

Colombian case study

Standards on Abortion, Protection of the Right to Health and other Human Rights

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**Routes to Advance
the Agenda of the Programme
of Action Cairo
Beyond 2014**



STANDARDS ON ABORTION, PROTECTION OF THE RIGHT TO HEALTH AND OTHER HUMAN RIGHTS

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THE AGENDA OF THE PROGRAMME OF
ACTION CAIRO BEYOND 2014

COLOMBIAN CASE STUDY

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CONTENTS

Introduction	5
Methodology	7
1. Commitments of the International Conference on Population and Development and Review Process after 20 years of Implementation	9
2. Abortion in Latin America and the Caribbean-LAC	11
3. Legal Framework and Scope of Abortion in Colombia	14
3.1. The Action for Protection as a Legal Mechanism to Protect the Rights of Women Requesting Abortion	15
3.2. Advances and Limitations in the Application of the Legal Framework of Abortion in Colombia	17
3.3. Jurisprudence on Abortion, the Right to Health and Other Fundamental Rights in Colombia	19
a) The Right to Health	20
b) Human Dignity and Autonomy	23
c) The Right to Equality and Non-discrimination	26
d) The Right to Information	27
e) The Right to Privacy	28
f) The Right to Justice	28

4.	Colombian Constitutional Court's Standards on Abortion, the Right to Health and Other Human Rights	30
5.	Conclusions	33
	Bibliography	35

INTRODUCTION

The International Conference on Population and Development held in Cairo in 1994 is an important milestone for the issues of abortion and reproductive health and rights. Nowadays, Cairo agenda is still active and some countries have managed to incorporate, in their domestic law, issues that are essential to the realization of sexual and reproductive rights as well as to the effective enjoyment of the right to health. This paper aims to identify and systematize the legal standards set by the Colombian Constitutional Court to resolve cases involving abortion on the grounds of the health exception.

The health exception refers to the decriminalization of abortion when the health or life of a woman is at risk as a result of pregnancy. Understood in the context of human rights, this exception means that the right to health must be interpreted consistently with the rights enshrined in international human rights instruments, such as the right to life, to personal integrity, to autonomy, to privacy and intimacy, to information, to equality and non-discrimination and to human dignity, and in harmony with the concepts of well-being and life planning.¹

¹ La Mesa por la Vida y la Salud de las Mujeres and Alianza Nacional por el Derecho a Decidir. Ana Cristina González (coordinator). *Causal salud, interrupción legal del embarazo, ética y derechos humanos*. Montevideo. 2008. pag. 29. Available at: www.despenalizaciondelaborto.org.co/Causal-Salud [Revised on June 27, 2012].

In as much as the legal standards of the Colombian Constitutional Court have been taken from standards included, among others, in international human rights treaties and conferences –such as the International Conference on Population and Development– they are not only relevant only relevant for Colombia. Internationally, those standards trace routes that could be followed by several Latin American and world countries. This statement is supported by the fact that the health exception has been implemented in most of the countries in the Latin American region. For these reasons, the judgments included in this study are a valuable resource for discussions on legal abortion under Cairo agenda after 20 years of its implementation for they are based on a common normative framework and belong in the discussions proposed by multilateral agencies.

METHODOLOGY

To develop this study, the international commitments of the Programme of Action adopted in Cairo on abortion and reproductive health were analyzed. All of the case-law of the Constitutional Court of Colombia, from 2006 to 2012, related to the protection of fundamental rights in cases of abortion was also reviewed. We also reviewed judgment C-355, 2006, which declared abortion partially unconstitutional in Colombia because some of the arguments developed by the Constitutional Court are grounded on a consistent interpretation of treaties and international conferences on human rights and development.

This work belongs in a research line developed during several years with the support of *La Mesa por la Vida y la Salud de las Mujeres* in Colombia. This research line seeks to identify and analyze advances in the field of the rights of women requesting abortion, especially through the follow up of favorable court decisions and the identification of national and international mechanisms to enforce reproductive rights.

The text addresses four key issues: in the first place the commitments coming out of Cairo Programme of Action on abortion and reproductive health are identified; second,

the laws on abortion and the health exception in Latin America and the Caribbean are reviewed; third, the advances in the case-law of the Colombian Constitutional Court on abortion and the right to health and some fundamental rights as well as the main barriers women face in accessing them are discussed; and fourth, the legal standards set by the Constitutional Court in relation to abortion and government commitments are elaborated upon.

1. COMMITMENTS OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT AND REVIEW PROCESS AFTER 20 YEARS OF IMPLEMENTATION

Cairo Programme of Action is vast and ambitious, and contains more than 200 recommendations and 15 goals in the areas of health, development and welfare. A key feature of this program is the recommendation to provide comprehensive reproductive health care,² family planning³ safe pregnancy and delivery services, abortion,⁴ the prevention and treatment of sexually transmitted infections (including HIV and AIDS),⁵ information and counseling on sexuality, and the elimination of harmful practices against women.

Cairo Programme of Action defined for the first time key reproductive health issues in an international policy document. It expressly speaks of *“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... [as] cornerstones of population and development-related programme”* and states the fact that *“the human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights.”*⁶

Principle 8 of the Programme states 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. 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.”*⁷

² Programme of Action of the International Conference on Population and Development, Cairo, approved through resolution in the 14th plenary meeting, September 1994, pars.7.1.-7.11.

³ Ibidem, pars. 7.12 - 7.26.

⁴ Ibidem, pars. 8.19- 8.27.

⁵ Ibidem, pars.7.27- 7.33.

⁶ Ibidem, principle 4.

⁷ Ibidem, principle 8.

This principle goes beyond the traditional concept of health care –i.e. to prevent illness and death–, for it promotes a more comprehensive approach that takes into consideration mental and physical health and other interrelated rights such as autonomy and the right to information and education.

