

# ***Colombia: The Tyranny of Rights Language***

## **I. IN SHORT . . . WHAT WE FOUND**

### ***A. Opportunities***

#### 1. THE TRIUMPH OF “SPIRIT OF THE LAW” ARGUMENTS

The decisions of the Colombian high courts require that the law is understood, in both text and practice, as a concrete response to social dynamics and that it promotes the achievement of justice in factual situations, rather than abstractly through the text of laws or jurisprudence.

The Constitutional Court has been the most active advocate for actual over theoretical justice and has led the way for judicial intervention through the mechanism of *tutela*. This has improved access for traditionally marginalized sectors to the justice system. Additionally, the court’s interpretation of rights has helped change established and harmful practices in Colombian society.

The Supreme Court has been consistent in its progressive interpretation of elements in sexual violence crimes. It has also established that the sexual life of a victim is irrelevant in determining whether her sexual freedom has been violated in cases of alleged abuse, that the testimony of minors should be considered and that it is not necessary to identify excessive physical injuries in order to prove that a victim resisted attack. The Council of State has recognized the inequality women experience in the matter of reproduction and has required that employers equally apply general labor laws. As a result, the Council has recommended that just as pregnant women may be fired for their incapacity to work, workers in the administrative sphere, including contract-at-will employees, should be held to similar standards of labor.

## 2. THE BENEFITS OF *TUTELA* AND THE PUBLIC ACTION FOR UNCONSTITUTIONALITY

*Tutela* and the public action for unconstitutionality have been key tools in the advancement of protections for sexual and reproductive rights. As can be seen in the decisions outlined below, these two mechanisms not only have allowed debate on issues related to health and reproduction, but also have permitted any citizen, and specifically marginalized groups, to utilize the judicial system to advance his or her demands for justice.

*Tutela*, as it was designed and as it has been understood by judges, has had the advantage of offering relatively rapid solutions for situations that do not permit delay. Further, it has led to a constitutional reconceptualization of cases that not only has broadened rights but also has made them more accessible to the majority of the population.

In the case of a pregnant woman who had not received her wages the judges stated:

*Due to the special circumstances (of the plaintiff), and specifically her pregnancy, united with the administration's non-payment of wages, it would not be fair to deny tutela for her right to demand opportune payment of her wages, thus remitting her to ordinary judicial or governmental routes, prolonging an irregular situation, while the labor court decides the case, and among other reasons, because during pregnancy and after birth women should enjoy the special protection of the state.<sup>148</sup>*

## 3. VICTORIES

A study of the jurisprudence reveals a clear tendency of the Constitutional Court to **protect reproductive autonomy**, particularly the decision to become a mother, which is often fraught with social stigma and is pursued despite the economic difficulties that maternity regularly implies. An analysis of the jurisprudence also reveals a protection of **sexual autonomy** and the decision not to become a mother, especially when this decision is made

in response to sexual violence, and pressures relating to gender identity and sexual orientation.

In the case of minor who was a hermaphrodite, the court decided to suspend the treatment set up by the parents until the minor could choose to which gender she wanted to belong. The court stated:

*[...] at the basis of every existence there is a core inaccessible to the rest, and sex forms a part of this core, or primary quality, or essence. Sex constitutes a permanent element of the identity of a person and only that person, with full understanding and [having been] duly informed, can consent to the readjustment of sex, and even “gender,” as the doctors say, because man cannot be the plaything of depersonalized experiments, nor can his identity be disfigured so that the outline which lives within is made to the idea of gender that some doctors determine, with the excuse that it was the “the least wrong choice.”<sup>149</sup>*

Equally clear is the decision of the court to **eradicate differences** between women due to **civil status**, to prevent continued gender stereotypes in the **professional and work spheres**, and to **support proactive interventions** that accelerate the processes of social change related to gender.

*[...] different treatment is legitimate when it is linked in a significant manner to obtaining an end of constitutional importance.<sup>150</sup>*

The Supreme Court has **successfully introduced the perspective of women** in its reading of **sexual violence** laws.

