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Constitutional developments in Latin American abortion law

Paola Bergallo [a,b,*], Agustina Ramón Michel [c,d]

[a] School of Law, Universidad Torcuato Di Tella, Buenos Aires, Argentina
[b] Consejo Nacional de Investigaciones Científicas y Técnicas, Buenos Aires, Argentina
[c] School of Law, Universidad de Palermo, Buenos Aires, Argentina
[d] Centro de Estudios de Estado y Sociedad, Buenos Aires, Argentina

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ABSTRACT

For most of the 20th Century, restrictive abortion laws were in place in continental Latin America. In recent years, reforms have caused a liberalizing shift, supported by constitutional decisions of the countries' high courts. The present article offers an overview of the turn toward more liberal rules and the resolution of abortion disputes by reference to national constitutions. For such purpose, the main legal changes of abortion laws in the last decade are first surveyed. Landmark decisions of the high courts of Argentina, Bolivia, Colombia, and Mexico are then analyzed. It is shown that courts have accepted the need to balance interests and competing rights to ground less restrictive laws. In doing so, they have articulated limits to protection of fetal interests, and basic ideas of women's dignity, autonomy, and equality. The process of constitutionalization has only just begun. Constitutional judgments are not the last word, but they are important contributions in reinforcing the legality of abortion.

1. Introduction

Throughout most of their history, continental Latin American countries have regulated abortion through restrictive uses of criminal law. In the past decade, however, certain reforms have shown a liberalizing shift, with some legal abortion services now moderately available in some places in the region. This turn toward softer restrictive regulations has been supported in some countries by decisions of the highest courts articulating new constitutional arguments.

Against this backdrop, the purpose of the present article is twofold. First, we provide an overview of the liberalizing trend, describing the shift toward more permissive abortion laws or their interpretation. Second, we examine recent high-court judgments from Argentina, Bolivia, Colombia, and Mexico to offer some insights into the emerging constitutional approach to abortion disputes. In these four countries, courts have interpreted a constitutional floor for the criminalization of abortion; recognized limits to the protection of unborn life when tensions emerge with women's dignity, autonomy, and equality; and issued recommendations for the implementation of abortion services.

2. A trend toward liberalization

By 2000, all continental Latin American countries regulated abortion through their criminal codes. At the time, Chile, El Salvador, Honduras, and Surinam were at one extreme of the spectrum, providing for a total ban of the practice. At the other extreme, Guyana was the only country decriminalizing abortion by regulation of periods. Most of the other countries of the region were somewhere in-between, having adopted versions of permissive indications throughout the 20th Century that decriminalized abortions in case of rape, fetal malformations, risk to the health or the life of a woman, or combinations thereof. In most of these countries, however, abortion services were unavailable, and allegations of the unconstitutional status of the criminal indications abounded [1].

Fifteen years later, the landscape of abortion rules in continental Latin America looks rather different. With the exception of Nicaragua and El Salvador, the countries that have reformed their abortion laws or their constitutional interpretations of abortion rules dating from the previous century have moved toward a more liberal framework. Among the jurisdictions that have adopted new statutes, Uruguay and Mexico City stand out: they replaced their old indication rules with a periodic model that decriminalizes abortion until 12 and 14 weeks of pregnancy, respectively. Another group of countries—Argentina, Bolivia, Brazil, Colombia, Ecuador, Peru, and Panama—and several Mexican states have put into motion legal changes to assist with the implementation of their old rules providing for a model of permissive

* Corresponding author at: Av. Figueroa Alcorta 7350, 1428, Ciudad de Buenos Aires, Argentina. Tel.: +54 11 5169 7253.
E-mail address: pbergallo@utdt.edu (P. Bergallo).

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indications. Finally, a last group of countries—Costa Rica, Guatemala, Venezuela, and Paraguay—and a few Mexican states have protected the status quo, neither amending their old criminal rules, nor developing public policies to guarantee abortions in the circumstances when abortions would be exempted from punishment.

This liberalizing trend resulted from a combination of legislative reforms, court judgments, and public health guidelines. Examples of legislative reforms include the adoption of a periodic model in Mexico City in 2007 and in Uruguay in 2012. In other contexts—e.g. Argentina, Colombia, Bolivia, Brazil, and Costa Rica—courts' decisions have been instrumental in defining the constitutionality and scope of certain indications for abortion. Finally, in the last group of countries, as well as in Peru, abortion guidelines issued by hospitals or by governments at federal or state levels have set procedural regulations to govern enforcement of the now constitutionally accepted indications.

These legal changes came at the same time as a series of international human rights rulings on abortion encompassing decisions by United Nations Human Rights Committees. The rulings have provided interpretations of the legal duty to protect women and not deny a woman access to abortion when a fetus is diagnosed with anencephaly [2], when the pregnancy resulted from rape [3], or when the health or the life of the woman is at risk [4]. Additionally, in its judgment in *Artavia Murillo v. Costa Rica* in 2012, the Inter-American Court of Human Rights interpreted the duty under Article 4.1 of the American Convention on Human Rights to protect human life in general from conception not to be absolute, protecting embryos in vitro, but as a duty that should be balanced with women's reproductive rights [5].

