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# SOCIAL MOVEMENTS AND LEGAL CHANGE: LEGAL MOBILIZATION AND COUNTER- MOBILIZATION IN THE FIELD OF ABORTION LAW IN LATIN AMERICA

Alba María Ruibal

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

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**European University Institute**  
**Department of Law**

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This thesis has been submitted for language correction

## **ABSTRACT**

This thesis studies social movements and their interaction with legal institutions, particularly constitutional courts, in their pursuit to influence abortion law reform or counter-reform in Latin America. More generally, it intends to contribute to the study of the conditions and ways in which movements in civil society may influence legal change. It introduces an analytical framework that combines three theoretical perspectives developed in separate fields of scholarship, which are usually not connected: social movement theory, democratic constitutionalism and legal mobilization studies. The underlying premise, following democratic constitutionalism, is that social movements can be central actors in the generation of a discourse that begins from below and that may influence the law officially sanctioned by the state. The cases in this study - Colombia, Mexico, Brazil and Argentina - show that recent changes to the abortion laws in Latin America have responded to direct claims by feminist actors in civil society. Over the last decade, constitutional courts have sided for the first time in the region with feminists' claims to decriminalize abortion in certain circumstances, and their decisions have been in line with the human rights discourse and particular ways of framing the abortion issue advanced by feminists to ground their rights claims in this field. An analysis of the interaction between social movements and the legal system in each case is carried out through an analytical narrative, drawing on original semi-structured interviews conducted from 2010 to 2013 with social movement activists, lawyers, health professionals and academics in each country, as well as on primary source documents and secondary sources, mostly produced by Latin American feminists. The main case law by constitutional courts in each case is analyzed with attention to the socio-legal process developed around judicial decision-making, and the relationship between courts and social movements.



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## INTRODUCTION

### I. RESEARCH QUESTION AND GENERAL PERSPECTIVE

This thesis tells the story of the role of social movements in recent processes of liberalization of abortion laws in Latin America. More generally, it intends to contribute to the study of the relationship between legal mobilization and legal change. The main research question that guides this work is how and under what conditions social movements may influence legal reform. The thesis introduces an analytical framework that combines three theoretical perspectives developed in separate fields of scholarship, which are usually not connected: social movement theory, generally developed in the field of sociology; the strand of constitutional theory known as democratic constitutionalism; and legal mobilization studies within the law and society tradition. The thesis is driven by the assumption that a comprehensive approach to the relationship between social movements and the law requires the integration of these approaches, in as much as each contributes a particular understanding of different aspects of that interaction. Empirically, the main focus is on feminist legal mobilization and its influence on law reform, but the thesis also addresses counter-mobilization strategies, movement/counter-movement dynamics and backlash processes, for they are part of the socio-legal field in which the abortion rights controversy takes place.

The underlying premise, following democratic constitutionalism, is that social movements can be central actors in the generation of a discourse that begins from below and that may influence the law officially sanctioned by the state.<sup>1</sup> From this perspective, not only are social movements constituted by law, as the law and society literature has emphasized, but they can also have an impact on legal change. Further, their influence may not only be related to creating momentum for reform, but they can contribute as well to shaping the content of norms. As Reva Siegel has put it, by framing their claims in legal terms, social movements produce new constitutional understandings that under certain circumstances can be incorporated by courts into constitutional law.<sup>2</sup> In fact, by locating courts' decisions in a broader discursive and political field and tracking the influence of social movements in constitutional doctrine, democratic constitutionalism is the field that most emphatically

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<sup>1</sup> Minow (1987); Pope (1996); Siegel (2001, 2004, 2006); Eskridge (2001); Rubin (2001); Mayeri (2004); Siegel and Post (2007); Balkin (2011); Greenhouse and Siegel (2011); Torres and Guinier (2012).

<sup>2</sup> Siegel (2004:15).

acknowledges the role of social movements in legal change.<sup>3</sup> It provides a unique perspective for understanding the nature of the interaction between social movements and legal institutions, and the role of courts in the institutionalization of societal claims.<sup>4</sup> Although this approach centers on the development of constitutional law, it provides as well more general insights into the relationship between social movements and courts, and into the role of social movements in processes of legal change.

However, with illustrious exceptions, constitutional theory does not take into account the collective action processes involved in the creation of legal concepts and discourses by social movements, or the organizational and contextual factors that affect movements' capacity to influence legal reform. This is why Reva Siegel, who has pioneered the incorporation of social movement insights into constitutional theory, has called for "a thicker description" of the concepts and actions developed by social movements aimed at influencing legal change.<sup>5</sup> In the same vein, she has argued for the need to include an analysis of the institutional settings in which different kinds of actors discuss constitutional interpretations, including the system of government, juridical institutions and organizations in civil society.<sup>6</sup> The main aim of this thesis is to offer an analytical and thick description of the kind advocated by Siegel, with the general purpose of contributing to an understanding of the conditions and ways in which movements may participate in the socio-legal processes involved in law reform.

The operationalization of the cultural, organizational and contextual dimensions of social movements' work and their relationship to the legal field - the dimensions that most crucially contribute to a thicker description of the legal work done by social movements - demands an integration into the analytical framework of the other two scholarly fields; that is, social movement theory and legal mobilization studies. Particularly social movement theoretical and

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<sup>3</sup> This explanation has been largely neglected in the history of jurisprudence. However, historical research has shown that social movements in general and women's movements in particular did have a direct influence in the creation of constitutional doctrine. See, for example, Winkler for an analysis of the role of the women's suffragist movement in the United States in the development of the concept of the "living constitution" (2001: 1473-1505). Further analysis of this process can be found in Mika (1998) and Balkin (2005).

<sup>4</sup> Considering social movements as a source of law does not imply that movements have a preeminent role with respect to the other factors that may influence legal change – in particular the political and economic spheres - but it is meant to acknowledge that the politics of legal change is not only constituted by special-interest groups or by hegemonic political powers, but also by the aspirations and interests of actors in civil society (Rubin 2001: 82).

<sup>5</sup> Siegel (2001: 304).

<sup>6</sup> Siegel (2006: 1350).

empirical research offers a privileged perspective into the social construction of legal claims and arguments that reach the courts, as well as into the political and organizational dimensions of that process. In this way, social movement studies provide exceptional analytical insights into the process of formation of the interests that intend to influence courts' decisions and legal processes more generally. Finally, insights from the field of legal mobilization are also incorporated into the analysis, in particular the influential concept of legal mobilization, which includes but is not limited to litigation strategies.

The analysis is structured following the three main frameworks developed by social movement studies, which allow us to merge the contributions of the other two fields in an orderly and analytically productive way. Hence, through the assessment of three main set of variables developed by social movement theory - the availability of resources for legal mobilization, the development of cultural framings, and the political and legal opportunities for movement's influence - and the integration of the other two perspectives, this work intends to explain legal mobilization for abortion rights in each country-study, and to show how social movements may become key participants in the creation of legal meaning, and in legal change.

## **II. THE ABORTION CONTROVERSY, THE FEMINIST MOVEMENT AND CONSTITUTIONAL COURTS IN THE LATIN AMERICAN CONTEXT**

The abortion controversy is especially apt to analyze the role of social movements in the broad processes of legal mobilization and legal change, as well as the role of courts in these processes. The legalization of abortion has been a core claim of one of most prominent contemporary social movements in Latin America; it is a paradigmatic case of interaction between movement and counter-movement; it has motivated the intervention of constitutional courts; and it includes prominently the crucial problem of implementation of legal decisions. Furthermore, the abortion issue encompasses larger political and constitutional claims about women's social status and equal citizenship, and it highlights perhaps more clearly than any other issue the tension between the aspirations of liberal democratic regimes and the still-powerful influence of religious institutions on Latin American states. In sum, abortion politics and abortion legal struggles offer a particularly appropriate field in which to analyze the role

of social movements in legal processes that are part of wide-ranging social and political conflicts, which neither begin nor end with court decisions.

Latin America is an especially interesting setting in which to observe this type of process. In the last few decades, most countries in the region have gone through democratization processes, which have included constitutional reforms, the enactment of new rights, the creation or reform of constitutional courts,<sup>7</sup> and the incorporation of new legal remedies. This new institutional context has been accompanied by new forms of social movement mobilization, including in particular legal mobilization. Moreover, during the past two decades there have been in Latin America, as part of the democratization process and in line with a global trend, significant developments in the legal recognition of women's rights.<sup>8</sup> However, while democratization and women's mobilization have brought about changes in almost all areas of women's rights in the region, abortion has been deemed as *the frontier of the right to decide*,<sup>9</sup> and women's campaigns in different countries call it *a debt of democracy*.<sup>10</sup> In fact, Latin American countries continue to share some of the most restrictive abortion laws in the world.<sup>11</sup>

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<sup>7</sup> The term *constitutional courts* is used generally to refer to the highest court in each country which holds ultimate constitutional review powers, although in some countries they receive other names (they are called *Supreme Courts* in Mexico in Argentina, and *Supremo Tribunal Federal* in Brazil).

<sup>8</sup> In the 1990s, most countries in the region adopted international and regional conventions on women's rights, and introduced national legislation in this field, particularly regarding gender quotas for political participation and violence against women. Argentina was the first country in the world to hold national legislative elections using a gender quota system, and since then, reforms introduced in more than half of Latin American countries made the region a world vanguard in the implementation of quota laws (Jones 2009: 56-57). Laws on violence against women were passed in at least 16 Latin American countries in the 1990s (Htun 2002: 745). Later on, there were further important changes in this field, such as the renowned law on violence against women promulgated in Brazil in 2006, and the reform to the law on violence against women in Argentina in 2009.

<sup>9</sup> Lamas (2001a: 8). In fact, Latin America should not be seen as a totally backward scenario for sexual and reproductive rights in general. For example, Argentina legalized gay marriage in 2010, and in 2012 it legalized the change of sexual identity, and established the state's obligation to provide for sex-change operations. However, this country is one of the worst examples in terms of access to abortion in the cases allowed by the law.

<sup>10</sup> See, for example, "Aborto legal, una deuda de la democracia en Sudamérica", National Campaign for the Right to Legal, Safe and Free Abortion, Argentina. Available at: <http://www.abortolegal.com.ar/?p=1739>.

<sup>11</sup> Sedgh et al. (2007: 167). The illegality of abortion does not prevent the practice; it only makes it clandestine and highly risky for women. In fact, the rate of abortions in the region is one of the highest worldwide, and more than 94% of those abortions are unsafe (Sedgh et al. 2007: 167).

At the beginning of the twentieth century, some Latin American countries included exceptions to criminalization, which placed them as “vanguards in the field of the abortion law”.<sup>12</sup> However, since then, in most countries in the region, the law has not been liberalized in order to allow for abortion on demand at some stages of pregnancy, as has occurred in European and North American countries during the 1960s and 1970s,<sup>13</sup> and the enforcement of the legally accepted exceptions to criminalization has been systematically contested and obstructed. Nowadays, a group of seven countries – Chile, Dominican Republic, El Salvador, Haiti, Honduras, Nicaragua and Surinam - completely prohibit abortion, without exceptions. A second group of countries - the majority in the region - consider abortion a crime, with some exceptions, most generally to save a woman's life, or in cases of rape or risk to the woman's health. It should be noted, however, that in many of these cases there is virtually no access to legal abortion, because of unnecessary judicialization and governments' reluctance to implement services. Finally, there is a third group of jurisdictions wherein abortion upon request of the woman is legal: Cuba since 1965, Puerto Rico since the 1970s, the Guyana since 1995, Mexico City since 2007 and Uruguay since 2012.

In this context, Latin American feminists have three main types of claims with regard to the legal status of abortion. In the first place, they advocate for the actual enforcement of lawful abortion, which is demanded of the executive branch, and in some cases also of the courts. Secondly, they seek the expansion of exceptions to the criminalization of abortion, which has been asked of courts as well as of legislatures. Finally, their ultimate goal is the legalization of abortion at women's demand, which is requested of the legislature.<sup>14</sup> In all cases, the feminist claim for decriminalization or liberalization includes the demand for the provision of the service by the state - which is generally known in Latin America as the legalization of abortion. In a region with the highest income inequality in the world, decriminalizing abortion without providing for access to the service would imply little change for broad sectors of the female population, who would continue having to recur to unsafe practices. This is one of the

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<sup>12</sup> Htun (2003: 143).

<sup>13</sup> See, in particular, Rubio-Marin (2010, 2013a, 2013b, 2014) for thorough and comparative accounts of the evolution of abortion laws in the United States and Europe.

<sup>14</sup> Given the position of constitutional courts in Latin America's political systems, the type of change expected from courts in the field of abortion law is related to the gradual expansion of legal permissions, or to the upholding of legislative reforms. But generally it is not expected that these courts legalize abortion, as it happened in the United States and Canada.

reasons why the Latin American feminist framings of the abortion issue have drawn heavily on social justice and right-to-health arguments, and not on a privacy rationale.<sup>15</sup>

The restrictive legal framework of abortion in Latin America has started to change during the past decade, as legislative reforms and high court decisions have liberalized, to different extents, the abortion law in Colombia, Mexico City, Argentina, Brazil and Uruguay. In 2006, the Colombian Constitutional Court established that abortion should be legal in cases of rape, risk to the woman's life or health and serious fetal malformation. In 2007, Mexico City legalized abortion during the first trimester. In 2012, the Brazilian Supremo Tribunal Federal legalized abortion in cases of anencephaly. In the same year, Argentina's Supreme Court established that abortions should be decriminalized in all cases of rape, and also in 2012 Uruguay decriminalized abortion during the first trimester (although it included provisions that condition the woman's decision).<sup>16</sup> In most of these cases, except for Uruguay thus far, constitutional courts, or supreme courts with ultimate judicial review powers, have played a central role, and in some of them they have been the key institutional venue for progress in this field.<sup>17</sup> As it has happened in other contexts, the crucial factor of change in this area of rights in Latin America has been women's mobilization.<sup>18</sup> Especially in the context with a high influence of religious institutions in the political system, such as in Latin American countries, this is not an area of rights usually embraced by politicians, and women's organized action becomes fundamental.

The contemporary or second-wave feminist movement in Latin America emerged in the 1970s and, since then, the legalization of abortion has been one of its main goals. In many cases, due to the context of political repression at that time, feminists organized in small

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<sup>15</sup> For similar reasons, Latin American feminists tend to use the term *decision* instead of *choice*. Especially in contexts of lack of access to material and social resources, it is considered that abortion is often a coerced decision and not a free choice (Gebara 1995: 130).

<sup>16</sup> Although significant in the Latin American context, these reforms are still insufficient in their scope and not yet consolidated, as they have affected only one sector of the country's population, as in Mexico; their implementation has been highly contested, as in Colombia and Argentina; they have included only a very limited range of exceptions to criminalization, as in Brazil; and there have been strong backlash processes, as in Colombia and Mexico.

<sup>17</sup> It should be noted, though, that high courts in other Latin American countries have ruled against women's reproductive rights. Examples, among others, are the 2007 Chilean Constitutional Court ruling to declare unconstitutional the distribution of the "morning-after pill," as well as Costa Rica's Supreme Court ruling in 2000 to prohibit in-vitro fertilization (which was reversed by the Interamerican Human Rights Court in 2012).

<sup>18</sup> See Casas (2010); Diniz and Gonzalez (2008); Jaramillo and Alfonso (2008); Lamas (2009).

reflexion groups, and in others, particularly in Mexico, feminists were able to publicly demonstrate and to position the abortion issue as a claim in the public and political sphere. At that time, one of the main aims of the Latin American feminist movement was to establish their own autonomy from the state as well as from political parties, even leftist ones, for they generally subordinated gender claims to more general struggles and conceived of birth control measures as imperialist policies. However, the democratization process, and the diffusion of the NGO model of organization in the 1980s and 1990s, implied a reformulation of the concept of autonomy by feminists in the region, and they entered into a dialogue with government, with the aim of influencing state actions and public policy in the field of women's rights. This development was correlated with an interest by the state in incorporating the human rights discourse as well as some criteria of gender equality, due to social and international pressures.<sup>19</sup> The 1994 International Conference on Population and Development held in Cairo, and the 1995 World Conference on Women, held in Beijing were watersheds in the development of a human rights perspective on women's reproductive health in Latin America, and in the incorporation of the concept of reproductive rights. These conferences also reinforced the Latin American feminists' idea that family planning should not be seen mainly as a solution for the demographic problem, but should be approached from the wider perspective of health and human rights.<sup>20</sup>

Especially since the 1980s, Latin American feminists have built regional networks, including specific networks on reproductive rights.<sup>21</sup> In 1987, feminist lawyers created the Latin American Committee for the Defense of Women's Rights (CLADEM), with the aim of using the law as a tool for change in the area of women's rights. Also in 1987, feminists who were part of grass-roots Catholic networks decided to establish the organization Catholics for Choice (CDD) in the region, with headquarters in Montevideo.<sup>22</sup> The organization has

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<sup>19</sup> As such, the interaction of the feminist movement and the state in Latin America has been approached from the point of view of a theory of the state that does not consider it as a monolithic place for the representation of patriarchal interests, but as an arena of gender struggle, which presents different entry points at different junctures (Alvarez 1990: 31). See Della Porta (2003: 49-52) for a thorough analysis of the possible relationships of the women's movement with the state, with reference to the Italian case. In similar lines, Della Porta and Diani observe state agencies are not always aligned, and that they constitute fields of transaction for different actors, including social movements (2006: 211).

<sup>20</sup> González Montes (1999: 44).

<sup>21</sup> The Latin American and Caribbean Feminist Encounters, which have taken place since 1981 (first every two years, and later on every three years) have been instrumental in the development of issue-specific networks and advocacy coalitions throughout the region (Alvarez et al. 2003: 5).

<sup>22</sup> CDD had been created in the United States in 1973.

become a key referent in the struggle for sexual and reproductive rights in several countries in the region, and in 1994 a regional network of CDD was created. In 1990 feminists founded the Latin American and Caribbean Health and Reproductive Rights Network (LACWHN), and instituted the Day for the Legalization of Abortion in Latin America and the Caribbean, to be commemorated on September 28 each year.<sup>23</sup> A Regional Coordination of the so-called 28 September Campaign was created in 1993, and the Campaign currently mobilizes feminist grass-roots networks as well as NGOs throughout Latin America for abortion legalization. Other regional initiatives by Latin American feminists include the development of a common conceptualization of the health exception within a human rights framework,<sup>24</sup> as well as the Campaign for an Inter-American Convention on Sexual and Reproductive Rights, launched in 1999,<sup>25</sup> in which those networks generally converge.

In Latin America, the rise of women's demands for abortion legalization intersected with the expansion of constitutional justice and the judicialization of the political process, in the aftermath of reforms that created new constitutional courts or reformed existing supreme courts with ultimate judicial review powers.<sup>26</sup> In fact, the incipient movement toward liberalization of abortion law in some countries has taken place at a moment in which constitutional review and constitutional adjudication have become relevant in Latin American institutional and political landscape. Since the processes of democratization, and particularly in the aftermath of the empowerment of courts, the rights discourse and the discourse on the rule of law set out to permeate political claims, social actors started framing their grievances and goals in terms of legal and constitutional rights, and developments have taken place in the areas of strategic and public interest litigation.<sup>27</sup> Furthermore, as part of this process, legal ideologies are changing in Latin America, and a paradigm shift has been observed on the part

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<sup>23</sup> The LACWHN was created in the 1990 Latin American and Caribbean Feminist Encounter in Argentina (Lamas 2007: 144).

<sup>24</sup> See González (2012: 23).

<sup>25</sup> See Pandjirjian (2003: 17).

<sup>26</sup> Over the past two decades, most Latin American countries have carried out reforms to their judicial institutions, which have prominently included the empowerment of constitutional review organs. Five countries in the region created constitutional courts (Bolivia, Colombia, Chile, Ecuador and Peru); Guatemala reformed its Constitutional Court (created in 1965); and five other countries established special constitutional chambers within their Supreme Courts (Costa Rica, El Salvador, Honduras, Paraguay, Venezuela). Furthermore, Brazil conferred more review powers to its Federal Supreme Tribunal; in Mexico, the 1994 judicial reform conferred new constitutional review powers to the Supreme Court; in Argentina, the Supreme Court conserved its ample original review competences and a reform in 2003 increased controls in the selection of justices and enhanced participation and accountability mechanisms in the Court's internal procedures.

<sup>27</sup> Böhmer (2010: 264).

of some sectors of the legal community toward neoconstitutionalist perspectives.<sup>28</sup> As a consequence, the perception of the role of courts in Latin America has shifted from being seen as obstacles to social change, to being considered one of the possible venues for rights claims.<sup>29</sup> It should be noted that these are incipient trends, but they certainly mark an innovation in Latin America's institutional history. In a context of transformation of the institutional role of courts, the relationship between courts and civil society may become a particularly relevant issue to be taken into account by justices in their decision-making procedures, as it may contribute to configure courts' institutional standing and legitimacy in the political system. In such contexts, highly disputed cases such as those involving abortion may become opportunities for the redefinition of the role of courts in terms of their interaction with social actors.

Movements and counter-movements in the field of sexual and reproductive rights in Latin America have affected each other. Conservative mobilization in the region is mostly led by the Catholic Church as well as by organizations in civil society that follow the Vatican's agenda on sexual and reproductive issues,<sup>30</sup> and in some cases, most prominently Brazil, other Christian churches are also influential actors in counter-mobilization processes. Particularly since the Papacy of John Paul II, the Catholic Church has lobbied for the introduction of an absolute protection of the right to life "from the moment of conception until natural death" into constitutional and legal texts.<sup>31</sup> In the context of transitions to democracy in Latin America, the Catholic Church attempted to influence constituent processes with the aim of introducing that clause into national constitutions.<sup>32</sup> Most recently, the conservative movement has turned its attention to local-level politics, for example by attempting to stop the implementation of lawful abortion at sub-national jurisdictions in several countries, or by influencing constitutional change at the states' level in the case of Mexico. Counter-

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<sup>28</sup> Couso and Hilbink (2011: 99).

<sup>29</sup> See Couso (2006: 62).

<sup>30</sup> For an analysis of the way in which anti-abortion advocates have changed its strategies in order to intervene in the public space through organizations in civil society and through the development of new strategies, see González Ruiz (2005); Vaggione (2005); Amuchástegui et al. (2010a and 2010b); Lemaitre (2012).

<sup>31</sup> During the Papacy of John Paul II, two institutions were established in the orbit of the Vatican in order to promote anti-abortion activism, among other activities oriented to defend the model of the natural family: the Pontifical Council for the Family, created in 1981, and the Pontifical Academy for Life, instituted in 1994.

<sup>32</sup> Particularly during the 1980s, Chile, Guatemala, Honduras, Dominican Republic and El Salvador introduced in their constitutions a protection of the right to life from conception, or conferred constitutional rights to the "product of conception" (Tames et al.: 9-10).

mobilization and counter-legal mobilization in Latin America are largely financed by Human Life International and its Latin American affiliate *Vida Humana Internacional*.<sup>33</sup>

Conservative Catholic mobilization in Latin America still deploy traditional methods of influence, from the intervention of the Vatican's diplomatic service and threats of excommunication to public or private actors that promote or carry out abortions, to violent practices and direct attacks or physical aggression.<sup>34</sup> However, in recent years, conservatives have also developed a language more in keeping with the discourse of democracy and human rights, and have leveraged the institutional means provided by the democratic structure.<sup>35</sup> Particularly since the 1990s, and influenced by the change of strategy of religious mobilization at the conferences of Cairo and Beijing, anti-abortion activists in Latin America have also crafted their discourse in the language of rights and public policy. They have interpreted constitutional and human rights provisions according to a Catholic understanding of the right to life, which equates a person with a fertilized egg.<sup>36</sup> They have also argued that abortion is a public health problem because it provokes psychological trauma in women, which should be attended to by the public health system; that the state has the obligation to support women in order for them to be able to carry on their pregnancies; and that the state should develop better public policies on adoption.<sup>37</sup> They have also opposed the liberalization of abortion laws on grounds of fathers' rights, particularly in the Mexican case.

This work studies social movements and their interaction with the state in their pursuit to influence abortion law reform or counter-reform in Latin America. It intends to develop a multi-institutional analysis, which considers different venues intervening in legal change, or in the implementation of existing laws and judicial decisions in the field of abortion. However, emphasis is placed on constitutional courts and constitutional justice. Constitutional courts are the ultimate interpreters of constitutional rights in most Latin American countries, and contemporary social movements that intend to influence legal reform in the region must consider the potential constitutional controversy that their rights claims may elicit,

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<sup>33</sup> Human Life International is a coalition of several anti-abortion groups, founded in the United States in 1981, which has an office for Latin America in Miami, as well as affiliates in most countries in the region (Htun 2003: 152), and portrays itself as the largest prolife organization in the world (González Ruiz 2005: 50).

<sup>34</sup> See González Ruiz (2005: 129-135) for a thorough account of the repertoire of actions taken by conservative activists, which in many cases have been illegal.

<sup>35</sup> See, generally, Vaggione (2005), Amuchástegui et al. (2010).

<sup>36</sup> See Lemaitre (2012: 507) for an analysis of the Catholic conception of the right to life.

<sup>37</sup> See Márquez (2010: 189).

particularly when pursuing change on highly controversial social issues. For these reasons, this thesis intends to assess in an in-depth manner the specific role played by constitutional courts in this field, and the interaction of feminist organizations, as well as the counter-movement, with constitutional courts around the abortion constitutional controversy.

It should be noted that Latin American feminists have first recurred to international instances in search of redress of injustices regarding access to abortion in their countries, and landmark cases have been successfully litigated at different international human rights organs.<sup>38</sup> In fact, although human rights treaties do not include a right to abortion, international human rights institutions and treaty monitoring bodies have been systematically favourable to women's reproductive rights, and their pronouncements – motivated mostly by claims from feminist organizations - constitute milestones in the struggle for abortion rights in Latin America and offer fundamental points of reference for any legal claim in the abortion field in the region.<sup>39</sup> However, nowadays the primary challenge is how to define abortion rights as women's rights in the much more complex and difficult context of national politics. Abortion rights must be built locally, in the struggle to influence the state, to respond to counter-mobilization, and to change cultural patterns. In fact, conservatives have to a large extent lost their struggle against reproductive rights at the international level, and now their focus is on influencing politics at the national and subnational levels, which constitutes the present challenge for reformers. The human rights discourse is an essential component of current feminist advocacy for the legalization of abortion. But in order to influence the field of national politics with regards to abortion it is not enough to invoke women's human rights. The process of creation of meaning about the legality of abortion has proven to be much more complicated at the local

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<sup>38</sup> Salient examples in this regards are the 2005 decision by the UN Human Rights Committee's against the Peruvian State for failing to provide access to abortion in the case of anencephaly (*K. L. v. Peru*, Human Rights Committee, Comm. No. 1153/2003, UN Doc. CPR/C/85/D/1153/2003 (2005); the so-called Paulina case in Mexico, settled at the Inter-American Commission, which condemned the Mexican State for not providing access to abortion in case of rape (IACtHR, Report No. 21/07, Petition 161/02, Friendly Settlement, *Paulina del Carmen Ramírez Jacinto*, México, 2007); and the decision of the UN Human Rights Committee against the Argentine case for failing to grant access to abortion to a mentally handicapped young woman who was pregnant after rape (*LMR v. Estado Argentino*, Human Rights Committee, Comm. No. No 1608/2007 (2011).

<sup>39</sup> In this regards, the recent decision by the Inter-American Court of Human Rights on in-vitro fertilization will certainly be a further key reference for feminist legal mobilization on reproductive rights in Latin America. The decision struck down the ruling by Costa Rica's Constitutional Court banning in-vitro fertilization based on ideas that recognize the embryo as a legal person with a right to life from the moment of conception. *Artavia Murillo et al. ("in vitro fertilization") v. Costa Rica*, Inter-American Court of Human Rights, Case No. 12.361 (November 28 2012). This case does not deal with abortion, but it has broad implications for the defense of reproductive rights in general.

level, and it requires a more elaborate construction, which includes building local coalitions and engaging with local cultural understandings.<sup>40</sup>

### III. CASES AND METHODOLOGY

The case studies included in this thesis correspond to Mexico, Brazil, Colombia and Argentina, which are four of the five Latin American cases in which legal reforms liberalizing abortion laws have taken place in the past decade, and are the four cases in which constitutional courts have had a relevant role by issuing decisions with *erga omnes* effects, liberalizing or upholding the legislative liberalization of the abortion law. These cases allow for a comparative assessment, and each one illuminates particular aspects regarding the role of social movements and their interaction with legal and political institutions in processes of legal change in the field of abortion law. Among these cases, Colombia is the only country with a centralized and unitary system of government, whereas Mexico, Brazil and Argentina are among the four countries with a federal organization in Latin America (the fourth one being Venezuela). For its part, Mexico is the only Latin American country where civil and criminal codes are determined by each state<sup>41</sup> and, thus, it is the only country where abortion law reform can be carried out at the subnational level.<sup>42</sup>

An analysis of the interaction between social movements and the legal system in each case is carried out through an analytical narrative, following process-tracing methods,<sup>43</sup> and drawing on original semi-structured interviews conducted from 2010 to 2013 with social movement activists, lawyers, health professionals and academics in each country. The analysis also relies on primary source documents (comprising reports elaborated by NGOs, news articles, legislative proposals and congressional statutes), as well as on secondary sources, mostly produced by Latin American feminists who have studied different aspects of the historical

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<sup>40</sup> Levitt and Merry have called vernacularization the process by which social movements adapt internationally generated concepts to local social settings (2009: 443).

<sup>41</sup> Htun (2003: 10 n. 9).

<sup>42</sup> In fact there are very few countries in the world where abortion laws are determined at the sub-national level: Australia, Mexico and the United States (Center for Reproductive Rights 2014: 32).

<sup>43</sup> Process tracing is a useful qualitative method for testing theories in small-n or single-case studies, generally involving extensive empirical research and drawing on a diverse set of sources (See George and Bennett 2005: 6; Collier 2011: 823). See Piscopo (2014) for an outstanding application of process-tracing methods to the study of the development of sexual health policies in Latin America.

construction of a socio-legal field of dispute around the issue of abortion in each country. Finally, the main case law by constitutional tribunals in each case is analyzed with attention to the socio-legal process developed around judicial decision-making, and the relationship between courts and social movements.

The thesis is divided into six chapters. The first chapter presents the theoretical and analytical framework. It is composed of three sections, each one corresponding to one of three main analytical approaches developed by social movement theory. The following four chapters present the case studies of Mexico, Brazil, Colombia and Argentina, respectively. The chapters are placed in that order following the criterion of the chronological development of legal mobilization by the feminist movement in each case. The case of Mexico is presented in the first place because Mexican feminists were the first ones to develop legal mobilization on the abortion issue, since the beginning of the 1990s. Brazil follows because it presents the first case of feminist strategic litigation for abortion rights before a national high court, in 2004. The Colombian case, where the main strategic litigation case on abortion was submitted in 2005, is presented in the third place. The final country study corresponds to the Argentine case, which presents a late process of legal mobilization in the field of abortion, as well as a strong recent process of feminist political mobilization on this issue.

Each chapter analyses in the first place the components of the political and legal context; that is, the political and legal opportunities that are relevant for the analysis of changes in the field of abortion law in each case. Secondly, each chapter addresses the organizational infrastructure as well as the strategies and framings developed by the feminist movement for the defense of abortion rights. An emphasis is placed on the development of legal mobilization, and on the characteristics and strategies of the counter-movement. Finally, each chapter addresses the interaction of the feminist movement with the state, most prominently with constitutional courts, in recent processes of legal change in the field of abortion. They include as well an assessment of backlash processes, where they have taken place. The concluding chapter presents a discussion of the main findings of the thesis as well as a comparative assessment of the four case studies, and, as in the theoretical chapter, it is structured along three main analytical frameworks developed by social movement theory.



