

# The new Colombian law on abortion

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## Abstract

On February 21, 2022, the Colombian Constitutional Court decided that the existing regulation of abortion was unconstitutional and repealed it (Sentencia C-055/2022). The new abortion law, as per the Court's decision, considers the voluntary interruption of a pregnancy a crime only when it happens after week 24 and does not fall under the health, rape, or malformation indications developed through precedent from 2006 to 2022. The decision is generally binding and of immediate application. The decision's rationale builds on the right to health, substantive equality, and freedom of conscience. It acknowledges severe restrictions in access to abortion faced by Colombian women and the costs these restrictions have on their lives. It also recognizes that the indications model forces women to obtain permission from medical doctors to access abortion, and thus fails to recognize women's freedom of conscience.

## KEYWORDS

Colombia judgment Sentencia C-055/2022, Colombian constitutional law, criminal law as last resort, freedom of conscience, reproductive health, right to equality, right to health

## 1 | INTRODUCTION

On February 21, 2022, the Colombian Constitutional Court (hereinafter "the Court") repealed the existing criminal law on abortion and introduced a mandatory interpretation of the legal text according to which women and health practitioners may be prosecuted only when the voluntary termination of a pregnancy: (1) happens after week 24 of gestation and (2) is not motivated on grounds of health, rape, incest, forced insemination, or malformations incompatible with extrauterine life.<sup>1</sup> This decision is generally binding and of immediate application under the legal framework developed by the Health Ministry and the Constitutional Court after 2006.<sup>2</sup>

The present paper provides an account of Colombian abortion law after the Court's 2022 decision, Sentencia C-055/2022,<sup>1</sup> and of the rationale that the Court used to justify its decision. It explains the following:

- a. how the Court built on its interpretation of the right to health and substantive equality to acknowledge the impact of abortion regulations on women's lives;

- b. the Court's analysis of freedom of conscience as commanding recognition of motherhood as an intensely personal choice; and
- c. the appreciation of the legislator's inability to protect prenatal life by other means as crucial to decriminalization of abortion.

The paper also describes some of the immediate consequences for health providers and the challenges for civil society in a context of increased polarization and little public support for the Court's decision.

## 2 | THE REGULATION OF ABORTION IN COLOMBIA AFTER SENTENCIA C-055/2022

Sentencia C-055/2022<sup>1</sup> contains the Court's most recent decision on the criminal legislation concerning voluntary abortion in Colombia (article 122 of the Penal Code).<sup>3</sup> The decision, which has general binding effect, decriminalized abortion up to week 24 of gestation and, thereafter, in cases of risk to health, malformations making



extrauterine life non-viable, and rape, incest, or forced insemination. The decision is immediately enforceable as the legal framework developed by the Ministry of Health and the Court since 2006 established the conditions for providing abortion services in the country.

Indeed, in 2006, the Court introduced an indications model for abortion<sup>2</sup> and allowed the development of administrative and constitutional law that legalized the practice of abortion. On the one hand, and only 6 months after the enactment of the Court's decision, the Ministry of Health (Ministry of Social Protection at the time) proclaimed that voluntary abortions authorized under the indications model should be considered as covered by the mandatory health package and should be offered by all health service providers in the social security system.<sup>4</sup> On the other hand, through a set of 18 individual constitutional writs (*tutelas*), mostly summarized in Sentencia SU-096/2018,<sup>5</sup> the Court defined the fundamental right to an abortion, specified the requirements and conditions for each indication, and fleshed out the limitations of the right to object to the procedure (see Table 1).

### 3 | THE RATIONALE FOR DECRIMINALIZATION

The Court used five arguments to justify its decision in Sentencia C-055/2022<sup>1</sup>: changes in the context of interpretation of the crime

of abortion; right to health; right to equality; right to freedom of conscience; and criminal law as a last resort for shaping pernicious behavior.

#### 3.1 | Changes in the interpretation of the crime of abortion

The Colombian Constitution, in its article 246, establishes the general binding power of Court decisions involving the constitutional review of laws. These decisions, thus, also bind the Court itself. In the case of abortion, the Court had already examined the law on three occasions before 2006.<sup>7-9</sup> In 2006, it was able to produce formal and substantive reasons to distinguish the new case from the previous ones.<sup>2</sup> Formally, the change in the Penal Code in the year 2000 allowed for a new revision. Substantively, the article on voluntary abortion was modified in 1999<sup>3</sup> by allowing judges to suspend application of the sentence if the woman was in extreme circumstances.

