

v. 10 • n. 19 • Dec. 2013
Biannual
English Edition

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SUR - International Journal On Human Rights is a biannual journal published in English, Portuguese and Spanish by Conectas Human Rights. It is available on the Internet at <<http://www.surjournal.org>>

SUR is covered by the following abstracting and indexing services: IBSS (International Bibliography of the Social Sciences); ISN Zurich (International Relations and Security Network); DOAJ (Directory of Open Access Journals) and SSRN (Social Science Research Network). In addition, SUR is also available at the following commercial databases: EBSCO, HEINonline, ProQuest and Scopus. SUR has been rated A1 and B1, in Colombia and in Brazil (Qualis), respectively.

SUR. Revista Internacional de Direitos Humanos / Sur – Rede Universitária de Direitos Humanos – v.1, n.1, jan.2004 – São Paulo, 2004 - .

Semestral

ISSN 1806-6445

Edições em Inglês, Português e Espanhol.

1. Direitos Humanos 2. ONU I. Rede Universitária de Direitos Humanos

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PRESENTATION



Foreign Policy and Human Rights

The fields of human rights and foreign policy have coincided with increasing frequency in recent years. The convergence of these areas, however, has not been widely explored in academic circles of the Global South, and is often considered secondary by activists working at the national level. This issue of SUR, prepared in partnership with **Asian Forum for Human Rights and Development**, **CIVICUS: Worldwide Alliance for Citizen Participation** and **Commonwealth Human Rights Initiative**, proposes, on the one hand, to raise awareness about the different interfaces and interactions between the international activities of countries and the national *protection* of human rights, and, on the other, to examine contemporary international dynamics such as the emergence of a multipolar world and its impact on the global protection of human rights.

The thematic group of articles addresses the changes in the international system – primarily the more prominent role played by so-called emerging powers (Brazil, South Africa, India and China, among others) – and their impact on the global protection of human rights.

Reviewing the foreign policy of these countries and their impact on human rights includes, for example, analyzing their increased commitment to and engagement with regional and international human rights protection mechanisms. With respect to this point, the potential role of emerging powers in the field of human rights is examined by David Petrasek in **New Powers, New Approaches? Human Rights Diplomacy in the 21st Century**. In his article, Petrasek argues that, despite the reluctance of these new powers to adopt “traditional” tactics such as naming and shaming and the imposition of conditionalities in their bilateral relations, these countries play an important role in the international protection of human rights through standard-setting on specific human rights issues in multilateral forums.

In **Foreign Policy and Human Rights in Emerging Countries: Insights Based on the Work of an Organization from the Global South**, Camila Asano, coordinator of Foreign Policy and Human Rights at Conectas, examines the role of emerging countries,

with a focus on Brazil, in international and multi-lateral bodies. Based on the experience of Conectas, the article provides insights for other civil society organizations wishing to engage with the formulators and implementers of foreign policy to promote policies that are more respectful of human rights. SUR 19 also features a **joint interview with Maja Daruwala, of the Commonwealth Human Rights Initiative (India), and Susan Wilding, of CIVICUS World Alliance for Citizen Participation (South Africa)**, two additional organizations that monitor how their countries’ activities abroad are affecting human rights. Both for Asano and for Daruwala and Wilding, the international performance of their countries leaves a lot to be desired in terms of consistency.

A subgroup of articles analyzes, more specifically, two topics of Brazilian foreign policy: health and international development cooperation. In **Public Health and Brazilian Foreign Policy**, Deisy Ventura addresses Brazilian diplomacy in the field of health – at a regional and international level – and analyzes how the human rights topic has been included in this agenda. In the article, Ventura demonstrates the solidarity that underpins Brazilian health diplomacy, but also warns of the proliferation of cross-cutting contradictions – both internal and external – that weaken, in the current context, the prevalence of human rights and the very effectiveness of Brazilian health cooperation. In **Brazil’s Development Cooperation with Africa: What Role for Democracy and Human Rights?**, Adriana Erthal Abdenur and Danilo Marcondes de Souza Neto revisit the role and presence of Brazil on the African continent, analyzing how and to what extent the “Brazilian model” of cooperation directly and indirectly impacts the dimensions of democracy and human rights on the African continent. The authors identify, despite the non-interventionist rhetoric of Brazilian foreign policy, a positive – albeit cautious – role of the country in its relationship with African nations. They point out, however, that Brazil could be a more active and decisive partner in the promotion of democracy and human rights on the continent.

This group also includes two articles on the national implementation of international norms, decisions and recommendations. These articles were

included with the aim of countering the normative analysis that usually underlies studies on this topic by including the political dimension that permeates the domestic incorporation of international instruments, given that, in the same one country, we find cases of active engagement, limited respect and even defiance of international norms. These dynamics interest us, since they have a considerable impact on the scope that victim protection systems will have in each specific context.

