

Legal Knowledge as a Tool for Social Change: La Mesa por la Vida y la Salud de las Mujeres as an Expert on Colombian Abortion Law

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Abstract

In May 2006, Colombia's Constitutional Court liberalized abortion, introducing three circumstances under which the procedure would not be considered a crime: (1) rape or incest; (2) a risk to the woman's health or life; and (3) fetal malformations incompatible with life. Immediately following the court's ruling, known as Sentence C-355, members of La Mesa por la Vida y Salud de las Mujeres (hereinafter La Mesa) began to mobilize to ensure the decision's implementation, bearing in mind the limited impact that the legal framework endorsed by the court has had in other countries in the region. We argue that La Mesa's strategy is an innovative one in the field of legal mobilization insofar as it presumes that law can be shaped not just by public officials and universities but also by social actors engaged in the creation and diffusion of legal knowledge. In this regard, La Mesa has become a legal expert on abortion by accumulating knowledge about the multiple legal rules affecting the practice of abortion and about the situations in which these rules are to be applied. In addition, by becoming a legal expert, La Mesa has been able to persuade health providers that they will not risk criminal prosecution or being fired if they perform abortions. We call this effect of legal mobilization a "pedagogical effect" insofar as it involves the production of expertise and appropriation of knowledge by health professionals. We conclude by discussing La Mesa's choice to become a legal expert on abortion as opposed to recruiting academics to do this work or encouraging women to produce and disseminate this knowledge.

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Introduction

In May 2006, Colombia's Constitutional Court liberalized abortion, introducing three circumstances under which the procedure would not be considered a crime: (1) rape or incest; (2) a risk to the woman's health or life; and (3) fetal malformations incompatible with life.¹ This ruling, which came after a series of decisions on the criminalization of abortion that deferred the issue to legislators, was the result of a high-impact litigation strategy devised by Women's Link Worldwide.² Aware of the social and political importance of arguments favoring the criminalization of abortion, as well as the challenges faced by other Latin American countries in implementing laws liberalizing the procedure, the group of women's organizations known as La Mesa por la Vida y la Salud de las Mujeres (hereinafter La Mesa) began to mobilize to ensure the decision's implementation as soon as the decision was publicized. In this article, we describe the strategy used by La Mesa to become an expert authority on abortion and explain how this knowledge has helped increase women's access to abortion. We argue that La Mesa's strategy is an innovative one in the field of legal mobilization insofar as it presumes that law can be shaped by social actors—not just public officials and universities—through the creation and diffusion of legal knowledge.³ We believe that the best way to pinpoint the effect of La Mesa's mobilization is by looking at its pedagogical effect regarding health providers' awareness of the grounds for abortion.

We claim that La Mesa has become a legal expert on abortion by accumulating knowledge about the multiple legal rules affecting the practice of abortion and about the situations in which these rules are to be applied. We then claim that by becoming a legal expert, La Mesa has been able to persuade health providers that they will not risk criminal prosecution or being fired if they perform abortions. We conclude with a discussion of La Mesa's choice of strategy in light of demands regarding the recognition and democratization of legal knowledge.

Expert legal knowledge

Expertise is generally defined as the ability to solve recurring problems in a given field.⁴ Studies on expertise show that this ability is grounded in extensive knowledge that results in more nuanced classifications and a better understanding of conceptual relations at more abstract levels than those grasped by novices.⁵ La Mesa has become a legal expert on abortion in Colombia because it has produced knowledge about the law that others lack and that is useful for solving particular problems in the realm of access to abortion. It has accumulated this knowledge in three ways: (1) by accompanying individual cases of women seeking abortion in the health system; (2) by articulating legal responses to individual cases in accordance with specific barriers that women face in the health or legal sector; and (3) by validating its own interpretations with experts in the fields of international law, constitutional law, and health law, including public officials. La Mesa has disseminated this knowledge through workshops and training sessions geared at teaching health providers about Colombia's abortion law, both as a set of freedoms for women and as a set of duties for health providers enforceable through the judicial system.⁶

