

TaLkingPoiNts

# Ensuring **Reproductive Rights** in Colombia: From **Constitutional Court** success **to reality**

*Issues and challenges in the implementation of the new abortion law<sup>1</sup>*

by **Mónica Roa**

*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. The project on High Impact Litigation in Colombia for the Unconstitutionality of Abortion<sup>2</sup> 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 the historic decision.*

Colombian presidential palace,  
Casa de Nariño.

Photo from Wikimedia Commons





*Women wearing masks marching on the streets in support of abortion. Together they asserted, "I decide"—women's right to control their bodies.*

Photo by Women's Link Worldwide

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>3</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 is premised on the importance of closely monitoring the acceptability of any new major legal change among 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. Thus, Women's Link initiated a series of activities in Colombia to follow up 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.

## **MAIN 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. To date, we have identified the following to be the major impediments to women's full enjoyment of their right to safe and legal abortion:

### ***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 as well as the regulations of the Ministry.<sup>4</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 in trying to address this issue by several actors. Many women's 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

A pro-abortion rally in Bogota in September 2005.

Photo by Women's Link Worldwide



leaflets, flyers, and posters with information on legal abortion.

Grassroots organisations have organised talks and seminars on the issue in different parts of 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 reproductive rights, including the right to voluntarily interrupt a pregnancy. The campaign was launched in December

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, not institutions, could be conscientious objectors. However, we have learned that institutions have been informally exploiting this instrument. This practice takes on many forms such as: (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 an identical document for each doctor, all of them with the same considerations and format; and (3) they simply tell women that the institution does not provide such services because it goes against institutional vision and values.



Conscientious objection is an exemption from 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.

2007. It includes TV, radio, and press advertisements together with a toll free number where operators are available to provide information and guidance.

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

Conscientious objection is an exemption from the duty to comply with

Moreover, the obligations ordered by the Court in defining the right to abortion are completely neglected. For instance, the obligation of conscientious objectors to refer women to other doctors who can provide the service is routinely violated. Similarly, doctors who are civil servants working in public medical facilities ignore the fact that, legally, they cannot be conscientious objectors. Further, the Court specified



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.



*A rally in Bogota.*

Photo by Women's Link Worldwide

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 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 health care system. The health care system in Colombia is divided into numerous jurisdictions by location and by levels of services at each location.

According to the new framework, abortion services should be made available at all types of health care institutions according to gestational age. This report was due in August 2007 and, thereafter, reports should be submitted quarterly. But we are still waiting for 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>5</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 a health institution. The judge issued a vehement argument, indicating he could not decide on the case because of his religious beliefs. The *tutela* was finally denied and was then reviewed by the Constitutional Court.

It came to Women's Link's attention because it is one of the first cases on abortion decided after the liberalisation of the abortion 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 that reviewed it said the case was moot, thereby ignoring the issue of judicial conscientious objection.<sup>6</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. Recently, we learned about one pending case under review by the Court involving this same issue of judicial conscientious objection. We are monitoring it closely and putting forth a number of the arguments so that the judges and the public will realise the centrality of addressing this issue in a modern democracy.

#### ***Requesting of requirements in addition 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,



Decision 355/06 provides that women who become pregnant as a result of rape only need to present a copy of the police report in order to get legal abortion. Though this may sound reasonable, our monitoring and mapping work reveal 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.

or the police report documenting sexual violence in cases of rape or incest.

Furthermore, the Court specifically detailed what cannot be asked of women survivors of rape, including forensic evidence of actual penetration or evidence to establish lack of consent to the sexual relationship; requiring a judge or a police officer to determine if rape actually occurred; or requiring the woman to obtain permission from, or be required to notify, her husband or her parents.

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 are commonly required: forensic medical exams, judicial orders, medical exams and authorisations of family members, legal advisors, 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. We have seen in many cases that this behaviour is accompanied by accusations of service providers that the women are lying, immoral, and guilty of criminal behaviour, all of which serve as excuses to deny the provision of abortion.

#### *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 do not comply with these obligations. 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, thereby breaking confidentiality; and pass moral judgement, all with the purpose of persuading the woman to decline her legal right to interrupt her pregnancy.

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

Decision 355/06 provides that women who become pregnant as a result of rape only need to present a copy of the police report in order to get legal abortion. Though this may sound reasonable, our monitoring and mapping work reveal 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 found out 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 fact-finding report "*Scarred Bodies, Hidden Crimes: sexual violence against women in the armed conflict.*"<sup>7</sup>

***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 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 an under-14 girl. 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 under 14.

***Discrimination against women who undergo abortion and medical professionals who provide legal abortion***

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>8</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. It has been monitoring these situations in order to identify an appropriate case that can be litigated to set a precedent in this front.

***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>9</sup>, “timely” is defined as within 5 days from the time the service is requested.

## CHALLENGES AHEAD

Women’s Link is not the first nor the only organisation working towards the liberalisation of abortion and its realisation 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 honored 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. ■

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### Endnotes:

- 1 This article has also been published in the IDS Bulletin, issued by the Institute of Development Studies.
- 2 Known as LAICLA, based on its Spanish name
- 3 For more information on the LAICLA project, including a video about the process, the text of the decision and other relevant documents visit, [http://www.womenslinkworldwide.org/prog\\_rr\\_laicia.html](http://www.womenslinkworldwide.org/prog_rr_laicia.html)
- 4 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) [http://www.womenslinkworldwide.org/prog\\_rr\\_colombia.html](http://www.womenslinkworldwide.org/prog_rr_colombia.html)
- 5 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 not other legal action that can offer protection.
- 6 Colombian Constitutional Court, decision T-171/07, 9 March 2007, Chamber composed by Jaime Córdoba Triviño, Marco Gerardo Monroy Cabra, and Rodrigo Escobar Gil.
- 7 Amnesty International (2004) Colombia: “Scarred bodies, hidden crimes: Sexual violence against women in the armed conflict.” Retrieved on 17 March 2008 <<http://www.amnesty.org/en/library/info/AMR23/040/2004>>
- 8 Colombia, Ministry of Social Protection, Governmental Decree 4444 of 2006, article 6 (in Spanish only) may also be accessed in Women’s Link Worldwide, [http://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)
- 9 Colombia, Ministry of Social Protection, Resolution No. 4905 of 2006, article 5 (in Spanish only) at [http://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)