hepatitis B have resulted in ineffective measures that cause more harm than good.

Next, the brief indicated that measures such as the challenged provision have on several occasions been taken "*in moments of crisis to address an increase in cases of a disease, either when these involve an emerging or reemerging disease that is not well known, or when the means are lacking to diagnose and treat the individuals who have them as a way to interrupt their transmission.*" The author criticizes the latter proposition after positing that infectious disease transmission is a complicated matter that makes it impossible to hold the individual who acquires the disease fully responsible, since "*[t]here are societal determinants that condition and increase the chances that such individual will acquire the disease.*"

The dean of the National School of Public Health of the University of Antioquia goes on to note that "*The Social Epidemiology of Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome,*" by POUNDSTONE *et al*. proposes "*a multilevel model to explain and intervene in HIV transmission, in which structural, social and individual factors are involved*." Finally, the brief stated that recent advances in medicine have managed to treat HIV through antiretroviral therapy, and Hepatitis B through vaccination, thereby arguing that the management of these diseases must be subject to periodic review and updating.

2. Center for the Study of Law, Justice and Society (Dejusticia), Diverse Colombia and Jaime Ardila

The Center for the Study of Law, Justice and Society (Dejusticia), through Diana Rodríguez Franco, Mauricio Albarracín Caballero, Valentina Rozo Ángel and Jesús David Medina Carreño; the organization Diverse Colombia, through Marcela Sánchez Buitrago, and Jaime Ardila in his capacity as public health physician and doctoral candidate in public health, request that Article 370 of Law 599 of 2000 be found unconstitutional on grounds of violating Article 13 of the Constitution.

Fundamentally, the brief explains why the challenged legal provision fails the integrated test of equality designed by case law of the Court "*for such cases in which the principle of equality is apparently ignored, or measures are under discussion that harm individuals who are in a position of manifest weakness, fall under a criterion suspected of being discriminatory or belong to a marginalized or excluded group*."

In this regard, the authors of the brief first reference discrimination that has targeted individuals who have contracted HIV and/or Hepatitis B. They also explain how scientific advances in the treatment of these diseases[1] now serve as a factor preventing discrimination against that population group. Subsequently, they summarize case law in rulings by the Court that have identified individuals who have the aforementioned diseases as a population group in a position of manifest weakness and thus subject to special constitutional protection. Finally, they perform a strict integrated test of equality and, as a result of such test, conclude that although the provision pursues a constitutional imperative, it would be neither adequate nor necessary for achieving the ends it pursues, and in any event it would be disproportionate.

3. Medical and Health Sciences Education Research Group of the School of Medicine and Health Sciences and the Human Rights Research Group of Rosario University

As members of the Medical and Health Sciences Education Research Group of the School of Medicine and Health Sciences of Rosario University and the Human Rights Research Group of that same university, Ana Isabel Gómez Córdoba and Diana Rocío Bernal Camargo, respectively, request that the challenged provision be found unconstitutional on grounds that it violates Articles 13 and 16 of the Constitution.

With regard to the violation of Article 13 of the Constitution, the authors of the brief argue that individuals with HIV and/or Hepatitis B are subject to special protection due to their vulnerability. They state that these individuals are the victims of stigma manifested through discrimination deriving from their exclusion or marginalization, and are consequently denied their rights. They indicate that "*[t]o date, over 89 countries have repealed laws that penalize HIV and, in contrast, have enacted laws that promote reproductive rights, sexual education and the human rights of individuals who live with or are at risk of acquiring HIV.*" They also reference the lack of proportionality and necessity

[1] According to the brief, with regard to the effects of antiretroviral treatment of HIV, "[*a]ccording to the Department of Health and Human Services of the United States, 'individuals with HIV who maintain an undetectable viral load have effectively no risk whatsoever of transmitting HIV to their HIV-negative partner through sex'.*"

that characterizes the challenged provision; the impact of various scientific advances on improving the quality of life of those who live with HIV, and how its transmission is prevented when there is adequate antiretroviral treatment that reduces the viral load to undetectable levels; also how the provision is contrary to public policies that promote self-care and information enabling the exercise of sexual and reproductive rights within the population of individuals living with HIV.

With regard to the violation of Article 16 of the Constitution, the authors of the brief note that constraints on the exercise of the right to the free development of the personality "*are to be expected when there is a defined and imminent risk or there is (sic) no other ways to prevent harm.*" They also argue that, with regard to sexual and reproductive rights, individuals have "*the opportunity to choose self-care but are not required to take diagnostic tests or to be informed,*" notwithstanding the potential for certain circumstances in which a punitive response would be merited: for instance if a person is aware of their viral status yet donates organs, or if there is intent to cause harm.

4. Ministry of Health and Social Protection

The legal representative of the Ministry of Health and Social Protection, Marcela Ramírez Sepúlveda, begins her brief by questioning the fact that the plaintiff seeks the complete elimination of the challenged provision yet fails to raise sufficient arguments against the donation of blood, semen, organs or anatomical components by those who are aware of their positive HIV and/or Hepatitis B viral status.

The Ministry then notes that the allegations set forth in the complaint "*show that the plaintiff is trying to use the recourse of unconstitutionality to solve problems that, in his personal opinion, may arise when the challenged provision is enforced by the Criminal Courts. This is not legally admissible.*"

The Ministry also defends the constitutionality of the challenged provision by arguing that those affected by the provision may engage in sexual relations without thereby necessarily infecting another individual or creating the danger of infection. Thus, it finds that what the provision truly seeks is to prevent individuals living with HIV and/or Hepatitis B from spreading these viruses maliciously "*when in practice they could perfectly well avoid such propagation by engaging in careful or preventive behaviors,*" *such as the use of condoms or the informed consent of their partners.*

Finally, the brief argues that the broad discretion enjoyed by the legislature in criminal matters authorizes it to enact a provision such as the one being

challenged by virtue of "*the disastrous consequences for Public Health and the exceedingly high cost to the State*" of the spread of HIV and/or Hepatitis B.

5. Mexican Network of Organizations against the Criminalization of HIV

After referencing the proceedings in which the Supreme Court of Mexico declared unconstitutional a provision penalizing the intentional spread of some sexually transmitted diseases such as HIV, the representatives of the Mexican Network of Organizations against the Criminalization of HIV argue that the provision being challenged in the above lawsuit must be repealed because it violates the human rights of the HIV-positive population.

In setting forth its argumentation, after citing the Oslo Declaration, this organization argues that the challenged provision does more harm than good in terms of public health and that the current state of science offers solutions to the goal of preventing HIV transmission, such as by therapies that reduce the level of detectability of the virus. It also suggests that any solution to this case take into account point 14 of the decision of the Inter-American Court of Human Rights in *Cuscul Pivaral et al. v. Guatemala*.[2]

6. Rosario University – Public Action Group and Germán Humberto Rincón Perfetti

In their capacity as members of the Public Action Group of Rosario University, Paola Marcela Iregui, María Paula Angarita Escobar, Rossi Daniela Cruz Ardila, Santiago Garzón Amaya, Esteban Guerrero Álvarez and Angy Viviana Higuera Toledo, together with German Humberto Rincón Perfetti, requested that the challenged provision be found unconstitutional.

In addition to indicating that the challenged provision violates Articles 13 and 16 of the Constitution, the authors of the brief note that it also contradicts international instruments ratified by Colombia and that have been made part of its body of constitutional law.

In light of the violation of Article 13 of the Constitution, the authors conclude that "*there is no valid constitutional reason to permit any inference of the need to codify and continue stigmatizing two diseases [that] do not pass an objective*

[2] In the aforementioned point 14 of the operative part of the cited decision, the Inter-American Court of Human Rights ruled: "*14. The State must implement measures for the monitoring and supervision of the health services, improve the accessibility, availability and quality of health benefits for persons living with HIV, guarantee the supply of antiretrovirals and other indicated drugs for all who are affected, offer the [entire] population the diagnostic tests necessary to detect HIV, implement a training program for health system officials, guarantee adequate medical treatment for pregnant women living with HIV, and undertake a nationwide awareness and sensitivity campaign under the terms set forth in paragraphs 225–230 of the Decision.*"

test for singling them out," which leads to the conclusion that the provision does not pass the strict equality test insofar as it is not useful, necessary, proportional, adequate and effective in achieving its purpose.

With regard to the violation of Article 16 of the Constitution, the authors of the brief indicate that, fundamentally, the challenged provision "*unjustifiably prevents the achievement or pursuit of legitimate aspirations in their lives*."

Finally, the provision challenged by the lawsuit is criticized for "*lacking an integral reading of the instruments that make up the body of constitutional law, and is therefore contrary to Article 93 of the Constitution.*"

7. Ministry of Justice and the Law

Néstor Santiago Arévalo Barrero, representing the Ministry of Justice and the Law, states that he is defending the constitutionality of the challenged provision.

After digressing about various matters relating to the strict equality test that should be applied to the challenged provision—all of which would appear to be leading the author of the brief to a request that this provision be found unconstitutional—and after indicating that in his view, the provision does not violate the right to the free development of the personality given that "*it is limited to establishing the criminal consequences of the abusive and harmful exercise thereof with regard to the rights of others and of the community,*" the representative of the Ministry of Justice and the Law indicates, "*the Constitutional Court must be allowed to debate and decide on the merits of the legal problem raised by the plaintiff and to make the determination that best safeguards the integrity and supremacy of the Constitution.*"

8. Colombian League Against AIDS

Jorge Pachecho Cabrales, in his capacity as Executive Director of the Colombian League Against AIDS, Yacid Estrada and Manuel Meza, in their respective capacities as physician and attorney for the same entity, request that the challenged provision be found unconstitutional.

After detailing the achievements and activities that the Colombian League Against AIDS has obtained and engaged in since it was founded, the authors of the brief begin by arguing that the lack of expert information on the subject of prevention has meant that HIV has been penalized by laws passed in several countries around the world. For this reason, they note, in 2009 the OPEN SOCIETY [INSTITUTE], with the support of UNAIDS, the IOM and other

organizations, published a document setting forth several reasons why the penalization of HIV should not be used as a means to prevent that disease, a publication that the authors have adopted and explain as follows:

i) They indicate that the penalization of HIV transmission is only justified when such transmission is the result of a deliberate or malicious act aimed at harming a person, in which case the legislature must turn to provisions non-specific to HIV to punish such act. However, they explain that even the use of such non-specific provisions may become problematic if one considers that in some cases there may not be a significant risk of transmission, or when the targets of the provision, for example, are unaware that they were HIV-positive, may not know how the virus is transmitted, may have taken measures to reduce their risk such as by the use of condoms, or may have reached an agreement with the other person regarding the level of risk they can face.

ii) The authors explain that penalization of HIV exposure and transmission does not reduce the spread thereof. Accordingly, the authors of the brief indicate that (1) "*[t]o reduce the propagation of the HIV epidemic, it must be foreseen that an immense number of people will have unsafe sexual relations, will share syringes or engage in other risky behaviors – something that cannot be addressed by any HIV-specific law*"; (2) "*[t]here is little evidence showing that criminal convictions for behaviors that transmit HIV or cause the risk of HIV transmission can 'rehabilitate' individuals to the point of preventing future conduct involving the risk of transmitting HIV*"*; and (3)* "*[t]here is no scientific evidence supporting the argument that criminal prosecution, or fear thereof, has a significant impact on incentivizing persons living with HIV to disclose their status to their sexual partners or on persuading behaviors that generate the risk of transmission (sic).*"

iii) They go on to state that enforcement of criminal laws such as the challenged provision harms efforts to prevent HIV exposure and transmission. This is because it "*creates a false sense of security*" among those who are not living with the virus by transferring all legal liability to the HIV-positive population, and it disincentivizes cooperation by seropositive individuals with the necessary research studies on the topic.

iv) They add that the criminalization of conducts specifically associated with HIV generates fear, stigma and discrimination that adversely affect the human dignity of those who live with this disease.

v) They also state that provisions such as the one being challenged "*entirely*

fail to confront the epidemic of gender violence or the serious economic, social and political inequality that constitute the root of the disproportionate vulnerability to HIV of women and children," which they reinforce by explaining that it is most likely that these laws will be used more frequently to prosecute women than men.

vi) They criticize provisions such as the one being challenged for failing to address the challenges posed by HIV prevention, such as education, prevention and treatment services, access to testing services and voluntary counseling, and others.

This brief closes by indicating that there are studies showing that "*HIV transmission occurred in zero cases in serodiscordant couples in which the seropositive member showed a sustained viral load below 200 copies*"; that "*this evidence upholds the claim that adhering to treatment is nearly 100% effective in preventing HIV transmission through sexual contact*"; and that "*if added to condom use, it can be concluded that today, HIV transmission is 100% preventable.*"

9. Somos Network Corporation

The Somos Network Corporation, through Damary Rodríguez Porras, María del Pilar Vargas Talero, José Guillén Cañizares and Manuel Meza, requests that the challenged provision be found unconstitutional.

In support of their request, the authors of the brief indicate that it is currently evident that persons living with HIV who receive antiretroviral therapy are not likely to transmit the virus to other individuals. They also argue that legal provisions such as the challenged provision do not truly combat HIV but rather "*strengthen the stereotype that persons living with HIV are criminal, immoral and dangerous.*" In this regard, the authors note the importance of governments focusing on allocating resources and implementing scientifically-supported programs aimed at HIV prevention, while protecting and recognizing the rights of women and the LGTBI community, among others. They initially conclude that laws such as the one being challenged end up placing the burdens and responsibilities of the response to HIV exclusively on the heads of those who live with this virus.

Next, they indicate that criminalization, as proposed by provisions such as the one being challenged, appears to be ineffectual and is instead counterproductive to the ends pursued: on the one hand, it may convince people not to be tested for HIV since ignorance of their status might serve as a defense in criminal

proceedings; consequently, it would prevent those living with the disease from receiving the necessary treatment.

10. School of Law of the Free University of Bogotá

Jorge Kenneth Burbano Villamarín, Claudia Patricia Orduz Barreto, Camila Alejandra Rozo Ladino and Ingrid Vanessa González, variously linked to the School of Law of the Free University of Bogotá, first indicated that the lawsuit does not meet all requirements necessary to be admitted since its arguments do not reflects "*'clear, true, specific, relevant and sufficient' grounds.*"

Nevertheless, in lieu of the foregoing, the above authors of the brief requested that the challenged provision be found conditionally constitutional, indicating that: (i) the penalty established in the definition of the crime being challenged "*[does not] constitute discrimination against persons living with HIV or Hepatitis B merely due to their health status, [b]ecause what it seeks to penalize are those acting in bad faith who, although aware of their condition, decide to infect, adversely affect and endanger the health and lives of others*"; (ii) the provision does not violate the right to either the free development of the personality or the sexual freedom of those it may target, because not only is that right constrained by respect for the rights of others, but also "*persons carrying this virus may enjoy their sexuality by taking the required precautions*"; and (iii) however, in order to guarantee observance of the principle of equality, it will be necessary to broaden the catalogue of diseases covered by the provision because "*it is clear that there are more diseases that meet the same condition that were not included in Article 370 of Law 599 of 2000*." For this reason, the authors of the brief call upon the Court to urge the Congress of the Republic to fill that legislative void.

11. Action Program for Equality and Social Inclusion (PAIIS) and Environmental and Public Health Law Clinic (MASP)

Juliana Bustamante Reyes, Julián Garcerant and Alejandro León, director and research students belonging to *Programa de Acción por la Igualdad y la Inclusión Social* [Action Program for Equality and Social Inclusion] (PAIIS), respectively, and Camilo Quintero Girando, Lina María Caicedo, Diego Alejandro Duarte and María Alejandra Pérez, director and research students belonging to *Clínica Jurídica de Medio Ambiente y Salud Pública* [Environmental and Public Health Law Clinic] (MASP), respectively, filed a brief in these proceedings to request that the challenged legal provisions be found unconstitutional.

The authors of the brief began by arguing that Article 370 of the Criminal Code must be analyzed in conjunction with criminal law doctrine and, only then should it be compared to the Constitution. In that regard, they stated that the challenged provision must reflect the principles of necessity, legality, proportionality and ends of the penalty, among others.

In terms of the principle of necessity,[3] they indicate that this comprises two elements: the principle of *ultima ratio* and the limits of legislative initiative. *Ultima ratio* as a principle that limits legislative activity has been established by criminal law doctrine and certain judgments of the Constitutional Court.[4] When the legislature, for its part, determines that there are other punitive measures that cause less harm, it may activate its legislative discretion in the realm of criminal law. This has been termed the "*limits of legislative initiative in criminal matters*."[5] Two fundamental criteria must be taken into account in the exercise of this authority: official punishment may only be used to defend, protect and guarantee legally protected interests linked to fundamental rights, and the use thereof may not encroach upon human dignity or restrict fundamental rights.

