

IMPLEMENTING SEXUAL AND REPRODUCTIVE RIGHTS IN COLOMBIA

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In this brief presentation, I will try to give a general idea of the context in which we discuss the issue of sexual and reproductive rights in Colombia, and of the type of work we do at the nongovernmental organization in which I work.

Let me start with the most recent and unfortunate public debate, generated by the Ombudsman.¹ The day he was elected to Congress he proposed that all women working in prostitution should be subject to mandatory sterilization as a way to "prevent child neglect and future delinquency." He claimed to be protecting human rights while failing to recognize that forced sterilization, as well as forced pregnancy or any other similar coercion, is a serious violation of human rights. To say the least, this very striking proposal prompted immediate reactions by the general public and particularly by women's groups; it also produced the most interesting of alliances: human rights activists and conservative opponents to contraception both agreed that the proposal itself was outrageous. Although there was general agreement that the proposal was not a very good idea, the implications of its making were not innocuous. The Ombudsman, who symbolizes the protection of and respect for human rights, delivered a wrongful message about human rights.

This unfortunate incident shows a deep misunderstanding and ignorance of human rights, and especially of women's rights. It never occurred to the newly appointed Ombudsman that many cases of children living in poverty or other difficult circumstances are the consequence of the father's complete failure to fulfill his obligations, leaving women on their own to raise and support their children. Or that many

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unwanted pregnancies result from men's reluctance to use condoms. Or while some women choose to be prostitutes, many others are forced into prostitution by poverty or other factors, or even that many women who work in prostitution are excellent mothers, and that in no case are they to be denied their right to decide whether or not to have children. And finally, to mention the most obvious argument: the causes of child neglect and of delinquency certainly are not to be found in prostitutes who get pregnant, and that the problems will certainly not disappear if all prostitutes are sterilized.

However, there are less disappointing sides to the discussion of sexual and reproductive rights in Colombia. The 1991 Constitution includes an article expressly providing for equality between men and women, prohibiting discrimination based on sex, pregnancy, marital status or any other condition, and guaranteeing the right to decide the number and spacing of children. From its creation in 1991, the Constitutional Court has adopted several decisions elaborating on these rights and defining their scope. The following examples provide a sense of the general doctrine that has been established by the Court through its decisions.

In July 1993, an imprisoned lawyer asked for permission to be visited by her husband. She found out that according to the national jail regulations, she had to prove that she was using some type of contraceptive method in order to have the permission granted, and that she had to agree to receive counseling and orientation on sexuality. She filed a petition saying that her fundamental right to equality was being violated because that requirement did not apply to men's prisons, and that requiring the mandatory use of contraceptives amounted to an additional punishment not included in the Criminal Code.

The first judge decided that the requirement of mandatory contraceptives did not violate the right to equality, but was rather a way of protecting maternity, by avoiding its use as a way to thwart imprisonment because pregnant women receive a temporary suspension of detention for two months before and six months after birth. To the argument of the requirement being an additional and illegal punishment, the

judge responded that it was legitimate to restrict the rights of persons who were imprisoned.

However, the Constitutional Court thought differently. According to the Court, the jail regulations violated several rights: the right to equality, the right to be free from all forms of discrimination and the right to decide the number and spacing of children. The Court's argument was that while it was true that prisoners had some rights restricted, those which were not expressly limited had to be observed and protected, on the basis of equality of men and women. The Court found that the establishment of different requirements for imprisoned men and women to allow conjugal visitation rights was discriminatory and violated not only the constitutional principle of equality but also the United Nations Convention on the Elimination of All Forms of Discrimination Against Women which prohibits States Parties from discriminating against women on the basis of possible pregnancy. The Constitutional Court found that the right to decide freely on the number and spacing of children had also been violated, and that it was not fair to assume that imprisoned women would deliberately get pregnant simply to avoid imprisonment during eight months. The Court stated that prisoners should not have their right to have children subject to any restriction. Neither the Constitution nor any international human rights treaty require that women not be imprisoned in order to enjoy the right to be free from discrimination on the basis of pregnancy.

Finally, however, it was unfortunate that the Court did not underscore how the establishment of mandatory contraception, under any circumstance, would be an inadmissible violation of women's rights. If it had done so, there would have been a very strong additional argument against the Ombudsman's proposal.

Another interesting decision relates to the opposite situation, when a woman was denied access to infertility treatment. This case involved a woman who worked as a copilot for a commercial airline and was fired after several months of infertility treatment which impaired her capacity to work. The airline, which normally covers medical expenses under the social security system, refused to pay the costs of the infertility treatment, arguing that such treatment was not

prescribed because of an illness, but because of her desire to have children. The woman, nonetheless, undertook the treatment at her own expense. The medications needed to recover her ovulatory function, and therefore, allow her to become pregnant, made her feel very sick and prevented her from flying. After approximately three months, during which she had received temporary paid medical leave, the airline dismissed her.

