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The history of universal access to emergency contraception in Peru: a case of politics deepening inequalities

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According to UNFPA estimates, four girls under the age of 15 give birth each day in Peru.¹ In 2010, 34% of adolescents who reported having suffered sexual violence became pregnant as a result of the assault, and 14% were aged 10–14 years.² Adolescent pregnancy, sexual violence and forced motherhood (i.e. resulting from the lack of true choice young women may have in becoming pregnant and/or carrying the pregnancy to term) remain serious health and human rights concerns in Peru. Girls from marginalised or low-income populations are more likely to become pregnant and consequently to drop out of school, because of their limited access to information and health care services. Despite this serious public health problem, ensuring universal access to emergency contraception (EC) (the only contraceptive method that can prevent pregnancy after intercourse), has remained an object of political dispute, further deepening social inequalities in Peruvian society.

Emergency contraceptive pills (ECPs) are a safe and effective contraceptive method that can prevent pregnancy up to five days after unprotected sexual intercourse. ECPs, also known as “the morning after pill” or “post-coital contraception”, work primarily by delaying ovulation and are more likely to be effective the sooner they are taken. Scientific evidence shows that ECPs do not prevent a fertilised egg from implanting in the uterus, and do not induce abortion.³

Ensuring universal access to a wide range of contraceptives, including EC, is associated with higher use and a decrease in the number of teen

pregnancies.⁴ A number of international treaties (such as the Convention on the Elimination of All Forms of Discrimination Against Women, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) recommend that, in order to protect and promote the right to health, States make universally available a comprehensive range of good quality, modern and effective contraceptives, including EC.⁵ Furthermore, ECPs are included in the World Health Organization (WHO) Essential Medicines Model List, an inventory of the medicines considered most necessary and effective to meet the needs of a country’s population. WHO recommends that ECPs be integrated into healthcare services⁶ and routinely offered to girls who have been raped.⁷

ECPs in Peru: a troubled start

In an effort to update the national policies on contraception, and to strengthen its evidence and rights-based approach, the first government after the authoritarian Fujimori era introduced ECPs to family planning protocols in 2001, as documented in the Ministerial Resolutions Num. 465-99-SA/DM and 399-2001-SA/DM.

ECPs quickly became available in the private sector through pharmacies, but the implementation of the family planning protocols in public health facilities, which largely serve the most deprived populations, never took place. The transitional government that introduced ECPs stayed in office for only six months and did not activate

official mechanisms to supply ECPs in public health care centres. Subsequent governments appointed conservative Catholic Ministers of Health (with one exception), who took a faith-based approach to health policies⁸ and did not prioritise the roll-out of the family planning protocols.

Concerned with the Ministry's lack of compliance with its own resolutions, in 2002, a group of female citizens and human rights defenders, under the leadership of Susana Chavez, initiated a litigation process. The plaintiffs requested the provision of EC information and methods in all public healthcare facilities. The claim was supported by organisations such as the National Medical College and Society of Obstetricians and Gynaecologists, WHO and UNFPA, which contributed invaluable technical opinions through *amicus curiae*. The lengthy process ended in 2006, when the Constitutional Court issued a decision (Sentence Num. 7435-2006-PC/TC), ordering the Ministry of Health to initiate the free-of-cost provision of ECPs in all public health facilities, and to comply with its own resolutions.

Simultaneous efforts to restrict access to ECPs

In 2004, while the case to have EC de facto provided in the public network was processed in the judiciary, a local civil society organisation, self-defined as Christian Catholic, initiated another legal process against the Ministry of Health to request exactly the opposite: suspension of any plans to provide ECPs. Their fundamental claim was that the universal provision of ECPs could mean the massive violation of the right to life from conception, protected in the Peruvian legal system.⁹ This case also reached the Constitutional Court which, in October 2009, in an unprecedented pronouncement, ordered the Ministry of Health to suspend the distribution and supply of ECPs (which by then had already started) in the public system, even in the emergency kit for victims of sexual abuse (sentence Num. 02005-2009-PA/TC). Paradoxically, the decision did not ban EC sales or purchases in the private sector.

The Court's decision brought the country back to a landscape of deeper inequalities, in which those with means could procure EC pills directly in private pharmacies, while low-income populations were deprived of the right to access post-coital contraceptives. The impact of this decision continues

to affect women in dramatic ways: in 2014, out of the 5201 female victims of rape, according to the National Police registry,¹⁰ only 60 received EC as part of post-rape care.¹¹ The case of one of these many women, who were not informed of, nor offered EC after sexual assault, was submitted to the Inter-American Commission on Human Rights. The case "Maria vs. Peru" (2014),¹² claims that by denying EC in public hospitals, the State of Peru is violating a number of fundamental human rights, including the right to equality before the law and freedom from discrimination. The case is still pending.

