

Judicial Lawfare: Analysis of Legal Arguments against Abortion Rights in Peruvian Courts

LAWFARE JUDICIAL: ANÁLISES DOS ARGUMENTOS JURÍDICOS CONTRA OS DIREITOS AO ABORTO NAS CORTES PERUANAS

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Abstract

This article analyzes the puzzling case of Peru, a country highlighted as an example of the internationalization of sexual and reproductive health and rights norms through supranational litigation, but where these legal victories have not prompted an expansion of abortion rights. Through the analysis of three judicial cases, with a focus on the legal arguments and strategies, the article argues that two features of the abortion legal mobilization in Peru are key to understand the lack of more positive developments: 1) formalistic feature of Peruvian Courts, that offers little space toward recognizing additional grounds for abortion, as has been the case in other Latin American countries; 2) innovative capacity of anti-abortion legal mobilization, that have forced to create a tacit alliance between the movement toward the recognition of abortion rights and the State, to defend the (restricted) abortion rights in the country.

Keywords

Judicial lawfare; Peru; abortion rights; Peruvian Courts; legal arguments.

Resumo

Este artigo analisa o caso do Peru, um país de destaque como exemplo de internacionalização das normas sobre direitos reprodutivos e sexuais por meio de litígios supranacionais, em que, apesar das vitórias dos litigantes, não houve expansão dos direitos ao aborto. Por meio da análise de três casos judiciais, com foco nos argumentos e nas estratégias jurídicas, o artigo pontua que duas características da mobilização jurídica sobre aborto no Peru são fundamentais para entender a falta de desdobramentos mais positivos: 1) o caráter formalista dos tribunais peruanos, que oferecem pouco espaço para reconhecer a ampliação de motivos para o aborto, como tem sido o caso em outros países latino-americanos; e 2) a capacidade inovadora de mobilização jurídica antiaborto, que tem obrigado a criar uma aliança tácita entre o movimento pelo reconhecimento do direito ao aborto e o Estado, para a defesa dos (restritos) direitos ao aborto no país.

Palavras-chave

Lawfare judicial; Peru; direito ao aborto; Cortes peruanas; argumentos jurídicos.

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INTRODUCTION¹

To date, the socio-legal studies literature on abortion rights disputes across the globe, particularly in Latin America, has analyzed the key role played by the courts (ANSOLABEHERE, 2009, p. 347; RUIBAL, 2014), as well as 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 (BERGALLO, JARAMILLO SIERRA and VAGGIONE, 2018; LEMAITRE and SIEDER, 2017; LEMAITRE, 2014) and the legal frames developed through these disputes (BERGALLO and RAMÓN MICHEL, 2016; RAMÓN MICHEL and BERGALLO, 2018; LEMAITRE, 2014).

Through the analysis of three cases from Peru, this chapter aims to help us better understand the puzzling case of Peru, a country highlighted as an example of the internationalization of sexual and reproductive health and rights norms through supranational litigation, but where these legal victories have not prompted an expansion of abortion rights. In Peru, abortion is allowed only on one ground: to preserve the life or health of the pregnant woman. As in other Latin American countries, higher courts have become one of the arenas where abortion lawfare is carried out in Peru. This chapter analyses three cases (see Table 1) filed before Peruvian courts in the wake of the groundbreaking international decisions *KL v. Peru* and *LC v. Peru* and the approval of therapeutic abortion guidelines. The selection of these cases is not random: two of them were filed before constitutional courts to restrict access to abortion, while the third one is one of the few cases seeking to criminalize abortion that reached a superior court.

¹ Editors' note: This article was evaluated by Catarina Helena Cortada Barbieri, the editor-in-chief of *Revista Direito GV*, and by guest editors María Angélica Peñas Defago and Marta Rodriguez de Assis Machado.

TABLE 1 – CASES ANALYZED

CASE	COURT	PLAINTIFF	DEFENDANT	SUBMITTED	DECISION	OBSERVATIONS
CRIMINAL LAWSUIT AGAINST EMP FOR INDUCING AN ABORTION	SUPERIOR COURT OF LIMA	STATE	EMP	2015	2017	NO GROUNDS. THE MINOR EMP WAS ACQUITTED OF CRIMINAL CHARGES.
CONSTITUTIONAL WRIT (AMPARO) AGAINST THE MINISTRY OF HEALTH (CASE NO. 31583-2014-0, RESOLUTION NO. 028)	SUPERIOR COURT OF LIMA	NGO ACCIÓN DE LUCHA ANTICORRUPCIÓN "SIN COMPONENTA"	PERUVIAN STATE (MOH)	2014	2019 AND 2020	DISMISSED. THE CASE WILL BE DECIDED BY THE CONSTITUTIONAL COURT.
POPULAR ACTION AGAINST THE COUNTRY'S THERAPEUTIC ABORTION GUIDELINES (CASE NO. 00058-2018-0-1801-SP-CI-01 REF. SALA: 225-2018-0)	SUPERIOR COURT OF LIMA	ASOCIACIÓN CENTRO DE ESTUDIOS JURÍDICOS SANTO TOMÁS MORO	PERUVIAN STATE (MOH)	2018	2020	DISMISSED. THE CASE WILL BE DECIDED BY THE SUPREME COURT.

Source: Authors.

The chapter is organized as follows: first, we present a brief overview of the different lawfare arenas, as described by Siri Gloppen in this special issue, and we then provide a description of each of the cases. This description includes an analysis of the legal strategies and legal arguments used to sustain the cases.