It is important to say that to a large extent, the development of the legal framework concerning abortion has happened through decisions adopted by the Constitutional Court in particular cases involving women seeking abortion. Some of these cases were litigated by La Mesa, but most Constitutional Court decisions were the result of cases filed by women affected by a negative response to their health service requests. The particular writ of protections used in these cases was the *tutela*, which was introduced by the 1991 Colombian Constitution. As opposed to other constitutional writs of protection, this one is very accessible to the public and the Constitutional Court has struggled to keep it as accessible as possible: it may be presented before any judge and does not need to be technically correct in any way. In the cases of abortion, it is evident that the court has had a political will to develop and enforce legislation regarding the rights

of women because its interventions in *tutela* cases are selective and the number of abortion cases selected for review are in no way representative of the number of cases that has arrived before the Court. In general, these have been cases of aggressive selection in which the Court has sought to develop legislation and not only redress the violation of a right. During the last 10 years, La Mesa has supported at least 26 *tutela* cases and two emblematic cases reached the Constitutional Court (T-841/2011, T-532/2011).

Recognizing La Mesa as a legal expert means, on the one hand, acknowledging its power in a realm where social organizations are not frequently recognized and, on the other, making La Mesa responsible for accumulating instead of redistributing power. As we will show, the case of La Mesa challenges existing frameworks around expertise, as it represents an intentional accumulation of knowledge for the sake of increasing the power of women seeking access to abortion. In the process of becoming a legal expert, La Mesa consulted not only traditional experts and health providers but also women whose rights had been violated. This knowledge became the source of La Mesa's expertise and its opportunity to structurally change the battle over abortion.⁷

Mobilizing to produce expertise: La Mesa's pedagogical effect

La Mesa is a collective of organizations and people working on behalf of the sexual and reproductive rights of women in Colombia, particularly toward the decriminalization of abortion.⁸ The collective was created in the context of Colombia's 1998 Penal Code reforms, in which conservative groups sought to create the crime of assault on the unborn person, and in the context of the forum on abortion held by the Universidad Externado de Colombia that same year.⁹ La Mesa's most innovative strategy has involved its constitution as a "technical space and not just an arena for militancy" and as an expert authority on the legal regulation of abortion.¹⁰ As explained by one of its members:

We have also been able to become a technical

referent on the issue [of abortion] for the Ministry of Health, which consults with us on how to deal with specific problems related to implementation, and we give them advice ... It is precisely La Mesa's ability to interrelate with state agencies and to be recognized as an authoritative voice on the issue. People refer to us, the ministry calls us, members of Congress call us, public entities call us, so I think that in this sense La Mesa has made an important impact.¹¹

We use the notion of "pedagogical effects" to explain how La Mesa worked to gather enough relevant knowledge to claim expertise and how it has increased access to legal abortion by making this knowledge available to health providers. These effects may be related to legal mobilization insofar as they are produced through the law (specifically, legal knowledge) and for the law (particularly the application of relevant legislation on reproductive health matters).

This paper is based in a qualitative research conducted between 2014-2016 by the research team in Colombia for the project "Abortion Rights Lawfare in Latin America". The data was collected through two basic tools: semi-structured interviews (55) with various stakeholders (civil society organizations, health providers, health authorities and lawyers among others) and review of secondary sources (documents, reports, laws, statistics, etc.). Based on data gathered from current and past members of La Mesa and from allies in different government bodies, the following sections explain how La Mesa has been able to mobilize law by producing legal knowledge.

Case accompaniment as a tool for collecting information and building advocacy agendas

From the very moment that Sentence C-355 was handed down, members of La Mesa were aware of the importance of providing legal services to women interested in obtaining a legal abortion. On the one hand, they knew that other countries in the region with similar abortion regimes had been evidencing extremely low rates of legal abortions.¹² And on the other, they knew that the ruling positioned individual health providers in such a way that they could effectively block the decision's

implementation, whether due to fear of being punished or a lack of knowledge regarding their legal obligations. As a member of La Mesa pointed out in an interview:

*I believe that the judicial strategy, both through case litigation and through strategic litigation, is a very important part of La Mesa.*¹³

*La Mesa began to work on the implementation of the ruling. In what sense? Meeting women's demands and making sure they received care in their EPS [assigned health care provider] or in public hospitals or in university hospitals or in private hospitals ... on the basis of the various exceptions provided for in Sentence C-355.*¹⁴