Furthermore, the Programme of Action states that countries should take measures to empower women and eliminate inequality,⁸ and that for this purpose it is necessary to eliminate all discriminative practices and to help women to establish and realize their rights, including those relating to sexual and reproductive 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.”⁹*

Moreover, the Programme of Action urges governments and NGOs to strengthen their commitment to women’s health, to address the effects on health of unsafe abortions as a major public health problem and to reduce the recourse to abortion through expanded and improved family planning services. It also points out that *“in all cases, women should have access to quality services for management of complications arising from abortion. Postabortion counseling, education and family planning services should be offered promptly, which will help to avoid repeat abortions.”¹⁰*

The challenges in the implementation of population and development strategies have been reviewed every five years (1999, 2004 and 2009). Cairo + 5 proposed the key actions for the further implementation of the Programme of Action as a tool to stimulate and facilitate the efforts of the States in implementing their commitments.

From the study of the key measures relating to this study we can highlight that *“where 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*

8 Ibidem, par. 4.4.

9 Ibidem, par. 4.20.

10 Ibidem, par. 8.25.

accessible. Additional measures should be taken to safeguard women's health."¹¹ It also calls for actions to protect the health of women in terms of adequacy and accessibility.

2014 will celebrate the 20th anniversary of the Cairo Programme of Action and by that time, the governments of the world –in the light of progress and obstacles– must renew their commitment to health and sexual and reproductive rights and determine new challenges in terms of objectives, measures and actions to be undertaken as part of the new development agenda. The question is to identify the new aspirations of the States in this area. In this context, the identification of the standards on abortion proposed in this study may become a key tool to advance the platform in matters relating to safe abortion and the provision of guidelines for the definition of objectives, measures and actions. Additionally, these standards are a solid foundation for advancing in the urgent task of reviewing the criminalization of abortion, because it is an issue that jeopardizes the protection and guarantee of fundamental human rights.

2. ABORTION IN LATIN AMERICA AND THE CARIBBEAN-LAC

In general, all of the countries in Latin America and the Caribbean (LAC) have decriminalized abortion when there is a risk to the life and/or health of the woman, that is, they have included the health exception in their law. Although the scope and limitations of this exception vary depending on the country, in most countries of Latin America the legal framework accepts risks to "health" or "physical and mental health" as grounds for abortion.

The grounds for the inclusion of the health exception in LAC can be organized into at least three groups. There are countries that protect: (i) life, (ii) health with no other adjective or holistic, (iii) physical and mental health. Of course, different rules allow for combinations, i.e., some countries decriminalize abortion when it comes to protecting the women's live and health, or the life and the physical and mental health. Finally, there are countries where abortion is prohibited in all circumstances: Chile, Honduras,

¹¹ *Proposals for key actions for the further implementation of the Programme of Action of the International Conference on Population and Development.* E/CN.9/1999/PC/CRP.1/ Rev.3, May, 1999, par, 63, lit. c.

Nicaragua, El Salvador, and the Dominican Republic. In these countries, women have limited rights and are subject to risks to their lives and health in all cases. The countries where abortion is restricted to the protection of the right to life are Venezuela, Paraguay, Panama and Guatemala.

In those countries where no statements are made on the dimension of health protected, the assumption is that the exception is based on a holistic concept of health. Thus, we understand that health is broadly protected in Argentina, Bolivia, Colombia, Costa Rica,¹²Ecuador, Peru, Trinidad and Tobago, Uruguay (total decriminalization until week 12).¹³

LAC countries implementing laws considering risks to “physical and mental health” are largely the Caribbean States: Belize, Barbados, Jamaica, Saint Kitts and Nevis, Saint Vincent and the Grenadines, and St. Lucia.

TABLE 1. Legislation on abortion in LAC regarding the health exception¹⁴

State	Life	Health without adjectives	Physical and Mental Health
Antigua and Barbuda	Yes	No	Yes
Argentina	Yes	Yes	No
Bahamas	Yes	No	No
Belize	Yes	No	Yes
Bolivia	Yes	Yes	No
Brazil	Yes	No	No

¹² Nevertheless, we found that for example in Costa Rica, article 121 of the Penal Code states that “abortion is not punishable when practiced with the woman’s consent by a medical doctor or an authorized obstetrician, when the former could not act, if this is done in order to avoid a risk for the health or life of the mother and this risk could not be avoided by other means”. The health exception has never been applied though. Medical doctors deny the service invoking lack of due protocols. Similar situations take place in Peru, Ecuador and Argentina.

¹³ In Uruguay, in October 2012, abortion was decriminalized under all circumstances and until the 12th week of gestation, if and only if a series of requisites are met including a hearing before an interdisciplinary team that will inform the woman on adoption and maternity programs. In addition, abortion is decriminalized with no gestational limit in the case of sexual violence (until week 14th), risk for the life and health of the woman and fetal malformation.

¹⁴ Cfr. GONZÁLEZ, Ana Cristina. *Una mirada analítica a la legislación sobre interrupción del embarazo en países de Iberoamérica y el Caribe*, Serie Mujer y Desarrollo, N° 110, 2011, pag. 4.

State	Life	Health without adjectives	Physical and Mental Health
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 [•]	Yes	No	No
Nicaragua	No	No	No
Panama	Yes	No	No
Paraguay [■]	Yes	No	No
Peru	Yes	Yes	No
Saint Kitts and Nevis	Yes	No	Yes
Saint Vincent and the Grenadines	Yes	No	Yes
Santa Lucia	Yes	No	Yes
Surinam	Yes	No	No
Trinidad and Tobago	Yes	Yes	No
Uruguay [◆]	Yes	Yes	No
Venezuela	Yes	No	No

- In Mexico each federal State has autonomy to regulate on the matter. Thus, while in Mexico City abortion is allowed under the health exception and in all cases until the 12th week, in other States criminalization is total.
- The Paraguay Penal Code in article 352 warns that “those that justify indirect abortion with the purpose of saving the life of a woman endangered by pregnancy or childbirth will be exempt from any responsibility”. This is therefore an indirect decriminalization.
- ◆ Total legalization of abortion up to 12 weeks and the health exception without time limit.