I. BACKGROUND

Access to safe and legal abortion has historically been a contested issue in Peru and has been a core pillar of Peruvian feminist groups' agenda for years. Since the early 2000s, some Peruvian feminist organizations, in alignment with the strategies developed in other countries, started to mobilize to undermine the informal rules and procedures that established a de facto prohibition of legal abortion services (see, e.g., BERGALLO, 2014; GONZÁLEZ VÉLEZ and BERGALLO, 2017). These rules and procedures are usually created and enforced

outside officially sanctioned channels, but they shape how democratic institutions work and can overturn formal rules and procedures in practice. Recognition of the formal and informal dimension of institutions, such as the health system, is well consolidated in the literature. Institutions are the foundation of social life and consist of formal and informal rules, monitoring and compliance mechanisms, and meaning systems that define the context in which we interact; they arise from struggles and negotiations that reflect the resources and power of those who made these rules and, in turn, affect the distribution of resources and power in society (CAMPBELL and PEDERSEN, 1996, p. 4). Paola Bergallo (2014, p. 146) shows that gaps and incomplete legal regulations – for example, the lack of a clear definition of the scope of the rape exception for legal abortion, or the failure to specify what type of health danger justifies a legal abortion – has led to uncertainty that could partially account for the failure of the health community to offer legal abortion services.

Peru offers an example of the existence of these uncertainties. In Peru, therapeutic abortion – abortion to save the life or protect the health of a pregnant woman – has been legal since 1924. However, for many years, Peruvian authorities failed to develop and implement regulations and national-level guidelines for the provision of therapeutic abortion, including the training of health workers. This vacuum allowed for the emergence of informal rules and procedures to deny access to safe abortion.

One of the mechanisms for overcoming such informal rules across Latin America has been legal mobilization, including litigation seeking the recognition of administrative procedural guidelines (BERGALLO, 2014; GONZÁLEZ VÉLEZ and BERGALLO, 2017). In the case of Peru, actors working toward the recognition of abortion rights have developed different strategies, such as the drafting of procedural guidelines (for example, therapeutic abortion guidelines developed in some public hospitals for internal use) (PROMSEX, 2012), as well as national and international litigation, including a 2008 lawsuit against the minister of health before national courts (requesting the enactment and implementation of therapeutic abortion guidelines) and two cases brought before United Nations bodies: the Human Rights Committee (*KL v. Peru*) and the Committee on the Elimination of Discrimination against Women (*LC v. Peru*). Although the decision from these United Nations bodies are technically “recommendations,” these legal victories resulted in the enactment, in 2014, of the National Therapeutic Abortion Guidelines. Moreover, Peru has acknowledged the binding nature of these decisions.

As has been described in other contexts (RUIBAL, 2018; HAALAND *et al.*, 2019; HAJRI *et al.*, 2015), the enactment of the National Therapeutic Abortion Guidelines has been contested at different levels. In the following section, we present the different arenas and strategies deployed in this regard.

2. MAPPING THE ARENAS OF DISPUTE

As described by Gloppen in this special issue, lawfare occurs in different arenas at the same

time, meaning that actors navigate across the different arenas, in many cases, at the same time. To describe the importance of the courts in the Peruvian context, as well as their potential role in emerging anti-abortion legal strategies, this section presents a brief description of the main arenas of abortion rights lawfare in the country, with a focus on the key arenas and “battles” following the adoption of the Therapeutic Abortion Guidelines in 2014.

2.1. HEALTH SERVICES

The implementation of the 2014 National Therapeutic Abortion Guidelines has been full of deficits. For example, for five years, there was no code for the procedure in the Ministry of Health’s information system. That is, for five years, health authorities did not have a tool to monitor the number of therapeutic abortions performed in the country, to systematize the type of conditions behind women’s requests for such abortions, or to detect delays in diagnosis and access to the procedure.

Studies performed at the national level have shown poor implementation of therapeutic abortion across the country: most of the procedures are still performed in Lima, at the Maternal Perinatal Institute, a specialized public hospital that has been applying its own therapeutic abortion guidelines since 2010. Some hospitals have stated that they do not perform the procedure because it is not demanded (FOROSALUD, 2018), as if therapeutic abortion should be driven by user demand. This is not a marginal consideration, as the national guidelines describe therapeutic abortion as a procedure that must be initiated by a physician or a health worker; in other words, women need to be informed by their physicians of the possibility. Every year, Peru reports on maternal deaths related to the conditions included in the guidelines, such as respiratory diseases (7.6% of all maternal deaths and 12.5% of deaths among pregnant women under nineteen years old) and oncological diseases (6.6% of all maternal deaths and 8.3% of deaths among pregnant women under nineteen years old) (GIL, 2018). While it would be inaccurate to assume that all of these pregnancies would have ended in a therapeutic abortion, the data collected across the country by organizations such as ForoSalud (2018) on the implementation of the guidelines cast doubt on the extent to which women are making autonomous decisions concerning whether to continue their pregnancies, as well as the extent to which they are being informed of their right to access a therapeutic abortion. Aside from barriers regarding access to information, women face delays in diagnosis (therapeutic abortion is allowed only until week twenty-two), which results in few women actually accessing legal abortion (GUERRERO, RAMÍREZ and GONZÁLEZ, 2019).

Medical doctors have publicly opposed the application of the National Therapeutic Abortion Guidelines on the grounds that the guidelines are unclear, thus showing the prevalence of informal rules that block women’s access to safe and legal abortion in Peru. For example, in May 2019, two cases reported by the media recalled the case of LC, showing that, despite this important legal victory, informal rules were still prevalent across the country. The cases reported on involved two different adolescents who had become pregnant as a result of rape

and who suffered complications during their pregnancies that put their health and lives at risk. One of the girls died after a cesarean section (FOWKS, 2019). The other girl (a thirteen-year-old) suffered severe pain during her pregnancy, for which medical doctors at public health facilities recommended bed rest. Only during her twenty-first week of pregnancy – when it was too late to start the process to access a therapeutic abortion – did her doctors inform her about this possibility (DEFENSORÍA DEL PUEBLO, 2019).

2.2. CONGRESS

Peru has seen legislative attempts to both expand and restrict the legal grounds for abortion; some of the most outstanding ones took place before the period studied in this chapter (see Tables 2-5). In parallel to the debate around and approval of the Therapeutic Abortion Guidelines by the Ministry of Health, several legislators presented a bill to decriminalize abortion in cases of sexual abuse (2014), while others presented a bill to increase the criminalization of abortion (2015). None of them passed. In the following legislative period (2016-2019), several legislators presented a new bill to decriminalize abortion in cases of sexual abuse and when the fetus has a pathology incompatible with life outside the uterus. The bill was never discussed in the plenary.