*Leaving aside the actual reasons for sex work (and it has not been proven here whether Laura Cristina is or has been a sex worker), the court should respond to such a reproach that it is basic legal understanding that the argued modus vivendi does not affect, by itself, the freedom to decide matters of sexuality. That is to say, that for a sex worker, more than others, said liberty should be respected, under pain of which the state, through its legal system, punishes, irrespective that the state itself, by the conduct of the legislator, has elevated to the*

*status of a crime.*<sup>151</sup>

**Labor protections** for pregnant women have increased in the Council of State.

## **B. Limitations**

### 1. WHEN THE LETTER IS THE LIMIT

Although the Colombian courts generally tend to support the implementation of justice over a theoretical meditation on justice, they continue to render a strict interpretation of the constitution in cases related to homosexual couples. In such cases they have asserted that the only possible interpretation of the constitution is one that excludes homosexuals from entering into the state of matrimony or domestic partnership. At the same time, the Constitutional Court has omitted the constitution's explicit guarantee of the right to choose the number and spacing of children from its recent rulings on abortion, thereby leaving the right to reproductive autonomy unprotected.

### 2. WHEN THE SPIRIT OF THE LAW IS THAT OF THE DOMINANT RELIGION

Antiformalism, or the broad and flexible interpretation of the law, can be problematic when all of those interpreting the law are not progressive. In the case of the Colombian Constitutional Court, religious arguments have played an important role in limiting the possibilities of obtaining protection for negative reproductive autonomy, reinforcing gender stereotypes that exalt motherhood as the only role that dignifies women regardless of the circumstances under which she becomes pregnant, including rape. In its most important decision on abortion to date, the court based its interpretation of constitutional rights on the Papal Encyclicals "Humane Vitae" and "Evangelium Vitae."<sup>152</sup>

*[...] the transmission of the life of a human being dignifies and exalts the mother. No one can call a woman wrong who, although*

*having been raped, finds herself pregnant as a consequence of the rape, and decides to give birth.*<sup>153</sup>

### 3. THE PROBLEM OF EXCESSIVE CONSTITUTIONALIZATION OF THE LEGAL DISCOURSE

It is important to recognize the limits and benefits of the *tutela* and claim of unconstitutionality. *Tutela*, which is a very effective way of resolving an emergency situation, does not correct structural flaws that impede access to justice for marginalized groups. These structural flaws are evidenced by the almost complete absence of rulings by the Supreme Court of Justice and the Council of State on the majority of the issues discussed, and the fact that ordinary procedures are too slow and too limited. Furthermore, in *tutela* the powers of judges are severely limited; in general, they cannot order compensation<sup>154</sup> or payment of benefits.<sup>155</sup>

The claim of unconstitutionality, on the other hand, functions on the most theoretical plane of the legislative system, sometimes repealing laws and at other times creating them, but always establishing a means for a legal interpretation within constitutional limits. Similar to laws made by the congress, the decisions in these cases do not have immediate impact because they are general, theoretical and not applicable to specific cases.<sup>156</sup>

Constitutional limits point to the necessity of expanding the judicial discourse to all jurisdictions, not only through procedural reforms that permit the acceleration of judicial intervention but also through the adoption and application of positive developments regarding rights that are debated through normal procedures.

#### ***C. The Road Still Ahead***

In spite of the clear advantages that the Colombian legal system offers in terms of the protection of sexual and reproductive rights, the road ahead is still long. Regarding **reproductive autonomy** it is important to note the silence of the Constitutional Court in matters of economic protection for fer-

tility treatments and sterilization, and the absolute lack of protection for the decision to interrupt an unwanted pregnancy. Furthermore, the court has failed to recognize economic, social and cultural rights, particularly the right to health, as fundamental rights that can be demanded from the courts.

*[...] [O]bviously, for reasons that touch on the situation of underdevelopment or crisis which nations go through together, it is impossible to think that the state or society can satisfy all and every social, economic or cultural necessity of individuals and groups.*<sup>157</sup> (From the decision on fertility treatments.)

Regarding sexual autonomy, there is an almost complete lack of debate on sexual harassment. The decisions of the Supreme Court of Justice on the subject are precarious and, contrary to decisions by the same court on “carnal access,” **require high evidentiary standards**. Sexual orientation has only been protected as a private option that is tolerated but not socially supported. Likewise, the decision on sexual identity offers protections in cases involving children but marginalizes this decision as a private matter to be barely tolerated in the case of adult transvestites.

