

# From Constitutional Court Success to Reality: Issues and Challenges in the Implementation of the New Abortion Law in Colombia

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On 14 March 2005, Women's Link Worldwide publicly launched a bold and innovative challenge to the Constitutional Court of Colombia, asking the judges to liberalise the country's abortion law, which outlawed the procedure under all circumstances.<sup>1</sup> The project on High Impact Litigation in Colombia for the Unconstitutionality of Abortion (LAICIA according to its name in Spanish) started with the preparation of three main strategies (legal, alliances and communications) in the summer of 2004 and ended on 10 May 2006 when the Constitutional Court issued a historic decision. The Court, in decision C-355/06, ruled that abortion is a constitutional right for women and should not be considered a crime under three circumstances:

- when the life or health (physical and mental) of the woman is in danger
- when pregnancy is a result of rape or incest
- when grave fetal malformations make life outside the uterus unviable.<sup>2</sup>

With a positive decision in hand, Women's Link started a new project called 'Ensuring Reproductive Rights in Colombia: From Constitutional Court Success to Reality'. This project was based on the premise that every time there is a major legal change, it is crucial to closely monitor the way in which the new laws are being received and accepted (or not) by different sectors of society. This is even more important when the issue at hand is as polemical and complex as abortion and the opposition is always looking for new avenues to neutralise or invalidate legal achievements.

Women's Link initiated a series of activities in Colombia in order to follow up on the Court's decision to liberalise abortion. This work is framed in two main areas: ensuring the proper implementation of the new legal framework, and protecting and strengthening the judicial decision that brought this change. This article reflects on the roadblocks to implementation and on some of the broader lessons that might be drawn from efforts to overcome them.

## 1 Mapping the roadblocks

Beginning in January of 2007, Women's Link started a mapping exercise in order to accurately identify the obstacles and resources available to work towards the full and proper implementation of the Constitutional Court's decision C-355/06 through strategic work with the justice system. Mapping consists of critically examining the structure, actors and arguments available in a given context with the purpose of identifying the most strategic avenues to address issues of concern.

This mapping is an ongoing exercise; however, the following are the most relevant issues we (i.e. Women's Link) have observed which are to date impeding women from enjoying their right to a safe and legal abortion.

### 1.1 Lack of knowledge regarding the new abortion legal framework

Although most Colombians have some information about the recent legal reform, many do not have an accurate idea about the newly acquired rights and procedures established by the Court and the Ministry's

regulations.<sup>3</sup> It is particularly important that women, doctors and legal officials in charge of monitoring and imposing sanctions, understand both the principles and mechanisms that now constitute the framework for the legal, safe and timely provision of abortion services. There have been clear advances and efforts trying to address this issue by several actors. Many women's non-governmental organisations (NGOs), including La Mesa por la Vida y la Salud de las Mujeres – a network of reproductive and women's rights NGOs and individual experts, have published leaflets, flyers and posters with information about legal abortion. Grassroots organisations organise talks and seminars on the issue in different locations throughout the country. Notably, the Ministry of Social Protection signed a large contract with an advertising company in order to design and publish a campaign that informs the public about their reproductive rights, including the right to voluntarily interrupt a pregnancy. The campaign was launched in December 2007 and includes TV, radio and press advertisements, together with a toll free number where operators are available to provide information and guidance.

### **1.2 Abuse of conscientious objection by institutions, individual doctors and judges**

One of the biggest obstacles we have found to date is the misuse of conscientious objection, an exception to the duty to comply with legal mandates, which in no case should be used to arbitrarily deny the health services to which women are entitled.

The Court clearly stated that only individual doctors and not institutions could be conscientious objectors. However, we have learned that institutions have been informally exploiting this instrument. This practice is being disguised in different manners: (1) institutions simply do not have any doctor willing to provide abortion services, either because they have discriminated during the hiring processes or because they exercise pressure on the existing medical staff; (2) they present collective objections, sometimes in the form of one document signed by all providers or otherwise an identical document for each doctor, all of them with the same considerations and format; (3) they simply tell women that the institution does not provide such services because it goes against their institutional vision and values.

Not only is conscientious objection abused in these ways, but also the obligations that were dictated by

the Court when outlining this right are being completely neglected. For instance, conscientious objectors are obligated to refer women to other doctors who can provide the service. This is routinely not done. Similarly, doctors who are civil servants working in public medical facilities ignore the fact that they cannot legally be conscientious objectors according to the Court's decision. Also, the Court specified that all health facility public networks (local, district or state) must provide abortion services within their network. The result is a disproportionate and unjust burden on women who, when they can, have to use their own means to seek a medical practitioner willing and able to provide the abortion.