Subsequently, the authors of the brief find that Article 370 of the Criminal Code does not effectively protect the legal interest of public health. They indicate that there is no justification for including only those two diseases, as there are other similar ones that likewise adversely affect this legal interest. The arguments set forth in 2008 are not in accordance with the current state of science. Moreover, they indicate that there are drugs available today that prevent the virus from reproducing and help reduce HIV concentrations in the body. By reducing viral loads to virtually undetectable levels, sexual relations may occur without the risk of transmission. They indicate that this reality has been reflected in a progressive change in the way HIV is perceived, since there are treatments that reduce the risk of transmission and that also permit the HIV-positive person to live a normal life. They state that this progress must bring about a change in public policy because today it is no longer as important to prevent contagion as it is to ensure timely detection and access to comprehensive treatment.

With regard to HBV, they indicate that this viral infection can be treated with medication, principally oral antivirals. Although this therapy cannot cure Hepatitis B, it does suppress its replication. It entails a lifetime of treatment. For this reason, the public policy that is implemented should not be one that penalizes those living with the disease but rather should ensure effective and

[3] In this regard, the authors point to judgments such as C-1033 of 2006 (Reporting Justice Álvaro Tafur Galvis), C-636 of 2009 (Reporting Justice Mauricio González Cuervo), C-387 of 2014 (Reporting Justice Jorge Iván Palacio Palacio).
[4] Citing, for example, judgment C-365 of 2012 (Reporting Justice Rodrigo Escobar Gil).
[5] Judgment C-233 of 2016 (Reporting Justice Luis Ernesto Vargas Silva), C-091 of 2017 (Reporting Justice María Victoria Calle Correa), C-342 of 2017 (Reporting Justice Alberto Rojas Río).

lasting treatment. The authors indicate that because there is currently a vaccine against Hepatitis B that attains levels of protection greater than 95% and that can last for up to 20 years or a lifetime, it cannot possibly be considered a public health problem.

Moreover, the authors of the brief believe that Article 370 of the Criminal Code is a discriminatory measure aimed at subjects requiring special protection and regarding whom a strict equality test must be applied. In this regard, they indicate that the provision is inadequate "*because it fails to punish the actual propagation of HIV or HBV but instead punishes practices that may potentially propagate the epidemic through its carriers.*" The above generates perverse effects for those who live with the virus, since it disincentivizes testing and overlooks the scientific advances that have reduced the spread of the virus. The authors argue that the measure also fails to satisfy the requirement of necessity, since "*there are less detrimental means for controlling the propagation of HIV and HBV, such as public health policies (...) or even, within the realm of criminal law, definitions of general crimes as in Article 369 regarding the propagation of epidemics.*" They close by indicating that the provision is not proportional in the strict sense of the term.

12. Brief contributed by Justice Edwin Cameron of the Constitutional Court of South Africa[6]

At the invitation of the reporting justice, Justice Edwin Cameron of the Constitutional Court of South Africa (hereinafter simply "Justice Cameron") submitted an *amicus curiae* brief by e-mail that in due course was made part of the record by the Court Clerk's Office.[7]

Justice Cameron states in his brief that he acquired the HIV virus in 1985 and that he ultimately developed AIDS between September and November of 1997, when he fell seriously ill. He indicates that he was nevertheless privileged to access antiretroviral drugs that saved his life, and that today he enjoys excellent health and is full of life. He also indicates that his virus was suppressed down to undetectable levels in all of his bodily fluids and that he is therefore incapable of transmitting the aforementioned infection.

Justice Cameron adds that his interest in these proceedings is personal, professional and legal, as the result of his experience as a victim of stigma, humiliation, fear and isolation. He states that as an attorney and a judge, he has

[6] Based on a free translation from English performed by the office of the reporting justice [Translator's Note: retranslated here into English without the benefit of the English original].

[7] In his brief, Justice Cameron stated that he was assisted in his brief by Annabel Raw, Edwin J. Bernard, Mariano Fanatico, Michaela Clayton, Cecile Kazatchkine, Sean Strub and Gonzalo Aburto.

acquired expert knowledge of the matter now before the Court, and that therefore, instead of remarking upon the provisions specifically being challenged, he wishes to express for the consideration of the Court several general principles that may be useful in its corresponding deliberations.

Justice Cameron states that in fundamental terms, the criminalization of HIV: (i) feeds the social stigma surrounding this virus; (ii) is characterized by vague and overly broad provisions; (iii) jeopardizes basic human rights such as the right to a fair trial, to equality, privacy, freedom, access to the administration of justice and gender equality; (iv) allows the judicial branch to ignore or inappropriately use medical and scientific facts regarding HIV; and (v) is highly harmful to public health, HIV treatment and prevention.

V. OPINION OF THE OFFICE OF THE PUBLIC PROSECUTOR [*Ministerio Público*]

Fernando Carrillo Flórez, Attorney General of the Nation, submitted in due course an analysis of Article 7 of Legislative Decree 2067 of 1991 and Paragraph 5 of Article 278 of the Constitution.

In his brief, the head of the Office of the Public Prosecutor asked the Court to find that it is barred from ruling on the merits of the case due to the substantive inadequacy of the complaint. As grounds for his request, the Attorney General argued that the challenged provision does not prohibit persons with HIV or Hepatitis B from having sexual relations, and therefore the plaintiff's arguments are based on a nonexistent legal proposition that is not derived from Article 370 of Law 599 of 2000. He also indicated, "*in order to satisfy the definition of the crime, there must be elements such as malice or the intent to cause unlawful harm, which in this case is to propagate the HIV or Hepatitis B virus by engaging in any practice whereby another person may become infected, knowing that the infection is being caused*"; or, "*[i]n other words, if an infected person engages in sexual practices and does not infect their partner, either because they use protection or because they have the virus under control through the relevant treatment, this does not satisfy the definition of the crime involving the human immunodeficiency or the hepatitis virus.*"

VI. PRELIMINARY CONSIDERATIONS

VI.I. Jurisdiction

Pursuant to the terms of Paragraph 4 of Article 241 of the Constitution, the Constitutional Court is competent to rule on the instant constitutional challenge.

VI.II. Adequacy of the Complaint

In response to the opinion of the Office of the Public Prosecutor and other *amicus curiae* briefs that question the adequacy of the complaint, the Court finds that the allegation of a violation of Article 13 of the Constitution is not based solely upon the punishability of conduct consisting of sexual relations on the part of the persons targeted by the challenged provision. It is clear to the Court that the complaint indicates that in singling out two specific viruses (HIV and the Hepatitis B virus), the provision affords special and more severe treatment to those who have these viruses compared with those who may have other, similarly transmissible infections. In other words, it is clear that, given the variety of similarly transmissible viruses, the singling out and special treatment that the provision affords to two of them—which have been the target of particular social rejection and condemnation—justifies a decision by the Court in this matter after an evaluation of the provision is conducted in light of the principle of equality.

For its part, with regard to the violation of the right to the free development of the personality (Art. 16 of the Constitution), the Full Chamber of this Court already decided, in Ruling 739 of the fourteenth (14) of November of 2018, in favor of the admissibility of that allegation when it indicated in that regard that the complaint "*raises a modicum of doubt regarding the constitutionality of the challenged provision by meeting the required burden of argumentation*."

VI.III. Legal Questions

Having expressed the above preliminary considerations, the Court finds that in order to disentangle the constitutional dispute before us, the following legal questions must be answered:

A. Did the legislature violate Article 13 of the Constitution regarding the right to equality when, in applying Article 370 of Law 599 of 2000, it especially and particularly penalizes those who, knowing that they are positive for HIV and/or Hepatitis B, engage in practices whereby they may infect another person and/or donate blood, semen, organs or anatomical components in general, but it does not establish the same penalty for those who may be affected by other similarly transmissible diseases and engage in the same practices but are protected by Article 369 of the same law, which carries a less severe penalty?

B. Did the legislature violate Article 16 of the Constitution regarding the right to the free development of the personality in the aspect of the right to the full pursuit and enjoyment of sexuality when, in applying Article 370 of

Law 599 of 2000, it especially and particularly penalizes those who, knowing that they are positive for HIV and/or Hepatitis B, engage in practices whereby they may infect another person, but it does not establish the same penalty for those who may be affected by other similarly transmissible diseases and engage in the same practices but are protected by Article 369 of the same law, which carries a less severe penalty?

VI.III. Case Plan

In order to rule on the complaint, the Court (i) will begin by discussing public health as a matter of public interest for which the State is responsible. The same section will include a summary of the origin of the challenged provision. (ii) Next, there will be a short description of the human immunodeficiency virus (HIV) and the Hepatitis B virus (hereinafter also "HBV"). (iii) Then we will briefly reference case law in which the Court has found evidence of discrimination and segregation targeting those who live with the aforementioned infections. (iv) Thereafter, the Court will refer to the current state of science on the treatment and control of HIV and HBV. (v) Next, we will briefly reference the ways in which courts of some countries have addressed the question of the criminalization of HIV transmission. (vi) Subsequently, we will undertake an analysis of the challenged provision in light of the two proposed allegations of violation of equality (A) and of the free development of the personality (B), providing answers to the legal questions identified in Section VI.III of this decision. (vii) Thereafter, in conclusion, we will summarize the reasoning upon which the decisions set forth in the operative part of the judgment are based. (viii) Finally, we will summarize the grounds for the judgment.

VII. BASIS FOR THE DECISION

1. PUBLIC HEALTH AND ARTICLE 370 OF LAW 599 OF 2000

1.1. In doctrine, public health is understood to mean "*the organized efforts of a society to promote, protect and restore the health of persons,*"[8] or, according to the World Health Organization (WHO), " *an organized effort by society, primarily through its public institutions, to improve, promote, protect and restore the health of the population through collective action.*"[9] Article 32 of

[8] GÓMEZ GUTIÉRREZ, Luis Fernando. "*Democracia deliberativa y salud pública*" [*Deliberative Democracy and Public Health*]. Pontificia Universidad Javeriana. First edition, December 2017. p. 34.

[9] World Health Organization and Pan American Health Organization. "*Public Health in the Americas: Conceptual Renewal, Performance Assessment and Bases for Action.*" Scientific and Technical Publication No. 589. p. 47. See: http://new.paho.org/hq/dmdocuments/2010/FESP_Salud_Publica_en_las_Americas.pdf

Law 1122 of 2007[10] defines public health as "*the set of policies that seek comprehensively to guarantee the health of the population through health-oriented actions at both the individual and collective levels, since the results thereof constitute indicators of the country's living conditions, well-being and development,*" and then goes on to explain that "*(s)uch actions shall be performed under the leadership of the State and must promote responsible participation by all sectors of the community.*"

Thus, public health stems directly from the right to health established in Article 49 of the Constitution, inasmuch as it comprises a public service for which the State is responsible, one that is aimed at protecting the health of the members of society from a comprehensive standpoint that takes on the challenges posed by the need to guarantee the health of the collectivity as a means of guaranteeing the health of individuals.

1.2. Criminal law holds a special place within the efforts by the State to guarantee health by structuring a public health policy. This has historically been reflected in the codification of various definitions of crimes in order to punish behaviors that undermine public health. Included among such crimes are behaviors capable of generating the mass and indiscriminate spread of disease (epidemics[11]). For example, Article 265 of the Criminal Code of 1936[12] established the penalty of confinement for any person who "*causes an epidemic through the dissemination of pathogenic germs*." Subsequently, the criminal code of 1980[13] used more general terms to define the crime committed by "*[a]ny person who propagates an epidemic*" (Art. 204). Finally, in Law 599 of 2000, the Criminal Code in force today, the legislature preserved the penalty established in the 1980 Code for "*[a]ny person who propagates an epidemic*" (Art. 369), but adds a new definition of a special crime aimed at punishing any person who, "*after having been notified that he/she is infected by the human immunodeficiency virus (HIV) or hepatitis B, engages in practices that may infect another person, or donates blood, semen, organs or anatomical components in general*" (Art. 370). This latter conduct is set forth in the provision whose constitutionality is presently before this Court.

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[10] "*Whereby certain modifications are made to the Social Security Health system and other provisions are enacted.*"

[11] **Epidemic**:
1. f. Disease propagated over a certain time period by a country, occurring simultaneously among a large number of people.
2. f. Evil or harm that spreads intensely and indiscriminately. (Dictionary of the Royal Spanish Academy. Updated 2018. See: http://dle.rae.es/?id=Fw3BQCP)

[12] Law 95 of 1936.

[13] Legislative Decree 100 of 1980.

1.3. At least with regard to HIV, the genesis of the crime defined in Article 370 of the current Criminal Code hearkens back to **Decree 559 of 1991**.[14] In fact, after finding that "*(...) a new* ***transmissible mortal disease*** *has emerged that is caused by the virus called Human Immunodeficiency [Virus] (HIV),*[15] *for which* ***there is presently no curative treatment nor has any vaccine been developed, and which, due to its particular form of transmission, constitutes a grave threat to public health****, (...)*"; "*[d]ue to its status as a transmissible infectious and mortal disease, infection by the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS) represents for society* ***a multifaceted problem that adversely affects institutions such as medicine, the family, work and ethics, among others***"; and "*[b]y virtue of the foregoing, there is a need to issue a set of regulations governing the conducts and actions that individuals (...) must observe for the prevention and control of the HIV epidemic (...),*" Article 53 of Decree 559 of 1991 provides the following:

> **"Persons who, after having been notified that they are infected by the Human Immunodeficiency Virus (HIV), intentionally engage in practices by which they may infect other persons, or who donate blood, semen, organs or anatomical components in general, may be the subject of a complaint in order to obtain an investigation of the crime of propagation of an epidemic or violation of the health measures indicated in the Criminal Code. If convicted, they must serve their term of confinement in locations that are adequate for their medical, psychological and psychiatric treatment."**

Thus, this was a public policy of criminal repression supported by the perception that HIV constituted a serious threat to both health and public morality. The latter was due in part to the fact that AIDS, as a disease associated with HIV, was shown to have devastating consequences for human health (see 2.1 *supra*); moreover, the early research into AIDS associated that disease with groups that were historically subject to discrimination, for example, groups comprising the male homosexual population and heroin users.[16]

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[14] Decree 559 of February twenty-second (22) of 1991, "*Whereby partial regulations are established for Laws 9 of 1979 and 10 of 1990 with regard to the prevention, control and oversight of transmissible diseases, in particular those related to infection by the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS), and decreeing other provisions regarding the matter,*" issued prior to the current Constitution, which took effect on July fourth (4) of that same year.

[15] The previous provision used the English-language acronym HIV instead of the Spanish-language acronym VIH.

