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ETHICAL AND LEGAL ISSUES IN REPRODUCTIVE HEALTH

The legal status of emergency contraception in Latin America

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ABSTRACT

Timely access to emergency contraception (EC) can contribute to reducing the number of unwanted pregnancies, and ultimately, the number of unsafe abortions and maternal fatalities. In Latin America, where all countries are parties to international human rights treaties that recognize the rights to autonomy, privacy, and health, and recognize sexual and reproductive rights including the right to family planning, the legal status of EC has been discussed in the courts. This article focuses on the analysis of the principal arguments voiced in the courts: the difference between contraceptives and abortifacients, the scientific status of available research on EC, and the age at which people develop a legal right to make decisions about their personal health. The conclusion is that Latin American countries whose laws or regulations ban access to EC in the public and/or the private sector fail to fulfill their obligations under international human rights law.

1. Introduction

Timely access to emergency contraception (EC) can contribute to reducing the number of unwanted pregnancies, and ultimately, the number of unsafe abortions and maternal fatalities. EC is listed on the WHO Model List of Essential Medicines, which is the list of minimum medicine required for a basic healthcare system [1]. Moreover, EC is a means to implement what the WHO calls "secondary prevention of sexual violence," that is, steps that can be taken after violence has taken place to reduce health-related harms and other consequences [2].

Current available research shows that levonorgestrel-only EC: (a) acts by avoiding or delaying ovulation; (b) may also act by interrupting other aspects of the reproductive cycle, before the onset of pregnancy, although this has not been conclusively proven; and (c) can not terminate a pregnancy once implantation has begun. No study based on accepted scientific standards has shown with certainty that EC affects an embryo [3].

All Latin American countries have ratified international human rights treaties that recognize the rights to autonomy, privacy, and health. These treaties have been interpreted to protect reproductive rights and the right to family planning, but the legal status of emergency oral contraception varies by country [4]. On the extreme, in 2009, Honduras prohibited both free distribution and sale of EC [5]. In Peru, for instance, a ruling by the Constitutional Court in 2009 ordered the Health Ministry to refrain from distributing EC to the public sector [6]. In Costa Rica, although distribution of EC is not expressly prohibited, levonorgestrel is not registered as a product, which impedes de facto access to EC from within the public health system as well as on the private market.

Although in the remaining countries of the region free distribution of EC is allowed, regulation is not uniform. For example, legislation in Chile, Colombia, and Ecuador expressly recognizes the right to have access to EC; other countries, conversely, have laws of varying scope that regulate the distribution of EC by healthcare services. In Nicaragua [7] and Bolivia [8], the protocols of the respective health ministries have the status of law. In Argentina and in Brazil, the distribution of EC is not legally recognized except in protocols and informative guides, although in Argentina a ministerial resolution (lacking legal status) is included as part of the "Obligatory Medical Program" [9]. In Mexico, in 2010, in response to a challenge brought by the governor of the State of Jalisco, the Supreme Court upheld a Mexican federal health directive (NOM-046-SSA2-2005) that requires health officials to provide EC to women victims of sexual and domestic violence [10].

In many countries of the region, the legal status of the manufacture and distribution of EC has been discussed in the courts. This article will focus on the analysis of the principal arguments voiced in the courts, which turn on 3 fundamental ideas: the difference between contraceptives and abortifacients, the scientific status of available research on EC, and the age at which people develop a legal right to make decisions about their personal health.

2. Emergency contraception and the right to life

The underlying legal argument presented by those who oppose EC is that life begins from the moment of fertilization and, because of its interference with a fertilized ovum, EC is considered an abortifacient. This argument equates "fertilizing the ovum" with "conception," a term recognized by the legislation [11,12] and constitutions of some

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countries in the region [13,14], as well as the American Convention on Human Rights [15]. According to this line of reasoning, throughout the entire course of a pregnancy, the pre-embryo, embryo, and fetus are all comparable to a live human person and have the same right to life, which is regarded as an absolute right that preempts any other right.

This argument has been accepted by some courts. For example, in 2002, on the basis of this argument, the Supreme Court of Argentina prohibited the production, distribution, and commercialization of Imediat, an EC; because of its perceived abortive effects it is considered to violate the right to life, which for the Court begins with the union of the gametes, namely, with fertilization and before implantation [16,17]. A similar line of reasoning was followed by the Ecuadorian Constitutional Court in 2004 [18].