In this context, in **Incorporating International Human Rights Standards in the Wake of the 2011 Reform of the Mexican Constitution: Progress and Limitations**, Carlos Cerda Dueñas examines how the 2011 constitutional reform in Mexico established respect for human rights as a guiding principle of the country's foreign policy and what the impact of this has been on the incorporation of international norms by the country. Elisa Mara Coimbra, meanwhile, discusses the relationship between Brazil and the Inter-American System of Human Rights. In **Inter-American System of Human Rights: Challenges to Compliance with the Court's Decisions in Brazil**, the author comments on the implementation status of the decisions in five cases in which Brazil was condemned by the regional system.

Despite the variety of issues present in this edition, we should briefly mention the major research topics and agendas that emerged during the conception and production of this issue of SUR and that, for practical reasons, have not been fully addressed here. Prominent among them are, for example, the dynamics of transparency, accountability and citizen participation in foreign policy, and comparative studies of foreign policies of two or more countries from the Global South. As expected, and fortunately, the debate does not end with this issue, and SUR remains committed to continuing this dialogue.

Non-thematic articles

This issue of SUR includes four articles in addition to the dossier. The first, **Finding Freedom in China: Human Rights in the Political Economy**, written by David Kinley, addresses human rights in China from an economic policy perspective, proposing new ways of viewing the relationship between the Chinese

economic model and the realization of fundamental freedoms in the country.

Laura Betancur Restrepo, in **The Promotion and Protection of Human Rights through Legal Clinics and their Relationships with Social Movements: Achievements and Challenges in the Case of Conscientious Objection to Compulsory Military Service in Colombia**, presents an analysis of the work of the Constitutional Court of Colombia on the subject of conscientious objection in the specific case of mandatory military service. Based on discourse analysis, the author attempts to comprehend the legal translation of social demands and its direct and indirect impacts for social movements.

Finally, the issue contains two articles that tackle the issue of sexual and reproductive rights. The first, **Modern-day inquisition: A Report on Criminal Persecution, Exposure of Intimacy and Violation of Rights**, written by Alexandra Lopes da Costa, discusses the implications of the ban on abortion in Brazil, in a quasi-journalistic account of a case that occurred in the state of Mato Grosso do Sul.

The second, **Case Study on Colombia: Judicial Standards on Abortion to Advance the Agenda of the Cairo Programme of Action**, by Ana Cristina González Vélez and Viviana Bohórquez Monsalve, examines how Colombia and, more broadly, Latin America, have advanced in the implementation of the Cairo Programme of Action, which addresses access to abortion and the protection of other reproductive rights.

Finally, we would like to emphasize that this issue of the Sur Journal was made possible by the support of the Carlos Chagas Foundation (FCC). Conectas Human Rights is grateful for the collaboration of the partner organizations throughout the production of the thematic section of this issue. We also thank Amado Luiz Cervo, Bridget Conley-Zilkic, Celia Almeida, Daniela Riva Knauth, Deisy Ventura, Eduardo Pannunzio, Eloisa Machado de Almeida, Fernando Sciré, Gabriela Costa Chaves, Gilberto Marcos Antonio Rodrigues, Gonzalo Berrón, Guilherme Stolle Paixão e Casarões, Katia Taela, Jefferson Nascimento, Louis N. Brickford, Márcia Nina Bernardes, Renan Honório Quinalha, Renata Avelar Giannini, Salvador Tinajero Esquivel and Thomas Kellogg for reviewing the articles published in this issue.



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ABSTRACT

This paper is part of a line of research which has been developed over a number of years by the *Bureau for the Life and Health of Women in Colombia*, aimed at identifying and analyzing progress concerning the rights of women requesting voluntary termination of pregnancy, or abortion, particularly through the monitoring of judicial rulings. The text addresses four key issues. Firstly, it highlights the commitments under the Program of Action of the Cairo International Conference on Population and Development relating to access to abortion and reproductive health protection. Secondly, the paper briefly examines laws on abortion and health exception (*causal salud*) in Latin America and the Caribbean. Thirdly, it contextualizes abortion in Colombia and discusses progress on abortion jurisprudence by Colombia's Constitutional Court regarding the right to health and other related fundamental rights. Fourthly, it describes a set of judicial standards set by the Constitutional Court in relation to abortion and other fundamental rights to be applied in Latin America.

Original in Spanish. Translated by John Penney.

Received in March 2013. Accepted in November 2013.

KEYWORDS

Abortion - *Causal salud* – Health exception – Reproductive rights – Constitutional Court of Colombia – Cairo International Conference on Population and Development



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This paper is available in digital format at www.surjournal.org.

CASE STUDY ON COLOMBIA: JUDICIAL STANDARDS ON ABORTION TO ADVANCE THE AGENDA OF THE CAIRO PROGRAMME OF ACTION*

Ana Cristina González Vélez and
Viviana Bohórquez Monsalve

1 Introduction

The International Conference on Population and Development (ICPD) held in Cairo in 1994 constitutes an important milestone in the field of abortion, reproductive health and rights in the international arena of human rights. Today, almost 20 years later, its agenda is still being actively pursued and some countries have succeeded in incorporating into their domestic law issues that are crucial for the attainment of sexual and reproductive rights (SRR), as well as for the effective enjoyment of the right to health. In this context, this study aims to identify and systematize the judicial standards established by the Constitutional Court of Colombia (hereinafter ‘the Court’) for solving cases involving abortion or Voluntary Interruption of Pregnancy (hereinafter VIP)¹ for assuring protection of the right to health, i.e. authorizing an exception known as *causal salud*, or ‘health exception’.