# CHAPTER I

## SOCIAL MOVEMENTS AND LEGAL CHANGE. ANALYTICAL APPROACH

### INTRODUCTION

The relationship between law and social movements has been treated in three main scholarly traditions: sociological research on social movements, popular and democratic constitutionalism within constitutional theory, and legal mobilization studies within the law and societal tradition. These three academic fields developed separately, and remained for a long time fairly independent of each other.<sup>44</sup> In recent years, however, a growing body of literature started to combine legal mobilization studies and social movement inquiry.<sup>45</sup> Furthermore, in exceptional but notable cases, constitutional theorists have incorporated perspectives from social movement theory.<sup>46</sup> However, the notable body of work developed especially since the 2000s in the field of democratic constitutionalism on social movements' role in legal change has remained unnoticed by the other two traditions. In particular, social movement studies have so far neglected developments in constitutional theory that provide a unique insight into explaining why social movements are central to the production of constitutional culture and constitutional law, and the reasons that constitutional courts may, in some circumstances, incorporate social movements' claims and concepts.<sup>47</sup> Given that a majority of contemporary social movements intend to influence law reform, and that constitutional theory gives them such a prominent place in its account of the development of constitutional doctrine, this neglect is surprising.

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<sup>44</sup> In fact, Handler (1978) applied social movement theory to the study of litigation strategies, but it remained for a long time a solitary example in the field of legal studies. Rubin (2001: 52-63) presents a thorough analysis of possible explanations for the lack of dialogue between legal and social movement scholarship, as well as a compelling argument for the advantages of integrating these two fields.

<sup>45</sup> Michael McCann's work is one of the few examples of earlier scholarship applying social movement research to legal mobilization studies (McCann 1994; 1998). NeJaime's work (2011a; 2012) presents one of the most comprehensive and detailed attempts so far to establish links among legal mobilization and social movement literature. For recent examples of legal mobilization research that incorporates social movement theory see, for example, Marshall (2005); Pedriana (2006).

<sup>46</sup> Reva Siegel (2001, 2004, 2006) has developed the most notable theoretical work in this regard, particularly with respect to the incorporation into constitutional theory of the cultural framing dimension of social movement research. The work of Ziegler (2012) is another such example. For his part, Douglas NeJaime, working in the field of legal mobilization, has laid out the most comprehensive proposal so far for the incorporation of social movement theory into constitutional scholarship (see NeJaime 2013).

<sup>47</sup> In point of fact, social movement theory has overlooked the importance of law in general for understanding the development of movements' grievances and discourses (Eskridge 2001: 420-421).

The analytical proposal is structured along three main frameworks developed by social movement theory, which address the organizational resources, the political context and the cultural dynamics, respectively, involved in collective actions. This allows us to integrate concepts and insights developed by legal mobilization studies and democratic constitutionalism in a systematic and orderly way, and to show the ways in which these traditions combine and complement each other, and together offer an enriched analytical framework for the study of the role of social movements in legal change. These approaches are generally known as resource mobilization, political process, and cultural framing theories. In laying out each approach, particular attention will be given, in the first place, to those features most closely related to the pursuit of legal mobilization. Secondly, emphasis is placed on factors linked to the timing, development and consequences of movements' actions for influencing change in cultural, legal and political conditions, and not for movement emergence or constituency mobilization.<sup>48</sup> Thirdly, more specific factors will be noted that may affect, in particular, feminist organizations, the mobilization for abortion rights, and the development of this struggle in the Latin American context.

This work follows the prevailing trend in social movement studies, which assumes that the three variables, considered in their dynamic relationships and interactions, are relevant for the analysis of collective action and its consequences.<sup>49</sup> Institutions constrain, channel and enable action and conflict in society and in movement activity in particular. But activists' choices about how to pursue change, and the ideas and interpretations they develop influence their organizational structure, the framing they create and their seizing of political or legal opportunities. Even the construction of group identity and the creation of solidarity networks are movements' accomplishments,<sup>50</sup> and all these processes are defined in the interaction between agency and structure.<sup>51</sup>

The proposed analytical framework may be applied to the study of different kinds of movements, as well as counter-movements. Social movement theory has also shown that

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<sup>48</sup> Pedriana has pointed out the prevailing trend in social movement research to treat social movements only as a dependent variable, although he has also observed a growing interest in the consequences and impact of social movements' work (2004: 182-184).

<sup>49</sup> McAdam, McCarthy and Zald (1996: 4-7).

<sup>50</sup> Cohen (1985: 675). Cohen argues that the resource mobilization and political process perspectives conceive of movements' goals and grievances as pre-existing and given (1985: 675-676).

<sup>51</sup> Jasper (2004: 1).

organized opposition is a normal consequence of a movement that achieves substantial success in its call for equal rights, and that in contemporary societies, that opposition increasingly takes the form of a social movement, or a counter-movement.<sup>52</sup> Following this perspective, conservative mobilization and legal mobilization in Latin America can be analyzed using the same categories and frameworks used for the analysis of social movements, and the term counter-legal mobilization can be used to refer to the legal strategies developed by conservative actors.

Finally, the movement/counter-movement dynamics is one of the components of the political opportunity of each of movement in that interaction, since they affect each other directly and also by changing the context in which they operate.<sup>53</sup> Movements also have a 'demonstration effect' on political counter-movements, showing that collective action can promote (or resist) change in particular aspects of society.<sup>54</sup>

The chapter is divided into three sections, each one corresponding to one of the three main frameworks developed by social movement theory. The first section outlines the main elements of the resource mobilization approach, which focuses on the organizational dimension of social mobilization, with an emphasis on the support structure for legal mobilization. The second section lays out the cultural framing approach, which refers to the interpretive dimension of collective action, and the strategic construction of movement discourses and interpretations, including prominently their creation of legal concepts and meanings. The third section addresses the political process approach, and in particular the concepts of political and legal opportunities. It also discusses conventional backlash theory, in light of democratic constitutionalism and social movement theory.

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<sup>52</sup> Meyer and Staggenborg (1996); Mottl (1980); Lo (1982); Fetner (2001); Della Porta and Diani (2006). The notion of counter-movement was developed to account for oppositional forces to social movements of the 1960s, which increasingly adopted organizational forms similar to those of the social movements they were opposing (Meyer and Staggenborg 1996: 1630).

<sup>53</sup> Della Porta (1995: 8); Meyer and Staggenborg (1996: 1633); Della Porta and Diani (2006: 211).

<sup>54</sup> Meyer and Staggenborg (1996: 1632).pp

## I. MOVEMENT ORGANIZATIONS AND SUPPORT STRUCTURE FOR ADVOCACY AND LEGAL MOBILIZATION

Within social movement inquiry, resource mobilization theory spotlights the organizational infrastructure and the availability and development of resources for collective action.<sup>55</sup> This approach has analytically distinguished social movements from the organizations that comprise them, which has facilitated organizational analysis.<sup>56</sup> Social movements are comprised by a diversity of organizational structures.<sup>57</sup> According to this perspective, the type and timing of mobilization, as well as its outcomes, vary according to the internal resources and capacities of social movement organizations, among them the availability of labor, financial and material resources, the education and professional background of their members, and their leadership. Further, they are affected by the presence of support groups and allies from outside of the movement, and the existence of institutional settings in society for collective action. Social capital, or the social relations of movement organizations, their formal and informal linkages and networks with other individuals and groups are fundamental components in this regard.<sup>58</sup>

In the present work, the distinction between a movement's resources and strategies and cultural production is analytical, and it is not meant to imply that resources are pre-determined and independent from movement actions. In fact, the evolution of a movement's strategies and framing, and their organizational infrastructure are closely related. For example, a shift in a movement's strategies and framing may lead to building new organizations in society in order to pursue them. Likewise, the availability or resources and the type of organization may favour a particular type of strategy or framing. Resources also vary according to the political context, which may affect, for example, the level of outside subsidy for movements' activities.

In the specific field of legal mobilization studies, the organizational dimension has been termed as *support structure for legal mobilization*, and includes the presence of public interest

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<sup>55</sup> McCarthy and Zald (1977: 1216).

<sup>56</sup> McCarthy and Zald have defined social movement organizations as “a complex, or formal, organization that identifies its goals with the preferences of a social movement or a counter-movement and attempts to implement those goals” (1977: 1218).

<sup>57</sup> Della Porta and Diani (2006: 161).

<sup>58</sup> Diani (1997: 129).

lawyers, rights advocacy organizations, and the availability of financing sources to sustain litigation.<sup>59</sup> These types of resources may be embedded as litigious formal structures within the movement, or they may be available to the movement through partnership with external organizations or individual cause-lawyers. A particularly relevant factor in this regard is the existence of a tradition of public interest litigation, and the type of legal education or legal training, which may be more or less favourable for the development of cause-lawyering. Regarding specifically the feminist movement, a relevant aspect to be considered is the presence of feminist lawyers, and the existence of training on gender issues at law schools or at other educational instances. In Latin American countries, important human rights organizations have been developed particularly in the aftermath of dictatorships, and in some cases they have led the field of public interest litigation in their respective countries. Thus, a further aspect to consider in the analysis of the support structure for women's legal mobilization in the region is the link between feminist organizations and those generally strong human rights associations.

An analysis of the movement's profile, structure and internal dynamics is crucial to understanding the type and timing of mobilization and its impact. This work concentrates in particular on three variables related to the movement's configuration that may affect its capacity to propose legal change, to create legal meaning, to pursue litigation and to oversee policy implementation and resist backlash. In the first place, the degree of concentration and coordination of intra-movement networks may influence the form and outcomes of mobilization.<sup>60</sup> Important indicators in this regard are the existence of a single-issue and powerful organization; the presence of an umbrella organization that coordinates a movement's common strategy; the existence of a broad alliance among different types of organizations; and, regarding specifically the structure for legal mobilization, the relative position of legal advocacy organizations within the movement; that is, whether they are central or peripheral. It can be expected that a powerful single-issue and legalized organization succeeds more easily in gathering movement support for legal mobilization strategies. The downside of centralization through a powerful single-issue organization, however, is that this type of concentration may hamper the movement's insertion throughout the territory. Secondly, the degree of movement's territorial embedment may become crucial

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<sup>59</sup> Epp (1998: 18). See also Teles (2008: 22-24) for further theoretical and empirical insight on the support structure for legal mobilization.

<sup>60</sup> I am thankful to Professor Judy Fudge for this observation.

because implementation processes may be halted at the state or municipal levels, and also because, especially in federal systems, backlash may take place at the local level.

Finally, the degree of professionalization of the movement's organizations, and the relationship between formalized organizations and grass-roots mobilization is a central concern in social movement studies, and it is particularly relevant regarding the feminist movement in Latin America. Social movement scholarship has observed a trend toward increasing professionalization in social movements, characterized by the growth of organizations with paid activists, professional leadership and institutionalized organizational practices.<sup>61</sup> In contrast with a view of collective action that associated professionalization with demobilization, de-radicalization and co-optation,<sup>62</sup> social movement research has increasingly confirmed that professionalization and institutionalization may contribute to the movement's maintenance and stability during periods of demobilization, and social movement researchers have argued that professionalization does not necessarily make the movement's goals and claims less radical.<sup>63</sup> In Latin America, the expansion of the NGO model in the 1990s was the paradigmatic form of social movement professionalization. In feminist scholarship, the so-called NGO-ization of the feminist movement became a crux of criticism.<sup>64</sup> However, early caution about the risk of co-optation of feminist NGOs in Latin America<sup>65</sup> has been reconsidered in the light of the often neglected "movement work" done by NGOs.<sup>66</sup>

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<sup>61</sup> Staggenborg (1988: 598-599).

<sup>62</sup> By invoking Michels' *iron law* concept, this perspective highlighted that organizations are vulnerable to *oligarchyzation* (Piven and Cloward 1979: 101).

<sup>63</sup> Staggenborg (1988: 585; 1996: 143-146); Banaszak (2010: 113-114). Clemens and Minkoff present a thorough account of recent literature that has questioned the iron law perspective on social movements, and which has turned the effects of movements' organizations into empirical questions (2004: 156-164).

<sup>64</sup> Fraser criticizes the role of feminism in neoliberal politics, and points out the role of NGOs as part of that process (2009: 111). Her analysis is largely based on important findings regarding Latin American processes developed by particular Alvarez (1999).

<sup>65</sup> Alvarez (1999: 182-208).

<sup>66</sup> Alvarez (2009: 177). In particular, Alvarez remarks the role of feminist NGOs in the articulation and diffusion of knowledge and discourses that have contributed to the consolidation and galvanization of the feminist field (2009: 177-178).

## **II. TACTICS, FRAMING AND THE CREATION OF LEGAL MEANING**

The concept of framing, in social movement theory, refers to the interpretive or ideological dimension of collective action, and alludes to the social and strategic construction of ideas, which includes legal concepts.<sup>67</sup> The tactical choices and strategies developed by movements - from direct action, demonstrations, riots, civil disobedience, to lobbying techniques, legal mobilization and litigation - are also part of their creation of meaning, and both entail ideological choices and convey messages.<sup>68</sup> In fact, this cultural dimension penetrates all areas of movements' work, from the construction of common interests and grievances, to their resource acquisition strategies and their definition of opportunities.

The interpretive or discursive dimension of social movement activity is particularly relevant in two different movement processes. On the one hand, movements develop cultural frameworks that define common interest, create intra-movement solidarity and mobilize constituencies. On the other hand, framing processes are crucial in movements' search to reshaping public discourse in society at large and to influencing political and legal change. Both processes involve cultural struggles, inside and outside the movement.<sup>69</sup> Movement theory has developed the concept of cultural resonance or frame alignment to refer to the operation by which movements and organizations appeal to shared concepts and principles in order to convince different audiences and influence their interpretations.<sup>70</sup>

According to a classic view of frame alignment, the more resonant the framing, the greater its likelihood of success.<sup>71</sup> However, the possibility of a discourse to become hegemonic does not only depend on its intrinsic (more or less resonant) character, but on power relations, within and outside the movement.<sup>72</sup> Within the movement, this possibility is related, among other factors, to the movement's organizational structure and internal relations. Different groups and organizations within the movement support particular discourses and tactics, and where they are situated within the movement as well as their resources and capacities may

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<sup>67</sup> Snow et al. (1986: 464); Gamson and Meyer (1996: 276); Swidler (1986: 280); (Zald 1996: 262); Benford and Snow (2000: 611).

<sup>68</sup> Snow et al. (1986: 466); Goodwin et al. (2003: 51); McAdam (2006: 341).

<sup>69</sup> Gamson and Meyer (1996: 283); Zald (1996: 270).

<sup>70</sup> Snow et al. (1986: 464) Benford and Snow (2000: 619-622).

<sup>71</sup> Snow et al. (1986: 477).

<sup>72</sup> See, in particular, Ferree (2003), Bagenstos (2009) and Vanhala (2011) for notable studies on intra-movement contestation on framing and tactics.

affect whether or not a framework will become dominant. The resolution of these contests may depend on the movement's structure and the type of movement network. Specifically, the capacity of a framework to become dominant within the movement may depend on the level of concentration and coordination of intra-movement networks. An important indicator in this regard is the existence of a single-issue and powerful organization. Single issue organizations may help to coordinate strategies; disputes about framing, tactics and goals may be solved when there is a clearly leading institution. Furthermore, the existence of a broad movement alliance, or an umbrella organization gathering different types of organizations, may also help solving collective action problems and coordinate a movement's common strategy. With respect in particular to legal strategies and framings, their capacity to become leading tactics within the movement may depend on the location of legal organizations within the movement network. The placement of rights advocacy organizations in a central position is likely to be more favorable in this regard than their location in the movement's periphery.

In their quest for influencing change in the wider political system, movements may search for cultural resonance in different ways. An insightful analysis of framing processes regarding the abortion issue argues that movements search for resonance by aligning their framing with institutionalized discourses; that is, the dominant discourse of the state.<sup>73</sup> According to this account, in the West German case feminists aligned their frameworks with the official view on abortion through the stigmatization of abortion as a criminal and immoral act. This discourse included the depiction of women who decided to have an abortion as victims of this situation, for it could not be admitted that they could authentically choose to do it.<sup>74</sup> This type of framing denies women's capacity to decide, and may lead to supporting policy solutions such as the requirement of mandatory counselling or measures that delay the woman's decision.

However, resonance may also be sought by other means, which do not imply an alignment with dominant institutional discourses. Movements may, for example, appeal to cultural understandings shared by relevant sectors of the population that do not necessarily reflect the discourse of the state. By drawing on those discourses and building support from those groups in society, movements may be able to influence change in the political sphere, without compromising their main tenets. On the other hand, movement-counter-movement dynamics

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<sup>73</sup> Ferree (2003: 332-335).

<sup>74</sup> Ferree (2003: 304).

have an impact on framing processes. In fact, the relationship between the movement and the state is affected by the presence of a counter-movement. In fact, the cultural struggle often is not vis-à-vis the state but regarding counter-movements, which may have an influence on public discourse and state institutions.

The decision to pursue legal mobilization is a crucial strategic choice for contemporary social movements; it may have a strong impact on the movement's framing of its demands, and it may trigger intra-movement disputes. Legal mobilization is understood as the articulation of a movement's aspirations and grievances into a claim that asserts legal rights.<sup>75</sup> In this sense, the analysis of legal mobilization is understood as including but not limited to litigation strategies.<sup>76</sup> Legal mobilization studies, and in particular critical legal studies, have pointed out the ideological biases and co-optative functions of law, as well as the limitations of litigation as compared to political tactics.<sup>77</sup> Increasingly, however, studies in this field have assumed that there is no dichotomic option for social movements between legal and political/cultural strategies, and have underscored the importance of political mobilization for the success of rights strategies.<sup>78</sup> A social actor's socialization and perception about the legal field and the role of the law may have an influence in the decision of social movements to pursue a rights strategy in the first place, and in the way they carry out that strategy afterwards.<sup>79</sup> This aspect is particularly important for the feminist movement in Latin America, which due to historical and still present reasons (among them the extreme

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<sup>75</sup> Zemans (1983: 700). Other authors use the term "rights strategy" to allude to the use of some of the dimensions of rights discourses (Hunt 1990: 463).

<sup>76</sup> Studies in legal mobilization have distinguished between legal strategies, and legal tactics, among them litigation (ver MacCann 1994: 48; Hunt 1990: 317). These perspectives in general evaluate litigation as part of broader political processes and not as a way of obtaining short-term remedies, and consider the law as a process of dispute instead of as a set of rules (see Lobel 1994: 1333). In this way, even unsuccessful litigation can be considered useful for the articulation of demands and aspirations of social movements (Lobel 1994: 1332-1333; NeJaime 2011b: 943-946).

<sup>77</sup> Scheingold (1974); Handler (1978); Tushnet (1984); Rosenberg (1991) Silverstein (2009). According to this perspective, activists had placed too much value in pursuing reform through courts, inspired by what Scheingold termed as "the myth of rights" (1974: 3). For a survey of the field of legal mobilization studies, see McCann (1998: 76-77). See Lobel for a critique of what she calls the "myth of activism", which has led to privileging informal extra-legal strategies, which denies the transformative potential of legal change and precludes learning from the successes and failures of both types of strategies (2007: 974).

<sup>78</sup> MacCann (1994) is one of the first works in the field of legal mobilization to have analysed the synergy between legal and political mobilization, as well as the constitutive role of legal rights in the pursuit of social transformation.

<sup>79</sup> Krishnan and Dulk emphasize the role of movement's normative orientation towards the law in the pursuit of legal strategies, and use the term *ideational factor* to refer to this dimension (2001: 237-238).

underrepresentation of women at the bench), may tend to perceive the judiciary as a male-dominated field, which can be resilient and hostile to their claims.

Social movement research has acknowledged the impact of the interaction between movements and counter-movements in framing processes,<sup>80</sup> but the link between these processes, as well as the factors impacting on that relationship, remain under-investigated.<sup>81</sup> The study of the relationship between social movements and legal framings is more developed in the field of constitutional scholarship<sup>82</sup> and legal mobilization.<sup>83</sup> Furthermore, the link between framing processes and movement-counter-movement dynamics has not been sufficiently studied in social movement research (McCaffrey and Keys 2000: 41), despite the influence of these dynamics on frame alignment.<sup>84</sup> Siegel's analysis of the influence of social movements in constitutional change contributes important original insights to both questions, through her analysis of the way in which the dynamics of constitutional politics affects framing processes by movements in their interaction with counter-movements.

According to Siegel, the *jurisgenerative* role of social movements implies that, by framing their claims in legal terms, these movements produce new constitutional understandings that under certain circumstances can be incorporated by courts into constitutional law.<sup>85</sup> In other words, the legal framings developed by social movements may become part of the legal canon, through their incorporation into statutes and court decisions. In fact, the discursive aspect of movements' work is a crucial point of intersection between social movement theory and legal studies, and Siegel's work is the key reference in understanding this connexion. This is, in fact, the dimension of social movement theory in which the contribution of democratic constitutionalism, and in particular the work of Reva Siegel, becomes most relevant. Siegel's work contributes to understanding the production of legal framings and the search for resonance by social movements that aim at influencing constitutional change. She argues that movements willing to influence legal change must subject their claims and framing to what she calls the *public value* condition; that is, they must frame their idiosyncratic demands into

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<sup>80</sup> See, for example, Snow (2004: 380).

<sup>81</sup> Examples of studies integrating both approaches are Meyer and Staggenborg (1996); McCaffrey and Keys (2000); Esacove (2004).

<sup>82</sup> Siegel (2001; 2004; 2008); Ziegler (2012).

<sup>83</sup> See, in particular, Marshall (2003); Andersen (2005); Pedriana (2006).

<sup>84</sup> Among the few examples of studies integrating both approaches within social movement theory are Meyer and Staggenborg (1996); McCaffrey and Keys (2000); Esacove (2004).

<sup>85</sup> Siegel (2004:15).

a discourse that appeals to public values and shared basic constitutional understandings.<sup>86</sup> This condition implies that even when a movement seeks to change the normative order, it has to present its claims in the public sphere as congruent with extant constitutional requirements. In the process of framing their grievances as necessary to fulfil society's fundamental constitutional commitments, social movements usually moderate their claims and rhetoric, especially when confronting counter-movements.<sup>87</sup>

Social movement studies have shown that movement and counter-movements influence each other, and modify their framings according to their opponent's claims and strategies.<sup>88</sup> Along these lines, Siegel argues that the mobilization-counter-mobilization dynamic is one of the main mechanisms that constrain the discourse of movements oriented to influence constitutional law and lead them to moderate their rhetoric and demands. In order to persuade the public and legal officials of the value of their claims, movements that aim at introducing new constitutional interpretations are compelled to respond to the objections raised by the counter-movement, and to recognize some of their opponents' arguments.<sup>89</sup> From this perspective, social conflict around constitutional understandings contributes to shaping the constitutional culture, and in this way it influences court decisions and constitutional change.

The public value condition can be related to an understanding of the struggle for rights and social transformation as an activity that must necessarily take place in the terrain of what is already constituted and hegemonic.<sup>90</sup> In this sense, law "channels" the movement's strategies and discourses.<sup>91</sup> The discourse of rights is at the same time a strategic resource and a constraint on movement's action.<sup>92</sup> Subjecting a movement's claims to this condition may be not in consonance with the movement's more radical discourses and claims, and this may be a cause for dissent among the movement's own ranks.<sup>93</sup> In fact, the moderation of movements'

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<sup>86</sup> Siegel (2004:11-12). The *public condition* implies that movements' contestation of disputed constitutional understandings is carried out by appealing to non-disputed constitutional understandings (Siegel 2006: 1359).

<sup>87</sup> Siegel 2006 (1354-1365).

<sup>88</sup> Zald and Useem (1987: 248); Meyer and Staggenborg (1996: 215); McCaffrey and Keys (2000: 42).

<sup>89</sup> Siegel (2006: 1365).

<sup>90</sup> See Hunt (1990). Hunt argues, following the Gramscian maxim, that social movements have to struggle in "the terrain where the struggle is constituted" (1990: 320).

<sup>91</sup> Eskridge (2001: 423).

<sup>92</sup> McCann (1994: 7).

<sup>93</sup> Intra-movement framing conflicts may be triggered by the fact that the moderation of the discourse may be instrumental to achieve public and elite support, but it may not resound with the aspirations of the movement's grass roots constituencies (see Meyer and Staggenborg 1996: 1653).

claims is part of the reason that the discourse of rights has been deemed to be incapable of achieving social transformation. However, the recognition that all tactics and struggles take place in a bounded and bounding field of hegemonic ideas and practices, allows us to understand movements' choices of legal strategies, as well as the articulation of their claims for change in the language of what already exists, not as a result of law's allurement or capacity for mystification, but as one of the possible tools for social movements among the limited options available to them in contemporary regimes.

### III. THE POLITICAL AND LEGAL SETTING OF SOCIAL MOVEMENT ACTION

#### *Political opportunities*

Finally, political process models, within the field of social movement studies, highlight the influence of exogenous factors, in particular the organization of the polity and the positioning of different institutions and actors within it, on the way movements organize, define their grievances and strategies and influence social change.<sup>94</sup> Key within this framework is the concept of political opportunity, which includes relatively fixed or stable components, such as traditions, constitutions, electoral systems, as well as more volatile or variable factors, such as political alignments and electoral and policy choices.<sup>95</sup> There exist different perspectives on how political opportunity affects mobilization. Classic works in this field, for example, have generally associated opportunities with institutional openness and access to the political system.<sup>96</sup> The main dimensions of opportunity in these models are the opening of access to participation, the availability of allies in political institutions, the tolerance of protest, shifting political alliances and cleavages among the elites.<sup>97</sup> However, authors working in the same tradition have pointed out that mobilization may take place in the face of threats or closed institutional opportunities.<sup>98</sup> For the purposes of this work, which concerns itself mostly with the impact of social movement mobilization in legal change, and not on the events and conditions that trigger mobilization, it is generally assumed that openness of access to the institutional system may constitute a favorable context. But state institutions are not monolithic, and within the state structure there can be constraints and opportunities at the

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<sup>94</sup> Tilly (1978); McAdam (1982); Costain (1992); Tarrow (1994).

<sup>95</sup> See Gamson and Meyer (1996); Goodwin et al. (1999).

<sup>96</sup> McAdam (1982); Tarrow (1994); Gamson and Meyer (1996).

<sup>97</sup> McAdam, McCarthy and Zald (1996: 15); Tarrow (1996 54-56). With regard to divisions between elites, Tarrow explains that when that occurs, some sectors of the elites may find incentives to "seize the role of 'tribune of the people'" in order to increase their own political influence" (1996: 56).

<sup>98</sup> See, for example, Meyer (1993: 471). The political opportunity approach has been strongly criticised for the ambiguity of the effects of opportunities on movement actions (see Goodwin et al. 1999: 38).

same time.<sup>99</sup> A movement's choice of one institutional venue over another to pursue its claims would depend on the relative openness or closure of each particular venue at its disposal in the political system at a particular moment.<sup>100</sup>

The political opportunity framework also distinguishes between general political opportunities which may be favorable for all sorts of movements from opportunities for specific issues or groups.<sup>101</sup> In the case of the study of mobilization for abortion rights in Latin America, the proposed analytical framework includes, beyond general variables related to the political regime, two relatively stable aspects of the political opportunity, which may have an important effect on abortion politics in each country: the relationship between the State and the Catholic Church, and the state's population and health policy. It is not religious devotion, as expressed for example by mass attendance, which explains variation. Instead, the critical factor in this regard is related to cultural understandings about the proper separation between the spheres of State and Church; that is, how much relevant social sectors of the population value secularism - as well as the institutional arrangements that sustain this separation. This component of political opportunity is highly specific for movements that advocate for sexual and reproductive rights, as well as for counter-movements in this field, and it affects each of them in inverse ways.

Regarding more contingent aspects of political opportunities, and in particular party alignments, research has shown that leftist parties are generally more favorable to feminist claims, although they do not guarantee their fulfillment.<sup>102</sup> Furthermore, divisions between elites is an important part of contingent or volatile opportunities for social movements, as they may lead sectors of the elite to assume the role of "tribune of the people" in order to gather support by social groups.<sup>103</sup> In Latin America, in contexts of interparty polarization and intraparty cleavages, elite actors may find incentives to attend to social movements' demands in order to differentiate themselves from their opponents and increase their own political leverage. In this way, a climate of polarization or clashes among elites, for example in the aftermath of electoral conflicts, may offer an opportunity for social movements to succeed in their claims for equal rights.

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<sup>99</sup> See, in particular, Alvarez (1990: 31-32), Della Porta and Diani (2006: 211) and Banaszak (2010: 6-8) for thorough arguments on this point.

<sup>100</sup> Meyer and Staggenborg (1996: 1647-48).

<sup>101</sup> Gamson and Meyer (1996: 285); Tarrow (1996: 42-43).

<sup>102</sup> Della Porta and Diani (2006: 214-215); Teghtsoonian and Chappell (2008).

<sup>103</sup> Tarrow (1996: 56).

Shifting political alignments may change opportunities for movements in various ways, one of which is by creating incentives for politicians to search for legitimacy and support from external actors. In contexts of changing party alignments and electoral uncertainty, politicians may find incentives to search for support from sources that are external to the political system.<sup>104</sup> In the specific field of abortion law reform in Latin America, politicians' search for legitimacy through other sources, and in particular their search for support by de facto powers, such as influential religious actors and institutions, may be a crucial factor of the political opportunity, especially in pre-electoral contexts.

Unexpected or narrower events, usually more limited in time, have been termed as *policy windows* or windows of opportunity.<sup>105</sup> Among them, so-called critical events can be created or exploited by movements in order to gather public attention and foster mobilization around an issue.<sup>106</sup> The political opportunity framework also distinguishes between general political opportunities that may be favorable for all sorts of movements and opportunities for specific issues or groups.<sup>107</sup> The movement/counter-movement dynamics is one of the components of political opportunity for each of the respective movements.<sup>108</sup> Research in this field also considers transnational influence, or the international political opportunity, as part of the political opportunity that affects collective action at the national level.<sup>109</sup>

The traditional political-opportunity approach underscores the importance of access points to the political system, in particular access to decision-makers in the areas related to the movement's interest. This perspective assumes that movement activists and elite actors are different entities; that movements and the state are separate or antithetical spheres; and that movement action is extra-institutional. However, more recent social movement research has shown that social movement participants may occupy formal positions within the

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<sup>104</sup> Tarrow (1996: 55).

<sup>105</sup> Kingdon (1984: 173–204).

<sup>106</sup> See Staggenborg (1993: 319).

<sup>107</sup> See Gamson and Meyer (1996: 285); Tarrow (1996: 42-43).

<sup>108</sup> As observed by Meyer and Staggenborg, “opposing movements influence each other both directly and by altering the environment in which each side operates.” (1996: 1633). Della Porta and Diani offer further insights on this phenomenon. The authors point out that the “opposition structure”, that is the field of political actors that are against the movement, mediate the relationship of a movement with the institutional structure (Della Porta and Diani 2006: 209-210).

<sup>109</sup> McAdam (1996: 34). See Della Porta and Tarrow (2005: 244-245) for an analysis of transnational opportunities for transnational contentious activities, as well as for the interaction between national and international contentious activities. See also Della Porta et al. (2009).

government.<sup>110</sup> It is assumed that these actors, so-called institutional activists,<sup>111</sup> or insider activists,<sup>112</sup> who are located at an intersection between movement and the state, have different interests than movements' elite allies, and that in certain cases they may behave differently - generally more positively or consistently - regarding movements' goals.<sup>113</sup> This category has generally been developed and used in analyses of the feminist movement, but it can also be applied for conservative activists within the state, that is, conservative institutional activists.