TABLE 2 – 1995-2000 PARLIAMENTARY TERM

BILL	DATE	PROPOSAL	STATUS
00636	09/11/1995	MODIFY ARTICLE 117 OF THE PENAL CODE REGARDING THE ABUSE OF A HEALTH PROFESSIONAL'S SCIENCE OR ART TO CAUSE AN ABORTION (THERE IS NO INFORMATION ON THE TEXT OF THE PROPOSED MODIFICATION OF ARTICLE 117).	FILED IN PARLIAMENTARY COMMITTEE.
01855	16/09/1996	MODIFY ARTICLE 120 OF THE PENAL CODE TO DECRIMINALIZE ABORTION IN CASES OF RAPE OUTSIDE OF MARRIAGE AND IN CASES OF NONCONSENSUAL ARTIFICIAL INSEMINATION.	FILED IN PARLIAMENTARY COMMITTEE.
02263	21/11/1996	THE GENERAL HEALTH LAW INCLUDES THE OBLIGATION OF HEALTH PERSONNEL TO REPORT ABORTION CASES TO THE AUTHORITIES IN CHARGE OF CRIMINAL PROSECUTION.	PROMULGATED INTO LAW (LAW NO. 26842).
02310	27/11/1996	MODIFY ARTICLE 117 OF THE PENAL CODE TO PUNISH THE PARTICIPATION OF DOCTORS, NURSES, OR HEALTH PERSONNEL IN ABORTION PRACTICES.	FILED IN PARLIAMENTARY COMMITTEE.
04047	25/09/1998	MODIFY ARTICLE 120 OF THE PENAL CODE TO DECRIMINALIZE ABORTION IN CASES OF RAPE AND NONCONSENSUAL INSEMINATION.	FILED IN PARLIAMENTARY COMMITTEE.

Source: <http://www.congreso.gob.pe/pley-1995-2000/>.

TABLE 3 – 2001-2006 PARLIAMENTARY TERM

BILL	DATE	PROPOSAL	STATUS
00122	27/07/2001	DECLARE MARCH 25 “DAY OF THE UNBORN CHILD”.	PROMULGATED INTO LAW (LAW NO. 27653).
00421	23/08/2001	EXPAND THE CASES OF NON PUNISHABLE ABORTION CONTAINED IN ARTICLE 119 OF THE PENAL CODE TO INCLUDE FETAL MALFORMATIONS INCOMPATIBLE WITH EXTRAUTERINE LIFE.	THE BILL WAS NOT DISCUSSED IN PARLIAMENTARY COMMITTEES.
00839	28/09/2001	INCORPORATE ARTICLE 124A INTO THE PENAL CODE, CLASSIFYING THE CRIME OF “INJURY TO THE PRODUCT OF CONCEPTION”.	PROMULGATED INTO LAW (LAW NO. 27716).
01696	01/04/2002	MODIFY ARTICLES 114, 115, 117, 118, AND 119 OF THE PENAL CODE TO INCREASE PENALTIES FOR WOMEN WHO ABORT.	WITHDRAWN BY ITS AUTHOR.
04562	13/11/2002	MODIFY ARTICLES 116 AND 117 OF THE PENAL CODE TO INCREASE PENAL SANCTIONS FOR THOSE WHO FORCE WOMEN TO ABORT.	APPROVED AT CONGRESS COMMISSION. WAS NOT DISCUSSED IN PLENARY SESSION.
05225	13/01/2003	GUARANTEE THE MEDICAL CARE OF WOMEN WHO ABORT BEFORE PROCEEDING TO THEIR ARREST OR SUMMONS FOR INVESTIGATION.	FAVORABLE OPINION BUT IT WAS NOT DISCUSSED IN PLENARY SESSION.
05439	30/01/2003	AMENDS ARTICLE 118 OF THE PENAL CODE TO AVOID CRIMINAL PENALTIES FOR WOMEN WHO UNINTENTIONALLY ABORT.	THE BILL WAS NOT DISCUSSED IN PARLIAMENTARY COMMITTEES.
06735	13/05/2003	PROHIBIT THE PUBLICATION OF INFORMATION ON ABORTION METHODS IN THE MEDIA.	THE BILL WAS NOT DISCUSSED IN PARLIAMENTARY COMMITTEES.
10957/ 2003-CR	07/07/2004	DECRIMINALIZE ABORTION FOR RAPE AND EUGENIC ABORTION.	THE BILL WAS NOT DISCUSSED IN PARLIAMENTARY COMMITTEES.
11083/ 2004-CR	04/08/2004	MODIFY ARTICLES 114, 115, 116, 117, AND 118 OF THE PENAL CODE TO INCREASE PENALTIES FOR THE CRIME OF ABORTION.	THE BILL WAS NOT DISCUSSED IN PARLIAMENTARY COMMITTEES.

Source: <http://www.congreso.gob.pe/pley-2001-2006/>.

TABLE 4 – 2006–2011 PARLIAMENTARY TERM

BILL	DATE	PROPOSAL	STATUS
02878/ 2008-CR	24/11/2008	MODIFY ARTICLE 119 OF THE PENAL CODE TO INCORPORATE A LIST OF HEALTH CONDITIONS NEEDED TO ACCESS THERAPEUTIC ABORTION AND LIMIT ITS PRACTICE TO 60 DAYS OF GESTATION; MODIFY ARTICLE 120 TO DECRIMINALIZE ABORTION IN CASES OF ANENCEPHALY.	THE BILL WAS NOT DISCUSSED IN PARLIAMENTARY COMMITTEES.

Source: <http://www.congreso.gob.pe/pley-2006-2011/>.