In 2022, it was much more difficult to justify revisiting the legislation on abortion. In two previous decisions, the Court had explained that the plaintiffs had not provided enough reasons to re-examine existing abortion law and dismissed their claims.<sup>10,11</sup> In the first case, the plaintiff argued that, because article 122 of the Penal Code does not provide a limit concerning gestational age, it discriminates viable unborn children.<sup>10</sup> In the second case, the plaintiff addressed the

TABLE 1 Constitutional law on abortion as a fundamental right

The fundamental right to an abortion	<p>All women in Colombian territory have the right to an abortion, regardless of how advanced their pregnancy is, or the type of affiliation they have to the social security system.<sup>5</sup></p> <p>The right to abortion involves not only the right to terminate a pregnancy, but also the right to receive “information that is clear, timely, sufficient, adequate and pertinent about the existence and content of all sexual and reproductive rights,” and about “the existence, reach and requirements to exercise the right to an abortion” (author's translation).<sup>5</sup></p> <p>Women have the right to have access to an abortion procedure within 5 days of presenting relevant documentation.<sup>5</sup></p> <p>Women who request a termination of their pregnancy have the right to confidentiality; health practitioners have the duty to keep this request confidential under rules of professional secrecy.<sup>5</sup></p> <p>Girls and adolescents do not need parental consent to request an abortion.<sup>5</sup></p>
Health indication	<p>The health indication includes the right to mental health and that health should be interpreted to mean the highest possible level of physical and mental well-being, so that women should never be forced to make “heroic sacrifices or to forgo their own rights to benefit others or the public in general” (author's translation).<sup>5</sup></p> <p>The certification of one medical doctor about the risks faced by the pregnant women is enough to credit the indication.<sup>5</sup></p> <p>Women have a right to a diagnosis and to certification of their diagnosis. The health service provider has the duty to produce the certificate within 5 days of the consultation.<sup>5</sup></p>
Malformations indication	<p>When it is probable that the fetus will not survive outside of the womb, the protection to prenatal life is minimal and pregnant women should be protected against cruel, degrading, and inhumane treatment.<sup>5</sup></p>
Rape indication	<p>Girls aged under 14 years do not need to provide a report of rape to get an abortion for this indication; their age is enough to prove statutory rape.<sup>6</sup></p>
Conscientious objection by health personnel	<p>The right to conscientious objection is personal, not institutional.<sup>5</sup></p> <p>The right to conscientious objection concerns only medical doctors involved in the procedure and not nurses or administrative personnel.</p> <p>Objectors have the duty to refer the patient to another doctor.</p> <p>Objections must be made in writing and explain the specific reasons that prevent the doctor from performing the abortion in the particular case; no prepared scripts are allowed.</p> <p>Judges cannot object to protect the rights of women to abort.<sup>6</sup></p>



articles in the Civil Code that define as subjects of rights persons who have lived at least a moment after separating from their mothers.<sup>11</sup> In both cases, the goal was to restrict abortion rights by revisiting the framework developed by the Court; the Court decided that there were no new arguments to consider.

The Court characterized the 2022 case as one of a partial precedent, since the law had not been repealed completely, and explained that the precedent could be revisited because there were new arguments, new meanings for the rule under consideration, and new norms to contrast with the rule. Among the new reasons for reinterpretation of the law, the Court stressed that in this case the plaintiffs offered evidence regarding lack of access to abortions that did not exist when abortion was completely prohibited and included Venezuelan migrant women among the women worst affected, which was not part of the debate in the past. As to the new context for interpretation of article 122 of the Penal Code, the Court mentioned both the establishment of the right to health as a fundamental right in the 2008 Court decisions<sup>12</sup> and the determination of abortion as a fundamental right in a series of *tutela* decisions already mentioned above. To this point, the Court also reasoned that the legal framework addressing gender violence and gender equity had importantly changed since 2006, including the approval of laws on protective measures against gender violence, sexual violence in armed conflict, femicide, and sexual harassment. It cited Court decisions on gender violence in intimate relations, schools, universities, and workplaces.

Finally, the Court reasoned that the numerous recommendations of treaty supervising organs relating to abortion, such as General Comment 22 of the Committee on Economic, Social and Cultural Rights regarding sexual and reproductive health,<sup>13</sup> had significantly transformed the interpretation of international law that should be included in the contrasting exercise involved in the abstract constitutional review that was at stake here.