This scenario shows that there are differences in the regulations in the LAC countries regarding the scope of the right to health. These differences result in that the interpretations of the law are not uniform. This in turn poses persistent challenges to the effective and timely access of women to legal abortion. However, given that the right to health is covered by international treaties and commitments the scope should be expanded to guarantee the rights of women, understanding that health is a state of complete physical, mental and social wellbeing, not just the absence of disease.

Thus, it is important to define standards for advancing in a consistent interpretation of the right to health and other human rights in the international legal framework and in line with the Cairo Action Programme and the international commitments signed by the LAC States on the matter. These frameworks also recognize that guaranteeing life implies guaranteeing health and that protecting women's lives means protecting also their health.

3. LEGAL FRAMEWORK AND SCOPE OF ABORTION IN COLOMBIA

The Colombian Constitutional Court has played an important role in the protection of people's fundamental rights, particularly the rights of women. Thus, it is stated that the high court's decisions have brought out an emancipatory potential for traditionally vulnerable and marginalized groups.¹⁵ The decisions of the Constitutional Court have been even discussed in comparative law studies, and are regarded as one of the most important laws for the protection of human rights. One of the most outstanding issues addressed by the Constitutional Court relates to the protection of the economic, social and cultural rights,¹⁶ among them the right to health,¹⁷ and includes major statements on sexual and reproductive health.

In May 2006, through judgment C-355 the Constitutional Court concluded that the rule criminalizing abortion in all circumstances imposed a disproportionate burden on women and implied a denial of the fundamental rights enshrined in the Constitution and in international treaties on human rights ratified by Colombia. The Constitutional Court held that it is legitimate to provide protection to the unborn person, but clarified that this protection is not absolute and could cease to protect the fundamental rights of the pregnant woman. The Court admitted that in certain circumstances the

¹⁵ UPRIMNY, Yepes Rodrigo y GARCÍA Villegas Mauricio, "Corte Constitucional y Emancipación Social en Colombia", in de Sousa Santos Boaventura (coordinator), *Democratizar la Democracia*, Mexico: Fondo de Cultura Económica, 2002, pag. 72.

¹⁶ SEPÚLVEDA, Magdalena, The Constitutional Court's Role in Addressing Social Injustice, in Langford Malcolm (Ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge: Cambridge University Press, 2008, pag. 161 and 162.

¹⁷ YAMIN Alicia Ely, PARRA Vera Óscar y GIANELLA Camila, *Colombia. Judicial Protection of the Right to Health: an Elusive Promise?* in Yamin Alicia Ely and Gloppen Siri (eds.), *Litigating Health Rights. Can Courts Bring More Justice to Health?* Massachusetts: Harvard University Press, 2011, pag. 103.

continuation of pregnancy could affect several fundamental rights of women: their lives, their health, their personal integrity and their autonomy. When these circumstances are present, women must be given the opportunity to decide on the continuation or not of pregnancy based on the ultimate recognition their dignity. As the Court explained, the right to dignity involves recognizing that a *“woman is a fully worthy human being and therefore should [be treated] as such, instead of considering her and turning her into a mere instrument of reproduction of the human species, or imposing on her, in some cases even against her will, the obligation of being an effective tool for procreation.”*¹⁸

Accordingly, it ruled that no crime was committed when an abortion was practiced in the following cases:

*“(i) When the continuation of the pregnancy endangers the life or health of the woman, as certified by a physician; (ii) Where there is serious malformation of the fetus that makes life unviable, certified by a doctor, and (iii) When the pregnancy is the result of conduct, duly reported, constituting rape or sexual intercourse without consent, abusive or artificial insemination or fertilized egg transfer without consent, or incest.”*¹⁹

Following this judgment, the Constitutional Court has ruled in specific cases where women have applied for an action for protection in order to interrupt their pregnancy in the cases decriminalized.

3.1. THE ACTION FOR PROTECTION AS A LEGAL MECHANISM TO PROTECT THE RIGHTS OF WOMEN REQUESTING ABORTION

Legal practice shows that every woman has an either positive or negative experience regarding her right to access abortion in Colombia. This perception depends on the degree of compliance with the scheme of comprehensive health care. Negative experiences have to do basically with the denial or unjustified delay to effectively access the service. These denial or delays are barriers that have led some women to file

¹⁸ Constitutional Court, judgment C-355, 2006.

¹⁹ Constitutional Court, judgment C-355, 2006.

actions for protection to protect their fundamental rights and guarantee their access to abortion. From 2007 to 2012 the Constitutional Court has ruled in ten cases of action for protection²⁰ filed by women who requested abortion on the ground of the exceptions decriminalized.

In the cases heard, the Constitutional Court identified various obstacles raised by several health institutions for denying access to abortion to women. Some of the obstacles identified by the Court are:

- (i) They ask for authorizations to provide an abortion not included in the norms;²¹
- (ii) They do not take into account women's autonomy in deciding whether to have an abortion when necessary in order to undergo further medical procedures required to protect her health and life;²²
- (iii) They do not perform the medical exams required to diagnose if a woman actually falls within one of the assumptions on which abortion is legal;²³
- (iv) They interpose administrative obstacles which unreasonably delay the abortions.²⁴
- (v) Conscientious objection is invoked by both health institutions and medical personnel –as well as by judges– in order to refuse to perform an abortion or to order it.²⁵

The first four obstacles have been present in cases calling for actions for protection where it is alleged that health authorities have failed to comply with their duty to guarantee abortion in the case of risk to the physical or mental health of the pregnant woman. These obstacles are present in four of the ten cases resolved by

20 The ten cases are: Constitutional Court, actions for protection: T-171, 2007; T-988, 2007; T-209, 2008; T-946, 2008; T-009, 2009; T-388, 2009; T-585, 2010; T-363, 2011; T-841, 2011 and T-627, 2012.

21 Colombian Constitutional Court, judgment T-388, 2009.

22 Colombian Constitutional Court, judgment T-009, 2009.

23 Colombian Constitutional Court, judgment T-585, 2010.

24 Colombian Constitutional Court, judgment T-841, 2011.

25 Colombian Constitutional Court, judgment T-209, 2008.

the Constitutional Court of Colombia after 2006 when abortion was decriminalized in three circumstances.²⁶ The obstacles are also addressed in the four most recent pronouncements of the Constitutional Court on the matter. These decisions illustrate the reasons why the Court concluded that denying women abortion when pregnancy is life-threatening or threatens the physical or mental health of the woman is a violation of several fundamental rights. In such decisions the Court has issued several orders aimed at removing the obstacles that prevent women from accessing abortion.