TABLE 5 – 2011–2016 PARLIAMENTARY TERM

BILL	DATE	PROPOSAL	STATUS
03648/ 2013-CR	25/06/2014	PROHIBIT THE DISPLAY AND ADVERTISING OF ABORTION.	IT WAS NOT DISCUSSED.
03839/ 2014-IC	26/09/2014	DECRIMINALIZE ABORTION IN CASES OF RAPE, NONCONSENSUAL ARTIFICIAL INSEMINATION, AND NONCONSENSUAL EMBRYO TRANSFER.	FILED IN TWO COMMISSIONS: CONSTITUTION AND REGULATIONS AND JUSTICE AND HUMAN RIGHTS.
03962/ 2014-CR	07/11/2014	INCORPORATE THE CRIME OF WRONGFUL ABORTION INTO THE PENAL CODE AND MODIFY ARTICLE 124A TO INCLUDE PENALTIES FOR THOSE WHO CAUSE INJURY TO THE BODY OR HEALTH OF THE CONCEIVED.	ADDED TO THE DRAFT REFORM OF THE PENAL CODE.
04101/ 2014-CR	18/12/2014	MODIFY ARTICLES 290, 363, AND 364 OF THE PENAL CODE TO PROHIBIT PRACTICES THAT ENCOURAGE ABORTION THROUGH FLYERS, PRINT MEDIA, OR SOCIAL MEDIA.	ADDED TO THE DRAFT REFORM OF THE PENAL CODE.

Source: <http://www.congreso.gob.pe/pley-2011-2016/>.

During the 2016-2019 legislative period, one congresswoman discussed the possibility of reforming the health law to abolish the article holding health professionals liable for not reporting women who have had an abortion and seek abortion-related care. However, Congress was shut down in 2019 amidst a national political crisis, which put a halt on the process. In 2021 was issued one of the most progressive bills, in terms of the recognition of women autonomy, however this wasn't debated (Table 6).

TABLE 6 – 2016-2021 PARLIAMENTARY TERM

BILL	DATE	PROPOSAL	STATUS
387/ 2016-CR	12/10/2016	DECRIMINALIZE ABORTION IN CASES OF RAPE, NONCONSENSUAL ARTIFICIAL INSEMINATION OR FERTILIZED EGG TRANSFER, AND MALFORMATIONS INCOMPATIBLE WITH LIFE.	NOT DEBATED.
7298- 2020-CR	09/03/2021	TO: I) RECOGNIZE THE RIGHT TO FREELY DECIDED MOTHERHOOD; II) WITHDRAW THE DISCUSSION OF ABORTION FROM THE CRIMINAL SPHERE, CIRCUMSCRIBING IT TO THE FIELD OF HEALTH CARE; III) RECOGNIZE THE RIGHT TO INTERRUPT THE PREGNANCY UNTIL THE FOURTEENTH WEEK, AND EXTEND THE TERM WITHOUT LIMITS IN CASES OF RAPE AND WHEN THE LIFE OR HEALTH OF THE PREGNANT WOMAN IS FOUND IN DANGER; IV) INCLUDE THE PRINCIPLES OF NON-DISCRIMINATION, RESPECT FOR FUNDAMENTAL RIGHTS AND ADEQUATE PROVISION OF PRE AND POST-ABORTION CARE SERVICES; V) INCLUDE RULES FOR CONSENT TO THE TERMINATION OF PREGNANCY FOR WOMEN WITH DISABILITIES AND FOR GIRLS AND ADOLESCENTS ESTABLISHING RESTRICTIONS ON THE EXERCISE OF CONSENT FOR ADOLESCENTS AND GIRLS UNDER 15 YEARS OF AGE; VI) MODIFY ARTICLE 1 OF THE CIVIL CODE IN ORDER TO RECOGNIZE THAT HUMAN LIFE BEGINS WITH THE WOMAN'S DECISION TO CARRY HER PREGNANCY TO TERM.	NOT DEBATED.

Source: <http://www.congreso.gob.pe/pley-2016-2021/> and <https://www2.congreso.gob.pe/Sicr/TraDocEstProc/CLProLey2016.nsf/e70a58c255248239052586cd0055cb8a/24b66516ab64580305258693007c228d?OpenDocument>.

2.3. PUBLIC OPINION

Research has shown some positive trends in certain sectors of Peruvian public opinion, such as journalists, toward expanded grounds for abortion (GIANELLA, 2017; PROMSEX, 2012). Nonetheless, Peru remains among the Latin American countries with the highest levels of public support for limiting abortion rights, accepting only the grounds for therapeutic abortion (IPSOS PUBLIC AFFAIRS, 2019). Meanwhile, national authorities have been reluctant to assess public opinion trends regarding abortion. One example of this is the National Human Rights Survey performed by the Ministry of Justice and Human Rights. The first version of this survey, conducted in 2013, included questions aimed at assessing people's opinions regarding abortion (mainly the grounds for therapeutic abortion and abortion in case of sexual abuse) and regarding the rights of LGBT individuals (mainly discrimination and violence against LGBT persons) (MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS and ESAN, 2013). But while the version conducted in 2020 kept the questions regarding LGBT rights, it excluded questions regarding abortion (MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, 2020).

Furthermore, abortion is still a contested issue in the public eye. Since 2011, presidential and congressional candidates have been asked to take a stand against abortion in public campaign events.² Additionally (as documented in other Latin America countries), abortion, sexual and reproductive rights, and gender equality have found their way onto the agenda of opposition politics (VAGGIONE *et al.*, 2018).

2.4. COURTS

The National Therapeutic Abortion Guidelines have also been challenged before the courts; as described in Table 1, two cases were brought to Peruvian courts to block the guidelines' implementation.

Furthermore, abortion continues to be restricted to one ground: to preserve the life or health of the pregnant woman. Women, adolescents, and girls in the need of an abortion or post-abortion care are exposed to criminal liability, and judges are deciding on these cases.

Despite the failures surrounding the implementation of the therapeutic abortion guidelines, no lawsuits have been filed calling for their enforcement,³ and no suits have been filed to expand the grounds for legal abortion. Feminist organizations have *used the courts* to join the Ministry in defending the therapeutic abortion guidelines – that is, the civil society actors involved in the protection of abortion rights in Peru have limited their judicial interventions to a form of resistance, not a strategy for advancement (RAMÍREZ HUAROTO, 2020), and the country's legal restrictions on abortion have remained steadfast.