### 3.2 | Right to health

The right to health was introduced in the 1991 Constitutional reform in article 49: "Health and sanitation are public services in charge of the State. The right of all persons to access services oriented to the promotion, protection and recuperation of their health shall be guaranteed [...]" (author's translation). Although included in the chapter on social and economic rights, since 1992 the right has been strongly protected by the Court for its connection to the right to life and, lastly, to the right to dignity. The Court determined since 2008 that the right to health is a fundamental right given the advances in legal protection and material coverage of services, authorizing the deployment of *tutela* to obtain medicines, services, and payments from the health system.<sup>14</sup>

In the 2022 case, plaintiffs argued that the failure to provide abortions following the legal framework developed by the Court itself constituted a violation of women's right to access health services necessary to preserve their health. In an unorthodox move, the Court validated data about maternal mortality in connection

to abortion produced by international bodies and the Colombian Ministry of Health. Based on these data, and abundant recommendations by international bodies and the Ministry, the Court concluded that the existing framework was limited in achieving the goal of protecting women's access to health services. It determined that Colombia had failed to fulfill its duty to *respect* the right to health by maintaining legal rules on the crime of abortion that became barriers to achieve reproductive health.

### 3.3 | Right to equality

The 1991 Constitution also introduced a sophisticated approach to equality in its article 13. Beyond formal equality, that is, the prohibition of discrimination, the constitutional text introduces substantive equality or equality in effect and requires that the government adopt affirmative measures to correct historical discrimination and accommodate physical, social, and economic vulnerability.<sup>15</sup> Although plaintiffs in 2006 attempted a gender equality claim for abortion based on the conviction that criminalized abortion is a critical cause of women's marginalization,<sup>16</sup> the Court, both in 2006 and 2022, recognized only intersectional equality claims—of poor and racialized women—as bearing on the issue.<sup>1</sup>

Adopting the idea that neutral legislation that has a differential impact on vulnerable populations is constitutionally problematic, the Court in 2022 explained that the crime of abortion had disparate effects on who is likely to be prosecuted and on individuals' access to health services. Using data from the Attorney General's Office, the Court established that most women investigated and convicted for the crime of abortion after 2006 were poor and lived in rural areas. Territories with large African and Indigenous populations showed greater needs regarding access to reproductive health services. Irregular migrant women were also recognized as a vulnerable population that "obviously" had more difficulties in requesting reproductive health services.

### 3.4 | Right to freedom of conscience

Since dignity had played such a stellar role in the 2006 decision,<sup>2</sup> the 2022 decision carefully spoke of the right to freedom of conscience of women as a component of their dignity as a new reason to decriminalize abortion. The Court explained, in terms reminiscent of feminist arguments about personal autonomy and dignity,<sup>17</sup> that women's rights to make decisions according to their own moral convictions and beliefs were disrupted when women were prevented from ending pregnancies that they did not wish to continue. The Court characterized the decision to be a mother as (1) highly personal, as it involves the individual's possibility of fulfilling her life's plan; (2) individual, for the high physical, emotional, and psychological costs it has on the pregnant person; and (3) non-transferable to other individuals or the State, except for cases demanding exceptional justification.



Recognizing the State's interest in protecting pre-natal life, though, the Court engaged in a balancing exercise between this interest and the restrictions imposed on women's rights. It argued that given the nature and intensity of the costs borne by women and considering the massive use of abortion to end unwanted pregnancies, the State could not use criminal law as the main tool to protect life.

### 3.5 | Criminal law as a last resort

The use of criminal law as a last resort has been central to the Court's doctrine on the protection of the human rights of prisoners since 2013. Even though prisoners' rights had been discussed before,<sup>18</sup> it was only in 2013 that the Court decided to take measures to intervene in the criminal law system directly.<sup>19</sup> This change had a very significant impact on the way the Court appreciated the case of the criminalization of abortion. In previous abortion decisions,<sup>2,7-9</sup> the Court was flexible in its appreciation of the burden of proof regarding the use of alternative ways to shape conduct. Here, however, it brought to bear in the balancing of government interests and women's rights regarding the following: (1) the lack of legislative decisions on abortion, regardless of the many calls to develop a legal framework that would protect women's rights; (2) the delays in executive action to better women's access to abortion services; and (3) the absence of measures to support women who did not wish to raise the children they give birth to.

The Court concluded that the protection of women's rights was urgent and that the State interest to protect prenatal life should use means other than criminalization.

## 4 | IMPLICATIONS FOR HEALTH PROVIDERS

According to available information on the prosecution of the crime of abortion in Colombia, from 2006 to 2022 no health practitioners were sentenced for the crime of abortion.<sup>20</sup> The anecdotal information on bullying by institutions, colleagues, and even family members of doctors openly accepting to practice abortions under the indications model of 2006, has not been corroborated by any academic or judicial research. To the contrary, and notwithstanding the dominant interpretation of the duty of professional secrecy, medical doctors, nurses, hospital administrators, and even security personnel at hospitals and clinics were the main source of complaints to the police about women suspected of criminal abortions in the same period.<sup>20</sup> This pattern should change as abortion has ceased to be a crime and remains only as a service to be provided to all women within 5 days of the request, as explained above.

