

The production of expert knowledge as a key tool in the implementation of legal abortion in Colombia

La producción de conocimiento experto: un eje central en la implementación del aborto legal en Colombia

A produção de conhecimento especializado como eixo central na implementação do aborto legal na Colômbia

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In 2006, the Constitutional Court of Colombia decriminalized abortion under three circumstances (Ruling C-355), allowing Colombian women to request an abortion when there was a risk to their life or health, when there was a severe fetal malformation (in both cases certified by a physician), or if the pregnancy had resulted from rape, in this case reported to the judicial authorities ¹ (La Mesa por la Vida y la Salud de las Mujeres. <http://despenalizaciondelaborto.org.co/nuestros-estudios/>, accessed on 04/Jul/2019).

Since then, various civil society organizations and government agencies in charge of enforcing this ruling have carried out multiple actions and strategies. The State's role has featured the production of a supportive regulatory framework for abortion, with participation by at least three key spheres: the Ministry of Health, which issued a protocol in 2014 for the prevention of unsafe abortion after various previous rules had been overturned due to administrative flaws (such as Decree 4444 2006, overturned by the State Council) ²; the National Health Superintendency, issuing External Memorandum n. 3 in 2013 ³; and the Federal Comptroller's Office, issuing Memorandum 0006 in 2016 ⁴. The work by civil society features the Panel for Women's Life and Health (La Mesa por la Vida y la Salud de las Mujeres – La Mesa), an organization that has mobilized since 1994 for full legalization of abortion in Colombia, one of whose strategic actions has been the development of tools for the adequate interpretation and application of the grounds for abortion (exceptions or indications) created by the Constitutional Court. This original work gave rise to a unique interpretation, different from that of the Constitutional Court (<https://derechoalaborto.com/conoce-las-sentencias/sentencia-t-532-de-2014/> accessed on 04/Jul/2019, which exists in the country concerning health grounds for abortion and which has served to expand the enforcement and thus improve the implementation of legal abortion ⁵.

In addition to this strategy, which the literature analyzes as the production of expert knowledge ⁶, the Panel for Women's Life and Health (La Mesa) also conducts follow-up and counseling for women that have suffered barriers to access to the service. This has served to propose solutions to actual problems, fostering changes in the policies and regulatory frameworks and/or awareness-raising campaigns on abortion.

Our article focuses on the strategy for the production of expert knowledge, signaling some of the barriers and the prospects for advancing the legal abortion agenda in Colombia.

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Health grounds: a pioneering experience

With extensive input from La Mesa, but within the scope of joint work with the National Alliance for the Right to Decide (consisting of Catholics for the Right to Decide; Gender Equity, Citizenship, Work, and Family; Information Group on Elective Reproduction – GIRE; IPas Mexico and Population Council Mexico), since 2008 Latin America experienced a movement for the implementation of “grounds” for abortion. Before such grounds were stipulated by the Colombian Constitutional Court, they were already in force in many other Latin American countries, but this did not necessarily translate as women’s real access to legal abortion services. In addition, countries like the United Kingdom had already adopted the same grounds that had been decriminalized in Colombia, but in the UK, this had already led to wider access to abortion ⁷.

Such action involved producing authoritative arguments based on the international human rights framework, making health services operators the interpreters of a comprehensive version of the right to health, interrelated with other rights (life, autonomy, liberty, free development of personality), meaning that individual protection involves more than maintaining life in the biological sense, since health is related to wellbeing, social determinants of health, and each woman’s chosen life project ⁶.

The arguments produced in this consensus relate to three aspects: (i) the human rights framework, emphasizing interpretations of the right to health, its interrelationship with other rights, and the criteria to apply and interpret or resolve conflicts between rights; (ii) key concepts for medicine, especially including questioning of notions such as risk or probability; and (iii) ethics, including such underlying principles as nonmaleficence and beneficence when claiming grounds for abortion ⁷.

We provide some examples of such interpretations that have been new for health services providers, based on which it was possible to apply grounds with a pedagogical effect.

(a) According to the human rights framework, health is a comprehensive state of well-being, interdependent with the rights to life, autonomy, liberty, information, and the right to freedom from cruel, inhuman, and degrading treatment, among others. Thus, the protection of health extends beyond the protection of biological life and encompasses social determinants and each woman’s life project.

(b) The definition of the existence of an effect on health or a risk to health cannot be limited to the risk of death, but should be established on the basis of such aspects as the possibility of the risk’s presence, or considering vulnerability factors that can appear at any stage in the pregnancy. The claim to health grounds for abortion proposes not a closed list of health conditions, but a broad set of situations in which health grounds can apply, called operative categories.

