

Judgement T-171/07

TUTELA PROCEEDINGS– Situation overcome by practicing an emergency caesarean in which a fetus with multiple malformations that made life unviable was removed.

Reference: record T-1489026

Action of *tutela* filed by Yolanda Pérez Ascanio against SALUDVIDA EPS

Reporting Judge:
Dr. JAIME CÓRDOBATRIVIÑO

Bogotá, D.C., March 9th, 2007.

The Third Review Chamber of the Constitutional Court, composed of Judges Jaime Córdoba Triviño, Rodrigo Escobar Gil and Marco Gerardo Monroy Cabra, in the exercise of their constitutional and legal powers, has issued the following:

JUDGMENT

Within the process of revising the judgment of the First Civil Municipal Court of Cúcuta, which ruled the *tutela* promoted by Yolanda Pérez Ascanio.

I. BACKGROUND

Facts and *Tutela* filed.

Mrs. Yolanda Pérez Ascanio filed a *tutela* against SALUDVIDA EPS, considering that that entity violated her right to “right to surgical abortion.” The action brought is based on the following facts:

1. The plaintiff said that for thirteen years she has lived together with José Daniel Cardenas and that she is the mother of three children, 11-year-old Brainer, eight-year-old Derinson and six-year-old Yordan Daniel.
2. Mrs. Pérez claimed that at the time of filing the *tutela* she was five months pregnant (October 3rd, 2006).
3. According to the plaintiff, on September 19th, she underwent an obstetrical ultrasound in the Communards Health Post (*Puesto de Salud de Comuneros*), in which, as a result, they noted that the fetus had a malformation called Anencephaly.

4. Mrs. Pérez indicated that, given that medical diagnosis, she contacted a renowned radiologist who practiced an ultrasound again and diagnosed the following: “FEMALE PREGNANCY LONGITUDINAL SITUATION BREECH PRESENTATION WITH THE POSTERIOR BACK WITH MULTIPLE CONGENITAL DEFECTS: ANENCEPHALY, CARDIOMEGALY WITH CONGENITAL HEART DISEASE AND DEXTROCARDIA, DEFECT OF ANTERIOR ABDOMINAL WALL (GASTRISQUISIS)”.

5. The plaintiff stated that she has spoken with his partner and has decided that given the multiple malformations of the baby, as well as the fact that there is no guarantee it will survive, the pregnancy should be discontinued.

6. Additionally, the plaintiff asserted that she receives health care through SALUDVIDA at the Hospital Universitario Erasmo Meoz.

7. In light of the foregoing, Mrs. Yolanda Pérez Ascanio filed a *tutela* against SALUDVIDA EPS considering that that entity infringed her right to surgical abortion since she considers that “(...) *due to the news of the malformation of my baby and the certainty that there is no hope for it of surviving. I felt exhausted, distressed, my health has deteriorated and is also threatening my life*”.

8. Mrs. Yolanda Pérez Ascanio provides as evidence: i) a copy of the obstetric ultrasound practiced on September 19th, 2006; ii) a copy of the obstetric ultrasound performed on October 2nd, 2006; iii) a copy of her SALUDVIDA membership card; and iv) a copy of the certificate of citizenship.

8.1 The copy of the obstetric ultrasound performed on September 19th, 2006 at the Institución Prestadora de Servicios de Salud de la Unidad de Atención Básica “Comuneros” by Juan Antonio Carrero Lamus, radiologist, reads as follows:

“There is a single living fetus, longitudinal breech with back to left. Fetal parts are observed, anencephaly, defect of the anterior abdominal wall muscle, amniotic fluid and umbilical cord is seen normal, fetal movements and positive fetal heart rate at the time of examination.

LF: 3.1 cm

Anterior corporal placenta grade I. Normal thickness no signs of loosening or praevia placenta

OPINION:

19 weeks pregnancy, by LF

Single living fetus

ANANCEPHALY

GASTROSCHISIS?”

8.2 The copy of the obstetric ultrasound performed on October 2nd, 2006, by the radiologist Gustavo Salgar Villamizar, reads as follows:

“FEMALE PREGNANCY LONGITUDINAL SITUATION BREECH PRESENTATION WITH THE POSTERIOR BACK WITH MULTIPLE CONGENITAL DEFECTS: ANENCEPHALY, CARDIOMEGALY WITH CONGENITAL HEART DISEASE AND DEXTROCARDIA, DEFECT OF ANTERIOR ABDOMINAL WALL (GASTRISQUISIS) THE BDP CAN NOT BE MEASURED BECAUSE THERE IS NO BRAIN.