The term *causal salud*, or health exception, refers to the exception made to the punishable offence of abortion when the health or life of a woman is at risk as a result of pregnancy. In the human rights context, the concept of health covered by this exception should be understood as the highest possible standard of physical, mental and social health, in harmony with the concepts of well-being and lifestyle choices, which are the social determinants of health (GONZÁLEZ, 2008, p. 29).

In Latin America, the precedents established in Colombia in the abortion debate have been of great importance:

*This paper is part of a line of research developed several years ago by the *Bureau for Life and Health of Women in Colombia*. We are grateful for the collaboration of, and comments by, Juan Camilo Rivera and Paola Salgado Piedrahita.

The use of international and comparative law by the Constitutional Court has brought Colombian women into contact with communities of women in other countries who face the same difficulties, to share experiences and common knowledge about abortion. The Court's rulings dignify women by exhibiting a profound understanding of the situations they face. The Constitutional Court's approach allows a contextual interpretation of the norms governing national and international human rights. By incorporating a gender perspective, the Court gives meaning to human rights in general, and particularly to the right of pregnant women to human dignity.

(UNDURRAGA; COOK, 2009, p 17).

2 Commitments of the Cairo International Conference on Population and Development and review process after 20 years

The Cairo Programme of Action is broad and ambitious, containing over 200 recommendations, with 15 goals in the areas of health, development and social welfare. An essential feature of the programme is the recommendation to deliver comprehensive reproductive health care (NACIONES UNIDAS, 1994, paras.7.1-7.11) covering family planning (NACIONES UNIDAS, 1994, paras 7.12-7.26), safe pregnancy and childbirth services, abortion (NACIONES UNIDAS, 1994, paras. 8.19-8.27), prevention and treatment of sexually transmitted infections – STI (including HIV and AIDS) (NACIONES UNIDAS, 1994, paras. 7.27-7.33), information and counseling on sexuality, and the elimination of harmful practices against women.

The Programme defined key aspects of reproductive health in an international legal document for the first time. Among its underlying principles, it explicitly states that:

Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development-related programmes. The human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights [...].

(NACIONES UNIDAS, 1994, principle 4).

Principle 8 recognizes that:

Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health. Reproductive health-care programmes should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so.

(NACIONES UNIDAS, 1994, principle 8).

The above principle goes beyond traditional concepts of healthcare related to preventing disease and death, given that it promotes a more holistic view by addressing mental and physical health and other interrelated rights such as autonomy, and the right to information and education.

The Program of Action also states that countries should take measures to empower women and eliminate inequality (NACIONES UNIDAS, 1994, para. 4.4), and for that purpose it is necessary to eliminate all discriminatory practices, helping women to establish and realize their rights, including those related to reproductive and sexual health. It also emphasizes that:

Countries should develop an integrated approach to the special nutritional, general and reproductive health, education and social needs of girls and young women, as such additional investments in adolescent girls can often compensate for earlier inadequacies in their nutrition and health care.

(NACIONES UNIDAS, 1994, para. 4.20).

Moreover, the Program of Action urges governments and non-governmental organizations to strengthen their commitment to women's health and address the effects on women's health of abortions performed in unsatisfactory conditions as a major public health problem, and to reduce pregnant women's recourse to abortion by expanding and improving family planning services. It also states that in all cases:

women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly in order to help to avoid repeat abortions.

(NACIONES UNIDAS, 1994 para. 8.25).

Progress and challenges in the implementation of population and development strategies have been reviewed every five years (1999, 2004 and 2009). In this respect it is important to note that the Cairo+5 "key actions for the further implementation of the Programme of Action of the International Conference on Population and Development" (NACIONES UNIDAS, 1999) were adopted by the UNGA in 1999 as a tool to foster and facilitate the efforts of States in implementing their commitments.

These key actions included the following, which has a direct bearing on the subject of this paper:

[...] abortion is not against the law; health systems should train and equip health-service providers and should take other measures to ensure that such abortion is safe and accessible. Additional measures should be taken to safeguard women's health.

(NACIONES UNIDAS, 1999, para. 63, c).

In addition, governments were urged to strengthen their commitment to protect women's health in terms of availability and accessibility to healthcare in general.

In 2014 the ICPD pledges will be 20 years old. To mark this milestone, governments around the world are urged, in the light of the progress made, and despite the obstacles encountered, to renew their commitments to health and sexual and reproductive rights, and to set themselves fresh challenges in terms of goals, measures and actions as part of the new ICPD development agenda. The key objective is to determine States' new aspirations in this area. In this context, identifying judicial standards on abortion, as this study proposes, could serve as an invaluable tool for furthering the discussion on matters relating to guaranteed safe abortion, as well as for helping to guide the definition of future goals, measures and actions. These standards also provide a solid basis for tackling the urgent task of reviewing the approach to abortion as a criminal offence ('total criminalization'), given that this places at risk the protection and assurance of women's fundamental human rights.