3.2. ADVANCES AND LIMITATIONS IN THE APPLICATION OF THE LEGAL FRAMEWORK OF ABORTION IN COLOMBIA

The first diagnosis of the situation of abortion in Colombia after two decades shows that one in 26 Colombian women had an abortion in 2008 and that approximately 29% of all pregnancies ended in abortion. In 2008 there were 400.400 induced abortions in the country.²⁷

Only 0.08% of induced abortions in 2008 were legal and clandestine procedures continue to pose risks to the health of women. 6 in 10 health institutions in Colombia which have the capacity to offer PAC (Post Abortion Care) services do not provide them, and nearly 9 out of 10 of these institutions do not provide legal abortion services.²⁸

From May 2006 to June 2012, the Mesa por la Vida y la Salud de las Mujeres has documented 387 cases in which there were obstacles or unjustified denials in the provision of services. As a result of this process, the Mesa has identified the following barriers²⁹ resulting in the violation of the rights of women in Colombia:

²⁶ Colombian Constitutional Court, judgments T-009, e 2009; T-388, 2009; T-585, 2010 and T-841, 2011. The facts causing these decisions will be outlined in the following part.

²⁷ Guttmacher Institute and Fundación Oriéntame. *Embarazo no planeado y aborto inducido en Colombia: causas y consecuencias*, Bogota, 2011, pag. 6-18.

²⁸ Ibidem.

²⁹ The classification of barriers presented here is based on the categorization done by the United Nations in the General Observation No. 14 on the implementation of article 12 of the Covenant on Economic, Social and Cultural Rights.(UN Doc. E/C.12/2000/4).

1. **Availability failures:** In 2009 part of the regulation³⁰ issued by the Ministry of Health and Social Protection, to facilitate access to abortion services, was provisionally suspended as part of a trial.³¹ This situation has caused serious confusion among service providers, government officials and women in general. Recurring denial or delays in the delivery of services are defended on the grounds of lack of regulation.³²
2. **Accessibility failures:** The imposition of additional requirements referred to above, such as forensic opinions, orders of judges, authorization or notification of relatives, among others, is recurrent. Faults are found in the diagnostic process, as well as the obligatory performance of unnecessary medical boards, audit reviews or approval timeouts causing unjustified delays. The information provided by the health staff to women about abortion procedures is often incomplete and not accurate, especially regarding the risk and complications associated with the method chosen, and the pain management. Ultimately the physicians make the decision about abortion based on their own assessment of the risk or the arbitrary imposition of disproportioned burdens to women, and therefore their rights are curtailed.
3. **Acceptability failures:** Conscientious objection³³ has become a systematic means for denying the exercise of women's rights. It is interposed without fulfilling legal requirements, i.e. refusing to provide information, trying to persuade woman against abortion, committing acts of abuse and discrimination and breaking confidentiality and professional secrecy. Some health institutions have made their staff sign collective agreements on conscientious objection

30 Decree 4444, 2006, Ministry of Health and Social Protection; Act 4905, 2006; Agreement 350, 2006; Communication 0031, 2007; Agreement 03, 2009 and 08, 2010.

31 Claim of unconstitutionality before the Council of State – highest dispute tribunal. (Council of State, 2009).

32 Database of La Mesa por la Vida y la Salud de las Mujeres. Since 2008, this organization has requested information to territorial entities responsible for enforcing the rules of legal abortion in Colombia. This follow-up has allowed for the detection of institutional barriers in the functioning of the health system and the impact on the provision of legal abortion services.

33 In Colombia, conscientious objection is recognized by the Constitutional Court and clearly delimited. The high court has been emphatic in determining that the right of health professionals to profess the belief of their choice can be protected through this mechanism but that it cannot be used to obstruct the rights of women who opt for an abortion.

or have refused to provide abortion services. There have been cases in which court officials refuse to protect women's rights as recognized by the law and raise conscientious objection arguments to avoid making a decision.

4. **Quality failure:** One of the biggest obstacles is the lack of medical training on abortion at all levels of care and in all the techniques listed in the technical standards. In many cases women must go to high complexity care levels. This raises the costs of the service and delays the process for requesting and providing medical care. These barriers show that in Colombia there are serious problems of access to justice and health for women deciding for legal abortion. This unnecessarily delays or totally prevents abortion, violating the rights of women and seriously jeopardizing their life and health. This, in turn, results in the systematic violation of international law obligations. Thus, these barriers should be brought down with the implementation of the standards set by the Constitutional Court.

3.3. JURISPRUDENCE ON ABORTION, THE RIGHT TO HEALTH AND OTHER FUNDAMENTAL RIGHTS IN COLOMBIA

The Colombian Constitutional Court has taken into account international standards and documents for the protection of human rights and has used them to interpret the duties of the Colombian State in protecting the reproductive rights of women. Specifically, to justify the legalization of abortion in the cases of danger for women's health, the Court took into account the provisions of various international conventions designed to protect the right to life and health of women.³⁴ On that occasion, the Court expressly cited Article 12 of the International Covenant on Economic Social and Cultural Rights which recognizes the "*right of everyone to the enjoyment of the highest attainable standard of physical and mental health*", and based on it, it stated that the danger for health –physical and mental– is a circumstance in which abortion should be decriminalized.

³⁴ It refers specifically to the following standards: article 6 of the International Covenant on Civil and Political rights; Article 12.1 of the Convention on the Elimination of all Forms of Discrimination against Women, and article 12 of the International Covenant on Economic, Social and Cultural rights.