LALF 3.6 cm FOR 20.5 WEEKS.

ANTERIOR NO PRAEVIA PLACENTA GRADE I.

AMNIOTIC FLUID AND NORMAL UMBILICAL CORD

UTERINE CERVIX 3.9 cm CLOSED

OPINION: FEMALE 20.5 WEEKS BY LF.

ANENCEPHALY GASTROSCHISIS.”

Judicial proceedings:

9. On October 4th, 2006, the Tenth Civil Municipal Court of Cúcuta decided that it was barred from ruling on the *tutela* and ordered to submit it to the First Civil Municipal Court of Cúcuta. The reasons for Judge José YáñezMoncada’s decision are transcribed below:

“It would be the case, to pronounce on the admission or not of the tutela filed by Mrs. YOLANDA PÉREZ ASCANIO against SALUDVIDA EPS, in the sense that it will protect the right to freedom of surgical abortion; if my consciousness as a result of this action, was not seriously affected, to the extent that prevents me from being impartial in the decision to take, leading to irresistibly lean to a non-legal decision, which I am not obliged to take.

And I express it, because once I found out that this action was assigned to this Office by way of distribution, my life has become a torment, in an internal conflict in what my conscience says and the application of law, to the point that for the first time in nearly 20 years of judicial service, I am necessarily inclined not to be impartial, without being humanly able to subjectively control myself in order to examine the case with sobriety.

As a person, as a human, I ask the judge of similar category, and the Superior Funcional Jerárquico, in the event he gets to hear the case, to respect my freedom of conscience and not be forced to act against it, as I repeat the internal conflict I am living is monumental, because I do not feel able to make a decision where it is ordered to terminate a pregnancy.

And this is because I am a staunch defender of life, as I grew up defending it and also respecting that I am an ardent practitioner of the Christian Catholic faith, which has not contributed me, but has been the basis to feed my conviction of being unable to make a decision in favor of the nature intended.

Article 18 of our Political Charter stipulates that freedom of conscience is guaranteed. No one shall be harassed because of their convictions or beliefs or compelled to reveal them or obliged to act against their conscience.

*As observed the Magna Charter guarantees freedom of conscience and **its normative content prohibits forcing someone to act against their conscience.***

Thus, as a person, I proudly bear the position of judge, a position that I have been exercising for many years, and I am well aware that the Constitution of Colombia does not exclude me, because it applies to everyone without exception. Therefore, in a respectful manner I request that the conscientious objection that I am exercising to not hear, nor rule on this claim, is respected.

Precisely the Honorable Constitutional Court in the S.C. 355 2006 case in one of its paragraphs, expressed: “It should also be remembered that conscientious objection is not a right which the legal persons or the State hold. It can only be recognized to a natural person, so that there can be no clinics, hospitals, health centers or whatever name they are called, that present conscientious objection to the practice of abortion when the above conditions are met. With regard to natural persons, it should be noted that conscientious objection refers to a religious conviction duly substantiated, and therefore the doctor’s opinion regarding whether or not he agrees with the abortion is not at stake, nor may it involve ignorance of the Fundamental Rights of Women; so, if conscientious objection is invoked by a doctor, he must immediately proceed to refer the woman who is in this situation to another doctor that can perform the abortion, without prejudice to subsequently determine whether conscientious objection was appropriate and relevant, through the mechanisms established by the medical profession.”

From the above it is clear that conscientious objection only applies to natural persons, that is to humans, and who is making use of this figure of constitutional status with a fundamental right is precisely a human person, which has his conscious severely affected by the internal conflict that he is facing because of his training, conviction and Christian Catholic faith, as a practitioner. As the practitioner that I am, I do not enjoy independence to make an impartial decision on what is intended; since my inclination tends, because of my training, conviction and Christian Catholic faith, to respect and defend human life.

I respectfully request that my position is understood and that my right to free development of my personality is not violated, as this right is broad and as a natural person it protects me in my personal, moral and subjective autonomy; because if we refer to the constitutional provision, we realize that this rule protects all persons, without exception, to the right of free development of personality.

Note well, I am not speaking about abortion, but about myself, with reference to what is intended with the action presented because my conscience is still troubled, and the only way to relax it is writing what she tells me.