3 Abortion in Latin America and the Caribbean (LAC)

In January 2012 the Guttmacher Institute released a report focusing on the reality of abortion in the world. According to this report Latin America has the highest rate of induced abortion in the world, with an estimated 32 out of 1000 women aged between 15 and 44 years having had at least one interrupted pregnancy. Africa comes second with 29 abortions per 1000, followed by Asia (28) and Europe (27). Although the rate declined in Latin America between 1995 and 2003 (from 37 to 31 per 1000), it is currently stable at 32 per 1000. Trends in the region tend to vary, with Mexico and Central America recording the lowest number (29 per 1000) (GUTTMACHER, 2012, p. 1).

The above figures again highlight the urgent need for States to regulate such practices and take a responsible approach to sexual and reproductive rights. We have consistently found that almost all the LAC countries have decriminalized abortion in cases of risk to a woman's life and/or health, in effect acknowledging what we refer to as *causal salud*, or health exception, in this paper.

While the scope and limitations of health exception vary from country to country, it can be argued that in most countries of the region the legal framework provides for "health" or "physical and mental health" to be regarded as legal grounds for voluntary termination.²

Causal salud, or health exception, is acknowledged in the legal framework of at least three main groups of countries that variously protect: (i) life; (ii) health in undifferentiated terms, i.e. overall health; and (iii) physical and mental health, or combinations of the same, e.g. countries that allow abortion to protect women's lives and health, or lives and physical/mental health. Finally, in certain countries, abortion is outlawed in all circumstances: Chile, Honduras, Nicaragua, El Salvador and the Dominican Republic. In all these countries, women have limited rights and are prone to risks and danger to their lives and health. In Venezuela, Paraguay, Panama and Guatemala abortion is permitted exclusively to protect the right to life.

In countries where no definition or distinction is made of the type of health to be protected (i, ii or iii above), we start from the premise that health is viewed as an overarching concept in legal terms. Thus, the protection of health in its broadest

sense applies to Argentina, Bolivia, Colombia, Costa Rica,³ Ecuador, Peru, Trinidad and Tobago, and Uruguay (total decriminalization up to week 12).⁴

LAC countries with legislation allowing abortion to prevent risk to “mental and physical health” are mainly Caribbean states such as Belize, Barbados, Jamaica, Saint Kitts and Nevis, Saint Lucia and Saint Vincent and the Grenadines.

The above table shows that differences exist in the various legislations regarding the scope of the right to health in Latin America and the Caribbean. This means that interpretations of the abortion laws are not uniform, paving the way to challenges to be constantly aired in favour of women’s effective and timely access to legal abortion, regardless of ‘risk to life’ considerations. However, given that the right to health is enshrined in international treaties and commitments, the scope of these legal provisions needs to be expanded in order to guarantee women’s rights, taking into account the fact that health is a state of complete physical, mental and social wellbeing and not merely the absence of disease.

A recent study published by International Pregnancy Advisory Services (IPAS) on the application of laws which criminalize abortion in Argentina, Bolivia and Brazil between 2011 and 2013, reveals a selective application of abortion laws as well as discrimination against and humiliation of women who choose not to be mothers (KANE, GALLI, SKUSTER, 2013). Women and health professionals are subject to investigations, prosecutions, preventive detentions and arrests. Offenders may be threatened or punished with fines, obligatory community service or even prison, and sentences ranging from a few days to several years. Most of the women who are detained are already marginalized because they are poor, Afro-descendants, young people or of indigenous stock, and have no recourse to competent legal defence (KANE, GALLI, SKUSTER, 2013, p. 4.)

It is therefore important to define judicial standards that can guide us towards a balanced interpretation of the right to health and other human rights enshrined in the international legal framework⁹ and that are consistent with the Cairo Programme of Action and relevant international commitments adopted by the LAC States. These frameworks also acknowledge that safeguarding life involves protecting not only women's lives but also their health, human dignity and autonomy. Furthermore, it

Table 1

ABORTION LEGISLATION IN LAC REGARDING ‘LIFE AND HEALTH EXCEPTION’⁵

State	Life	Health (no adjectival refinement)	Physical and Mental Health
Antigua & Barbuda	Yes	No	Yes
Argentina	Yes	Yes	No
Bahamas	Yes	No	No
Belize	Yes	No	Yes
Bolivia	Yes	Yes	No
Brazil	Yes	No	No
Colombia	Yes	Yes	No
Costa Rica	Yes	Yes	No
Ecuador	Yes	Yes	No
Grenada	Yes	No	No
Guatemala	Yes	No	No
Haiti	Yes	No	No
Honduras	No	No	No
Jamaica	Yes	No	No
Mexico ⁶	Yes	No	No
Nicaragua	No	No	No
Panama	Yes	No	No
Paraguay ⁷	Yes	No	No
Peru	Yes	Yes	No
Saint Kitts & Nevis	Yes	No	Yes
Saint Vincent and the Grenadines	Yes	No	Yes
Saint Lucia	Yes	No	Yes
Suriname	Yes	No	No
Trinidad and Tobago	Yes	Yes	No
Uruguay ⁸	Yes	Yes	No
Venezuela	Yes	No	No