[16] "*In the first year of the 1980s, a publication emerged showing the existence of a few cases of Pneumocitys [sic] Pneumonia in Los Angeles, California (Pneumocystis Pneumonia- Los Angeles, 1981). One month following that publication, summaries appeared of other cases found in New York City at the time, including Kaposi sarcoma (1981). The affected population consisted of men who had sex with men, and thus in no time at all this syndrome was dismissively called* "*Gay-Related Immune Deficiency*" *or GRID in English. New cases were discovered in 1982 and other populations were found to be affected by factors not related to sex, whereby the disease took on a new identity and was called,* "*The 4H disease,*" *referring to* "*Haitians, hemophiliacs,*

1.4. In the current Constitution in force, and almost two decades after the appearance of the first cases of HIV, the Executive Branch repealed Decree 559 of 1991 by enacting **Decree 1543 of 1997**.[17] Although this decree did not renounce the criminalization of acts that may result from the propagation of HIV,[18] its language hinted at a humanist and humanitarian tendency in its portrayal of a pathology that just a few years back was viewed with panic and as socially catastrophic. For example, after considering "*[t]hat given the increasingly frequent violation of the fundamental rights of persons who carry HIV and who suffer from AIDS due to the* ***unfounded fear of the ways the virus is transmitted****, it becomes necessary to determine the r****ights and duties of these persons and of the community in general,***" Decree 1543 of 1997 established the **duty of non-discrimination as the common thread that must run through all public policy aimed at managing HIV infections**.[19] This is

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heroin users and homosexuals." *This war of discriminatory names ended in August 1982 when the Centers for Disease Control and Prevention (CDC in English) called it Acquired Immunodeficiency Syndrome or AIDS, making clear that this set of conditions was not hereditary but was instead acquired by certain specific factors, which placed the entire population on alert for the potential risk of acquiring this disease.*"*(*Medicina y Salud Pública [Medicine and Public Health]. "*34 años de historia del Síndrome de Inmunodeficiencia Adquirida [34 Years of Acquired Immunodeficiency Syndrome],*" May 24, 2016). See: https://medicinaysaludpublica.com/34-anos-de-historia-del-sindrome-de-inmunodeficiencia-adquirida/

[17] "*Whereby regulations are established for the management of infection by the Human Immunodeficiency Virus (HIV), Acquired Immunodeficiency Syndrome (AIDS) and other Sexually Transmitted Diseases (STD).*"

[18] Decree 1543 of 1997, ARTICLE 55. Propagation of Epidemics. "*Any person who fails to perform the duties enshrined in Articles 36 and 41 of Chapter V of this decree may be the subject of a complaint in order to obtain an investigation of the possible existence of crimes of propagation of an epidemic, violation of health measures and others indicated in the Criminal Code.*"// ARTICLE 36. Duty to Report. "*In order to ensure adequate treatment and prevent the propagation of the epidemic, all persons infected with the Human Immunodeficiency Virus (HIV), or who have developed Acquired Immunodeficiency Syndrome (AIDS) and have knowledge of that status, are required to report this fact to their sexual partners and to any treating physician or medical team where they request any health service.*"// ARTICLE 41. Duty to Refrain from Spreading Infection. "*All persons who have been informed of their status as carriers of the Human Immunodeficiency Virus (HIV) must refrain from donating blood, semen, organs or any anatomical component in general, as well as from engaging in activities that carry the risk of infecting others.*"

[19] Decree 1543 of 1997. ARTICLE 2. Technical Definitions. The following definitions will be adopted for purposes of this decree: (…) DISCRIMINATION: Threat or violation of the right to equality through individual or social attitudes or practices that adversely affect the respect and dignity of the individual or group and the pursuit of their activities, due to any suspicion or confirmation of being infected by HIV.// ARTICLE 17. Dissemination of Messages. The Ministry of Communications, the National Television Commission and the National Radio Broadcaster shall adopt the necessary measures to ensure that the mass media disseminate promotional messages aimed at specific population groups in the community to encourage the prevention of infection by the Human Immunodeficiency Virus (HIV), Acquired Immunodeficiency Syndrome (AIDS) and other Sexually Transmitted Diseases (STD), which may include condom use, education on values and non-discrimination against persons living with HIV and AIDS.// ARTICLE 31. Duties of IPS [Health Centers] and Medical Staff. Individuals and entities that promote or provide health services, both public and private, are required to provide comprehensive treatment to persons infected by the Human Immunodeficiency Virus (HIV) and those ill with AIDS, or at high risk thereof, in accordance with the appropriate treatment levels and degrees of complexity, under conditions of respect for their dignity, without discriminating against them, pursuant to the provisions of this decree and observing the technical, administrative and epidemiological oversight regulations issued by the Ministry of Health. // ARTICLE 39. Non-Discrimination. "Persons infected with the Human Immunodeficiency Virus (HIV), their children and other relatives, may not for that reason be denied the right to enter or remain in educational, medical treatment or rehabilitation centers, either public or private, or be denied

consistent with the legal framework that the Court has set forth regarding the social treatment of persons who suffer from that disease (see 3 *infra*), as well as with the later provisions of Article 2 of **Law 972 of 2005**,[20] whereby "*[t]he contents of this law and any provisions that complement or enhance it shall be interpreted and enforced bearing in mind that the right to life must be respected and guaranteed and* ***the dignity of the individual may under no circumstances be adversely affected; nor may any marginalization or segregation ensue****, or injury to the patient's fundamental rights to intimacy and privacy, the right to work, to family life, to an education and to lead a decent life, and in all cases the doctor-patient relationship must be respected.*"

1.5. With the exception of the terms of Articles 46–51,[21] Decree 1543 of 2007 was repealed by the enactment of **Decree 780 of 2016**,[22] in which Title I (*HIV-AIDS*) Part 8 (*Rules addressing public health*) retained the non-discrimination mandate.[23]

1.6. However, when enacting **Law 599 of 2000**, the legislature echoed the text and spirit of Decree 559 of 1991 and codified the definition of a stand-alone crime that is specifically aimed at those who have HIV and/or HBV. The definition of this crime is a virtual copy of Article 53 of Decree 559 of 1991 (see 1.3 *supra*) and is found in Article 370 of Law 599 before us; the former article was subsequently amended by Law 1220 of 2008,[24] which increased the earlier penalties. The First Constitutional Commission of the House of Representatives justified this by arguing that: "*With regard to the propagation of the human immunodeficiency virus or the hepatitis B virus, which is codified in Article 370, bearing in mind that these are* ***catastrophic illnesses****, the propagation of which affects and endangers the life and health of persons, the increase contained in Law 890 brings the minimum penalty to four years, which likewise merits such increase.*"[25]

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access to any labor activity or the right to remain in such activity, nor shall they be discriminated against for any reason."

[20] "*Whereby rules are adopted for improving services by the Colombian State to persons suffering ruinous or catastrophic illnesses, particularly HIV/AIDS.*"

[21] Except for Articles 46–54, which remain in effect pursuant to the terms of Article 4.1.2, the remaining articles of Decree 1543 of 2007 were repealed altogether by virtue of the enactment of Unified Regulatory Decree 780 of 2016 with regard to the Health and Social Protection Sector.

[22] "*Whereby the Unified Regulatory Decree governing the Health and Social Protection Sector is enacted.*"

[23] Decree 780 of 2016. Article 2.8.1.5.10. ***Non-Discrimination.*** "*Persons infected with the Human Immunodeficiency Virus (HIV), their children and other relatives, may not for that reason be denied the right to enter or remain in educational, medical treatment or rehabilitation centers, either public or private, or be denied access to any labor activity or the right to remain in such activity, nor shall they be discriminated against for any reason.*"

[24] "*Whereby penalties are increased for the crimes against Public Health addressed in Title XII Chapter I of the Criminal Code.*"

[25] Congressional Gazette. House of Representatives. No. 519 of 2006, p. 11.

The foregoing shows that State policies aimed at combating HIV have fluctuated somewhat, and that with the codification of the challenged provision, the legislature appears to have returned to the catastrophic mindset regarding the virus that characterized the executive branch almost three decades ago.

2. BRIEF CHARACTERIZATION OF HIV AND HBV

2.1. The human immunodeficiency virus (HIV) is a microscopic infectious agent that attacks the cells responsible for the human body's immunological system. Once it enters the human body, HIV advances by reproducing itself, infecting and damaging the CD4 cells responsible for coordinating the body's response to outside attacks. Thus, people who initially just carried HIV end up harboring a high viral load that permits the entry and development of "opportunistic"[26] diseases that the gradually weakening immunological system is incapable of repelling and that ultimately consume a human life. This last phase of HIV development in the human body is known as acquired immunodeficiency syndrome (AIDS).

It should be noted that the curve of the HIV epidemic continues upward. According to the UNAIDS report of 2017, while "*77.3 million [59.9 million–100 million] people have become infected with HIV since the start of the epidemic,*" "*1.8 million [1.4 million–2.4 million] people became newly infected with HIV in 2017.*"Nevertheless, and also according to that report, it is true that the curve is tending to flatten out, since "*[s]ince the peak reached in 1996, new HIV infections have dropped by 47%.*"[27]

2.2. For its part, HBV, as one of the five hepatitis viruses,[28] is the infectious agent responsible for a hepatic disease that affects the liver, alters its functioning and, when it becomes chronic, leads to the possibility of the person's death from cirrhosis of the liver or liver cancer. According to the *Global Commission on HIV and the Law*, there are 2.6 million people co-

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[26] According to "*HIV-related opportunistic diseases*" (UNAIDS Technical Update, March 1999), "*[o]pportunistic diseases in a person with HIV are the products of two things: The person's lack of immune defenses caused by the virus, and the presence of microbes and other pathogens in our everyday environment. A partial list of the world's most common opportunistic infections and diseases includes:* ***Bacterial diseases*** *such as tuberculosis (caused by Mycobacterium tuberculosis), Mycobacterium avium complex disease (MAC), bacterial pneumonia and septicemia ("blood poisoning"). **Protozoal diseases** such as Pneumocystis carinii pneumonia (PCP), toxoplasmosis, microsporidiosis, cryptosporidiosis, isosporiasis and leishmaniasis. **Fungal diseases** such as candidiasis, cryptococcosis (cryptococcal meningitis (CRM)) and penicilliosis. **Viral diseases** such as those caused by cytomegalovirus (CMV), herpes simplex and herpes zoster virus. **HIV-associated malignancies** such as Kaposi sarcoma, lymphoma and squamous cell carcinoma.*" See: http://data.unaids.org/publications/irc-pub05/opportu_es.pdf

[27] UNAIDS. "*Fact Sheet. Latest Statistics on the Status of the AIDS Epidemic.*" See: http://www.unaids.org/es/resources/fact-sheet

[28] Hepatitis has five types of virus (A, B, C, D and E).

infected with HIV and HBV.[29] In the words of the WHO, "*HBV is about 50 to 100 times more infectious than HIV*."[30]

It should be noted that the status of hepatic viruses is more worrisome than HIV because, according to the WHO, "*while mortality from tuberculosis and HIV has been declining, deaths from hepatitis are on the increase.*" Nevertheless, with regard to HBV, "*[a]lthough overall deaths from hepatitis are increasing, new infections of HBV are falling, thanks to increased coverage of HBV vaccination among children (...).*"[31]

3. DISCRIMINATION AGAINST PERSONS LIVING WITH HIV AND HBV AND COURT CASE LAW

3.1. Ever since early days, the Court has warned of the risk to public health that HIV represented, as well as of the challenges facing the State in light of the subsequent appearance of AIDS. In Judgment **T-505 of 1992**,[32] this Court noted:

> "AIDS constitutes an affliction of immeasurable proportions that threatens the very existence of the human race, before which the law may not remain impassive but must instead offer paths to a solution. The growing dimension of the threat to public health posed by AIDS is a reflection of its nature as an epidemiological and mortal that has no curative treatment.
> (…)
> The Director-General of the World Health Organization (WHO) submitted to the Executive Council, at its 87th Session of December 12, 1990, a report on the worldwide strategy to prevent and respond to AIDS. According to this report, by the year 2000 there would be some 15-20 million adults infected by the human immunodeficiency virus (HIV), and it was estimated that "the cumulative total of infected children will reach 10 million by the year 2,000, on top of the fact that another 10 million uninfected children will be orphaned by the loss of one or both parents from AIDS."
> The immediate objectives of a worldwide strategy in response to AIDS would include preventing infection, reducing its individual and social impact, and unifying national and international efforts

[29] Global Commission on HIV and the Law. "*Risks, Rights and Health. Supplement*. July 2018, p.10. (See: https://hivlawcommission.org/wp-content/uploads/2018/09/HIV-and-the-Law-supplement-FINAL.pdf)
[30] "*How do you get hepatitis B and how can I protect myself from this disease?*" See: (https://www.who.int/features/qa/11/es/)
[31] WHO. "*New hepatitis data highlight need for urgent global response.*" See: https://www.who.int/es/news-room/detail/21-04-2017-new-hepatitis-data-highlight-need-for-urgent-global-response
[32] Reporting Justice Eduardo Cifuentes Muñoz.

against the disease. Notable among the priority activities of the WHO to attain those objectives are "**continuing to advocate for the adoption of measures to prevent and combat [AIDS] based on solid public health principles and bearing in mind the need to prevent all forms of discrimination**," as well as "exploring the possibilities for improving clinical treatment, health care and support for persons with HIV/AIDS in medical establishments or through community-based home care services."
(…)
The national public health policy in response to HIV/AIDS was designed to take into account the different stages of the disease. To prevent contagion, preventive campaigns are being promoted in order to provide information on risks and on ways of contracting the disease (preventive stage), as well as on the duty of self-care by observing all rules, recommendations and precautions aimed at preventing infection.
(…)

The national AIDS strategy seeks to contain the epidemic through prevention and monitoring of the disease, and also by protecting individuals through timely medical treatment. Prevention constitutes the most important measure to control the disease. All institutions and organizations, whether public or private, have the duty to promote campaigns of dissemination, education and orientation to prevent infection from AIDS, and are required to take all necessary hospital precautions to prevent contagion during the treatment of those who are sick with [AIDS]. The dissemination of messages to inform the community is the responsibility of the Ministry of Communications. Mandatory sexual education—at the appropriate levels—for students in elementary, secondary and higher education is the shared responsibility of the Ministry of National Education and the Ministry of Health. The Ministry of Health, for its part, has the duty to issue rules for epidemiological oversight and monitoring, in which it must prioritize the prevention, diagnosis and treatment of AIDS in close cooperation with non-governmental organizations." (Emphasis added)

3.2. Over a quarter of a century later, the fears expressed in 1990 by the Director-General of the WHO that were cited in the above ruling appear understated. According to the calculations of that organization, "*36.7 million people were living with HIV globally at the end of 2016. That same year, some 1.8 million people became newly infected, and 1 million died of HIV-related*

causes."[33] Or, as UNAIDS has stated, "*[s]ince the first cases of HIV were reported more than 35 years ago, 78 million people have become infected with HIV and 35 million have died from AIDS-related illnesses.*"[34]

3.3. The design of State policies in response to HIV has not been viewed with indifference by the Court. This Court has constructed a solid body of case law that has influenced the actions of the State in response to the aforementioned threat to public and individual health. This influence has chiefly centered on (i) the necessary protection and health care services that those who live with HIV deserve by virtue of their vulnerable status; and (ii) punishing social discrimination against those who live with this disease. For example, in its recent Judgment **T-033 of 2018**,[35] the Court held that:

> "The Court, in a consolidated trajectory of case law, has determined that individuals living with HIV/AIDS are in a situation of manifest weakness that entails the need to provide them with special protection [42].[36] In this regard, Judgment T-513 of 2015 [43][37] found that persons living with HIV are subject to special protection, since this is a disease that, **on the one hand, places those living with it *in the cross-hairs of society*, exposed to discrimination based on existing prejudices surrounding this condition, and, on the other hand, involves a continuous state of medical decline, thereby rendering them deserving of *equal, supportive and dignified treatment in response to the manifestly weak circumstances in which they find themselves*.**
>
> Hence, according to this case law:
>
> > "*Due to the specific characteristics of this disease and to its disastrous consequences, the Constitutional Court has stated that: (i) those who live with HIV require additional care from the State, (ii) not only do they have the same rights as others, but the authorities are also required to afford them special*

[33] See: https://www.who.int/features/qa/71/es/
[34] See: http://www.unaids.org/es/whoweare/about
[35] Reporting Justice Diana Fajardo Rivera.
[36] [42] See Judgments T-505 of 1992. Reporting Justice Eduardo Cifuentes Muñoz; T-295 of 2008. Reporting Justice Clara Inés Vargas Hernández; T-273 of 2009. Reporting Justice Humberto Antonio Sierra Porto; T-490 of 2010. Reporting Justice Jorge Ignacio Pretelt Chaljub; T-025 of 2011. Reporting Justice Luis Ernesto Vargas Silva; T-323 of 2011. Reporting Justice Jorge Iván Palacio Palacio; T-327 of 2014. Reporting Justice María Victoria Calle Correa; T-408 of 2015. Reporting Justice Jorge Iván Palacio Palacio; T-348 of 2015. Reporting Justice Jorge Ignacio Pretelt Chaljub; T-513 of 2015. Reporting Justice María Victoria Calle Correa; T-412 of 2016. Reporting Justice Jorge Iván Palacio Palacio; T-327 of 2017. Reporting Justice Iván Humberto Escrucería Mayolo; T-392 of 2017. Reporting Justice Gloria Stella Ortiz Delgado, among others.
[37] [43] Reporting Justice María Victoria Calle Correa, referring to Judgments T-295 of 2008. Reporting Justice Clara Inés Vargas Hernández; and T-505 of 1992. Reporting Justice Eduardo Cifuentes Muñoz.

protection in order to ***defend their dignity [44]***[38] ***and prevent them from being the targets of discrimination****, and (iii) their particular situation represents a condition of manifest weakness that renders them deserving of reinforced constitutional protections.[45]*[39] *By virtue of the foregoing, [we] have recognized that these individuals must be afforded special treatment in contexts such as health,[46]*[40] *the workplace[47]*[41] *and social security.[48]*[42] *[…]*

Thus, HIV/AIDS is a pathology that not only has grave consequences for the health of the person living with it, which declines in a

[38] [44] Constitutional Court, Judgment T-505 of 1992 (Reporting Justice Eduardo Cifuentes Muñoz).