The first judge again denied the claim of unjustified dismissal, claiming that it was not a matter involving human rights, but an issue to be resolved before a labor court. However, for the Constitutional Court, the case revealed the relationship between good health and human rights. The Court's decision established that health was at risk when any function (like ovulation) was not operating normally. In addition, the Court showed how the exclusion of infertility treatments from the list of covered medical services was discriminatory, since it only affected women. Therefore, the decision concluded that the airline had violated the woman's fundamental rights to health and to be free from discrimination by excluding her treatment from insured medical services and by refusing to continue to recognize temporary medical leave, thereby placing her in a situation in which she had to choose between having children and retaining her job.

The sensitive issue of spousal consent regarding fertility has not yet been defined by a clear and coherent legal decision. The prevailing doctrine was established by the Council of State in 1993, when it decided on a case in which a public hospital had performed a tubal ligation during cesarean section, without obtaining the woman's prior consent. The doctor argued that when the woman gave birth, he realized that her health would be at high risk with a subsequent pregnancy and decided to perform the operation at that moment. Several years later, while investigating why she did not get pregnant again, she was informed that she had been sterilized. The woman's claim against the doctor was successful, but the decision stated that consent to sterilization had to be secured from the couple, rather than from the individual who would be subject to the procedure, in this case the woman. Although, the decision focused on the issue of

obtaining consent in itself, it did not devote that much thought to whose consent it was and why.

More recently, a municipal court decided a case in which a man filed a claim against a public clinic, requesting compensation for damages suffered by himself and his three children after the clinic had performed a tubal ligation on his wife. She had agreed because she suffered from severe diabetes and had six previous pregnancies which had resulted in involuntary abortions and had caused great risk to her life. His claim was based on the prior decision guaranteeing the couple's right to decide the number and spacing of children, and additionally on the Constitution itself which also articulates that right as a couple's right.

Fortunately, the claim was denied. The judge interpreted the constitutional provision as establishing a difference between the decision to have children, and the decision not to have children. It stated that having children was a right of the couple, but the decision not to have children was an individual decision and therefore an individual right.

Having mentioned very general features of the legal context of sexual and reproductive rights, the following is a brief description of the type of work done at PROFAMILIA in Colombia.

PROFAMILIA is a non-profit nongovernmental association created 30 years ago, at a time when there were almost no contraceptives available and the average number of children per woman in Colombia was seven. The organization grew out of a medical doctor's concern to provide education, information and services in family planning to low income women who had no access to such services. Soon after it opened its doors, the number of women seeking information and access to contraceptives increased rapidly from 83 during the last semester of 1965 to almost 23,000 only two years later. New services were then incorporated into the program, including treatment of infertility, cervical cancer diagnosis and general gynecological services. This list kept growing, and today PROFAMILIA provides diagnosis and treatment of the full range of sexual and reproductive health related issues.

The objectives of PROFAMILIA have been framed over time along with the evolution of the understanding of family

planning services: first provided as an end in themselves; then seen as part of a broader concept of sexual and reproductive health; and finally as part of sexual and reproductive rights. The rights approach to health has permitted us to understand that the medical quality of the services should not only aim to attain acceptable levels of good health, but that the provision of services had to be oriented in a manner which contributes to the realization of women's dignity, autonomy and equality.

Today, the objectives of the institution are not only to provide quality sexual and reproductive health services, but also to contribute to the promotion and protection of sexual and reproductive rights.

To give a general overview of our work, I will mention some of the special programs we have developed in addition to medical attention on all matters related to sexuality and reproduction, currently available at the 40 women's clinics that PROFAMILIA has established throughout the country. (There are also about 10 men's clinics, which were created to promote male involvement in reproduction.)

Since 1973, PROFAMILIA adopted a community-based model of distribution of information and contraceptive products, which has had tremendous impact and has been adopted by other family planning organizations in other parts of the world.

There are also youth centers which were started almost 20 years ago, with the purpose of addressing adolescents' special needs. They offer information, both to groups of students and individuals; training for teachers and parents; and services and counseling for individuals or couples. Services include both medical attention and counseling and provision of contraceptives.

Another program provides services in slum areas, aimed at some of the poorest neighborhoods of the city of Bogota. A mobile medical unit visits different areas of the city about three times a week, providing medical services, counseling and access to family planning alternatives. Whenever surgery is required, PROFAMILIA provides transportation to one of the clinics, and the woman is returned to her home in the afternoon after she has recovered from the procedure.