Three additional elements related to the provision of health services are key to understand the way ahead: (1) the gradual delegation of abortion services to specialized sexual and reproductive health clinics; (2) the scarcity of doctors trained in, and willing to make, late-term abortions<sup>21</sup>; and (3) the heavy regulation of misoprostol, the

scarcity of legally imported and produced mifepristone and misoprostol, and the booming black market for the medication.<sup>22</sup> While it is true that all health service providers have the duty to offer abortions, the resistance of doctors in the system has led to ample subcontracting to sexual and reproductive health clinics. These clinics, which are concentrated in the major cities in the country, offer better abortion services but have limited technical capacity that prevents them from offering late-term abortions. And even if they have endured persecution by zealous pro-lifers in the past,<sup>23</sup> this persecution is bound to increase as they proliferate and penetrate regions with stronger opposition to abortion.<sup>24</sup> Increased visibility of doctors performing late-term abortions, as these procedures have become legal and available upon request as late as week 24, could also spark stronger reactions.

A crucial element for the safety of sexual and reproductive health clinics and medical doctors performing abortions will be an adequate development of regulation guaranteeing access to abortion medication and information, so that abortion continues to be mainly an early pregnancy event. Currently, mifepristone and misoprostol are registered for abortion uses, but a prescription by trained obstetricians is required and the number of registered brands has been radically reduced (from 13 to only 2).<sup>25</sup> Thus, revisiting existing rules on the distribution of misoprostol and mifepristone will be key, as will be training general practitioners to prescribe the use of medications for abortion purposes. Until now, only trained obstetricians have been authorized to perform abortions or prescribe medications, although existing regulations allow women to take abortion medications on their own and do not require in-person consultation for prescriptions.<sup>25</sup> Being strictly a technical matter, this regulation should not face any obstacles in the sanitary bureaucracy and is expected to be enacted soon.<sup>26</sup>

## 5 | OLD AND NEW CHALLENGES FOR CIVIL SOCIETY

For 15 years, sexual and reproductive non-governmental organizations (NGOs) in Colombia tried to increase women's access to abortion using the indications framework.<sup>27</sup> *La Mesa por la Vida de las Mujeres* (hereinafter *La Mesa*), a network created in 1998 to repeal the crime of abortion, deployed sophisticated and innovative strategies to prevent conservative-led changes in the Constitution and relevant legislation, accompany women in their encounters with health providers and doctors, educate health practitioners about the correct interpretation of the 2006 abortion decision, and enlarge the legal framework through *tutela* litigation.<sup>28,29</sup>

In 2018, *La Mesa* decided to mobilize around the *Causa Justa* or Justice Indication, using the same feminist methodology that had previously allowed them to become legal experts concerning abortion. The methodology included extensive consultations with women in sexual and reproductive NGOs, revisions by renowned constitutional and criminal lawyers, workshops with Latin American allies, and finally the dissemination of the relevant



knowledge produced.<sup>28</sup> In the case of the Justice Indication, the work to be accomplished initially was to collect all the arguments that could justify repealing the criminal prohibition against inducing abortion.<sup>30</sup> Using this battery of arguments, *La Mesa* leaders planned to launch social decriminalization campaigns and to lobby before Congress to obtain a change in legislation without recourse to the Court.

Before starting the first social decriminalization campaign, it became evident that at least three of the Justices in the Court favored the decriminalization of abortion. The larger and stronger NGOs in the Justice Indication campaign decided to take advantage of the opportunity and start strategic litigation conducive to the repeal of the crime of abortion. The litigation ended favorably, with Sentencia C-055/2022, but arrived at a moment of increased polarization in the country.<sup>31</sup> Even though the political climate finally seems to be favorable,<sup>32</sup> the cultural work, which had been calculated as crucial according to surveys in especially conservative regions, remains imperative.<sup>33</sup> To this old work, a new challenge has been added: defending the validity of the Court's decision against conservative demands for annulment and continuing attempts to reform the constitution in the name of unborn children.<sup>34</sup>

## 6 | CONCLUSIONS

On February 21, 2022, Colombia became one of the few countries to decriminalize abortion until viability. It is also one of the few countries in which abortion is a health service available to all. For health service providers, the Court's decision clarified the legal framework and eased the burden of supervising the correct interpretation of indications. Women NGOs around the country are focusing, for now, on campaigns to reduce the social stigma on abortion and women who abort, and on repealing efforts to annul the 2022 decision or reverse it through a referendum.

### CONFLICT OF INTEREST

The author has no conflicts of interest.

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