must be taken into account that international and regional human rights mechanisms have repeatedly expressed concern about the consequences of illegal abortions, or abortions carried out in unsafe conditions, in terms of women's inability to exercise their human rights, and have thus advised States to liberalize abortion regulations and to ensure access to abortion in the instances established by law (GRUPO DE INFORMACIÓN EN REPRODUCCIÓN ELEGIDA, 2013, p. 14).

4 Abortion in Colombia

The following brief overview of the situation in Colombia, based on available statistics on legal/illegal abortion, provides some idea of the difficulties that Colombian women have had over the years to access sexual and reproductive health services.

A study done by the Guttmacher Institute found that 1 out of every 26 Colombian women had an abortion in 2008, and that approximately 29% of all pregnancies ended in abortion. In the same year 400,400 induced abortions were performed, representing an increase of over 25% compared to the estimated total for 1989 (288,395). The actual abortion rate has not changed substantially over the past twenty years, but the increased number of abortions largely reflects the larger number of women of reproductive age in the country (GUTTMACHER, 2011, p 6).

Colombia's abortion rate is slightly above the average for South American countries, estimated by the World Health Organization (WHO) to be 33 abortions per 1000 women in 2003. According to the limited data available for other Latin American countries with similar laws to those of Colombia, the abortion rate in Colombia is slightly higher than that of Mexico (33 per 1000 in 2006), substantially higher than that of Guatemala (24 per 1000 in 2003), and much lower than that of Peru (54 per 1000 in 2000) (GUTTMACHER, 2011, p. 10).

The Guttmacher study clearly highlights the need to remove institutional and bureaucratic obstacles for women seeking a legal abortion, and to ensure that such women are cared for by health institutions that have the mandate, skills and facilities needed for delivering legal, safe procedures. "Six out of 10 health institutions in Colombia with the capacity to provide post-abortion care fail to do so, and around 9 out of 10 of these do not provide legal abortion services" (GUTTMACHER, 2011, p 27).

As for access to legal abortion, Colombia's Ministry of Health and Welfare reports that 954 procedures of Voluntary Pregnancy Interruption were performed between 2008 and September 2011 within the constitutional framework developed since Judicial Ruling C-355 (2006). This would appear to be a significant understatement, probably reflecting under-reporting of cases by healthcare providers.

5 Constitutional Court decisions on abortion

The Constitutional Court has played an important role in protecting the basic rights of people in Colombia, especially the rights of women, with emancipating potential (UPRIMNY; GARCIA VILLEGAS, 2002, p. 72). In the case of the latter the Court has moved towards unlocking the potential of women by addressing issues such as the protection of economic, social and cultural rights (SEPÚLVEDA, 2008, p. 161 and

162), including the right to health. The Court has also made key pronouncements on sexual and reproductive health (YAMIN; PARRA-VERA; GIANELLA, 2011, p. 103).

In April 2005, the organization *Women's Link Worldwide*, through the lawyer Monica Roa, filed a suit challenging the unconstitutionality of the provision under the Penal Code which held abortion to be a criminal offence in Colombia. Roa's approach was predominantly based on comparative law, international human rights law and public health arguments (SIERRA JARAMILLO; ALFONSO SIERRA, 2008, p. 86). WLW's main objective was to seek to decriminalize abortion in all circumstances.¹⁰

In May 2006, under Ruling C-355, the Court concluded that the law criminalizing abortion in all circumstances imposed a disproportionate burden on women and manifested ignorance of fundamental rights recognized both by Colombia's Constitution and by international treaties on human rights. The Court thus decided, with Ruling C-355, that abortion, provided the pregnant woman agreed, would not be regarded henceforth as a crime in one of the following circumstances: (i) when continuation of the pregnancy would endanger the life or health of the woman; (ii) in the event of severe foetal abnormality incompatible with life; and (iii) in the case of sexual violence (COLOMBIA, 2006, sentencia C-355).¹¹

Court ruling C-355 was seen as a breakthrough and, although it failed to guarantee free exercise of motherhood, it certainly responded to a public health predicament by acknowledging the problems that could result from the continuation of pregnancy in extreme circumstances (DALÉN, 2011, p. 19).

Subsequently, from 2007 to 2012, the Court ruled on 10 petitions¹² from women requesting a legal abortion on the grounds set forth in C-355. In these cases the Court was able to identify various impediments generated by different health institutions aimed at denying women access to VIP, and was obliged to reiterate its position in favour of protecting a broad spectrum of women's basic rights, including their right to health.