[39] [45] For example, Judgment T-262 of 2005 (Reporting Justice Jaime Araújo Rentería) indicated that "*HIV-AIDS has been considered a catastrophic disease that produces an accelerated decline in the health of the individuals who suffer from it, and consequently the patients' risk of death increases when they fail to receive adequate and timely treatment. Consequently, it is the duty of the State to afford comprehensive protection to those affected.*" *Similarly, Judgment T-843 of 2004 (Reporting Justice Jaime Córdoba Triviño) made reference to the consequences of this disease and to the special measures the State must adopt to guarantee the fundamental rights of such persons:* "*…the very existence of any person infected by HIV is threatened due to the incalculable proportions of this affliction, and the State may not remain indifferent in response, but rather must actively guarantee that such person not be condemned to live under inferior conditions. (…) The Court has had the opportunity to rule in cases of individuals who live with this disease, and has stated that said pathology places those living with it in a state of continuous decline, with serious repercussions for life itself, given that the virus attacks the organism's defense systems and leaves it fully exposed to any condition that may finally produce death.*"

[40] [46] For example, providing drugs and treatments that the person is not financially capable of paying for, see the Constitutional Court Judgments T-271 of 1995 (Reporting Justice Alejandro Martínez Caballero), SU480 of 1997 (Reporting Justice Alejandro Martínez Caballero), T-488 of 1998 (Reporting Justice Alfredo Beltrán Sierra), T-036 of 2001 (Reporting Justice Fabio Morón Díaz), T-925 of 2003 (Reporting Justice Álvaro Tafur Galvis), T-546 of 2004 (Reporting Justice Álvaro Tafur Galvis), T-919 of 2004 (Reporting Justice Marco Gerardo Monroy Cabra), T-343 of 2005 (Reporting Justice Jaime Araújo Rentería), T-586 of 2005 (Reporting Justice Jaime Córdoba Triviño), T-190 of 2007 (Reporting Justice Álvaro Tafur Galvis), T-230 of 2009 (Reporting Justice Cristina Pardo Schlesinger), T-744 of 2010 (Reporting Justice Humberto Antonio Sierra Porto), among others.

[41] [47] For example, not to suffer discrimination because of the disease and to be afforded special treatment in the workplace, see Constitutional Court Judgments T-136 of 2000 (Reporting Justice Carlos Gaviria Díaz), T-469 of 2004 (Reporting Justice Rodrigo Escobar Gil), T-295 of 2008 (Reporting Justice Clara Inés Vargas Hernández), T-490 of 2010 (Reporting Justice Jorge Ignacio Pretelt Chaljub; Partial Dissent Humberto Antonio Sierra Porto and Luis Ernesto Vargas Silva), T-025 of 2011 (Reporting Justice Luis Ernesto Vargas Silva), T-461 of 2015 (Reporting Justice Myriam Ávila Roldán), among others.

[42] [48] For example, with regard to survivors' benefits, see Judgments T-1283 of 2001 (Reporting Justice Manuel José Cepeda Espinosa), T-021 of 2010 (Reporting Justice Humberto Antonio Sierra Porto), T-860 of 2011 (Reporting Justice Humberto Antonio Sierra Porto), T-327 of 2014 (Reporting Justice María Victoria Calle Correa), T-546 of 2015 (Reporting Justice Gabriel Eduardo Mendoza Martelo). Judgment T-026 of 2003 (Reporting Justice Jaime Córdoba Triviño) recognized the disability pension that had been denied due to administrative problems at the pension fund. On many occasions, the issue of acknowledgment of pensions has been analyzed in cases of earlier legal systems, bearing in mind the progressive nature of the law and the principle of most favorable outcome; see, for example, Judgments T-1064 of 2006 (Reporting Justice Clara Inés Vargas Hernández), T-628 of 2007 (Reporting Justice Clara Inés Vargas Hernández), T-699A of 2007 (Reporting Justice Rodrigo Escobar Gil), T-077 of 2008 (Reporting Justice Rodrigo Escobar Gil), T-550 of 2008 (Reporting Justice Marco Gerardo Monroy Cabra), T-1040 of 2008 (Reporting Justice; Concurring Opinion Jaime Araújo Rentería), T-509 of 2010 (Reporting Justice Mauricio González Cuervo), T-885 of 2011 (Reporting Justice María Victoria Calle Correa), T-576 of 2011 (Reporting Justice Juan Carlos Henao Pérez), T-1042 of 2012 (Reporting Justice Nilson Elías Pinilla Pinilla; Concurring Opinion Alexei Egor Julio Estrada), among others.

continuous and progressive manner, but also has a financial, social and labor impact; therefore, the State and society in general have the duty to afford special attention to those who are living with it. By virtue of constitutional mandates and international law, **persons living with HIV must be protected from all forms of segregation or discrimination, thereby requiring the State to commit to increasing its protection of their rights and reinforce its guarantees of their right to equality in all walks of life** [50].[43] [44]

On the basis of the foregoing, constitutional case law has established that such special protection is grounded in the principle of equality, whereby the State shall afford special protection to those persons who, due to their financial, physical or mental condition, are in a situation of manifest weakness (Article 13 of the Constitution); in [the principle] of solidarity, as one of the guiding principles of social security (Articles 1 and 48 of the Constitution); and in the duty of the State to further a policy of care, rehabilitation and social integration for those with physical, sensory and psychological limitations, who must be afforded the specialized care they require (Article 47); as well as in the instruments and tools of international law that have advocated special protection to persons living with HIV/AIDS, such as the International Conference on Population and Development in Cairo (1994); the Universal Declaration of Sexual and Reproductive Rights (1997); the Millennium Development Goals (2000); the Political Declaration on HIV and AIDS (2006); the Andean Subregional HIV Plan (2007–2010), among others [51].”[45] (Emphasis added)

3.4. Thus, by virtue of the principle of equality emanating from Article 13 of the Constitution and of special and additional protection in the realms of labor, health, education and social security rights (see 3.3 *supra*), which are merited by the situation of manifest weakness of those living with HIV, the above constitutional provision condemns any tendency to discriminate and socially stigmatize those who are living with that virus.

[43] [50] Judgments T-505 of 1992. Reporting Justice Eduardo Cifuentes Muñoz; T-271 of 1995. Reporting Justice Alejandro Martínez Caballero; SU-256 of 1996. Reporting Justice Carlos Gaviria Díaz; T-843 of 2004. Reporting Justice Jaime Córdoba Triviño; T-948 of 2008. Reporting Justice Clara Inés Vargas Hernández; T-229 of 2014. Reporting Justice Alberto Rojas Ríos; T-671 of 2016. Reporting Justice Aquiles Arrieta Gómez; and T-522 of 2017. Reporting Justice Cristina Pardo Schlesinger, among others.
[44] Emphasis added.
[45] [51] Judgment T-327 of 2017. Reporting Justice Iván Humberto Escrucería Mayolo.

3.5. Regarding the duty of the State to prevent discrimination against persons living with HIV—a duty that is not alien to the realm of special and reinforced protections of labor, health, education and social security rights for persons living with that virus but is rather one of its foundational values—it is clear to the Court that such discrimination is a conspicuous reality. For example, in the aforementioned Judgment **T-033 of 2018**, this Court stated that persons living with HIV are "*in the cross-hairs of society, exposed to discrimination based on existing prejudices surrounding this condition.*"[46] Moreover, in Judgment **T-769 of 2007**,[47] the Court recalled that "*[a]s indicated in Judgment T-577 of 2005, the discrimination and stigmatization suffered by these individuals are mutually reinforcing social phenomena.*"

3.6. However, notwithstanding the fact that a high percentage of the judgments handed down by this Court regarding discrimination against persons living with HIV are in reference to cases in which the corresponding segregation can be verified in situations involving violations of labor, health, education and/or social security rights, the fact is that such manifestations of segregation do not encompass the entire universe of discrimination that case law rejects. The universe of situations of negative discrimination targeting persons who live in HIV is just as broad as the universe of situations of segregation or differentiation that this population may confront in daily life. Therefore, although the Court has referenced specific cases in which persons living with HIV have been subjected to disgraceful treatment in their experiences of labor relations or in regard to their rights to education, health and/or social security, the central criterion that serves as the foundation for such case law is **general** in nature and is aimed at eradicating **any and all types of segregation** targeting the above population based on their health condition, in accordance with the terms of a variety of instruments of international law to which Colombia is a signatory and that are binding pursuant to the terms of Article 93 of the Constitution.[48]

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[46] T-033 of 2018, Reporting Justice Diana Fajardo Rivera.

[47] Reporting Justice Humberto Antonio Sierra Porto.

[48] ARTICLE 7 of the Universal Declaration of Human Rights establishes that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." ARTICLE 1.1 of the American Convention on Human Rights indicates that the States party to the Convention "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition"; ARTICLE 24, in turn, establishes that "all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." ARTICLE 26 of the International Covenant on Civil and Political Rights states that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

3.7. The above statements are reflected in the case law of the Court. For example, Judgment **SU-256 of 1996**[49] indicated that "*[i]t is unthinkable in today's State that '**ghettos**' can exist as they did previously, containing individuals of a certain race, or persons living with diseases such as leprosy. The concept of 'untouchables' has been reevaluated along the path of history, which is aimed at shoring up the principle of equality. One of the measures of civilization of a society is the way in which it supports the weak, the sick and, in general, the neediest, instead of the way it permits discrimination against them or their elimination. (...) "it is clear that, due to a lack of greater information and awareness, those who live with AIDS, and even healthy persons who live with HIV, have been the target of social and labor discrimination, not only in our society but also in the rest of the world" (...) "the need to remember that persons ill with AIDS or who live with the HIV virus [sic] are human beings, and that therefore, pursuant to Article 2 of the Universal Declaration of Human Rights, they are entitled to all rights proclaimed in international texts on human rights **and may not be the target of any discrimination or of any arbitrary treatment by virtue of their circumstance.** It would be illogical for a person who suffers from an affliction to be treated in a manner deleterious to their physical, moral or personal integrity.*" (The second emphasis is added).

By the same token, the Court indicated in Judgment **T-577 of 2005**[50] that "***[t]he stigma surrounding HIV/AIDS is grounded in social prejudices and inequalities, particularly with regard to sex, sexuality and race.*** *Stigma exacerbates these inequalities. (...) As a result of HIV/AIDS-related stigma and discrimination, the rights of persons living with HIV/AIDS and those of their family members are often violated based on nothing more than the belief that those persons have HIV/AIDS. This violation of rights hinders the response to the epidemic and enhances its negative impact.* ***The following are also needed to address stigma and discrimination: (i) strategies preventing the emergence of ideas that foster prejudices and stigmas, and (ii) strategies to address or remedy the situation when stigma persists and is manifested through discriminatory actions resulting in negative consequences or in the denial of rights or services.*****"** (Emphasis added)

Likewise, in the aforementioned Judgment **T-769 of 2007**, the Court indicated that discrimination and stigmatization targeting persons living with HIV results in "*disgraceful isolation from the community, (...). In this regard, putting an end to these widely disseminated social misconceptions resulting from disinformation and deeply-rooted prejudices against differences will demand of the State a two-pronged approach: (i)* ***the adoption of strategies aimed at averting the emergence of ideas grounded in discrimination****, and second, (ii)*

[49] Reporting Justice Vladimiro Naranjo Mesa.
[50] Reporting Justice Humberto Antonio Sierra Porto.

the design and implementation of programs that effectively address and remedy the persistence of such ideas through educational and social inclusion programs[8]."[51] (Emphasis added)

In this same regard, the Court stated in Judgment **T-948 of 2008**[52] that "***it is the duty of the Colombian State to adopt all measures that are essential to guaranteeing their inclusion in society and protecting them in all realms in which they customarily suffer discrimination.*** *The prohibition against discrimination is grounded in the protection that the Constitution affords to persons who, by virtue of their physical condition, are excluded due to the fact that they live with a virus such as HIV or suffer from AIDS. In this fashion, the provision seeks to protect a stigmatized group, of which any one of us human beings could become a member (...)*" *Case law established by the Court has protected persons living with HIV/AIDS in different aspects of life such as social security, in terms of both health and pensions, in the context of the workplace, penitentiaries, social spaces, etc. Underlying the above precedent is a simple but powerful argument, which can be translated as:* ***the mere condition of living with a disease such as HIV/AIDS is not a valid argument for discriminating against a person in <u>any context</u>***." (Emphasis added)

3.8. Finally, in contrast with the case of HIV, case law by the Court regarding discrimination suffered by those living with HBV is limited. In fact, although it is clear that persons living with the HBV virus have been the targets of discrimination similar to that felt by those who live with HIV,[53] the Court's case law addressing discrimination against persons living with HBV has been mentioned as part of guardianship proceedings related to discrimination against persons living with HIV or based on case law arguments offered in support of the protection of such persons.

Thus, for example, in Judgment **T-513 of 2015**,[54] after finding that a person suffered from several pathologies, including HIV and HBV, the Court recognized that this person merited the protection of their fundamental rights to

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[51] [8] Judgment SU-256 of 1996 by the Full Chamber of this Court stated: "*The State may not permit such discrimination, fundamentally for two reasons: First, because human dignity prohibits discrimination against any legal subject, because discrimination per se is an unjust act and a lawful State is based on justice, the foundation of the social order.*"

[52] Reporting Justice Clara Inés Vargas Hernández.

[53] For example, it has been stated that "*Hepatitis B and Acquired Immunodeficiency Syndrome (AIDS) are viral diseases of great importance to public health due to their elevated epidemiological indices. The manner in which they are represented generates discriminatory and prejudicial attitudes, chiefly in terms of access to health services.*"(GARBIN, Clea *et al*. "*Discriminación y prejuicio. La influencia del VIH/SIDA y la Hepatitis B en la actitud de los académicos en odontología [Discrimination and Prejudice. The influence of HIV/AIDS and Hepatitis B in the Attitude of Dentistry Academics]*", in Revista Ciencias de la Salud [Health Sciences Journal], Universidad del Rosario, Vol. 16, No. 2 (2018). See: http://dx.doi.org/10.12804/revistas.urosario.edu.co/revsalud/vol16num22018

[54] Reporting Justice María Victoria Calle Correa.

reinforced job stability, equality, the right to work and to a living wage. Moreover, in Judgment **T-610 of 2005**,[55] after finding that "*Hepatitis B is an incurable disease, classified as a catastrophic and high-risk illness, along with HIV,*" the Court ordered a health center to refrain thereafter from refusing to administer viral load tests to persons living with HBV, given that such a test enabled determining more quickly the type of treatment that such patients would require.

4. TREATMENT AND CURE FOR HIV AND HBV

4.1. If curing a disease is understood as its eradication from the body hosting it (*sterilizing cure*), experience indicates that, at least in the medium term, this is not a feasible solution for the problem of HIV.[56] Nevertheless, today's antiretroviral therapy (or treatment) (ART), has proven to be an effective solution for eliminating the adverse effects of HIV on the human body: although not eradicating the virus from the body, at least it holds it at bay. In contrast to the *sterilizing cure*, this is therefore a ***functional cure*** for the consequences of the HIV infection, with significant effects on reducing its transmissibility. However, as we will see, this situation is not quite as clear with HBV (see 4.8 *infra*).

4.2. HIV transmission depends upon the presence of certain conditions, to wit: (i) the existence of a sufficient amount of the virus in certain bodily fluids, such as blood, semen, preseminal, vaginal and/or rectal fluids or mother's milk; (ii) a sufficient amount of at least one of these fluids must come into direct contact with parts of the body of a person not infected with HIV and where the infection may take hold (usually mucous membranes, damaged tissue or inflamed ulcers); and (iii) the virus must latch onto the immunological system of the formerly seronegative subject, thereby enabling its establishment and propagation.[57]

4.3. In other words, except for cases of parental or vertical transmission, HIV transmission requires the existence of direct contact between some parts of the body and certain bodily fluids, such as usually occurs in sexual relations.

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[55] Reporting Justice Marco Gerardo Monroy Cabra.

[56] However, there is the case of Timothy Brown, better known as the Berlin Patient. Brown received a bone marrow transplant to treat his leukemia, and since the transplanted marrow came from a person who was naturally resistant to HIV, the virus was actually eradicated from his body. This potential for a cure has not been viewed as an effective treatment for the eradication of the virus given its high cost and uncertain success. Moreover, studies have been performed aimed at eradicating HIV from the body using stem cells, but their effectiveness as a sterilizing cure has yet to be proven. (See, for example: "*In Search to Repeat* "*Berlin Patient*" *HIV Cure, Questions About How It Worked*". See: https://www.poz.com/article/search-repeat-berlin-patient-hiv-cure-questions-worked).