## II. TENDENCIES IN JUDICIAL INTERPRETATION

### A. *The Judicial System*

#### 1. THE JUDICIAL BRANCH

The **judicial branch** is divided into **four jurisdictions**: ordinary,<sup>158</sup> administrative law,<sup>159</sup> constitutional,<sup>160</sup> and the indigenous branch.<sup>161</sup> Each of the first three has a court as its highest body of jurisdiction: the **Supreme Court of Justice**,<sup>162</sup> the **Council of State**,<sup>163</sup> and the **Constitutional Court**, respectively.<sup>164</sup> The magistrates of the first two are **elected** by members of the corresponding court from a shortlist of three candidates submitted by the Superior Council of the Judiciary,<sup>165</sup> the body charged with the administration and disciplinary control of the judicial branch.<sup>166</sup> The judges of the Constitutional Court are elected by the senate from shortlists of

three candidates sent by the president of the republic, the Supreme Court of Justice and the Council of State.<sup>167</sup> The **indigenous jurisdiction** is composed of the joint group of authorities that administer justice in each indigenous community.<sup>168</sup>

## 2. SOURCES OF LAW

The legal system recognizes the supremacy of the constitution<sup>169</sup> and its place as the **principal source of legislation**.<sup>170</sup> **Custom** is also explicitly recognized as a source of law in cases where there is no direct applicable law, as well as in cases in which the law expressly refers to it.<sup>171</sup> International treaties have validity internally as laws of the republic,<sup>172</sup> except when there are treaties and international conventions on **human rights** that take precedence over national laws and therefore serve as a basis of interpretation of constitutional laws.<sup>173</sup>

According to the general rule established in the constitution, **judicial decisions** are merely additional criteria for the interpretation of laws<sup>174</sup> and are only binding on the parties. **Exceptions to this rule** include the following: decisions of the Constitutional Court on public actions for unconstitutionality whose adjudicatory part<sup>175</sup> and central arguments have general effects;<sup>176</sup> decisions of the Constitutional Court in which constitutional doctrine is established and should be applied by all judges in their decisions;<sup>177</sup> decisions of the Council of State that review the constitutionality of administrative acts (*acciones públicas de nulidad*);<sup>178</sup> and decisions of the Supreme Court and the Council of State on the same, and on lower-court judges.<sup>179</sup>

## 3. CONSTITUTIONAL REVIEW

The **supremacy of the constitution** is guaranteed by actions, exceptions, and the constitutional review established by the constitution for statutory laws<sup>180</sup> and laws approving international treaties, presidential objections to bills approved by the congress, and presidential decrees issued during one of the states of exception (i.e. state of emergency or state of war, etc.).<sup>181</sup> **Any citizen** can appear before the Constitutional Court to solicit a review **of the constitutionality of a law** for reasons of “spirit” or “letter” of the law,

called *acción pública de inconstitucionalidad*.<sup>182</sup> Citizens can also appear before the Council of State for the legality and constitutionality of general administrative acts, called *acción pública de nulidad*.<sup>183</sup> In **any judicial proceeding, the non-application of a law** can be solicited on the grounds of contravening the constitution, called *excepción de inconstitucionalidad* (exception for unconstitutionality).<sup>184</sup>

#### 4. MECHANISMS FOR THE PROTECTION OF RIGHTS

In addition to ordinary actions established by legislation, the constitution establishes *tutela*, *acciones populares* (popular actions) and *acciones de cumplimiento* (actions for compliance) for the protection of constitutional rights. A **petition for *tutela***<sup>185</sup> can be presented by a person who believes that his or her fundamental rights<sup>186</sup> have been violated or who has been threatened by a **public authority or, in some cases, by a private citizen**. *Tutela* can be brought against a private individual when a person is in a situation of subordination or is defenseless; when the threatened or injured right is the right to not be subjected to slavery, servitude or trafficking in persons; when the individual is in charge of the provision of health services, education or any domestic service; when protection of the right to *habeas data* is sought; and when the request for rectification of information has not been heeded.<sup>187</sup> *Tutela* can be presented before **any judge** where the events occurred<sup>188</sup> and through **any channel**.<sup>189</sup> It should be resolved within ten days after the petition is filed.<sup>190</sup> However, the petition can proceed only when the petitioner **has no other judicial remedy**<sup>191</sup> or when the *tutela* is necessary to prevent **irreparable harm**.<sup>192</sup>

**Actions for compliance** can be presented by any person before a court of the administrative law branch when it is believed that a public authority has not implemented a provision of the law or an administrative act.<sup>193</sup> **Popular actions** are intended to protect collective rights.<sup>194</sup> They can be presented by any person before an administrative judge, or if there are no administrative judges in the jurisdiction where the events occurred, before a circuit judge.<sup>195</sup>

## ***B. Decisions on Sexual and Reproductive Rights***

### 1. THE RIGHT TO HEALTH AND TO REPRODUCTIVE HEALTH

**Constitution:** “Art. 49. Health and sanitation services are public services in the charge of the state. All people are guaranteed the services of promotion, protection, and recuperation of health. [...] The law outlines the conditions under which basic services will be free and obligatory for all inhabitants.”