These are the reasons for which I will declare myself in the operative part of this decision prevented to hear and determine this tutela, in compliance with the provisions of Article 39 of Decree 2591 of 1991, which states in one of its paragraphs that, a Judge shall be declared impeded when the grounds for disqualification of the Code of Criminal Procedure are met under penalty of incurring the appropriate disciplinary action.

Before analyzing this norm, I want to make clear that the impairment occurs not by legal means, but by constitutional means, considering the exposed here; however, if we consider Article 29 we will find out that it stipulates... when the grounds for disqualification of the Code of Criminal Procedure are met.

Article 99 of Law 600 of 2000 establishes: These are grounds for disqualification: 1. That the judicial official, his spouse or life partner, or any of his relatives within the fourth degree of consanguinity, affinity or first civil, has an interest in the procedural action.

For its part, Article 150 of the Code of Criminal Procedure modified by Executive Decree 2282/89, Article 1, paragraph 88, establishes as grounds for recusal the following reasons:

1.- That the judge, his spouse, or any of his relatives within the fourth degree of consanguinity, affinity or first civil has direct or indirect interest in the process.

It is inferred from the previous transcripts, that the first causals refer to the same; and about this, Hernán Fabio López Blanco indicated that: This is a generic causal, within which all others can be encompassed, and where it is possible to frame any circumstance that does not fit within the other that are enshrined in the article commented. It is without doubt the most comprehensive of all the grounds where can be placed circumstances meriting the impediment or objection but that were not specifically established.

Indeed, he says, the interest that the law is referring to can be direct or indirect and of any kind; i.e. material, intellectual, or even purely moral. As clearly expressed by the Court when commenting on a similar provision of the previous Code and stating that “the law does not distinguish the kind of interest that must be taken into account and not making such distinction, the moral interest is included within the causal.”

(Procedimiento Civil, Tomo I, parte general, Novena Edición, DUPRE EDITORES, Bogotá D.C., Colombia 2005).

Under these arguments I plead that I be prevented to rule on competition, admission, and the merits of this tutela; insisting on the fact that the impediment arises from constitutional rules, but not legal rules, inferring that if I am obliged to act against my conscience the most logical thing is that the consequence is the impediment.

Therefore, it is ordered that the action with its annexes is sent to the First Civil Municipal Judge of the city, who is, and follows in turn for decision.

It is not superfluous to inform that the undersigned is silent regarding what is intended, but only with respect to what my conscience tells me.

Based on this, it is

RESOLVED:

FIRST: Due to the conscientious objection raised and supported by the relevant part of this decision; I plead prevented to rule on competition, admission, and the merits of the intended action.

SECOND: Refer the action instituted together with its annexes to the First Civil Municipal Court of this city; authority next in turn for his competition.”

10. On October 5th, 2006, the First Civil Municipal Court of Cúcuta accepted the impediment pleaded by the Tenth Civil Municipal Judge of Cúcuta because of conscientious objection and admitted the *tutela*. In the same order, the judge ordered SALUDVIDA and the Hospital Erasmo Meoz to report on the following aspects: i) if the plaintiff had requested that a surgical abortion be performed due to fetal malformations; ii) the name of the doctor who is attending the plaintiff's pregnancy and if he has ordered a surgical abortion; and iii) remission of clinical history.

In addition, the judge called the plaintiff and her life partner in order to give testimony on the facts that gave rise to the *tutela*. Finally, the judge ordered doctors Juan A. Carrero Lamus and Gustavo Salgar to be heard in a statement to illustrate to the Office of the malformations detected in obstetrical ultrasounds performed on the plaintiff.

Response from the defendant entities

11. On October 10th, 2006, the legal representative of SALUDVIDA S.A. EPS, reported that Ms. Yolanda Pérez Ascanio is affiliated with the EPS in the subsidized regime. In this regard, he clarified that the plaintiff has not filed an application for authorization so that a surgical abortion due to fetal malformations be performed.

Furthermore, he noted that the plaintiff receives health services of first level in the ESE IMSALUD, Communards Basic Unit, where she underwent prenatal care. On this matter, he reported that it has requested information about the doctor who is attending the plaintiff and if the need to perform a surgical abortion has been communicated to the ESE IMSALUD and the ESE Hospital Universitario Erasmo Meoz.

Finally, the legal representative concluded that SALUDVIDA EPS has not endangered or violated the fundamental rights of the plaintiff as it is complying with the legal and contractual obligations arising from the provision of health services.