[57] *Judging the Epidemic*. *A judicial handbook on HIV, human rights and the law*. UNAIDS, 2013. p. 7 (See: https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161)

Nevertheless, it has been established that the likelihood of transmission per individual sexual act is low or nonexistent, "*with an estimated range of from 0% to 1.4%*[5]."[58] [59]

4.4. Moreover, there are several factors that contribute to preventing HIV transmission through sex. Among these is the use of impenetrable barriers (male or female condoms) that prevent contact between the seronegative body and the aforementioned bodily fluids of the seropositive subject; pre- and post-exposure prophylaxis, through the use of antiretrovirals by the seronegative subject before and/or after risky sexual contact; male circumcision, in the event of transmission from women to men; and the seropositive subject's low viral load or HIV levels at the moment of contact with the uninfected person.[60] This last factor is precisely what has been achieved through ART as a procedure that not only serves as a method to prevent transmission of the virus but also translates into the functional cure for the immunological system of the patient living with HIV. Let us examine this:

4.4.1. On the one hand, adequate and sustained ART dramatically reduces the progression of diseases associated with HIV, keeping the virus at undetectable load levels and allowing the HIV-positive person to maintain or even restore a healthy immunological system [119][61] [120],[62] with noticeable improvement in the person's quality of life and life expectancy, and within a relatively short period of time.[63] UNAIDS, in fact, posits that "*when a person starts highly active antiretroviral therapy for the first time, the right combination of medications can reduce their viral load to an undetectable level within 12–24 weeks.*"[64]

4.4.2. On the other hand, the reduction in the HIV viral load as a result of adequate ART has proven to be a determining factor in reducing the transmission of the virus. In fact, according to the *Global Commission on HIV and the Law*, there are significant studies showing that the population living with low levels of HIV as a result of ART has a null

[58] [5] Patel P, Borkowf CB, Brooks JT, Lasry A, Lansky A, Mermin J. Estimating per-act HIV transmission risk: a systematic review. *AIDS*. 2014; **28**(10):1509–19.
[59] BARRÉ-SINOUSSI, FRANÇOIS y *et al*. *Op. cit.*
[60] *Ibid.*
[61] [119] Lee FJ, Amin J, Carr A. Efficacy of initial antiretroviral therapy for HIV-1 infection in adults: a systematic review and meta-analysis of 114 studies with up to 144 weeks' follow-up. *PLoS ONE*. 2014; **9**(5):e97482.
[62] [120] The INSIGHT START Study Group. Initiation of antiretroviral therapy in early asymptomatic HIV infection. *N Engl J Med*. 2015; **373**(9):795–807.
[63] BARRÉ-SINOUSSI, FRANÇOIS *et al*. *Op. cit.*
[64] "*Judging the epidemic. A judicial handbook on HIV, human rights and the law*". See: http://www.unaids.org/sites/default/files/media_asset/201305_Judging-epidemic_en_0.pdf.

risk (level 0) of transmitting that virus [10].[65] [66] Moreover, the recently disseminated (2018) *Expert consensus statement on the science of HIV in the context of criminal law*[67] argued that: (i) recent analyses from key studies (namely, *HPTN052*, *PARTNER* and *Opposites Attract*[68]) involving both heterosexual and male couples of different HIV status have not identified any cases of sexual transmission from a person with an undetectable viral load[29, 30, 36, 37];[69] and (ii) these findings have transformed public health messaging. For example, the UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION now describes the estimated possibility of HIV transmission from an HIV-positive person with an undetectable viral load (as a result of effective antiretroviral therapy) as "*effectively no risk*"[6];[70] this conclusion has been reiterated

[65] [10] Cohen, M., *et al*. (2016), Antiretroviral Therapy for the Prevention of HIV1 Transmission. N Engl J Med 2016; 375:830 – 839. Rodger, A., *et al*. (2016), Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy. JAMA.2016; 316(2):171–181. Available at: https://www.ncbi.nlm.nih.gov/pubmed/27404185 [Accessed on 5 July 2018]; Bavinton, B., *et al*. (presenter Grulich A) (2017), HIV Treatment Prevents HIV Transmission in Male Serodiscordant Couples in Australia, Thailand and Brazil, 9th International AIDS Society Conference on HIV Science, Paris, abstract no. TUAC0506LB, July 2017.

[66] Global Commission on HIV and the Law. Risks, Rights and Health. Supplement. July 2018, p.10. (See: https://hivlawcommission.org/wp-content/uploads/2018/09/HIV-and-the-Law-supplement-FINAL.pdf)

[67] BARRÉ-SINOUSSI, FRANÇOIS *et al*. "*Expert consensus statement on the science of HIV in the context of criminal law,*" *in* Journal of the International Aids Society. Wiley Online Library, first published July 25, 2018. (See: https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161).// *Judging the Epidemic*. *A judicial handbook on HIV, human rights and the law*. UNAIDS, 2013. p. 4. (See: http://www.unaids.org/sites/default/files/media_asset/201305_Judging-epidemic_en_0.pdf).

[68] According to *ibid.*: "In 2011, the HPTN052 trial (conducted in Botswana, Brazil, India, Kenya, Malawi, South Africa, Thailand, the United States and Zimbabwe), which investigated the impact of early treatment initiation, observed no HIV transmission from 1763 people on antiretroviral therapy who had a stable viral load below 400 copies/mL. Partners of HIV-positive participants were followed for the equivalent of 8509 person-years. The only transmission from people on treatment occurred either early in treatment (before viral load was stabilized below 400 copies) or when viral load was above 1000 copies/mL on two consecutive visits. The PARTNER and Opposites Attract studies found no HIV transmission from people with a viral load below 200 copies/mL after more than 75,000 acts of condomless vaginal or anal sex. In the PARTNER study, heterosexual couples reported approximately 36,000 condomless sex acts and homosexual male couples reported about 22,000 condomless sex acts. No HIV transmission occurred between partners in the study. Eleven cases of new HIV infection did occur, however, phylogenetic analysis found that in all cases, the infection resulted from sexual contact with someone other than the person's regular sexual partner. The Opposites Attract study included nearly 17,000 condomless sex acts among men. No HIV transmission was reported between partners involved in the study, while three cases of new HIV infection resulted from sexual contact with someone other than the person's regular sexual partner."

[69] [29] Cohen MS, Chen YQ, McCauley M, Gamble T, Hosseinipour MC, Kumarasamy N, *et al*. Prevention of HIV-1 infection with early antiretroviral therapy. *N Engl J Med*. 2011; (365):493–505. // [30] Rodger AJ, Cambiano V, Bruun T, Vernazza P, Collins S, van Lunzen J, *et al*. Sexual activity without condoms and risk of HIV transmission in serodifferent couples when the HIV-positive partner is using suppressive antiretroviral therapy. *JAMA*. 2016:171–81.// [36] Grulich A, Bavinton B, Jin F, Prestage G, Zablotska I, Grinsztejn B, *et al*. HIV transmission in male serodiscordant couples in Australia, Thailand and Brazil. Abstract for 2015 Conference on Retroviruses and Opportunistic Infections, Seattle, USA, 2015.// [37] Cohen MS, Chen YQ, McCauley M, Gamble T, Hosseinipour M, Kumarasamy N, *et al*. Antiretroviral therapy for the prevention of HIV-1 transmission. *N Engl J Med*. 2016; (9):830–9.

[70] [6] Centers for Disease Control and Prevention. CDC Information Undetectable Viral Load and HIV Transmission Risk. October 2017 [cited 30 June 2018]. Available from https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-uvl-transmission.pdf

in other studies.[71] [72]

4.5. However, it should be emphasized that, as noted in section 4.1 *supra*, ART is not a sterilizing cure but rather a purely functional cure. Although it does not eradicate HIV from the human body, it does significant reduce the body's viral load, consequently increasing levels of CD4 cells, strengthening the human body's immunological system and reducing the possibilities of sexual transmission of the virus to null or very low. In sum, the current state of science has made it so that, far from the *catastrophic disease* that the legislature considered in 1991 and in 2000 (see 1.3 and 1.6 *supra*), HIV has a highly effective treatment which, if adequately applied, although not eliminating the viral status of a previously infected person, does allow persons living with the virus to lead a normal life and to be entirely free to pursue their sexual lives.

4.6. Now, with regard to HBV, this "*is transmitted through contact with the blood or bodily fluids of persons living with the virus—in other words, the same way that human immunodeficiency virus (HIV) is transmitted*," and its principal forms of transmission are (i) perinatal, from mother to child during childbirth; (ii) from one child to another;[73] (iii) by contaminated injections and transfusions; and (iv) by unprotected sexual contact."[74] [75]

4.7. Nevertheless, in contrast to the case of HIV, there has been a vaccine against HBV since 1982 that is 95% effective in preventing this chronic

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[71] According to BARRÉ-SINOUSSI, FRANÇOIS *et al*., *op. cit*. "*A 2013 systematic review and meta-analysis also found no transmission where viral load fell below a threshold of between 50 and 500 copies/mL (depending on the study. Another study reported no transmission when viral load was lower than 400 copies/mL. A number of other studies have provided evidence that low (but detectable) viral load dramatically decreases (and may eliminate) the possibility of transmission. For example, early studies involving participants who were not taking antiretroviral therapy identified no instances of transmission among couples where one partner was living with HIV and had a low but detectable viral load: below 1500 copies/mL (Uganda), below 1094 copies/mL (Thailand) and below 1000 copies/mL (Zambia). The Ugandan study found that the probability of transmission through vaginal intercourse where viral load was lower than 1700 copies/mL was 1 in 10,000.*"

[72] A series of research studies along these lines may be found at http://toolkit.hivjusticeworldwide.org/theme/transmission-treatment-and-viral-load

[73] "*A child can get HBV through contact with the blood or body fluids of a person who has the virus. Exposure can occur from:*

- *A mother with HBV at the time of birth. It does not appear that HBV is passed to the fetus while still in the mother's womb.*
- *A bite from an infected person that breaks the skin.*
- *Blood, saliva, or any other body fluid from an infected person that may touch a break or opening in a child's skin, eyes, or mouth.*
- *Sharing personal items, such as a toothbrush, with a someone who has the virus.*
- *Being stuck with a needle after use by an HBV-infected person.*"

See: *https://medlineplus.gov/spanish/ency/article/007671.htm*

[74] According to INOUE and TANAKA, the most frequent modes of transmission worldwide are perinatal and sexual. "*Hepatitis B virus and its sexually transmitted infection - an update.*" Microb Cell. 2016 Sep 5; 3(9): 420–437. Published online 2016 Sep 5. doi: 10.15698/mic2016.09.527 (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5354569/)

[75] WHO. *How do you get hepatitis B and how can I protect myself from this disease?* (See: https://www.who.int/features/qa/11/es/)

disease,[76] and which has been in use in Colombia since 1993,[77] in three (3) doses given during the first six months of life,[78] provided free of charge[79] and with coverage that hopes to become universal. According to the WHO, "*[u]niversal immunization of lactating infants is by far the most effective preventive measure against diseases induced by HBV,*[80] *and effective vaccination programs against hepatitis B will achieve a gradual reduction in the incidence of HBV-related diseases, such as chronic hepatitis, hepatic cirrhosis and hepatocellular carcinoma, in endemic zones. After the series of primary vaccinations, almost all children will be protected, probably for the rest of their lives, without the need for booster shots.*"[81] Thus, notwithstanding the fact that a highly reliable method of prevention is the use of an impermeable barrier during sexual contact, the vaccination against HBV has proven to be the most effective method to provide immunity to the adult population exposed to this virus through sexual contact.[82]

4.8. Although there are research studies "*showing that the sexual transmission of the hepatitis B virus is uncommon among persons monoinfected by this virus who achieve an undetectable viral load in the blood through antiviral therapy*,"[83] Judgment T-610 of 2005 cited a WHO document stating, "*Just as with the technique used to measure the amount of HIV in blood, analysis of the HBV viral load can determine whether the virus is reproducing in the liver. A viral load of HBV over 100,000 copies/mL indicates that the virus is active (even if HBeAg is negative and anti-HBe are positive.) A viral load below 100,000 copies/mL indicates that the virus is inactive, particularly if HBeAg is negative and anti-HBe are positive.* ***However, even if this is the case, the virus can still be transmitted to other people.***"[19][84] (Emphasis added). Another issue is whether the use of post-exposure prophylaxis is effective against risk of exposure by any means.[85] [86]

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[76] *Ibid.*

[77] "*The vaccine against hepatitis B was made part of the normal regime in Colombia starting in 1993, and in 1994 the World Health Assembly included among its goals a reduction in the incidence of children living with hepatitis B (...).*"(Ministry of Health. "*Norma Técnica para la Vacunación según el Programa Ampliado de Inmunizaciones – PAI [Technical Rules for Vaccination according to the Extended Immunization Program – PAI]*." p. 23. See: https://www.minsalud.gov.co/sites/rid/Lists/BibliotecaDigital/ RIDE/VS/PP/1PAI.pdf)

[78] https://www.minsalud.gov.co/proteccionsocial/Paginas/EsquemasdeVaunaci%C3%B3n.aspx

[79] Learn which vaccines you and your children are entitled to get. See: (http://www.urnadecristal.gov.co/gestion-gobierno/plan-vacunacion-colombia)

[80] The acronym for the Hepatitis B virus in Spanish is VHB. In English it is HBV.

[81] WHO. "*Vaccinations against hepatitis B*" (See: https://www.who.int/immunization/wer7928HepB_July04_position_paper_SP.pdf

[82] INOUE, *op. cit.*

[83] Working Group on HIV Therapies. "*CROI 2010: Eficacia del tratamiento de la hepatitis B para prevenir su transmisión sexual [Efficacy of hepatitis B treatment to prevent its sexual transmission]*." See: http://gtt-vih.org/actualizate/la_noticia_del_dia/08-03-10

[84] [19] *Cfr.* http://www.aidsmeds.com/espanol/10/VHB.htm. June 1, 2005.

[85] Associació Catalana de Malalts d' Hepatitis, "*Transmisión del virus de la hepatitis B (VHB) [Transmission of the hepatitis B virus (HBV)]*" See: https://asscat-hepatitis.org/hepatitis-viricas/hepatitis-b/informacion-basica-sobre-la-hepatitis-b/transmision-del-virus-de-la-hepatitis-b-vhb/

4.9. With regard to the adult population who have been infected with HBV and are living with chronic Hepatitis B, it should also be noted that the disease also responds to ART, although this therapy does not manage to cure the corresponding infection since it is limited to suppressing the replication of the virus; thus, once begun, it must be continued indefinitely.[87]

4.10. In addition to the above, it must be noted that, above and beyond the particular characteristics of both HIV and HBV, when it comes to sexual contact—namely, sexual contact involving contact with certain fluids produced during sexual relations—a highly effective method of preventing the transmission of any sexually transmitted infection (STI) is the proper use of the impermeable barrier represented by male and female condoms.[88]

4.11. Finally, in light of the concepts set forth in this section, the Court is clear that advances in science with regard to the treatment and cure of HIV and HBV now enable society to leave behind the notion of ***catastrophic diseases*** that the legislature referenced when it increased the original penalties in Article 370 of Law 599 of 2000 (see 1.6 *supra*).

5. THE DECRIMINALIZATION OF HIV TRANSMISSION IN GLOBAL CASE LAW

The discovery of HIV at the start of the 1980s, and the grave consequences for human health of the associated affliction of AIDS,[89] gave rise to a worldwide climate of fear that rapidly translated into stigmatization and discrimination targeting those living with it. As mentioned in section 1.3 *supra*, AIDS was associated with groups historically discriminated against such as those comprising male homosexual individuals and heroin users, among others.

5.2. In several countries, fear of HIV translated into the criminalization of conducts which could potentially cause it to spread. Today, according to a study conducted by UNAIDS,[90] of 194 countries studied, fifty (50) of them (including

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[86] Reporting Justice Marco Gerardo Monroy Cabra.

