



The Stakes of the Pending Colombian Constitutional Court Abortion Decision

[June 4, 2021](#) [Alicia Ely Yamin](#) [Abortion](#), [Alicia Ely Yamin](#), [Global Health](#), [Global Health and Rights Project](#), [Health Law Policy](#), [Human Rights](#), [International](#), [Judicial Opinions](#), [Pregnancy](#), [Public Health](#)

By **Alicia Ely Yamin**

Amid the massive social protests wracking Colombia, the Colombian Constitutional Court is currently considering whether to decriminalize abortion beyond the narrow exceptions already recognized in law.

The petition was brought before the court by the [Causa Justa \(“Just Cause”\) movement](#), a group of activists and organizations who argue that the country’s broad criminalization of abortion through Article 122 of the Penal Code poses an unconstitutional violation of women’s rights.

Colombia’s iconic Constitution of 1991 aspired to establish a “social state of law” that would guarantee freedom and equality to its citizens. The Court [eloquently captured these ambitions](#) as follows: “the realization of freedom and equality requires measures, actions, entitlements and services that a person by himself cannot achieve. The social state of law thus evolved from a liberal state of law, animated by the purpose of ensuring that the material prerequisites of freedom and equality are effectively guaranteed.”

In its sweeping [T-760 decision in 2008](#), the Court forcefully set out the parameters of a health system as a site for the construction of inclusive citizenship in a social state of law, underscoring the obligations of the state to respect, protect, and fulfil the right to health.

In reality, however, the promise of a social state of law has yet to be fulfilled. Colombia is one of the most socially unequal countries in the world, and poor women often most acutely experience structural exclusion through their contacts with the health system.

As feminists have argued for decades, all people, *but women in particular*, cannot achieve freedom and equality without reproductive justice, including, crucially, access to services to meet their sexual and reproductive health needs. Lower abortion rates are not achieved

through criminalization, but through policies that provide diversely situated women with information and material conditions necessary to exercise agency over their lives.

The decision to seek an abortion is never a “private” decision; it is always deeply connected to a web of informal norms as well as formal legal rules that structure institutional practices, social discourses, and women’s opportunities to make decisions about their bodies. As jurisprudence from [other constitutional courts has articulated for close to fifty years](#) decriminalization is compatible with recognizing that the state may have a legitimate interest in protecting prenatal life, while still enshrining an ethical as well as legal understanding of gestation as *sui generis* and, in turn, the non-demandable nature of the obligation to carry a pregnancy to term.

By contrast, in the context of a conservative Catholic society such as Colombia, it is unsurprising that the current default of criminalization (except in cases of risk to life/health, rape, and congenital anomalies not compatible with life) produces a [profound stigma](#) and [chilling effect](#) on the ability of women and girls — and especially those who are poor or marginalized — to access their rights, and undermines the ability of health providers and the health system to ensure that critical services are made accessible to all those women who require them. According to a [recent study done by the Ministry of Health and Well-Being and the United Nations Population Fund](#), many women who meet the criteria for obtaining legal abortions, including pregnancy as a result of rape, are afraid to seek these services in the health system [for fear of being criminally prosecuted](#). Although criminalization does not reduce abortions, it drives them underground into unsafe conditions, and converts the health system into another policing arm of the state.

Latin America has historically had some of the most restrictive abortion laws in the world, but the region is also at the heart of a “Green Wave” of activism by feminists and a wide array of other groups who have deployed human rights in legal, social and political mobilizations for reproductive justice. In December, 2020, [Argentina passed a law legalizing abortion through the first trimester, and under certain indications thereafter](#). [Uruguay](#), the autonomous federal district of [Mexico City](#), and the [Mexican state of Oaxaca](#) had already done so. In 2017, Chile [decriminalized abortion](#) under certain indications, and the Constitutional Court has upheld the law [against challenges](#); in April of 2021, [the Ecuadoran Constitutional Court also expanded access to abortion beyond the existing indications](#), ruling restrictions on abortion in cases of rape were unconstitutional.

In international law, there is a clear trend toward expanding legal access to abortion and recognizing the barriers that informal rules and background norms pose. In 2017, the Committee that monitors the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted [General Recommendation No. 35](#), which construes restrictive abortion laws as a form of structural violence against women. In its [General Comment 36](#), the United Nations (UN) Human Rights Committee extended the right to life to a right to life with dignity, and called on states to provide the necessary conditions for a life with dignity, including sexual and reproductive health and abortion in particular. In its 2016 [General Comment 22](#), the UN Committee on Economic, Social and Cultural Rights, explicitly addressed the lack of availability and accessibility of abortion services as a violation of the right to sexual and reproductive health.

Despite approaching safe abortion from distinct perspectives — as a matter of a life of dignity, freedom from structural violence, and the equal enjoyment of the right to sexual and reproductive health — the UN treaty bodies’ collective conclusions point to an overlapping consensus in international standards for the protections of women’s health rights.

The pandemic has drawn far greater public attention to the connections between population health, health systems, and democratic institutions across the globe. The Just Cause petition comes at a critical inflection point for reproductive and social justice in the country, the region, and the world.

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[ALICIA ELY YAMIN](#)

Alicia Ely Yamin is the inaugural Senior Fellow in the Global Health and Rights Project (GHRP) at the Petrie-Flom Center, a collaboration with the Global Health Education and Learning Incubator (GHELI) at Harvard University. Yamin is currently a Senior Scholar in Residence at GHELI, an Adjunct Lecturer on Global Health and Population at the Harvard T. H. Chan School of Public Health, and a Department of Global Health and Social Medicine Affiliate at Harvard Medical School. Trained in both law and public health at Harvard, she has worked at the intersection of the two fields while living abroad in Latin

America and East Africa. She is known globally for her pioneering scholarship and advocacy in relation to economic and social rights, sexual and reproductive health and rights, and the right to health.