In May 2007, the Ministry of Social Protection issued an official letter to all health officials in the country stating that they must submit information regarding the network of available and willing abortion providers at every level of the healthcare system. The healthcare system in Colombia is divided into numerous jurisdictions by location and by levels of services provided at each location. According to the new framework, abortion services should be made available at all types of healthcare institutions according to gestational age. This report was due in August 2007 and starting from that date, reports are due every three months. We are still waiting to see the first statistics.

Of unique concern is a case of conscientious objection abuse in the judicial system. The case involves a local judge who was assigned a *tutela*<sup>4</sup> claim filed by a pregnant woman with a diagnosis of fatal fetal malformations asking for a judicial order to obtain an abortion, since the service had been denied by the health institution. The judge elaborated a vehement argument indicating he could not decide the case because of his religious beliefs. The *tutela* was finally denied and was then reviewed by the Constitutional Court. It came to the attention of Women's Link because it is one of the first cases on abortion decided after the Court's decision that liberalised the law.

The Constitutional Court decision did not issue a decision on the substance of the case. Since the woman had given birth (to a baby that died soon after), the Chamber of the Court reviewing the case said the case was moot and did not address the issue of judicial conscientious objection.<sup>5</sup> In Colombia, as in any other country under the rule of law, judges must

decide based on the law, not on their conscience. As basic as this principle seems, the judges decided to avoid making an issue of it. We have learned there is one pending case being reviewed by the Court at the moment involving this issue. We are monitoring it closely and putting forth a number of the arguments so that the judges and the public realise the centrality of addressing this issue in a modern democracy.

### **1.3 Requesting of additional requirements to those established in decision C-355/06**

Both the Court's decision and the subsequent Government regulation very clearly established that the only requirements for a woman to obtain an abortion under the accepted circumstances are a doctor's certificate in cases involving malformations or a risk to the life or health of the woman or the police report documenting the sexual violence in cases involving rape or incest. In practice, service providers have started to demand a series of additional requirements that, needless to say, are not only prohibited but also place an undue burden on women. For example, we have found that the following is being commonly required: forensic medical examinations, judicial orders, medical examinations and authorisations of family members, legal advisers, medical auditors or a plurality of doctors. The illegitimacy of these requirements is of grave concern, considering that they are imposed due to the misconception that the service providers themselves have the power to behave as judges requesting evidence, taking declarations, questioning and judging women. In many cases, we have seen that this behaviour is accompanied by accusations by the service providers that the women are lying, immoral and guilty of criminal behaviour, as excuses for denying the provision of abortion.

### **1.4 Interference with women's consent**

Constitutional jurisprudence clearly states that free and informed consent is an indispensable prerequisite to any medical treatment. Informed consent includes the physician's obligation to explain in understandable language, the relevant information about the benefits, risks and objectives of the treatment; the patient's consent must never be obtained by offering inaccurate information. Nonetheless, we have information that doctors are not complying with these obligations when women request abortions. Medical providers often exaggerate the risks; minimise the benefits; give subjective and unsolicited opinions; threaten the

women with criminal sanctions or actually denounce them to the police – breaking confidentiality – and pass moral judgement, all with the purpose of persuading the woman to decline her legal right to interrupt her pregnancy.

### **1.5 Obstacles for women raped within the armed conflict**

According to decision C-355/06, women who become pregnant as a result of rape need only to present a copy of the police report in order to get a legal abortion. Furthermore, the Court specifically detailed what cannot be asked of women under this circumstance and this list included: forensic evidence of actual penetration or evidence to establish lack of consent to the sexual relationship. Nor can anyone require that a judge or a police officer find that the rape actually occurred; or require that the woman obtain permission from, or be required to notify, her husband or her parents.

Even though it might seem that only requesting the copy of the police report is reasonable, we have found through our monitoring and mapping work that women who have been raped by armed actors have real reasons to fear for their life or integrity when reporting the rape to the police. Therefore they are trapped. We have identified that these cases occur more often in regions where rape is used as a weapon of war, as is also documented in Amnesty International's (2004) fact-finding report *Scarred Bodies, Hidden Crimes: Sexual Violence Against Women in the Armed Conflict*.

### **1.6 Disregard for the consent of girls under 14 years old**

The Constitutional Court has emphatically stated that age alone cannot be used as a criterion to determine whether or not minors can consent to medical procedures. In the case of abortion, it further indicated that any measure that disregards the consent of girls under the age of 14 is not only unconstitutional but also counterproductive. The Ministry's regulation effectively ignored the constitutional jurisprudence and gave more weight to the 1981 legal norm that stated that minors require their parent's consent for all medical procedures. This has created a lot of confusion around the issue because service providers do not know whether they should comply with the Ministry regulation or follow the Court's holding. A meeting with the Ministry was called to discuss the

elimination of the parental consent requirement in July 2007. While the Ministry has not taken any action on this front, we identified through our mapping and monitoring work, a *tutela* claim that was filed by a girl under the age of 14. This *tutela* reached the Constitutional Court and was selected for review. We are closely monitoring the outcome of this claim, which might put an end to the confusion on the issue of the parental consent requirement for girls aged under 14.