Initially, La Mesa adopted a more litigious approach to monitoring and implementation, offering a “protection-based model” to women seeking access to legal abortion. Under this model, La Mesa members who were lawyers provided counsel to women facing obstacles in the health system and frequently initiated *tutela* proceedings to get judges to order health care providers to perform the procedure. La Mesa eventually abandoned this model in favor of one oriented toward supporting women’s agency and focusing on administrative claims, mainly for three reasons. First, the amount of women requiring legal counsel did not diminish but rather increased over time. As a result, litigating individual cases became too costly for La Mesa in terms of human and monetary resources. Second, individual *tutelas*, even if speedier than other judicial mechanisms, proved incapable of providing appropriate decisions in time. While the Constitutional Court was developing a strong and generous doctrine on access to abortion, getting a decision from the Court could take more than a year. At the same time, while the Constitutional Court was developing a strong and generous doctrine on access to abortion (in particular after analyzing *tutelas* that had been denied by judges in the lower echelon), the judges responsible for deciding on *tutelas* in the first place, were often isolated from these developments in terms of their legal theory and argumentation and thus did not always promote women’s access to legal abortion.

Third, many women seeking legal counsel eventually opted out of litigation, increasing frustration among La Mesa’s lawyers. The new model thus focuses on providing relevant information about access to legal abortion and recommendations regarding the use of administrative procedures (such as disciplinary procedures) and is restricted to two interventions: welcoming the woman seeking legal redress and conducting a follow-up call.¹⁵

Although the results of La Mesa’s initial litigation strategy were not as positive as expected, and the later model places decreased attention on litigation as a tool to increase access to abortion, work relating to individual cases was nonetheless crucial, and remains crucial, for La Mesa’s learning process around the barriers and obstacles faced by women in the health system. Indeed, very early on, La Mesa began systematizing the types of cases it received and developed answers to these cases that integrated constitutional and international law in a way that provided firm ground to health providers faced with the decision whether to provide an abortion.¹⁶ The facts recorded include, a description of the women’s social and economic situation, and a description of the service offered by health providers when the abortion was requested. To date the data basis of La Mesa has around 1000 entries corresponding to cases from 2006 to 2015.

The production of relevant legal knowledge regarding abortion

One of the strategic actions powered by La Mesa in coordination with other groups in Latin America, and which stands out among efforts to implement Sentence C-355, is the development of a conceptual framework for achieving a comprehensive, rights-based interpretation and application of the indications outlined by the Constitutional Court. This conceptual production aims to offer providers (mainly health providers) solutions to their legal questions that are grounded on the sophisticated integration of different types of legal knowledge. It also seeks to offer relevant organizations a comprehensive conceptual framework for enabling women’s access to abortion services and driving the ruling’s implementation. With this particular

strategic development of knowledge, La Mesa has become an interpreter of the law and in that role has become a central stakeholder, from the civil society side, in the process of creating law.

In particular, in 2007, La Mesa and the Alianza Nacional por el Derecho a Decidir in Mexico made the policy decision to encourage a wide and plural discussion on the scope of the health exception, whereby women's access to legal abortion services could be widened and guaranteed, at the same time that certain components could be generated to offer certainty to professionals who would apply the exception.¹⁷

As part of this effort, they published the report *Health Exception: Lawful Termination of Pregnancy, Ethics and Human Rights*.¹⁸ This report proposes an extensive interpretation of the health exception that is in line with the international human rights framework, specifically the right to health and its relation to other rights.

The report, which relied on the contributions of various organizations and initiatives in Latin America, including women leaders, lawyers from regional and international organizations, health providers, and bioethicists, consists of two parts.¹⁹ The first part comprises a position paper expressing the points of consensus reached by the organizations and experts who signed it. These ideas are based on an extensive literature review, an analysis of high court jurisprudence, and the international human rights framework.²⁰ The second part comprises a background document that underpins the position paper. This document includes an extensive review of decisions by national and international courts and of recommendations by human rights treaty monitoring bodies. In this way, the report addresses the health exception from a human rights perspective, the dimensions of the right to health, the principles to consider when applying the health exception, and ethical considerations.