[87] https://www.who.int/news-room/fact-sheets/detail/hepatitis-b

[88] Although the literature agrees that abstention is the best way to prevent an STI, the use of condoms is a highly effective method for preventing the transmission of one of these infections. In that regard, see for example: https://www.cdc.gov/condomeffectiveness/spanish/brief.html and/or https://www.who.int/hiv/mediacentre/news/condoms-joint-positionpaper/en/

[89] See, for example, "*Where did HIV come from*". See: https://www.theaidsinstitute.org/education/aids-101/where-did-hiv-come-0

[90] The study examined how frequently the countries targeted by the study possessed policies aimed at: (i) criminalizing the transgender population; (ii) criminalizing sex work; (iii) criminalizing sex acts between same-sex individuals; (iv) criminalizing the use or possession for personal use of illicit drugs; (v) requiring parental consent for adolescents to access HIV testing; (vi) requiring male spousal consent for the female spouse to access sexual and reproductive health services; (vii) criminalizing transmission of, non-disclosure of and/or exposure to HIV transmission; (viii) restricting entry, stay and residence of people living with HIV; and (ix)

Colombia) criminalize conducts specifically associated with HIV transmission.[91] This is precisely the case with this legal provision whose constitutionality is now before the Court.

5.3. Worldwide, the judicial branch has occasionally intervened in the situation of national legislation insofar as it has ruled on a variety of matters associated with HIV transmission where human rights constitute an underlying concern. These matters include, for example, (i) discrimination on the basis of actual or presumed infection by HIV; (ii) criminalization of non-disclosure of HIV-positive status or of HIV exposure and transmission; (iii) sexual abuse and domestic violence; (iv) anti-drug legislation and the rights of drug users; (v) women's rights with regard to family legislation and property rights; (vi) treatment and care of persons living with HIV; and (vii) criminalization of persons highly exposed to HIV infection.[92]

5.4. In terms of the legal questions set forth at the start of this ruling, the cases involving a dispute over the criminalization of sexual conduct associated with HIV transmission are particularly useful. For example:

5.4.1. In 2004, in examining the responsibility of a person who had transmitted HIV to two women with whom he had sexual relations, the Criminal Division of the Court of Appeals of the Supreme Court of the United Kingdom ruled that if the defendant had failed to disclose his viral status to these women, the women's consent to have sexual relations with him was insufficient to absolve the defendant from the injury caused. Thus, it was found that in order for the defendant to be exonerated, the injured parties would have had to give prior consent to the risk of being infected.[93]

5.4.2. Later, in 2005, the European Court of Human Rights examined the case of an HIV-positive individual who, following repeated behaviors that risked transmitting the virus he was carrying, was temporarily confined in a hospital, thereby depriving him of his liberty, pursuant to the *Infectious Disease Act* of 1988. On that occasion, the European Court of Human Rights found that the penalty of deprivation of liberty must not only satisfy the principle of legality whereby the offending individual

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requiring HIV testing prior to marriage, access to a job or if a member of certain groups. (See: *epidemic transition metrics* in http://aidsinfo.unaids.org/)

[91] According to the study cited, thirty countries do not criminalize HIV transmission, non-disclosure of HIV status and/or HIV exposure, while twenty-five countries permit the prosecution thereof based on general legal provisions not specifically associated with specific diseases.

[92] A compendium of case law encompassing the above cases in various jurisdictions may be found at "*Judging the epidemic. A judicial handbook on HIV, human rights and the law*" See: http://www.unaids.org/sites/default/files/media_asset/201305_Judging-epidemic_en_0.pdf

[93] *R. v. Dica*.

must have been able to foresee the consequences of his conduct, but must also be proportional insofar as it would only be justified if less severe measures attempted previously were evidently insufficient to guarantee the general interest.[94]

5.4.3. Also in 2005, the District Court of Wellington, New Zealand, was asked to decide whether a person living with HIV was responsible for endangering the life of a woman when he had unprotected oral sex and protected vaginal sex with her, but in both cases without informing the woman beforehand of his viral status. On that occasion, the above Court found that although the defendant had the legal duty to take precautions and reasonable care to keep from endangering human life, inasmuch as the HIV present in his semen could effectively endanger it, his acts did not make him criminally liable because a person can prevent HIV transmission without the need to meet the requirement of disclosure prior to having relations, and that since the relations were vaginal, the use of a barrier form of protection was sufficient to protect public health. In sum, that Court found that, in contrast to the moral duty to take precautions, the associated legal duty involved taking reasonable protection measures instead of absolutely guaranteed measures.[95]

5.4.4. In 2012, the Supreme Court of Canada found that the equality, autonomy, liberty, privacy and human dignity enshrined in the Canadian Charter of Rights and Freedoms signify that the duty of disclosure of a person's HIV status prior to having sexual relations with another depends on whether there is a significant risk of harm through transmission; such risk is nonexistent if the viral load of the person living with HIV is low at the time of relations, as well as if barrier methods are used.[96]

5.5. Based on the above cases, the Court finds that case law in some parts of the world has not only addressed matters of informed consent and the proportionality of punishment but has also attempted to achieve a balance that allows the general interest that public health seeks to defend to coexist with the pursuit of sexual relations by those living with transmissible diseases. As shown by the case examined in section 5.4.4. *supra*, one of the strategies for

[94] *Enhorn v. Sweden*.
[95] *Police v. Dalley*.
[96] *R. v. Mabior*.

achieving that objective is to use scientific advances in support of case decisions.[97]

6. THE INSTANT CASE

As indicated at the start of this ruling, there are two (2) allegations raised against Article 370 of Law 599 of 2000, to wit: (A) for violation of the right to the free development of the personality, and (B) for violation of the principle of equality. For methodological reasons, the Court will begin with the analysis of the second allegation.

A. Regarding the violation of the principle of equality

6.1. The complaint challenges the constitutionality of Article 370 of Law 599 of 2000 in terms of Article 13 of the Constitution. Fundamentally, the plaintiff argues that the challenged provision singles out HIV and HBV, treating them differently compared to other, similarly transmissible pathologies that are afforded more general treatment under Article 369 of the Criminal Code in force, thereby committing arbitrary discrimination. Indeed, in contrast to the challenged Article 370 of Law 599 of 2000, the preceding Article 369 states:

> **ARTICLE 369.** ***Propagation of Epidemics.*** Amended by Article 2 of Law 1220 of 2008. "Any person who propagates an epidemic shall be subject to a term of imprisonment of four (4) to ten (10) years."

The plaintiff also questions the fact that the challenged provision places on the same footing two types of virus (HIV and HBV) that scientific advances have addressed separately, inasmuch as there is a vaccination for the latter but not for the former.

6.2. The enforcement of the criminal definition being challenged is based on **two (2) independent types of conduct** engaged in by persons aware of their HIV-positive or HBV-positive status. These types of conduct are: (i) **engaging in practices** whereby these viruses can be transmitted to another person (first hypothesis); and (ii) **donating** blood, semen, organs and anatomical components in general that might contain such viruses (second hypothesis).

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[97] In this same regard, as an example, the *Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine* indicated that criminal cases addressing transmission of or exposure to HIV demand that the judicial branch learn of and understand the rapid evolution of scientific advances regarding HIV transmission and its impact on diagnosing the virus. (BOYD M, Cooper D, Crock EA, *et al*. *Sexual transmission of HIV and the law: an Australian medical consensus statement.* Med J Aust 2016; 205 (9): 409-412, in: https://www.ashm.org.au/products/product/HIV%20Consensus)

6.3. Solution to the first hypothesis

6.3.1. With regard to the first hypothesis, namely, conduct consisting of "*engaging in practices*" whereby a person with prior knowledge of their viral status could transmit to another person either of the viruses covered by the challenged provision, the definition of the crime includes all acts that could ultimately lead to the consummation of the corresponding infection, except those addressed by the second hypothesis, in which the key verb is "*donating*" blood, semen, organs, etc.

6.3.2. The analysis of this first situation requires demands that the court apply the integrated test of equality that constitutional case law has employed in cases alleging violations of Article 13 of the Constitution. Although the Court has held that the legislature enjoys broad discretion in shaping criminal law, the legislature must also observe the constitutional principles of proportionality, reasonableness and equality.[98]

6.3.3. According to case law, the aforementioned integrated test of equality requires a three-stage analysis, to wit:

> "*i) establish the point of comparison: pattern of equality or tertium comparationis, in other words, determine whether the factual circumstances permit a valid comparison and if subjects of the same nature are being compared;*
>
> *(ii) define whether from both a factual and a legal standpoint there is unequal treatment among equals or equal treatment among unequals; and*
>
> *(iii) determine whether the difference in treatment is constitutionally justified, in other words, whether the situations being compared merit differential treatment under the Constitution* [26][99]."[100]

The determination reached in the third stage above depends on the result of a test of reasonableness and proportionality in which the following are analyzed in common:

> "*(i) the ends sought by the measure,*

[98] Judgment C-015 of 2018 (Reporting Justice Cristina Pardo Schlesinger) recapitulated case law regarding the limits of legislative powers in matters of criminal law.
[99] [26] *Cfr*. Judgments C-093 of 2001, Reporting Justice Alejandro Martínez Caballero; C-862 of 2008, Reporting Justice Marco Gerardo Monroy Cabra
[100] Reporting Justice Jorge Ignacio Pretelt Chaljub.

(ii) the means employed, and

(iii) the relationship between the means and the ends."[101]

And, if the foregoing test is rigorously applied, there ensues a "*fourth aspect of analysis, to determine 'whether the benefits of adopting the measure clearly exceed the restrictions imposed on other constitutional principles and values'.*"[102]

6.3.4. In this regard, after recalling that case law has recognized that "*the strict test of equality is appropriate when, among other reasons, the measure fundamentally affects persons in situations of manifest weakness, and marginalized or discriminated groups (...),*"[103] and given that the provision addresses a population group that is seriously affected by stigmatization and discrimination (see 3 *supra*), the Court subsequently performs the respective integrated test of equality, applying a test of reasonableness and proportionality in either its intense or its strict form, as illustrated here:

6.3.5. The first question to be addressed is whether the two viruses indicated in the challenged provision (HIV and HBV) are in one and the same position of equality that would permit them to be treated in an analogous fashion. In other words, this is a test of equality to analyze Article 370 of Law 599 of 2000 from an **internal perspective**.

The Court's answer to this first question is affirmative because, aside from the differences between them, HIV and HBV: i) are both viruses that produce diseases that seriously endanger human health, to the point of ending life (see 2 *supra*); ii) are both viruses that cause particular rejection and fear among the social body (see 3 *supra*); iii) are both transmissible through contact with the same bodily fluids (see 4 *supra*); and iv) are both viruses that can be treated medically and the propagation of which can be scientifically controlled (see 4 *supra*).

Consequently, even if it is believed that HBV has a much higher likelihood of being passed on than HIV (see 3.2 *supra*), the Court finds that, fundamentally,

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[101] *Ibid.*

[102] In Judgment C-104 of 2016 (Luis Guillermo Guerrero Pérez), based on Judgment C-225 of 2017 (Reporting Justice Alejandro Linares Cantillo), the Court found that the strict test of reasonableness and proportionality "*has been categorized as the most rigorous, since it seeks to establish 'whether the ends are legitimate, important and imperative, and whether the means are legitimate, adequate and necessary; in other words, whether they cannot be replaced by other, less harmful means'.*" *This test includes a fourth aspect of analysis, to determine* "*whether the benefits of adopting the measure clearly exceed the restrictions imposed on other constitutional principles and values.*"

[103] C-015 of 2018, Reporting Justice Cristina Pardo Schlesinger.

HIV and HBV are on an equal footing, and that if they are afforded the same legal treatment under Article 370 of the Criminal Code in force, the Court does not believe that its internal analysis of the provision threatens Article 13 of the Constitution because this is a matter of equal treatment among equals.

6.3.6. It is thus appropriate to apply the test of equality in comparing the legislature's treatment of HIV and HBV to the treatment it affords to other pathologies that potentially pose the same or similar danger to human life. In other words, the Court must now conduct an analysis of the challenged provision from an **external perspective**, in light of possibly analogous pathologies that the provision does not address but which, as indicated in the legal questions that must be resolved, do in fact fall under the general crime codified in Article 369 of Law 599 of 2000.[104] In this regard, the Court bears in mind the following:

6.3.6.1. Initially it is clear that both HIV and HBV are viruses that, as with other various sexually transmitted infections (STI), have serious consequences for human health. According to PROFAMILIA, these other STIs include: (i) gonorrhea, which "*[m]ay cause infertility because the infection travels to the internal organs. In the case of women, it produces inflammation and obstruction of the Fallopian tubes or abscesses (accumulations of pus) on the ovaries. In men, infections in the urethra, prostate, seminal vesicles and epididymis. (…) When a pregnant woman has gonorrhea and her child is delivered vaginally, there is a risk that the newborn may have an eye infection*"*;* ii) syphilis, the third stage of which "*does not always show symptoms, but the microorganism attacks other tissues of the body such as the bone structure, the brain, the spinal cord and the blood vessels*"; and (iii) human papilloma virus (HPV), one type of which can "*cause changes in cells leading to cervical cancer.*"[105] However, the Hepatitis C virus (HCV) deserves special mention. In fact, although it is not addressed in the challenged provision, this virus is just as lethal as HBV,[106] it is almost three times as common as HBV in the Americas, and in Latin America and the Caribbean alone it is twice as frequent as HBV.[107]

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[104] Law 599 of 2000, **ARTICLE 369. *Propagation of Epidemics.*** Amended by Article 2 of Law 1220 of 2008. "Any person who propagates an epidemic shall be subject to a term of imprisonment of four (4) to ten (10) years."

[105] *Cfr.* https://profamilia.org.co/preguntas-y-respuestas/infecciones-de-transmision-sexual-its

[106] According to the Ministry of Health and Social Protection, "*[h]epatitis B and C can become chronic and can even lead to hepatic cirrhosis, liver cancer and even death some 20-30 years following infection.*"(Minsalud. Government of Colombia. "*ABECÉ de las hepatitis virales [The ABCs of Hepatitis Viruses]*", *in:* https://www.minsalud.gov.co/sites/rid/Lists/BibliotecaDigital/RIDE/VS/PP/ET/abc-hepatitis.pdf)

[107] According to the Pan American Health Organization, "*(i)n the Americas an estimated 2.8 million people are living with hepatitis B, 2.1 million of them in Latin America and the Caribbean,*" while "*(a)n estimated 7.2 million people are living with hepatitis C in the Americas, 4.1 million of them in Latin America and the*

Based on the foregoing, the Court has verified that there are sufficient similarities between the set of viruses subject to the challenged provision and the set of other STIs not included therein to render them subject to comparison in light of the principle of equality.

6.3.6.2. It is equally clear to the Court that, since the two sets of pathologies are comparable, the challenged provision singles out the first of them—the one comprising HIV and HBV—and therefore affords that set differential treatment compared to the second (in other words, this is unequal treatment among equals). Indeed: i) although the challenged provision establishes that the transmission of HIV and/or HBV is a crime of simple endangerment (which is committed even if such transmission does not in fact occur, since practices must be engaged in whereby another person "*may*" become infected), in the case of the other STIs, including the dangerous HCV, the crime defined under Article 369 of Law 599 of 2000 involves harm, since it requires a result: "*propagation*";[108] and (ii) although Article 369 of the Criminal Code in force imposes a penalty of "*imprisonment of four (4) to ten (10) years*" on anyone who propagates any type of epidemic, Article 370 which follows it, the subject of today's challenge, imposes a more serious penalty "*of six (6) to twelve (12) years*."

Having thus worked through the first two stages of the integrated test of equality, it is now appropriate to verify whether the differential treatment between persons living with HIV and/or HBV and persons living with other STIs, such as HCV, is justified. Let us examine this:

6.3.6.3. The Court considers that the goal of protecting public health that is sought by Article 370 of Law 599 of 2000 is a constitutional imperative. Indeed, although considerable advances have been made in the response to the spread of HIV and HBV (see 4 *supra*), these diseases continue to constitute a massive threat (see 2.1 and 2.2 *supra*), demanding continuity in the pursuit of that response aimed at protecting public health and, thereby, the fundamental rights to health and to life itself.