3. THE CASES

As described by Rebecca Cook (2014), the meaning of abortion is partly constructed and contested through “how abortion laws are framed, enforced and interpreted.” In this light, this section of the chapter analyzes three lawsuits in Peru that sought to block access to abortion and to criminalize abortion, and includes an in-depth description of the legal arguments used and of the implications of the legal venues adopted.

- 2 For example, during the campaign, presidential candidate Pedro Pablo Kuczynski signed a commitment in which he promised to reject abortion (except in cases of life-threatening situations) and to recognize the value of the “natural family” (i.e., only those unions comprising a woman and a man). On March 2011, in a meeting with the archbishop of Lima and a leader of the Peruvian Catholic Church, presidential candidate Ollanta Humala confirmed his conservative Catholic upbringing, his commitment to respecting family values as defined by the Catholic Church, and his position against abortion and same-sex marriage.
- 3 There have been some administrative cases against providers, such as cases against private providers for denying access to abortion.

3.1. THE CASE OF EMP: THE CRIMINALIZATION OF MINORS SEEKING POST-ABORTION CARE

Despite the fact that abortion sanctions in Peru are not very severe, the Attorney General's Office (Ministerio Público) criminally prosecutes adolescents and women for abortion. Between 2015 and 2018, 3,883 adolescents and women were prosecuted for consensual abortion, self-abortion, abortion in cases of rape, and even therapeutic abortion. Of these individuals, 312 were taken to court, 89 were captured by police officers to force them to testify in court, 62 were convicted of the crime of abortion, and 1 was deprived of her liberty during the investigation phase (SALAZAR, 2019).

Criminalization begins at health facilities, when girls, adolescents, and women seek care for an incomplete abortion and are reported by health workers in accordance with article 30 of the General Health Law (in force since 1997), which states that health workers must report all cases of suspected abortion to authorities. The case of EMP illustrates this situation well. This analysis is based on the legal files provided by EMP, who provided her verbal consent to use the files for this work.

In 2016, EMP – then seventeen years old (a minor under Peruvian law) – decided to take Cytotec (misoprostol) to end her six-week pregnancy. After taking the pills, she went to a public hospital for post-abortion care. Because EMP was an unaccompanied minor, and because according to Peruvian legislation minors do not have the right to decide over their own bodies (i.e., any medical intervention requires the approval of a parent or legal guardian), her case was reported to the family court. The public prosecutor interviewed EMP, who was in need of medical care in the hospital, without a lawyer or her parents present. The Attorney General Office allowed the post-abortion care, and in parallel filed a criminal lawsuit against EMP.

EMP was charged with the criminal offense of violation of body integrity and health. At the time of the suit against her, she was studying at a university in Lima, with a state-sponsored scholarship – an outstanding achievement in a country where only 7.7% of adolescents and young adults (ages 17-24) from rural areas, such as EMP, attend universities, compared to 21% of their counterparts from urban areas (MINISTERIO DE SALUD, 2017). EMP's defense requested a remission of the process – that is, exemption from criminal liability – in order to avoid any negative effects that the legal proceedings might have for her education. This request was denied by the family court, which alleged that her abortion was a serious offense because it affected the life of a child. On October 27, 2016, the family court issued a ruling stating that EMP was responsible for the crime of abortion, to the detriment of society. In its ruling, the court identified EMP's selfishness and her personal interest in not harming her studies as her motivations for obtaining an abortion. It ordered her to undergo three months of socioeducational measures and to pay a monetary civil reparation of 100 soles. She appealed her sentence, and in June 2017, the Second Chamber of the Family Court of the Superior Court of Justice of Lima reversed the ruling, granting a remission of the process. It must be noted that throughout the case, the Attorney

General's Office decided to omit any assessment of the impact that the pregnancy had been having on EMP's health.

3.2. AMPARO AGAINST THE THERAPEUTIC ABORTION GUIDELINES

Public policies on sexual and reproductive health in Peru are repeatedly challenged by opposition groups, particularly on constitutional grounds.

In August 2014, the Peruvian nongovernmental organization (NGO) Acción de Lucha Anticorrupción "Sin Componenda" filed an *amparo* against the Ministry of Health to prevent the implementation of the National Therapeutic Abortion Guidelines issued in June 2014. Like other Latin American countries, Peru has a writ for the protection of constitutional rights known as *amparo*. The Peruvian *amparo* in principle provides the same level of protection as the Colombian *tutela* or the Costa Rican *amparo*,⁴ but in practice the Peruvian version requires certain procedural steps⁵ that hinder the adoption of urgent precautionary measures (ABAD YUPANQUI, 2014; ROLDÁN, 2015).

In its lawsuit, Acción de Lucha Anticorrupción "Sin Componenda" argued that the guidelines violated the fundamental right of the unborn. In July 2019, the First Specialized Constitutional Chamber of Lima dismissed the lawsuit, stating that: (i) the right to life is not an absolute right and that, in application of the interpretative parameter set in *Artavia Murillo v. Costa Rica*, the protection of the right to life is incremental; (ii) the guidelines comply with the principles of proportionality and reasonableness for the protection of the life, health, and dignity of women; and (iii) the guidelines were issued in compliance with the international decisions issued in *KL v. Peru* and *LC v. Peru*. This ruling was appealed by the plaintiff. In January 2020, the Fourth Civil Chamber of the Superior Court of Justice of Lima resolved the appeal, declaring the lawsuit inadmissible. The court stated that when no specific acts, omissions, or threats are present, the *amparo* is not the legal path for questioning the abstract constitutionality of the guidelines.

This was not the first time that Acción de Lucha Anticorrupción "Sin Componenda" has been involved in cases against the Ministry of Health. The organization, registered in 2002, gained notoriety in 2004 when it filed an *amparo* against the Ministry of Health to request that it stop distributing emergency contraception. In 2009, the Constitutional Court declared the

4 For more on the Colombian *tutela* and the Costa Rican *amparo*, see, e.g., Wilson (2011); Yamin, Parra-Vera and Gianella Malca (2011).