Moreover, the Constitutional Court has also included in its analysis and decisions a number of international documents³⁵ in order to point out that the State has the obligation to *“take the necessary internal measures to promote the elimination of barriers that impede the access to abortion services.”*³⁶[42] Additionally, it should be noted that the Court has held that these standards and documents not only impose obligations on the government and judges *“but on all health professionals at all levels, those who have the ethical, legal and constitutional duty to respect the rights of women and to guarantee their full enjoyment allowing access to all legal health services.”*³⁷

The Constitutional Court has resolved the lawsuits filed by women who without justification were denied the service stating that such action constituted a violation of several fundamental rights, including the rights to health, autonomy, access to justice, human dignity and information.

The rights protected by the Constitutional Court in cases of abortion are described below. These rights are indeed the ones most closely related to the provisions of the Programme of Action adopted in Cairo, where –as mentioned above– the duty of the States to guarantee abortion in those countries in which this can be legally exercised is highlighted. In this regard, in this program it is noted that *“in circumstances where abortion is not against the law, such abortion should be safe.”*

a) The Right to Health

Colombia’s Constitutional Court has held that health is a fundamental constitutional right. Health has been understood by the Court as *“a state of complete physical, mental*

35 Among them what has been established in the International Conference on Population and Development (Cairo, 1994) and the Fourth World Conference on Women (Beijing, 1955), as well as the document Abortion without Risk prepared by the WHO (2003). Constitutional Court, judgment T-209, 2008.

36 Constitutional Court, judgment T-209, 2008. In this case an action for protection was presented. An IVE was requested from a 13 year old victim of violent carnal access. Health services denied the IVE invoking conscientious objection. Moreover, judges who resolved the case denied the action for protection stating that there was no sufficient proof that the pregnancy was a result of the violent carnal access.

37 Ibidem.

and social wellbeing” within the possible health standards of a person.³⁸ It is a law of progressive development meaning that the State has an obligation to move steadily towards the enjoyment of the highest attainable standard of health.

Regarding the right to health of women requesting abortion, the Constitutional Court has addressed three issues: sexual violence, the right to diagnosis and the State’s duty to guarantee access to health services across the country.

The Constitutional Court has recognized that health can be affected when pregnancy results from rape: *“Besides being a violent act, rape is aggression, humiliation and subjugation, and has not only a short term impact but also a long term impact on the emotional, existential and psychological fields, including damage to the health due to the pregnancy itself and the sexual disease transmitted.”*³⁹ For this reason, when a woman requests an abortion in cases of rape, it should be noted that some of the standards developed by the Constitutional Court regarding the health exception may be fully applicable (especially in relation to mandatory diagnosis as an integral aspect of the right to health).

On the other hand, the Constitutional Court has argued that diagnosis is a part of the right to health, so women who request an abortion should undertake the necessary tests to determine whether her physical or mental health is at risk.

Regarding diagnosis, according to the Court, the protection of the right to health implies the access to the health services *required* by the person so that *“everyone is also entitled to access the necessary examinations and diagnostic tests for establishing precisely whether the person suffers from a health condition requiring the services asked for.”*⁴⁰ In this regard, the right to health protects the performance of medical diagnosis.

The reason the diagnosis is a necessary element to ensure access to abortion when this hypothesis is invoked is that *“being a health-related issue, only a medical diagnosis*

³⁸ Constitutional Court, judgment T-760, 2008.

³⁹ Constitutional Court, judgment T-209, 2008.

⁴⁰ Ibidem.

can determine if the hypothesis referred to can be probed.”⁴¹ Therefore, the Court has stated that when an abortion is requested on the grounds of danger to the life or health of the mother, all the necessary actions to verify if the case fits in the hypothesis should be performed, both in the case in which health professionals deem that such a hypothesis is probable, as when the pregnant woman claims to be covered by it.⁴²

The Constitutional Court added that it is precisely the health institutions which have the medical personnel required to make an assessment of the physical or mental health of a woman. Therefore, health care providers are the ones who must “perform the medical diagnosis when a legal abortion is requested on the grounds of danger to the life or health of the mother.” When this duty is breached, the judge summoned to protect the woman’s rights is obliged to order the diagnosis.⁴³

According to the Constitutional Court, the right of women to have a medical diagnosis in the cases in which abortion is considered on the basis of the health exception allows for requesting health professionals the two following actions:

“(i) A timely medical assessment of the dangers of pregnancy to the woman’s life or health. This should be carried out in those cases in which health professionals deem that this hypothesis is probable or when the pregnant woman claims to be covered by it due to the symptoms she is having. Furthermore, it must be comprehensive, i.e. include an assessment of the mental health status of the woman since judgment C-355, 2006, determined that threat to mental health also legitimizes a request for abortion.

⁴¹ Constitutional Court, judgment T-841, 2011. In this judgment the Court studied the case of a minor who requested an IVE because she considered that the pregnancy endangered her mental health. The health services company did not accept her request.

⁴² Constitutional Court, judgment T-585, 2010. On this occasion the Court revised an action for protection for a woman who had requested the practice of abortion on the grounds that this posed a danger to her mental health. The health services company refused the request adducing the inexistence of a medical certificate recommending the IVE.

⁴³ Constitutional Court, judgment T-585, 2010.

*(ii) The timely issuance of an appropriate medical certificate to proceed with the abortion. This certificate must respond to the results of the medical evaluation performed.*⁴⁴

In order to ensure early and comprehensive diagnosis, the Court ordered the health service providers to produce diagnostic protocols to handle cases where the possibility of finding a pregnant woman at risk in her physical or mental health is raised. It also ordered the Superintendent of Health to take *“the necessary measures so that health care institutions, regardless of whether they are public or private, secular or religious, provide rapid diagnostic protocols for those events where health professionals think that the possibility of the hypothesis of danger to the health of the mother is configured or the pregnant woman claims to be covered under the hypothesis and requests an abortion. This should be done in order to determine compliance with the condition of a medical certificate imposed by judgment C-355, 2006. Such a protocol should be comprehensive, i.e. include an assessment of the mental health status. The National Health Authority shall monitor compliance with the foregoing by the [Health Promotion Entities] and [the health institutions].”*⁴⁵

On the other hand, the Court has pointed out that the State must ensure that abortion services in the cases provided for by national law are *“available throughout the national territory”* and women should be able to access them at all the levels of complexity required. Furthermore, it must be ensured that all health institutions are staffed with suitable and adequate personnel to guarantee safe and timely abortion.⁴⁶

b) Human Dignity and Autonomy

One of the arguments considered by the Constitutional Court to declare the criminalization of abortion unconstitutional was that this criminalization violated the right to dignity of women.⁴⁷ According to the Court, human dignity recognizes to everyone a sphere of autonomy and moral integrity that must be respected by governments and

⁴⁴ Ibidem.