### ***Legal opportunities***

Legal mobilization studies have developed the concept of *legal opportunity* to allude in particular to specific institutional settings and dynamics within the state structure that are directly related to movements' recourse to law and the courts.<sup>114</sup> Following the political opportunity approach advanced by social movement research, the legal opportunity concept has been defined as including relatively stable or structural components, mostly related to rules of access to courts, as well as more contingent aspects related to courts' receptivity towards the claims of social movements.<sup>115</sup> Institutional aspects of courts as well as judicial behaviour influence court's decision-making, and how they may incorporate and translate, or not, claims and concepts developed in the social sphere. They may also influence movements' expectations and legal strategies. It is assumed, in this regard, that there is a connection between institutional features and the types of claims and actors that reach the courts. In particular, the rules that regulate access and legal standing set incentives for parties to litigate and may affect the possibility social movements to channel their claims through courts.

Particularly salient rules governing access to courts are regulations about legal standing in constitutional review proceedings (whether broad or limited to those with a personal interest in the matter under scrutiny; for individual citizens, civil society's organizations or public authorities; as litigants or as third parties, etc.), rules regarding the submission of amicus curiae briefs and the participation in public hearings, and the cost of the legal process. Rules

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<sup>110</sup> McGuire and Santoro (1997: 504-518); Banaszak (2010: 30-62); Pettinicchio (2012: 501-502).

<sup>111</sup> McGuire and Santoro (1997: 504).

<sup>112</sup> Banaszak (2010: 30).

<sup>113</sup> Banaszak (2010: 6-7).

<sup>114</sup> Hilson (2002); Pedriana (2004); Andersen (2005); Wilson and Cordero (2006); Meyer and Boutcher (2007); De Fazio (2012); Doherty and Hayes (2012).

<sup>115</sup> Hilson (2002: 243-244).

governing access and legal standing set incentives for parties to litigate and may affect the possibility of social movements to channel their rights claims through courts. For example, the existence of flexible and accessible procedures for the participation of social actors before courts may allow for marginalized individuals and groups to appeal to courts even in contexts marked by the absence of a support structure for legal mobilization in society.<sup>116</sup> Other types of access rules - such as those enabling public hearings, amicus curiae briefs, class actions, third parties intervention - though granting expanded standing and access, may favor the participation of organized interest group and rights advocacy organizations at courts' procedures, instead of direct access by marginalized individuals and groups. For its part, judicial receptivity or responsiveness is indicated by the composition of courts as well as by their decisions.<sup>117</sup> Court precedent in previous decisions on a particular issue constitutes a signal for social actors about the courts' receptivity to certain types of claims, and can be also considered a component of legal opportunity.

Institutional aspects also figure into the way in which courts deal with constitutional conflict. The formal powers and competences of courts, the content of constitutional provisions and regulation, as well as internal court proceedings, structure the decision-making of courts and affect their relationship with external actors. In highly contentious cases, judges may have an interest in citizen's engagement with constitutional interpretation, in order to make a decision informed by evolving social understandings and to find social support, which may allow courts to preserve their institutional authority (Siegel 2001: 351).<sup>118</sup> In those cases, courts may even have incentives to create new institutional channels for social actors' participation in their decision-making process; that is, they may decide to expand the legal opportunity. They may, for example, establish new procedures allowing for the presentation of amicus curiae briefs or for public hearings. This development may be found especially in contexts of redefinition of the institutional role of high courts, as is the case in many Latin American countries in the aftermath of processes of political transition and judicial reform. In those contexts, the relationship between courts and civil society may become a particularly relevant issue to be taken into account by justices in their decision-making procedures, and justices

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<sup>116</sup> Wilson (2009: 60-84).

<sup>117</sup> See Meyer and Boucher for an account of the way in which court decisions about movements' claims may signal judicial openness for other movements and issues as well (2007: 81).

<sup>118</sup> Strategic accounts of judicial behavior confirm that one of the main concerns of judges is to maintain the legitimacy of courts (Epstein and Knight 1998: 11-12), and studies on judicial legitimacy have shown that courts search for public support as a source of legitimacy and institutional power (see, for example, Caldeira and Gibson 1992: 635).

may decide not only to listen to social actors' claims, but also to expand the opportunities for their participation. In such settings, highly disputed cases such as the abortion controversy may become opportunities for the redefinition of the role of courts in terms of their interaction with civil society, and may contribute to opening up judicial procedures to the participation of social actors. These developments may favor both movements and counter-movements.

Beyond rules of access and legal standing, some of the main institutional provisions that regulate the decision-making of courts are related to collegiality and the way opinions are formed within the court.<sup>119</sup> This aspect is relevant to analyze, for example, the consequences of the incorporation of women justices at high courts, for women judges may have an informational role in deliberation processes regarding gender matters. Rules of collegiality and opinion-formation within the court are also important for understanding the way in which constitutional conflict, expressed by different voices at the court is translated into a court's final decision.

With respect to the receptivity of courts, and specifically regarding the women's movement, the presence of female justices could be considered a significant signaling factor of the court's openness to women's rights claims. The initial intuition is that beyond what the attitudinal model of judicial behavior suggests; that is, that judges' ideology and political preferences are determinant,<sup>120</sup> there might be a different factor at play with respect to the presence of women in courts. For gender may have a particularity in terms of representation as well as regarding substantive issues at stake in a decision concerning women's rights. There are different approaches to the role of female justices on high courts. The essentialist view that women bring a different voice, based on a different ethics, to justice issues<sup>121</sup> has been disputed by the feminist literature on law and courts.<sup>122</sup> In general, gender equality at courts is nowadays defended on other grounds. On the one hand, it is argued that an equal representation of women on the bench is a crucial democratic principle, as well as a requisite for the justice system not to lose legitimacy and public confidence.<sup>123</sup> Along these lines, it has been contended that the presence of female justices has a symbolic representational effect for

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<sup>119</sup> Maltzman et al. (1999).

<sup>120</sup> Segal and Spaeth (1993: 6-12).

<sup>121</sup> Gilligan (1982: 99-101).

<sup>122</sup> Feenan (2008: 492); Malleson (2003: 7-8).

<sup>123</sup> Malleson (2003: 18-21); Monopoli (2007: 65).

women in the legal profession and in society in general.<sup>124</sup> On the other hand, the presence of women may be relevant for the internal interactions and decision-making of constitutional courts as collegiate bodies.<sup>125</sup> Recent empirical research has provided substantive evidence for this argument, by showing that the presence of female justices at the US federal appellate judiciary has no influence, except for one significant area: sex discrimination disputes, in which it was found not only that female justices bring distinct approaches to these cases, but also that their presence in a collegiate discussion has a direct influence on the decision of male judges to vote in favor of plaintiffs.<sup>126</sup> However, given the highly contested moral and religious issues involved in the abortion legal controversy, it may prove to be a difficult area for the assessment of the role of female justices on the outcomes of judicial processes. Especially in these cases, the presence of women on courts may have mixed consequences, not always favorable, for the advancement of women's rights. However, it can be expected that the presence of women on the bench may have implications that are worthwhile to analyze, both for the court's decisional procedures and for its final decisions.

The variables that fall within the rubric of political and legal opportunities interact with the other two main approaches in social movement research; that is, framing processes and movements' organization dimension. Social movement studies acknowledge that so-called political opportunities - and this applies also to legal opportunities - have a cultural dimension in that they must be recognized and framed as such by the movement, and also because cultural factors may be opportunities for movements.<sup>127</sup> In fact, what is at play in the relationship between social movements and the context in which they operate is more than the recognition of opportunities. The definition of opportunities depends on activists' agency and interpretation.<sup>128</sup> Disagreement within movement's sectors may be also about the definition of opportunities.<sup>129</sup> Furthermore, it is assumed in this work that opportunities do not cause or determine movements' actions, but they are the terrain in which those actions are constituted and channelled. Movements may, for example, change the venue for their demands, and thus modify their strategies and framing, according to contextual factors. A favourable political opportunity, for example, may encourage social actors to pursue political mobilization and

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<sup>124</sup> Monopoli (2007: 45).

<sup>125</sup> O'Connor and Yanus (2010: 447-449); Peresie (2005: 1765-1765).

<sup>126</sup> Boyd, Epstein and Martin (2010: 406).

<sup>127</sup> Gamson and Meyer (1996: 279-285); Zald (1996: 271).

<sup>128</sup> See Zald (1996: 271); Goodwin et al. (1999: 33).

<sup>129</sup> Gamson and Meyer (1996: 284).

lobbying strategies in order to influence the legislature or administrative organs. In turn, the absence of a favourable political opportunity may lead movements to choose a legal strategy, and more specifically a litigation strategy, especially if there exists a propitious legal opportunity. Furthermore, social movement studies acknowledge that movements can modify political opportunities themselves.<sup>130</sup> Movement activity produces changes in mainstream institutional politics and policy, as well as in legal opportunities, which may create a new terrain for their own future struggles as well as for other groups and issues.

Finally, social movement theory's understanding of counter-mobilization, as well as democratic constitutionalism and its conception of the role of courts as participants in a broader social and political process, have implications for the assessment of backlash processes and the role of courts and litigation strategies in those processes. Conventional backlash theory argues that social change should be pursued through legislatures rather than courts, and that in highly controversial issues courts should maintain a minimalist position, in order to avoid a conservative reaction.<sup>131</sup> This perspective assumes that the intervention of courts creates backlash, and also that conflict could be avoided by not appealing to courts, as well as by judicial restraint.<sup>132</sup> However, in the first place, judicial deferral to legislatures to decide over fundamental rights, such as those involved in the abortion case, in order to avoid backlash, may imply that those rights may not be secured.<sup>133</sup> This may especially take place when the political process is closed to the advancement of certain types of rights. Secondly, this perspective assumes that legislative treatment of highly controversial issues would not provoke backlash, although empirical research on legal mobilization processes has shown that there have been strong backlash processes in the aftermath of changes effected by legislatures.<sup>134</sup> Third, the backlash narrative assumes that the level of conflict, as well as the emergence of a counter-movement, are related to the institutional venue through which a claim is pursued, and not to the conflictive nature of the issue, or to the dynamics of social

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<sup>130</sup> Gamson and Meyer (1996: 276).

<sup>131</sup> See, for example, Tushnet (1984; 1989); Ginsburg (1985); Rosenberg (1991); Sunstein (1999); West (2009).

<sup>132</sup> Siegel and Post (2007).

<sup>133</sup> For example, historical evidence shows that in the context of United States politics at the time the Supreme Court issued the decision on *Roe v. Wade*, it was improbable that the right to abortion would have been granted by state legislatures (Greenhouse and Siegel 2010, 2011). In some cases, the only alternative to constitutional conflict is the lack of engagement on constitutional matters, or "constitutional anomie" (Siegel and Post 2007: 427).

<sup>134</sup> Schacter (2005); Bagenstos (2009). See Cummings (2013) for a thorough analysis of the way in which backlash theory deals with counterfactual assumptions, such as the claim that courts are more prone to provoke backlash than legislatures.

movement development. In this regard, social movement theory has shown that organized opposition is a normal consequence of a movement that achieves substantial success in its call for equal rights, and that in contemporary societies, that opposition increasingly takes the form of a social movement; that is, a counter-movement.<sup>135</sup> Finally, from the perspective of democratic constitutionalism, which understands the role of courts as part of a network of discourses that advance different interpretations of constitutional principles, backlash is not the consequence of judicial decisions alone, but it is part of a wider social process in which courts' decisions are one component.<sup>136</sup> Finally, the emergence of counter-mobilization may be unavoidable when a movement promotes a claim that has a transformative potential, whether through the legislature or through courts.<sup>137</sup> In sum, in this framework, backlash is conceived of as inherent part of the social mobilization on rights issues, as well as of the constitutional process in those cases.

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<sup>135</sup> Meyer and Staggenborg (1996: 1630).

<sup>136</sup> Greenhouse and Siegel (2011).

<sup>137</sup> Siegel (2006: 1362-1363). In this regard, Siegel points out that backlash is a result of challenging the status quo, and that courts' decisions are just one component of that process.

## CHAPTER II

### SOCIAL MOVEMENTS AND ABORTION LAW REFORM IN MEXICO

#### INTRODUCTION

Since the beginning of the 1990s, Mexican feminist organizations have been at the forefront of a process of strategic defense of abortion rights that culminated in 2007 in the legalization of first trimester abortion by Mexico City's legislature. As a result, the Federal District of Mexico City became one of the few Latin American jurisdictions in which abortion on demand is legal. In 1991, feminist mobilization included the creation of the first single-issue NGO in the region for advocacy on abortion rights, as well as a notable transformation of the feminist framing of the abortion question. The reframing process was related to the pursuit of legal mobilization, and included the articulation of a moderate feminist position, partly as a response to the counter-movement's claims. In the words of a prominent actor in this process, the feminist strategy involved the pursuit of radical aims through reformist means.<sup>138</sup> In the 2000s, feminist organizations were able to influence a gradual process of abortion law reform in Mexico City, which has been remarkable in many regards. In the first place, among recent reforms to abortion laws in the region, this is the most successful case so far in terms of the recognition of women's right to decide, for it admitted the full agency of women, including young girls, to make a decision on abortion during the first 12 weeks of pregnancy. It also established that the service should be provided free of charge for the city's residents, and for a small fee for residents of other Mexican states as well as for foreign women. As part of the reform process, a majority of Supreme Court justices gradually developed a position in favor of the right to abortion and linked it to women's human rights and dignity. Finally, the reform triggered a backlash process in several Mexican states, which modified their constitutions to include the right to life from conception and extend personhood to the embryo, and on that occasion feminist organizations were not prepared to resist the conservative reaction.

Mexican feminists were involved in promoting a cultural change that was part of the struggle to change the law. In a country whose population contains a strong Catholic affiliation, but has a history of anti-clericalism and State-Church separation, the peculiarities of the Mexican political transition and the role of Mexico City's politics in the national context created a

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<sup>138</sup> Lamas, Marta, Director of *Debate Feminista*; ex-Director of GIRE, Author interview, México DF, September 29 (2011).

propitious political opportunity at the local level in the 2000s. This was a setting in which the work of feminist organizations could be translated into legislation that legalized abortion. The interaction between Mexican feminists and public officials/political authorities as well as the Supreme Court can be analysed as a case in which social movements have played a *jurisgenerative* role; that is, a role in the creation of legal meaning that in turn has influenced legal change.

The first section presents an overview of the components of the political and legal opportunity that are relevant for understanding how the field of reproductive rights has been configured in Mexico's political system, as well as for limning the normative and institutional framework of constitutional politics in the country. The second section analyses the development of feminist mobilization for abortion rights, with attention to organizational aspects or support structure, cultural work or framing and legal mobilization. It also presents an overview of conservative organizations and strategies in this field. The third section analyses the process of abortion liberalization in Mexico City, as well as the conservative backlash that has taken place as a response to that development, including an analysis of the political and legal opportunities at each juncture, and the role of legislatures as well as the Supreme Court, with an emphasis on the interaction between state institutions and social actors in this process.

## I. POLITICAL AND LEGAL OPPORTUNITIES

### I.1. Historical, political and policy background

#### I.1.1 State–Church relationship in Mexico

Historically, in Mexico, as generally in Latin America, the Catholic Church has had a strong institutional influence. However, in contrast with other countries of the region, one of the distinctive aspects in the development of the Mexican State was its successful process of secularization. In fact, despite the high Catholic affiliation among the population,<sup>139</sup> the separation between the State and the Church has been part of Mexico's political and cultural development since the mid-nineteenth century. This has been manifested in constitutional

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<sup>139</sup> Mexico has the second-largest Catholic population in the world, after Brazil.

provisions and shared cultural understandings among wide sectors of the population.<sup>140</sup> The Mexican Revolution started in 1910 and the ensuing 1917 Constitution were key milestones in that process. They aimed to strip the socio-political sphere of religious power, and in fact they outlawed the Church.<sup>141</sup> More recently, in particular since the 1990s and in the context of the transition from the hegemonic party regime of the PRI (Institutional Revolutionary Party) after 71 years of government, the radical exclusion of the Church from public affairs started to be challenged. However, the tradition of the state secularism is pervasive among wide sectors of the population and key institutions in the country.

The decline in the hegemony of PRI, during the slow democratic transition in Mexico may explain its search for legitimacy in external forces, which led to increasing demands of the Church over the political sphere.<sup>142</sup> This marked a transformation in the historical separation between State and Church in Mexico, and the Catholic Church started gaining unprecedented influence in the public domain. However, the advancement of the Church in the public sphere continues to be regulated in Mexico in a distinctive way, and despite reforms that have granted more competences to the Church, the laity of the Mexican State is not questioned in existing norms. However, the behavior of Catholic Church representatives, as well as some political figures continuously challenges the separation of spheres, frequently transgressing existing laws.<sup>143</sup> This situation has been exacerbated by the 2000 ascension to national power of the right-wing PAN (National Action Party), which has links to the Catholic Church.<sup>144</sup>

In this context, the abortion debate has provided a key opportunity for relevant actors to resume the debate about the secular state and to reaffirm the need for State-Church separation in the context of a democratic and pluralistic regime. This is because, on the one hand, the area of reproductive rights is perhaps the only field that had not been conquered by laicism in

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<sup>140</sup>According to the 2010 national census, 83.9% of the population identified themselves as Catholic. However, the population's religiosity is combined with an anti-clerical stance, which has been claimed to be part of Mexico's national identity, and not just a matter of liberal elites (Blancarte 2001: 844-845).

<sup>141</sup>Lamas (1997: 61); Blancarte (2008: 35-37).

<sup>142</sup>Blancarte (2008: 36).

<sup>143</sup>González Ruiz (2005: 24).

<sup>144</sup>Emblematic examples of this trend, which have directly affected the field of reproductive rights, are, firstly, the transfer during the first PAN government (2000-2006) of large amounts of federal funds to the largest conservative anti-abortion organization in Mexico, *Provida* and, secondly, the incorporation, in the same period, of *Provida* into a technical group established by the National Population Council (CONAPO) to pursue statistical analysis on abortion (Cardaci and Sánchez 2011: 15).

Mexico, and, on the other hand, it is nowadays the main field of dispute among liberal and conservative forces in Mexico as well as in other contexts.

### I.1.2. Population and health policy

Especially since the 1920s, pronatalist measures were promoted in Mexico as part of a broader attempt to increase the population.<sup>145</sup> This policy changed during the 1970s, when there was a radical alteration in the way in which the Mexican government dealt with population or demographic policy, through the implementation of a massive program of family planning that involved the public health system in promoting anti-conception measures. This process was influenced by international institutions<sup>146</sup> and was part of an international trend in the prevailing developmentalist paradigm and in programs of cooperation for development. In fact, Mexico has been the Latin American country with the most explicit state-led population policy.<sup>147</sup> In that context, new governmental institutions were created in Mexico,<sup>148</sup> and the normative framework was reformed through the passage, in 1974, of the General Law on Population and the incorporation, on the same year, of a constitutional provision (contained in art. 4), which established the right of individuals to decide on the number and spacing of their children.

Thus, a framework for the promotion of women's reproductive freedom has been in place in Mexico since the 1970s. However, as feminist organizations and academics claimed at that time, the implementation of natality-control policies led to serious violations of women's rights, particularly through non-consensual permanent sterilization, which affected mainly indigenous and poor women.<sup>149</sup> Consequently, there was a disjuncture between the purposes and preoccupations of governmental and international actors in this field, on the one hand,

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<sup>145</sup> Amuchástegui et al. (2010b: 4), Figueroa (2010: 259).

<sup>146</sup> When the government had to negotiate policies with the IMF and the World Bank in 1973-74, a compromise was made to promote natality control in Mexico (Morales, Pedro, Litigant lawyer; member of the College of Bioethics; Director of Medilex. Author interview, México DF, September 7, 2011). In fact, a fundamental factor in understanding the development of this type of policy in Mexico is that this country's high population growth was considered to be a risk to the national security of the United States (Welti 2004: 6-18).

<sup>147</sup> Corrêa (1995: 15).

<sup>148</sup> The National Population Council (CONAPO) was created in 1974; the first National Program for Family Planning was established in 1976; and the Coordination of that National Program was created in 1977.

<sup>149</sup> Lamas (2003a: 91); Figueroa, Juan Guillermo, Professor Center for Demographic and Urban Studies-El Colegio de México, Author interview, México DF, September 13 (2011).

and feminist organizations, on the other. It was in that context that Mexican feminists adopted the alternative concept of voluntary motherhood.

In the 1990s there was a shift in policy from family planning to reproductive health, which incorporated criteria based on equity and human rights into the field of sexuality and reproduction.<sup>150</sup> This change was also part of an international trend, promoted in particular by the International Conference on Population and Development held in Cairo, in 1994, and the World Conference on Women, held in Beijing in 1995, and external financing was fundamental to the adoption of the new framework, which also involved a new type of relationship between external agencies and NGOs, which helped the latter to develop and professionalize.<sup>151</sup> This required a reorganization of public health institutions with regard, for example, to contraceptive services, which incorporated a human rights perspective and introduced a discourse on gender.<sup>152</sup> However, beyond the benefits of this approach, in the past two decades, the implementation of population policies at the federal level has stagnated.<sup>153</sup> Moreover, the presence of a conservative party in the federal government for more than a decade complicated the relationship between federal governmental agencies and feminist organizations in the field of sexual reproductive health.<sup>154</sup>

### I.1.3. Political context and the position of political actors in the abortion debate

In the 1970s, the political opportunity in Mexico was different from that in many other countries in the region. Even though the hegemonic party regime of PRI, which governed the country for seven decades, developed strong repressive elements, there was no military dictatorship, which created a relatively more favourable climate for the development of the feminist movement, as compared to other Latin American countries.<sup>155</sup> Later on, the political

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<sup>150</sup> Szasz and Lerner (2010: 215-217).

<sup>151</sup> González Montes (1999: 25-26).

<sup>152</sup> Figueroa (2010: 263-265).

<sup>153</sup> Lerner, Susana, Professor Center for Demographic and Urban Studies-El Colegio de México. Author interview, México DF, September 23 (2011).

<sup>154</sup> Cardaci and Sánchez (2011: 10-15).

<sup>155</sup> The PRI (characterized as the "philanthropic ogre" in Octavio Paz's famous phrase), permitted the existence of a movement, in contrast to what happened in the context of military dictatorship that swept through the Southern Cone and Central American in the 1970s and 1980s (Echarri, Carlos, Professor Center for Demographic and Urban Studies-El Colegio de México. Author interview, México DF, September 13, 2011).

transition from the regime governed by PRI,<sup>156</sup> which had strong anti-clerical strands, was marked by the coming to power at national level of the right-wing PAN in 2000, with overt links to the Catholic Church. The broader process of democratization, which is acknowledged to have started in 1968,<sup>157</sup> brought about institutional and socio-cultural changes related to civic participation, governmental accountability, the incorporation of human rights and rule of law building.<sup>158</sup>

As in other countries in the region, in Mexico the incorporation of abortion rights into the political agenda has met with strong resistance, mainly due to pressure from the Catholic Church. However, some of the Mexican core political parties have liberal and secular strands, which differentiate themselves from many of their Latin American counterparts.<sup>159</sup> The PRI was founded in 1929,<sup>160</sup> and it held national power for seventy-one years, until 2000. Emerging from the Mexican Revolution, since its foundation it has been a member of the Socialist International, and it drew on the Mexican anticlerical tradition. It had historically upheld reproductive rights in national cases as well as in the international sphere.<sup>161</sup> However, nowadays it is considered centrist, it has promoted free trade in Mexico, and during recent debates on policies about sexuality and reproduction, as well as about the role of the Church in the public sphere, it has played according to electoral convenience. For its part, the National Action Party is a center-right party, with strong links with the Catholic Church. It

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<sup>156</sup> The political transition in Mexico was marked by a slow process of loss of hegemony by the PRI. In 1989, PAN won the election of governor of the state of Baja California, in 1991 it won in Guanajuato and in 1992, in Chihuahua. In 1997 PRI lost its majority at the federal Chamber of Deputies for the first time in its institutional history, as well as the first election for Mayor of Mexico City, and in 2000 an opposition party candidate (Vicente Fox from PAN) assumed the Presidency for the first time since 1929.

<sup>157</sup> The brutal repression of the Mexican students' movement in Plaza de Tlatelolco, Mexico City, on October 2, 1968, is considered to have triggered the process of democratization.

<sup>158</sup> There is in Mexico an increasing development of the discourse of human rights, and the law is beginning to have more relevance. Democracy and the rule of law are not accomplished processes, but there is a dispute within institutions, and there are important streams, even within political parties, that defend transparency, the rule of law and the construction of citizenship (Amuchástegui, Ana, Professor Universidad Autónoma Metropolitana UAM-Xochimilco. Author interview, México DF, September 23, 2011).

<sup>159</sup> Blancarte (2008: 36).

<sup>160</sup> Since its foundation, the Party has had three different names: National Revolutionary Party (PNR, 1929- 1938), Party of the Mexican Revolution (PRM, 1938-1946), Institutional Revolutionary Party (PRI, since 1946).

<sup>161</sup> Particularly during the 1980s, PRI promoted reforms of the Criminal Codes at states' level to include new exceptions to criminalization, and at the international conferences of Cairo and Beijing, the Mexican government supported liberal pronouncements on women's rights and reproduction, and it introduced a progressive reservation regarding provision of the American Convention of Human Rights on the right to life from the moment of conception.

was founded in 1939 by Catholic activists, as a way to achieve political representation in the aftermath of the Cristero War. Nowadays, PAN represents the right of Mexico's political spectrum, both in terms of economic and social policies, such as those related to sexual and reproductive rights. PAN does have a clear policy against abortion, and its political manifesto advocates the incorporation of the right to life from the point of conception into legislation.<sup>162</sup> Among the three main parties that have competed for power since the democratic transition (PRI, PAN, PRD), it has been the left-of-center Party of the Democratic Revolution (PRD)<sup>163</sup> that has had the strongest position in terms of gender equality<sup>164</sup> and which has led the process of abortion legalization in Mexico City. Feminist organizations have supported PRD since its creation, and the alliance of feminism with this party has been crucial in legal reforms favorable to women's rights.<sup>165</sup> Finally, in 2006, the Social Democratic Party (PSD) presented as its presidential candidate Patricia Mercado, who was a prominent feminist activist. The candidacy of Patricia Mercado in 2006 led all the other parties to make clear their positions on controversial issues such as the legalization of abortion and gay rights, showing importance of the presence of a feminist platform in an electoral contest.<sup>166</sup> In the electoral manifesto of PSD 2009-2012, the first of the "Five main issues on the national agenda" is "the decriminalization of abortion throughout the country".

Mexico is a federal republic, formed by thirty-one states and the Federal District of Mexico City. One of the peculiarities of Mexican federalism, in contrast with other federal countries in Latin America, is that each state has its own criminal code, as well as its own health law (Htun 2003: 10). Thus, Mexico is the only country in the region where abortion laws can be reformed at the local level, and the only country where abortion laws vary throughout the

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<sup>162</sup> The electoral platform of PAN 2009-2012, in the section devoted to human rights, states that the Party "will promote the passing of laws that recognize the right to life from conception to natural death". The electoral manifestos of political parties are available at: [http://www.ife.org.mx/portal/site/ifev2/Plataformas\\_electorales/](http://www.ife.org.mx/portal/site/ifev2/Plataformas_electorales/)

<sup>163</sup> PRD is a left-wing party, also a member of the Socialist International, which was founded in 1989 by prominent former members of PRI, who abandoned that party after the fraudulent elections of 1988, as well as by many small left-wing parties.

<sup>164</sup> Fundamental documents of PRD (i.e., the Political Program, the Statute, and the Declaration of Principles) specifically approach the issue of gender equality, and that it was the first party in Mexico to establish a minimum quota (30%) of female participation in directive as well as popularly elective positions (González 2003: 4).

<sup>165</sup> See Amuchástegui et al. (2010b: 7). It should be noted, however, that there are different factions within PRD, and that some of them have not supported women's reproductive rights in certain political situations; for example, they have supported some of the constitutional reforms carried out at states' level to introduce the right to life from conception.

<sup>166</sup> Amuchástegui et al (2010b: 6).

nation.<sup>167</sup> This is an important institutional aspect when considering abortion law reforms in Mexico, as well as divergences with reform attempts and processes in other countries in the region, where criminal and health laws must be approved by national legislatures. The location of abortion policy in Mexico, different from the rest of Latin America, may have favored feminist claims for reform in Mexico City, where progressive forces are more relevant than in the other states.

In 1997, political opportunities changed at the local level of Mexico City. The Federal District has a special constitutional status within the Federal Republic.<sup>168</sup> In 1997 its residents elected the city's mayor by popular vote for the first time since 1928 (when it started to be appointed by the national executive only), as well as the members of the reformed unicameral Legislative Assembly. Since 1997, the city has been governed by the leftist Party of the Democratic Revolution (PRD), which has also had a majority at the Legislative Assembly. The constitutional reform that established these reforms also stipulated that the city could have its own criminal code and health law, as other states in the country.

With regard to changing or volatile components of political opportunities that made abortion law reform possible in Mexico City in 2007, this case confirms that a climate of polarization (or divisions among elites) may offer an opportunity for the feminist movement, as well as for other social groups, to advance their claims through the political process. The reform was carried out in the aftermath of the 2006 presidential election, in which the conservative National Action Party (PAN) won by a difference of 0.65 over PRD, after an extremely polarizing campaign, with widespread suspicions of electoral fraud and the resultant highly disputed legitimacy of the new president. In the context of political polarization, the abortion reform was an opportunity for PRD to signal that its project for the country differed from that offered by PAN.<sup>169</sup> Furthermore, Mexico City's Mayor, Marcelo Ebrad, had adopted the discourse of citizenship as a key principle of his government: he presented himself as a

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<sup>167</sup> All the Mexican states include exceptions or indications to the criminalization of abortion. The only common one across states is the rape exception. GIRE (the Information Group on Reproductive Choice) periodically updates the state of the regulation of abortion in the Mexican federative entities at its website: <http://www.gire.org.mx/contenido.php?informacion=31>.

<sup>168</sup> It is a federative entity where the federal powers reside, and historically it has had less institutional autonomy vis-à-vis the federal government than the 31 Mexican states.

<sup>169</sup> Ibarra Palafox, Francisco. Professor Institute of Legal Research-UNAM. Author interview, México DF, September 20, 2011.

modern politician,<sup>170</sup> and during his term he promoted several progressive reforms.<sup>171</sup> Hence, the abortion reform also helped Ebrad to differentiate himself from the PRD presidential candidate in 2006, López Obrador, who had systematically refused to consider the possibility of decriminalizing abortion. So, in this case inter-party polarization and intra-party cleavages placed abortion as an issue that allowed a sector of the political elite to embrace the abortion reform cause, as a way to differentiate itself from its political opponents.

Nonetheless, the political opportunity was favorable for the advancement of conservative claims at the states' level, which led to the incorporation of the right to life from conception into the constitutions of sixteen Mexican states. Catholic conservative forces, with a strong influence over local elites and politics, have also been able to exert influence for legal change at the states' level, where reforms can be passed with much less public visibility and accountability. The location of abortion policy in Mexico was also favorable for the counter-movement, as it allowed Catholic conservative forces to influence local elites. This was possible in the context of political alignments related to electoral incentives at the national level. The strategy was promoted by PAN, but it would not have been successful without support by PRI. A traditionally anticlerical party, at the time of the reforms PRI was led by declared-feminist Beatriz Paredes. So, the position of PRI in this process was surprising for activists and observers.<sup>172</sup> After the first counter-reforms took place, feminist organizations demanded the national authorities of political parties, in particular Paredes, to stop the backlash process.<sup>173</sup> However, Paredes only addressed her party on this issue through a letter presented at the PRI annual meeting in 2010, when the bulk of reforms had already been passed.<sup>174</sup> The explanation given by several actors in this process is that PRI made pacts with the Catholic hierarchy, with the aim of winning the presidential elections in 2012.<sup>175</sup>

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<sup>170</sup> Amuchástegui, author interview (2011).