5 For example, judges who receive an *amparo* request must first inform the institution being sued and the Attorney General's Office, and only after these two institutions have responded may a judge decide whether to approve precautionary measures. In addition, there are geographic barriers: in Lima, a city of nearly one million inhabitants, there are only two judges with the power to evaluate and grant *amparos* (ROLDÁN, 2015).

amparo action admissible and ordered the Ministry of Health to stop the distribution of emergency contraception in public health facilities.

3.3. POPULAR ACTION AGAINST THE THERAPEUTIC ABORTION GUIDELINES

The third case is the popular action filed by the Asociación Centro de Estudios Jurídicos Santo Tomás Moro, an organization that seeks to defend the Catholic Church, its doctrine, and its representatives. Previous to this lawsuit against the therapeutic abortion guidelines, the organization filed a lawsuit against the Peruvian chapter of Catholics for Choice seeking to annul the NGO's legal registration in the country, because, under the plaintiff's view, the NGO uses the term "Catholic" in bad faith. Asociación Centro de Estudios Jurídicos Santo Tomás Moro is also linked to "Con Mis Hijos No Te Metas" ("Don't Mess with My Kids"), a movement that emerged in 2016 to oppose the implementation of a gender perspective in the educational curriculum.

In February 2018, this organization filed a popular action (e.g., a lawsuit filed on behalf of the collective interest) contesting the constitutionality of the National Therapeutic Abortion Guidelines, arguing that while therapeutic abortion is not criminalized (i.e., not punishable) in Peru, this does not imply that it is legal and therefore in need of regulation. For the plaintiff, the nonpunishable feature of therapeutic abortion in Peru is restricted to its criminal liability, and abortion is still considered a criminal offense in the country. The unconstitutionality claim was based on the allegation that the guidelines violated the rights to life, to equality, to nondiscrimination, and to the protection of health; the rights of the unborn; and the right to access policies that promote responsible fatherhood and motherhood without affecting the life or health of the unborn. Moreover, the plaintiff argued that the guidelines violated the principle of legality by transgressing the presuppositions of the General Law of Health and the General Law of Administrative Procedures, which orders that all administrative acts (regulations) must be lawful and physically and legally possible.

In December 2019, the court of first instance, the First Civil Chamber of Lima, dismissed the suit. The court considered that the plaintiff, in addition to challenging the guidelines, was seeking to question the constitutionality of article 119 of the Penal Code that decriminalizes therapeutic abortion. For the court, the popular action was not the appropriate legal mechanism for this aim. In its ruling, the court upheld the constitutionality of the guidelines, indicating that they are adjusted to the constitutional and legal framework and comply with the recommendations issued by the United Nations treaty bodies in *KL v. Peru* and *LC v. Peru*. As of January 2021, the judgment of the second instance court was pending.

3.4. MODUS OPERANDI

These three cases involve a different modus operandi of anti-abortion rights actors. The first case, EMP, shows a practice that puts in evidence the power of the stigmatization of the criminal abortion law in the country. Peruvian law forces health personnel to report suspected

abortion cases to the authorities. This legal context facilitates the perpetuation of informal rules. As mentioned above, in this type of case, state prosecutors become the main actors in the criminalization of abortion. Disturbingly, in cases such as that of EMP, such actors are also the ones that decide whether to allow emergency post-abortion care for unaccompanied minors – in other words, the same prosecutor uses the information provided by the minor when seeking access to emergency health care to prosecute her.

The two lawsuits against the country's therapeutic abortion guidelines were brought by actors external to the justice apparatus. These actors have a trajectory of using the judiciary to innovate on the strategies. Interestingly, these actors have chosen the constitutional avenue to challenge the therapeutic abortion guidelines. However, their strategies differ. *Acción de Lucha Anticorrupción "Sin Componenda"* replicated, to some extent, its strategy against the Ministry of Health regulations and filed an *amparo*. The selection of this mechanism was not a random one. As mentioned above, because of the nature of the *amparo* (emergency protection), it is one of the least formal constitutional venues: it does not require an evidentiary stage and it responds to the principle of flexibility. The *amparo* also allows informal representation – that is, any person who feels that fundamental rights have been violated can file a claim in representation of diffuse interests or the interest of another person. As a result, it is possible to file a claim on behalf of the interests of the unborn, as *Acción de Lucha Anticorrupción "Sin Componenda"* did in the case of emergency contraception and in the case of the therapeutic abortion regulations.

However, due to its required procedural steps that, as mentioned above, distort its urgent purpose, the *amparo* is not an ideal mechanism for seeking access to health care in Peru (RAMÍREZ HUAROTO and ÁLVAREZ, 2016). On average, it can take more than three months for a judge to decide whether to admit an *amparo* (ABADYUPANQUI, 2014; DEFENSORÍA DEL PUEBLO, 2015). Nonetheless, one key feature of the *amparo* process is its potential impact: *amparos* can reach the Constitutional Court. When a case is dismissed by a second-instance court, the Constitutional Court can review the suit. This means that through an *amparo* process it is possible to bring a debate to the highest level of constitutional justice.

Meanwhile, the avenue chosen by Asociación Centro de Estudios Jurídicos Santo Tomás Moro – the popular action process – aims for an abstract control of constitutionality in the face of infractions against its normative hierarchy. This process proceeds against norms of lower legal rank (such as regulations, administrative norms, and resolutions of a general nature) when such norms violate the Constitution or the law. The popular action process can be undertaken by anyone, and its examination falls under the exclusive purview of the judiciary, and the judgments issued by second-instance courts are not reviewed by the Constitutional Court. This process allows for a faster final decision compared to the *amparo*. This lawsuit against the National Therapeutic Abortion Guidelines was not the first popular action filed by actors linked to the Asociación Centro de Estudios Jurídicos Santo Tomás Moro

against a ministerial regulation. In 2017, the association’s president filed a popular action against the Ministry of Education that aimed to block the implementation of the national school curriculum (CORTE SUPERIOR DE JUSTICIA DE LIMA PRIMERA SALA CIVIL, 2017). This was achieved temporarily through a precautionary measure and, subsequently, the first-instance sentence. The decision was overturned by a second-instance court. Despite this reversal, the litigation has had a significant impact on national education policy.

