

BOLIVIA: A STEP FORWARD IN THE PRO-LIFE MOVEMENT?

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TIME OF "LEGAL CHANGE"

On March 15th 2012, Patricia Mancilla deputy of the governmental Movement Toward Socialism (MAS), filed a suit in the Plurinational Constitutional Tribunal of Bolivia² (TCP) to have certain laws declared unconstitutional. Several articles of the Criminal Code were addressed, including four -263, 264, 265, 266 - where abortion is criminalized based on different behaviors.

The deputy filed this action, inspired by the promises that President Evo Morales made at the start of his presidency in 2006, as part of a "democratic and cultural revolution" or "change process", the main goal of which was to eliminate any form of exclusion or inequality between men and women. This proposal for change failed to observe the right to life.

A lengthy debate by the Court ensued; it took almost a year from the time the action was filed until the final decision was announced by the TCP.

TCP'S RULING

Art. 263³ of the Code penalizes those who cause the death of a fetus in the womb, or cause premature expulsion, stipulating such aggravating factors as age of the women and her consent or lack of thereof. Art. 264, in turn, institutes penalties for abortions followed by injury to the mother, and aggravates the criminal classification if there is no consent. Finally, Article 265 provides punishment of the abortion called *honoris causa*, committed by women or others so as preserve the woman's honor.

The grounds asserted for unconstitutionality of these articles by the Deputy were that they would run against art. 66⁴. This article provides the following: "*Women and men are guaranteed the exercise of sexual rights and their reproductive rights.*"

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² Through a Supreme Decree No. 0048 of 18 March 2009, the Government of Bolivia determined the renaming of Bolivia to "Plurinational State of Bolivia". This new designation implies that public bodies have to carry the same qualification of "Plurinational". See motives of the change: <http://cejis.org/estado-plurinacional-de-bolivia/>

³Read complete articles: http://www.oas.org/juridico/spanish/gapeco_sp_docs_bol1.pdf

⁴ See National Constitution: <http://consuladoboliviano.com.ar/portal/node/119>

However, the Court held that *"it should be noted that although the Constitution guarantees sexual and reproductive rights, as established by art. 66, the right to abortion is not equated with reproductive rights under that provision, so the exercise of sexual and reproductive rights does not imply the right to abortion."*⁵

The Court also stated that *"life (...) is protected by our Basic Law, so pregnancy per se does not imply a threat to women's right to health as long as it is the result of a free decision and cannot be equated with a disease or a threat to integrity, or cruel, inhuman or degrading treatment"*⁶. After urging the authorities to address sexual education as part of a possible solution to the problem, the court concluded that *"an unconditional abortion in all stages of embryo development is not constitutionally permissible and the policy of constitutional protection of the right to life of the implanted embryo provides sufficient grounds for the Legislature to use all kinds of public policies needed for its protection, including criminal law"*⁷. The court found no grounds to modify art 263, 264 and 265.

However, the court did find that modification of one of the challenged articles - article 266 - was necessary. Art. 266 covers cases of legal abortions. For such cases it is stipulated that the abortion has to be performed by a physician, with the consent of the woman and judicial authorization. The cases in point are:

1. No penalty shall apply when abortion has been the result of a crime of rape, abduction not followed by marriage, rape of a minor or incest, provided that the criminal action has been initiated.
2. Abortion shall also be unpunishable when it has been practiced in order to prevent a life or health risk for the mother and the stated risk cannot be avoided by other means.

In relation to paragraph 1, the deputy asserted that the requirement (under 266) that the victim initiate a criminal action is unconstitutional, *"a mere complaint filed for the above offenses is sufficient"*⁸.

Regarding paragraph 2, the deputy asserted that *"for the stated paragraph to be constitutional, determining risk for the mother's life, physical or psychological health must be the*

⁵See CONSTITUTIONAL PLURINATIONAL JUDGMENT 0206/2014-Sucre, February 5, 2014 - <http://www.tcpbolivia.bo/tcp/index.php>

⁶Idem.

⁷ Idem.