<sup>171</sup> PRD has promoted reform on three social issues in Mexico City: gay rights (a same-sex civil union bill was passed in 2006 in Mexico City), euthanasia (currently under debate), and abortion.

<sup>172</sup> See Marta Lamas, "Nefasta jugada del PRI", *Proceso*, April 26, 2009. Available at: [http://enlineadirecta.info/nota.php?art\\_ID=91192&titulo=Proceso.com\\_\\_Nefasta\\_jugada\\_del\\_PRI.htm](http://enlineadirecta.info/nota.php?art_ID=91192&titulo=Proceso.com__Nefasta_jugada_del_PRI.htm).

<sup>173</sup> Beltrán, Alma and Fernanda Díaz de León, Members of the Legal Area of GIRE, author interview, México DF, September 29 (2011).

<sup>174</sup> Beltrán and Díaz de León, author interview (2011).

<sup>175</sup> Beltrán and Díaz de León, author interview (2011); Ortiz-Millán, Gustavo, Professor Institute of Philosophical Research-UNAM, member of the College of Bioethics, Author interview, México DF, September 26 (2011).

Electoral calculation and politician's search of legitimacy in other sources at the level of the states help explain the PRI's role during the reform processes. At the time of the states' reforms, PRI's main concern was to win the presidential elections in 2012, and to regain its hegemony at the national level, which it had lost in 2000 for the first time after having governed the country for seven decades. In that pre-electoral context, the support of the Church at the local level was fundamental. The decline in the hegemony of PRI may explain the party's search for legitimacy in external forces, which led to increasing demands of the Church over the political sphere.<sup>176</sup> Moreover, it has been noted that the influence of the Church is much stronger at the level of the states than in Mexico City or at the national level and, furthermore, due to the erosion of political centralism, its influence over local politics has increased.<sup>177</sup>

## **I.2. The legal opportunity. Normative framework and institutional rules at the Supreme Court**

### **I.2.1. Overview of abortion regulation in Mexico**

Until its legalization in Mexico City in 2007, abortion was defined as a crime in all Mexican jurisdictions. However, in Mexico the regulatory framework has been relatively more advanced than in other Latin American countries.<sup>178</sup> As it happens in other Latin American countries, though, there is no effective access for women to legal abortion services at most Mexican states.<sup>179</sup> During the 1930s, criminal provisions on abortion in the 31 Mexican states, as well as the federal code that was applicable to the Federal District of Mexico City,<sup>180</sup>

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<sup>176</sup> Blancarte (2008: 36).

<sup>177</sup> Echarri, author interview (2011).

<sup>178</sup> Abortion legislation in Mexico has a common origin in the first federal criminal code of 1871, which had a liberal orientation, and was a point of reference for state codes (Cortés 2006: 26). This code – the so-called *Código Juárez* – differentiated between the crimes of abortion and homicide and established a more lenient punishment for the former. It also established exceptions to criminalization based on the risk to the pregnant woman's life and on abortion as a result of the woman's negligence (see Barraza 2003).

<sup>179</sup> See Ubaldi (2006: 213).

<sup>180</sup> The federal criminal code introduced in 1931 was applied to the Federal District, and was a point of reference for drafting the criminal codes of the various states. As Mexico City now has its own criminal code, the federal criminal code is currently only applicable to federal territories, most importantly including the hospitals that are affiliated to the national Ministry of Health (*Secretaría de Salud*) as well as those that belong to the national social security systems (Pou Jiménez 2009: 139, n. 8).

incorporated a common exception based on rape, and other exceptions were further added to the criminal codes of each state. From the 1970s onwards, there was a slow process of liberalization of abortion laws at state level, through reforms that introduced in particular exceptions based on cases of severe malformations and risk to health. In 2000, when the first reform of Mexico City's criminal law on abortion was introduced, Mexico City was the only federative entity whose criminal law on abortion had not been liberalized since 1931.

Following Mexico City's reforms in 2007, two systems of abortion regulation coexist in the country: an indications model with provisions that vary from state to state, and a periodic model in Mexico City. The regulation of abortion in the Mexican federative entities includes a common indication based on rape in all 32 states; and abortion is not punished in 30 states when it is accidental; in 29 entities when there is a risk to the woman's life; in 14 states when the foetus is seriously malformed; in 12 states when the woman's health is at serious risk; in 11 states for non-consented artificial insemination; and in 1 state (Yucatán) for economic reasons when the woman already has at least three children.<sup>181</sup>

### I.2.2. Constitutional and human rights norms

The Mexican federal constitution includes a reproductive freedom provision.<sup>182</sup> Other constitutional provisions that are relevant for the abortion debate in Mexico are the protection of human dignity (Article 1), the right to non-discrimination (Article 1), the right to health (Article 4), the right to equality between men and women (Article 4) and the right to privacy (contained in provisions of several articles, among them, Article 1, 4 and 6). The right to life was recently included in Article 29 of the Mexican Constitution, following the constitutional reform of June 10, 2011.<sup>183</sup> However, there is no provision in the federal constitution, or in the legislative process that led to this reform, that specifies from what stage of development life is protected. Furthermore, in the Mexican constitutional regime there are no absolute rights, and the right to life does not take precedence over other fundamental rights.

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<sup>181</sup> This information is provided by GIRE (updated in November 2011). GIRE periodically updates the state of the regulation of abortion in the Mexican federative entities on its website: <http://www.gire.org.mx/contenido.php?informacion=31>.

<sup>182</sup> Constitutional Article 4 reads: "every individual has the right to decide in a free, responsible, and informed manner the number and spacing of his or her children".

<sup>183</sup> The constitutional reform on human rights carried out on June 10, 2011, modified Constitutional Article 29, among other provisions, and introduced the right to life as one of the rights that could not be suspended by decree in case of national emergency.

The constitutional reform of June 10, 2011 incorporated human rights treaties into the constitutional system.<sup>184</sup> Hence, human rights treaties ratified by Mexico now have a legal status below the Constitution, but above ordinary laws, whereas previously they were just one of the sources of law recognized by the Constitution in Article 133. Among the main human rights treaties ratified by Mexico, and which have been relevant in the debate about abortion regulation is CEDAW, signed by Mexico in 1980 and ratified in 1981, the International Pact on Economic, Social and Cultural Rights, the International Pact on Civil and Political Rights, and the American Convention of Human Rights. Furthermore, the provision of Article 4 of the ACHR, which states that life will be respected “in general, from the moment of conception”, presents less of a challenge for abortion rights defenders in Mexico than in other Latin American countries, because Mexico made a progressive reservation to this Convention. The Interpretative Declaration made by this country in 1981 stated that the expression “in general” with regard to the protection of life from conception means that the states have no obligation to enact legislation to protect life from the point conception.<sup>185</sup>

### **I.2.3. The Supreme Court. Institutional rules and legal instruments for constitutional control**

The Supreme Court is the highest court in Mexico. It comprises eleven justices (*Ministros*), one of them being the Court’s president, who are appointed for a non-renewable period of fifteen years. The Supreme Court and the means of constitutional review in Mexico have been substantially reformed in the last two decades, in particular in 1987 and 1994, with the stated purpose of transforming the Court into a constitutional court.<sup>186</sup> The main changes in the Court’s competences were introduced through a constitutional amendment in 1994, which conferred new review powers on the Supreme Court. Most importantly in terms of the judicial

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<sup>184</sup> This reform is linked to the constitutional reform of the *amparo* regime, carried out on June 6 2011, and both affect the role of the federal justice system, included the Supreme Court (See the Supreme Court’s statement in this regards at <http://www2.scjn.gob.mx/red/constitucion/>).

<sup>185</sup> The complete text of interpretative declarations made by Mexico to the ACHR are available at: <http://www.cidh.org/basicos/Basicos3.htm>.

<sup>186</sup> The main purpose of the 1987 reform was to separate the control of constitutionality from the control of legality, and to establish that the latter would be a competence of the Federal Collegiate Circuit Courts (Cossío 2002: 144-145; Mejía 2004: 3-5). In 1994 a comprehensive judicial reform process took place, which included provisions intended to empower the Supreme Court and confer more independence on it. The reform also included an almost complete renewal of the Court’s composition.

process of abortion law reforms, this amendment introduced the figure of actions of unconstitutionality, whereby the Court can decide over a possible contradiction between a general law and the Constitution.<sup>187</sup> Constitutional Article 105 establishes that such actions may be brought before the Court within thirty days following the publication of the general law. The Supreme Court is the only court in Mexico with jurisdiction over actions of unconstitutionality, and the vote of eight (out of eleven) justices is required to declare the invalidity of a challenged norm, and for the decision to have general, or *erga omnes* effects.

The process of reform of the Supreme Court has also produced a redefinition of the Court's competences regarding the writ of *amparo*, which is the legal means par excellence for concrete constitutional control in Mexico, and the only means for citizens to access the federal judiciary. One of the main reforms in this regard was the creation in 1987 of collegiate circuit tribunals, with powers to review the *amparo* suits that were formerly under the competence of the Supreme Court, and had historically been the main means of constitutional review in Mexico. This reform established that only those *amparos* that include a constitutional question reach the Supreme Court. The 1987 reform also established the Court's authority to assert its jurisdiction discretionally in cases of grave violations of constitutional guarantees (*facultad de atracción*). On June 6, 2011, a constitutional reform introduced changes to the *amparo* regime, which extended legal standing to social actors, and allowed for claims regarding collective, and not only individual rights.

Regarding the role of female justices, in 1961 the Mexican Supreme Court was one of the first high courts in the world to become integrated by a woman among its membership. Since its reform in 1994, two women have been appointed to the Court.<sup>188</sup> In the Mexican case, the presence of female justices has not been considered as a particularly significant sign of the court's openness to women's rights claims by social actors that promoted the constitutionality of abortion rights. In this regard, it has been pointed out that these justices have not developed a leading role with regard to women's rights within the Court.<sup>189</sup> It has also been noted that the presence of these two female justices does not generally change the deliberative process at

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<sup>187</sup> The other important power conferred on the Supreme Court by the reform of Constitutional Article 105 in 1994, and aimed at empowering it as a constitutional tribunal, was the extension of its scope of competences regarding constitutional controversies, whereby it can resolve conflicts among different governmental levels and branches on the constitutionality of their acts.

<sup>188</sup> In January 1995, Justice Olga Sánchez Cordero became the ninth woman to join the Court. Justice Margarita Luna Ramos was appointed in February 2004.

<sup>189</sup> Ibarra Palafax, author interview (2011).

the Court; that is, they do not play the expected informational role with regard to women's rights.<sup>190</sup> However, there exists agreement among participants in the abortion reform process that one of these justices (Olga Sánchez Cordero), who had a conservative background, did not have a feminist education, and who in salient cases had decided against women's rights,<sup>191</sup> changed her position in this regard in recent years, as a result of her work as a Supreme Court Justice, and due to the reaction of feminist organizations to her initial standing in this field.<sup>192</sup>

The Court can either sit in plenary sessions or as two separate chambers.<sup>193</sup> The Court's internal procedures, established by internal agreements and custom among the Court's justices, regulate the allocation of cases and the way they are processed within the Court until the final decision. When a case reaches the Court, it is assigned randomly to one of the justices of the Court (called *Ministro Ponente*).<sup>194</sup> This justice is responsible for writing a draft resolution (*proyecto de resolutivo*) in which he or she outlines the main elements of the case as well as his or her proposed decision. The draft resolution is discussed collectively in sessions that may be public or private, according to the justices' preference, and the justices then vote for or against the outcome of the case proposed by the draft judgment. After this vote, one justice is appointed, through an informal selection, the task of writing the final decision (so-called *engrose*). In some cases (particularly when the original project was not approved by the required majority, and justices decide to vote without waiting for the drafting of a new project, as happened in the abortion decision of 2008), the *engrose* must build the holding of the Court's decision from scratch. The justice in charge of writing the *engrose* is supposed to reflect the arguments that had been posed during the deliberation, but in some occasions this is not the case, and a new argument is presented, which is considered to be the

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<sup>190</sup> Specifically, according to interviewees in this study, the presence of two women at the Court does not seem to change either the form or the substance of the arguments.

<sup>191</sup> One of the main cases in this regard was the Supreme Court's 2002 decision on the liberalization of Mexico City's abortion law, in which Justice Sánchez Cordero was *Ponente*.

<sup>192</sup> Cruz Parcerio, Juan Antonio, Professor Institute of Philosophical Research-UNAM. Author interview, México DF, September 14 (2011); Lamas, author interview (2011); Morales, author interview (2011)

<sup>193</sup> The First Chamber deals with civil and criminal cases, and the Second Chamber with administrative and labor cases.

<sup>194</sup> When a case reaches the Court it is assigned to one of the Justices by strict turn, according to a pre-established list. See Elizondo and Magaloni (2008) for a discussion of the negative effects that this rule may have on the Supreme Court's decisional processes. One of the major consequences is that the justice in charge of writing the draft project to be discussed by the Court's plenary or at one of the Chambers may be in the minority.

final decision of the Court. The *engrose* is not subject to a new round of voting among justices.

The rules of access and legal standing at the Supreme Court are restrictive, since only public authorities are allowed to present claims by the two principal means of constitutional control used by the Court, that is, constitutional controversies and actions of unconstitutionality. According to Constitutional Article 105, four types of actors are allowed to present actions of unconstitutionality, depending on the type of norm that is challenged: the Attorney General of the Republic; a minimum of 33% of members of the legislature that approved the norm; political parties; and (after a constitutional amendment in 2006), also the National Human Rights Commission, and the human rights commissions of the 32 federative entities.

There are other ways in which individual and social actors in civil society can intervene in the Court's procedures, such as public hearings and *amicus curiae* briefs. Those proceedings were not used by the Court until recently, and they have been used only in few and special cases. It was in the 2008 abortion decision that the Court regulated the procedure for public hearings, and the procedure for the submission of *amicus curiae* has not yet been regulated by the Court, so there are no formal requirements for their presentation, which is an obstacle for the determination of their relevance and their classification.<sup>195</sup> Another important feature of the Court's practices is that one of the parties in a case is permitted to hold private meetings with justices in the absence of the other party.<sup>196</sup>

With regard to the behavior and institutional role played by the Supreme Court since its reform in 1994, observers agree that the Court is well established in terms of its formal powers and that it has played a fundamental role in the country's political transition.<sup>197</sup> Several studies have argued that in its new role as a constitutional tribunal, the Court has privileged its power of review on conflicts among governmental powers over its competences

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<sup>195</sup> Pou Jiménez, Francisca, Professor Law Department-ITAM; ex-Law clerk at the Supreme Court, Office of Justice Cossío). Author interview, México DF, September 7 (2011).

<sup>196</sup> This informal practice, in the Supreme Court as well as in lower courts in Mexico, is considered as part of the inheritance of the authoritarian regime (Elizondo and Magaloni 2008) and has survived the Court's institutional reforms. See Elizondo and Magaloni (2008) for a discussion of the negative consequences of this practice on the public image of the Court's impartiality.

<sup>197</sup> Fix-Fierro (2003); Magaloni (2006); Ríos-Figueroa (2007). In particular, after its reform the Supreme Court became a mediator in political conflicts among different levels of government in the federal system, a function that during the hegemonic party regime had been performed by the President (Magaloni 2006).

regarding the protection of rights.<sup>198</sup> More recently, however, scholars as well as social actors have written of signs of change in the Court's attitude toward the protection of rights. A gradual change has been noted lately in the Court's attitude to the protection of human rights.<sup>199</sup> The Supreme Court's opinions on abortion, particularly in 2008 and 2011, can be seen as an indication of such change. Indeed, the abortion cases, as well as other significant cases on controversial issues relating to sexual rights and discrimination,<sup>200</sup> have been at the core of this incipient transformation in the role of the Court towards a more active role in the protection of fundamental rights.<sup>201</sup>

## **II. SOCIAL MOVEMENTS AND LEGAL MOBILIZATION IN THE FIELD OF ABORTION LAW**

### **II. 1. Feminism and the struggle for abortion rights in Mexico**

From the beginning, Mexico's second-wave feminists had the legalization of abortion as a core aim. From 1976 to 1981, feminist coalitions worked together on the formulation of a legislative reform proposal on reproductive health that included the legalization of abortion.<sup>202</sup> After a period of relative demobilization in the 1980s, at the beginning of the 1990s Mexican feminists changed their strategic approach to the abortion issue. Their revised strategy included the creation of a new support structure in society, the development of legal mobilization, new forms of advocacy in the social and political sphere, and the elaboration of an innovative framing. In 1991, a group of feminist activists founded the Information Group on Reproductive Choice (GIRE),<sup>203</sup> the first single-issue organization in Latin America specifically dedicated to the legal and political defense of abortion, which changed the whole

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<sup>198</sup> Cossío (2002); Magaloni Kerpel (2008); Mejía (2004).

<sup>199</sup> Abad Suárez (2012: 7-13).

<sup>200</sup> Particularly relevant in this regard were the case of soldiers with HIV (*Amparo en revisión* 307/2007, Supreme Court, September 24, 2007), and the action of unconstitutionality presented against Mexico City's reform to its civil code that redefined marriage in order to allow same-sex marriage (Action of Unconstitutionality 2/2010, August 5 2010).

<sup>201</sup> See Madrazo and Vela (2010: 1869-1893).

<sup>202</sup> Lamas (2003a: 86). At the end of the 1970s, the Coalition of Feminist Women and the National Front for Women's Liberation and Rights worked on the reformulation of a bill on voluntary motherhood that had already been put forward by the movement in 1976. The failure of this initiative, which was not even discussed by Congress, marked the end of a cycle for the feminist movement (Espinosa 2009: 66).

<sup>203</sup> The leader of this initiative was the renowned feminist activist Marta Lamas.

approach to the feminist struggle for abortion rights in Mexico. GIRE became part of broad coalitions that had the legalization of abortion as one of their main concerns, in particular the Network for Women's Health DF, founded in 1993, and the Campaign for Access to Justice for Women, created in 1998. In 2000, five highly professionalized organizations from different fields of specialization – GIRE, Population Council-Mexico, Catholics for Choice, *Equidad de Género* (Gender Equity) and the Mexican chapter of the International Pregnancy Advisory Services (IPAS-Mexico) - established the National Alliance for the Right to Decide with the aim of promoting abortion liberalization. This Alliance is considered by its members as a political coalition in which each organization provides its expertise on specific aspects of the right to abortion,<sup>204</sup> and it has become the most important institutional structure in civil society in the process of abortion legalization in Mexico City.

In order to understand the continuities and shifts in feminist framings and strategies for the defense of abortion, it is useful to recall the feminist standpoint in this field in the 1970s. At that time, Mexican feminists adopted a comprehensive approach based on public health and social justice arguments, as well as on the concept of voluntary motherhood.<sup>205</sup> At that time, however, some of their positions were characterized by an all-or-nothing logic, whereby, for example, abortion advocates did not contemplate the possibility of gradual reforms, or they demanded the legalization of abortion on demand at any stage of pregnancy.<sup>206</sup> Further, the rhetoric of collective action was dominated by a radical framing grounded on women's right to control their own body.<sup>207</sup> In the 70s, feminists believed that their claim for reproductive freedom was so legitimate and evident that just by voicing their arguments they would be heard by society and the government.<sup>208</sup> However, their campaigns at that time could not influence the public and political sphere, which led to the demobilization of the abortion rights movement during the following decade.

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<sup>204</sup> Beltrán, Alma and Fernanda Díaz de León, author interview (2011); Schiavon, Raffaela, Director of IPAS-MEXICO, Author interview, México DF, September 29 (2011).

<sup>205</sup> The concept of voluntary motherhood, advanced by Italian feminists, was presented for the first time in Mexico at a public conference in 1972 (Lamas 2009: 157). It included access to abortion as a central claim, as well as sexual education, access to contraception and the rejection of forced sterilization (Lamas 1997: 58).

<sup>206</sup> Lamas, author interview (2011).

<sup>207</sup> Cardaci and Sánchez (2011) explain that in the 1970s, women's concern about reappropriating their own body was fostered by the publication, in 1973, of the book *Our Bodies, Ourselves*, by the Boston Women's Health Book Collective, which had an important influence in Mexico as well as in other Latin American countries.

<sup>208</sup> Lamas (1997: 58).

At the beginning of the 1990s the struggle for abortion rights in Mexico regained momentum, due to feminists' reaction to two main events: on the one hand, the detention of patients and doctors in a clandestine abortion clinic in Mexico DF, in 1989,<sup>209</sup> and on the other hand the blocking, due to pressure by the local Catholic church, of a progressive legislative reform on abortion passed in the state of Chiapas in 1990.<sup>210</sup> At that point, GIRE's founders judged that the occasional public discussion on abortion in Mexico took place between extremist positions held by feminists and Church spokesmen.<sup>211</sup> One of GIRE's main goals was to change the terms of the public debate through a non-confrontational strategy and a carefully argued discourse that could take the abortion issue outside of the feminist movement and transform it into a public issue.<sup>212</sup> This move entailed a shift from an approach based on identity politics into a wider perspective, which consciously pursued the incorporation of actors from outside the feminist field into the public discussion about abortion.<sup>213</sup> Most fundamentally, the new approach involved the development of an innovative framing, which included the incorporation of a constitutional and human rights framework, and which would acknowledge the claims of the counter-movement.

In its first public appearance in 1992, GIRE presented the results of a national public opinion poll carried out by Gallup, which was repeated in 1993 and 1994, in which the main question was not "abortion: yes or no", but "who should decide". The results showed that around 78% of the population thought that it was the woman alone, or together with her partner, who should decide.<sup>214</sup> GIRE also set out to investigate the legal status of abortion in the world, and to build a documentation center. As a result of this effort, it now has one of the most important libraries specializing in reproductive rights in Latin America, which is open to the public. Through its public activities, GIRE consciously sought to include men as active supporters and to engage individuals and groups that did not usually intervene in social mobilization, such as scientists and intellectuals. As part of this endeavour, it rallied renowned figures from different fields, such as the medical and legal profession, as well as some of the most famous Mexican intellectuals and writers, such as Carlos Monsivais, Carlos Fuentes and the Nobel Prize winner Octavio Paz. These signed a full-page ad commissioned

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<sup>209</sup> Lamas (2003: 90).

<sup>210</sup> Lamas (2009: 159).

<sup>211</sup> Lamas (2001a: 58).

<sup>212</sup> Lamas, author interview (2011).

<sup>213</sup> Lamas (2001c: 118-120).

<sup>214</sup> Lamas (2003: 94).

by GIRE and published by several newspapers on May 28, 1998, advocating for new exceptions from abortion criminalization in Mexico City. This publicity had a strong impact on public opinion.<sup>215</sup> This organization also developed targeted campaigns and institutional relationships with different types of actors and decision-makers, mainly politicians and journalists, through workshops, lobbying, distribution of information and press statements.

Framing transformation was a key component of the new strategy. The discourse built by GIRE as well as by other feminist organizations that have worked in close collaboration with it - in particular those linked to the National Alliance for the Right to Decide - has three main axes: public health, social justice and democracy. In the context of Mexico's democratic transition, a central goal of this sector of the feminist movement has been to reframe the abortion issue as a matter of democratic citizenship. In this sense, they aimed at establishing as the central question "who should decide," and "on what grounds decisions should be made in a pluralistic and democratic society."<sup>216</sup> One of the central arguments in this regard was related to the need for maintaining the separation between the state and the Church. They argued that, in a democracy, individuals should be free to choose whether to live their lives based on religion, but the public sphere of the state should remain secular.<sup>217</sup>

A further central component of the new strategy was the development of legal mobilization, which was related to the transformation of the way feminist framed abortion claims. In fact, GIRE was the first feminist organization in Latin America to develop a broad legal mobilization strategy, and to involve lawyers and legal arguments in the struggle for the legalization of abortion. The awareness by feminists that the abortion campaign should have a legal argument at its core grew in the midst of a process of judicialization of conflicts and demands in diverse fields of Mexican politics.<sup>218</sup> However, in a country where there was no tradition of public interest law, or a support structure for strategic litigation, and where the use of testing cases was not a common practice, the feminist movement was one of the first social movements to frame its grievances for social change in legal terms, and this fact obliged the feminist movement in Mexico to generate its own legal strategy,<sup>219</sup> and to develop its own

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<sup>215</sup> Lamas (2011).

<sup>216</sup> Lamas (1997: 94).

<sup>217</sup> Lamas, author interview (2011).

<sup>218</sup> Beltrán and Díaz de León, author interview (2011).

<sup>219</sup> Morales, author interview (2011).

support structure for legal mobilization.<sup>220</sup> One of the events that consolidated GIRE's legal work was the emblematic Paulina's case, settled at the Inter-American Commission, which was the first strategic lawsuit in which this organization was involved.<sup>221</sup>

The process of legal mobilization carried out by GIRE implied the translation of feminist political claims into a legal argument, and this operation impacted feminists' discourse and demands. In fact, the restrictions posed by the constitutional controversy were a key part of the cultural framework developed for the abortion campaign. As predicted by Siegel's account of the way in which social movements adjust to the public value condition, these restrictions contributed to the moderation of feminist discourse on abortion. To begin with, the new approach reflected the transformation of a radical discourse based on the woman's right to control her body into a perspective that articulated constitutional and human rights.<sup>222</sup> GIRE's first legal advisor explained that, at one of their initial meetings, it became clear for those with a legal background that the claim about women's absolute right to their body could not be translated into a legal claim.<sup>223</sup> Subsequently, the crafting of a legal argument involved the appropriation of fundamental rights by the feminist movement, the use of international human rights law, and the more general elaboration of a feminist legal doctrine.<sup>224</sup> Secondly, one of the characteristics of the legal strategy developed by GIRE and its allies was its gradualist approach. Their demands of the political system were oriented toward the inclusion of new exceptions or indications within the criminal code, and for several years they worked on a bill aimed at broadening the legal grounds for legal abortion.<sup>225</sup>

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<sup>220</sup> GIRE's first legal advisor was litigant lawyer Pedro Morales, who over the years became a key figure in the field of constitutional litigation for sexual and reproductive rights in Mexico. More recently, GIRE strengthened its legal department and the presence of women in it. In fact, one of its aims as an organization has been to develop training for young feminist lawyers in the field of reproductive rights (Beltrán and Díaz de León, author interview, 2011). In 2002, the organization hired its first female lawyer, and since 2011 it has been directed for the first time by a lawyer.

<sup>221</sup> IACHR, Report No. 21/07, Petition 161/02, Friendly Settlement, *Paulina del Carmen Ramírez Jacinto*, México, 2007. The case of Paulina, a girl who was pregnant as a result of rape, and whose right to have a legal abortion was denied by public authorities, had great impact on national public opinion and resulted in a friendly settlement signed in 2006 by the government and her representatives at the Inter-American Commission of Human Rights (see GIRE 2004).

<sup>222</sup> In this regard, Marta Lamas recalls: "We found it necessary to transform the profoundly subversive concept of women's re-possession of their own bodies into arguments that are more closely bound to democratic concerns. Formulated in this way, a question of morality becomes a question that is closely related to the concept of rights" (1997: 61).

<sup>223</sup> Morales, author interview (2011).

<sup>224</sup> Morales (2010: 138-140).

<sup>225</sup> Lamas (1997: 66).

Thirdly, and most notably, GIRE's activists and lawyers understood that by framing the abortion issue in constitutional terms, they would need to confront the right to life claim. In fact, one of the most remarkable and interesting aspects of this process was the feminists' engagement with the discussion about the value of fetal life, in a move that was innovative and is still unique in Latin America, and possibly in other contexts as well. The involvement of feminists with this discussion was oriented to demonstrate that women's right to decide was not opposed to the right to life. This is remarkable, given that in other contexts, feminists, and the progressive camp in general, have been reluctant to address the substantive moral question posed by conservatives about the beginning of life and the personhood of the *nasciturus*.<sup>226</sup> In fact, at first, Mexican feminist organizations tried not to enter into discussion about the personality of the embryo, but given their opponents' insistence on this argument, they found that this debate was ineludible.<sup>227</sup>

The argumentation developed by feminists and their allies had two main components. On the one hand, they disputed the conservative argument about the personhood of the embryo. They based this claim on bioethics and explained why, during the first stages of pregnancy, the *nasciturus* did not have the attributes of a person, and did not deserve a protection that invalidated women's right to abortion.<sup>228</sup> On the other hand, based on the same type of argumentation about the gradual development of unborn life, feminists made it clear that in their struggle for abortion legalization, their enemy was not the right to life.<sup>229</sup> This type of moderate framing, developed over several years and with support of specialized actors and organizations, implied an appropriation of the discourse about life by the feminist camp. From the juridical point of view, this aspect of the process of legal mobilization entailed the recognition that unborn life is a constitutional value. As a result of this process, feminists argued that the legal reform of abortion should include a balance between the rights of the woman and the protection of the *nasciturus* as a constitutionally protected good.<sup>230</sup>

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<sup>226</sup> See Sandel (989: 531-533); Borgmann (2008: 558-564).

<sup>227</sup> GIRE (2008: 46).

<sup>228</sup> The central argument in this regard was that the embryo at twelve weeks is not a biological individual or a person because, at that stage, the cerebral cortex, which is fundamental to the presence of sensations, has not yet developed.

<sup>229</sup> Morales, author interview (2011).

<sup>230</sup> Morales, author interview (2011).

This position was resisted by a sector of the feminist movement in Mexico, which considered it a reformist discourse.<sup>231</sup> It was also criticized by feminists from other countries, for allegedly contributing to stigmatizing abortion (Sánchez Fuentes et al. 2008: 351). However, despite its consciously moderated proposal, and in contrast, for example, to the framing developed by West German feminists,<sup>232</sup> in the Mexican case, feminists did not advance woman-protective or victimization arguments based on the trauma of abortion, which might have led, for example, to acknowledging the need for counseling measures, nor did they sustain the sacralization of motherhood at any time. On the contrary, feminists in Mexico placed women's agency at the center, through a demand for a comprehensive reform that allowed women of all ages to make a free decision on whether or not to become mothers, within a trimester limit. Furthermore, during the reform process in Mexico City, they struggled to remove legal provisions that defined as criminals women who had an abortion.

Also in contrast with the German case, Mexican feminists' framing did not adopt the official discourse of the state in order to achieve resonance. Instead, they searched for resonance with an important strand of Mexico's political culture, linked to the Mexican liberal tradition, which defends the secularity of the state. Secularism is cherished by Mexican intellectuals as well as by broad sectors of Mexican society, and the abortion controversy was an opportunity for liberal actors to assert the need for secular policies. An active participant in this process put it this way: "in Mexico, we can disagree on many issues, but there is a common concern: the separation between the state and the Church, and the abortion debate was also a moment to defend that separation".<sup>233</sup> Mexican feminists also appealed to the increasingly popular discourse on democracy and human rights. As well, they relied on bioethical arguments about the development of human life, in order to appeal to liberal and also moderate Catholic audiences, to whom they made an effort to explain that women's autonomy to decide was compatible with Catholic doctrine.

Two organizations have been crucial in the construction of a new framing of the right to abortion in Mexico: Catholics for Choice (CDD), which was established in Mexico in 1994, and the College of Bioethics, created in 2003. In fact, the creation of these institutions was consciously promoted and supported by GIRE, as part of a new strategy for the defense of

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<sup>231</sup> GIRE (2008: 46).