⁴⁵ Ibidem.

⁴⁶ Constitutional Court, judgment T-388, 2009.

⁴⁷ Constitutional Court, judgment C-355, 2006.

individuals. Regarding the case of women, the Court considered that human dignity includes “*decisions about her life plan*” including reproductive autonomy, as well as ensuring their moral inviolability, whereby is prohibited “*to assign to them stigmatizing gender roles, or deliberately inflicting mental suffering.*”⁴⁸ For this reason, the right to autonomy is directly related to the sexual and reproductive rights of women for it is this autonomy what allows them to exercise them freely. Denying women the opportunity to decide on the number of children and the spacing between them would be to deny their dignity.

The right to autonomy of women to decide on abortion is closely linked to their right to human dignity, according to which every human being is free to choose “*to live as he/she wishes.*” Human dignity, then, protects the right of people to freely design a life plan and to try to achieve it. In this regard, the Constitutional Court has explained that human dignity protects the “*freedom of choice of a specific life plan as part of the social conditions in which the individual develops.*”⁴⁹ Denying a woman the right to abortion interferes with her life plan, and therefore denies her human dignity. In cases in which the Constitutional Court has considered that this has happened, it has ordered officials who denied the woman access to IVE (health service institutions and doctors associated to them) to fully repair the damage caused with compensation.⁵⁰

The Constitutional Court has recognized that the Constitution and the international treaties recognize the so-called “reproductive rights”, as they emerge from rights recognized in instruments such as the right to a life of dignity, equality, the free development of personality, information, health and education.⁵¹ Similarly, to explain the content of these rights, the Court has invoked the Programme of Action of the International Conference on Population and Development.⁵² As explained by the Court, reproductive rights recognize and protect two distinct purposes: reproductive self-determination and access to reproductive health services.⁵³ Regarding reproductive self-determination, the Court has held that it “*recognizes, respects and guarantees the*

48 Ibidem.

49 Ibidem.

50 Ibidem.

51 Ibidem.

52 Constitutional Court, judgments T-209, 2008 and T-841, 2011.

53 Constitutional Court, judgment T-585, 2010.

*freedom of individuals to decide on the possibility to procreate or not, when and how often.*⁵⁴ In the Court's opinion, reproductive self-determination comprises the right of women to safe and timely abortion in the case of the exceptions decriminalized by the law.

The decision to end a pregnancy or not in such circumstances resides only in the pregnant woman. In this regard, the Constitutional Court has established that *"[a] decision of such high importance as to terminate or continue a pregnancy, when it represents risks to the life or health of the woman, is a decision that can be taken only by her, in its sole discretion and in compliance with the rules in force, as it will be her who will bear the consequences arising from that decision."*⁵⁵ Following the Court, the power to make this decision is protected by the right to human dignity, so that not complying with the will of a woman covered by any of the four exceptions would be a violation of her dignity.

The right to empower women to decide on abortion is not only protected when it comes to adult women, but also to children and adolescents. In this regard, the Constitutional Court has considered an "inadmissible barrier" to abortion in the circumstances permitted by the Colombian law *"[i] To avoid that pregnant girls under 14 freely externalize agreement to have an abortion, when their parents or legal representatives disagree with the interruption."*⁵⁶ When the will of a woman under 14 years of age is overturned in making any decision about an abortion, her right to human dignity is being violated.

⁵⁴ Ibidem.

⁵⁵ Constitutional Court, judgment T-009, 2009. On this occasion the case studied was that of a woman who was refused a medical procedure –an abdominal hysterectomy– because she was pregnant. In this case the judges and the doctors, and not the woman, decided on the unfairness of abortion in order to carry out the required surgery.

⁵⁶ Constitutional Court, judgment T-388, 2009. On this occasion the Court studied the case of a woman who claimed that her pregnancy posed a risk to her physical and mental health and thus she requested an IVE. Doctors who attended her advised the realization of IVE, but conditioned it to the production of a court order.

c) The Right to Equality and Non-discrimination

In the judgment that partially decriminalized abortion in Colombia, the Constitutional Court pointed out that the State has some special duties to fulfill in order to ensure the right to equality and non-discrimination of women. Such obligations force the State to remove all obstacles that interfere with the free exercise of the sexual and reproductive rights of women.⁵⁷

In subsequent decisions, the Court argued that once the State recognized hypothesis in which abortion is not criminalized, women have the right to equality and nondiscrimination in the access to the procedure. In this regard, the Court argued that women seeking abortion and those who provide it should not be discriminated against or be subject to *“practices that somehow limit or prevent their access to the workplace or schools or their affiliation to the general health systems.”*⁵⁸

The Constitutional Court has elaborated on the relationship between the right to equality and non-discrimination in relation to reproductive self-determination on the basis of some international human rights treaties, while recognizing that women have a *“right to be free from all kinds of interference in their reproductive decision making, including physical and psychological violence, coercion and discrimination, as they should not suffer from any unjustified unequal treatment because of their reproductive decisions, whether they decide to have children or not”* (Articles 13 and 42 of the Colombian Constitution and Article 11.2 of the CEDAW⁵⁹).⁶⁰

⁵⁷ Ibidem.

⁵⁸ Constitutional Court, judgment T-388, 2009 and T-841, 2011.

⁵⁹ “(1) States Parties shall take all appropriate measures to eliminate discrimination against women in employment and shall ensure, on the basis of equality of men and women, the same rights (...) 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status.”

