

Report

Regional
perspectives.

Colombia: historic advancement in the decriminalization of abortion.



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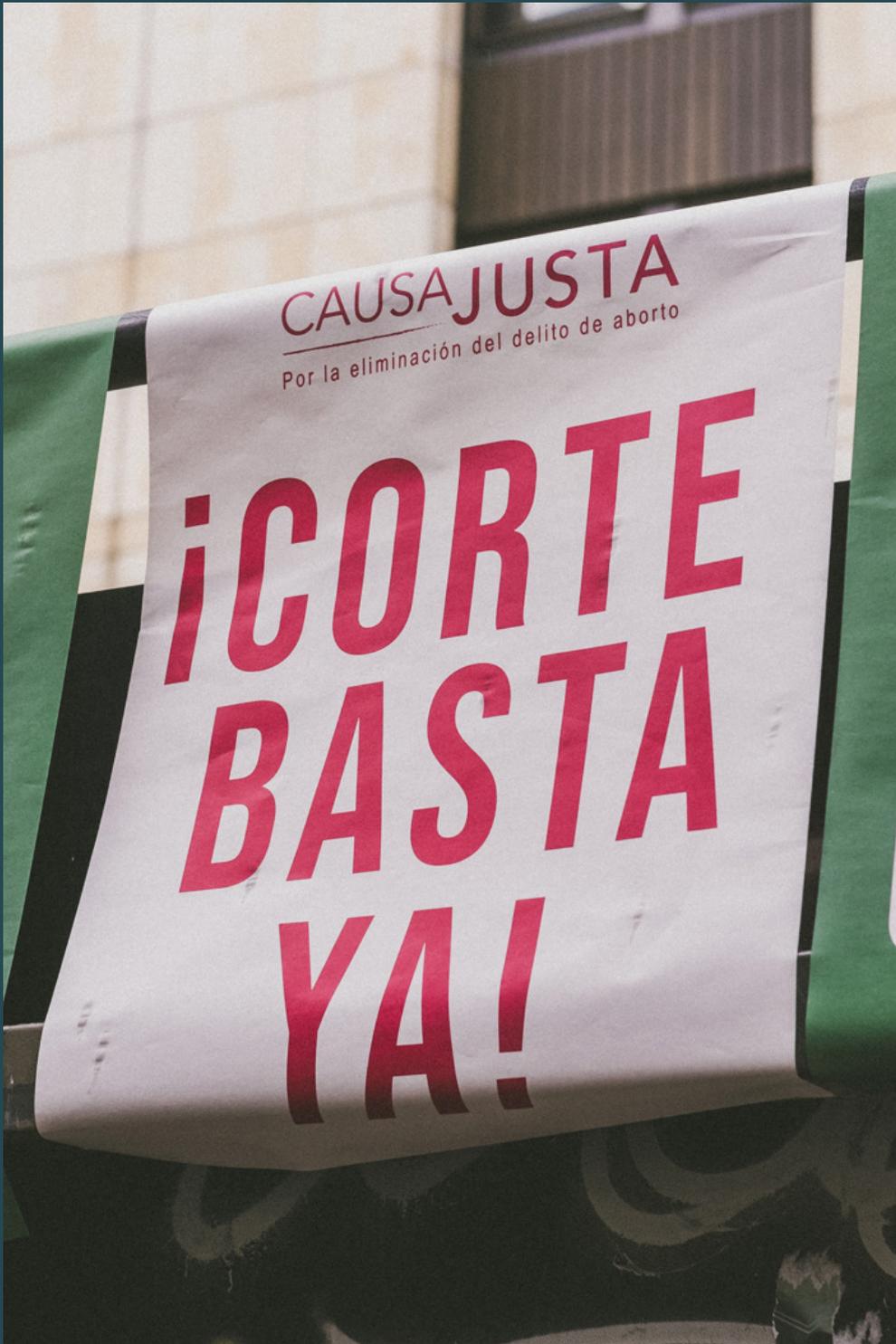
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CONCLUSIONS AND RECOMMENDATIONS



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1. Introduction



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The Constitutional Court, in a historic decision, decriminalized abortion up to week 24 of pregnancy¹, positioning Colombia among the countries that regulate the Voluntary Termination of Pregnancy (VTP) based on gestational limits. The purpose of this document is to provide context for the implications of this decision, including an analysis of the regulation of abortion in the region. Likewise, it explores the advantages of eliminating laws that criminalize abortion.