<sup>232</sup> See Ferree (2003).

<sup>233</sup> Cruz Parcero, author interview (2011).

abortion rights.<sup>234</sup> Significantly, although many feminists may be atheists, they actively promoted the creation of CDD, for they assumed that the struggle for abortion rights should actively engage Catholics.<sup>235</sup> This endeavor required disputing and reframing the way in which the Church depicted sexuality, abortion and ultimately, the place of women in society, which has been the focus of CDD work in Mexico, as well as in other countries. In particular, CDD had a leading role in the construction of the right to abortion linked to freedom of consciousness as well as in the demand for secular public policies.<sup>236</sup> The role of CDD in the abortion campaign reflected an effort by feminists to appeal to symbols that are embedded in the culture.<sup>237</sup> For its part, the College of Bioethics was established in 2003, as an autonomous organization formed by a multidisciplinary group of renowned professionals and scientists, aimed at offering scientific arguments for the public discussion of issues related to bioethics. GIRE assisted scientists in the formal establishment of this institution, particularly in its obtaining legal recognition, as it acknowledged the need to count on such an organization in order to build a new framework for the abortion debate.<sup>238</sup> Nowadays, the College is a prestigious institution in Mexico, and it was crucial to the reform process in Mexico City in that it provided arguments based on scientific and ethical reasoning, which assisted the development and grounding of the feminist position regarding the gradual development of unborn life. The publication of these arguments in the press as well as in several forums has been considered as one of the main contributing factors to favorable public opinion during the reform process.<sup>239</sup>

Despite intra-movement resistance to the framing advanced by GIRE and its allies, their discourse gained ground within the movement, as well as among a network of allies, formed by lawyers, doctors, scientists, philosophers and journalists, who collaborated to develop and expand that framing. The centralization of the movement's network, with a prominent and leading single-issue organization, allowed for that discourse to become hegemonic, and to be presented in the public sphere as a solid feminist standing. Given that GIRE was also the main

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<sup>234</sup> Lamas, author interview (2011).

<sup>235</sup> Lamas, author interview (2011).

<sup>236</sup> GIRE (2008: 48).

<sup>237</sup> As an example, CDD developed a campaign with an image of the Annunciation that read: "Mary was consulted about becoming God's mother. Choosing is everybody's right" (Lamas 2001b: 187).

<sup>238</sup> Lamas, author interview (2011).

<sup>239</sup> Lamas, author interview (2011). See, for example, an influential press communicate issued by the College of Bioethics during the reform process, on April 7 2007, available at <http://citius64.blogspot.it/2007/04/el-colegio-de-biotica-por-la.html>.

rights advocacy organization in the feminist field, its legal strategy also became, at some point, the main tactic of the abortion campaign. However, one of the shortcomings of this type of movement network is its weak insertion or presence throughout the national territory. The organizational infrastructure for the abortion campaign is remarkably strong in Mexico City, but at the moment of the reform, the movement did not count on a strong organizational network throughout the country, and GIRE and its allies did not have the institutional capacity to intervene in local events. There are organizations working for reproductive rights in different states,<sup>240</sup> but in general these groups had low visibility before the reform, and in some occasions, they were not sufficient to counterbalance the advances of the Catholic Church and conservative groups, which are particularly strong at the local level in Mexico.<sup>241</sup> Finally, the mobilization and counter-mobilization dynamics had an effect in the movement's infrastructure, as a stronger national network started to develop in order to resist the conservative backlash that took place at states level in the aftermath of the legal reform in Mexico City.<sup>242</sup>

## II. 2. Counter-mobilization

The largest anti-abortion organization working in Mexico is the National Pro-Life Committee, *Provida*, which is comprised of more than 140 organizations that portray themselves as “fighting for life”.<sup>243</sup> Since 1989, *Provida* has installed so-called *Centros de Ayuda a la Mujer* (CAM, pregnancy help centers) in several Mexican cities, in order to persuade women to carry on their pregnancies, and in some cases to encourage them to bring criminal charges against doctors who perform illegal abortions.<sup>244</sup> Besides *Provida*, the support structure of conservative mobilization against sexual and reproductive rights in Mexico is made up of a series of organizations that are interlinked and operate at the local and national level; others that operate in several countries and have a strong presence in Mexico; and international

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<sup>240</sup> The NGO *Las Libres*, established in 2000 in the conservative state of Guanajuato, is a notable example.

<sup>241</sup> Cardaci and Sánchez (2011).

<sup>242</sup> In November 2009, more than eighty feminist organizations from more than twenty states - among them, the five organizations that form the National Alliance for the Right to Decide - gathered in Mexico City and established the National Pact for Women's Life, Liberty and Rights, whose main aim is to resist the advance of conservative reforms on reproductive rights at the local level.

<sup>243</sup> González Ruiz (2005: 71).

<sup>244</sup> González Ruiz (2005: 72).

organizations with affiliates or offices in the country, notably Human Life International.<sup>245</sup> All these groups are connected to the Catholic Church.<sup>246</sup> It has also been observed that the Catholic Bar Association has been a non-official mouthpiece for the Church.<sup>247</sup> Finally, financing for conservatives strategies in Mexico comes from prominent Mexican businessmen.<sup>248</sup> International financing is provided mainly by Human Life International.<sup>249</sup>

During the past decades, conservative activism in Mexico, as in other Latin American countries, has lobbied for legal and constitutional reforms that grant an absolute protection of the right to life “from the moment of conception until natural death”. Since 1995, *Provida* has received support from Human Life International in order to promote constitutional reforms incorporating this provision in the states governed by the conservative PAN.<sup>250</sup> For many years, these attempts failed, except in Chihuahua in 1994.<sup>251</sup> However, since 1996 the initiative of PAN on this issue has been dominant in debates at states' level.<sup>252</sup>

By the time the legalization of abortion was discussed in Mexico City, the public image of the conservative field in Mexico had been damaged by national scandals involving two of the most important conservative organizations that carry out activism against reproductive rights. Firstly, the founder of the order Legionarios de Cristo, priest Marcial Maciel, after a long

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<sup>245</sup> Among the main organizations are *Unión Nacional de Padres de Familia*, created in 1917 to oppose secular education (González Ruiz 1998); *Comisión Mexicana de Derechos Humanos*, created in 1988; and *Asociación Nacional Cívica Femenina*, which has strong links with PAN (González Ruiz 2005: 71). Two of the most important internationalized organizations are *Legionarios de Cristo*, a congregation established in 1941 in Mexico, which now has a presence in 22 countries, and *Opus Dei*, established in Spain in 1928 and with a presence in America since 1949; both organizations have a significant presence in the field of education (González Ruiz and Infante 2004: 214). For its part, Human Life International opened an office in Mexico in 1999 (González Ruiz 2005: 50).

<sup>246</sup> Protestant groups, which have a significant role in the opposition to the advancement of reproductive rights in other countries, do not have a uniform position in Mexico, and their policies vary from issue to issue (González Ruiz 1998: 293).

<sup>247</sup> Echarri, author interview (2011).

<sup>248</sup> See González Ruiz (1998: 292). The daughters of Lorenzo Servitje (Bimbo Group) and the daughter of Carlos Slim have reportedly financed many conservative campaigns (Echarri, author interview, 2011).

<sup>249</sup> González Ruiz (2005: 71).

<sup>250</sup> In particular, the states of Chihuahua, Nuevo León, Guanajuato and Jalisco (Lamas 2003a: 97).

<sup>251</sup> González Ruiz (2005: 24). The reform carried out in Chihuahua in 1994 was promoted by PAN, which also tried to introduce a similar provision on the protection of life from conception in other states, such as Baja California and Nuevo León, but without success at that time (González Ruiz and Infante (2004: 215).

<sup>252</sup> Lamas (2003a: 98).

process of accusations of sexual abuse and pedophilia, was asked by the Vatican not to practice publicly as minister. Secondly, in 2005 an audit carried out by the Mexican authorities verified the accusations published by the press in 2004 about corruption and misuse of resources by Provida, which was led at that time by one of the main Catholic fundamentalist activists in Mexico, Jorge Serrano Limón.<sup>253</sup>

Beyond previous attempts by conservative actors to introduce a right-to-life clause into local constitutions, one of the aspects of the process of counter-mobilization on abortion in Mexico is that conservatives started developing a legal argumentation long after the women's movement started the process of legal mobilization for abortion rights. In fact, conservatives set out utilizing arguments based on human rights following the legalization of abortion in Mexico City, and in particular during the debate in the Supreme Court,<sup>254</sup> that is, the juridification of their discourse was a result of the dynamics between mobilization and counter-mobilization.

### **III. MEXICO CITY'S LEGAL REFORMS, THEIR PROCESS BEFORE THE SUPREME COURT, AND BACKLASH**

#### **III.1. Gradual decriminalization of abortion in Mexico City and legalization in 2007**

In 2000, Mexico City had the most restrictive regulation in the country (exceptions to criminalization included only cases of rape, risk to the woman's life and accidental abortion). Since that year, a series of local legislative reforms gradually expanded the conditions under which abortion was allowed. The fact that since 1997 Mexico City has been governed by the leftist Party of the Democratic Revolution (PRD) configured a favorable political opportunity, which contributes to explain the government's commitment to the reform process and the type of relationship it established with feminist organizations.

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<sup>253</sup> With the coming to power at national level of PAN, pregnancy help centers (CAMs) started receiving large amounts of funding from the federal government (González Ruiz 2005: 72). In 2004, the press revealed that funding provided for building twelve more CAMs had been used to pay for propaganda and personal items that were not in any way related to that purpose.

<sup>254</sup> Beltrán and Díaz de León, author interview (2011).

In the first place, on August 2000 Mexico City's Legislative Assembly passed a reform that had long been demanded by feminists,<sup>255</sup> including three additional exceptions to abortion criminalization, based on congenital fetal malformation, risk to the woman's health and non-consented artificial insemination. However, the new law did not establish the state's obligation to provide for abortion services. The reform was challenged through an action of unconstitutionality submitted by a legislative minority (17 legislators from PAN and the Green Ecologist Party) on grounds that it violated the fetus's right to life. This constitutionality challenge produced the first abortion case to be decided by the Supreme Court.<sup>256</sup> It was also one of the first cases involving a broad social conflict that the Court had to deal with, and on this occasion, the Court adopted new procedures for the participation of civil society, such as the acceptance of *amicus curiae* briefs, as well as a new approach towards the media.<sup>257</sup> This was a novel experience for civil society's organizations, and they counted on support from academics and lawyers in order to develop their arguments, which were based mostly on public health and comparative abortion law.<sup>258</sup> A majority constituted by 7 out of 11 justices, including the two female justices sitting on the Court, voted in favor of the constitutionality of the reform (the vote of 4 justices would have been enough to keep the law in place). The project of resolution had been drafted by Justice Olga Sánchez Cordero, who had been appointed as *ponente* in this case. The Court ruled that the Constitution protected the right to life from the point of conception, but it argued that the reform did not violate this right because abortion remained a crime, even though the state could decide not to apply sanctions under certain circumstances.<sup>259</sup> Feminist organizations disapproved the holding of the decision because it maintained the status of women as criminals.<sup>260</sup> Following a gradualist approach, the strategy of feminist organizations was to promote another reform.<sup>261</sup>

In January 2004, Mexico City's legislature approved a second reform, which did not change the existing indications but established that abortion in the cases permitted by the law was not to be considered a crime. The reform also incorporated a conscientious objection clause for

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<sup>255</sup> See Lamas and Bissell (2000) for an account of efforts by the feminist movement to effect reforms in Mexico City.

<sup>256</sup> On September 25, 2000, a legislative minority within Mexico City's Assembly brought an action of unconstitutionality against the reform.

<sup>257</sup> Morales, author interview (2011).

<sup>258</sup> GIRE (2008: 33).

<sup>259</sup> Action of Unconstitutionality 10/2000, January 30, 2002.

<sup>260</sup> Morales, author interview (2011).

<sup>261</sup> Morales, author interview (2011).

the first time in Mexico,<sup>262</sup> which had been demanded by conservative actors. Most importantly, the reform established that the local public health system should provide cost-free services for legal abortions. In this way, Mexico City became the jurisdiction with the most advanced abortion norms and procedures in the country.<sup>263</sup> Significantly, the reform was grounded for the first time on the idea that it was necessary to balance conflicting constitutional rights, and that fetal life was a constitutional value. This rationale had been advanced by the feminist movement, and in particular by GIRE, which had an important impact on the technical aspects of the reform.<sup>264</sup> In practical terms, feminists considered this change as an intermediate step: it removed the characterization of women as criminals and it established the state's obligation to provide the service.<sup>265</sup>

Finally, in April 2007, Mexico City's Legislative Assembly reformed the Criminal Code and the health law, and established both the legal termination of pregnancy on demand during the first twelve weeks and its provision free of charge by public hospitals within Mexico City's jurisdiction.<sup>266</sup> The health law also declared that sexual and reproductive health was a priority, and established that the government should implement comprehensive public policies to provide for information and orientation on reproductive health, as well as free contraceptive services. The reform implied a full recognition of women's autonomy, since it stipulates that women do not have to justify their decision before any authority. Regarding abortions carried out during the second and third trimester, the reform did not change the exceptions to criminalization that had been previously introduced.

Mexico City's government encouraged a wide public debate on this issue, and the Legislative Assembly organized discussion forums with diverse types of actors, ranging from conservative and progressive positions, as well as doctors and lawyers, who assisted them in developing the arguments and technical aspects of the reform proposal.<sup>267</sup> The NGOs that formed the National Alliance for the Right to Decide provided PRD with arguments and

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<sup>262</sup> Cortés (2006: 33).

<sup>263</sup> Cortés (2006: 33).

<sup>264</sup> Morales, author interview (2011).

<sup>265</sup> Morales, author interview (2011).

<sup>266</sup> "Decreto por el que se reforma el Código Penal para el Distrito Federal y se adiciona la Ley de Salud para el Distrito Federal", Mexico City's Legislative Assembly, published in the *Gaceta Oficial del Distrito Federal* on April 26 2007.

<sup>267</sup> Lamas (2009: 167).

technical support for this reform.<sup>268</sup> The reform was grounded on a discourse about the protection of fetal life, and the need for balancing constitutional goods, which was one of the most important arguments developed by GIRE. Members of GIRE's legal team explained that, throughout the reform process, they said that they wanted abortions to end, and that for that reason, they supported a comprehensive and balanced reform, which included preventive measures and abortion as a last resort, and added: "we tried to maintain ourselves in the middle ground".<sup>269</sup>

Different groups and sectors in society supported the reform. One of the main contributory factors to favorable public opinion was the publication, during the debate at the Assembly, of a manifesto (*desplegado*) formulated by the College of Bioethics.<sup>270</sup> This text argued, among other things, that the embryo at twelve weeks is not a biological individual or a person because at that stage the brain is at its initial stage of development, and the cerebral cortex, which is fundamental to the presence of sensations, has not yet developed.<sup>271</sup> The reaction of conservative groups was of vast proportions, and the Catholic hierarchy threatened any person promoting the bill, and in particular the deputies who voted for it, with summary excommunication.<sup>272</sup>

This reform is notable not only for its content and for the high level of participation of social actors, but also for its implementation., which has been successful in at least three main regards: a) its quick and effective enforcement, as well as in the quality of the services provided;<sup>273</sup> b) its consequences for women's agency and empowerment, as it has facilitated the appropriation of reproductive rights by many women who were not previously aware of

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<sup>268</sup> Sánchez Fuentes et al. (2008: 350).

<sup>269</sup> Beltrán and Díaz de León, author interview (2011).

<sup>270</sup> The *desplegado* was published in the press on April 17, 2007 (Lamas, author interview (2011)).

<sup>271</sup> The full text of *desplegados* published by the College of Bioethics can be found at: [http://colegiodebioetica.org.mx/desplegados/opinon\\_publica.htm](http://colegiodebioetica.org.mx/desplegados/opinon_publica.htm).

<sup>272</sup> Lamas and Bissell (2000 : 20).

<sup>273</sup> Among the main measures of success, Raffaela Schiavon (author interview, 2011) points out that public hospitals started practicing legal abortions the day after the reform was implemented; since then the rate of maternal death on legal abortion procedures was zero out of 65,000 cases (except for one case in which the procedure did not follow legal guidelines); and the type of procedures rapidly improved, shifting from the use of curettage to misoprostol and vacuum aspiration. Furthermore, studies have found a low rate of abortion repetition, which has been attributed to post-abortion guidance and contraception that is provided free of charge by the public health system (Mondragón et al. 2011). Finally, it was determined that users of public as well as private abortion services were highly satisfied (Van Dijk et al. 2011).

them<sup>274</sup> and has instilled in women the idea that their decision to have an abortion is legitimate;<sup>275</sup> c) its effects on public opinion regarding abortion rights.<sup>276</sup> In fact, the reform has been considered to have brought about a “paradigm change” in service provision, only comparable, within the American context, to the type of service offered in Canada.<sup>277</sup>

As for the reasons regarding implementation success, several factors have been highlighted. Firstly, the commitment of the government of Mexico City (especially the mayor and the secretary of health), and the collaboration between the secretary of health and NGOs have been fundamental for implementation.<sup>278</sup> In particular, IPAS-Mexico, one of the five organizations that form the National Alliance for the Right to Decide, has worked for several years to assist public health institutions to provide abortion services, in coordination with the secretary of health.<sup>279</sup> An important factor for the success in implementation of this reform was the previous work done by the government of Mexico City in the implementation of legal abortion services since the 2000 reform, and its close collaboration with NGOs working on reproductive health since then.<sup>280</sup> Finally, the breadth of public discussion on abortion during the reform process, and awareness-raising actions by health institutions significantly contributed to a successful implementation.<sup>281</sup>

### **III.2. The reform at the Supreme Court**

In May 2007, Mexico City’s reform was challenged before the Supreme Court through actions of unconstitutionality submitted by the heads of two federal institutions.<sup>282</sup> Between

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<sup>274</sup> Ortiz-Millán (2012).

<sup>275</sup> Amuchástegui, author interview (2011).

<sup>276</sup> Wilson et al. (2011).

<sup>277</sup> Schiavon, author interview (2011).

<sup>278</sup> Schiavon, author interview (2011).

<sup>279</sup> Schiavon, author interview (2011).

<sup>280</sup> During the four years prior to the reform, and up to July 2011, there were only 66 cases of legal abortions performed in Mexico City, which is an extremely low figure (Schiavon 2011). However, the work done prior to legalization allowed quick intervention in scale when the law changed Schiavon, author interview (2011).

<sup>281</sup> Schiavon, author interview (2011).

<sup>282</sup> In May 2007, the Federal Prosecutor’s Office (PGR, reporting to {okay?} the national Executive Power), and the President of the National Human Rights Commission (CNDH) presented actions of unconstitutionality against the reform before the Supreme Court. The presentation of the CNDH was done on a personal basis by its President, José Luis Soberanes, who is an Opus Dei member, without having consulted the Commission’s consultative council (Ortiz-Millán, author

the presentation of these claims and the judgment, an unprecedented public debate took place before the Supreme Court. At the end of March, 2008, the Court called upon various parties – both social and political - to participate in a debate that took place inside and outside the courtroom. The Court encouraged civil society's involvement with the discussion about the constitutionality of abortion through the creation of new institutional mechanisms for civic participation in its proceedings. It established a special online forum within its website for the publication of documents and comments on the abortion case;<sup>283</sup> it organized the receipt of e-mails from social actors; it received several *amicus curiae* briefs from national and international individuals and institutions;<sup>284</sup> and most fundamentally, it regulated the procedure for public hearings.<sup>285</sup> Finally, the Court's president, Justice Guillermo Ortiz Mayagoitia, for the first time in the Court's institutional history, convened six public hearings,<sup>286</sup> which were broadcast through the Judicial Channel.

In this way, the Court expanded the legal opportunity for access and participation by social actors.<sup>287</sup> These proceedings were innovative for the Mexican Supreme Court, for even though some of them had been already implemented in a few cases, in this instance the Court developed for the first time a thorough strategy of communication and promotion of the participation of social actors in this process. Indeed, this case has been considered as

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interview, 2011). When the Court admitted these claims, both actions were combined into a single case, given that they challenged the same norms. The main grounds of unconstitutionality alleged in these actions were the following: 1) the reform violated the right to life of embryo from conception; 2) the reform discriminated against men's right to procreation. The Court's decision, which details the arguments of both actions of unconstitutionality, is available at: <http://www.informa.scjn.gob.mx/sentencia.html>.

<sup>283</sup> This micro-site, which was active during the abortion debate at the Court, is now available as a virtual archive that contains important information about this issue: <http://www.informa.scjn.gob.mx/inicio.html>

<sup>284</sup> See GIRE (2009) for a list of organizations that presented *amicus* briefs.

<sup>285</sup> On March 10, 2008, the Court issued a General Agreement (No. 2/2008), in which it established that it would hold public hearings related to cases that had special juridical interest or national significance. The text of this Agreement is available at <http://www.informa.scjn.gob.mx/normatividad.html>.

<sup>286</sup> A total of six hearings on the abortion issue took place during this process before the Court, three of them for the presentation of arguments in favor of the reform, and three for counter-arguments against it. The complete text of many of these interventions can be found at: [http://www.informa.scjn.gob.mx/audiencias\\_publicas.html](http://www.informa.scjn.gob.mx/audiencias_publicas.html).

<sup>287</sup> This is particularly important in the Mexican context, given that the rules of access and legal standing at the Supreme Court are restrictive, since only public authorities are allowed to present claims in the two principal means of constitutional control used by the Court, that is, constitutional controversies and actions of unconstitutionality (constitutional Article 105).

paradigmatic in terms of the Court's ability to develop a novel approach to civil society.<sup>288</sup> In fact, the broadest process of public discussion on abortion in Mexico took place when the issue reached the Supreme Court, and partly due to the Court's decision to create new procedural rules for the participation of social actors in its decision-making process, in a context in which legal standing to present constitutional claims is narrow. In this way, the Court expanded the legal opportunity for access and participation by social actors. For nine months, an unprecedented public discussion on abortion took place, which was also the broadest public debate about a decision by the Mexican Supreme Court thus far. In addition to the debate at the Supreme Court, several parallel forums were organized from 2007 to publicly discuss the abortion issue - most significantly those convened at the National Autonomous University of Mexico (UNAM), and the one organized by the national newspaper *La Jornada*.<sup>289</sup>

As for the reasons for opening up Supreme Court procedures to non-judicial parties, participants in this process observed that the Court knew that the case of abortion was a highly controversial one, and that it was important for the Court's legitimacy to pursue a transparent process, without suspicions of undue pressures, and to convey the message that the Court listens to society.<sup>290</sup> The Court did not expand the legal opportunity to give a forum to feminists, or to promote the abortion issue in particular. Significantly, the opening of Supreme Court's proceedings to civil society in this case was carried out by a conservative justice, Ortiz Mayagoitia, who voted against the reform, and the new participatory mechanisms were used both by pro-reform and anti-reform actors.

During the Supreme Court process, the five NGOs that constitute the National Alliance for the Right to Decide coordinated the most visible network of social actors that advocated for the abortion reform. This network was formed by philosophers, scientists and lawyers, and included as its main actions the publication of press statements, the presentation of amicus curiae briefs and meetings with justices and their law clerks. This was the first time that

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<sup>288</sup> Lara, Roberto, Law clerk at the Supreme Court, Office of Justice Cossío, Author interview, September 12 (2011).

<sup>289</sup> The "Forum for the Decriminalization of Abortion in Mexico" brought together more than fifty specialists from different fields related to the abortion issue, and was coordinated by the journalist Javier Flores. The contributions were published in successive editions of the newspaper. Every month Flores prepared a compilation of the main arguments of these contributions and sent it to the Supreme Court (Figueroa, author interview, 2011). In 2009, a book was published (Flores 2009), which includes each participant's contribution.

<sup>290</sup> Cruz Parcero, author interview (2011).

academic actors had worked in tandem with feminist organizations, and with social organizations in general.<sup>291</sup> Notable was the degree of male participation, which was pushed by feminist organizations. Feminists maintained the importance of this involvement, toward the goal of the issue not being categorized only as a "woman's concern."<sup>292</sup> In this process, the main concern of progressive actors was to assert women's right to decide. But it was also an opportunity for liberal actors in general, including men, to assert the secularity of the Mexican State, which is cherished by Mexican intellectuals as well as by broad sectors of Mexican society. Those speaking against the reform during public hearings at the Supreme Court included PAN legislators, academics, Catholic bar associations, doctors and representatives from civil society's organizations.<sup>293</sup> The main claim in the presentations of conservative actors at public hearings before the Court was that there was scientific evidence of existence of a human being from the moment of fertilization.<sup>294</sup>

In August 2008, during four consecutive days of public deliberation, eight out of eleven justices of the Court spoke in favor of the reform and developed arguments grounded on women's rights. At the close of those sessions, the justices decided that they were ready to vote without waiting for a project of resolution to be written. The reform was upheld by eight justices (when only four votes would have been sufficient to keep it in place). At this stage, the discussion showed itself to have been informed by the previous public debate. It was clear for participants in that process that many justices had incorporated the discourse of the need to balance different constitutional values, which had been one of the main contributions of the feminist movement to the abortion debate over the past years, and had been widely asserted during public debate before the Court by feminists and pro-reform actors in general.<sup>295</sup> In fact,

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<sup>291</sup> Ortiz-Millán, author interview (2011).

<sup>292</sup> Cruz Parcero, author interview (2011).

<sup>293</sup> In fact, the numerical presence of conservatives at various instances before the Supreme Court (e.g., sending e-mails, visiting justices, applying to participate at public hearings, etc.) during this process was much stronger than that of those who supported the reform, because the Catholic church had a much stronger capacity for mobilization (Cruz Parcero, author interview 2011). For example, of 186 applications to participate at public hearings, 125 (67%) pertained to those who opposed the law (GIRE 2009: 31). However, the arguments developed by the conservative position did not show a high degree of variation and, in fact, many times they consisted in the same text signed or presented by different persons or organizations. The list of anti-reform participants at the first, third and fifth public hearings held at the Supreme Court, as well as the complete text of many of these contributions, can be found at: [http://www.informa.scjn.gob.mx/audiencias\\_publicas.html](http://www.informa.scjn.gob.mx/audiencias_publicas.html).

<sup>294</sup> See, for example, the presentation by Rodrigo Guerra, President of the NGO Red Familia, at the first public hearing, April 11, 2008, and the presentation by Jorge Adame Goddard, Professor, Institute of Legal Research, UNAM, at the first public hearing, April 11, 2008.

<sup>295</sup> Beltrán and Díaz de León (2011).

the true depth of the discussion among justices can be found at this stage of the Court's decisional process, where justices invoked seventeen fundamental rights to uphold the reform (among them, women's right to life, health, voluntary motherhood, equality, dignity and autonomy).

Participants in this process have indicated it is difficult to evaluate the impact of the debate, as well as of lobby activities, on each Justice.<sup>296</sup> A law clerk at the Supreme Court stated that no drastic changes in positions were made, but that external actors provided elements that allowed those who were in favor of the reform to ground their arguments on more solid footing.<sup>297</sup> Finally, it has been argued that the debate and, in general, the mobilization of different actors before the Court did have an influence on those justices who did not have a definite, initial position.<sup>298</sup>

### ***The Supreme Court's decision. Downplaying women's voices and rights***

Justice José Ramón Cossío, who was in favor of the reform, was appointed by the Court's president to write the final decision (*engrose*), which was published on February 26, 2009 (AI 146/2007).<sup>299</sup> Cossío decided not to follow the arguments of the other justices in the majority, and in his decision (which is the final one taken by the Court) there is no trace of the arguments based on women's fundamental rights which had been advanced by the justices in the majority during public deliberations.<sup>300</sup> The decision neither mentions the arguments developed at public hearings nor by *amicus curiae* briefs, although several law clerks in Justice Cossío's office had been heavily involved in receiving and processing communications submitted by social actors during the Court's decision-making process.<sup>301</sup>

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<sup>296</sup> In this regard, one of the participants in that process commented that it was not easy to evaluate to what extent having talked with each Justice influenced their decision, but he also pointed out that there was a certain concern among Justices about the need that this decision had support on the liberal side (Ortiz-Millán, author interview, 2011).

<sup>297</sup> Lara, author interview (2011).

<sup>298</sup> Cruz Parcero, author interview (2011). In the view of participants in this process, from the beginning it was clear that three justices were against the reform, four of them were in favor, and the positions of the other four were not known (Ortiz-Millán, author interview, 2011).

<sup>299</sup> Action of Unconstitutionality 146/2007 and *acumulada* 147/2007, decided on August 28, 2008.

<sup>300</sup> Morales, author interview (2011).

<sup>301</sup> In fact, some of his law clerks who were experienced in writing *engroses* had also had held many meetings with people for and against the reform who visited Cossío's office to present their arguments, and had also received and classified the many e-mails that arrived at this office. Moreover, among those clerks was Francisca Pou Jiménez, who had a prominent academic and professional

In the final decision, the main legal question was framed in terms of the obligation, or not, of the State “to criminalize a specific behavior, and not if the criminalization of a particular behavior affects constitutional rights”.<sup>302</sup> In this way, the central rationale of the decision could elude the question about women’s fundamental rights vis-à-vis the abortion issue. Instead, the reform was upheld on grounds of the freedom of configuration of the legislature to criminalize or not specific behaviors in order to safeguard constitutionally protected goods.

The decision is structured into three sections. The first section deals with the argument about the competence of the Legislative Assembly to carry out the reform. Specifically, the decision examined the competence of the Assembly to define the term "pregnancy" and if in doing so it was not transgressing the General Health Law. In this regard, it ruled that, as the general (federal) law did not contain a definition of pregnancy, the local Assembly had autonomy to define it.<sup>303</sup> The third section deals with questions of legal certainty and exact application of criminal law. In this regard, the Court ruled that the new articles were clear and that the stipulated punishment was proportionate.

The second section is the most important one of the decision, because it addresses the plaintiffs' claims about the infringement of rights by the new norms. It presents the decision's core argument, which is based on two main lines of argumentation: 1) that the right to life does not have constitutional protection; and 2) that federative entities are not obliged to protect fundamental rights through the penalization of certain types of conducts. With regard to the first argument, the decision extensively asserts that there is no positive recognition of the right to life in itself in the Mexican Constitution, but only constitutional provisions that establish “in a positive way State obligations to promote and enforce rights related to life,

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interest in the field of gender and law. However, Justice Cossío commissioned the drafting of the bulk of the decision to one of the male clerks at his office, who had little experience in writing *engrosses* and, most importantly, who had neither been involved in the process, nor had any background in gender issues.

<sup>302</sup> AI 146/2007, p. 177. The decision remarks that, in this sense, the legal question in this case is inverse to that in *Roe v. Wade*, as well as other abortion cases decided, for example, by the high courts of Colombia, Canada and Spain, in that while those courts had to assess the constitutionality of laws that criminalized abortion, the case in question before the Mexican Supreme Court had to evaluate a law that decriminalized it (AI 146/2007, p. 176).