The weight of the outdated FDA label

The Peruvian legal system states that "the conceived" is a subject of law, and that accordingly, life must be protected from the moment of fertilisation of the ovum. Research and scientific evidence regarding the mechanism of action of ECPs was proliferating at the time, including their lack of capacity to prevent the implantation of a fertilised egg. Regardless, the so-called potential anti-implantation effect of ECPs was one of the main arguments put forward by the Constitutional Court in 2009, to support its decision to halt the public provision of ECPs. One of the pieces of evidence presented to support the "anti-implantation effect" was the explanation of how ECPs work according to the USA's Federal Drugs Administration (FDA) label of the EC product "Plan B" (and others). This reads as follows: "If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation)".

This FDA label was developed in 1998 and was based on the label for birth control pills. In the following years, research provided stronger and direct evidence that ECPs prevent or delay ovulation, but not the implantation of a fertilised egg.³ However, the label has not been updated to reflect the evidence developed since 1998. The manufacturers of other brands of EC, such as NorLevo, registered in a number of European countries, updated the label of this product in 2014, and it now clearly states that ECPs work by blocking or delaying ovulation, and not by interfering with implantation of a fertilised egg. Yet the outdated FDA label continues to be used and cited by opponents to ECPs access around the world and is believed and trusted in high courts.

A positive preventive measure in the midst of a promising landscape

A stronger focus on women's rights and protection is slowly gaining ground in the interpretation of the "right to life from the moment of conception" in critical regional justice systems, such as the Inter-American Court of Human Rights, which also sets binding jurisprudence on the State of Peru (case "Artavia Murillo et al vs Costa Rica", 2012). This landscape has encouraged a group of Peruvian human rights organisations to undertake legal action again. In early 2016, this group initiated a new domestic litigation process to request the protection of the right to universal access to ECPs, based on state-of-the-art scientific evidence that was not available or considered by the Constitutional Court in 2009.

In August 2016, a first instance judge in Lima ordered the immediate re-establishment of ECP provision in all public healthcare facilities, as a preventive and temporary measure, until the case is resolved. The effective distribution of ECPs throughout the country is not yet a reality, and lack of ECP supplies in public health facilities have been reported in 10 Departments (Amazonas, Huancaavelica, Huánuco, Moquegua, Pasco, Piura, Puno, Tacna, Tumbes and Ucayali).¹³ However, the current legal framework now allows oral EC information and methods to be requested and provided and sets a promising scenario for the resolution of the case.

Hope and an example to follow

The history of ECPs in Peru shows the extent to which policies regarding this contraceptive, far from being based on scientific evidence, can become politicised and criminalised, with absolute disregard of the needs of the most vulnerable populations. Between 2001 and 2017, the country drastically changed EC public provision policies on four occasions. This suggests the absence of a scientific evidence base; the strong influence of

groups that oppose reproductive rights and women's autonomy in the highest spheres of policy-making; and their lack of sense of public health policies as a means to build healthier and more equitable societies. It is also a clear case of the damaging repercussions that outdated information in the FDA registry of ECP products can currently have, inside and outside of the USA, and of the urgency manufacturers concerned should demonstrate in updating information. On the other hand, the turn of events in 2016 shows that the body of evidence on the mechanism of action of ECPs is more solid than ever before, and that evidence-based advocacy can trigger immediate positive changes, such as the provisional measure to ensure immediate access to EC with no financial barriers.

The case of Peru, and the solid and lasting determination of civil society organisations, can inspire others in Latin America and the Caribbean working to advance reproductive rights in countries where ECPs remain banned (such as Costa Rica and Honduras), or where ECPs are not yet included in health provisions (such as El Salvador, Jamaica, Nicaragua, Surinam and Trinidad & Tobago).¹⁴ Ensuring timely access to ECPs when a woman experiences a contraceptive emergency can make a difference to her life. Offering counselling and free-of-cost ECPs in the public health system is the only way to make sure that all populations, high- and low-income, in or out of school, rural or urban, indigenous or foreign, black or white, single or in a relationship, insured or uninsured, equally get a second chance to prevent a pregnancy.

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