To this end, this document is divided into three parts: the first establishes the national context of abortion in Colombia and explores the Causa Justa movement that has sought the complete decriminalization of abortion. The second part examines the regional context of the regulation of voluntary termination of pregnancy in Latin America and, finally, the third section presents international standards on the decriminalization of abortion and the positive experiences in countries where abortion services are regulated outside criminal law.

1.1 The regulation of abortion in Colombia and barriers to access this right

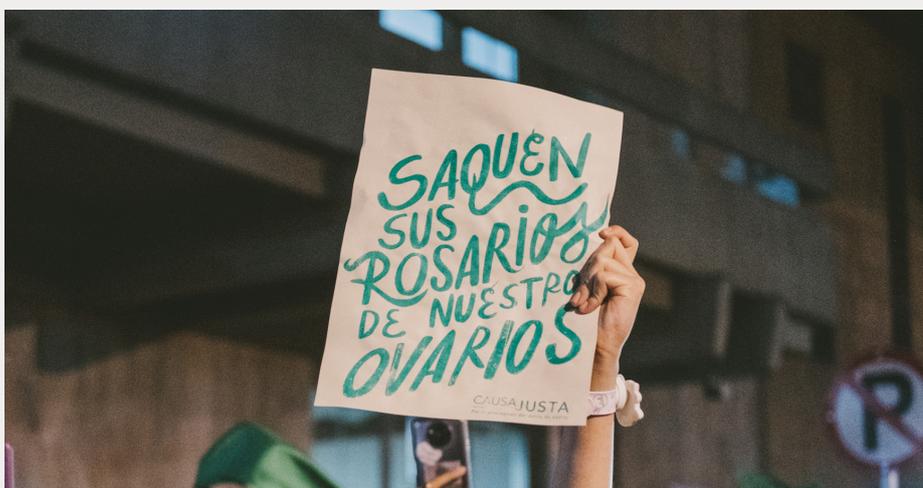
As of ruling C-355/2006 issued by the Constitutional Court, access to safe abortion was allowed in Colombia under three circumstances: when the life or health of the woman is in danger, when there is fatal fetal impairment and when the pregnancy is the result of rape or incest. Since then, the Court has developed a jurisprudential line that recognizes VTP as a fundamental right and establishes that this service must be available throughout the country,² prohibits the imposition of illegal requirements or unjustified delays such as the authorization of third parties or medical boards, and establishes clear limitations on the

exercise of conscientious objection.³

Despite these advances, the crime of abortion has remained in the Colombian Criminal Code⁴ for 15 more years, penalizing women and doctors who practice this service outside the three grounds mentioned above, and even, on several occasions, prosecuting those who were qualified under the constitutional requirements. This dual nature of abortion, as a right and as a crime, creates serious barriers to women's access to this essential service, even in the circumstances permitted by the Court.

Among the main barriers encountered by women when accessing VTP under the model of grounds, it is possible to identify (i) the ignorance of the legal framework, i.e., lack of knowledge of ruling C-355/2006 and its subsequent developments; (ii) the restrictive interpretation of the legal framework and finally, (iii) failures in the provision of health services.⁵

According to figures from the Attorney General's Office, 97% of women and girls criminalized for abortion live in rural areas⁶ and 30% of them have been victims of different forms of gender violence.⁷ According to a study conducted by La Mesa por la Vida y la Salud de las Mujeres, 12.5% of abortion cases prosecuted by Colombian justice system relate to women between 14 and 17 years of age, and 24% of cases sentenced include girls and adolescents.⁸



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1.2 Causa Justa Movement

The Causa Justa Movement (Just Cause) was created at the initiative of La Mesa por la Vida y la Salud de las Mujeres in 2020 with the purpose of eliminating the crime of abortion from the Colombian Criminal Code and the social decriminalization of abortion in Colombia. Causa Justa brings together more than 100 civil society organizations and more than 150 activists across the country.

As part of its actions, in September 2020 Causa Justa filed a claim to request that the Constitutional Court declare the crime of abortion unconstitutional based primarily on seven counts: i) violation of the fundamental right to VTP, ii) violation of the right to health, iii) violation of the right to freedom of profession or trade of health personnel, iv) violation of the right to equality of migrant women, girls and adolescents, v) violation of freedom of conscience, vi) and violation of the principle of exceptional use of criminal law.⁹

The Center for Reproductive Rights is part of the movement and, together with La Mesa por la Vida y la Salud de las Mujeres, Women's Link Worldwide, Católicas por el Derecho a Decidir and Grupo Médico por el Derecho a Decidir, contributed to the drafting of the claim of unconstitutionality. Furthermore, the Center engaged in advocacy, communications, and mobilization actions led by the movement.

