

ABORTION LAWFARE IN LATIN AMERICA: SOME READING KEYS FOR A CHANGING SCENARIO

<https://doi.org/10.1590/2317-6172202133>

It is with great pleasure that we present this last issue of the 2021 *Revista Direito GV* (v. 17, n. 3, September/December 2021). It also marks an important landmark: the journal has reached 40 issues since its foundation in 2005.

This commemorative edition comes with the special issue “Abortion Lawfare in Latin America”. This special issue brings together novel scholarship produced since 2013 by a project of similar name based at the Centre on Law & Social Transformation, Chr. Michelsen Institute (CMI), the University of Bergen (Norway) in partnership with scholars and institutions from Argentina, Brazil, Colombia, Mexico, Peru and the USA.¹ FGV Direito SP was not only involved in the in-deph case study on Brazil, coordinated by Marta Machado, but hosted in 2016 one of the comparative workshops, and public seminars, to discuss and reflect on the case studies and on the abortion battles over the region.

The project’s initial aim was to reflect on the phenomenon of the legal battles of abortion rights in Latin America, and the political dimensions of these. Across the region, abortion rights were already emerging as a contested issue during electoral campaigns. Moreover, cases, such as the Colombian and the Mexican, were already showing the possibilities of backlash of legal victories, through constitutional reforms bills, or the use of political power to discourage providers and women seeking for abortion services, as well as the risks of weak implementation of the judicial rulings expanding abortion rights.

One initial finding was that actors involved in the legal battles on abortion rights across Latin America use different arenas and strategies, sometimes simultaneously. Moreover, the exchange between Latin American scholars allowed them to identified similarities on the strategies and arguments used to advance in the recognition of abortion rights, as well as to limited

...

1 The project developed between 2014-2017 was funded by the Research Council of Norway and coordinated by Rachel Sieder (CIESAS) and Siri Gloppen (LawTransform, CMI/UiB). It analyzed the strategic use of rights and law in battles over abortion rights in Latin America in Argentina (case study coordinated by Paola Bergallo), Brazil (case study coordinated by Marta Machado), Colombia (case study coordinated by Isabel Jaramillo and Ana Cristina Gonzalez), Mexico (case study coordinated by Yacotzin Bravo and Rachel Sieder), Peru (case study coordinated by Camila Gianella) and El Salvador (case study coordinated by Angelica Peñas Defago), and included a regional paper conducted by Alicia E. Yamin.

them. These first findings encouraged the idea to edit a journal issue that would describe key features of the regional phenomenon of the legal battles on abortion rights in Latin America from specific cases. *Revista Direito GV*, a leading Brazilian journal focused on socio-legal research, became the perfect outlet for these findings as it was important to look for a medium that was peer reviewed,² open access and easily available to other researchers in Latin America and elsewhere.

To date, the socio-legal studies literature on abortion rights disputes across the globe and particularly on Latin America has analysed the key role played by the courts in these legal disputes (JARAMILLO and ALFONSO, 2008; KANE, 2008; ANSOLABEHERE, 2009; RUIBAL, 2014 and 2021; MACHADO and COOK, 2018), and the strategies deployed by activists contesting legal abortion access (MORÁN FAÚNDES and PEÑAS DEFAGO, 2016). This includes the emergence of conservative legal mobilization within courts (MORGAN, 2014; BERGALLO, JARAMILLO SIERRA and VAGGIONE, 2018; LEMAITRE, 2014; LEMAITRE and SIEDER, 2017), and the legal frames developed through these disputes (BERGALLO and RAMÓN MICHEL, 2016; LEMAITRE, 2014; RAMÓN MICHEL and BERGALLO, 2018; MACHADO and MACIEL, 2017; MACHADO and BRACARENSE, 2018). Other scholars have analysed the relationship between political parties and churches (MORÁN FAÚNDES and PEÑAS DEFAGO, 2016 and 2020; VAGGIONE and MORÁN FAÚNDES, 2021), including a focus on the increased role of religious groups in local politics (CAMPOS MACHADO, 2012; MONTERO, 2012; VAGGIONE and CAMPOS MACHADO, 2020). But there's still a large research agenda to be address to fully understand this complex scenario.

The articles which make up this special issue aim to contribute to this emergent field of study, by describing, through an in-depth analysis of cases from Costa Rica, El Salvador, Mexico, and Peru, different elements of the contestation of abortion rights in the region, even in contexts where, supposedly, there have been major positive developments.

This special issue includes the presentation of a framework developed by Siri Gloppen – “Conceptualizing Abortion Lawfare” – that constitutes a major theoretical contribution to the analysis of these phenomena. The article describes how, in the region, different arenas – such as courts and legislatures – present different opportunity structures for movements and

...

2 Editor-in-Chief's note: All articles were submitted to at least two anonymous reviewers. We thank these reviewers for their invaluable contributions to all the articles in this special issue. To ensure anonymity throughout the editorial evaluation, when necessary, only part of the guest editors participated in the reviewing process. These cases are signaled in the articles' front pages.

counter-movements, forcing them to adapt their strategies, framing and tactics in response both to the nature of those arenas, to each other and international developments. The different arenas described by Gloppen allow us to understand the local and the international dimension of these processes, and observe them in a dynamic and relational way.