<sup>303</sup> The decision concluded that the federal law did not establish a definition of pregnancy that was of general application (AI 146/2007, p. 151), and that the local legislature had the freedom to qualify and configure the terms of legislation in its area of competence, including the penal law (AI 146/2007, p. 152).

such as [...] provisions related to health, the environment, shelter, protection of children or food security".<sup>304</sup> It also argues that fundamental rights are not absolute rights under any circumstance, and so, even if in the hypothetical case that the right to life was explicitly protected, it would still have to be balanced with other rights. It examines several international human rights treaties ratified by Mexico – among them, the Convention on the Rights of the Child; Covenant on Civil and Political Rights and the American Convention of Human Rights - and concludes that they do not specify the right to life as an absolute right. In particular, it argues that the American Convention of Human Rights, which is the only treaty that includes a provision on the right to life from conception (Article 4), does not establish this right as absolute. It also observes that, even in the case that the Convention had established that right as absolute, it would not impose an obligation on the Mexican State, because Mexico had made an interpretative declaration to Article 4 of the Convention, in order to explicitly state that this provision did not oblige the Mexican State to pass legislation that protected life from conception.

With regard to the second argument, the decision affirmed that "the mere existence of a right does not entail the obligation to criminalize a behavior that affects it",<sup>305</sup> and that there is no constitutional or human rights treaty provision that mandates the criminalization of specific conduct.<sup>306</sup> On these grounds, it argued that "it is the democratic legislator that has competence to evaluate the elements to regulate, or deregulate, a specific conduct".<sup>307</sup> With regard to the exercise of legislative discretion to decriminalize a conduct in this particular case, the decision argued that it was correctly done, because the reform was grounded on compelling reasons: to end a public health problem and to enforce women's rights. In fact, this is the only part of the Court's core argument that mentions women's rights, and it does so in passing, without any articulation of the content of those rights in the abortion controversy. This is also the only opportunity in which the Court mentions the balancing of conflicting interests, but it mentions it as an operation done by the legislature. In this way, the crucial aspect of women's rights and the need to balance conflicting interests in the abortion issue, which were central to the arguments of most other justices in the majority in order to uphold

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<sup>304</sup> AI 146/2007, p. 174.

<sup>305</sup> AI 146/2007, p. 176.

<sup>306</sup> The decision mentions treaties that oblige the Mexican State to criminalize conducts – among them, the Conventions against Genocide and Forced Disappearance, as well as the American Convention on violence against women (Belem do Pará)-, but it argues that no international treaty obligates Mexico to criminalize abortion.

<sup>307</sup> AI 146/2007, p. 180.

the reform, as well as to the argumentation developed by social actors, appear in the *engrose* only in reference to what the legislature had done, and as proof that the legislature had dealt with the issue in a thoughtful manner.

Finally, the section that deals with the objection to the reform based on men's right to procreation and equality is the only part of the *engrose* that develops substantive arguments regarding the conflicting rights in question, as well as a reasoning based on gender equality.<sup>308</sup> In this regard, it argued that the right to become a father or mother is exercised individually, not collectively, and that the capacity granted to the woman to make the decision by herself was not discriminatory because it recognized the fact that an unwanted pregnancy had permanent and deep consequences that affected the lifecourse of women in a distinctive way. It also argued that the consequences for women and men are different also because of the difficulties and limitations of the judicial system to enforce obligations on masculine participants to share the burdens inherent to the development of an unwanted pregnancy. Regarding the rights of underage girls, the decision said there was no constitutional obligation for state legislatures to establish a special regime in those cases, and that the provisions on informed consent included in the reform were sufficiently comprehensive as to cover the needs of young girls.

The two main arguments developed by the *engrose* to uphold the reform, that is, that the right to life was not included in the text of the Constitution, and that federative units have the liberty of deciding whether or not to criminalize certain types of conduct, set a favorable precedent for the promotion of the introduction of the right to life from conception into the texts of local constitutions, which had already started to develop in several states. The *engrose* indicates, on the one hand, that states are free to legislate the criminalization of abortion, and on the other hand, that they would be better off incorporating the right to life into their constitutions if they wish to prevent reforms that liberalize abortion. Moreover, the argument that the reform is constitutional because the right to life is not constitutionally protected – instead of balancing the protection of life with the rights of women –, has pernicious implications in many regards, not the least because it militates against the construction of the right to abortion as not opposed to the right to life, and the idea that gestational life has

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<sup>308</sup> Notably, this section was the only part of the decision written by law clerk Francisca Pou Jiménez.

constitutional protection, even if it is not absolute. This was the *engrose*'s most resisted argument among the justices in the majority, which led them to write concurrent opinions.

In fact, had the Court's final decision validated Mexico City's reform on grounds that women's rights and freedoms require the decriminalization of abortion, it would have constitutionalized the right to abortion at the demand of the woman. In this way the Court would have upheld Mexico City's reform and it would have also established a right to abortion for all Mexican women, and an obligation to all federated states to reform their abortion laws in this sense, which is something that the Court was not called to do in this case, and which it most certainly would not have been willing to do. However, the decision could have still upheld the reform on grounds of freedom of configuration of the legislature, but at the same time it could have developed an argument based on the recognition of women's rights and on balancing of the two main constitutional goods involved in the controversy, instead of asserting that the right to life was not constitutionally protected.

One consequence of the *engrose* formulation is that it did not gather support from other justices who were in favor of the outcome, for they nor did not agree with the holding of the decision. This can be considered a negative result from the perspective of the need to have consensus to support a Court's decision on such a controversial issue as abortion. In fact, the holding of the decision was highly disputed by the other seven justices comprising the majority that had agreed on the result of the case and, as a consequence, there were seven concurrent votes. Justice Genaro Góngora Pimentel was one of the justices who most clearly expressed a gendered defense of abortion rights during the previous debate in the Court.<sup>309</sup> In his voting, he stated that the legalization of abortion should be analyzed from the perspective of the human rights of women and from a gendered perspective (pp. 3, 4).<sup>310</sup> Justice Olga Sánchez Cordero expressed in her concurrent vote that the constitutional examination should start by considering that "life is a right and not a constitutionally protected good" (p. 3) and that the analysis should consist in balancing "the rights of the mother" with health and life, with "the right to life of the *nasciturus*" (p. 6). Justice Juan Silva Meza began by stating that the *engrose* did not thoroughly reflect the arguments that had been presented during the deliberation on the case, and that it had included other arguments that had not been debated,

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<sup>309</sup> Justice Góngora Pimentel wrote a book in which he defended the rights of women to have an abortion (Góngora Pimentel 2009).

<sup>310</sup> The concurrent, as well as the minority votes of each justice in this case are available at: <http://www.informa.scjn.gob.mx/sentencia.html>.

“arriving at conclusions that differ from those of the majority” (p. 1). He pointed out that, beyond divergences in the arguments of the justices within the majority, there was consensus in that: a) the Constitution protects life, but this protection was not absolute (about which only Justices Margarita Luna Ramos and José Ramón Cossío did not agree); and b) the rights of women are fundamental in this decision (p. 2). In this reasoning, he argued that the reform protected women’s rights to life, health, equality, non-discrimination and sexual and reproductive freedom, and that the protection of the fetus during the first trimester of pregnancy did not take priority over those rights.

Thus, the case shows how institutional rules, such as the rules for deliberation and opinion formation and writing at the Supreme Court, can affect, for example, the rationale of the final decision in a judicial proceeding and, more specifically, they can affect the capacity of social movements to exert influence on it. This result was possible, among other reasons, because the opinions of the eight justices who were in this case in the majority had to be written up into a document written by a single justice, and this document would not be subject to further voting and may not reflect the arguments developed during the justices' deliberation, as happened in this case. Personal motivations of justices may also help in understanding judicial behavior, and ultimately the ways in which the claims of different actors are (or are not) reflected in the Court’s final decision. In this regard, the alleged interest of Justice Cossío at that time to become Supreme Court president may account for his intention to make a relatively less-controversial decision, without committing to a substantive position that would have constitutionalized women’s rights in the case of abortion.<sup>311</sup>

### **III. 3. Backlash at the states’ level**

In the aftermath of Mexico City’s reform and its endorsement by the Supreme Court, the legislatures of sixteen Mexican states set out to reform the respective local constitutions in order to incorporate the right to life from conception.<sup>312</sup> The reformed constitutions, together with the constitution of the state of Chihuahua, reformed in 1994, now share a similar provision that declares the protection of life from the moment of fertilization, and most of

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<sup>311</sup> Interviewees for this study commented that Justice Cossío had aspirations of becoming president of the Supreme Court, which explains his reluctance to draft a substantive decision on such a controversial issue. Eventually, Justice Juan Silva Meza was appointed as Court president from January 2011 to December 2014.

<sup>312</sup> Detailed information about these reforms is available at: [http://www.gire.org.mx/publica2/ReformasAbortoConstitucion\\_Marzo14\\_2011.pdf](http://www.gire.org.mx/publica2/ReformasAbortoConstitucion_Marzo14_2011.pdf).

them extend the full rights of a born person to the embryo and specify that the protection of life is intended until natural death. By contrast with the process in Mexico City, these reforms were passed without public or legislative debate.<sup>313</sup>

This does not mean that the Supreme Court as an institution triggered backlash. The framing of the engrose, with emphasis on the absence of a constitutional right to life as well as on legislative discretion may have strengthened the arguments of the conservative movement. But backlash was not caused by the Court as an institutional venue. The Court's decision gave the legalization of abortion a national reach, by declaring that local legislatures can decriminalize abortion, which implied an imminent danger for conservative forces. It has been observed that the fact that the issue of abortion reached the Supreme Court, gave the issue a national platform that it would not have had, had it remained only as a legislative decision.<sup>314</sup> Along these lines, it has been pointed out that a debate that had been limited to Mexico City, and which many sectors of society had been unaware of - mostly because there was a favorable majority at the Legislative Assembly, and there was no need for a massive mobilization - became a national debate.<sup>315</sup> But there had already been several attempts to reform the states' constitutions, and the conservative movement was already well established in Mexico. Backlash in this case can be explained by the fact that political opportunity at the states' level was favorable for conservative claims, where the influence of the Church is much stronger than in Mexico City or at national level, and PRI had electoral incentives to support reforms. The counter-movement was able to influence legal change in the states, not by promoting an open public discussion, but through their influence as a de-facto power over the political system at the local level. That feminist organizations in the states were not as strongly represented as in Mexico City, and there was not at that time a consolidated national alliance or strategy to resist backlash at the states' level, also increased the likelihood of reform.<sup>316</sup>

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<sup>313</sup> Lamas, author interview (2011).

<sup>314</sup> Ortiz-Millán, author interview (2011).

<sup>315</sup> Cruz Parcero, author interview (2011).

<sup>316</sup> Lamas, author interview (2011); Ortiz-Millán, author interview (2011).

### *The states reforms at the Supreme Court*

In 2009, the reforms that had introduced the right to life from conception in two Mexican states were challenged through actions of unconstitutionality before the Supreme Court.<sup>317</sup> The draft resolution, written by Justice José F. Franco, proposed to declare both reforms unconstitutional.<sup>318</sup> For the first time, a project of resolution by the Supreme Court about the constitutionality of abortion was based on women's rights. The project balanced the constitutional protection of the unborn, which was not considered to be absolute, with the rights of women. It argued that the reforms, by granting the embryo an absolute right to life, violated women's rights to dignity, reproductive freedom and health. It also remarked that the constituent power of the states has competence to increase the spectrum of rights' protection, but not to establish new rights holders.<sup>319</sup>

A remarkable aspect of this draft resolution is that it extensively developed the concept of dignity in relation to the reproductive rights of women. It stated that the constitutional principle of dignity emanates from Constitutional Art. 1, as well as from a systematic interpretation of the Constitution, and that it is a mandatory requirement to evaluate the constitutionality of the challenged norms.<sup>320</sup> Then it develops the principle of dignity as liberty and as equality, and explains how several provisions in the Constitution, as well as in CEDAW and the Convention of Belem do Pará, grant women a series of rights aimed at

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<sup>317</sup> On January 26, 2009, the president of the Human Rights Commission of Baja California presented an action of unconstitutionality (AI 11/2009) against the constitutional reform carried out in that state, and on October 5, 2009, a legislative minority of San Luis Potosí presented an action of unconstitutionality (AI 62/2009) against the reform in that state. This was the only opportunity in which the local ombudsman challenged the constitutional reforms that curtailed women's reproductive rights (Maier 2010: 229). It has been observed that human rights commissions are not autonomous, and that at the point that reforms were passed at states' level, this was part of conservatives' calculation regarding the prospects of their strategy (Beltrán and Díaz de León, author interview (2011).

<sup>318</sup> The draft resolutions are available at:

[http://www.scjn.gob.mx/pleno/Documents/proyectos\\_resolucion/AI-62-09-SLP.pdf](http://www.scjn.gob.mx/pleno/Documents/proyectos_resolucion/AI-62-09-SLP.pdf) and  
[http://www.scjn.gob.mx/PLENO/Documents/proyectos\\_resolucion/AI-11-09-BajaCalifornia.pdf](http://www.scjn.gob.mx/PLENO/Documents/proyectos_resolucion/AI-11-09-BajaCalifornia.pdf), respectively.

<sup>319</sup> In this regard, the projects remarked that the unborn is protected by the Constitution, but it cannot be considered as a legal person and a holder of fundamental rights. The drafts also denied the competence to state legislatures to introduce the right to life from conception on the grounds that "federalism must be congruent with the principle of constitutional supremacy" (AI 11/2009, p. 60).

<sup>320</sup> AI 11/2009, p. 64.

maintaining their dignity in those two respects, and in relation specifically to their reproductive rights.<sup>321</sup>

In September 2011, seven out of eleven justices voted against the constitutionality of the reforms, and developed an argumentation that linked the right to abortion to women's human rights and dignity. The extent and depth of this move was novel. However, this majority fell short by one vote of rejecting the reforms, and the decision of four justices to leave them standing prevailed. Justices who supported the reforms did so on grounds of federalism, that is, they argued that state legislatures have freedom to define when life begins and what type of legal protection that life should have (the so-called states' freedom of configuration), rather than based on substantive considerations.<sup>322</sup> In fact, institutional rules governing actions of unconstitutionality in Mexico conform to a legal opportunity that is favorable for legislative deference, for they require the vote of eight out of eleven justices to overturn a law sanctioned by federal or state legislatures. Thus, in the case of reforms carried out at the states' level, these provisions favor a strong form of federalism, for any reform approved by state legislatures would require a qualified majority of eight justices to be overturned.

## CONCLUSION

Initially, Mexican feminists thought that simply voicing their claims would be enough to accomplish their goals. Later on, they developed a strategic defense of reproductive rights that effectively appealed to democratic aspirations of equal citizenship in the context of the country's democratization process, as well as to the shared tradition of the secular state in Mexico. Most crucially, in this process, they have developed an original stance that has put into question the conservative argument about the development of prenatal life, while at the same time recognizing it as a value that deserves protection. This case confirms Siegel's claim that framing moderation takes place often when rights claims is the chosen strategy. This is particularly notable given that in other contexts feminism and the progressive camp in general have been reluctant to address the substantive moral question posed by conservatives about the beginning of life and the personhood of the *nasciturus*. In this way, Mexican feminists have altered the public discourse and achieved a radical aim in the Latin American

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<sup>321</sup> AI 11/2009, p. 64-83.

<sup>322</sup> Some of them did argue for an absolute right to life from conception.

context: the legalization of abortion at the demand of the woman, and the official recognition of abortion as a woman's right. The Mexican case also shows how conservatives have also set out to develop a process of juridification of their claims, but that they have not changed their core tenet that the fertilized ovum is a person and that the state owes it absolute protection.

The notable process of framing transformation carried out by feminists was supported by the development of an organizational infrastructure that included the creation of a strong single-issue organization, as well as of other organizations and alliances that sustained and furthered a new strategy and a new discourse for the defense of abortion rights. This development has been related to feminists' decision to pursue a legal strategy, which modified their cultural struggle for abortion rights. In effect, the innovative framing advanced by Mexican feminists has been linked to their adoption of a legal claim based on balancing of constitutional values. Nonetheless, one of the main problems of the otherwise successful feminist mobilization in Mexico was the concentration of feminist networks in a delimited geographical zone, and their lack of presence throughout the national territory at the time of a conservative backlash that took hold at the local level in Mexican states.

With regard to the political opportunities, the situating of abortion policy at the sub-national level in Mexico was favorable both for the feminist movement in Mexico City, where there was a progressive government, and for the counter-movement at the states' level, as it allowed Catholic conservative forces to influence local elites. Most surely, it would have been much harder, both for reformers and counter-reformers to achieve desired changes at the national level, where inter- and intra-party disputes take a much harder line, and political majorities for the controversial abortion issue would probably be much more difficult to achieve. On the one hand, this case confirms that divisions among elites may increase the possibilities of social movements to influence policy and legal change. For example, after contested elections, and generally in the aftermath of conflictive electoral politics, some elite actors may find incentives to attend to social movements' demands in order to increase their own political leverage. On the other hand, short-term electoral incentives and politicians' search for legitimacy in other sources may be important factors for the prospects of conservative mobilization and counter-reform.

With regard to legal opportunity, one of the most significant factors has been the receptivity of the Supreme Court, which has expanded the legal opportunity structure for the participation

of social actors in its proceedings, and whose doctrine regarding the right to abortion has evolved during the last decade to include women's rights at the center of its argumentation. In fact, this case shows how institutional rules that regulate Supreme Court procedures influence the way public debate was processed and how different voices in that debate were reflected in the final decisions of the Court.

## **CHAPTER III**

### **SOCIAL MOVEMENTS AND ABORTION LAW REFORM IN BRAZIL**

#### **INTRODUCTION**

The Brazilian feminist movement that emerged during the democratic transition has been acknowledged as one of the most diverse and influential in Latin America.<sup>323</sup> It is a movement with widespread territorial insertion throughout the country, comprised of a vast grass-roots mobilization as well as highly professionalized organizations. It has developed original ways of interacting with the state and has penetrated governmental institutions and programs, particularly in the area of women's health. The legalization of abortion has been a central demand of the movement, together with an end of violence against women. The ability of the feminist movement in Brazil to influence the political process led to the inclusion of a constitutional right to reproductive self-determination, as well as to the enactment of a comprehensive women's health program, whose principles were ahead of international developments in this field. The feminist advocacy strategy for abortion law reform has concentrated on legislation, and since the 1980s several projects for abortion liberalization have been presented to the Federal Congress. However, Brazil is among the Latin American countries with the most restrictive abortion legislation, and the 1940 criminal abortion law, which only provides for exceptions in the cases of rape and risk to the woman's life, has not been modified by Congress.

The most successful advocacy action for abortion law reform has been carried out before the Supremo Tribunal Federal (STF) by the Institute of Bioethics, Human Rights, and Gender (ANIS), a feminist NGO specialized in research and advocacy in the field of bioethics. Since 2004, ANIS led a strategic litigation process before the STF, which in April 2012 upheld the claim and expanded the indications and legalized abortion in cases of anencephaly. The Brazilian Tribunal became in this way the second constitutional court in Latin America, after the Colombian Constitutional Court did so in 2006, to expand the limits of the abortion law.

This chapter analyzes the development of the field in which the struggle for abortion law reform has taken place in Brazil, with emphasis in the role of feminist organizations and

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<sup>323</sup> Alvarez (1990: 3); Baldez (2003: 254); Montaño (2003: 9).

advocacy actions.<sup>324</sup> The first section presents an overview of contextual and institutional factors that configured the political and legal opportunity for abortion law reform in Brazil. The second section analyses the development of feminist organizations and strategies for the defense of reproductive rights, and abortion in particular, and it also presents an overview of conservative mobilization in this field. The third section analyses the 2012 decision of the Supremo Tribunal Federal, with an emphasis on the role of social actors in this process.

## I. POLITICAL AND LEGAL OPPORTUNITIES

### I.1. Historical, political and policy background

#### I.1.1 State–Church relationship in Brazil.

Brazil, with 193 million inhabitants, is the country with the largest Roman Catholic population in the world. During the past decades, however, there has been a significant drop in the country's Catholic affiliation and a growth of religious pluralism, with a notable advance of evangelical churches.<sup>325</sup> Nowadays, the Brazilian constitutional framework has important provisions to grant secularism. The Constitution of 1988 established religious freedom as a fundamental right (Art. 5, inc. VI) and it included the principle of the laicity of the State, prohibiting the different levels of government to finance religious cults or churches and to maintain relationships of dependence or alliance with them (Art. 19, inc. I). However, religious education is allowed at public schools, religious symbols are present in almost all official state offices (including the Plenary Room of the Supremo Tribunal Federal), the Catholic Church runs social projects, particularly for children, with support of public funding; and bishops and pastors can occupy official positions, for example as heads of a federal ministry or legislators. In fact, the presence of religious legislators who devote their mandates to promote the particular interests and agendas of their moral and religious communities is

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<sup>324</sup> This chapter makes use of the term *advocacy* as employed by Brazilian feminist organizations, which have adopted it without translation from English, as a main term to allude to their strategies and actions. The meaning of this term is conventional, but Brazilian feminists have explicitly defined it as the participation in a relational political process, subject to changes in its direction according to new opportunities and junctures (Pitanguy 2011: 22).

<sup>325</sup> There are more than 1,200 different churches in Brazil, and in the past three decades, affiliation with Evangelical ones went from 6.6% to 22.2% of the population, according to the 2010 census (*Brazilian Institute of Geography and Statistics*. Information available at: [http://www.ibge.gov.br/english/presidencia/noticias/noticia\\_visualiza.php?id\\_noticia=2170&id\\_pagina=1](http://www.ibge.gov.br/english/presidencia/noticias/noticia_visualiza.php?id_noticia=2170&id_pagina=1)).

accepted without much controversy.<sup>326</sup> Until very recently, the separation between the spheres of the State and churches was not an issue for most sectors of the population.<sup>327</sup>

The Catholic Church has always been an influential actor in Brazilian politics. Until the second half of the 1960s, it was closely linked to the state and to conservative sectors in society.<sup>328</sup> However, during the dictatorship (1964-1985), the Brazilian Catholic Church was transformed into the most progressive Catholic church in the world.<sup>329</sup> In the aftermath of the Vatican Council the Brazilian Catholic Church was quite influential in linking faith with social justice, it was a precursor of Liberation Theology, and it influenced other national churches in the region, by serving as a model for progressive ecclesiastical change.<sup>330</sup> The distinctive feature of the Brazilian Church, in contrast with other Latin American cases, is that by the beginning of the 1970s, in the midst of the most repressive period, a progressive strand became the mainstream position within the institution. In a context of repression of neighbourhood associations, unions and all kind of political mobilization, the Brazilian Catholic Church became the strongest opposition actor, and it was pivotal in fostering the resistance role against the dictatorship played by social movements and opposition forces, providing them with protection, legitimacy and space for discussion and organization.<sup>331</sup>

However, the emphasis placed by the progressive Catholic Church on human rights and against social injustice did not include questioning gender injustices and asserting the rights of women.<sup>332</sup> The Church actively promoted women's participation at community organizations, but usually under the form of "mother's clubs", which reinforced the sexual division of labor.<sup>333</sup> In fact, the People's Church and Liberation Theology have ignored, and continue to ignore, the social injustice that characterizes the conditions of reproductive health for women of the less-favoured sectors in society.<sup>334</sup> A few important liberation theologians have defended women's reproductive rights and abortion in particular, from a Catholic point

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<sup>326</sup> Diniz and Vélez (2008: 2-3).

<sup>327</sup> Rosado and Citeli (2009: 25); Soares, Regina, Member of Catholics for Choice Brazil. Author interview, São Paulo, August 27 (2012).

<sup>328</sup> See Mainwaring (1986: xii); Rosado and Soares (2002: 18).

<sup>329</sup> Mainwaring (1986: 145).

<sup>330</sup> Mainwaring (1986: 179).

<sup>331</sup> See Della Cava (1989: 152); Mainwaring (1986: 149).

<sup>332</sup> Gebara (1995: 131).

<sup>333</sup> Alvarez (1989: 211).

<sup>334</sup> Gebara (1995: 133).

of view, but they have done so on an individual basis.<sup>335</sup> The Church as an institution, including liberation theologians, who on this point rehearse official Church statements, has reproduced the discourse of the Vatican regarding sexual and reproductive rights, and against women's rights.<sup>336</sup>

After 1982, the popular Church in Brazil experienced a decline, and a partial conservative restoration was witnessed due to the ascendancy of conservative forces in the Vatican, particularly during the Papacy of John Paul II.<sup>337</sup> In the 1980s, too, evangelical and in particular Neo-Pentecostal churches started making extraordinary advances in Brazil, and in a few years some of the most important of them expanded to become transnational.<sup>338</sup> These churches defend the precept of an absolute right to life from conception, and have strongly lobbied for its introduction in Brazilian legislation.<sup>339</sup> The Brazilian Universal Church of the Kingdom of God (*Igreja Universal do Reino de Deus*), founded in 1977, became the most influential Neo-Pentecostal Church in Brazil, successfully using the electronic media and openly intervening in the political field, through the election of their own representatives in legislative and executive positions and by campaigning among its followers in favour of certain candidates while discrediting others.<sup>340</sup>

### **I.1.2. Population and health policy**

The family planning model developed in Brazil in the 1980s at the instance of the women's movement was a vanguard in Latin America and the world. In fact, Brazilian policies on reproductive health antecedced by a full decade the Program of Action of the UN Population Conference in Cairo, and the Brazilian advocacy experience influenced the paradigm shift from population control to reproductive rights that took place in Cairo.<sup>341</sup> The feminist movement and the health reform movement (*movimento sanitarista*) were some of the most

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<sup>335</sup> In particular, feminist theologian Ivone Gebara, and also Leonardo Boff (the best known of Brazilian liberation theologians, who renounced the priesthood in 1992, after silencing measures and other types of censorship by the Vatican). See Gebara (1995: 130-135); Boff (2006: 18).

<sup>336</sup> Rosado and Soares (2002: 17-18). For example, renowned liberation theologians joined other bishops in signing a letter that rejected the ratification of the CEDAW's Protocol by the Brazilian Congress in 2002 (Corrêa 2004: 7-8).

<sup>337</sup> Mainwaring (1986: 242-249); Cleary (1997: 261); Della Cava (1989: 153-160).

<sup>338</sup> See, generally, Mariano (2004); Oro (2004).

<sup>339</sup> Baltar (1996: 389-390).

<sup>340</sup> Lehmann (2003: 135); Mariano (2004: 135, n. 10).

<sup>341</sup> Corrêa et al. (1998: 3); Lago (2004: 58).

influential social movements in terms of their penetration into the State and their influence in public policy during the 1980s, in the aftermath of the democratic transition.<sup>342</sup> Their influence on public policy led to the passage of constitutional provisions granting universal access to health through a Unified Health System (*Sistema Único de Saúde - SUS*), which was established in 1990. In this way, Brazil became one of the few public health systems in Latin America to include universal coverage as well as embedded mechanisms of social participation and accountability as its main pillars.<sup>343</sup> Demands by the women's movement for a comprehensive state policy on women's health had started at the end of the 1970s, and due to this pressure in the 1980s women's health became the main public health issue in the country. As a result, a comprehensive women's health program was formally established, reproductive freedom was granted by the Constitution, and relatively generous funding for this area of public health was assigned.<sup>344</sup>

Brazil never had an explicit demographic policy.<sup>345</sup> Since the 1970s, in a context of international pressure to stop population growth in the so-called developing world, the military regime held a pro-natalist position and resisted the implementation of population-control policies,<sup>346</sup> but it adopted what has been termed as a laissez-faire approach, allowing for the development of private contraception services and research.<sup>347</sup> Private family planning initiatives as well as foreign institutions with an interest in this field have been denounced for abuses against the rights of women during the 1970s and 1980s, in the framework of an uncontrolled contraception and sterilization market in the country.<sup>348</sup>

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<sup>342</sup> The health reform movement was formed in the mid-1970s by public health specialists and leftist doctors, with support of popular organizations. The Brazilian Center for Health Studies (CEBES), created in 1976, was fundamental for the articulation of this movement, and it presented the first proposal of a unified health system in 1979 (Lago 2004: 46-47).

<sup>343</sup> Lago (2004: 68).

<sup>344</sup> See, generally, Corrêa et al. (1998); Lago (2004: 46-49); Mello (2002). The Brazilian case is unique with respect to the funding of reproductive health activities, which is relatively high in comparison with other developing countries (Corrêa et al. 1998: 4).

<sup>345</sup> Vieira Villela (2001: 88).

<sup>346</sup> At the time of the 1974 World Population Conference in Bucharest, the military government aimed at promoting population growth, in the context of the so-called Brazilian economic miracle, and it was also subject to pressure by the Catholic Church (Mello 2002: 137).

<sup>347</sup> Non-governmental family planning organizations started working in Brazil in 1960, offering contraception and sterilization procedures, when no demographic policy existed (Vieira Villela 2001: 88).

<sup>348</sup> See Corrêa (1995: 38).

From 1982 to 1983, during the last years of the military regime, there was an exceptional juncture at which the Ministry of Health gained transitory leverage to intervene in the definition of population policies.<sup>349</sup> The Ministry, influenced by the feminist and the health reform movements, created an exemplary Program for Integrated Women's Health (PAISM), which included prominently access to information and non-cohesive contraceptive methods, and placed family planning activities under the public health system.<sup>350</sup> The formulation of this program started a new, collaborative relationship between feminists and state actors, specifically within the Ministry of Health, and the team in charge of this program was coordinated by feminist health professionals who were receptive to the women's movement demands and resisted efforts by some sectors of the government that were against this development.<sup>351</sup> Mobilization around the formulation and implementation of PAISM contributed to forge the influential reproductive rights discourse of the Brazilian women's movement at the constituent process in the 1980s as well as at the Conferences of Cairo and Beijing in the 1990s.<sup>352</sup> The women's movement was also a key actor in the definition of the 1997 Family Planning Law (Law No. 9263/96), which operationalized Constitutional Article 226 on reproductive freedom and access to reproductive health.<sup>353</sup>

While PAISM was never fully implemented, it has achieved partial results, and it remained as a separate program, not included in the universal health system established in 1990.<sup>354</sup> During President Lula da Silva's first term, the approach to integral women's health was revitalized.<sup>355</sup> In 2004, the government launched a National Pact for the Reduction of Maternal and Neonatal Mortality, which was a result of an agreement between the public administration, health professionals and women's organizations, and had as one of its aims the consideration of legal abortion and the consequences of unsafe abortions.<sup>356</sup> In 2007, it

<sup>349</sup> As a consequence of the debt crisis in 1982-83, and the resulting negotiations with international financial institutions, particularly the IMF, the military regime changed its approach to population control and made it a priority in its political agenda (Alvarez 1989: 217).

<sup>350</sup> See Alvarez (1989: 222); Barroso et al. (1991: 76); Corrêa (1992: 4).

<sup>351</sup> Alvarez points out that, surprisingly, the Ministry of Health was an effective point of access for the feminist movement to the authoritarian state organization (1989: 222).

<sup>352</sup> See Corrêa et al. (1998: 3); Ventura (2009: 32).

<sup>353</sup> Pitanguy (2011: 43); Ventura (2011: 319-320); Corrêa and McIntyre (2003: 17).

<sup>354</sup> Corrêa et al. (1998: 10).

<sup>355</sup> Interview with Telia Negrão, Executive-Secretary of *Redesaúde*, "Governo Dilma ainda sem rumo na saúde das mulheres", September 26, 2011. Available at: <http://www.viomundo.com.br/entrevistas/telia-Negrão-governo-dilma-ainda-sem-rumo-na-saude-das-mulheres.html>.

<sup>356</sup> Ministério da Saúde, "Pacto Nacional pela Redução da Morte Materna e Neonatal", Brasilia, 2004. Available at:

formulated a National Family Planning Policy aimed at strengthening previous programs and expanding access to contraception.<sup>357</sup> However, since 2011, under the government of President Dilma Rousseff, there has been yet another retreat to a conservative maternal-infant approach to women's health.