**See also:** Law 100 of 1993, decree 1938 of 1994, Ministry of Health Resolution 8430 of 1993.

The Constitutional Court protected the **right to health** as a **right to choose** and as a **right to access a service** when it found that the required service is **related** to the individual’s right to life, personal integrity or dignity.<sup>196</sup> In the same way it found that a woman’s decision to **choose whether or not to undergo treatment for cancer**, should be made by her. The court refused to issue an order requested by a woman’s siblings when the woman refused to continue with her treatment.<sup>197</sup> Likewise, it found that **individuals living with HIV** who cannot pay for the drugs necessary to live a dignified life, have the right to **free provision** of the drugs either from the state or individuals, depending on their health insurance.<sup>198</sup> If it is possible to identify the **person who knowingly transmitted the infection**, that person can be obligated to assume the costs of treatment.<sup>199</sup>

#### *Right to Reproductive Health*

On the other hand, the court **has refused** the request that basic health plans include coverage for **fertility treatments<sup>200</sup> and sterilization,<sup>201</sup>** finding that these services are not related to the right to health, personal integrity or human dignity. Ironically, the court protected men’s right to health when it ordered health insurance companies to include obligatory coverage of Viagra, establishing that men’s sexual functions are of vital

importance and do form part of the right to a dignified life.<sup>202</sup>

In the case of fertility treatments, the court added that the **protection of motherhood** established in the constitution and international treaties only includes the obligation to provide for family planning, pregnancy, birth, and postpartum care. **For women who cannot conceive**, the state provides the option of adoption.<sup>203</sup>

The **Supreme Court of Justice and the Council of State** have recognized that sexual and reproductive functions are legally protected rights susceptible to injury and have ordered compensation for this specific injury. The former awarded compensation for damages to a worker who lost his sexual function in a work accident<sup>204</sup> and the latter forced the Social Security Institute to indemnify one of its users for damages caused to her sexual and reproductive health.<sup>205</sup>

*[The court ratified the decision of the Constitutional Court conceding compensation for moral damages related to psychological and emotional harm that the petitioner suffered from a work accident that caused] the loss of one of the most important vital functions of a human being, that being sexual activity.*<sup>206</sup>

*[The Council of State found that a patient who was left sterile by an error in a surgical procedure was] permanently physically and psychologically harmed as a woman and as a mother.*<sup>207</sup>

Unfortunately, this recognition of the importance of sexual and reproductive rights continues to be biased and sexist in its implementation: while there is protection for men's sexual health, there is limited protection for women's reproductive health.

## 2. THE RIGHT TO PHYSICAL INTEGRITY AND TO BE FREE FROM VIOLENCE

**Constitution:** "Article 12. No one shall be subjected to forced disappearance, torture, or cruel, inhuman or degrading treatment or punishment."

**See also:** Law 599 of 2000, law 294 of 1996 reformed by law 575 of 2000.

### *Sexual Violence*

The Constitutional Court recognized the seriousness of marital rape and found that it is a constitutional violation to establish lesser penalties for sex crimes when they take place between spouses, permanent domestic partners or individuals who have a child in common, because this reduction in penalties assumes a loss of the capacity for sexual self-determination once such relationships are initiated.<sup>208</sup> On the other hand, the court maintained the constitutionality of a minimum age of marriage of 12 years for women and a maximum age of 14 for the victim of the crime of “violent carnal access.” Also, the court interpreted the laws so that the husband of a minor under the age of 14 and over the age of 12 cannot be accused of committing the crime of violent carnal access because **the context of marriage implies that the girl has the freedom to decide matters of sexuality.**<sup>209</sup>

The **Supreme Court of Justice** has played a very important role in the area of sexual violence through its issuance of decisions that have challenged the stereotypes that generally accompany these crimes. For example, the court found that the victim’s lifestyle, whether the defendants were known to her and whether she had willingly accompanied them, are irrelevant in **determining consent for a sexual act**, because none of these factors can influence “*the freedom to decide matters of sexuality.*”<sup>210</sup> The court also found that the age of the victim is irrelevant in determining the credibility of her testimony, making it possible for the testimony of a minor to provide the only evidence of a crime.<sup>211</sup>

*[The testimony of the minor deserves full credibility because] in spite of the inaccuracies due to her young age and her ignorance of sexual matters, she explained with sufficient clarity so that the nature of the acts to which the accused subjected upon her are understood.*<sup>212</sup>

**Resistance**, as a demonstration of the lack of consent, need not be more than what might appear reasonable given the pressure wielded by the attacker.<sup>213</sup> For this reason, violent sex crimes can be concurrent with the crime of assault, when the violence exercised - either physical or psychological - is superior to that necessary from the point of view of an objective observer, given all of the extenuating circumstances.<sup>214</sup>

Unfortunately, these decisions have yet to influence the entire justice system. Law schools and activists have an important role to play in this regard.