5.1 *The right to health*

The Court has ruled that health is a fundamental constitutional right, "a state of complete physical, mental and social well-being and enjoyment of the highest attainable standard of health by an individual" (COLOMBIA, 2008b, sentencia T-760-08). The Court has addressed three issues concerning the right to health of women petitioning for a VIP: (i) pregnancy as a result of sexual violence; (ii) a woman's right to diagnosis; and (iii) the duty of the State to guarantee women access to health services throughout the entire country.

The Court has recognized, for example, that health can be affected when pregnancy results from rape:

[...] rape, apart from being a violent act, constitutes aggression, humiliation and submission, and carries with it short term and long-range impacts of an emotional, psychological and existential order, including damage to [women's] health caused by pregnancy and sexually transmitted disease.

(COLOMBIA, 2008a, sentencia T-209-08).

The Court has also argued that since diagnosis is part of the right to health, women requesting a VIP should have tests to determine whether their physical or mental health would be put at risk by an abortion. Furthermore, the Court has declared that the State must ensure that abortion services in the cases provided for under Colombia's national legislation must be "available throughout all the national territory" and that women must be able to access these services at whatever level of complexity it is required. Finally, the Court ruled that all health agencies should possess sufficient qualified staff to ensure a satisfactory VIP result (COLOMBIA, 2009b, sentencia T-388-09).

5.2 The right to human dignity and autonomy

The right of women to decide autonomously on VIP is intimately linked to their right to human dignity, according to which every human being is free to choose "to live as he wishes." In this regard, the Court has declared that human dignity protects the "freedom of an individual to choose a particular lifestyle under the social conditions in which the individual develops" (COLOMBIA, 2009b, sentencia T-388-09).

Moreover, the Court has argued that the autonomous right of a woman to decide on an abortion applies to the protection of all women regardless of their age. In this regard, current legislation, according to the Court, is an "*impermissible barrier*" given that its premise is "to prevent pregnant girls under 14 years of age from freely consenting to voluntary termination of pregnancy when their parents or legal guardians do not agree with this procedure" (COLOMBIA, 2009b, sentencia T-388-09). In short, when the wishes of the pregnant under 14-year-old girl are overruled, her right to human dignity is effectively infringed.

5.3 The right to information

The Court has held that information on reproductive health involves two clearly distinct obligations. On the one hand, the State has the duty to ensure that women have "comprehensive and appropriate information to enable them to fully and freely exercise their sexual and reproductive rights" (COLOMBIA, 2009b, sentencia T-388-09), and that information on sexual and reproductive rights "helps individuals to make free and informed decisions regarding intimate aspects of their lives" (COLOMBIA, 2012, sentencia T-627-12).

On the other hand, the State must refrain from "censoring, withholding or intentionally misrepresenting health-related information, including sex education," and also "ensure that third parties do not limit a person's access to information" (COLOMBIA, 2012, sentencia T-627-12). To protect this duty, the Court has instructed public authorities not to distort the content of its previous rulings on sexual and reproductive rights, especially in relation to abortion (COLOMBIA, 2012, sentencia T-627-12).

5.4 The right to privacy

The Court has held that to promote women's access to justice, the judicial authorities must not divulge the identity of any woman seeking an abortion or disclose any information that might lead to her identity being revealed. The Court has taken full

cognizance of the fact that in Colombia exercising the legal right to request a VIP runs the risk of the individual involved being subjected to moral and religious censure. According to the Court,

[The] possibility of being subjected to this kind of opprobrium can deter a woman from going to court to demand her fundamental right to VIP and, for this reason, keeping her identity confidential seeks to keep her out of the public eye, thus protecting her from exposure to public censure and creating favorable conditions for her to access justice.

(COLOMBIA, 2012, sentencia T-627-12).

5.5 The right to justice

The Court has argued that women are a group traditionally discriminated against in terms of access to justice. Fearing moral or religious gender bias by judges, many women prefer not to go to court, thus leading to “the perpetuation of violations of their rights and of their status as a discriminated group” (COLOMBIA, 2012 sentencia T-627-12).

To address this situation, the Court has established a set of rules intended to remove the barriers which deter women from going to court. These include the following: (i) all private individuals have a right to conscientious objection, but when these subjects exercise judicial functions or serve as Judges of the Republic, they cannot resort to conscientious objection to avoid deciding a case; (ii) given that women’s right to autonomy must be protected, judges are not authorized to comment on the feasibility or relevance of a particular medical procedure because this appraisal is incumbent on the relevant qualified medical personnel (COLOMBIA, 2009a, sentencia T-009-09).

6 Standards on abortion, the right to health and other human rights

“Legal standards” are formulations through which abstract fundamental rights (health, life, dignity, information, autonomy etc.) are developed and given concrete expression for the purpose of defining specific responsibilities for their protection and guarantee. In the case of access to abortion, the usefulness of extending these standards more widely to other countries outside Colombia is reinforced by the fact that they are based upon an international framework of human rights as well as on the existence of health exception and the recognition by other Latin American States of the obligation to protect the right to health.