4. LEGAL ARGUMENTS

In addition to examining the legal avenues chosen in these three cases, it is important to describe how claimants framed their legal arguments – how they described the facts, which narratives they used, which values they selected, and which main arguments were used. This section begins by presenting the framing of the arguments put forward to challenge the right to abortion and then presents the arguments used to support the legality of the therapeutic abortion guidelines.

4.1. ARGUMENTS PUT FORWARD BY LITIGANTS TO CONTEST THE RIGHT TO ABORTION

Life from the moment of conception: One of the strongest claims used to contest abortion decriminalization is that human life begins at conception, and, therefore, abortion is the murder of persons who are unborn (LEMAITRE, 2014). This argument has been at the core of the legal strategies used across Latin America, including disputes around the adoption of “life from the moment of conception” clauses in laws, constitutions, and courts (GIANELLA MALCA, *et al.* 2017; LEMAITRE, 2014; GIANELLA, 2018). One of the legal arguments used to sustain the legal recognition of life from the moment of conception – and therefore the impossibility of decriminalizing abortion (and allowing emergency contraception) – draws on the American Convention on Human Rights, specifically its article 4.1, which reads: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” Actors against abortion rights have long used the phrase “from the moment of conception” to reject abortion rights⁶ (LEMAITRE and SIEDER, 2017). At the country level across American Convention on Human Rights signatories, requests for the application of the doctrine of conventional-ity control⁷ were previously at the center of arguments to block attempts to decriminalize abortion. However, this dramatically changed with the 2012 *Artavia Murillo et al. v. Costa Rica*

⁶ See, e.g., De Jesus (2014).

⁷ The doctrine can be defined as an international legal obligation that requires all the authorities of the States parties to the American Convention to interpret domestic law in accordance with the Inter-American Corpus

ruling, in which the Inter-American Court of Human Rights provided content to article 4.1. In its ruling, the court noted that the phrase “in general” (referring to “in general, from the moment of conception”) “could not be interpreted in defiance of the need to protect the rights of pregnant women, precluding balancing and proportionality” (LEMAITRE and SIEDER, 2017). This meant that, from 2012 onward, the adequate use of conventionality control needed to include the Inter-American Court of Human Rights’ interpretation of article 4.1. In its ruling, the Inter-American Court also rejected the argument that personhood is present in a fertilized ovum.

In the cases analyzed, both the first-instance ruling in EMP’s case and the *amparo* lawsuit (first instance) filed by Acción de Lucha Anticorrupción “Sin Componenda” ignored the *Artavia Murillo et al. v. Costa Rica* ruling, quoting in their arguments article 4.1 of the American Convention of Human Rights and its binding nature. In these two cases, litigants applied the long-used argument that abortion is unconstitutional, based on the constitutional recognition of the rights of the unborn enshrined in article 4.1 of the American Convention. In the case of the *amparo*, the claimants quoted the previous lawsuit won by Acción de Lucha Anticorrupción “Sin Componenda” regarding access to emergency contraception; in other words, they included a strategic use of Constitutional Court jurisprudence.

At the same time, however, *Artavia Murillo et al. v. Costa Rica* had an impact on litigants’ argumentation: their legal arguments challenged the binding nature of the doctrine of conventionality control. In its appeal (after the rejection by the first-instance court), Acción de Lucha Anticorrupción “Sin Componenda” drew on the argument of national sovereignty to question the binding nature of the Inter-American Court’s ruling. The appeal introduced the doctrine of “margin of appreciation,” which claims that the international legal framework must be adapted to national legal systems and cannot challenge or reform national laws. Such calls to limit the impact of Inter-American Court rulings in countries that are not directly involved in the cases are not limited to sexual and reproductive rights. Moreover, these calls ignore the pronouncements of the Peruvian Constitutional Court, which has stated that the rulings and statements issued by the Inter-American Court are binding in the Peruvian legal system. However, the *Artavia Murillo* ruling has prompted the development of this type of argument not only in Peru but across the region (see, e.g. DE JESUS, 2014).

Juris, which is integrated by the American Convention, treaties of similar nature (i.e. the Inter-American Convention to Prevent and Punish Torture), the interpretations of these treaties made by the Inter-American Court (in the exercise of its contentious or advisory jurisdiction) and other sources of soft law in the Inter-American System (i.e. the Inter-American Democratic Charter). In accordance with this doctrine, State authorities must avoid the enforcement of anti-conventional laws in case that no consistent interpretation is legally possible, although they must always act within their competences and the corresponding procedural regulations as defined by domestic law. (GONZÁLEZ-DOMÍNGUEZ, 2018)

Balancing of rights: The defense of “life from the moment of conception” is accompanied by a framing of the fertilized ovum (or fetus) as a child.⁸ This framing is linked with the argument concerning the need to defend the “superior interest of the child,” whereby the first obligation is to protect the right of the fetus and the second obligation is to protect the health and life of the pregnant woman. The right of the fertilized ovum or fetus is presented as an absolute and superior right. In the case of EMP, this argument was used to reject the remission requested by the defense. The argument also appears in the *amparo*.

Framing the fertilized ovum as a child presents the fetus as an independent entity: the pregnant woman does not have the right to decide over this independent entity. This argument, present in the first-instance ruling of the EMP case, is also commonly used to frame abortion as the murder of children.

The “superior interest of the child” argument allows judges to neglect other constitutional rights. One salient feature of the EMP case was the court’s dismissal of EMP’s ethnic origin, even though court records include repeated references to the fact that under her culture, abortion is not a crime and is a common practice. The Peruvian Constitution recognizes the right to ethnic and cultural identity as a fundamental right (article 2) and establishes the state’s obligation to respect the cultural identity of indigenous communities (article 89), which means that health services must be culturally appropriate. Despite the cultural aspects of abortion, they were not considered by the court.