12. On October 10th, 2006, the Deputy Director of Health Services at the Hospital Universitario Erasmo Meoz, Carlos David Celis Rincón, sent a copy of the medical records of Mrs. Yolanda Pérez Ascanio, according to which the original treatment of the plaintiff in that hospital was on April 5th, 1998. In this regard, stated: “*From that date – he refers to April 8th, 1998 – she only consulted once on September 19th, 2006 and the doctor who treated the patient that day was Dr. WILLIAM PÉREZ. The location address of Dr. Pérez is Av. 11E N° 5AN-71, ESE HUEM- labor room. Inside the medical records, there is no evidence that the physician has ordered or communicated the need to perform a surgical abortion due to defects suffered by the fetus.*”

13. On October 18th, 2006, the legal representative of SALUDVIDA EPS presented in the First Civil Municipal Court of Cúcuta, a copy of the medical records of Mrs. Yolanda Pérez Ascanio, sent by the ESE IMSALUD.

According to the IMSALUD ESE report, the plaintiff was treated by Dr. Alfredo de Jesús Burgos, on August 29th, 2006. On September 19th, Dr. Juan Antonio Carrero Lamus performed an obstetrical ultrasound on her, and that same day she was treated in the emergency room by Dr. Edgar González who referred her to the Hospital Universitario Erasmo Meoz for Gynecology consultation. The report concluded that: “(...) *reviewed the medical records it does not appear that the doctor has considered or ordered to perform a surgical abortion.*”

Statements before the First Instance Court

14. On October 10, 2006, in a statement made by Mrs. Yolanda Pérez Ascanio before the First Civil Municipal Judge of Cúcuta, it is noted that: “(...) *QUESTION: Please tell the office if you have attended to SALUDVIDA EPS so that it performed a surgical abortion. ANSWER: No, I have not attended there, but this afternoon I will present to those offices. QUESTION: Tell us what doctors have conceptualized on the need to carry out the abortion. ANSWER: The Hospital doctor told me that the only thing was to file a tutela so that the abortion could be performed, a gynecologist at night in the hospital where I went, Dr. JUAN ANTONIO CARRERO LAMUS from IMSALUD – Communards Post, who practiced an ultrasound on me, gave me a referral to the Hospital, and the Hospital Erasmo Meoz gynecologist told me that he would not touch me until the tutela was ordered, hence I went to Dr. GUSTAVO SALGAR VILLAMIZAR and I underwent another ultrasound, and he also told me the same malformations result and more things that are on the record. QUESTION: Is it your desire to undergo surgical abortion? If so explain the reasons. ANSWER: Yes, I want it because the doctors have told me that if born he probably won't live and it is very difficult for me to keep a child in those conditions, since I work in Ureña and live in Cúcuta, I have three children, who is going to take care if he comes to live with the disease he is suffering (...)*”.

15. On October 11, 2006, Mrs. José Daniel Cárdenas, life partner and father of the three children of the plaintiff, testified before the First Civil Municipal Judge of Cúcuta. In the proceedings, Mr. Cárdenas reported: “(...) *QUESTION: Please declare to the Office if it is your desire that Mrs. Yolanda undergo a surgical abortion. If so, explain why. ANSWER: As long as there is no danger to Yolanda's life, I agree that the abortion is performed, because according to the doctors the child is in bad conditions in the womb, has no figure, no brain, no part of the abdomen and it's column is twisted. QUESTION: Tell the office if thereon medical experts have conceptualized on the need to practice surgical abortion. ANSWER: Yes, being in the state in which the child is (...)*”.

16. On October 11, 2006, the statement made by the radiologist Gustavo Salgar Villamizar, before the First Civil Municipal Judge of Cúcuta, reads as follows: “(...) *QUESTION: Please express to the Office if the suggestion or diagnosis concerning the need to practice surgical abortion on YOLANDA PÉREZ ASCANIO was issued. ANSWER: I was visited by Yolanda Pérez Ascanio who was seeking a second opinion of the ultrasound practiced in the Communards Unit of Basic Attention by my colleague Dr. Juan Antonio Carrero Lemus who initially diagnosed absence of brain and cerebral cortical bone in relation to a serious congenital*