The claim was admitted by the Constitutional Court in October 2020. During the procedural stage in which the Court received citizen interventions and amicus curiae, it received 114 documents supporting the claim of Causa Justa, including national and foreign experts in a variety of fields.



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1.3 The ruling of the Constitutional Court

On February 21, 2022¹⁰, the Court took a historic step to ensure the reproductive rights of women, girls, adolescents, and people who can get pregnant. It decriminalized abortion up to week 24 of pregnancy and, without any gestational limit, for situations under the grounds set out in ruling C-355/2006.

The Court made this important decision on the following grounds:

1. Life is a legal right that must be protected at all stages of its development, but not with the same intensity; therefore, the application of criminal law must also be gradual and incremental according to the stage of development;
2. The decision to carry a pregnancy to term is a very personal matter that impacts the pregnant person, because it affects their life project and reproductive autonomy;
3. Criminalization is a barrier to pregnancy and reproductive health, as indicated by several international human rights organizations, which severely affects the right to life;
4. The criminalization of consented abortion is not effectively conducive to protecting the legal interest of the fetus, if its low incidence in the fulfillment of the purpose of the general prevention of the penalty attributed to its typification is taken into account;
5. Criminalization disproportionately impacts vulnerable women, including those with irregular migration status.



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However, the Court recognized that there is a tension between the fetus, which in its opinion warrants constitutional protection, and the rights of women. Therefore, the Court decided to take an intermediate path to make each of these dimensions relevant. Thus, it determined that the most optimal formula would be to define a system of terms and a public policy that considered measures related to sexual and reproductive health and education¹¹.

With this ruling, Colombia joins the countries in Latin America that regulate abortion based on different gestational limits, and that has achieved significant liberalization against restrictive conditions. The model of terms establishes that abortion is legal until a certain gestational stage, usually 12 or 14 weeks. Colombia has gone beyond the most common limit, liberalizing abortion until week 24, until which it is not necessary to explain the reasons for abortion.

The Court positioned Colombia in the current world trend (75 countries), which considers liberalization a protective way to regulate sexual and reproductive rights of women, adolescents, girls and people who can get pregnant. Although decision C-355/2006 is an advancement, the Court should have considered complete decriminalization, with regulations on abortion approached as health care. Thus, under this scenario, the punitive system outside 24 weeks continues to be used as a symbolic and patriarchal punishment of the reproductive autonomy of women.

2. Regional overview on the regulation of abortion in Latin America



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Taking into account recent changes in Colombia regarding the regulation of abortion, as well as recent reforms and decisions in other countries in the region, this section provides an analysis of abortion regulation in Latin America and the Caribbean. Since 1998, the Center has produced the World Abortion Laws Map,¹² which is an interactive tool that is updated in real time that serves as a source of information for activists, state agents, journalists, academics, and society in general.

According to the map, over the past 25 years the global trend has moved toward the liberalization of abortion laws. However, Latin America and the Caribbean remains one of the regions with the greatest restrictions on abortion in the world. The following is a classification of the countries of the region in four categories.

2.1 Countries that fully criminalize abortion

Although there are fewer and fewer countries that maintain a total criminalization of abortion, this continues to be a reality in Latin America.

Regulations that prohibit abortion in all cases disregard international human rights standards¹³ on the matter and have serious impacts on the fundamental rights of women and people who can get pregnant who face greater risks of living in vulnerable conditions and undergoing unsafe abortions that seriously endanger their health and life.¹⁴ Additionally, in some contexts, regulations lead people in charge of providing health services to be unaware of their duty to maintain professional confidentiality and report their patients.¹⁵ In many cases, this also leads to the unjust criminalization of women who have experienced obstetric emergencies.



JAMAICA, HAITI, DOMINICAN REPUBLIC, EL SALVADOR, HONDURAS, NICARAGUA, SURINAME

Since 1998, El Salvador has criminalized access to abortion in all cases. In this country, women are criminally prosecuted even in cases of involuntary obstetric emergencies.