This “balancing” of rights is rooted in gender stereotypes, and legal arguments are linked with social values. In the case of EMP and the *amparo*, gender stereotypes were used to justify the criminalization of abortion. And in EMP’s case, such stereotypes were used in the arguments presented by the judges and the Attorney General’s Office. For example, EMP was presented as a person who lied and betrayed her boyfriend. The fact that she decided by herself (i.e., exercised autonomy over her own body) was presented as a betrayal in the first-instance ruling. She was also portrayed as acting selfishly (because she wanted to continue her studies). All of these arguments were presented as facts to justify EMP’s punishment.

Abortion as a crime: The above argument is used to support the framing of abortion as a crime. In the case of the popular action against the National Therapeutic Abortion Guidelines, and due to the characteristics of the legal mechanism, the claim focused on framing abortion as a crime against a child and therefore incompatible with administrative regulations. This argumentation represents a different legal strategy that goes beyond the discursive framing of abortion as murder, which was used, for example, in the cases filed by Acción de Lucha Anticorrupción “Sin Componenda,” and that has been used broadly across the region (GIANELLA, 2018; LEMAITRE, 2014). The popular action explored a venue to declare the Therapeutic

⁸ As mentioned earlier, the *Artavia Murillo et al. v. Costa Rica* ruling also questions this argument.

Abortion Guidelines unconstitutional because of irregularities in the norm. Claimants' argued that the nonpunishability of an act does not detract from its illegality. Such argumentation is not built on traditional arguments used by, for example, the Catholic Church, or attempts to secularize religious arguments.

Therapeutic abortion as a cover-up: This argument is accompanied by a discourse stating that there are no scientific grounds for therapeutic abortion. Under this view, therapeutic abortion was justified in 1924 (when the procedure first became legal), but nowadays, the development of science allows for the preservation of both the life of the pregnant woman and the life of the unborn. According to this discourse, therapeutic abortion is justified only to save the life of the pregnant woman.

This argumentation is also linked with the discourse that frames abortion as a business of international actors, and it appears in the claim filed by Acción de Lucha Anticorrupción "Sin Componenda."

4.2. ARGUMENTS PUT FORWARD BY THE COURTS TO SUPPORT THE LEGALITY OF ABORTION

A central and outstanding characteristic of the rulings is the formalistic approach of the Peruvian courts, which reveals their weak capacity to innovate and develop jurisprudence toward expanding the grounds for legal abortion in the country. This formalistic approach is expressed through the quoting of international jurisprudence, symbolizing a deep respect for the doctrine of conventionality control, as well as state responsibility toward United Nations bodies.

For example, in the case of the *amparo*, the court decisions issued in 2019 and 2020 quoted the cases of *KL v. Peru*, *LC v. Peru* and the Inter-American Court of Human Rights in *Artavia Murillo*, and recognized the power of United Nations bodies (CORTE SUPERIOR DE JUSTICIA DE LIMA CUARTA SALA CIVIL, 2020). The use of international jurisprudence denotes a qualitative improvement. Previous studies showed, for example, that in cases related to gender violence, judges ignored international jurisprudence, as well as treaties adopted by the Peruvian government (DEFENSORÍA DEL PUEBLO, 2010).

The court responses to the *amparo* and the popular action enumerate all the steps carried out by the executive, which also indicates a self-censorship from the court to provide an opinion against State policies. These features could indicate that, in the case of Peruvian high courts, judges put the responsibility to innovate in the executive, or in case of controversial cases, in international jurisprudence (in its binding power). There is less innovation or openness to judicial activism compared to courts from the region, such as the Colombian Constitutional Court, whose rulings have clarified the indications model; the Mexican Supreme Court, that, in a case regarding the Criminal Code of one Mexican State (Coahuila), ruled that in the state it is unconstitutional to punish abortion as a crime; or the Supreme Court of Argentina, that in 2012 clarified the interpretation of article 86.b of the Criminal Code, by stating that any woman, competent or disabled, who has been raped may seek an abortion without criminal liability and without any court authorization.

CONCLUSION

Peruvian courts have developed jurisprudence to protect abortion rights. However, our analysis shows that more than being innovative, Peruvian courts are formalistic. In this context, international jurisprudence has become key for protecting the right to abortion but has offered little space toward recognizing additional grounds for abortion, as has been the case in other Latin American countries.

The weak innovative capacity of Peruvian courts contrasts with the capacity of anti-abortion actors to use new legal arguments and mechanisms. Charging that an administrative regulation is unconstitutional is not a strategy unique to Peru – in Argentina and Costa Rica, for example, abortion guidelines have been also contested. In the case of Peru, however, plaintiffs did not challenge the jurisdiction of the Ministry of Health. Their main arguments focused on: (i) the violation of the right of the unborn, which is defined as an absolute right; and (ii) the constitutional validity of the norm that regulates a “nonpunishable but criminal offence.” Anti-abortion plaintiffs have also reacted to the new situation created by the *Artavia Murillo* ruling and introduced the doctrine of “margin of appreciation,” as well as calls for national sovereignty, which are linked to the anti-globalization movement that is present in the region and beyond and which have been used in different settings to reject LGBTIQ rights and abortion rights.

While these cases can be classified as victories for the defense of the right to abortion in Peru, our analysis shows that: (i) despite jurisprudential developments, justice operators (judges and prosecutors) share and use the arguments used by anti-abortion rights actors, and these arguments are used to criminalize abortion; (ii) actors against abortion rights have the capacity to not only develop secular legal frames but also to search for new venues (such as constitutional mechanisms) and legal strategies to challenge abortion rights; and (iii) in the case of Peru, the formalistic approach of the courts (i.e., their weak innovative capacity, and strict following of the legal framework approved by the executive, or international bodies) raises doubts about the possibility of developing a litigation strategy to expand the legal grounds for abortion, as has been the case in other Latin American countries.

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