The **Supreme Court of Justice** has also ruled on the subject of **sexual harassment**. The court protected the right to compensation for dismissal without just cause, but not the right to reinstatement, for employees fired for soliciting sexual favors from their subordinates<sup>215</sup> and for requiring sexual favors in exchange for improving their work conditions.<sup>216</sup> The court ruled that the employer must specify in the termination letter who the victims of the harassment were, along with the date and place of the events. Without this information, the dismissal is not considered to be valid. Similarly, neither is the cause for dismissal considered proven when the victims are asked to notarize their statements. In both cases referenced above, the evidence was sufficient for the purposes of establishing that the work atmosphere was not favorable for the reinstatement of the petitioning employee.

On the other hand, the court has established that **the Military Disciplinary Court does not have jurisdiction over sex crimes committed by members of the military** because these crimes can never be considered to have anything to do with military service, not even when the soldier's service and situation provide the opportunity to commit the crime.<sup>217</sup> In this type of crime the responsibility for the crime belongs to the defendant, but also to the state for the actions of its agents. On two occasions the **Council of State ordered the Colombian government to pay compensation to victims of sexual aggression by military personnel** based on a doctrine of state responsibility called *falla del servicio*.<sup>218</sup>

*Domestic Violence*<sup>219</sup>

The Constitutional Court found that creating an **independent crime of domestic violence** did not violate the constitution because it seeks to protect a legal right distinct from personal injury, and does not seek to replace this crime in order to reduce the assailant's punishment when the aggression takes place within the sphere of the family.<sup>220</sup> Further, the court found that the law violates the constitution because it assumes that the absence of the accuser in cases of domestic violence is **evidence of her desire to drop the charges**, a tactic that was established to encourage the parties to attend reconciliation hearings.<sup>221</sup> According to the Constitutional Court, this law is contrary to the mandate for the protection of the family because it overburdens the weakest members of the family and in this way reduces the state's ability to intervene to curtail the stronger members. The assumption here is that the victim's absence from the hearing is generally motivated by the aggressor's threats.

The **Supreme Court of Justice** found that when a woman who is in a situation of domestic violence kills her assailant, her punishment must be diminished due to her rage and intense pain, even if the provocation from her assailant has been building over time and does not occur solely at the time of the homicide.<sup>222</sup>

3. THE RIGHT TO EQUALITY AND TO BE FREE FROM DISCRIMINATION

**Constitution:** "Article 13. All persons are born free and equal before the law, receive the same protection and treatment from authorities and enjoy the same rights, freedoms and opportunities free from discrimination based on sex, race, national or family origin, language, religion, or political or philosophic opinion. The state will promote conditions for real and effective equality and adopt measures in favor of marginalized or discriminated groups. The state will especially protect those persons who due to their economic, physical or mental state are clearly in a disadvantaged position, and will punish the abuse or mistreatment committed against those persons."

“Article 43. Women and men have equal rights and opportunities. Women cannot be subjected to any type of discrimination. During pregnancy and after giving birth they will enjoy special assistance and protection from the state and will therefore receive support if they are unemployed or homeless. The state will especially support women heads of household.”

### *Sex Discrimination*

The **Constitutional Court** found that the laws invalidating the **marriage of an adulterous woman** and her accomplice,<sup>223</sup> the requirement that a marriage take place in the **home of the woman**,<sup>224</sup> and the prohibition on **working at night**, which mainly affected women,<sup>225</sup> violated the right to equality. In these three cases it found that the difference in treatment based on sex was not justified by achieving a desired end.