In addition to the programs directly related to the provi-

sion of health services and counseling, PROFAMILIA established a legal service 10 years ago. Although at the beginning it was not at all clear why it made sense to include legal services in an organization which was primarily health oriented, it became more and more evident that it was of crucial importance to understand the needs of women as a whole, and particularly to understand their needs in relation to sexuality and reproduction within the context of exercising fundamental rights. If we were to make a contribution to the realization of sexual and reproductive rights, which include but transcend the concept of sexual and reproductive health, it was then necessary to work towards the realization of those rights. Being able to enjoy sexual and reproductive rights entails the possibility of exercising one's autonomy and freedom of choice, and a way of making that possible was by providing the means to claim one's rights and to seek remedies when they have been violated.

With that idea in mind, the legal service was opened in 1986. Initially, it provided legal counsel, but soon afterwards it included representation before courts. Although giving legal counsel is useful in itself, it was not enough, at least in our context where it is a requirement to be represented by an attorney to be able to file most claims. Counseling is provided in all areas of family law, including divorce, child custody and maintenance, division of joint property between spouses, and in cases of domestic violence. A woman seeking legal services would normally receive general legal advice, and subsequently she is referred to a specific lawyer depending on the procedures that are required. If she wants a divorce and the division of property, whether she is legally married or not, an invitation is sent to her partner in order to inform him on the legal status of their case, and in order to encourage a consensual arrangement. If an agreement is reached, we draft it immediately and that document becomes judicially enforceable. Unfortunately, we are not able to take these cases to court when it is not possible to reach an agreement, because the procedures are too long and the costs too high. The cases we do take to courts are those related to child custody and maintenance and those involving domestic violence, which are the most common situations brought to our attention.

Child support claims are relatively effective. The possibilities provided by the law range from forced retention of salaries to imprisonment; it is a crime to withdraw from the obligation to provide for the children's maintenance and the costs must be covered by both parents according to their income.

Until very recently domestic violence was very difficult to address, because the only punishment and remedies available were those established for criminal offenses. However, there have been two major reforms in this matter, introduced by the constitutional reform in 1991 and the second one involves a very recent law. The 1991 Constitution prohibits all forms of discrimination and establishes that domestic violence should be punished. The Constitution also established a special emergency procedure intended for violation of fundamental rights, under which it is possible to file a claim before any judge and without the need of a lawyer, whenever a fundamental right has been violated. The judge has a maximum of 10 days to decide, and if he finds grounds for the petition, he orders the offender to refrain from further violations. Disobedience of this order gives rise to a contempt procedure that can result in imprisonment. Although this procedure does not necessarily lead to a clear punishment of the offender, its deterrent effect can sometimes be very powerful. It has also resulted in very important decisions by the Constitutional Court, whereby it has been established that domestic violence is in fact a major violation of human rights. While this doctrine may sound very obvious to most of us, the general understanding of domestic violence continued to be that it was an incident occurring within the private sphere of family life, and that it was not for the state to interfere.

The other important legal reform regarding domestic violence was a law approved in September 1996, which introduced new emergency measures. Under the new law, it is possible to order the expulsion of the offender from the house even when he (or she) is the sole owner, and all types of domestic violence, including marital rape and all forms of ill treatment and abuse, are defined as criminal offenses with longer terms than those established for cases when the victim is unknown to or at least not related to the offender. Although it is too soon to assess the impact of this law, and at

the moment there is much confusion among the judges regarding its application, the important thing is that it makes clear that domestic violence is a very serious crime.

The legal counsel that PROFAMILIA provides in cases of domestic violence consists of reinforcing that the abuse amounts to a violation of fundamental rights, and of drafting the petition to be filed by the victim before the courts. In these cases, it is very important to follow-up which at times can be rather confusing for the woman and, in some cases, even mean actually walking with her into the courtroom.

It would not be honest to claim that the violence has come to an end but at least, in terms of legal outcome, we have succeeded in most cases. Sometimes the procedures take more than a year and the ups and downs of a particular situation are at times frustrating and even threatening. We have even had cases of death threats by the accused partners against our lawyers. In any event, we feel that with the legal service we are able to frame the sexual and reproductive health discourse within the context of rights, and most important of all: we feel that we make a small contribution to many women's lives.

Notes

1. The Ombudsman (Defensor del Pueblo) is a quasi-governmental official responsible for promoting and protecting human rights in Colombia. Although the Ombudsman is elected by the House of Representatives from among three candidates selected by the President, s/he is attached to a ministry-level body which is formally independent of the government.