6.3.6.4. However, this is not the case with regard to the effectiveness of the

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Caribbean." (Pan American Health Organization, "*Hepatitis B and C in the Americas*", in https://www.paho.org/hq/dmdocuments/2016/2016-cha-infographic-hepatitis-b-c.pdf)

[108] Law 599 of 2000, **ARTICLE 369. *Propagation of Epidemics.*** Amended by Article 2 of Law 1220 of 2008. "Any person who propagates an epidemic shall be subject to a term of imprisonment of four (4) to ten (10) years."

challenged provision. Even if one believes that the penalty established for a violation of the challenged provision might be an effective method by virtue of the deterrent power of confinement as the harshest penalty that the legislature can impose under the present constitutional system, there are certainly reasons that undermine much of the efficacy of the challenged provision. For example:

- The provision might be ineffective due to the need to verify the requirement of culpability when defining the conduct as criminal. Imagine, for example, how lacking knowledge of one's HIV and/or HBV transmissible status could be the best defense in criminal proceedings filed for transmitting these viruses. More specifically, the challenged criminal provision would have a deterrent effect whereby, instead of preventing violations of this law, it would invite people to avoid being tested for their viral status because a potentially positive result for such viruses could make them subject to future criminal liability.[109]

- The provision could even be counterproductive in terms of the ends sought. In fact, the above deterrent to possibly taking a test that would report on the status of either of the viruses addressed in the challenged provision would result in a reduction in the number of seropositive persons who would feel the need to prevent the transmission of infections of which they were not aware, even if present in their organisms, because they would not learn of their viral status. Thus, a person infected with either of the viruses indicated in the challenged provision, but unaware of their status, would not feel the need to take any other precautions to prevent transmission of their infection, such as the use of impermeable barriers to prevent the transmission of the virus from an infected to an uninfected person (see 4.10. *supra*). On the other hand, a person duly informed of their HIV-positive status (and/or HBV, though to a lesser extent, as indicated in 4.8 *supra*) could substantially reduce their viral load through effective ART and thereby remove the possibilities of transmitting that virus sexually, even without the

[109] According to the OPEN SOCIETY FOUNDATIONS, "*[a]pplying criminal law to HIV transmission could discourage people from getting tested and finding out their HIV status, as lack of knowledge of one's status could be the best defense in a criminal lawsuit.* Indeed, in jurisdictions with HIV-specific criminal laws, HIV testing counselors are often obliged to caution people that getting an HIV test will expose them to criminal liability if they find out they are HIV-positive and continue having sex. These same counselors are sometimes forced to provide evidence of a person's HIV status in a criminal trial. This interferes with the delivery of health care and frustrates efforts to encourage people to come forward for testing." ("10 reasons to oppose the criminalization of HIV exposure or transmission", in: https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf)

need for a condom (see 4.4.2 *supra*). Moreover, if the healthy sexual partner is unaware of the viral status of the HBV-positive sexual partner, that would negatively influence the possibility that the former would take the decision to get vaccinated against that virus (see 4.7, *supra*) and thereby engage in sexual relations with a minimum risk of acquiring the virus.

- The confinement that would be imposed on persons engaging in the conduct described in the challenged criminal provision would be equally misguided, because that would constitute a factor tending to disseminate these viruses in penitentiaries. In fact, conduct that entails a high risk of HIV transmission is prevalent in correctional centers.[110]

- Finally, the provision could be futile because, given the prevalence of the right to privacy with regard to the HIV/HBV status of individuals,[111] it would rarely be enforced given the difficulty of finding evidence of a person's prior knowledge of their viral status. According to UNAIDS, there are at least 63 countries that have instituted HIV-specific criminal provisions, but only 17 of these have prosecuted individuals for such crimes.[112]

Based on the foregoing, the Court notes that the first hypothesis of the provision—namely that the law is violated by **engaging in practices** whereby one may infect another person with HIV and/or HBV—does not meet the test of reasonableness inasmuch as there is no correlation between the definition of the crime and the ends sought thereby. On the contrary, the effects of the provision may run counter to the ends it seeks. In this regard, the Court cites the *amicus curiae* brief by Dejusticia, Diverse Colombia and Jaime Ardila, in which they state that "*the sexual life of the seropositive person [would] be penalized even if they take preventive measures that reduce risk to virtually zero.* It is [also] possible to affirm that the means-ends relationship takes a perverse turn insofar as it promotes ignorance of a person's health status (…)."[113]

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[110] See: "*Las cárceles y el SIDA [Jails and AIDS]*". UNAIDS Technical Update. April 1997. In: http://files.unaids.org/en/media/unaids/contentassets/dataimport/publications/irc-pub05/prisons-tu_es.pdf

[111] See, for example, Judgments T-1218 of 2005, Reporting Justice Jaime Córdoba Triviño; T-509 of 2010, Reporting Justice Mauricio González Cuervo; T-628 of 2012, Reporting Justice Humberto Antonio Sierra Porto; and T-426 of 2017, Reporting Justice Cristina Pardo Schlesinger.

[112] UNAIDS, "*Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape*", 2012. pp. 6-7. See: http://www.unaids.org/sites/default/files/media_asset/JC2322_BackgroundCurrentLandscapeCriminalisationHIV_en.pdf

[113] Page 128 of the case file.

6.3.6.5. Even though the ineffectiveness of the challenged provision as explained above would suffice for the first hypothesis of the provision to fail the test of equality, the Court also notes that the same hypothesis also fails the test of proportionality, for the following reasons:

- Restricting the application of the provision to persons living with HIV and/or HBV and leaving out those who are positive for any other STI only reinforces the imaginary stereotypes of perversity and danger that have surrounded those who are positive for those infections, particularly with regard to persons living with HIV. The promotion of such ideas is not only groundless but also obviously violates the principles of non-discrimination/non-stigmatization that the Court has defended, as shown in section 3 *supra*. On the contrary: singling out diseases that may be associated with certain sexual behaviors or addiction will lead to an unconstitutional stigmatization of historically marginalized sectors such as the LGTBI community, users of addictive substances and sex workers. This generates a vicious cycle, since marginalization brings with it the risk of contracting one of the viruses addressed in the provision, while at the same time a seropositive status with regard to either virus results in the marginalization of the person living with it.[114]

- As explained above, the transmission of HIV and HBV is not an issue that should necessarily be associated with any subjective behavior. On the contrary, there are many cases of transmission of such viruses that are not the result of conduct attributable to the initial seropositive individual. Such cases include, for example, transmission through sexual abuse and violence, particularly against women, adolescents and girls, who are subject to special constitutional protection in Colombia.[115]

- Due to their more frequent access to the health system, the female population is more likely to become aware of their viral status than their male sexual partners.[116] This makes women subject to

[114] *Cfr*. "*Taking Action Against HIV Stigma and Discrimination: Guidance document and supporting resources*". (Department for International Development, November 2007). See: https://www.icrw.org/wp-content/uploads/2016/10/DFID-Taking-Action-Against-HIV-Stigma-and-Discrimination.pdf

[115] See Order 009 of 2015 and Judgment T-271 of 2016, Reporting Justice Luis Ernesto Vargas Silva.

[116] According to the 2007 National Health Census, "*[o]f the estimated volume, the gender distribution is noteworthy. Almost 70% of outpatient consultation events involve women as consumers.*"
See: *https://www.minsalud.gov.co/Documentos%20y%20Publicaciones/ENCUESTA%20NACIONAL.pdf* (pp. 185-186).

criminal liability to a greater extent than men, in detriment to the principle of equality.[117]

- In addition, considering that Article 369 of Law 599 of 2000 establishes confinement for all who "*propagate epidemics*," without distinction, it is clear that the ends of protecting public health that are sought by the challenged criminal provision can be achieved by applying a law that, due to its general nature, would not entail violating the principle of equality with regard to the duty of non-discrimination explained in section 3 *supra*. Moreover, any future cases establishing the existence of intentional and malicious transmission of HIV could be criminally punished pursuant to the definition of the crime in the aforementioned Article 369 of Law 599 of 2000, by applying general criminal provisions such as those used for personal injury and/or homicide.

6.3.6.6. Finally, it must be noted that the challenged provision is unnecessary because, with today's scientific advances in treating and preventing the transmission of HIV and/or HBV, before resorting to criminalizing the transmission of such viruses, it would be more effective to undertake widespread educational campaigns addressing the different methods available to prevent sexual infections among serodiscordant couples and/or the risks of sharing items that entail interpersonal contact with bodily fluids that may carry such viruses (e.g., needle-sharing among heroin users).[118]

By virtue of the arguments set forth in this section 6.3.6, the Court finds that Article 370 of Law 599 of 2000 is unconstitutional with regard to the first hypothetical application, namely, for **engaging in practices** whereby another person could be infected with HIV and/or HBV.

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[117] "*Women are more likely to know their HIV status than their male partners: Because they engage with the health system more often (including during pregnancy and childbirth), women are typically more likely to find out about their positive HIV status before their male partners—particularly as governments move towards provider-initiated HIV testing and counseling in pre-natal settings. Where laws criminalizing HIV exposure or transmission are in place, to avoid the risk of being prosecuted for exposing their partner to HIV, women who test HIV-positive have to disclose their HIV status to their partners, refuse to have sex, or insist on condom use. However, for many women these actions carry the risk of violence, eviction, disinheritance, loss of their children, and other severe abuses. The combination of more routine forms of testing (particularly during pregnancy) and criminalization of HIV transmission or exposure thus gives women an impossible choice: either to risk violence by trying to protect their partners, or to risk prosecution by failing to do so.*" (See: "*10 reasons to oppose the criminalization of HIV exposure or transmission*". p. 12. in: https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf)

[118] *Cfr*. *Ibid.* p. 19.

6.4. Solution to the second hypothesis

6.4.1. Although the text of the complaint does not clearly show that it is targeting the second hypothesis of the challenged provision—the criminalization of the premeditated **donation** of blood, semen, organs and anatomical components in general that may contain HIV and/or HBV—the Court deems it necessary to reach a finding in that regard pursuant to the principle of *pro actione* and after concluding that the complaint is challenging the entirety of Article 370 of Law 599 of 2000.

6.4.2. To achieve the above purpose, the Court must first indicate that, having reviewed the legislation regulating the donation of organic materials as established under the challenged provision, it finds that the banks that receive and store such items must verify whether they carry not only HIV and HBV but also an additional number of diseases or infections.

For example:

i) With regard to **blood** donation, Article 42 of Decree 1571 of 1993[119] establishes the following:

> "Blood banks of any category are required, under their own responsibility, to perform the following tests on each and every unit collected:
> * ABO Group Determination (detection of antigens and antibodies)
> * Rh Factor Determination (D antigen) and variant Du, where appropriate.
> * Serological test for syphilis.
> * Detection of Hepatitis C virus antigen.
> * **Detection of Hepatitis B virus surface antigen.**
> * **Detection of Human Acquired** [sic] **Immunodeficiency Virus (HIV) 1 and 2 antibodies.**
> * Any others that the Ministry of Health may determine for any given region pursuant to epidemiological monitoring studies."

[119] "*Whereby Title IX of Law 09 of 1979 is partially regulated with regard to the operations of establishments dedicated to drawing, processing, preserving and transporting whole blood or blood products, this creates the National Network of Blood Banks and National Council of Blood Banks and enacts other provisions regarding the matter.*"

ii) In the case of donation of **gametes**[120] and **pre-embryos**, Article 13 of Resolution 3199 of 1998[121] establishes that:

> "In order to enter the Reproductive Biomedicine program, the following tests, at a minimum, must be performed on both the donor and the recipient:
> - Blood typing.
> - Syphilis test.
> **- HIV test.**
> **- Hepatitis B surface antigen.**
> - Hepatitis C antibodies.
> - Semen and urethral cultures for Neisseria Gonorrhoeae and Chlamydia.
> - Cytomegalovirus antibodies.
> - Test for mononucleosis and other tests considered relevant in accordance of the region of origin of the donor and the recipient. The tests established in this article must be repeated every six months as long as the individuals remain in the program. Keep in mind that donors must be removed from the program eighteen (18) months after having entered the program."

iii) Finally, with regard to the donation of **organs and tissues**, Article 18 of Decree 2493 of 2004[122] establishes the following:

> "Tissue banks and Healthcare Service Providers (IPS in Spanish) are required, under their own responsibility, to perform the following tests on each and every donor, where applicable:
> 1. Determination of cytotoxic antigens.
> 2. Blood group determination.
> 3. D antigen (Rh) determination.
> 4. Histocompatibility test (HLA).
> 5. Serological test for syphilis.
> 6. Detection of Hepatitis C virus antibodies.

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[120] Gamete is understood to mean a "*Reproductive cell merged with another gamete to form a zygote. Examples are the ovum and the sperm cell (...).*"Semen is the "*[s]ubstance produced by the male reproductive organs of animals that contain spermatozoa.*" (See: https://biodic.net/palabra/semen/#.XGSAynrwaM8).

[121] "*Whereby the technical, scientific and administrative rules are established for the operations of Banks of Anatomical Components, of Reproductive Biomedicine Units, Centers or similar entities and other provisions are enacted.*"

[122] "*Whereby laws 9 of 1979 and 73 of 1988 are partially regulated with regard to anatomical components.*"

7. Detection of Hepatitis B virus surface antigen (HBsAg).
8. **Detection of Hepatitis B virus core antigen (Anti-HBc) total antibodies.**
9. Detection of Human T-cell lymphotropic virus (HTLV 1 and 2) antibodies.
10. Detection of Human Immunodeficiency Virus (HIV 1 and 2) antibodies.
11. Detection of Tripanosoma Cruzii (Chagas) antibodies.
12. Detection of Cytomegalovirus antibodies.
13. Detection of Epstein Barr virus (EBV) antibodies.
14. Others that may be established by the Ministry of Social Protection in accordance with health risk, specific clinical situations and epidemiological monitoring studies for a given region or throughout the nation."

6.4.3. The above makes clear that, with regard to the organic items addressed by the second hypothesis of Article 370 of Law 599 of 2000, their donation and effective use are subject to advance medical detection not only for HIV and HBV, but also for other viruses such as Hepatitis C (HCV) or bacteria such as syphilis, gonorrhea and/or chlamydia (Hepatitis C and syphilis in all three cases).

6.4.4. Moreover, a comparison between HBV and HCV enables the following conclusions: i) both are viruses that produce diseases with similarly grave results for human health;[123] ii) both can be transmitted through contact with blood;[124] iii) both infections are frequently found co-infected with HIV;[125] iv) although there is an effective vaccine against HBV, this is not the case for

[123] According to the Ministry of Health and Social Protection, "*[h]epatitis B and C can become chronic and can even lead to hepatic cirrhosis, liver cancer and even death some 20-30 years following infection.*"(Minsalud. Government of Colombia. "*ABECÉ de las hepatitis virales [The ABCs of Hepatitis Viruses]*", in*:* https://www.minsalud.gov.co/sites/rid/Lists/BibliotecaDigital/RIDE/VS/PP/ET/abc-hepatitis.pdf)
[124] See 4.6 *supra* for the case of Hepatitis B. Regarding Hepatitis C, it has been said that "*Hepatitis C is usually spread when blood from a person infected with the hepatitis C virus enters the body of someone who is not infected. Today, most people become infected with the hepatitis C virus by sharing needles or other equipment to prepare or inject drugs.*" *(*Centers for Disease Control and Prevention, "*Hepatitis C Questions and Answers for the Public*", in https://www.cdc.gov/hepatitis/hcv/cfaq.htm#C1)
[125] "Infection by the hepatitis B virus (acronym HBV) and infection by the hepatitis C virus (acronym HCV) are common in persons living with HIV. In the case of more than one infection, persons are said to be co-infected or having a co-infection. A person may have HIV and HBV, HIV and HCV, or even a triple infection of HIV, HBV and HCV (of course, a person may have HBV and HCV but not HIV, although this is not common (…))."(Working Group on HIV Therapies. "*Coinfección por VIH y hepatitis virales [Co-infection by HIV and hepatitis viruses],*" in http://gtt-vih.org/aprende/enfermedades_y_sintomas/coinfeccion_por_vih_y_hepatitis_virales/general)

HCV;[126] v) in the Americas, 99% of deaths from hepatitis are associated with HBV and HCV;[127] and vi) in Latin America and the Caribbean, HCV is twice as common as HBV.[128] In other words, HCV and HBV are fundamentally analogous, notwithstanding the fact that there may in the future be arguments showing that the former is more dangerous than the latter.

6.4.5. Based on the above, it is clear to the Court that the challenged provision arbitrarily singles out HIV and HBV without any justification, particularly given the general treatment afforded to other STIs that pose a sufficient danger to health and human life, as is obvious with HCV. This unjustified singling out produces a violation of the principle of equality, as this is obviously differential treatment among equals (see 6.4.3 *supra*) without the least justification in that regard. In other words, this is openly discriminatory treatment.

6.4.6. Furthermore, the laws themselves undertake to establish a protocol that effectively safeguards the underlying interest of protecting public health by placing the burden of responsibility for verifying that the pertinent materials are free of HIV, HBV, or any other pathology that might endanger the health of those benefiting from such substances, upon the entities that receive and bank the biological elements referenced under the challenged provision. Therefore, the laws have established a more effective mechanism for protecting public health in comparison with the criminalization established by the challenged provision, which singles out and thereby discriminates against persons living with the above viruses (see 6.4.2 *supra*). For this reason, the Court is able to find that the special criminalization of HIV and HBV is unnecessary and that it is therefore an unconstitutional measure.