These standards could pave the way towards progress on the sexual and reproductive rights (especially abortion) agenda to mark the 20 years of implementation of the Cairo Programme of Action. Ensuring access to VIP on health exception grounds implies protection of the right to health and other associated rights and amounts to defending the sexual and reproductive rights of women.

- a) **Reproductive self-determination:** the decision to have a VIP or not, assuming that abortion is not a criminal offence, and even where risk to overall health is involved, is entirely that of the woman concerned.
- b) **Respect for lifestyle:** women's right to dignity includes their right to freely make decisions about their own lifestyle.
- c) **Health as a holistic concept:** it is the duty of the State to allow women to have a VIP when their health is at risk in any of the three forms - physical, mental or social. It should be recognized that in cases of rape a woman's health is at risk.
- d) **Diagnosis:** the attending physician has an obligation to fully diagnose a woman's state of health and to take any necessary steps when it is a case of confirming the existence of risk for implementing health exception procedures.
- e) **Protection of privacy in legal and medical matters:** obliges all the practitioners involved in a case of VIP (including judges) to keep the identity and clinical record of the woman confidential.
- f) **Timely information provided for women about how to access VIP:** the State must provide appropriate, comprehensive and reliable information for women. Moreover it should generate information outreach mechanisms such as publicity campaigns, and foster education on aspects related to sexual and reproductive rights.
- g) **Free consent of girls and adolescents and handicapped women:** the State must ensure that children can express their consent freely when their parents or legal representatives are opposed to a VIP. Women with disabilities can do the same through their parents or another person acting on their behalf, without additional formal requirements.
- h) **Prohibition on imposed barriers:** this includes preventing third parties from interfering with the legal and timely VIP procedure by imposing obstacles such as requests for further requirements, ignoring the woman's autonomy and posing administrative impediments, thereby unjustifiably prolonging the procedure; or collectively or institutionally claiming conscientious objection to the procedure.
- i) **Guaranteeing services throughout the country and at different levels of complexity:** the State must ensure that abortion services are available throughout the country at all the levels of complexity required.
- j) **Number and quality of health professionals:** the State must ensure that all health agencies have sufficient numbers of qualified staff to undertake VIP.
- k) **Limits to court intervention:** judges are not permitted to rule on the medical aspects of VIP. Furthermore, it is not necessary for women to appeal to any judicial body in order to request clearance for a VIP authorization.

Over the 20 years since the Cairo Programme of Action was signed, efforts on the

abortion front have focused on guaranteeing abortion in cases permitted by law. However, the fact that women still face obstacles even in the best legal environments means that we need to think of ways in which we could genuinely progress towards meeting the Cairo commitments and truly push back the frontiers on this issue. Health exception and the standards set by the Constitutional Court of Colombia are of special importance since they serve not only to encourage moves towards legal abortion but also to contribute to efforts to decriminalize abortion as a way of protecting and guaranteeing women's right to health and other related rights.

Colombia's constitutional development and experience could contribute further to the implementation of the Cairo Programme of Action (which provides that in States where abortion is not a criminal offence they must ensure that it is safe), by encouraging States to broadly interpret the justification for abortion from a human rights point of view, avoiding disclaimers, restrictions or undue delay, and thereby to ensure women's access to abortion when they consider their health to be at physical, mental or social risk. These standards could well form the basis of efforts to identify new goals such as revising laws that at present totally criminalize abortion, and to seek new objectives and specific measures that could guarantee effective access to legal abortion in a safe and timely manner in those cases where the law makes exceptions, always based on respect for women's human, and especially their sexual and reproductive, rights.