Likewise, it has found that the following cases violated the right to equality: when women were prohibited from enrolling in the only school that provides **training to become a cadet in the Navy**<sup>226</sup> because the changes necessary to admit women would be expensive; when women were **not hired for a position** for the reason of being a woman, and thus perceived as less capable, in spite of placing first in the entrance examinations;<sup>227</sup> when the social security administration **refused to enroll** a spouse or partner as a dependent;<sup>228</sup> when a woman was fired for not being able to work because she was undergoing fertility treatments;<sup>229</sup> when a man was fired from a **job perceived to be exclusively the province of women**, such as cleaning;<sup>230</sup> and when a man was prevented from being a “community father,” i.e. the person in charge of caring for the children of the community.<sup>231</sup> Similarly, the Council of State found that women could not be barred from the **voluntary firefighter** squad.<sup>232</sup> The courts found that these cases not only violate the right to equality, but also **reinforce stereotypes** about “appropriate” work based on gender.

In addition, the court has established justification for differential treatment based on sex in situations of affirmative action. For example, it found that the laws establishing a **pension system** favorable to women<sup>233</sup> and **quotas** requiring 30% representation of women in high-level positions in the public administration<sup>234</sup> are in accordance with the constitution. In both cases the court found that the **measures were not only effective** in achieving the elimination of the discrimination from which women have historically suffered, they were also **less costly** in terms of the violations of rights of others.

#### *Discrimination on the Basis of Sexual Orientation*

The Constitutional Court has found that it is contrary to the constitution to **impose disciplinary action** on students,<sup>235</sup> teachers<sup>236</sup> or members of the armed forces<sup>237</sup> for homosexual acts or for being homosexual. **Homosexual acts and being homosexual are protected by the right to sexual self-determination**<sup>238</sup> and consequently cannot be used as criteria for classification without implying discrimination. In the case of students and members of the armed forces, however, the court clarified that it is possible to impose disciplinary action for behaviors that, without belonging to any particular group, go against the standards of decency of the institution. For example, schools can prohibit students' use of make-up and high heels.<sup>239</sup> The armed forces can impose disciplinary action for sexual acts that take place in public, whether of a heterosexual or homosexual nature.<sup>240</sup>

In contrast, the court has found that refusing protection to homosexuals under the **domestic partnership** legislation,<sup>241</sup> including the possibility of adding a partner as a beneficiary for social security,<sup>242</sup> is not discriminatory because the constitution explicitly indicates that the family structure it protects is "constituted by the decision of a man and a woman."<sup>243</sup>

#### *Discrimination on the Basis of HIV Status*

The Constitutional Court has found that the dismissal of a worker due to his HIV status was **without effect**, the **right to not be fired for this reason is paramount**, and any transaction related to it is invalid.<sup>244</sup> However, the

order of reinstatement should only be given if the worker desires it and if the work atmosphere will be conducive to the reinstatement. Otherwise, only compensation is appropriate.<sup>245</sup>

#### 4. THE RIGHT TO CONSENT TO MARRIAGE AND TO FORM A FAMILY

**Constitution:** “Article 42. The family is the fundamental basis of society. It can be formed by natural or legal bonds, by the free decision of a man and a woman to contract matrimony or by the responsible intention of forming one. [...] Family relations are based on the equality of rights and responsibilities of the couple and on reciprocal respect among all members. Any form of violence in the family is considered destructive to its harmony and unity and will be punished in accordance with the law. [...] The forms of matrimony, the age and ability to contract it, the responsibilities and rights of the spouses, its separation and the dissolution of the bonds, are governed by civil law.”

The Constitutional Court has found that the constitutional protection offered to families formed by natural bonds implies that **women in school<sup>246</sup> or in the armed forces<sup>247</sup> who are in domestic partnerships cannot be subjected to disciplinary action**, that a person who lives in a domestic partnership can **adopt the partner’s child**,<sup>248</sup> and that women in domestic partnerships with a person entitled to a pension have a right to a **pension replacement**<sup>249</sup> even when that person had been previously married.<sup>250</sup>

The Constitutional Court also found that losing the right to a replacement pension by contracting a new marriage violates the **right to marriage**, in the general system<sup>251</sup> as well as in the special system governed by the Armed Forces.<sup>252</sup> Likewise, it found that to deprive the daughters of military personnel of their benefits upon contracting marriage was also unconstitutional.<sup>253</sup>

5. THE RIGHT TO DECIDE THE NUMBER AND SPACING OF CHILDREN

**Constitution:** “Article 42. [...] Couples have the right to decide freely and responsibly the number of children and should support and educate them when they are minors or disabled.”