The development of a progressive approach to women's health from the 1980s has been part of a democratization process that in the Brazilian case had as one of its distinctive features the creation of participatory instances within the State. Since the process of democratization, not only did the women's movement achieve a prominent place in the interlocution with government officials, but it also penetrated the state apparatus through a unique model of interaction that allowed the movement to work within the State, without being subordinated to it.<sup>358</sup> On the one hand, the Ministry of Health, and in particular its Technical Area for Women's Health, has been one of the main governmental interlocutors with the women's movement. On the other hand, an emblematic instance of participation of the women's movement within the State was the National Council on Women's Rights (CNDM), created in 1985 under the Ministry of Justice, as a result of the women's movement mobilization and negotiation with political parties during the democratic transition.<sup>359</sup> The "movementist" character of the Council was a mark of the Brazilian model.<sup>360</sup> Among the main activities of the CNDM were its advocacy for the introduction of women's rights, and against the incorporation of a clause on the right to life from conception into the 1988 Constitution. In 2002, the Secretary for the Rights of Women (SEDIM) was created, also under the Ministry of Justice, and also as a product of women's advocacy and negotiation with state actors.<sup>361</sup> In 2003, President Lula da Silva changed its name to Special Secretary of Policies for Women (SPM), reporting directly to the Presidency with the status of a Ministry, and the CNDM was integrated into the structure of this secretary. The SPM has organized three National Conferences on Policies for Women (in 2004, 2007 and 2009), which convened government

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[http://dtr2002.saude.gov.br/proesf/Site/Arquivos\\_pdf\\_word/pdf/Pacto%20Aprovado%20na%20Tripartite.pdf](http://dtr2002.saude.gov.br/proesf/Site/Arquivos_pdf_word/pdf/Pacto%20Aprovado%20na%20Tripartite.pdf).

<sup>357</sup> Ventura (2011 : 319).

<sup>358</sup> See Andrade (1994: 45); Montaño (2003: 12); Pitanguy (2010: 37).

<sup>359</sup> See Andrade (1994: 46); Blay (1985); Pitanguy (2010: 37).

<sup>360</sup> See Alcantara (2010: 180), Montaño (2003: 13).

<sup>361</sup> Montaño (2003: 14). SEDIM was created at the end of President Fernando Henrique Cardoso's term.

officials and thousands of women from all over the country in Brazil to formulate the respective National Plans of Policies for Women.<sup>362</sup>

### **I.1.3. Political context and the position of political actors in the abortion debate**

Between 1964 and 1985, Brazil went through the longest dictatorship in the Southern Cone. The authoritarian regime attempted to institutionalize a long-term military rule, and in contrast with the cases of Argentina or Uruguay, it did not abolish Congress, nor did it eliminate all political party activities, but created a controlled two-party system and constantly manipulated the electoral process.<sup>363</sup> A slow and negotiated process of transition to democracy, from 1973 to 1985, began as a regime-led liberalization, but it was marked by the emergence of civil society and strong social movements. Not only were social movements pivotal in mobilizing for the return of democracy, but their role in the transition was also vital for the configuration of a new type of relationship between social movements and the state in Brazil through innovative models of participatory democracy. Many of the new politicians, especially from PT (Workers' Party) and PMDB (Brazilian Democratic Movement Party), were part of social movements, and they maintained a commitment to grassroots participation, which was expressed through the development of government councils for citizen participation at all levels of public administration.<sup>364</sup> The women's movement was one of the most influential actors in supporting the opposition to the military, and during the last years of the transition, the new political parties that had been given permission to form since 1979 started incorporating women's demands into their electoral platforms.<sup>365</sup>

PT was founded in 1980 as an entirely new political grouping led by the auto workers' union leader Luís Ignacio da Silva. It gathered some of the most important social movements at the time, including the progressive sectors of the Catholic Church and radical intellectuals and politicians, and connected them with the union movement.<sup>366</sup> PT ranks as the party most

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<sup>362</sup> The first two Conferences included the legalization of abortion as a central proposal, but due to an unfavorable political context, only the I National Plan included this issue (Batista and Costa 2011).

<sup>363</sup> Skidmore (1989: 33).

<sup>364</sup> Hochstetler (1997: 4).

<sup>365</sup> Alcantara (2010: 176).

<sup>366</sup> Della Cava (1989: 156-157); Hochstetler (1997: 5).

committed to participatory democracy.<sup>367</sup> While the links of the party with the Church have been clear from the beginning,<sup>368</sup> some of the party's manifestos have included the legalization of abortion as a programmatic priority.<sup>369</sup> Moreover, in numerical terms, PT has been the most important promoter of the liberalization of abortion laws in Congress.<sup>370</sup>

The PMDB, created in 1980 by members of the official opposition party during the dictatorship, is the biggest Brazilian party, and is considered to be centrist and somewhat catch-all in nature. The PSDB (Brazilian Social Democratic Party), founded 1988 by Fernando Henrique Cardoso and other ex-members of the PMDB, is considered to be a centrist party. It does not have an official position on abortion, but PSDB Federal Deputy and well-known feminist academic Eva Blay presented in 1993 one of the most important projects of abortion legalization. Moreover, José Serra, who was appointed as Minister of Health in 1998, under Cardoso's government, promoted measures to grant access to legal abortion. For its part, the Communist Party (PCB), founded in 1922, and particularly its congress-woman Jandira Feghali, has been one of the most outspoken promoters of the legalization of abortion at the Federal Congress.

The 2003 ascension of PT to national power created a new political opportunity for the furthering of social movements' demands. At the beginning of President Lula da Silva's first term, the elimination of hunger and poverty was defined as a priority, and there was a massive incorporation of members of social movements into the governmental structure. A member of the feminist movement was appointed at the crucial Area of Women's Health at the Ministry of Health, and during Lula's government a broad national strategy to combat maternal mortality was implemented, with the participation of the National Feminist Network for Sexual and Reproductive Health and Rights (*Redesaúde*), which brought the issue of abortion

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<sup>367</sup> Autonomous grassroots control and direct participation have been PT's tenets since its foundation (see Abers 1996: 35).

<sup>368</sup> Cleary (1997: 269); Della Cava (1989: 156).

<sup>369</sup> For example, among the main resolutions of the third PT National Congress in 2007 were the "defense of women's self-determination and the decriminalization of abortion and its provision in all cases in the public health services" (available at: <http://www.fpabramo.org.br/uploads/Resolucoesdo3oCongressodoPT.pdf>). However, the abortion issue was absent from the Resolutions of the IV party Congress in 2011 (available at: [http://www.pt.org.br/arquivos/RESOLUÇÃO\\_POLITICA\\_4\\_CONGRESSO\\_versao\\_final.doc](http://www.pt.org.br/arquivos/RESOLUÇÃO_POLITICA_4_CONGRESSO_versao_final.doc)).

<sup>370</sup> In the 1990s, PT was the party that introduced the most bills favorable for reforming the abortion law (9 out of a total of 21) (Casanova 2000: 72). Some PT legislators, however, have promoted regressive bills in the field of abortion and sexual rights Castilhos (2008: 10).

into the discussion.<sup>371</sup> Moreover, for the first time a Brazilian Minister of the Health spoke in favour of changing the abortion law.<sup>372</sup>

At the I National Conference on Policies for Women in 2004, social organizations recommended that the government modify the abortion law; it then incorporated this claim as one of six priorities in the area of women's health, and created the so-called Tripartite Commission, which would be in charge of elaborating a reform project.<sup>373</sup> However, the position of PT authorities regarding the abortion issue has been shifting, and during the two terms of President Lula da Silva not only did the abortion law not change, but at two crucial instances the government backed down on its reform initiatives, due to pressure by religious groups. One of these key occasions involved the project of the Tripartite Commission, which eventually lost the support of the government and was defeated in Congress. The other was the exclusion of the declaration of abortion as a human right in the III National Program of Human Rights (III PNDH) in 2010.<sup>374</sup> In fact, what was at stake for the government on that occasion was the creation of a truth and reparations commission, and the abortion question became a bargaining chip in that negotiation.<sup>375</sup>

On January 2011, PT's Dilma Rousseff took office as Brazil's first female president. She began her term by appointing more female ministers to the cabinet than had ever before served in this country, and in 2012 she designated Eleonora Menicucci, a well-known feminist academic in the field of public health and an active defender of abortion rights, as Minister of the Secretariat of Policies for Women. Before the presidential campaign, Rousseff had publicly expressed support for the legalization of abortion on public health grounds.<sup>376</sup> However, during the campaign, and in particular during the second round of the presidential

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<sup>371</sup> Negrão, Telia, former Executive Secretary of the National Feminist Network for Sexual and Reproductive Health and Rights (2006–2012), Author telephone interview, Porto Alegre, August 8 (2012).

<sup>372</sup> See Castilhos (2008: 6); Galli and Sydow (2009).

<sup>373</sup> Gonçalves and Souza (2010: 53).

<sup>374</sup> The right to abortion had been included in the original version of the III PNDH, at the insistence of the feminist movement, and it was the first time that abortion was recognized as a human right (Corrêa 2010: 89).

<sup>375</sup> Corrêa (2010: 91); Pitanguy (2011: 42). Due to pressures by religious actors, the final text only said that abortion was considered as a public health issue and that access to legal abortion was granted by public health services (III Programa Nacional de Direitos Humanos, 2010, p. 91. Available at: <http://portal.mj.gov.br/sedh/pndh3/pndh3.pdf>).

<sup>376</sup> Interview to Dilma Rousseff, "A mulher do presidente", *Marie Claire*, April 2009. Available at: <http://revistamarieclaire.globo.com/Marieclaire/0,6993,EML1697826-1739-3,00.html>.

election, the abortion issue, which had become a staple of recent Brazilian electoral politics, was radicalized by pressures from Catholic and evangelical churches. Abortion became the single most crucial issue in the electoral contest.<sup>377</sup> The main opposing candidate, former health minister José Serra, from PSMB, changed his previous progressive standing and adopted an open anti-abortion position. In that context, during the second round, and at insistence of religious leaders, Rousseff signed a public statement claiming to be personally against abortion, and pledging not to take the initiative to promote changes in the abortion law or in any other issue related to the family.<sup>378</sup> Rousseff's government has been loyal to that commitment, while affirming a compromise to grant access to lawful abortion and the reduction of risks in cases of unsafe abortions.<sup>379</sup> Moreover, at the beginning of her term, the President announced a new program for women's health called *Rede Cegonha* (Stork Network), which has implied the reestablishment of a maternal-infant approach into the Ministry of Health, which is widely opposed by feminists.<sup>380</sup>

The position of President Rousseff should be understood in the context of the ascension and alliance of conservative forces in the political field, particularly at the National Congress. This is a recent development that had not yet come to full fruition during Lula da Silva's first term in office, and radically influences political opportunities for reform.<sup>381</sup> In fact, changes in the government's standing with regard to abortion had started during da Silva's second term, with the withdrawal of the abortion issue from the government's agenda, and in the framework of the advance of conservative religious forces in the political field.<sup>382</sup> This shift coincided with a more general restraint of social movements' participation in the governmental decision-making process during the last years of da Silva's government.<sup>383</sup> Moreover, feminist government insiders observe that the fact that President Rousseff is a woman makes it more difficult for her to position herself with regard to abortion than it was

<sup>377</sup> Batista and Costa (2011: 20); Corrêa (2010: 93); Pitanguy (2011: 42).

<sup>378</sup> The text of this letter can be found at: [http://media.folha.uol.com.br/poder/2010/10/15/carta\\_mensagem\\_dilma.pdf](http://media.folha.uol.com.br/poder/2010/10/15/carta_mensagem_dilma.pdf).

<sup>379</sup> Negrão, Author interview (2012).

<sup>380</sup> The *Cegonha* program has allegedly been a reward to the Catholic and evangelical churches for the compromises assumed by then presidential candidate Rousseff during the electoral campaign (Negrão, Author interview 2012).

<sup>381</sup> Ferreira Gonçalves, Lidiane, Technical Advisor Area of Women's Health, Ministry of Health. Author interview, Brasilia, August 15 (2012).

; Rodrigues, Kauara, Member of CFEMEA, Author interview, Brasilia, August 13 (2012).

<sup>382</sup> Negrão, Author interview (2012).

<sup>383</sup> Ferreira Gonçalves, Author interview (2012). See Kingstone and Ponce (2010) for a thorough account of changes in the PT mode of governing.

for President da Silva.<sup>384</sup> With regard to Minister Menicucci, her appointment was celebrated by feminists, and she can in fact be considered as an institutional activist within the state's structure. But she has been instructed not to talk about the legalization of abortion.<sup>385</sup> Notably, in such a context, the presence of a very favourable and well-known institutional activist within the government may even have a negative effect on the advancement of a controversial cause such as abortion. For, in such a situation, feminists may refrain from exerting pressure about a specific issue on such a close and beloved colleague, in order not to threaten her stability, and also considering that she can do a lot of good in other areas of women equality rights.<sup>386</sup> Overall, the government's standing on abortion is not grounded on a rigorous ideological position, but on the lack of will to confront conservative political actors on this issue.<sup>387</sup>

## **I.2. The legal opportunity. Normative framework and institutional rules at the Supremo Tribunal Federal**

### **I.2.1. Overview of abortion regulation in Brazil**

The Brazilian abortion law is among the most restrictive in the world, considering that it does not include an indication for cases in which women's health is at risk. Its Criminal Code, drafted in 1940, criminalizes abortion with only two exceptions, set forth in Article 128, for cases of rape and life-threatening circumstances. As the Brazilian Criminal Code does not establish requirements or procedures regarding legal abortion, these are set by municipal and state law.

Despite Brazil's limited abortion law, the existence and implementation of these technical guidelines distinguish the country from most of its Latin American counterparts. The guidelines were elaborated by the Technical Area on Women's Health at the Ministry of Health, in collaboration with the women's movement as well as with medical associations. These norms established clear procedures for implementing legal abortion services,

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<sup>384</sup> Prevailing prejudices identify and condemn a female politician as abortionist more easily than they do a male politician (Ferreira Gonçalves, Author interview 2012).

<sup>385</sup> Ferreira Gonçalves, Author interview, (2012); Rodrigues, Kauara, Member of CFEMEA, Author interview, Brasilia, August 13 (2012).

<sup>386</sup> Vieira Villela, Author interview (2012).

<sup>387</sup> Belloque, Juliana, Public Defender do Estado de São Paulo; member of the Commission on Reform of the Criminal Code. Author interview, São Paulo, August 28 (2012).

particularly for female victims of rape, and are intended to promote an expansion of the number of hospitals that provide those services. The 1998 guidelines have been taken as a reference by the World Health Organization and the Pan-American Health Organization, which translated them into English and Spanish in order to disseminate them among other countries with similar legislation.<sup>388</sup>

Furthermore, Brazil is a unique case in that it has a restrictive abortion law but at the same time it presents one of the most developed frameworks for the attention of legal abortions particularly in cases of rape in Latin America. The leading actors in this development have been feminists, as well as a handful of influential doctors, who coincided in their claim for legal abortion services at the end of the 1980s. The attention to violence against women, and in particular sexual violence, has been the door through which the implementation of legal abortion entered into the public health system and took hold in Brazil. In 1988, feminist organizations and doctors started collaborating in the formulation of what would be a model program to train health professionals for carrying out abortions permitted by the law. Feminist mobilization contributed to create a more favorable political environment, while the Brazilian Federation of Gynecologists and Obstetricians (FEBRASGO) created a National Committee for Legal Pregnancy Termination, dedicated to training health professionals in the attention of legal abortions.<sup>389</sup> A fundamental step in this process was the establishment in 1989 of the first legal abortion service in São Paulo.<sup>390</sup> The main factors in this development, which has been pioneering not only in Brazil but in Latin America in general, were the 1988 election of the first woman mayor in the city's history, who belonged to the Progressive Party and worked closely with feminist organizations, as well as the crucial role of progressive doctors from FEBRASGO.<sup>391</sup> This service established a progressive framework for the attention of rape victims, by not requiring judicial authorization and creating an interdisciplinary commission for the attention of women victims of violence.<sup>392</sup> Since 1994, other legal abortion services became available, which followed the model advanced by that initiative. In the expansion of legal abortion services, the Technical Area of Women's Rights at the Ministry of Health had a fundamental role. It should be observed, though, that despite this

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<sup>388</sup> Corrêa and McIntyre (2003: 30).

<sup>389</sup> Vieira Villela (2001: 95).

<sup>390</sup> The Service was implemented at Municipal Hospital "Arturo Ribeiro de Saboya", known as Jabaquara Hospital.

<sup>391</sup> Faúndes et al. (2002: 124); Talib and Citeli (2005); Vieira Villela and Oliveira (2000: 79).

<sup>392</sup> Kyriakos and Fiorini (2002: 133).

impressive development in Brazil, legal abortion services still do not grant sufficient access to legal abortion. There is a lack of implementation of the abortion legal provisions in cases of risk to the woman's life, and doctors who lack proper training in this field usually ask for a judicial authorization, which is not required by the law, and they do not consider the possibility of aggravated or future risk to the woman's life, but only imminent risks.<sup>393</sup> Furthermore, the number of legal abortion services for cases of violence is still low,<sup>394</sup> and there are regional disparities in their implementation.<sup>395</sup>

### I.2.2. Constitutional and human rights norms

The 1988 Brazilian Constitution has been referred to as the "Citizen's Constitution" because of the preeminence given in its text to fundamental rights, as well as to mechanisms for popular participation. It incorporated new rights and guaranties, including diffuse rights and collective rights, and it established that fundamental rights are of immediate application. With regard to reproductive rights, the Constitution notably incorporated a right to self-determination in family planning, based on the principle of dignity of the person, and it established a state obligation to provide for information and resources for its exercise (Art. 226). It also included other rights linked to women's reproductive freedom, in particular the right to equality, including gender equality (Art. 5), the right to privacy (Arts. 5) and, most importantly, the right to health, which is considered as a social right that must be granted by the State on a universal and egalitarian basis (Art. 6, 196). On the other hand, the Constitution incorporated the right to life as a general principle (Art. 5), but it did not include a specific protection of the right to life from the time of conception.

Since the democratization process, Brazil ratified the main human rights treaties, and the 1988 Constitution established that once ratified, these treaties have the same rank as constitutional amendments, and are of immediate application (Art. 5). With regard in particular to international treaties on women's rights, Brazil ratified CEDAW in 1984 and its Optional Protocol in 2002, and it ratified the Convention of Belem do Para in 1995.

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<sup>393</sup> Galli (2010: 974).

<sup>394</sup> Nowadays there exist approximately 50 legal abortion services in Brazil (Faúndes, Aníbal, Coordinator of the Sexual and Reproductive Rights Committee of FIGO; Founder and Senior Investigator of CEMICAMP, Author interview, Campinas, August 30, 2012).

<sup>395</sup> Access to these services is not effective in five Brazilian states: Mato Grosso do Sul, Ceará, Amapá, Piauí, Roraima, and Tocantins (Galli 2010: 974).

One of the key moments of the democratic transition in Brazil was the drafting of the new constitution. Since 1986, social movements mobilized to influence this process. The women's movement - together with the Health Reform Movement- were the most successful ones in terms of their capacity to introduce their demands into the constituent assembly's agenda.<sup>396</sup> The constitutional text adopted in 1988 was called the "Citizen's Constitution" due to the importance given in this text to civil, political and social rights, including women's rights and reproductive freedom. At the time of the Constitutional Convention, the National Congress, which became the Constituent Assembly from 1986 to 1988, had a stronger women's presence than ever before, with 26 representatives, which amounted to 5.7% of the total membership. A notable aspect of the role of female constituents in this process is that the majority of them were not feminists, but they formed a supra-partisan women's caucus (the so-called *bancada feminina*), which presented thirty constitutional amendments that included almost all the demands of feminists at that time.<sup>397</sup>

The 1988 constitutional text incorporated 80 percent of the rights demanded by women during that process, including a clause on freedom in family planning and the duty of the state to provide for its effective exercise (Art. 226). Crucially, moreover, the new Constitution did not incorporate the fetal protection clause requested by religious actors. The discussion about abortion was introduced into the constituent process by Catholic Church representatives, with support by evangelical legislators.<sup>398</sup> They did so in the context of the rise of anti-abortion activism in the international arena, which at that time had as one of its main aims to influence the drafting of new constitutions in countries that were going through processes of reform of their normative frameworks.<sup>399</sup> In that context, the CNDM's strategy was arguing that the abortion issue should not be regulated by the Constitution, and to fight against the introduction of a provision regarding the right to life from conception.<sup>400</sup> Eventually, this was the prevailing position in the Constituent Assembly.

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<sup>396</sup> Pinto (1994: 265).

<sup>397</sup> Pinto (1994: 265).

<sup>398</sup> Rosado and Soares (2002: 22)

<sup>399</sup> They influenced for example the constituent process in the Philippines, where they successfully advocated for the introduction of the right to life since conception into the new Constitution (Pitanguy 2011: 40).

<sup>400</sup> Pitanguy (2011: 40-41).

### **I.2.3. The Supremo Tribunal Federal. Institutional rules and legal instruments for constitutional control**

The system of constitutional justice in Brazil is mixed; it combines a concrete control of constitutionality with *inter partes* effects, which is the traditional and most common form of judicial review in the country, with a centralized abstract system with *erga omnes* effects. The *Supremo Tribunal Federal* (STF), comprised of 11 justices (*Ministros*), is the highest judicial instance in the country. It is both a constitutional court, in that it exercises concentrate abstract review, and it is also the ultimate appellate instance in concrete constitutional review cases. The *Tribunal Supremo de Justicia* (STJ) is the final court of appeals for all infra-constitutional matters. The 1988 Constitution widened the review powers of the STF, created new instruments for the defense of fundamental rights and expanded access for social and political actors to present claims before this court.<sup>401</sup> In 2000 a woman was appointed for the first time to this court, and since then two more women have been appointed: this is the first time in its history that more than two women have numbered among its 11 members.<sup>402</sup>

There exist in Brazil four types of abstract review cases, which are filed directly with the STF.<sup>403</sup> The Claim of Noncompliance with a Fundamental Precept (*Argüição de descumprimento de preceito fundamental*, ADPF) is only admitted when there is no alternative remedy to protect a fundamental precept of the Constitution.<sup>404</sup> It is regulated by Law 9882/99, passed in 1999, and it is only rarely used in Brazilian jurisprudence.<sup>405</sup> One of the exceptional cases in which it has been used is the claim for the decriminalization of abortion in case of anencephaly. Abstract review petitions can be brought before the Court by

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<sup>401</sup> Before the 1988 Constitution, there existed an instrument to present an abstract claim of unconstitutionality before the STF, but its scope was limited and the only legitimated actor to present it was the attorney-general of the Republic who directly reported to the president of the Republic (Bustamante and Godoi 2010: 138).

<sup>402</sup> Justice Ellen Gracie was the first female justice at the STF. She was also the first woman to preside the Court, between 2006 and 2008, and she retired in 2011. Justices Cármén Lúcia Antunes and Justice Rosa Maria Weber were appointed in May 2006 and December 2011, respectively.

<sup>403</sup> Three of these actions are the Direct Action of Unconstitutionality (*Ação direta de inconstitucionalidade*); the Direct Action against Unconstitutional Omissions (*Ação direta de inconstitucionalidade por Omissão*); the Declaratory Action of Constitutionality (*Ação declaratória de constitucionalidade*).

<sup>404</sup> Fundamental precepts are more comprehensive than constitutional principles established in Articles 1-4, and they are not exactly defined by the Constitution or the legislation, so it is a competence of the STF to establish their scope and meaning.

<sup>405</sup> Diniz and Velez (2008: 1).

several state actors,<sup>406</sup> by the Federal Section of the Brazilian Association of Advocates (*Ordem dos Advogados do Brasil*), by any political party with representation in Congress, and by national unions or class-representing entities (Constitutional Art. 103). Lawyers have a monopoly on judicial representation; this monopoly is protected by the 1988 Constitution and creates a barrier to direct citizens' access to the courts.<sup>407</sup>

The STF sits in bank in cases related to its most important competences, or in two chambers (*Turmas*), each one comprised of five justices without the presence of the STF's President. Internal regulations of the STF establish that one of the justices (*Ministro Relator*, Justice-Rapporteur) should be in charge of organizing and directing the process in a case.<sup>408</sup> When they issue a decision, each justice writes a separate opinion, even if they concur. It is a competence of the Justice-Rapporteur to convene public hearings with expert actors in cases of institutional and public relevance, as well as to accept *amicus curiae* briefs.<sup>409</sup> There are no specific regulations for public hearings at the STF, but it decided to adopt the Federal Congress's procedures for public hearings. The appointment of STF justices is decided by the president, with Senate approval. There are important safeguards to promote the independence of STF justices once they are in office, such as life terms with late retirement age, secure tenure and irreducible income.<sup>410</sup> These provisions, together with the fact that they assume their positions at the peak of their career, imply that they are not highly vulnerable to external pressures.<sup>411</sup>

The STF has one of the widest mandates in comparison with other high courts in Latin America, and it enjoys considerable public support and institutional legitimacy.<sup>412</sup> It has no docket control and is called to intervene in all types of conflicts, even small disputes, having an annual work load of approximately 160,000 cases, which may weaken its institutional

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<sup>406</sup> State actors who can present actions of unconstitutionality are the President of the Republic, the Governing Boards of the Federal Deputies or Senators Chambers, the Governing Boards of the Legislative Assemblies of the Federal States, the Governors of the States, and the General-Attorney of the Republic.

<sup>407</sup> Botelho (2003: 71).

<sup>408</sup> See the STF's internal procedural regulations (*Regimento Interno*) at: [http://www.stf.jus.br/arquivo/cms/legislacao/regimento/interno/anexo/ristf\\_120anos.pdf](http://www.stf.jus.br/arquivo/cms/legislacao/regimento/interno/anexo/ristf_120anos.pdf).

<sup>409</sup> The use of *amicus curiae* briefs is well accepted by the STF (Gonçalves and Souza 2008: 17, n. 5). Their presentation is regulated by law 9.868/99.

<sup>410</sup> Brinks (2011: 138).

<sup>411</sup> Brinks (2011: 139).

<sup>412</sup> See Brinks (2011: 137).

standing as a constitutional court.<sup>413</sup> There is no formal *stare decisis*, although a constitutional reform in 2004 created the *sumula vinculante*, which gives competence to the STF, by a vote of two-thirds of its members, to declare binding a certain precedent after repeated decisions on the same matter. This has broadened the STF capacity to influence lower courts' decisions.

After the promulgation of the 1988 Constitution, the bulk of the STF work concentrated on cases related to the distribution of political power and to economic governance.<sup>414</sup> For many years, the STF was not a significant player in the field of rights adjudication. Moreover, for some time it was seen as an appellate instance more than as a constitutional court.<sup>415</sup> However, in recent years the STF has gained prominence in the political scene, and it has decided prominent rights-related cases, including issues such as access to AIDS medication, affirmative action in the field of racial quotas at universities, research on stem cells, religious freedom, same-sex civil unions and, prominently, abortion in case of anencephaly.<sup>416</sup>

## **II. SOCIAL MOVEMENTS AND LEGAL MOBILIZATION IN THE FIELD OF ABORTION LAW**

### **II.1. Feminist advocacy and legal mobilization for abortion rights**

In the 1980s, during the democratic transition, the legalization of abortion emerged as a feminist demand in the public space. The 1975 UN-declared International Women's Year gave feminists leverage to organize a week-long seminar on women's issues in Rio de Janeiro, which is acknowledged as the trigger-point of institutionalized feminism in the country.<sup>417</sup> However, in the context of political repression the abortion issue was silenced.<sup>418</sup> The context of authoritarian rule not only did preclude the possibility of feminists to publicly demonstrate and to make claims to the State, but it also affected the way they had to deal with gender issues, their specific condition of domination, and in particular the abortion question. On the one hand, feminists were generally part of leftist political groups, which at that time

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<sup>413</sup> See Brinks (2011: 138).

<sup>414</sup> Kapiszewski (2011: 154).

<sup>415</sup> Martins (2009: 46).

<sup>416</sup> See Barroso (2012: 78); Martins (2009: 46).

<sup>417</sup> The seminar, entitled "The Role and Behavior of Brazilian Women", was sponsored by the United Nations and the Brazilian Press Association (Schmink 1981: 117).

<sup>418</sup> Andrade (1999: 9).

argued that so-called specific claims should be put aside in favor of the more general class struggle as well as the fight against the military regime.<sup>419</sup> The traditional left also denounced family planning measures as genocidal and imperialist-imposed. As a consequence, potentially conflictive issues, and in particular abortion, were avoided by feminists in public discussions and dealt with only in small and private groups (*grupos de reflexão*).<sup>420</sup> At the end of the 1970s, the criminalization of abortion was framed for the first time by the feminist movement as a matter of injustice against women.<sup>421</sup> At the time of the democratic opening, feminism was already organized throughout the country and a process of democratization within leftist groups allowed feminist to fully develop their political demands.<sup>422</sup> In 1981, feminists organized a campaign for the decriminalization of abortion, which marked a rupture with the Catholic Church.<sup>423</sup>

At the time of the democratic opening, feminism was already organized throughout the country and a process of democratization within leftist groups allowed feminist to fully develop their political demands.<sup>424</sup> In the mid-1980s, the notion of reproductive rights took hold among feminist organizations.<sup>425</sup> At that time, as well, the oppositionist stance towards the State was replaced by the recognition that a dialogue with governmental institutions was necessary to achieve full citizenship rights and policies for women.<sup>426</sup>

The bulk of feminist NGOs working for abortion rights were created during the 1990s, during a process of professionalization of the women's movement.<sup>427</sup> In Brazil there is no single-issue organization devoted to advocating for abortion rights, but rather many feminist organizations with diverse views and institutional arrangements. These have widespread territorial insertion, as evidenced by the diversity of organizations located in different cities and regions throughout the country. SOS Corpo-Feminist Institute for Democracy, founded in 1981 in the northeastern city of Recife, was the first feminist NGO to advocate for women's reproductive health, and continues to be a key actor within the reproductive rights

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<sup>419</sup> See Alcántara (2010); Alvarez (1990); Sarti (1998).

<sup>420</sup> Sarti (1998).

<sup>421</sup> Corrêa (2005).

<sup>422</sup> Andrade (1994).

<sup>423</sup> The Church posted articles in the press threatening with excommunication to those who defended abortion (Rosado and Soares 2002).

<sup>424</sup> Andrade (1994: 45).

<sup>425</sup> Scavone (2008: 677).

<sup>426</sup> Andrade (1994: 42).

<sup>427</sup> See Hochstetler (1997: 9); Pinto (2006: 656).

movement.<sup>428</sup> Later on, important organizations were created that have over time maintained a strong institutional structure. CFEMEA (Feminist Center for Studies and Advisory Services) was founded in Brasilia in 1989. Its work in the field of abortion entails coordinating with the movement strategies toward the National Congress, monitoring congressional activity in this area, and providing the movement information about legislative dynamics in the field of women's rights.<sup>429</sup> The latter has been instrumental in avoiding legislative backlash.<sup>430</sup> In this sense, CFEMEA is an example of how very professionalized NGOs can maintain a strong relationship with the feminist movement, serving at the same time as a bridge between the movement and the political process.<sup>431</sup> Catholics for Choice (*Católicas pelo Direito de Decidir*, CDD) was created in São Paulo in 1993, and in 1995 it was constituted as a NGO.<sup>432</sup> In practice, access to abortion rights has become the main focus of the organization.<sup>433</sup> For its part, the Institute of Bioethics, Human Rights, and Gender (ANIS), founded in Brasilia in 1999, is a feminist NGO devoted to academic research, information, education and advocacy on bioethical issues related to human reproduction. ANIS was the organization that led the litigation strategy and the advocacy process in the case on anencephaly decided by the Supremo Tribunal Federal in 2012. The founder of ANIS, anthropologist Debora Diniz, is a leading actor in the abortion debate in Brazil, and the organization has developed some of the most creative and effective strategies in denouncing violations of women's rights, mainly through ethnographic research, as well as regarding the legal defence of abortion rights. Remarkably, ANIS is the only feminist NGO in Latin America to specialize in the field of bioethics, and it combines the characteristics of an NGO with an academic character.<sup>434</sup>

Among other important organizations working in this field are the Curumim Group, created in Recife in 1989; CEPIA (Citizenship, Study, Research, Information and Action) founded in Rio de Janeiro in 1990; the Committee on Citizenship and Reproduction (CCR), created in São Paulo in 1991 within the Brazilian Center for Analysis and Planning (CEBRAP); and Themis-Legal Advice and Gender Studies, created by feminist lawyers in Porto Alegre in 1993. IPAS-Brazil (International Pregnancy Advisory Services) was established in 1994, in the city of Rio de Janeiro, and it provided crucial training for medical professionals in safe

<sup>428</sup> Mello (2002: 149).