Manuela, a woman who in early 2008 had an obstetric emergency for which she lost her child, was unjustly sentenced to 30 years in prison for aggravated homicide. She died in prison from cancer without having received adequate treatment. Her two children were left two orphaned

The Center and the Feminist Collective for Local Development represented her case before the Inter-American Court of Human Rights in what became the first case on this subject to be ruled on by that Court.

(For more information on Manuela's case, see: Case Manuela Vs. El Salvador. The impact of the absolute prohibition of abortion on women who suffer obstetric emergencies. At: <https://bit.ly/3SYWdm5>).

In Honduras, where there is also a total ban on abortion, in January 2021 the National Congress approved an amendment to article 67 of the Constitution that prohibits "the practice of any form of termination of the life of unborn children, whose life must be respected at all times."

The UN ruled on this amendment, reiterating that "it is contrary to international obligations on human rights, since it prevents addressing a public health problem that the criminalization of abortion in all its forms is already causing"

(Press Release: The UN expressed its concern about the approval of the constitutional amendment that prevents abortion and same-sex marriage in Honduras (2021). At: <https://bit.ly/3vRhi76>).

2.2 Countries that consider the risk to life as grounds for abortion

This category includes countries where abortion is allowed when the life of the pregnant woman is at risk, in which it is not sufficient that her health is at risk, but there must be an imminent danger of death. In these countries there may be other grounds under which abortion is allowed, such as when the pregnancy was the result of rape or in cases of fatal fetal impairment.

Although it represents a step forward compared to regulations where abortion is prohibited in all cases, this type of legislation presents a significant limitation to sexual and reproductive rights. In many cases, the risk to life can involve a limited interpretation on the risk of death, ignoring that different personal circumstances of women may be life-threatening for biological, psychological or social reasons.¹⁶



BRAZIL, VENEZUELA, PARAGUAY, GUATEMALA, PANAMA, ANTIGUA AND BARBUDA, DOMINICA AND CHILE

Chilean citizens did not approve a constitutional draft that included the right to abortion and other reproductive rights.

On September 4, 2022, Chilean citizens did not approve, in a nation-wide plebiscite, the text of the New Constitution proposed by the Constitutional Convention. Article 16 of this text established that people hold sexual and reproductive rights, including the right to decide freely, autonomously, and in an informed manner about reproduction and contraception. This article also established protection for the voluntary termination of pregnancy in a voluntary and safe manner, without interference from other individuals or institutions.

This decision represents a lost opportunity to advance what would have been a historic recognition for the protection of reproductive rights by incorporating them expressly in a National Constitutional text. However, the important work of organizations and activists to position this initiative and achieve its discussion in the Constitutional Convention sets a significant benchmark for similar initiatives in other countries in the future.

2.3 Countries that consider health and other risks as grounds for abortion

This category describes the countries in which abortion is permitted not only when the life of a pregnant woman is in danger, but also when there is a risk to her health. In these countries there are variations regarding other grounds that are allowed with the preservation of women's health and in some cases mental health.¹⁷ For example, in some countries, legal abortion is permitted in cases of rape, incest or fatal fetal impairment.

COSTA RICA, ECUADOR, PERU, BOLIVIA, TRINIDAD AND TOBAGO, GRENADA, SAINT LUCIA, SAINT KITTS AND NEVIS, BAHAMAS

Ecuador is included in this category for having provided since 2014 in its Criminal Code that abortion is considered legal only in cases where the life or health of pregnant women is in danger or in cases of rape of people with mental disabilities.

However, in April 2021, the Constitutional Court eliminated from the Criminal Code the expression "people with mental disabilities," so it is considered that the country legalized VTP when the pregnancy has been the result of rape for all pregnant people.¹⁸



2.4 Countries with abortion on request

This category describes countries in which women may freely request access to safe abortion, regardless of their reasons. A gestational limit of 12 weeks is common in these countries, but that limit can vary. Based on this model, it is likely that countries will progressively advance to the next phase, which is regulation outside criminal law.



*Although this criteria of the Supreme Court of Mexico is binding, the legislation of the states with restrictive laws still needs to be reformed.