Along with its regional allies, La Mesa has also produced documents and reports on the rape exception, gestational age limits, and conscientious objection. The report about the rape exception was published in 2011.²¹ As with the health exception, La Mesa follows a strict procedure in which it identi-

fies barriers to access through the accompaniment of cases, conducts meetings with regional experts on abortion law (both medical doctors and lawyers litigating on abortion in Latin America), and validates its findings through a virtual meeting.²² This methodology enhances the usefulness of La Mesa's knowledge not only in Colombia but throughout the region.

Training health professionals, judges, and women's groups

La Mesa has disseminated its knowledge through trainings for health professionals, public officials, and women's organizations.²³ Between 2010 and 2014, La Mesa conducted more than 30 workshops throughout Colombia on the legal aspects of abortion.²⁴ The workshops were held in cities as diverse as Barranquilla, Bogotá, Cali, Manizales, Medellín, Mocoa, Neiva, Pereira, Riohacha, and Villavicencio. Participants included judicial officers, health sector workers (including personnel from secretariats of health and secretariats on women's affairs), community leaders, women's organizations, and sexual and reproductive rights organizations. In all, 1,189 participants were trained. In addition, La Mesa conducted more than 17 workshops on the health exception in different Colombian cities, including Bogotá, Cali, Cartagena, Medellín, Manizales, Mocoa, Neiva, Pereira, and Sincelejo. Participants in these sessions included lawyers, health professionals, health care providers, medical students, medical school professors, staff from secretariats on women's affairs (mainly lawyers and psychologists from equal-opportunity houses for women, known as *casas de igualdad de oportunidades*), and staff from secretariats of health.²⁵

At these workshops, La Mesa also incorporated the participation of officials from public entities charged with monitoring and promoting human rights (such as the Ombudsman's Office, the Ministry of Social Protection, and district-level secretariats), with the aim of empowering them and integrating them into the chain of care.²⁶ These officials supported La Mesa's legal expertise by jointly convening the sessions and presenting their own views as supportive of and coordinated with

those presented by La Mesa. This deference toward La Mesa is the result of a relationship regarding knowledge that was established in 2006, when La Mesa provided the Ministry of Health with technical guidelines for the implementation of Sentence C-355 that allowed for the ministry's swift intervention on increased access to safe abortion.

Discussion: The difference that La Mesa makes

In this section, we explore the positive effects of the actions deployed by La Mesa regarding legal knowledge, arguing that the creation of expertise can be a powerful tool in supporting the application of legal frameworks that advance counterhegemonic positions, such as the feminist one. We also briefly reflect on the limits of the expertise strategy, noting that while social actors may be accepted as participants in the creation of knowledge, the lack of confrontation by intellectual peers renders conclusions unstable in the long term. Moreover, privileging international law as an authority and service providers as an audience further increases rather than reduces women's vulnerability.

Increasing access to legal abortion in Colombia

According to available data, La Mesa's work has helped increase the number of requests for legal abortion under the health exception; has assured doctors and hospitals that the protocols designed by health authorities are appropriate under current law and do not put health operators at risk; and has increased public perception of abortion as a legal procedure as opposed to an illegal one. La Mesa's legal knowledge of the other exceptions has not been as useful in expanding legal access to abortion in Colombia to date. This is partly the result of the order in which the strategy was deployed, with work on the health exception starting much earlier, and partly a consequence of tensions with other groups around the rape and fetal malformation exceptions.

Indeed, since 2009, the health exception has been increasingly invoked in requests for legal abortion and is currently the main reason for the procedure's performance in Colombia. Figures

from two of the country's most important sexual and reproductive health care organizations confirm the growing use of the health exception, which reflects the dedicated work of organizations such as La Mesa in promoting its implementation.²⁷ At Oriéntame, a Colombian nongovernmental organization that provides comprehensive sexual and reproductive health care services, the health exception was invoked in 28% of abortion requests from 2006 (with seven being the total number of cases received), while it was invoked in 99% of the cases from 2011 and 2015 (4,066 and 8,897 cases in total, respectively). A similar situation can be seen at Profamilia, a private nonprofit organization that provides sexual and reproductive health care services throughout the country. Although Profamilia did not perform any abortions in 2006, between 2011 and 2015 the percentage of abortions performed on the basis of the health exception oscillated between 98% and 100%. In other words, when looking at all three exceptions, most legal abortions are performed under the health exception. This same tendency is confirmed by the information collected by La Mesa, whose database contains information on nearly 1,000 cases of women who have faced barriers in accessing legal abortion and who have been directly supported by La Mesa in order to overcome these obstacles and obtain the procedure. Of the women assisted by La Mesa, 74% relied on the health exception, 14% on the rape exception, and 9% on the fetal malformation exception.²⁸ The increased willingness among doctors and other health care providers to perform abortions as a result of La Mesa's guidance is also revealed in their adherence to organizations such as El Grupo Médico por el Derecho a Decidir, which recently joined La Mesa's activities. It is important to notice that official data on abortion is difficult to access and inconsistent and that data reported here might be biased by the nature of the providers and their explicit interest in using the health exception. Nonetheless, it is the only available data.