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NOTES

1. The term Voluntary Interruption of Pregnancy (VIP) is used in Colombia in Ministry of Health documents. It is a broad term, not linked to the number of weeks of gestation or foetal viability but rather to the wishes of the woman within the context of the grounds for abortion permitted by the country's Constitutional Law.
2. As mentioned before, some countries prefer the term Legal Termination of Pregnancy (LTP). In Colombia we use Voluntary Interruption of Pregnancy (VIP) since it has a broader meaning, not being subject to medical opinions regarding the viability of the foetus (normally at 22 weeks gestation).
3. However, we found that in Costa Rica, for example, article 121 of the Criminal Code states that "abortion is not punishable when performed with the consent of the woman by a medical doctor or, in the absence of a doctor, by a qualified obstetric, providing the procedure is carried out in order to prevent danger to the life or health of the mother and cannot not be avoided by other means" (COSTA RICA, 1970, art. 21). In practice, abortion on health grounds has never been applied, since doctors refuse to do this, claiming the non-existence of relevant protocols. Similar problems occur in Peru, Ecuador and Argentina.
4. In Uruguay, abortion was decriminalized in October 2012 in all circumstances up to 12 weeks gestation, provided the pregnant woman meets certain requirements, including appearing before an interdisciplinary panel to be informed about current adoption and maternity programmes. In addition, abortion is permitted with no gestational limit in cases of sexual violence (up to week 14), risk to the woman's life and health and in the event of fetal malformation.
5. See González, 2011, p. 11.
6. In Mexico, each federal state has autonomy to regulate in this area. In Mexico City abortion is permitted under the health exception mechanism and in all cases up to 12 weeks, while in other states abortion is a criminal offence.
7. Paraguay's Penal Code article 352 notes that " [...] will be exempt from liability providing evidence is presented that the abortion has been performed in order to save the lives of women endangered by pregnancy or childbirth" (PARAGUAY, 1997, art. 352). This amounts to indirect decriminalization.
8. Total decriminalization of abortion up to 12 weeks and *causal salud* as an exception, with no time limit.
9. A recent study shows the impact of the dissemination of information and training on abortion on health grounds in Latin America, and how a regional process of discussion and training to healthcare providers conducted in 2009-2010 has had a favourable impact on the views and practices of health professionals in Argentina, Colombia, Mexico and Peru, where women request abortion on the grounds of health - interpreted in its 'broadest' sense (GONZÁLEZ, 2012, p. 28).
10. Litigation on abortion in Colombia has been viewed as a first foray into strategic litigation in favour of women's rights. Many lessons have been learned from this about how to manage the media and promote advocacy as a way of influencing public opinion from a public health and human rights angle.
11. The robust approach to the reproductive rights of women by the Colombian Court is not reflected in the German and Spanish rulings on abortion. Although our Court has limited itself to ruling that the criminalization of abortion is unconstitutional only in extreme cases, the judges' insistence on the use of the criminal code as a last resort suggests that their approach could be extended to normal pregnancies when the woman decides she is not ready to embrace motherhood. Meanwhile, abundant evidence exists to show that treating abortion as a criminal offence is not effective as a means of reducing abortion rates (UNDURRAGA; COOK, 2009).
12. Constitutional Court of Colombia, Court Rulings: T -171 -07 (COLOMBIA, 2007a), T -988 -07 (COLOMBIA, 2007b), T -209- 08 (COLOMBIA, 2008a), T -946- 08 (COLOMBIA, 2008c), T -009- 09 (COLOMBIA, 2009a), T -388- 09 (COLOMBIA, 2009b), T -585- 10 (COLOMBIA, 2010), T - 363-11 (COLOMBIA, 2011a), T -841 -11 (COLOMBIA, 2011b) and T -627 -12 (COLOMBIA, 2012).

RESUMO

Este texto faz parte de uma linha de pesquisa desenvolvida há vários anos pela Mesa pela Vida e a Saúde das Mulheres na Colômbia, orientada para identificar e analisar os avanços a favor dos direitos das mulheres que solicitam interrupção voluntária da gravidez ou aborto, em especial através do acompanhamento de decisões judiciais. O texto aborda quatro questões fundamentais. Em primeiro lugar, identifica os compromissos decorrentes do Programa de Ação da Conferência Internacional sobre População e Desenvolvimento do Cairo relacionados com o acesso ao aborto e à proteção da saúde reprodutiva. Em segundo lugar, apresenta um breve estudo sobre as leis sobre aborto e sobre o permissivo legal para a interrupção da gravidez em caso de risco à saúde da mulher (*causal salud*) na América Latina e no Caribe. Em terceiro lugar, contextualiza o aborto na Colômbia e discute os avanços da jurisprudência da Corte Constitucional da Colômbia sobre aborto no que diz respeito ao direito à saúde e outros direitos fundamentais relacionados. Em quarto lugar, propõe um conjunto de normas fixados pela Corte Constitucional em relação ao aborto e outros direitos fundamentais a serem aplicados na região da América Latina.

PALAVRAS-CHAVE

Aborto – *Causal salud* – Permissivo por motivo de saúde – Normas – Corte Constitucional da Colômbia – Conferência Internacional de População e Desenvolvimento – Conferência Internacional sobre População e Desenvolvimento – Cairo

RESUMEN

El presente escrito hace parte de una línea de investigación desarrollada desde hace varios años por *La Mesa por la Vida y la Salud de las Mujeres* en Colombia, orientada a identificar y analizar los avances a favor de los derechos de las mujeres que solicitan la interrupción voluntaria del embarazo o aborto, en especial a través del seguimiento de decisiones judiciales. El texto aborda cuatro cuestiones fundamentales. En primer lugar, identifica los compromisos emanados del Programa de Acción de la Conferencia Internacional sobre Población y Desarrollo de El Cairo, relacionados con el acceso al aborto y la protección de la salud reproductiva. En segundo lugar, se presenta un corto estudio sobre las leyes sobre aborto y causal salud en América Latina y El Caribe. En tercer lugar, contextualiza el aborto en Colombia y discute los avances de la jurisprudencia de la Corte Constitucional de Colombia sobre aborto, en relación con el derecho a la salud y otros derechos fundamentales relacionados. En cuarto lugar, propone un conjunto de estándares fijados por la Corte Constitucional en relación con el aborto y otros derechos fundamentales para ser aplicados en la región de América Latina.

PALABRAS CLAVE

Aborto – Causal salud – Estándares – Corte Constitucional de Colombia – Conferencia Internacional de Población y Desarrollo – Conferencia Internacional sobre la Población y el Desarrollo – Cairo

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