In Argentina, Law 27610/2020 legalized access to the VTP¹⁹ under a mixed model. This rule establishes that all people who can get pregnant have the right to access abortion up to week 14. However, women subject to health or life risks or sexual violence can access abortion without any gestational limit.²⁰ This law seeks to have a comprehensive approach, which is why it also promotes other sexual and reproductive rights, such as access to information, comprehensive sexual education and contraceptive methods.²¹

In Mexico, a federated country where laws can vary substantially from one state to another, abortion is decriminalized on request during the first few weeks of pregnancy in Mexico City, Oaxaca, Hidalgo²², Veracruz, Baja California²³, Coahuila, Colima, Guerrero and Sinaloa.

The Supreme Court of Justice has had a leading role in Mexico's advances in the regulation of abortion. For example, in 2018, it decided that health institutions must have health policies in place to provide, without any delay, urgent legal abortions in cases of rape.²⁴ Likewise, last September 2021, the Supreme Court unanimously declared the invalidity of Article 196 of the Criminal Code of Coahuila, considering that it is unconstitutional to criminalize abortion absolutely and ruling for the first time "in favor of ensuring the right to women and pregnant people to decide, without facing criminal consequences."²⁵

2.5 What is Colombia's position when moving from a model of grounds to a model of terms in the region?

With the C-055/2022 ruling, Colombia is advancing to a more progressive model that seeks to protect the exercise of reproductive autonomy,²⁶ as in other countries in the region (Argentina, Uruguay, Cuba, Guyana and French Guiana). However, in these places where abortion is accessible to women on request, criminal law continues to regulate scenarios other than the number of weeks during which this medical service may be requested.

These regulations do not overcome many of the practical barriers faced by women in Colombia and that, as mentioned above, arise from the duality of abortion as a fundamental right and as a crime.

Accordingly, the Court should have considered the alternative of protecting VTP based on health regulations, without considering criminal regulations that, to a greater or lesser extent, end up restricting reproductive rights.

Despite this, Colombia has taken a big step for other countries in the region to consider a legal framework that guarantees women's right to access abortion and, therefore, their freedom of decision and reproductive autonomy.



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3. Towards a necessary step: to regulate abortion outside the Criminal Law



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3.1 International standards on the decriminalization of abortion

International standards have established the obligation of under safe conditions. These standards have been set by agencies of the Universal Human Rights System and have relied on the rights to life, health, freedom from cruel, inhuman, or degrading treatment, freedom from discrimination equality, privacy, information, and the right to decide the number of children and the interval between births.

Regarding the right to life and health, for example, the UN Human Rights Committee, in its General Comment No. 36, highlighted that the regulation of abortion should not violate the right to life or any other human right in accordance with to the International Covenant on Civil and Political Rights (ICCPR), of pregnant women or girls.²⁷ Likewise, it urged States to:

“[...] ENSURE SAFE, LEGAL AND EFFECTIVE ACCESS TO ABORTION WHEN THE LIFE AND HEALTH OF PREGNANT WOMEN OR GIRLS ARE IN DANGER, WHEN THE FACT OF CONTINUING THE PREGNANCY WILL CAUSE CONSIDERABLE PAIN OR SUFFERING TO WOMEN OR GIRLS, PARTICULARLY WHEN THE PREGNANCY IS THE RESULT OF RAPE OR INCEST OR IS NOT VIABLE.”²⁸

In this same observation, this Committee indicated that States “should not place additional obstacles and should eliminate those currently existing that deny effective access to safe and legal abortions for women and girls.”²⁹ On the other hand, the CEDAW Committee has also repeatedly expressed its concern regarding the links between maternal mortality and unsafe abortion, and has called for abortion to be decriminalized in all cases and legalized at least in certain circumstances.

For this reason, States should legalize abortion, at least in cases of rape, incest, serious fetal anomaly, especially in cases of complications caused by unsafe abortions.³⁰ Member States should also remove punitive measures for women who undergo abortions under any circumstances.³¹

Along the same lines, the UN Committee on the Rights of the Child has pointed out that “the risk of death and illness during adolescence is real, among other reasons resulting from preventable causes, such as... unsafe abortions” and urged States to “decriminalize abortion so that girls can, under safe conditions, abort and be cared for after doing so, as well as to review their legislation to ensure that the best interests of pregnant adolescents are served and that their voices are always heard and their opinion in decisions related to abortion respected.”³²

Likewise, the UN Committee Against Torture asked governments to “allow legal exceptions to the prohibition of abortion in certain circumstances in which the continuation of the pregnancy could cause serious pain and suffering, such as when the pregnancy is the result of rape or an incest, or in cases of fetal malformation incompatible with life.”³³ The CEDAW Committee has also referred to the criminalization of abortion and the denial or delay of access to legal abortion as “forms of gender-based violence that, depending on the circumstances, may constitute torture or cruel, inhuman or degrading treatment.”³⁴