### 1.7 Discrimination against women and medical professionals who undergo or practise legal abortions

The government regulation bans discriminatory practices based on the provision or demand of abortion services. The ban includes the prohibition to request information from women, service providers (conscientious objectors or not) or institutions on whether or not they have performed or have undergone an abortion.<sup>6</sup> We have identified some cases that blatantly ignore this prohibition. Women also face discrimination, not only within the health system as described above, but also within their communities.

Another aspect of this concern is the discrimination and harassment suffered by doctors who follow what the new law mandates, respect women's dignity and their right to safely interrupt a pregnancy. In some cases, they are harassed by colleagues or supervisors who disagree with the practice. Women's Link is aware of the importance of having doctors feel supported by the new law and has been monitoring these situations in order to identify if an appropriate case is documented that could be litigated in order to set a precedent on this front.

### Notes

- \* This article has also been published in the Women in Action 2008 issue, *Abortion Battles*, prepared by ISIS International-Manila, [www.isiswomen.org](http://www.isiswomen.org) (accessed 18 March 2008). It is reprinted here with thanks.
- 1 Women's Link Worldwide is a network that collaborates with women's rights and human rights groups in Western Europe and Latin America to foster the implementation of international law and the use of international tribunals to advance women's rights, providing technical support and guidance ([www.womenslinkworldwide.org](http://www.womenslinkworldwide.org)).

### 1.8 Unjustified waiting periods or medical board approvals

Decree 4444 of 2006 establishes that unjustified waiting periods, or medical board approvals represent '*administrative barriers that unnecessarily delay*' the provision of abortion services. Nonetheless, these actions are being routinely practised by all kinds of service providers, creating an obstacle to women to obtain timely service. According to Article 5 of resolution 4905 of 2006,<sup>7</sup> 'timely' is defined as within five days from the time the service is requested.

### 2 Challenges ahead

Women's Link is not the first nor the only organisation working towards the liberalisation of abortion and its materialisation as a woman's right. Our guiding principles and expertise on strategic litigation are directing the role we play during the implementation stage. The challenge we face now is to ensure the judicial and disciplinary accountability of those in charge of providing or ensuring the service through strategic litigation and precedent setting.

Women's Link is honoured to have been an integral part of the historic decision to liberalise abortion in Colombia. As is incumbent upon any activist organisation involved in social change, we are now closely following the new legal and social climate as it relates to abortion. We are also working with other organisations and with service providers and government agencies to ensure that the reproductive rights of all women in Colombia are respected and enforced.

- 2 For more information on the LAICIA project, including a video about the process, the text of the decision and other relevant documents visit [www.womenslinkworldwide.org/prog\\_rr\\_laicia.html](http://www.womenslinkworldwide.org/prog_rr_laicia.html) (accessed 17 March 2008).
- 3 The National Government through the Ministry of Social Protection enacted a complete set of decrees and guidelines regulating the provision of voluntary interruption of pregnancies. Find the full text of these legal documents (only in Spanish) at [www.womenslinkworldwide.org/prog\\_rr\\_colombia.html](http://www.womenslinkworldwide.org/prog_rr_colombia.html) (accessed 17 March 2008).

- 4 A *tutela* claim is an expedite and extraordinary procedure that can be filed before any judge in the country by an individual whose constitutional rights are being violated and there is no other legal action that can offer protection.
- 5 Colombian Constitutional Court, decision T-171/07, 9 March 2007, Chamber composed by Jaime Córdoba Triviño, Marco Gerardo Monroy Cabra and Rodrigo Escobar Gil.
- 6 Colombia, Ministry of Social Protection, Governmental Decree 4444 of 2006, Article 6 (in Spanish only) at [www.womenslinkworldwide.org/pdf\\_programs/es\\_prog\\_rr\\_col\\_legaldocs\\_decreto4444.pdf](http://www.womenslinkworldwide.org/pdf_programs/es_prog_rr_col_legaldocs_decreto4444.pdf) (accessed 17 March 2008).
- 7 Colombia, Ministry of Social Protection, Resolution No. 4905 2006, Article 5 (in Spanish only) at [www.womenslinkworldwide.org/pdf\\_programs/es\\_prog\\_rr\\_col\\_legaldocs\\_res4905.pdf](http://www.womenslinkworldwide.org/pdf_programs/es_prog_rr_col_legaldocs_res4905.pdf) (accessed 17 March 2008).

### Reference

Amnesty International (2004) *Colombia: 'Scarred Bodies, Hidden Crimes': Sexual Violence Against Women in the Armed Conflict*, [www.amnesty.org/en/library/info/AMR23/040/2004](http://www.amnesty.org/en/library/info/AMR23/040/2004) (accessed 17 March 2008)