Lynn Morgan’s article – “Costa Rica’s Oversize Role in Latin American Anti-Abortion Lawfare” – present the political contestation around the Interamerican Court of Human Rights (ICHR). Even though the topic in itself has been the focus of extensive scholarship, Morgan innovates by analysing the special features of the rejection of the ICHR decisions on issues related sexual and reproductive rights, and its specific potential impacts.

Two of the articles show the key role played by higher courts in the abortion debates. Rachel Sieder and Yacotzin Bravo – “Abortion Lawfare in Mexico’s Supreme Court: Between the Right to Health and Subnational Autonomy” – bring a detailed account of the interaction between the Mexican Supreme Court and legislators at the national, but mainly at the subnational level, and analysis the potential capacity of the higher court to innovate and advance women’s sexual and reproductive rights. Camila Gianella and Brenda Alvarez – “Judicial Lawfare: Analysis of Legal Arguments against Abortion Rights in Peruvian Courts” – explain that, when courts do not have a tradition of issuing innovative jurisprudence on issues such as abortion, their capacity as an arena to advance rights is undermined.

María Angélica Peñas Defago and Violeta Cánaves – “Socio-Legal Strategies against a Total Abortion Ban in El Salvador: Alliances in Hostile Contexts” – present a detailed description of the legal and advocacy strategies developed in a context of abortion total ban. The article also calls for a reflection on how these cases are portrayed, what is a successful case and also what means to develop a strategy to challenge a total ban. In contrast, Amy Krauss – “Jurisdiction as Feminist Legal Advocacy Tactic: Politics between Substance and Form” – presents an in-depth reflection on the limits of legal reforms in favour of abortion rights, and the major challenges of the implementation of these rulings.

Abortion remains one of the most contested topics of the sexual and reproductive rights agenda in the region, one that defies prevailing stereotypes of gender roles and triggers fierce countermobilization. Its increased politicization by neoconservative and religious actors and movements, deploying renewed alliances and strategies bring new challenges to gender equality in Latin America. While opposition to abortion is now inserted in a global anti-gender mobilization, Latin American countries show the specificities of such battles in contexts of high presence and influence of religious groups, high inequality rates and hierarchies of various orders and structural questions of access to women in politics.

More empirical research is needed to cover how abortion battles and opposition to gender and sexual equality intersect with national political processes and how institutions and social movements are interacting in such contexts. We hope this special issue contributes to a better understanding of the broader trends in abortion lawfare, not only in Latin America but also in other countries and regions where the demands for the legalization are strong, yet challenged by several actors. We also hope that the diagnosis and reflexions presented here will contribute to a larger debate on the features of the global neoconservative wave, the paths for resistance and the role law and institutions are playing in such battles.

REFERENCES

ANSOLABEHERE, Karina. *Oportunidades y decisiones: la judicialización del aborto en perspectiva comparada*. Paper presented at the SELA 2009, Asunción, Paraguay, 2009. Available at: https://digitalcommons.law.yale.edu/yls_sela/77/. Access on: November 17, 2021.

BERGALLO, Paola; JARAMILLO SIERRA, Isabel Cristina; VAGGIONE, Juan Marco. *El aborto en América Latina Estrategias jurídicas para luchar por su legalización y enfrentar las resistencias conservadoras*. Buenos Aires: Siglo 21, 2018.

BERGALLO, Paola; RAMÓN MICHEL, Augustina. Abortion. In: GONZALEZ-BERTOMEU, Juan; GARGARELLA, Roberto (ed.). *The Latin America Casebook: Courts, Constitutions and Rights*. Abingdon, Oxon; New York: Routledge, 2016.

JARAMILLO, Isabel Cristina; ALFONSO, Tatiana. *Mujeres, cortes y medios: la reforma judicial del aborto*. Bogotá: Siglo del Hombre Editores and Universidad de los Andes, 2008.

KANE, Gillian. Abortion Law Reform in Latin America: Lessons for Advocacy. *Gender and Development*, v. 16, n. 2, p. 361-375, 2008.

LEMAITRE, Julieta. Catholic Constitutionalism on Sex, Women and the Beginning of Life. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernardo (ed.). *Abortion Law in Transnational Perspective*. Philadelphia: University of Pennsylvania Press, 2014. p. 239-257.

LEMAITRE, Julieta; SIEDER, Rachel. The Moderating Influence of International Courts on Social Movements: Evidence from the IVF Case Against Costa Rica. *Health and Human Rights Journal*, v. 19, n. 1, p. 150-160, 2017.

MACHADO CAMPOS, Maria das Dores. Aborto e ativismo religioso nas eleições de 2010. *Revista Brasileira de Ciência Política*, v. 7, p. 25-54, 2012.