**See also:** Law 599 of 2000, Decision No. 1290 of 1994 and 677 of 1995.

The Constitutional Court has protected the option of maternity even when it is not socially accepted. In this way, it has ordered schools to refrain from treating **pregnant students** differently, stating that, for example, it is not permissible to make these students wear different uniforms, require them to change from day to night classes, prevent them from enrolling, or expel them.<sup>254</sup> Likewise, it has ordered the withdrawal of prison regulations requiring inmates to **demonstrate the use of contraceptive methods** in order to have the right to conjugal visits. These regulations were aimed at preventing inmates from becoming pregnant in order to maintain the state’s right to house or hospital arrest, depending on what was stipulated by the relevant regulations.<sup>255</sup>

However, on two occasions the court decided against the option of abortion. The court found that the right to choose the number and spacing of children **only applies before the moment of conception**. Once a human life is present, **the right is nullified by the superior interest of that life**.<sup>256</sup> According to the court, protection for that life prevails even when the pregnancy is a result of **rape or nonconsensual artificial insemination**.<sup>257</sup> In these cases, the fact that the mother is a victim of a crime does not justify her conduct because the life she would sacrifice is not responsible for the harm caused to her. Additionally, the court argued, motherhood dignifies and does not humiliate or sacrifice women.

In the last decision on the subject, as a result of the modification of the type of abortion in the recently issued penal code,<sup>258</sup> the court indicated that it is within the discretion of legislators to introduce an **absolute exemption for abortions** that are performed as the result of rape or nonconsensual artificial insemination or fertilization, and that imposing the penalty would not serve any interest. The decision, however, only included arguments on the ends and methods of penal law and the political legitimation of the legislator, without explicitly referring to women's reproductive rights.<sup>259</sup>

Each of these decisions has been opposed by a minority that believes in the importance of relativizing the absolute value of the right to life when women's reproductive rights are at stake. It is important to adopt these arguments and continue to promote the acceptance of these rights within the courts in future decisions.

The **Council of State** has considered that the harm caused to a woman subjected to **permanent sterilization** without her consent or her husband's should be compensated, when it was possible to postpone the surgery without serious risk to the woman.<sup>260</sup>

## 6. THE RIGHT TO WORK AND TO SOCIAL SECURITY

**Constitution:** "Article 53. [Principles of labor law.] Equality of opportunities for workers; minimum, non-fixed living wage, proportional to the quality and quantity of work; job stability; obligatory minimal benefits established by labor laws; power to settle and reconcile uncertain or disputed rights; favoring the worker in case of doubt in the application and interpretation of formal sources of law; primacy of reality over formalities established by the subjects of labor relations; guarantee to social security, continuing education, training, and necessary breaks; special protection for women, motherhood, and working minors."

“Article 48. [...] All residents are guaranteed the fundamental right to social security.”

*Special Protection for Motherhood*

The Constitutional Court found that by virtue of the **special protection afforded pregnancy by the constitution**, pregnant women have the right to reinstatement to their position and to receive **compensation** if they are fired without previous authorization by a work inspector;<sup>261</sup> to obtain through the expedited action of *tutela* the **payment of wages**,<sup>262</sup> **disability**,<sup>263</sup> and **maternity leave**;<sup>264</sup> and if they are homeless and unemployed, that their **spouses or companions be excused from military service** in order to care for them, at least while the state develops a more effective system of protection.<sup>265</sup> The court explained that in these cases it seeks to provide for the **effective equality of women** in the work force as well as guarantee that women and their children have the minimum resources necessary for adequate continued existence, which is known as the **minimum living wage**.

The **Council of State** has found that the requirement that a work inspector authorize a pregnant woman’s dismissal also holds for **contract-at-will government employees** at the national<sup>266</sup> and local levels.<sup>267</sup>

7. THE RIGHT TO BE FREE FROM SEXUAL EXPLOITATION

**Not one** of the courts **has found in favor of victims of sexual exploitation**. The Constitutional Court, however, found that although sex work and transvestitism are **not penalized as life options**, they can be controlled and authorized, limiting their display to **specific zones in cities**. The court emphasized that these lifestyles are crimes against the right of those who live in “residential” zones to **tranquility, security and a dignified life**.<sup>268</sup>

*[For the sake of guaranteeing the rights to personal and family privacy, tranquility, security, the free development of personhood, and a dignified life, the court ordered the competent authorities to take the*

*necessary measures so that] the unreasonable and disproportionate exercise of sex work and transvestitism, child sex work, exhibitionism, sexual harassment of passersby and residents, performance of sexual acts in public places, verbal or physical harassment of third parties, crimes against public decency, the sale and consumption of liquor and hallucinogenic drugs in public ways, threats or direct crimes against the integrity of residents and passersby, sex workers, assaults, illegal arms sales of all types, and other [crimes cease.]<sup>269</sup>*

## 8. THE RIGHT TO EDUCATION<sup>270</sup>

**Constitution:** “Article 67. Education is an individual’s right and a public service with a social purpose; with it one seeks access to knowledge, science, technology, and all other goods and values of the culture [...]”