Another argument against EC that has been invoked before courts hinges upon the scientific status of research into the effects of emergency contraception. This is the argument based on the "reasonable doubt" [19], which was upheld by the Ecuadorian Constitutional Court in 2006 [20], the Chilean Constitutional Court in 2008 [21], and the Constitutional Court of Peru in 2009 [22]. According to this argument, scientific evidence showing that EC does not prevent implantation is not conclusive. The Chilean Constitutional Court accepted that, "given the 'reasonable doubt' with respect to the effects… [of EC], the reasonable doubt extends to possible effects on life of the fetus." The Court, then, appealed to the legal principle of "giving preference to an interpretation that favors the right of 'a person' to life above any other interpretation that may annul such a right." Given that the right to life is at stake, which takes precedence over any other right, the existence of the "reasonable doubt" regarding whether EC definitively does or does not terminate an existing pregnancy leads to the conclusion that permitting the use of EC violates the right to life of the embryo.

Judges in these countries are not responsible for evaluating scientific evidence. They are not experts in medicine, nor are they expected to be. Administrative bodies are responsible for evaluating whether a particular medicine satisfies requirements for allowing it to be sold or distributed freely to the public. If these bodies certify that EC is not abortifacient, then judges should defer to their opinion, rather than themselves attempt to evaluate the scientific evidence.

However, when these bodies adopt an interpretation of the law, the Inter-American Court of Human Rights requires that "… the law most favorable to the human person must prevail" [23]. The governing legal principle does not require the protection of pre-embryos, but rather permits access to EC. This protects the lives of women, because where women who obtain medically assisted abortions may be criminally prosecuted, they may instead attempt to terminate unwanted pregnancies by recourse to unskilled practitioners or self-induced abortions that place their health in danger, and potentially risk their deaths.

Furthermore, these decisions restricting access to EC ignore the finding by the Inter-American Commission on Human Rights, in the "Baby Boy" case [24], that the protection of the right to life is compatible with member states' legislation permitting abortion. Accordingly, the protection of life is not absolute: it must be made compatible with the protection of other rights, such as women's rights to autonomy, privacy, and health.

3. Use of recent scientific evidence

On the basis of recent scientific evidence, other courts have reached conclusions opposite to that of the Argentinian Supreme Court and courts that adopted the "reasonable doubt" argument. In 2006, both the Chamber of Administrative Dispute of the State Council of Colombia [25] (the highest authority of the jurisdiction in administrative dispute litigation in Colombia) and the Peruvian Constitutional Court concluded that emergency oral contraception only has contraceptive effects—that is to say, not abortive effects. On this basis, the highest constitutional court of Peru [26] ordered the Ministry of Health to distribute emergency contraceptives free of charge at all public healthcare facilities. However, this decision was revoked in 2009 on the basis of the "reasonable doubt" with regards to whether EC is abortifacient [6].

With respect to the question of whether life begins at fertilization, the State Council of Colombia accepted the argument that juridical norms that protect the right to life protect "natural subjects of law, and not life in the abstract, therefore rights … must refer to subjects; consequently, they are identified as rights belonging to someone (a human person, a woman, a child, etc.)" [25]. According to the State Council, if the opposite were true, when taken to an absurd extreme, even live gametes before fusion would be considered viable legal subjects. Furthermore, "in the case in which an ovum becomes fertilized but not implanted, a conflict of interest may arise on religious, ethical or moral levels; but in these areas, the problem escapes the competence of this jurisdiction because it no longer has relevance in international law or within Colombian internal law" [25].

4. Adolescents and emergency contraception

In Latin American courts, the validity of health legislation has been questioned when it allows the exclusive consent of adolescents regarding their receipt of healthcare information and contraceptive services. Challengers to such health legislation have argued that the laws are detrimental to legal parental authority, which is proposed as the appropriate means for protecting and educating minors. Parental authority is claimed to include parents' right to decide on the form of general education for their children and, in particular, the form of their sexual and reproductive health education. Additionally, it is claimed that such laws also violate the overall protection of the family. Such a challenge was made in the presentation by delegates to the Chilean Constitutional Court [27], and, on more than one occasion, before Argentinian courts [28].

Challenging this argument for parental authority in Argentina, the Superior Tribunal of Justice of the City of Buenos Aires has confirmed the legal constitutionality of the right of adolescents to have access to information and contraceptives without authorization from their parents and tutors [28]. The Tribunal based its decision on the Convention on the Rights of the Child, governing young persons up to the age of 18 years, ratified by all Latin American countries. The Convention establishes in article 3.1 that "In *all* actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child* shall be a primary consideration" (emphasis added).

According to this legal paradigm, adolescents of adequately evolved capacity have rights of which they are the exclusive subjects, because they are considered to be individuals in their own right. This does not imply that legal parental authority disappears, but article 14 (1) of the Convention respects "the rights and duties of the parents… to provide direction to the child…in a manner consistent with the *evolving capacities of the child* "(emphasis added). It has been observed that "since [the adoption of] the Convention on the Rights of the Child, the duties and rights that result from the inadequately named 'legal parental authority' find their limitation where they butt up against the right to privacy of children and adolescents" [29]. The UN Committee on the Rights of the Child has interpreted Article 19 of the Convention on the Rights of the Child —which states that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse"—as requiring States to provide medical health services to victims of abuse [30,31]. As a result, States can be considered to have a duty to provide for access to EC.