⁶⁰ Constitutional Court, judgment T-627, 2012.

d) The Right to Information

The Constitutional Court has held that information on reproductive health involves two distinct obligations: first, the duty to ensure that women have *“sufficient, comprehensive information enabling them to fully exercise their freedom and their sexual and reproductive rights.”* In this regard, the Court has stated that sexual and reproductive rights require the government to provide information and education so that they can be effectively exercised by women, otherwise many women could simply stop demanding them for not knowing who holds them;⁶¹ in agreement with the Court, information on sexual and reproductive rights *“helps people to make free and informed decisions about intimate aspects of their personality.”*⁶²

To fulfill this duty, by judgment T-388, 2009, the Constitutional Court ordered the Ministry of Social Protection, the Ombudsman’s Office and the Attorney General’s Office to design and implement *“mass campaigns to promote sexual and reproductive rights to contribute to ensuring women across the country the free and effective exercise of these rights.”* The Court also ordered the same entities to track the implementation of these campaigns in order to measure their level of impact and effectiveness. Additionally, it specified that such campaigns should convey *“complete information on the subject in simple, clear and sufficiently illustrative manner.”*⁶³

Moreover, the state must refrain from *“censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information.”* It must also *“ensure that third parties do not limit people’s access to information.”*⁶⁴ To protect this duty, the Court ordered authorities to not misrepresent the content of the judgments handed down by the Constitutional Court relating to sexual and reproductive rights, especially in relation to abortion.⁶⁵

⁶¹ Constitutional Court, judgment T-841, 2011.

⁶² Constitutional Court, judgment T-627, 2012.

⁶³ Constitutional Court, judgment T-388, 2009.

⁶⁴ Constitutional Court, judgment T-627, 2012.

⁶⁵ Ibidem.

e) The Right to Privacy

The Court has held that in order to promote women's access to justice judicial authorities must keep the identity of women requesting abortion under reserve, as well as all data that could reveal their identity. Following the Court, this measure takes into account that in Colombia the exercise of the legal authority to request abortion is subject to moral and religious reprobation.

For the Court, *"the possibility of being subjected to such trials may deter a woman to go to court to demand their fundamental right to abortion and, in that sense, the condition of anonymity aims at keeping her name from public awareness, preventing her from being exposed to reprobation and, thus, creating favorable conditions for the access to justice."*⁶⁶ In order to enforce this standard, the Constitutional Court ordered the Colombian State agencies with authority over the judges (Supreme Judicial Council) to inform them of this rule so that they apply it in all those cases resolving abortion applications.

However, the Attorney General's Office, in an attempt to restrict the reproductive rights of women and ignore the rulings of the Constitutional Court, requested the Higher Judiciary Council to specify that the reservation could not be applied to the Prosecutor and the Attorney. As a result, through Act 096, 2012,⁶⁷ the Constitutional Court consolidated its position regarding the protection of the fundamental right to protect identity, enshrined in Article 15 of the Political Constitution of Colombia, noting that this is closely related to the right to free development of the personality which, in turn, is essential to guarantee the protection of sexual and reproductive rights.

f) The Right to Justice

The Constitutional Court pointed out that women are a group traditionally discriminated against in terms of their access to justice. Due to the gender biases of moral or religious

⁶⁶ Constitutional Court, judgment T-841, 2011.

⁶⁷ Act 096, 2012 resolves the request for clarification to judgment T-841, 2011. File T-3.130.813. Action for Protection established by Balder on behalf of her youngest daughter's age AA against BB EPS.

origin with which the judges regard women when they come before the courts, many prefer not to, and this leads to “*perpetuate the violations of their rights and their status as a discriminated group*.”⁶⁸ To support this claim, the Court cites documents analyzing the situation of access to justice of women victims of violence in the Americas and the world.⁶⁹ To address this situation, the Constitutional Court has set some rules intended to remove barriers to the access to justice of women who demand abortion and to facilitate such access. Among them two stand out:

First, the Constitutional Court has stated that the right to justice of women who request abortion is affected when the judges responsible for settling such claim invoke conscientious objection and therefore are inhibited to solve the claim. In the opinion of the Court, the right to conscientious objection lies in all people as particular subjects, but when they exercise judicial functions or act as judges of the republic, they cannot invoke conscientious objection to not decide over a case. To justify that conclusion, the Court stated that the characteristic of the rule of law is that judges administer justice based “*solely*” on the right, leaving aside their particular beliefs. Moreover, the refusal of a judge to decide would be an infringement of the right of women to access justice.⁷⁰ Judges resolving a petition to protect the right to abortion who refuse to rule over it invoking conscientious objection may be subject to criminal and disciplinary investigation.

Second, the Constitutional Court has been emphatic in protecting the right of women to autonomy, stating that judges resolving actions relating to abortion are not authorized to decide on the feasibility or relevance of certain medical procedures, because this is something that only the medical personnel trained for this purpose can evaluate. All the judges who are in such a situation must do is to study if the right to abortion is respected and guaranteed.⁷¹

68 Constitutional Court, judgment T-841, 2011.

69 In this regard, the international documents cited by the Constitutional Court are: “El acceso a las justicia para las mujeres víctimas de violencia en las Américas” by the Inter-American Commission on Human Rights (2007), “El progreso de las mujeres en el mundo 2011-2012. En busca de la justicia” by UN Women.

70 Constitutional Court, judgments T-388, 2009 and T-841, 2011.

71 Constitutional Court, judgment T-009, 2009.

4. COLOMBIAN CONSTITUTIONAL COURT'S STANDARDS ON ABORTION, THE RIGHT TO HEALTH AND OTHER HUMAN RIGHTS

From the discussion and analysis of the judgments of the Constitutional Court raised in the previous chapter, we can identify a number of legal standards whose ultimate aim is to remove the obstacles faced by women seeking legal abortion. This section defines these standards in order to state them as paths to advance the agenda of sexual and reproductive rights and particularly abortion, 20 years after the implementation of Cairo Platform for Action.