The success of the health exception is interesting both as evidence of the success of La Mesa's strategy and as evidence of the strategy's limitations. The fact that La Mesa initially focused its

efforts on the health indication explains in part the result of a greater impact of this strategy in the long term. But research on barriers associated with the other two exceptions—together with the debates that emerged in the construction of expertise concerning sexual violence and fetal malformations—has showed that insofar as knowledge is never merely technical, it demands either alienating potential allies or giving up on the avenues open for legal expertise. In the case of sexual violence, as some research has started to show, reproductive rights advocates are confronting radical feminists who consider filing rape cases to be a political act and for this reason the reduction or requirements to accessing an abortion by this indication, could increase difficulties to judge the perpetrator.²⁹ In the case of fetal malformations, tensions have risen among reproductive rights and disability rights advocates. The latter group accuses feminists of inadvertently supporting eugenics when arguing for an extension of the interpretation of viability to include “dignified life conditions.”³⁰

Although the number of legal abortions remains low—between 5,000 and 9,000 a year—the impact of access to these abortions as ‘health exceptions’ is considerable when appreciated in context.³¹ The first contextual element is the strong opposition by Colombia’s attorney general to the increase in legal abortions. Since his appointment in 2008, Alejandro Ordoñez has used the resources of the Attorney General’s Office to investigate, prosecute, and sanction entities that perform the procedure. The second contextual element is the reluctance of public opinion to support the new legal framework, which can be seen in the difficulties faced in introducing reforms via the legislative and judicial routes, as well as in public opinion polls and media coverage.³² Unlike in Mexico, for example, leftist movements in Colombia have not been traditional allies of the feminists, and the media has also failed to sway public opinion with cases of extreme pain and suffering.³³ The last element is the absence of a strong medical community that acts as an ally of sexual and reproductive health organizations and doctors.

The success of La Mesa’s strategy in this politically hostile climate, then, may be evidence of the

importance of constructing knowledge to achieve counterhegemonic effects. Nevertheless, as shown in the literature, one of the risks of putting expertise on a pedestal is that it can naturalize or reify a particular state of affairs by cloaking itself in the mantle of truth, which can end up delivering power to a new set of elites (for example, the members of La Mesa) who are not public officials who can be held accountable, for they claim a particular “scientific” or expert character.³⁴ In this light, La Mesa has embraced dynamics that place it closer to its base and its peers in terms of knowledge, allowing for democratic responsibility vis-à-vis the knowledge it produces, unlike strategies that seek only to change public opinion. We believe that such democratic dynamics—arising from mobilization aimed at social change—can be expanded to involve legal experts from prestigious universities in such a way that extends technical validation and the appropriation of knowledge to other levels.

The cost of expert legal knowledge

To discuss the costs of a strategy aimed at the construction of expertise, we adopt Stephen Turner’s approach, which begins by characterizing such expertise in terms of the actors and texts involved. Turner expands on the traditional definition of expert knowledge by including the relationship between various types of expertise and the democratic process. On one end of the spectrum is scientific expertise—the most democratic type of expertise—which is acquired collectively, is efficacious in practice, and is validated by its audience. On the other end are experts who create their own following through the investment of large sums of money; this type of expertise is the most fragile in terms of democratic legitimacy.³⁵

In the case of La Mesa, one could say that knowledge is constructed in connection with a “cultivated ignorance”—that is, against the carelessness of legal experts and the health sector in constructing a framework around the lawfulness of abortion in particular and of sexual and reproductive rights in general.³⁶ Instead of polarizing its audiences, La Mesa has staked out its territory by responding to the ambivalence and unawareness of

the majority. The target audience for this knowledge is service providers—whether health care providers or judicial operators—who are involved in one way or another with the legality of abortion. This is also the group that La Mesa has consulted about existing data, difficulties, and realities. Vis-à-vis this audience, La Mesa has risen as expert because it has proven itself able to amass more information than anyone else (density) and has become visible as a problem solver for service providers and bureaucrats (visibility).