malformation “ANENCEPHALY” and defect in the anterior abdominal wall muscle “GASTROSCHISIS” in the nineteenth week of gestation on September 19th, this year. Thirteen days later, on October 2nd, 2006, I gave as a second opinion the diagnosis of multiple congenital malformations: ANENCEPHALY, GASTROSCHISIS, CARDIOMEGALY WITH DEXTROCARDIA WITH REVERSE SITUS without shell (table) brain with mere presence of face, brainless, which is incompatible with life, it is impossible to take BDP measures and basic brain circumference to determine gestational age. By femur length I determined that it has 20.5 weeks of gestation (3.6 cm) DLF. QUESTION: Please declare to the Office if SALUDVIDA EPS referred to the plaintiff’s petition. ANSWER: I have never had direct or telephone contact with SALUDVIDA as the patient paid me the private consultation looking for a second opinion that reaffirmed the diagnosis initially given by Dr. Carrero in the Communards’ Basic Unit on last September 19th with just nineteen weeks of gestation.”

Decision under review

17. By judgment of October 18th, 2006, the First Civil Municipal Court of Cúcuta decided to withdraw the *tutela* filed by the plaintiff. According to the judge in the case of Mrs. Pérez Ascanio, none of the grounds for decriminalization provided by the Constitutional Court in Case C-355 2006 existed. In this regard, considering that it is not possible to practice an abortion when it is based on the will of the mother without medical diagnosis, so ordered.

In the opinion of the judge, while fetal malformation is reported in the medical records of the plaintiff, the truth is that there is no medical recommendation that she be provided an abortion. Finally, the judge exonerated the defendant of the violation of fundamental rights because there is no proof in the file that shows that they have refused to provide a medical service.

Interim measures by the Constitutional Court:

18. By order of December 6th, 2006, the Presiding Judge ordered an interim measure by which it was provided that the Hospital Universitario Erasmo Meoz should form a medical board to assess the state of health of Mrs. Yolanda Pérez Ascanio and determine the procedure according to predetermined medical protocols. In particular, the provisional measure stated:

“First. ORDER the Hospital Universitario Erasmo Meoz to form in the space of forty-eight (48) hours of notification of this decision a medical board integrated, at least, by specialists in the areas of bioethics and pediatrics neonatology, the Head Nurse and the President of the Society of Obstetrics and Gynecology of Norte de Santander.

Second. The Medical Board shall remain together until a final decision is taken on the procedure to be followed in the case of Mrs. Yolanda Pérez Ascanio, according to pre-established medical protocols. The procedure approved by the Board shall be guided taking into account the informed understanding of the mother, the specific health conditions of the plaintiff, gestational age, the risks of the procedure, choosing one that is less traumatic and of a lesser degree of involvement of the health and physical and mental integrity of the patient.

The report of the Medical Board will be made known to the mother in a timely manner.

Third. *The procedure suggested by the Medical Board, must be made within forty-eight (48) hours, unless medical considerations require otherwise. In any case, the hospital must provide the best medical care conditions determined by the protocol for comprehensive care to the mother in such cases and must necessarily include immediate psychological protection and future, as is required.”*

19. On December 11th, 2006, the Hospital Universitario Erasmo Meoz reported that the procedure unanimously adopted by the Medical Board, was: *“Let the pregnancy get to term (about 37 weeks) handling it as outpatient high risk, seek psychological support and then extricate, since at this time is coursing, according to the ultrasound performed on December 7th, 2006, with a gestational age of 29 weeks +/- 2; in previous ultrasound, on September 20th, was reported 20 weeks at that time and today that would be 32 weeks and a half.”*

In addition, the representative of the Hospital Universitario clarified that: *“(…) once read, explained and notified the record of the plaintiff, an appointment was schedule with psychiatry for December 13th and an OBSTETRICAL ULTRASOUND was ordered again WITH DOPPLER ANALYSIS which will be held on Tuesday 12th of this month, to be addressed by the gynecologist Dr. LUIS EMILIO ESCALANTE on Wednesday 13th.”*

20. On December 14th, 2006, the Presiding Judge decided to inform the Sectional Health Directorate of the Department of Norte de Santander on the content of the *tutela* filed by Yolanda Pérez Ascanio against SALUDVIDA, to integrate the contradictory. This, as the defendant, SALUDVIDA, is a health provider public entity.