Legal standards are formulations developing and concretizing the abstract content of fundamental rights (such as health, life, dignity, information, autonomy, etc.) by defining specific responsibilities for the protection and guarantee of the right (for judges, health service providers, health institutions, and the State in general). Such formulations are considered standards because they are of wide application. In this case what makes these standards generalizable to other countries has to do, first, with the fact that they are based on the international human rights framework, and on the other, in the existence of the health exception or the recognition of the right to health in the Latin American States.

To the extent that barriers in the access to abortions are a violation of women's fundamental rights, the decisions of the Constitutional Court seeking to remove them constitute a significant step towards the effective protection of the rights involved. In these decisions the Court has widely used international law on human rights and international documents on women's rights. This gives special value to the judgments at the regional level, as several countries in the region have signed the same human rights treaties cited by the Colombian high court. In this sense, the decisions of the Constitutional Court have a common normative framework that must be adopted by all authorities.

The legal standards set by the Court in its judgments, then, are interpretations of the human rights protected in the region (such as life, health, autonomy, etc.) and also focus on the health exception and abortion in general. Based on this, the rules of the Constitutional Court set out in this paper as standards can and should be used to influence the agenda and the new challenges arising after the 20th anniversary of the

International Conference on Population and Development, and in general the agenda of all those international instruments that protect the reproductive rights of women.

Ensuring a safe and timely abortion in the case of the health exception implies the protection of the right to health and other human rights including sexual and reproductive rights. In this sense the standards proposed here pave the way for this protection and advance in the agenda and content of the Programme of Action of the ICPD.

- **Reproductive self-determination:** the decision of having an abortion in the case of the decriminalized hypotheses, including cases of comprehensive health risk, rests solely with the woman, as it is a decision that significantly determines her life plan. The decision to have an abortion should be taken only by women, at their own discretion.
- **Respect for the life plan:** women's right to dignity includes freedom to make decisions about their own life plan, including reproductive autonomy. Similarly, the right to human dignity guarantees their moral intangibility according to which it is prohibited to assign stigmatizing gender roles to women or deliberately inflicting mental suffering on them.
- **Health as a holistic concept:** it is the duty of the State to allow women to have an abortion when their health is at risk, and health here must be considered from a holistic perspective including physical, mental and social aspects. It should be recognized that in cases of rape the pregnant woman's health is at risk, so that in the cases of pregnancy caused by rape the health exception is applicable.
- **Diagnosis:** it is the duty of the physician to diagnose the health situation in full and to perform all the necessary actions to confirm if the health exception is applicable in a case. The diagnostic tests can never be a barrier to access the service, or to generate a delay impeding timely care.
- **The protection of privacy in medical and legal issues:** the protection of women's rights requires all actors involved in legal abortion cases –including judges– to safeguard the identity of the woman and her history.

- **Timely information to women on the conditions to access abortion:** the State must provide sufficient and proper information to women in order to enable them to fully exercise their freedom and their sexual and reproductive rights. Additionally, it should create mechanisms for public information and education campaigns on issues related to the SRH.
- **Free and informed consent by children and adolescents:** the State must ensure that pregnant minors can externalize their free consent when their parents or legal guardians disagree with abortion and reproductive determination.
- **Free and informed consent by women with disabilities:** the application for the termination of pregnancy must be issued by the parents of the disabled women or any other person acting on their behalf without additional requisites besides those specified in the legislation for each of the exceptions.
- **The prohibition of imposing obstacles to abortion:** this includes preventing third parties from interfering with legal and timely abortion services. The obstacles that cannot be imposed in cases of women requesting abortion include:
 - i. Requesting additional requirements, such as asking for a judiciary order authorizing it.
 - ii. Ignoring women's autonomy in deciding whether to have an abortion when it is necessary to undergo further medical procedures required to protect their health and their life.
 - iii. Bringing up administrative obstacles that unreasonably delay access to abortion services.⁷²
 - iv. Invoking conscientious objection, collectively or institutionally in health institutions or by judges to refuse to perform an abortion or to order it.

⁷² Constitutional Court, judgment T-841, 2011.

- **Ensure services throughout the country:** the State must ensure that abortion services in the cases envisaged by the national law are *“available throughout the national territory.”*
- **Access to all levels of care according to complexity:** women should have access to abortion services at all levels of complexity required.
- **Suitable and adequate health staff:** it must be ensured that all health institutions have suitable and adequate personnel to ensure abortions.
- **Prohibition of discrimination:** women requesting abortion and those providing it should not be subject to discrimination or practices that somehow limit or prevent their access to the workplace or schools or the health system or the occupational hazards system.
- **Limit to judicial intervention:** judges cannot rule over the medical aspects of abortion. Going to court in order to request abortion is not required.

5. CONCLUSIONS

20 years after the signing of the commitments of the Cairo Programme of Action, efforts in relation to abortion have focused on the guarantee of abortion when legal conditions permit it. However, the obstacles faced by women even in the best legal scenarios prompt us to think about routes that would really advance in the implementation of these commitments. The case of the health exception and the standards set by the Constitutional Court in this matter are of particular importance since they are useful not only to advance in the fulfillment of legal abortion. They also contribute to advance in the decriminalization of abortion as part of the protection and guarantee of women's right to health and other related rights.

Experience and constitutional development in Colombia should contribute to the Programme of Action of Cairo which establishes that States must commit themselves to ensure safe abortion in those circumstances in which it is decriminalized, and to rely on a broad interpretation of the exceptions from a human rights framework to

ensure women's access to abortion when they considered their physical, mental or social health at risk with no denials, restrictions or undue delay.

From these standards it is possible to advance in the identification of new targets, for example, the revision of the laws criminalizing abortion completely, and in objectives and concrete measures to ensure access to real legal, safe and timely abortion in cases where it is decriminalized, based on the respect for the human rights of women, and particularly their sexual and reproductive rights.

The jurisprudence on abortion of the Colombian Constitutional Court allows us to identify important standards to meet for establishing the liability of the States in the region in this area, consistent also with the respect for their domestic legislation when they recognize the health exception and the fulfillment of the commitments of Cairo Programme of Action. These standards based on international standards of human rights also binding on other States can be used to make a rereading of the agenda of the International Conference on Population and Development and all international instruments that protect the sexual and reproductive rights of women.

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