(c) In cases involving potentially conflicting legal provisions, the health professional is bound to the broadest interpretation when it involves protecting rights and to the most restrictive interpretation when it involves prohibitions, following the pro persona principle.

The dissemination of the wider interpretation and application of health grounds in Colombia has been intense, based on a wide set of materials that express their principal contents for women in general and for health system operators and the legal system in particular. This has involved training more than 2,000 health professionals in 15 cities of the country from this perspective. Meanwhile, these arguments have been included in various instruments or levels in other countries, ranging from the development of protocols of care or health regulations in Argentina to health personnel training in Peru and the revision of the Penal Code in Mexico, besides debates on strategies pertaining to health grounds in regional congresses promoted by the Latin American Consortium Against Unsafe Abortion and the Latin American Legal Congress on Reproductive Rights ⁸.

Barriers

A barrier is any conduct which by action or omission constitutes a limitation or obstacle to women’s timely access to legal abortion services. Such barriers are counter to the parameters laid out by the Constitutional Court and are translated in practice as the refusal or reluctance to perform abortion by services providers, involving a violation of women’s fundamental rights (<https://derechoalaborto.com/conoce-las-sentencias/sentencia-t-532-de-2014/>). The legal aid work by La Mesa has served to

identify the principal barriers faced by Colombian women when requesting an abortion⁹. These have to do with three issues:

(a) Ignorance of the jurisprudence, related mainly to lack of information on (and familiarity with) the prevailing legal framework and the duties stemming from it: 73.7% of the cases received by La Mesa have involved lack of information on Ruling C-355.

(b) Restrictive interpretation of the legal framework, related to an erroneous understanding of the country's prevailing regulatory frameworks, especially the constitutional jurisprudence: 21% of the cases received by La Mesa claim advanced gestational age as an impediment to performing the abortion, although no such limit exists in Colombia.

(c) Failures in the provision of services, associated with acts or attitudes by health services employees and providers that fail to comply with their duty to guarantee safe access: 10% of the women counseled by La Mesa experience violence and abuse by health personnel when requesting an abortion.

The impact of the legal grounds for abortion in the enforcement of Ruling C-355

Colombia has witnessed changes in the interpretation of health grounds by operators in the health sector and legal system. According to data, starting in 2009, health grounds were increasingly claimed when requesting abortion services and are now the leading cause for performing legal abortions in Colombia. Data from two of the country's most important providers of sexual and reproductive health services confirm the growing trend in the use of health grounds. In the case of Fundación Oriéntame, in 2006, health grounds accounted for 28% of the cases (out of a total of only seven cases), while by 2011 (4,066 cases) and 2015 (8,897 cases), health grounds accounted for more than 99% of the legal abortions. There has been a similar trend with Profamilia, which performed zero legal abortions in 2006, while from 2011 to 2015 the proportion of abortions on health grounds varied from 98% to 100%. In other words, comparing the three permissible circumstances for abortion, the vast majority correspond to health grounds (Profamilia. Informe Profamilia marzo 2016. https://profamilia.org.co/wp-content/uploads/INFORME_PROFAMILIA_2016_VERSION_MARZO_16.pdf, accessed on 04/Jul/2019).

This same trend is seen in the information gathered by La Mesa, whose database includes more than a thousand cases of women that have faced barriers to abortion, and that have been counseled directly by this organization's team to help them deal with such barriers. Of all the women counseled, 74% requested abortion on grounds of risk to the woman's life or health, 14% on grounds of rape, and 9% due to fetal malformations.

Towards full enjoyment of rights

The strides made in the years since legal grounds for abortion have existed in Colombia range from increased access to services for legal, timely, and safe abortions, including increased knowledge and claims of health grounds, to training for health services providers, judges, and women's groups in different regions of Colombia. Other strides include a highly comprehensive set of new jurisprudence, where actors such as La Mesa have played an important role. Still, the barriers described above confirm that the implementation has not been easy and that the State continues to fail in all dimensions of the right to health: accessibility, availability, quality, and acceptability of health services to guarantee abortion under the terms established by the Constitutional Court.

In this context, it is clear that the process of construction and expansion of the interpretation of grounds for abortion and the dissemination of such interpretation's contents have served to back efforts for their enforcement and to achieve women's empowerment, while safeguarding against possible backstepping in legal abortion. The process has especially served to support efforts for the full legalization of abortion in Colombia by revealing the prevailing model's limitations. In a country that has made enormous progress towards peace, it is urgent to put women's full inclusion and rights at the center of the agenda in order to avoid their suffering and guarantee their self-determination. Such a

challenge requires eliminating the crime of abortion from the Penal Code, without further delay and with no further excuses.

Additional information

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