⁸See Reasons of unconstitutionality: Art 266. "Action abstract unconstitutional" File: 00320-2012-01 - AIA / Department: La Paz
<http://observatoriointernacional.com/?p=714>

sole responsibility of health care providers under whose care the woman is placed. The intervention of a third party is not necessary; whether it is a prosecutor or judge.”⁹

The Court held that both “*the initiation of a criminal action [in paragraph 1] of article 266 and the requirement for judicial authorization required for unpunishable abortions [in paragraph 2] are incompatible with the need to guarantee the rights to physical, psychological and sexual integrity, the right not to be tortured, not to suffer cruel and inhuman treatments, and the free development of women’s personality and autonomy, as it is stated in articles 15, 18 and 22 of the Constitution.*

Consequently, in order to be in full accordance with the Supreme Law, these provisions should be construed as not requiring the filing of a criminal action.”¹⁰

CONSEQUENCES

According to the Constitutional Procedural Code of Bolivia, the decisions of the Constitutional Court are mandatory and binding.

Section II, Art. 15¹¹ states that “*the resolutions of the Plurinational Constitutional Court constitute jurisprudence and are binding on all branches of government, legislators, authorities, courts and for individuals*”. As the TCP’s decisions are binding, the legislative body must adapt the Penal Code, eliminating the requirement for a prior judicial authorization for an abortion in case of rape, abduction not followed by marriage, rape of a minor or incest, or when the mother’s life or health are at risk

Chief Justice of TCP, Ruddy Flores, told reporters that the elimination of the requirement for prior judicial authorization for legal abortion is in force in the country since February 13¹², even though the legislators did not amend the criminal code yet.

REMAINING QUESTIONS

The grounds given by the Deputy for filing the suit challenging the criminalization of abortion were, in general, rejected by the TCP. Thus, many headlines and press releases

⁹Idem.

¹⁰ See CONSTITUTIONAL PLURINATIONAL JUDGMENT 0206/2014-Sucre, February 5, 2014 – page 56.
<http://www.tcpbolivia.bo/tcp/index.php>

¹¹Article 15 ° -. (Mandatory Nature, binding and jurisprudential value of the judgments)

I. The judgments, statements and orders of the Plurinational Constitutional Court are binding in a constitutional process for the intervening parties, except those issued unconstitutional actions and proceedings against taxes that have general effect.

II. The resolutions of the Plurinational Constitutional Court constitute jurisprudence and are binding on all organs of government, legislators, authorities, courts and for particulars.

<http://www.lexivox.org/norms/BO-L-N254.xhtml>

¹²Newspaper “La Razón”. Pressrelease, 19 de febrero 2014,

http://www.la-razon.com/sociedad/Hospital-Mujer-aplicara-aborto-legal_0_2001399868.html

presented the judgment as unreservedly "pro-life". But a careful reading of the portion of the decision dealing with art. 266 raises a serious question: as regards article 266, was the decision really a step forward in favor of life? Or, rather, was it a veiled point in favor of abortion?

The change caused by the TCP calls for expedited access to abortion upon (as the Deputy put it) the mere filing of a complaint based on rape. No one can deny that this can be easily abused.

Moreover, in the case that the woman has been a victim of rape, the practice of abortion does not respond to "*a policy of constitutional protection of [the] embryo's right to life*"¹³ as the TCP acknowledged in its decision, nor does it provide real solutions to women going through such a grave tragedy. Finally, it seems that the TCP considers abortion as a solution, when in fact women rape victims undergo a life-changing experience that is not resolved through abortion; instead these women need a strong social and political commitment to guarantee their wellbeing, compensation for the harm suffered, and the punishment of those who are responsible for the crime.

Abortion kills the unborn, damages the mother, and leaves the rapist unpunished. The question then remains: Was the decision of the TCP in Bolivia fully in favor of Life?

¹³ See CONSTITUTIONAL PLURINATIONAL JUDGMENT 0206/2014-Sucre, February 5, 2014 – page 56. <http://www.tcpbolivia.bo/tcp/index.php>