21. The Director of the Departmental Health Institute Norte de Santander, through a communication based on this Corporation on January 15th, 2007, reported that once the SISBEN database corresponding to the municipalities of the Department was revised, it was found that Mrs. Yolanda Pérez Ascanio *“(…) is identified by the Identification System Beneficiaries of Social Programs (SISBEN) of the Municipality of Cúcuta, under N° 87445 tab, the urban area and showing a score of 31 that classifies her at Level 1, the reason why she meets the requirements defined in the Agreement 244 of the CNSSS, since 2005, joined the Subsidized Regime and is currently in the ARS SALUDVIDA EPS, acquiring the right to receive the services contained in the Mandatory Health Plan subsidized at the risk of the insurer, under the resources management contract of the Subsidized Regime undersigned by the Municipality of Cúcuta and said ARS.”*

As for the provision of health care services claimed by the plaintiff, the Director of the Institute said that it is not for the Department to take care of issues related to pregnancy and childbirth. In this regard, he clarified that according to Article 2 of the Agreement 306 of 2005, the Mandatory Subsidized Health Plan (POSS) includes: *“(…) complications of pregnancy, childbirth and postpartum and diseases that endanger the development and normal completion of them or pose a risk to the life of the mother, fetal viability or survival of the newborn.”* In this regard, he concluded that it is SALUDVIDA who is the competent body to ensure the health care stipulated

in the POSS, as the Departmental Health Institute only cover medical services that are not contained in such coverage.

In addition, the representative of the departmental agency reaffirmed the position of unaccountability of the Institute in providing the health service claimed by the plaintiff, since the regulations on abortion, issued by the National Government through Decree 4444 of 2006, states that: *“health services required by and affiliated with the General System of Social Security in Health in charge of the Health Promotion Entities, the Subsidized Regime Administrators and adapted entities will be provided in the health service providers institutions with whom each manager has an agreement or contract, or without agreement in the case of emergency care (...)”*.

Consequently, the Departmental Health Institute Norte de Santander requested that the judgment be revoked; the fundamental rights of the plaintiff are protected, and therefore order SALUDVIDA to undertake and provide Mrs. Yolanda Pérez Ascanio with the health services that she required, through the health service providers' institutions with which the Administrator of the Subsidized Regime has a contract. In this sense, the Director of the Institute requested the exclusion of liability of the entity for the alleged failure to provide health services that are contained in the POSS.

22. On January 17, 2007, in order to have more evidence at the time of ruling, the Presiding Judge required the Hospital Universitario Erasmo Meoz to report on the state of health of Mrs. Yolanda Perez Ascanio, as well as health services and treatment that were being provided. In particular, he asked the hospital about the following aspects:

“a. When the birth took place and what the results of this procedure are?”

b. What is the current health status of the patient and whether there were physical and/or mental limitations due to pregnancy?”

c. What medical and psychological treatment is the patient currently receiving?”

23. In a communication dated February 12th, 2007, the Deputy Director of Health Services of the Hospital Universitario Erasmo Meoz, presented, based on medical records of Mrs. Yolanda Pérez Ascanio, the report reproduced below:

“a)- Mrs. YOLANDA PÉREZ ASCANIO identified with the CC. N. 60.369.368, underwent an emergency Caesarean, on December 13th, 2006, a procedure performed with no complications, obtaining unique male product, weighing 1,400 g, height 35cm, head circumference 23 cm, with Anencephaly, harelip, bilateral cleft palate, omphalocele. Shutdown 1 2/10 minute; died at 5 2/10 minutes.

b)- As is recorded in the psychiatry assessment of February 5th, 2007, whose copy is annexed, Mrs. YOLANDA PÉREZ ASCANIO, is enjoying good mental health.

Similarly, as is recorded in the psychiatry assessment of February 5th, 2007, whose copy is annexed, Mrs. YOLANDA PÉREZ ASCANIO, has no physical alterations, she was only diagnosed with vaginal discharge, for which she was ordered medical treatment:

Metronidazole and Nystatin eggs. She was called for an outpatient control in a month for cytology.

c)- Currently she is only treated with Metronidazole and Nystatin, cytology will then be performed.

She has been instructed to assist the institution when necessary.

The Hospital Universitario representative provided as evidence copies of the following documents: i) The clinical care record of December 13th, 2006; ii) the epicrisis care of December 13th, 2006; iii) The surgical procedures' RIA of December 13th, 2006; iv) The clinical record of the psychiatry assessment of February 5th, 2007; and v) The clinical record of the gynecology assessment of February 5th, 2007.