**See also:** General Education Law.

The Constitutional Court defined sex education as a “conscious effort of communication and transparency” about sexuality and declared that it is important to “remove the veil of mystery and taboo” surrounding sexuality because it creates trauma in an individual’s personal development. The court’s view of sex education covers all sexual and emotional conduct displayed in front of minors, such as gestures and signals. The place for this education is therefore the family environment and, only secondarily, schools, without signifying a reduction of schools’ responsibility for sex education of its students. Inasmuch as schools are obligated to provide a general education, they are responsible for compensating for the faults or correcting the errors learned at home.<sup>271</sup>

The **Constitutional Court** has determined that requiring a five year-

old child to **exhibit his genitals** in front of his classmates is not an adequate way of providing sex education to him or to his classmates.<sup>272</sup> The freedom of professors to choose the method of sex education is limited by the obligation to respect the religious convictions of the students, their age and their sensitivity.<sup>273</sup>

## 9. THE RIGHT TO PRIVACY

**Constitution:** “Article 15. All persons have the right to personal and familial privacy and to their good name, and the state must respect and require respect of those rights. Likewise, all persons have the right to know, update and correct information collected on them in databases and archives in public and private entities.”

“Article 16. All persons have the right to free development of personhood without limitations other than those imposed by the rights of others and the law.”

### *Professional Confidentiality*

The **Constitutional Court** has stated the following regarding the laws on the duty of doctors to respect the confidentiality of their patients: doctors are obligated to keep the medical history of their patients confidential except when the patient has authorized the release of information; when a patient does not have the ability to give consent due to impaired mental facilities or as a minor (in which case the consent of family members will be sufficient); or when medical intervention has been judicially ordered; or when the life of the spouse or children of the patient is obviously at risk. Doctors are not required to provide information that would incriminate their patients, nor can they submit individualized patient information when presenting data to health authorities. The court established that the **governing principle** for the interpretation of the laws is the **patient’s right to his or her medical information**.<sup>274</sup>

The **Constitutional Court** also established that requiring a woman to provide her **medical history** to ascertain whether she has been **sterilized** as a **requirement for marriage**,<sup>275</sup> and making **public the psychological evaluations** of military personnel that contain information on their sex lives, violate the right to privacy.<sup>276</sup>

### *Sexual Privacy*

The Constitutional Court established that **expelling students** for having sexual relations<sup>277</sup> and **imposing disciplinary action on members of the armed forces** for adultery, concubinage, homosexual acts, or trafficking with homosexuals and sex workers violate the right to sexual privacy.<sup>278</sup> However, it found that requiring women in **prison** to have an **identity card** in order to have conjugal visits is **not a violation** of the right to privacy. In such cases the restriction is justified in the interests of maintaining discipline, order, morality, and health in the prison.<sup>279</sup>

*[I]n reality, what they seek to punish by the expression “homosexual acts,”<sup>280</sup> is not the potential offense on the part of the disciplined person, but the human condition of homosexuality and the legitimate exercise of that inclination, which gravely affects an individual’s right to freely manage something so personal as sexuality.<sup>281</sup>*

### *Personal Identity*

The Constitutional Court has established that **surgical intervention** for the **determination of a person’s sex** cannot be carried out without informed consent.<sup>282</sup> Given the importance of the decision, when dealing with minors it is preferable to wait until the minor can decide for himself or herself since the treatment is not necessary to safeguard life or health. The court explicitly noted that the urgency surrounding the treatment is due to a social need to **eliminate sexual ambiguity**, which reveals a **pattern of discrimination and intolerance** that must not be encouraged.<sup>283</sup> The court has found that

parents cannot provide consent for a minor of seven years,<sup>284</sup> but can for a minor of two years.<sup>285</sup>

*Sex constitutes a permanent element of the identity of a person and only that person, with full understanding and duly informed, can consent to the readjustment of sex, and even “gender” [...]*

**None** of the high courts in Colombia have used the right to **privacy** as the basis for protecting reproductive autonomy.