Therefore, just as the Court established that Article 370 of Law 599 of 2000 was unconstitutional with regard to its first hypothetical application (see 6.3. *supra*), it also finds that the same provision is unconstitutional with regard to its second hypothetical application, which results in a finding that the entire challenged provision is unconstitutional.

B. With regard to the violation of the free development of the personality

6.5. Concerning the allegation in the complaint that challenges the

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[126] According to the WHO, "*[t]here is currently no vaccine against hepatitis C, but research in this area is ongoing.*" *(WHO, Hepatitis C, July 18, 2018, in https://www.who.int/es/news-room/fact-sheets/detail/hepatitis-c)*

[127] Pan American Health Organization, "*Hepatitis B and C in the Americas*", in https://www.paho.org/hq/dmdocuments/2016/2016-cha-infographic-hepatitis-b-c.pdf

[128] According to *ibid.*, "*(i)n the Americas an estimated 2.8 million people are living with hepatitis B, 2.1 million of them in Latin America and the Caribbean*" while "*(a)n estimated 7.2 million people are living with hepatitis C in the Americas, 4.1 million of them in Latin America and the Caribbean.*"

constitutionality of Article 370 of Law 599 of 2000 by virtue of its irreconcilability with Article 16 of the Constitution, the plaintiff argues that the definition of the crime involved limits the fundamental right to the free development of the personality in the aspect of the right to the full pursuit and enjoyment of sexuality.

The plaintiff bases this allegation on the fact that, for example, "*if a person knowingly wishes to have sexual relations with another person who is infected (sic) by either of these two viruses, the person carrying it would be committing a crime,*" *even if* "*preventive measures [were taken] such as the use of condoms or [of] medications that make disease transmission very unlikely today.*"

The plaintiff also argued that, even if the challenged provision is aimed at protecting the collective right to public health, the defense of such right may not be attained at the cost of denying a group of individuals their sexual lives, for such restriction would be not only ineffective but also disproportionate. In this regard, the plaintiff concluded by indicating that "*the actual violation of another person's right to health occurs when a disease is transmitted (in this case, sexually) to that person and NOT when there is a consensual relationship in which one of the parties had a disease but took precautions to prevent transmission which, in fact, did not occur. This is obvious, because if the other person failed to catch any disease as a consequence of the sexual relationship, their health was not adversely affected, nor was public health adversely affected, because no new seropositive person resulted who could potentially transmit the disease to others.*"

6.6. Bearing this in mind, the Court begins by recalling that the protection of the fundamental right to the free development of the personality reaches its limits when the exercise of such right conflicts with the rights of others. That is precisely what may be surmised from Article 16 of the Constitution when it states: "*All persons have the right to the free development of their personality* ***with no limitations other than those imposed by the rights of others and the law.***"

6.7. However, examinations of Article 16 of the Constitution through case law have specified that not just any conflict between the right to the free development of the personality and the rights of others may serve to restrict the exercise of the former. Precisely, Judgment **T-562 of 2013**[129] reiterated that "*in order for a limitation placed on the free development of the personality to be legitimate, it must have a* ***legal and constitutional foundation****. Otherwise it would be arbitrary, because simple invocations of the general interest, or of*

[129] Reporting Justice Mauricio González Cuervo.

social duty, or of the legally protected rights of others, are insufficient to limit this right[19]."[130] *(Emphasis added). The above postulate was developed further in Judgment* ***T-565 of 2013****,*[131] *which specified that* "*in order to determine which types of limitations on the free development of the personality would be constitutionally admissible, case law begins by distinguishing two possible types of conduct that may be subject to equally differentiated scrutiny.* ***In the first place is conduct that only concerns the individual, and that therefore does not interfere with the effective rights of others. These acts are inherent expressions of the essential core of the right to the free development of the personality, and in general cannot be validly guided or restricted. In the second place we find those actions in which the subject's behavior may entail effects on the fundamental rights of other individuals, in which case limitations are admissible as long as they satisfactorily meet the tests of reasonableness and proportionality.*** *In this regard, the corresponding restriction shall only be legitimate if it satisfies a constitutionally mandated purpose, such as precisely the protection of the fundamental rights of other individuals.*" (Emphasis added)

6.8. Furthermore, as the Court delves into the second legal question that must be resolved in this ruling, which addresses the potential clash between the aspect of the right to the free development of the personality in the form of individual sexual rights, and the ends of public health sought by the challenged provision (see 1 *supra*), the Court recalls how Judgment **T-1096 of 2004**[132] found that "*the affective and sexual dimensions of all human beings, an expression of the free development of the personality, may be subject to* ***reasonable restrictions, but may not be abrogated***" (Emphasis added);[133] or how Judgment **T-732 of 2009**[134] indicated that "*[b]y virtue of the right to sexual freedom, individuals have the right to make autonomous decisions whether or not to have sexual relations and with whom (Article 16 of the*

[130] [19] Judgment T-532 of 1992.
[131] Reporting Justice Luis Ernesto Vargas Silva.
[132] Reporting Justice Manuel José Cepeda Espinosa.
[133] In that judgment the Court also recalled how it protected the sexual rights of persons on prior occasions. In that regard, it noted that "*[w]ithin the realm of protection of this freedom we also find, for example, the right to have a conjugal visit. Judgment T-296 of 2002 (Reporting Justice Marco Gerardo Monroy Cabra), for example, found that* "*(...) given the clear relationship between conjugal visits and the pursuit of other rights such as privacy, protection of the family and human dignity, it is plausible to assert that such visits are fundamentally justified by their connection with these rights and that they must only be subject to restrictions based on a test of reasonableness and proportionality. The position taken in this case has been reinforced, for example, in Judgment T-1204 of 2003 (Reporting Justice Alfredo Beltrán Sierra) and Judgment T-499 of 2003 (Reporting Justice Álvaro Tafur Galvis), which upheld the decisions of the trial courts to protect the rights of an imprisoned couple in light of the fact that case law has repeatedly held* "*(...) that persons deprived of their liberty may demand opportunities for conjugal relations in privacy, and jail authorities may not hinder their objectives because the human dignity of inmates is afforded special protection under articles 1, 2, 4, 5, 15 and 16 of the Constitution.*"
[134] Reporting Justice Humberto Antonio Sierra Porto.

Constitution).[18][135] *In other words, the realm of sexuality must be completely free of any form of discrimination*[19][136] (…)"

6.9. Bearing in mind the above, the Court sees evidence that the restriction imposed by Article 370 of Law 599 of 2000 on the sexual rights of persons living with HIV and/or HBV is not reasonable for the following three reasons, to wit:

6.9.1. The wording of the challenged provision implies an absolute restriction or abrogation of the sexual rights of persons living with HIV and/or HBV. Indeed, the provision punishes those who, by virtue of nothing more than their viral status, might potentially transmit such virus to their sexual partners. For this simple reason, insofar as the ***abrogation*** of the sexual rights of persons is not constitutionally admissible under any circumstances (see 6.8 *supra*), the provision becomes unconstitutional. However, it should be noted that this unconstitutionality does not contradict "*the constitutionality of legal provisions establishing 'minimum ages' for minors to engage in activities that may compromise their rights and their development, as protective measures*."[137]

6.9.2. Moreover, although the challenged provision seeks to protect the general interest, for the same reasons set forth in section 6.3.4 *supra* regarding the practices whereby a person might transmit HIV and/or HBV to another person, the provision fails the test of reasonableness because there is no correlation between the definition of the crime to be charged and the ends sought by the provision. In other words, the provision is not demonstrably well-suited to achieving the ends it seeks.

6.9.3. Finally, as explained in section 6.3.6.6 *supra*, the challenged provision has also shown itself to be unnecessary for the protection of public health because, with today's scientific advances in treating and preventing the transmission of HIV and/or HBV, before resorting to the criminalization of the sexual transmission of those viruses, it would be more effective to undertake widespread educational campaigns addressing the different methods available to prevent sexual infections among serodiscordant couples.

By virtue of the foregoing, and without prejudice to the reasons set forth in part A of this section 6 whereby the challenged provision was found to be unconstitutional because it violates Article 13 of the Constitution, the Court

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[135] [18] On that point the Court could cite the entire body of case law banning discrimination against homosexual persons. See Judgment C-029 of 2009.

[136] [19] In the case of minor children, this right is subject to greater limitations due to their age. In that regard, see Judgment C-507 of 2004, among others.

[137] Judgment C-507 of 2004, Reporting Justice Manuel José Cepeda Espinosa.

reiterates its finding that this unconstitutionality also derives from its violation of Article 16 of the Constitution.

7. Conclusions

For the above reasons, the Court finds that the entire Article 370 of Law 599 of 2000 is unconstitutional because its text involves a violation of Articles 13 and 16 of the Constitution. This is because, although the provision pursues ends that represent a constitutional imperative, it fails the integrated test of equality by failing to establish a necessary, effective and proportional means to attain the ends sought. In addition, the provision signifies an unconstitutional restriction on the sexual rights of persons living with the diseases addressed by the provision.

8. Summary

The Court finds that Article 370 of Law 599 of 2000 must be declared unconstitutional inasmuch as it violates the principle of equality and the free development of the personality, established by Articles 13 and 16, respectively, of the Constitution.

The grounds for the foregoing decision are principally the fact that the challenged provision fails to pass the strict equality test that is required with regard to the special constitutionally protected status of those who live with HIV and/or HBV, as a group that has been subjected to constitutionally objectionable stigmatization and discrimination, as the Court has recognized on repeated occasions.

In performing the above test, the Court proceeded to analyze the two hypothetical types of conduct addressed by the challenged provision, to wit: (i) engaging in practices that may result in the transmission of such viruses; and (ii) donating various types of anatomical components that may contain such viruses.

In response to the first hypothesis, after examining the current state of science and scientific advances in the treatment of HIV, the Court found that antiretroviral drugs (ART) represent a functional cure for that virus whereby the reduction of the corresponding viral load in the human body removes the possibilities of sexual transmission, even without using an impermeable barrier such as a condom, and in addition it increases the life expectancy of the seropositive person to the same levels as those who are not infected. By the same token, in the case of HBV, the Court verified the existence of a highly effective and nationally widespread vaccine, which aspires to become universal, and which constitutes an effective prophylaxis against acquiring the virus and the

diseases that may derive from it, although without prejudice to the effectiveness represented by the use of impermeable barriers in sexual relations.

Bearing in mind the above, after bringing up several experiences from comparative law addressing the criminalization of HIV transmission, the Court initially found that, because the latter virus and HBV are similarly dangerous to human health, the test of equality is met from an internal perspective of the provision.

Nevertheless, upon examining the provision from an external perspective, the Court questioned the constitutionality of the provision's differential treatment of HIV and HBV in comparison to other sexually transmitted infections (STIs), such as the hepatitis C virus (HCV); notwithstanding their degree of danger and high risk of transmission, [these STIs] receive unjustifiably privileged treatment under the more general and largely benign definition contained in Article 369 of the Criminal Code, which involves lesser penalties than those established in the challenged provision.

Moreover, the Court refuted the effectiveness of singling out HIV and/or HBV for criminalization in the provision after finding that such criminal treatment ends up deterring possibly seropositive persons from having their status tested; if such a test were positive, they would learn of their viral status, access the scientific therapies offered by today's science as well as take measures to prevent the propagation of these viruses, break the vicious cycle consisting of the marginalization of seropositive persons and the possibilities of new infections among the marginalized population, demonstrate their effectiveness in the goal of protecting public health and, finally, disincentivize the constitutionally objectionable discrimination and stigmatization of sectors historically associated with these viruses.

Furthermore, with regard to the second hypothesis, associated with the propagation of HIV and HBV through the donation of various anatomical components that may carry these viruses, the Court ascertained that the provision is unnecessary because the banks and entities that first receive such biological substances and materials are subject to strict legal regulation enabling the detection of the potential presence of these infections, as well as of many others (including HCV), which constitutes an effective defense of the health of those who hope to benefit as recipients of such anatomical components.

Although the above reasons served to find the provision unconstitutional for violating Article 13 of the Constitution, the finding of unconstitutionality for violating Article 16 of the Constitution was based on the constitutional prohibition on abrogating the sexual rights of individuals and on the fact that the

provision is neither suitable nor necessary to protect the ends of public health that it seeks.

VIII. DECISION

By virtue of all of the foregoing, the Constitutional Court, administering justice, on behalf of the people and by authority of the Constitution,

RESOLVES

To declare Article 370 of Law 599 of 2000 **UNCONSTITUTIONAL**.

This ruling is ordered copied, notified, disclosed and published in the Gazette of the Constitutional Court, enforced and placed in the file.

GLORIA STELLA ORTIZ DELGADO
Presiding Justice
With concurring opinion

CARLOS BERNAL PULIDO
Justice
With concurring opinion

DIANA FAJARDO RIVERA
Justice
With concurring opinion

LUIS GUILLERMO GUERRERO PÉREZ
Justice
Absent on commission

ALEJANDRO LINARES CANTILLO

Justice
With concurring opinion

ANTONIO JOSÉ LIZARAZO OCAMPO
Justice
With dissenting opinion

CRISTINA PARDO SCHLESINGER
Justice

JOSÉ FERNANDO REYES CUARTAS
Justice
With concurring opinion

ALBERTO ROJAS RÍOS
Justice

MARTHA VICTORIA SÁCHICA MÉNDEZ
Clerk of the Court

CONCURRING OPINION BY JUSTICE
CARLOS BERNAL PULIDO
IN RULING C-248/19

Reference: Case File D-12883

Reporting Justice:
Cristina Pardo Schlesinger

With all due respect, I am filing my concurring opinion regarding the decision taken by the Full Chamber of the Constitutional Court, which found Article 370 of Law 599 of 2000 to be unconstitutional.

In fact, I voted to find the challenged provision unconstitutional for violating Article 16 of the Constitution, since it disproportionately affected the right to the free development of the personality. However, I do not find that it violated the principle of equality (Article 13 of the Constitution) in the terms set forth in the complaint. In my view, the provision containing the definition of the crime of propagating the human immunodeficiency virus or hepatitis B did not make an unreasonable or constitutionally unjustified distinction. The reasons underlying my position in that regard are as follows:

i) The parameter for comparison proposed by the Court suffers from a lack of clarity. For reasons as yet unexplained, the judgment limited itself to comparing the pathologies addressed by the provision with others "*that are similarly transmitted*," even though there may be many diseases capable of endangering public health above and beyond the manner in which they are transmitted. In all, in this event there is clearly no precise *tertium comparationis*, which is the first prerequisite of any test of equality. In fact, above and beyond the list of pathologies that the Court saw the need to list, it never explained: *a)* why two unequivocally comparable groups were involved; *b)* the grounds for that comparison; or *c)* what the alleged unequal treatment of equals under Article 370 of the Criminal Code consisted of.

ii) Having said that, the provision did seek constitutionally legitimate ends, as the Full Chamber recognized, because the legislature, in a specific social and historical context, using plausible arguments, believed that defining as a crime the intentional practices that might propagate diseases that constituted a massive threat constituted an appropriate measure to protect public health. The Court should thus preserve a measure of deference and respect for this consideration,

above and beyond the fact that, under strict scrutiny, one might conclude that in today's day and age this provision is not effective for achieving those ends and in fact it does, as has been demonstrated, violate the free development of the personality.

Date *ut supra*,

Carlos Bernal Pulido
Justice

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SPANISH TRANSLATION SERVICES

Christina Courtright
ATA-Certified Translator

August 19, 2019

I, Christina Courtright, translated the attached document from the Spanish into the English language.

Judgment C-249/19 of the Constitutional Court of Colombia

I am certified as a Spanish-to-English translator by the American Translators Association with certification number 482640. I am also certified as a Spanish-English Court Interpreter by the Supreme Court of the State of Indiana and the Administrative Office of the US Courts. As a competent translator of legal documents from Spanish into English, I hereby attest that the attached translation is a true, complete, and accurate English-language representation of the Spanish-language original, to the best of my knowledge and ability.

CE Courtright

Christina Courtright
Court-Certified Interpreter
ATA-Certified Translator

Verify at www.atanet.org/verify

NOTARIZATION:

Signed before me in Monroe County, Indiana, this 19 day of August, 2019.

Barbara Bright-Read
NOTARY PUBLIC
My Commission Expires: May 12, 2027

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