In the Inter-American System, the ruling in the case of *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*, represents a fundamental advance for the protection of sexual and reproductive rights, among other things, because the Inter-American Court of Human Rights: i) acknowledged for the first time that reproductive rights are human rights and ii) established that the scope of protection of the right to “prenatal life” pursuant to the American Convention is not an absolute but a gradual and incremental right under which, according to the American Convention, the embryo is not a person.³⁵ Although the case focuses on in vitro fertilization, therein the Court established standards from which it can be inferred that the criminalization of abortion, as it is not a measure that significantly protects “prenatal life”, may disproportionately interfere with the human rights of pregnant persons.

Similarly, in 2017 the Inter-American Commission on Human Rights (IACHR) stated that “denying women and girls access to legal and safe abortion services or post-abortion care can cause prolonged and excessive physical and psychological suffering to many women, especially in cases of health risks, fatal fetal impairment or in pregnancies resulting from incest or rape.”³⁶ Subsequently, in a 2018 statement, it called on the States to “adopt laws intended to guarantee women the effective exercise of their sexual and reproductive rights, in the understanding that the denial of the voluntary termination of pregnancy in certain circumstances is a violation of the fundamental rights of women, girls and adolescents.”³⁷

3.2 The regulation of abortion under the perspective of the right to health

The absence of regulations on abortion from the criminal sphere does not necessarily completely deregulate the way abortion must be guaranteed. There are legal alternatives that would allow States to establish standards so that pregnant people can access VTP. These alternatives include, for example, the application of administrative and health provisions.

There are cases from other countries in the world that illustrate the success of regulating abortion under medical standards. Dejusticia researchers³⁸ identified three places that have successfully implemented abortion outside criminal law: i) Canada ii) The Australian Capital Territory (ACT), in Australia and iii) New York, in the United States.

In these places, barriers are lower and people can access abortion quickly and safely.

The removal of barriers has meant that in places such as Canada and the TCA women who terminate their pregnancies do so in 90% (or more) of cases during the first few weeks of pregnancy,³⁹ a trend that is also observed in New York.

In these places, the elimination of the crime of abortion made it possible to implement provisions that make access safer, faster, and more comfortable for women and pregnant people.⁴⁰ For example, the designation of protection areas around clinics that provide reproductive health services was established. As a result of this, it is possible to access services without being harassed, bullied or mistreated by radical groups.⁴¹ Innovation in telemedicine and access to medical abortion was also implemented to ensure that women and pregnant people can access abortion regardless of their socioeconomic level or geographic location.⁴²

In conclusion, the case study demonstrates the advantages that decriminalizing abortion brings to women and health professionals.

4. Conclusions and recommendations



Although judgment C-355/2006 was a triumph in the advancement of sexual and reproductive rights, the truth is that 15 years later it had not been enough to guarantee access to safe abortion for women, adolescents, girls and people who can get pregnant, even in the three circumstances under which it was decriminalized. The reason for this deficiency is the practical and legal barriers that arose as a result of the dual nature of abortion as a crime and as a fundamental right.

Recently, the Constitutional Court modified the manner in which the voluntary termination of pregnancy had been regulated, by means of decision C-055/2022, to make way for regulations that further guarantee the gestational limit of 24 weeks. Thereupon, around 400,400 abortions could be performed in the health system.⁴³ More women will be able to act more broadly according to their own personal convictions and not under a belief system that is alien to them. Similarly, more health professionals will be able to practice their profession without fear of stigmatization and criminalization.

The ruling means a new victory for women, girls and people who can get pregnant. However, this does not overcome the legal/criminal duality. The Plenary Chamber should have considered in this historical opportunity a model of complete decriminalization and moved closer to regulations from a public health perspective. As shown above, based on the comparative experience in Canada, New York and the TCA, this paradigm allows greater access to abortion services in the early stages of pregnancy.

This last regulation model must be considered by countries in Latin America, including Colombia, to advance the effective protection of sexual and reproductive rights of women, girls and adolescents. It is time to leave behind the restrictive regulations that cause serious damage to the health, life and integrity of women, girls and adolescents living in more marginalized conditions, or their criminal prosecution, which entails profound consequences for them and their families.



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