To an important extent, this knowledge is created collectively: it is connected to cases of individual accompaniment, it is developed by networks of reproductive rights advocates, and it is validated by international law and constitutional law experts hired as consultants. The fact that the number of abortions has increased also reveals the usefulness of this knowledge for practitioners. But the process and results fall short of being democratic at least in three ways: (1) they do not reveal awareness of the limitations of international law as an authority at the local level, (2) they do not engage bureaucrats as equals, and (3) they do not work to level the knowledge playing field for women who are users of the legal system.

Conclusion

To date, La Mesa has invested significantly in producing and disseminating knowledge on human rights and international law with regard to abortion, filling a void among low-ranking health care providers and judicial operators. Legal experts at law schools, in fact, would not agree with many of the interpretations that La Mesa derives from legal texts. The Constitutional Court has also explained that only treaties and judicial decisions can be enforced at the local level, explicitly noting that recommendations made by any authority in the international system are just that: recommendations.

Then again, the weak bureaucracies of the health and judicial sectors do not contest the knowledge produced by La Mesa, apparently out of a sheer lack of resources as opposed to convictions relating to the status and worth of international law

in these sectors' daily practices. It is crucial to note that even if some key health providers and health officials have been invited as experts to validate the knowledge produced by La Mesa, participants in the workshops are not asked to work toward the daily construction of knowledge, nor are they represented as being in charge of developing legal knowledge. In other words, the pedagogical strategy is not aimed at furthering autonomous processes or critical stances toward legal knowledge. Rather, legal knowledge is presented as a fact that is to be "absorbed" by individuals attending the workshops.

Relocating the field of legal objectivity from the local to the transnational and international has the cost of reifying and naturalizing the same meanings that might need to be challenged in the future in order to broaden current guarantees. If we have learned anything from the feminist struggle, it is that we cannot relinquish the politicization of legal knowledge, for law has been an important tool in women's oppression.³⁷ In this sense, even if La Mesa articulates feminist efforts in a struggle to appropriate the law by producing legal knowledge, the question remains whether the effects of this tactic will be sustained. In particular, it is crucial to understand whether feminists will be able to master their positions as experts to further legal reforms in directions not wholly supported by international law.

Finally, La Mesa's insistence on providing tools to health providers and bureaucrats seems to increase rather than decrease the legal knowledge gap between women and men. Even if women seeking abortions are counseled upon seeking La Mesa's legal advice, and even if their cases are used to build La Mesa's larger strategy, these women are neither the sources of expertise, nor the audience or validators. La Mesa has yet to devise a way to massively instruct women on how to fight for their rights when confronting street bureaucrats, such as health providers and hospital bureaucracies.

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33. See M. Lamas and S. Bissell, "Abortion and Politics in Mexico: Context Is All," *Reproductive Health Matters* 8/16 (2000), pp. 10–23; M. L. Sánchez, J. Paine, and B. Elliot-Brettner, "The Decriminalisation of Abortion in Mexico City: How Did Abortion Rights Become a Political Priority?," *Gender and Development* 16/2 (2008), pp. 345–360.

34. See S. Turner, "What Is the Problem with Experts?," *Social Studies of Science* 31/1 (2001), pp. 123–149; H. M. Collins and R. Evans, "The Third Wave in Science Studies: Studies on Expertise and Experience," *Social Studies of Science* 32/2 (2002), pp. 235–296; M. Schudson, "The Trouble with Experts—and Why Democracies Need Them," *Theory and Society* 35 (2006), pp. 491–506. With regard to the idea of reification and its political consequences, see C. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989).

35. Turner (see note 34).

36. A. Mingo and O. Moreno, "El ocioso intento de tapar el sol con un dedo: La violencia de género en la universidad," *Perfiles educativos* 37/148 (2015), pp. 138–155.

37. Alviar and Jaramillo (see note 7).