3. The constitutional foundation of liberalization

Since 2006, several Latin American courts have joined the liberalizing trend with decisions confirming the constitutionality of limits to the criminalization of abortion. The process can be traced back to the T-355 decision—the landmark judgment of the Constitutional Court of Colombia of 2006 [6]. In their decision, the Colombian justices inaugurated a line of precedents that have recognized and urged the enforcement of a right to abortion in specific circumstances. Since then, other courts have pushed further constitutional arguments in favor of liberalization. For instance, in 2009, the Mexican Supreme Court of Justice of the Nation endorsed the trimester-based abortion law adopted by the legislature of Mexico City 2 years before [7]. Since 2012, the Supreme Court of Argentina and the Bolivian Supreme Tribunal of Justice have joined the conversation with two important judgments—in the *F., A.L.* case [8] and Decision 0206/2014 [9] respectively—affirming the constitutionality of the model of indications for lawful abortion provided for in the countries' criminal codes.

The following sections summarize four types of arguments developed by the high courts of Argentina, Bolivia, Colombia, and Mexico with respect to congressional powers to criminalize abortion, the legal protection of unborn life, women's rights, and the regulation and provision of legal abortions.

3.1. Limits and scope of the power of congress to regulate abortion

The highest courts of Argentina, Bolivia, Colombia, and Mexico have reached the conclusion that there are limits on the extent to which legislative bodies are authorized to deploy criminal law to restrict abortions. For these courts, constitutional and human rights treaty provisions mandate the adoption of at least a model of indications that should constitute legal grounds for abortion. In the case of Mexico, the Supreme Court has also approved the constitutional standing of the periodic model. The Court found that the decision to pass an abortion law with a more liberal framework was within the discretion of Mexico City's congress [7].

In the string of decisions considered here, the judges developed an understanding of the conflicts between the rights of women and the protection of unborn life, which led to the recognition of the need to apply a balancing or proportionality test to define the extent to which criminal law could be employed. Even if the courts did not question the use of criminal law as a tool to protect unborn life, they agreed that legislators could define the extent of its usage—a usage that could not imply a total ban of the practice.

In Decision T-355/06 [6], the Consistutional Court of Colombia found that the margin of legislative discretion encompassed the capacity to provide for the decriminalization of abortion on demand for certain cases. For the judges, however, the adoption of such a rule was part of the competence of the Congress of Colombia and its own appreciation of policy goals. At the same time, the Constitutional Court applied a proportionality assessment that justified a mandate under the Colombian Constitution and the human rights treaties that formed the *bloque de constitucionalidad* (constitutional block) for the decriminalization of abortion for at least four indications (risk to the life of a woman, risk to her health, rape, and fetal malformation).

When considering this point, Mexico's Supreme Court of Justice of the Nation [7] rejected the complainants' view that Mexico City's legislators had overstepped their powers when enacting a law to establish abortion on demand in early pregnancy. For the Supreme Court, the duty to protect unborn life had not been infringed because "the Legislative Assembly of the Federal District has the power to determine, by a majority of its members and through open debate, which behaviors should or should not be reproached by criminal law, and in the absence of an express constitutional obligation, it has the duty to weigh the various events, issues and rights that may be in conflict" [7] (p. 180).

In the *F., A.L.* case [8], the Supreme Court of Argentina found for the constitutionality of the model of indications for lawful abortion established in the criminal code since 1922. The Supreme Court understood that abortion in case of rape was constitutional for every rape survivor, and accordingly the government had to guarantee its access. The Supreme Court considered that democratic lawmakers had opted for this criminal law policy within the boundaries of their discretion as defined by the Argentine Constitution, which did not include a mandate to totally criminalize the practice.

3.2. The protection of unborn life is not boundless

Before the courts of the region began to articulate a more complex view of the protection of unborn life, constitutional arguments for abortion were easily defeated with the mere affirmation of an absolute duty to protect life from conception. The recent decisions of the four courts considered here helped to reframe that conversation.

The most original contribution came from the judges of the Plurinational Constitutional Tribunal of Bolivia, who recognized an imperfect right to life of the unborn. The judges described different concepts of life and death in the tradition of the indigenous nations and peoples inhabiting the country. For centuries, life has been viewed by most indigenous communities as part of the cosmos and *pacha* (Mother Earth)—i.e. not as an isolated event, but as a creation of *pacha*. Therefore, humanity was connected to other living beings and deities. The dynamic culture of life that understands nothing as irreparable could thus conceive abortion as part of the life cycle.

After these philosophical and cultural considerations, the Bolivian Plurinational Constitutional Tribunal went on to focus on the treatment of unborn life in international human rights law and domestic regulations. Citing the Inter-American Convention on Human Rights and related court rulings, the judges found that: "Article 4.1 of the convention cannot be read as a recognition of an absolute right to life from conception" [9]. They also concluded that the duty to protect human life is gradual and that the level of protection rises as resemblance to a born human being increases.

Before the Bolivian decision, the Constitutional Court of Colombia had pioneered the region's consideration of the duty to protect unborn