II. CONSIDERATIONS OF THE CONSTITUTIONAL COURT

Jurisdiction

1. This Court has jurisdiction in accordance with Articles 86 and 241 of the Constitution and Decree 2591 of 1991, to review the selected *tutela* judgment.

Legal Issue

2. It is for this Court to decide whether the defendants violated the right to the integrity of a pregnant woman who has been medically diagnosed with a severe malformation of the fetus which makes its life unfeasible without simultaneously being prescribed the termination of pregnancy based on one of the grounds for decriminalization of abortion and whatever was the will of the mother the application of that procedure.

However, the constitutional issue raised, given the evidence gathered in the review instance, makes it necessary for this Court to previously consider the existence of a fact that is over in the case.

Case study. Fact exceeded.

3. According to the communication of the Hospital Universitario Erasmo Meoz, Mrs. Yolanda Perez Ascanio, underwent an emergency Caesarean on December 13th, 2006. As a result of this procedure. it a fetus was removed with multiple malformations, which, as had been known medically, made life unviable. Also, according to the report by the Hospital Universitario today, Mrs. Yolanda Perez Ascanio enjoys good health and is being provided medical services for both physical and psychological well-being.

Therefore, howsoever in this case we face an exceeded fact, since the situation that caused the *tutela* already disappeared; this Chamber of Review declares the current lack of object, under Article 26 of Decree 2591 1991.

4. In view of the aforementioned, the Chamber confirms the revised judgment, but for the reasons stated in this Order, according to the case law in this regard has decided as follows:

“This Corporation, in interpreting the content and scope of Article 86 of the Constitution, repeatedly pointed out that the purpose of the tutela is limited to the immediate and current protection of fundamental rights when these are violated or threatened by an action or omission by public authorities or individuals in cases expressly enshrined in law.

As a matter of fact, it follows that the purpose of the tutela, as stated in that article, is that the Constitutional Court, expeditiously, must administer justice in the case, stating the orders which it considers relevant to the public authority or to the private individuals whose actions have threatened or violated fundamental rights and thus ensure the current and certain defense of them.

However, when the factual situation that causes the alleged threat or violation of the alleged right is overcome, the tutela loses all raison d’etre as the most appropriate mechanism and expeditious judicial protection, regarding the decision that a judge could take regarding the case would be harmless to all lights, and thus contrary to the objective constitutionally foreseen for this action.”

5. In sum, the Court finds that in this case the violation or threat of compromised fundamental rights has ceased, and therefore the *tutela* has no purpose, to the extent that under these new conditions there is no order to impart or damage to avoid. In this regard, the Court confirmed the ruling issued by the First Court Civil Municipal of Cúcuta that solved the *tutela* promoted by Yolanda Perez Ascanio against SALUDVIDA and the Departmental Health Institute Norte de Santander, the latter linked to review.

6. While during the resolution of this case there was no regulation for the practice of abortion in the decriminalized circumstances, the Court should note that on December 13, 2006, the Ministry of Social Protection issued Decree 4444 of 2006, which regulates the provision of sexual and reproductive health, in particular, access of pregnant women to health care in cases where the applicable voluntary interruption according to the decriminalization of abortion under Case C-355 2006. In this regard through Resolution 4905 of 2006, the Ministry of Social Protection adopted the technical standard for the Voluntary Interruption of Pregnancy "Safe Abortion: technical and policy Guidance for health systems Guide" of the World Health Organization.

III. DECISION

In light of the foregoing, the Third Review Chamber of the Constitutional Court, administering justice on behalf of the People and by mandate of the Constitution,

RESOLVE:

First: DECLARE the current lack of object, in the process of *tutela* because it is a fact exceeded.

Translation provided by the Lawyers Collective (New Delhi, India) and partners for the Global Health and Human Rights Database

Second: CONFIRM the ruling of the Municipal Civil Court First Cucuta against SALUDVIDA and Departmental Health Institute Norte de Santander, but only for the reasons stated in this decision.

Third: By General Secretariat notify under Article 36 of Decree 2591 of 1991.

Let it be copied, reported, communicated, and published in the Gazette of the Constitutional Court and be enforced.

JAIME CÓRDOBA TRIVIÑO

Reporting Judge

RODRIGO ESCOBAR GIL

Judge

MARCO GERARDO MONROY CABRA

Judge

MARTHA VICTORIA SÁCHICA MÉNDEZ

Secretary General