5. Professional responses

In 2002, the Ordinary Assembly of the Federation of Latin-American Associations of Obstetrics and Gynecology (FLASOG), which met in Santa Cruz, Bolivia, highlighted the importance of assuring that adolescent and adult women have access to all scientifically approved contraceptive methods through public services. The Assembly stressed the importance of spurring local obstetrics and gynecologic organizations and governmental health authorities to implement laws to assure the existence of technical services for the provision of EC. The Assembly also highlighted the necessity that instructors, in medical schools, universities, and institutions training healthcare professionals and professionals in complementary sciences, should include human rights perspectives in the curricula of their courses. This is to avoid instructors imposing their personal values that might infringe on women's rights. Similarly, in 2010, FLASOG published a finding on human rights indicating that "to deny or erect obstacles to the utilization of emergency contraceptives constitutes a human rights violation, principally, to the right to decide to have children and when to have them, the right to be free from discrimination for reasons of gender and/or age, and the right to have access to medication and the benefits of scientific advances" [32].

This was consistent with the finding of a workshop on EC organized in 2006 by the Women's Health Alliance that preceded the 18th FIGO World Congress, which concluded that national gynecologic and obstetric associations may play an important role in contributing to increasing access to emergency contraceptives in their respective countries [33]. In fact, recently, the judicialization of the distribution of EC has generated reactions in the medical world. For example, in Peru, the Association of Peruvian Obstetricians and Gynecologists presented an *amicus curiae* brief —a brief presented by nonparties to a law suit—before the Constitutional Court in the 2006 EC controversy [34]. In addition to explaining why EC is not abortifacient, the "friend of the court" brief explains that the Peruvian state has an obligation to respect the right to health, and consequently it is important that all women have access to EC. The Association estimates that, in Peru, more than 350 000 women risk their lives each year in back-alley abortions, a situation which would be relieved by access to EC. The brief claims that impeding access to EC in public service facilities is detrimental to the rights primarily of poor women and thereby discriminates against them, because it does not impede access to EC for women who are able to afford it in private sector pharmacies [36].

Another question that can be addressed by gynecologic and obstetric associations is whether to pressure health authorities and legislators in each country to work toward enacting laws that recognize the right of conscience, but ensure that denying the delivery of emergency contraceptives for reasons of conscience neither compromises the exercise of women's human rights, nor risks their lives or health. As an example, they may invoke the 2008 instructive decision on healthcare responsibilities and conscientious objection by the Constitutional Court of Colombia, which, consistent with the FIGO Ethical Guidelines on Conscientious Objection [35], stated that objecting providers have a duty to refer their patients to nonobjecting providers so that timely access to health care is assured; the decision also stated that hospitals and other institutions do not have a right of conscience [36].

6. The way forward

According to international human rights law, States have two main obligations, namely to *respect* and to *guarantee* human rights to all without discrimination. Concerning health, a State violates its obligation to *respect* when it maintains actions, policies, or laws that may result in avoidable deaths. Additionally, a State violates its obligation to *guarantee* when it fails to take all necessary steps to ensure the realization of the right to health. This includes the failure to adopt a gender-sensitive approach to health care, including health care for rape victims, and the failure to reduce maternal mortality and morbidity rates [37].

In particular, Latin American countries have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The CEDAW monitoring Committee has recommended that States parties establish or support services for victims of family violence, rape, sexual assault, and other forms of gender-based violence [38]. In the same line, in December 2010, the Inter-American Commission on Human Rights requested the State of Haiti to take urgent measures, including ensuring access to EC, to protect the life and physical and mental health of women victims of rape in the 22 camps for Haitians displaced by the January 12, 2010 earthquake [39].

The CEDAW Committee also explains that neglecting to provide health care [such as EC] that only women, and subgroups of women such as rape victims, need is a form of discrimination against women [40]. States parties are obligated to take steps to prevent, prohibit, and punish violations of women's human rights under the CEDAW Convention, including violations not only by the State itself, but by third parties as well [41]. In light of this, health service authorities are obligated, as secondary prevention, to provide EC. Neglecting to do so discriminates against rape victims in accessing appropriate care. Thus, Latin American countries whose laws or regulations ban access to EC in the public and/or the private sector fail to fulfill their obligations under international human rights law.

Conflict of interest

The author has no conflicts of interest to declare.

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