MACHADO, Marta R. de Assis; BRACARENSE, Ana Carolina. El movimiento pro y antiaborto en el Supremo Tribunal brasileño. Marcos y estrategias argumentativas utilizados en la audiencia pública referente al feto anencefálico. In: BERGALLO, Paola; SIERRA, Isabela Jaramillo; VAGGIONE, Juan (comp.). *El aborto en América Latina: Estrategias jurídicas para luchar por su legalización y enfrentar las resistencias conservadoras*. Buenos Aires: Siglo Veintiuno Editores, 2018. Disponível em: <https://www.cmi.no/publications/file/6584-movimiento-transnacional-contra-el-derecho-al.pdf>. Acesso em: 24 fev. 2021.

MACHADO, Marta R. de Assis; COOK, Rebecca J. Constitutionalizing Abortion in Brazil. *Revista de Investigações Constitucionais*, Curitiba, v. 5, n. 3, p. 185-231, set./dez. 2018. DOI: 10.5380/rinc.v5i3.60973

MACHADO, Marta R. de Assis; MACIEL, Debora Alves. The State-Level Battle over Abortion Rights in Brazil. *Health and Human Rights*, [S.l.], v. 19, n. 1, p. 119-131, jun. 2017. Disponível em: <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2469/2017/06/Machado.pdf>. Acesso em: 25 fev. 2021.

MONTERO, Paula. Controvérsias religiosas e esfera pública: repensando as religiões como discurso. *Religião e Sociedade*, Rio de Janeiro, v. 32, n. 1, p. 167-183, 2012.

MORÁN FAÚNDES, José Manuel; PEÑAS DEFAGO, María Angélica. Una mirada regional de las articulaciones neoconservadoras. Rupturas y continuidades transnacionales. In: TORRES SANTANA, Ailynn (ed.). *Derechos en Riesgo en América Latina*. Ediciones desde Abajo-Fundación Rosa Luxemburgo, 2020.

MORÁN FAÚNDES, José Manuel; PEÑAS DEFAGO, María Angélica. Strategies of Self-Proclaimed Pro-Life Groups in Argentina Effect of New Religious Actors on Sexual Policies. *Latin America Perspectives*, v. 43, n. 2, 2016.

MORGAN, Lynn. Claiming Rosa Parks: conservative Catholic bids for 'rights' in Contemporary Latin America. *Culture, Health & Sexuality*, v. 16, n. 10, p. 1245-1259, 2014.

RAMÓN MICHEL, Augustina; BERGALLO, Paola. *La reproducción en cuestión. Investigaciones y argumentos jurídicos sobre el aborto*. EUDEBA, 2018.

RUIBAL, Alba M. Using Constitutional Courts to Advance Abortion Rights in Latin America. *International Feminist Journal of Politics*, v. 23, n. 4, p. 579-599, 2021.

RUIBAL, Alba M. Movilización y contra-movilización legal. Propuesta para su análisis en América Latina. *Política y Gobierno*, v. 22, n. 1, 2014.

VAGGIONE, Juan Marco; MACHADO CAMPOS, Maria das Dores. Religious Patterns of Neoconservatism in Latin America. *Politics & Gender*, v. 16, n. 1, E2, 2020. DOI:10.1017/S1743923X20000082

VAGGIONE, Juan Marco; MORÁN FAÍNDES, José Manuel. Neoconservative Incursions into Party Politics: The Case of Argentina and Chile. In: SUTTON, Barbara; VACAREZZA, Nayla Luz (ed.). *Abortion and Democracy. Contentious Body Politics in Argentina, Chile and Uruguay*. New York: Routledge, 2021.

How to quote this editorial:

BARBIERI, Catarina Helena Cortada *et al.* Abortion Lawfare in Latin America: Some Reading Keys for a Changing Scenario. *Revista Direito GV*, v. 17, n. 3, set./dez. 2021, e2133. <https://doi.org/10.1590/2317-6172202133>

CATARINA HELENA CORTADA BARBIERI

<https://orcid.org/0000-0002-0332-7063>

EDITOR-IN-CHIEF OF *REVISTA DIREITO GV*, FGV DIREITO SP

catarina.barbieri@fgv.br

CAMILA GIANELLA

<https://orcid.org/0000-0002-2656-0589>

GUEST EDITOR. ASSISTANT PROFESSOR, PONTIFÍCA UNIVERSIDAD CATÓLICA DE PERU (PUCP). RESEARCHER CHR. MICHELSEN INSTITUTE, NORWAY.

gianella.c@pucp.edu.pe

MARIA ANGELICA PEÑAS DEFAGO

<https://orcid.org/0000-0001-8190-907X>

GUEST EDITOR. RESEARCHER, NATIONAL SCIENTIFIC AND TECHNOLOGICAL RESEARCH COUNCIL OF ARGENTINA (CONICET). PROFESSOR, SCHOOL OF LAW, NATIONAL UNIVERSITY OF CORDOBA, ARGENTINA.

angelicapdefago@unc.edu.ar

MARTA R. DE ASSIS MACHADO

<https://orcid.org/0000-0002-8924-089X>

GUEST EDITOR. PROFESSOR AT FGV DIREITO SP AND RESEARCHER AT THE CEBRAP, BRAZIL. RESEARCHER AT THE CENTER ON LAW AND SOCIAL TRANSFORMATION, NORWAY.

marta.machado@fgv.br