<sup>429</sup> Rodrigues, Author interview (2012).

<sup>430</sup> For an account of CEFEMEA's activities in this regards, see Rodriguez et al. (2010).

<sup>431</sup> Rodriguez et al. (2010: 6).

<sup>432</sup> Rosado and Soares (2002: 57).

<sup>433</sup> Soares, Author interview (2012).

<sup>434</sup> Mello (2002: 160).

abortion procedures and post-abortion care.<sup>435</sup> Finally, the Group of Studies on Abortion (GEA) was formed in 2007 to foster a dialogue between the fields of health and law; it is comprised of doctors, judges, lawyers, journalists and feminist activists.<sup>436</sup>

Most of these organizations are part of the National Feminist Network for Sexual and Reproductive Health and Rights (*RedeSaúde*), which was founded in 1991. The National Feminist Network conjoins more than 300 entities, among them women's groups, NGOs, Women's Studies Nucleus, and trade unions, as well as lawyers and health professionals.<sup>437</sup> This has been since its creation the biggest and most structured feminist network, with a presence in all Brazilian states and with twelve regional offices.<sup>438</sup> From its inception, it has had the legalization of abortion among its main aims.<sup>439</sup> In the 2000s, the first networks that focus specifically on the legalization of abortion were developed.

In 2004, the well-known Brazilian Initiative for the Right to a Safe and Legal Abortion (Jornadas Brasileiras pelo Direito ao Aborto Legal e Seguro) was created. This coalition is an offspring of *RedeSaúde* and coordinates 17 networks, as well as local organizations and advocates. Its aim is to advance the revision of the abortion legislation in Brazil through a wider and more proactive strategy than the one that had been pursued until then.<sup>440</sup> The creation of the *Jornadas* is an example of the dynamics of mobilization and counter-mobilization, for it is part of a new impetus within the feminist movement, triggered by the advance of conservative projects at the National Congress in 2003.<sup>441</sup> The creation of the *Jornadas* indicated a shift in feminist strategies, from actions that were mainly reactive to the advance of conservative projects, to the creation of conditions for the legalization of abortion, by actively bringing other sectors of Brazilian society into the abortion debate and directly intervening in the formulation of proposals for legalization.<sup>442</sup> The coordination of a feminist

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<sup>435</sup> Corrêa and McIntyre (2003: 50). In 2011 it closed its office in Brazil, and it was transformed into a Brazilian NGO named Affirmative Action in Human Rights and Health (AADS / IPAS Brasil), which does not participate in the feminist networks and has a drastically reduced budget (Galli, Beatriz, Human Rights Advisor of IPAS Brazil, Author interview, Rio de Janeiro, August 10, 2012).

<sup>436</sup> Adesse, Leila, ex Director Ipas Brasil, Author interview, Rio de Janeiro, August 11 (2012).

<sup>437</sup> Lago (2004: 58, n. 9).

<sup>438</sup> Negrão, Author interview (2012).

<sup>439</sup> Lago (2004: 58). Its agenda also includes work on violence against women, active women's citizenship, and more recently the fight against racism (Negrão, Author interview (2012)).

<sup>440</sup> Bezerra and Santos (2006: 206).

<sup>441</sup> See Bezerra and Santos (2006: 208-209); Xavier (2009: 54-55).

<sup>442</sup> Bezerra and Santos (2006: 207-208); Xavier (2009: 55).

strategy through the *Jornadas*, and its role together with the women's movement at the First and Second National Conferences on Policies for Women, contributed to the development of the Tripartite Commission, whose mission was to formulate a project of abortion law reform.<sup>443</sup> The work on this Commission during 2005 had a significant impact on feminists' approach to the law and was very successful in terms of the capacity of the movement to mobilize for legal change. However, the 2008 congressional defeat of the proposal for legalization drafted by this commission discouraged the feminist movement, and since then there has been neither a national strategy nor a common proposal for legal change.<sup>444</sup> As well, financial problems contributed to the current weakness of this initiative and to the creation, in 2008, of the National Front Against the Criminalization of Women and for the Legalization of Abortion (*Frente Contra a Criminalização das Mulheres e Pela Legalização do Aborto*).

In the aftermath of the Beijing Conference, the Brazilian feminist movement diversified, with the creation in 2000 of the Association of Black Brazilian Women (*Articulação de Mulheres Negras do Brasil*), and the emergence of stronger and more visible lesbian networks.<sup>445</sup> During the same period, two new feminist networks were founded: the Brazilian Women's Articulation (*Articulação das Mulheres Brasileiras*), and the World March of Women-Brazil (*Marcha Mundial de Mulheres*), created in 1996 and 2000 respectively, which had a more grassroots formation and methodology than *Redesaúde*.<sup>446</sup> These associations imparted a new flavor to the political activity of the feminist movement.<sup>447</sup> Given the importance and the former denial of the existence of racial discrimination in Brazil, one of the most significant developments in the struggle for reproductive rights has been the creation and consolidation of black women's organizations and their activism in the field of sexual and reproductive health and rights.<sup>448</sup> They have successfully highlighted the previously neglected racial injustice in the abortion field in Brazil, by showing that it is a problem with particular consequences for black women, who were more vulnerable to forced sterilization, maternal mortality and lack of access to services.<sup>449</sup>

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<sup>443</sup> Xavier (2009: 55).

<sup>444</sup> Negrão, Author interview (2012); Rodrigues, Author interview (2012).

<sup>445</sup> Negrão, Author interview (2012).

<sup>446</sup> Negrão, Author interview (2012); Soares, Author interview (2012).

<sup>447</sup> Bezerra and Santos (2006: 205).

<sup>448</sup> Corrêa and McIntyre (2003: 18).

<sup>449</sup> Santos (2008: 278). Before the emergence of a strong Black women's movement, the categories and data used by Brazilian feminists tended to hide racial difference with the argument that it could affect the unity of the movement (see Corrêa and McIntyre 2003: 18, 27; Santos 2008: 277). In recent years, this situation has changed and strong feminist organizations, such as CFEMEA, have

In contrast with the previous well-known strength of the Brazilian feminist movement, the perception among feminists who work on abortion rights is that during the past five years the strength of networks – in particular those working on reproductive rights - has decayed, and that the movement is going through a difficult phase in terms of its resources and capacity of coordination and mobilization.<sup>450</sup> Among the main reasons for the current perceived disarticulation is the withdrawal of financial resources that used to be available for advocacy in this field. The main sources of financing of feminist organizations that advocate for abortion rights, including most of the above-mentioned NGOs as well as the *RedeSaúde*, have been foreign foundations and international organizations, such as Oxfam, Pathfinder, the European Commission, the International Women's Health Coalition, the Ford Foundation and the MacArthur Foundation.<sup>451</sup> But during the past five years there has been a drastic reduction in external financing for feminist organizations in the country, due to the global financial crisis, and also due to the fact that Brazil is considered an emerging economy, which has, moreover, met demographic objectives.<sup>452</sup> Most significantly, two major donors, the McArthur Foundation and Ford Foundation, stopped financing organizations and projects on reproductive rights in Brazil in 2001 and 2006, respectively. The United Nations Population Fund, which was one of the main funding sources of the *RedeSaúde* and other organizations, reduced to 1/10 its donation to Brazil.<sup>453</sup> The financial challenge produced an internal crisis in the movement; big organizations, such as *RedeSaúde*, which used to receive the largest economic resources, had to start competing for small funds.<sup>454</sup>

Since the late 1980s one of the distinctive strengths of the feminist movement for abortion rights in Brazil is its alliance with doctors and medical associations. This alliance was not easy to forge, for mutual mistrust existed among feminists and the predominantly male

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united with Black feminists in order to advocate for specific issues, such as legislation pertaining to domestic work (Santos 2008: 279).

<sup>450</sup> Corrêa (2012); Davis Mattar, Laura, Program manager CONECTAS Human Rights; member of Global Doctors for Choice/Brazil, Author interview, São Paulo, August 31 (2012); Gonçalves, Tamara, Coordinator of CLADEM /Brazil, Author interview, Brasília, August 16 (2012); Negrão, Author interview (2012); Paranhos, Fabiana, Member of ANIS: Institute of Bioethics, Human Rights, and Gender. Author interview, Brasilia, August 14 (2012).

<sup>451</sup> Barroso et al. (1991: 76); Casanova (2000: 70); Corrêa and McIntyre (2003: 40-55).

<sup>452</sup> Vieira Villela, Wilza, Professor, Member of the Research Group on Women's Health and Gender Relations, Universidade Federal de São Paulo, Author interview, Rio de Janeiro, August 9 (2012).

<sup>453</sup> Negrão, Author interview (2012).

<sup>454</sup> Negrão, Author interview (2012).

gynecological profession, despite their common aims.<sup>455</sup> Nowadays, however, doctors in key positions are close allies with feminists in advocacy for access to lawful abortion, which has allowed for a comparatively successful implementation of legal abortion services. Renowned gynecologists have also been feminists' partners in advocacy actions for the legalization of abortion.<sup>456</sup> This movement from within the medical establishment is unique in the Latin American context, and has started to be promoted in other countries in the region as well.<sup>457</sup> The Brazilian Federation of Obstetrical and Gynecological Societies (FEBRASGO), has been pivotal in this process.<sup>458</sup> During its existence in Brazil, IPAS also had a fundamental role in this partnership, by providing training for the use of techniques for the practice of legal abortions.<sup>459</sup>

On the other hand, the health framing, as well as the emphasis on the need to provide abortion services in cases of sexual violence against women may have also been a limitation for the Brazilian abortion rights movement. The link between abortion and violence against women has increased the visibility of the problem of rape and abortion among the general population, it has raised awareness and installed as familiar within the medical profession issues that are usually not considered by health practitioners, it has allowed to gather more partners and financing for this field, and it allowed for the articulation of the abortion and violence issues within the feminist movement.<sup>460</sup> On the other hand, according to an experienced feminist doctor working in the field of public health, the association of the right to access to abortion with the discussion about violence against women has also had the undesired effect of promoting the idea that women have the right to have an abortion only when they are seen as victims.<sup>461</sup> In the same lines, an insider to the legal system in Brazil pointed out that the country's judicial sector accepts the social justice discourse that the penalization of abortion is used to criminalize poor women, but it does not accept the argument that all women deserve the right to abortion, they see this argument as egoistic.<sup>462</sup>

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<sup>455</sup> Faúndes et al. (2002: 121).

<sup>456</sup> One of the key figures in changing the position of the Brazilian obstetrics and gynecological establishment with regards to legal abortion has been Professor of Obstetrics Aníbal Faúndes.

<sup>457</sup> Faúndes et al. (2002: 124).

<sup>458</sup> Faúndes, Author interview (2012).

<sup>459</sup> Faúndes et al. (2002: 124); Talib and Citeli (2005: 18).

<sup>460</sup> Adesse (2012); Bezerra and Santos (2006: 203); Faundes (2012); Vieira Villela (2012).

<sup>461</sup> Vieira Villela (2012). Vieira Villela also adverts that the huge expansion of access to contraception in Brazil has installed the idea that the woman who aborts is irresponsible.

<sup>462</sup> Belloque, Author interview (2012).

With regard to feminist legal mobilization, the feminist movement in Brazil does not have a strong support structure specializing in legal mobilization for reproductive rights, nor does it have a tradition of human rights advocacy and litigation. Since its origin, and even in a context of growing protagonism of the judiciary in Brazilian politics, the energies of the feminist movement working for abortion legalization were invested in parliamentary lobby and advocacy for changing legislation.<sup>463</sup> Legislative strategies were directed to obtain the legalization of abortion on demand during the first trimester, and they disregarded the use of courts - which would necessarily entail gradualism for in Brazil, as in Latin America in general, courts are not expected to legalize abortion on demand.

In recent years, though, given, on the one hand, the lack of legislative change during the past decades, the ascension of a religious coalition in Congress, and the lack of political will of the executive branch to support legislative change in this field, and on the other hand, the recent favorable decisions of the Supremo Tribunal Federal (STF) with regard to controversial moral issues, feminist organizations in general started acknowledging the need to appeal to the judicial power.<sup>464</sup> At the beginning this action was not embraced by the whole feminist movement, and it was disdainfully called “gradualist”. However, with time, it gained increasing support within the movement, and its favorable resolution by the STF has confirmed that pursuing a legal strategy at the highest Brazilian court could be an appropriate move for the defense of reproductive rights by the feminist movement.<sup>465</sup> Since the first stages of this case before the STF there were signs that the Court could issue a positive decision, and in this way the case served as a first signal for the movement that the Court could become a propitious venue to pursue this type of claim.

One of the limitations for the development of legal mobilization for women's rights is that there are still few feminist lawyers working in this field.<sup>466</sup> This can be partly attributed to the lack of gender training at law schools, as well as to the lack of a human rights approach in

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<sup>463</sup> Corrêa (2012); Gonçalves and Souza (2010: 60); Pitanguy (2010: 43).

<sup>464</sup> Gonçalves and Souza (2010: 60); Paranhos, Author interview (2012); Negrão, Author interview (2012); Rodrigues, Author interview (2012).

<sup>465</sup> Galli, Author interview (2012).

<sup>466</sup> Davis Mattar, Author interview (2012); Gonçalves, Author interview (2012).

legal education.<sup>467</sup> Indeed, until recently the field of human rights and public interest litigation in Brazil has not been favourable for the pursuit of gender rights claims. Human rights movements in the country - which focus on issues such as public security, police violence and the violation of rights in the public space - have not traditionally incorporated gender as a mainstream perspective. The lack of a gender approach by the human rights movement in Brazil may be explained in part by the fact that since the dictatorship this movement has been linked to the progressive sectors of the Catholic Church.<sup>468</sup>

In addition, the characteristics of the field of public interest litigation have contributed to a scarce legal mobilization by social movements in general, except for exceptional cases. In the first place, cause lawyering in Brazil had its origin in the initiative of lawyers who defended political prisoners during the dictatorship, and started building community organization and rights awareness.<sup>469</sup> The provision of these alternative legal services has been linked to some degree to the Church but most prominently to leftist political parties, in particular the Workers' Party (PT).<sup>470</sup> Due to the ascension to national power of political actors that had been on the resistance side during the dictatorship in the first years of the transition, and due to the increasing difficulty to obtain external financing, since the late 1990s and during the 2000s a partnership between alternative legal services and the State started to develop.<sup>471</sup> However, the provision of alternative legal services is relatively scarce, for pro bono services have not traditionally been promoted by the legal profession, and legal clinics and NGOs with a clinical orientation are not profuse.<sup>472</sup> The most developed NGO activism with regards to the right to health has been the successful HIV/AIDS policy mobilization.<sup>473</sup> In the second place, the Public Ministry has been a key actor in development of a more rights-oriented

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<sup>467</sup> Gonçalves, Author interview (2012). This situation may change in the near future due to a directive issued in 2012 that mandates the incorporation of a human rights approach throughout the educational system (Gonçalves, Author interview 2012). Regarding particularly the curriculum at law schools, it has usually included a reference to human rights as part of international law courses, but did not incorporate a human rights approach that could be applicable at the national level (Davis Mattar, Author interview 2012).

<sup>468</sup> In fact, more than half of the groups that make up the National Movement for Human Rights are related to religious institutions, mainly to the Catholic Church (Cleary 1997: 268).

<sup>469</sup> Botelho (2003: 90).

<sup>470</sup> Botelho (2003: 90).

<sup>471</sup> Botelho (2003: 91).

<sup>472</sup> Hoffman and Bentes (2008: 112).

<sup>473</sup> See Hoffman and Bentes (2008) for an account of legal mobilization actions by this movement.

justice system and has taken the lead in the field of public interest litigation.<sup>474</sup> The proactive stance of the Public Ministry in the defense of citizens' rights may have downplayed the role of civil society's actors in this field.<sup>475</sup> However, there have been changes in this regards in recent years.<sup>476</sup>

The difficulty in coordinating a legal strategy is also related to disagreements within the feminist movement regarding the way in which advocacy for abortion rights should be pursued.<sup>477</sup> Beyond basic agreements among the different sectors within the movement,<sup>478</sup> there exist strong disagreements regarding strategies and framing, both of which are related to pursuit of legal mobilization. For example, while the more legalized sector of the movement, represented by *RedeSaúde* among others, hold that it is not always necessary to mention the word abortion (for, it is argued, it may discourage some actors, in particular doctors who do not talk about abortion but about the legal interruption of pregnancy and its indications), more radical sectors, including the Brazilian Women's Articulation, argue that not using the word abortion openly would mean a concession to false morals.<sup>479</sup> Another point of conflict refers to the convenience of pursuing a gradualist strategy: while some sectors defend working for implementation of legal abortion and advocating for the extension of the indications model, other groups argue that emphasis should be placed on campaigning for unconditional abortion rights for all women.<sup>480</sup> For example, a member of the World March of Women maintains that while the gradualist approach contributes to placing the abortion issue on the public agenda, it circumscribes the limits of the abortion debate, consumes the energies of the movement and

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<sup>474</sup> Sarmento, Author interview (2012). Hoffman and Bentes (2008: 114) affirm that the Public Ministry has played the role of a citizens' ombudsperson in the fields of health and education. In particular the Federal Public Ministry does not understand its role as an accusatory organ, but as a defender of human rights, minority rights, and collective rights, and it is an independent power (Sarmento, Author interview, 2012).

<sup>475</sup> Hoffman and Bentes (2008: 114).

<sup>476</sup> At the beginning of the 2000s, for example, 9 out of 10 public interest actions were promoted by the Public Ministry, and nowadays that proportion is 5 out of ten, which is due to the growth of the protagonism of civil society in this field (Sarmento, Author interview, 2012).

<sup>477</sup> Negrão, Author interview (2012); Pitanguy (2011: 38-39); Rodriguez et al. (2010: 12).

<sup>478</sup> There exists consensus within the movement about the need to advocate for the legalization of abortion during the first trimester, despite conservatives' accusations that the movement promoted abortion during the whole period of pregnancy (Soares, Author interview (2012). The movement also shares the view that abortion should be framed not as a matter of privacy vis-à-vis the State, but as a right that should include the provision of the service by the State Corrêa (2005: 210).

<sup>479</sup> Negrão, Author interview (2012).

<sup>480</sup> Rodriguez et al. (2010: 12); Vieira Villela and Oliveira (2000: 78).

obliges it to develop a distorted argumentation, instead of openly advocating for abortion rights on grounds of women's autonomy and women's right to decide.<sup>481</sup> Further disagreement within the movement is related to the idea of the balancing of constitutional values in the abortion controversy, although this has gained support in recent years.<sup>482</sup> Illustrative of the controversy was the rejection, by a movement's sector, of the proposal for abortion legalization drafted in 2010 by a group of organizations.<sup>483</sup> Among the main reasons for disagreement was the idea of balancing of rights, which the drafters of the proposal considered as a strategic component that was necessary to negotiate a possible reform with a diverse group of allies, among them doctors and lawyers.<sup>484</sup>

However, there are currently signs of more favorable conditions for gender-related strategic litigation in the country. Among the vast universe of feminist organizations in Brazil, there are some whose composition and mission are more directly related to the pursuit of a legal strategy. These organizations do not generally count on solid institutional structures or resources, although they may count on social capital and prestige associated to the legal profession. The main reference in this regards is the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM BRASIL), based in Brasilia, and formed by feminist lawyers who work *ad honorem* on the enforcement of women's human rights through international litigation and the development of rights strategies at the local level. Important actors in this field are also the Bioethics Committees of the Brazilian Lawyers Association (*Ordem dos Advogados do Brasil*), among which the office in Rio de Janeiro is one of the most active in the abortion debate. On the other hand, CONECTAS Human Rights is an international NGO which opened an office in São Paulo in 2001, and since 2004 has filled amicus curiae briefs in cases involving fundamental rights, mainly before the Supremo Tribunal Federal, and has participated in public hearings held by this Court.

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<sup>481</sup> Godinho (2009: 65).

<sup>482</sup> Corrêa (2005: 212).

<sup>483</sup> *Redesaúde*, CLADEM, CCR, CEPIA, IPAS and FEBRASGO participated in the formulation of a legislative reform proposal, which was rejected by important feminist organizations such as CFEMEA and the Brazilian Women's Articulation (Negrão, Author interview (2012)).

<sup>484</sup> Negrão, Author interview (2012).

## II. 2. Counter-mobilization

Some of the most important anti-abortion organizations in Brazil are the Pro-Life Association from Anápolis, founded in 1997 in the state of Goiás (*Pró-Vida de Anápolis*), and the national Prolife and Pro-Family Association (*Provida Família*), which is an affiliate of Human Life International.<sup>485</sup> In fact, mapping the support structure of the anti-abortion field is still a pending task in Brazil.<sup>486</sup> But conservative mobilization in this country is not based on the development of NGOs as an expression of religious groups in civil society. The two distinctive aspects of conservative mobilization in Brazil are its direct participation in the legislative process at the federal and local levels, and the coalition between Catholic and evangelical actors in Congress. Notably, some of the most active anti-abortion networks are formed by legislators.<sup>487</sup>

The stronghold of abortion opponents is located at the Federal Deputies Chamber. The two most important confessional groups in Congress are the Catholic Pastoral Parliamentary Group (*Grupo Pastoral Parlamentar Católico*) and the Evangelical Parliamentary Front (*Frente Parlamentar Evangélico*), both formed by legislators of different party affiliations.<sup>488</sup> In fact, the current coordination between religious actors of different confessions speaks to the existence of a religious caucus.<sup>489</sup> The influence of conservatives at the legislature has grown since the beginning of the 1990s.<sup>490</sup> From that time through the beginning of the 2000s, the strength of forces at Congress was more evenly balanced between defenders and opponents of

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<sup>485</sup> González Ruiz (2005: 65); Rodrigues et al. (2010: 4).

<sup>486</sup> Soares, Author interview (2012).

<sup>487</sup> This is the case of the National Citizen's Movement for the Defense of Life - Brazil without Abortion (*Brasil sem Aborto*), founded in 2006 by a Christian Spiritist Deputy (Federal Deputy from the PT from Bahia, Luiz Bassuma) (Soares, Author interview (2012). Nowadays, this is a supra-partisan and supra-confessional movement, based at the Federal Congress and supported by the National Conference of Brazilian Bishops (CNBB), the Brazilian Spiritist Federation and the National Evangelic Forum for Social and Political Action (FENASP) (See “Movimento Brasil sem aborto realiza 2<sup>a</sup> marcha nacional”. September 7. 2008. Available at: <http://noticias.cancaonova.com/noticia.php?id=270970>).

<sup>488</sup> The Catholic Pastoral Parliamentary Group, created in 1990, is not exactly a parliamentary caucus, and is not directly linked to the Catholic Church, but it maintains contact with the National Confederation of Brazilian Bishops and anti-abortion groups (Vieira Villela 2001: 101-102), and its members seek advice and support from Church officials when they have to make a decision on issues that affect the interests of the Church (Orozco 2006: 215-216). The Evangelical Parliamentary Front was created in 2003, and the majority of its members are linked to the neo-Pentecostal Churches *Igreja Universal do Reino de Deus* and *Assamblea de Deus* (Orozco 2006: 209).

<sup>489</sup> Mori (2009: 81); Rodrigues et al. (2010: 4-5).

<sup>490</sup> Corrêa and McIntyre (2003: 36).

abortion rights, and legislators from different confessions worked separately.<sup>491</sup> Since 2005, however, religious groups have begun to function in a more coordinated way, and since 2007 there has been a perceptible increase in the number of religious legislators from different parties. These legislators vote as a bloc against abortion rights, as well as the rights of sexual minorities.<sup>492</sup> At crucial junctures the religious caucus presided over the two most important legislative commissions dealing with this issue: the Commission on Social Security and Family and the Commission on Constitution, Citizenship and Justice, both in the Deputies Chamber.<sup>493</sup> Furthermore, as an example of the dynamic between mobilization and counter-mobilization, fundamentalist actors at the National Congress have started developing a more sophisticated approach, learning from feminists' strategies to influence the legislative process.<sup>494</sup>

The most flagrant instance of the penetration of fundamentalist actors within the state structure was the appointment, in February 2013, of Pastor Congressman Marco Feliciano, from the Social Christian Party,<sup>495</sup> as President of the Committee on Human Rights and Minorities of the Chamber of Deputies. Feliciano, a conservative institutional activist, had repeatedly issued racist public declarations as well as statements against women's and sexual minorities' rights.<sup>496</sup> The candidacy of Feliciano galvanized opposition by liberal actors in society, including prominently feminist organizations, who mobilized against his appointment. Feliciano presided over this Committee until December 2013. The most important conservative initiative so far has been the legislative proposal on the so-called Statute of the Unborn, which aims to eliminate the right to abortion in all circumstances, even those currently allowed by the law.<sup>497</sup> The Statute was submitted in 2005 by conservative legislators, and resubmitted in 2007. The Project has been approved by the Commission on

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<sup>491</sup> Rodrigues et al. (2010: 13).

<sup>492</sup> Viana (2011: 168).

<sup>493</sup> Mori (2009: 83); Belloque, author interview (2012). Their influence is also notable in other legislative spaces, such as the Human Rights Commission in the Deputies Chamber, and the Commission on Economic Affairs in the Senate (Mori 2009: 83).

<sup>494</sup> Members of CEFEMEA heard conservative legislators saying “we have to be like them”, with reference to the advocacy work of this organization at the legislature (Rodrigues et al. 2010: 13).

<sup>495</sup> This party had supported the candidacy of Dilma Rousseff during the 2010 presidential campaign.

<sup>496</sup> See “Brazil Chooses a Racist Homophobe to Head its Human Rights Commission”, March 13, 2013. Available at: <http://lab.org.uk/brazil-chooses-a-racist-homophobe-to-head-its-human-rights-commission>.

<sup>497</sup> PL 478/2007.

Finances at the Deputies Chamber in 2013 and is currently under evaluation by the other corresponding legislative commissions.

In 2004, the I National Conference on Policies for Women, convened by the Special Secretary of Policies for Women (SPM) recommended the revision of the abortion law as a priority issue.<sup>498</sup> This recommendation was included in the I National Plan of Policies for Women, approved by 98% of the vote at the Conference.<sup>499</sup> Based on this proposal, the federal government incorporated this issue as one of the top six priorities in the area of women's health, and created a Tripartite Commission comprised of six representatives from the Federal Legislative, the Federal Executive and civil society, respectively, in order to draft a proposal for the reform of the abortion law. This was the first governmental initiative to revise the criminalization of abortion. The Commission worked for four months, during which time a wide public debate on abortion took place in Brazilian society.<sup>500</sup> The result of this work was the "Project of revision of the punitive legislation that deals with the voluntary interruption of pregnancy", which included the elimination of abortion from the Criminal Code, except in the case of forced abortions, and established a regulation of abortion at the demand of the woman during the first trimester, or at any time in cases of risk for the woman's life or fetal malformation.<sup>501</sup> This project was defeated in Congress in 2008, after having lost support by the national Executive. This had a profound impact on the demobilization of abortion rights movement, which had invested most of its energy in the legislative.

### **III. The anencephaly case before the Supremo Tribunal Federal (2004-2012)**

On June 17, 2004, a Claim of Noncompliance with a Fundamental Precept (ADPF No. 54) was presented before the STF, requesting that it uphold the right to selective abortion in cases of anencephaly, and to protect health professionals who perform the procedure. The petitioner was the National Confederation of Health Workers (CNTS), but, in fact, the case was built and promoted by ANIS, with legal advice by prominent Brazilian constitutionalist Luís Roberto Barroso, who represented the CNTS before the STF. This was the first case on

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<sup>498</sup> Bezerra and Santos (2006: 209-210); Xavier (2009: 55). This conference involved around 120,000 in meetings throughout the country and gathered around 1,700 national delegates in Brazil.

<sup>499</sup> Bezerra and Santos (2006: 210).

<sup>500</sup> Batista and Costa (2011: 20).

<sup>501</sup> A synthesis of this project can be found at: Thomaz Gollop, Jorge Andalaf and Edmund Chada, "Projeto de lei relativo à interrupção voluntária da gravidez", <http://files.bvs.br/upload/S/0100-7254/2010/v38n2/a004.pdf>.

reproductive rights to be decided by the Court. On April 12, 2012, the Court upheld the claim by 8 to 2 votes.<sup>502</sup>

This case dates back to 2003, when Debora Diniz, who is the Director of ANIS and Professor of Anthropology at the University of Brasilia, was carrying out ethnographic research at two public hospitals in Brazil,<sup>503</sup> which provide legal abortion services. There, she was confronted with overwhelming cases of pregnant women who were going through medical treatment for cases of fetal anencephaly.<sup>504</sup> At the end of that year, Gabriela de Oliveira Cordeiro, a 19-year-old woman who was pregnant of an anencephalic fetus, asked a local court of justice in the State of Rio de Janeiro for authorization to terminate the pregnancy. Her case would become nationwide known as the “Gabriela case”. The authorization was denied by the first instance, subsequently granted by a state court, and revoked by the *Tribunal Supremo de Justicia* (STJ), which upheld a *habeas corpus* claim in favor of the fetus, presented by a Catholic anti-abortion group.<sup>505</sup> Then, in February 2004, when the pregnancy had reached the eighth month, ANIS together with the NGO Themis, submitted a *habeas corpus* claim in favor of Gabriela before the STF.<sup>506</sup> Diniz travelled to Rio de Janeiro to meet Gabriela. She arrived at Gabriela’s home in the midst of the voting process on this case by the STF, only to know that the fetus had already been delivered and had lived for seven minutes.<sup>507</sup> At that moment, Diniz informed the STF about this situation, and the decision-making process on this case was terminated.<sup>508</sup> However, the favorable position already expressed by some justices in favor of women’s right to choose to carry out a pregnancy in these circumstances gave ANIS a signal that the STF could be an appropriate venue to advance a claim of this kind.<sup>509</sup> Particularly significant in this regard was the opinion of the Justice-Rapporteur in this case, Justice

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<sup>502</sup> Supremo Tribunal Federal, Arguição de Descumprimento de Preceito Fundamental (ADPF No. 54). Published at Diário da Justiça No. 125, Brasilia, July 1 2004. Available at: <http://www.stf.gov.br>.

<sup>503</sup> Diniz was doing research at Hospital Regional da Asa Sul, Brasilia, and Hospital Universitário de Brasilia.

<sup>504</sup> Diniz (2004b: 23). Paranhos, Author interview (2012). This study, which included gynecology-obstetric health providers throughout the country, was coordinated by Debora Diniz and Aníbal Faúndes, and it was carried out in partnership between ANIS, UNICAMP and FEBRASGO. A synthesis of its results can be found at: <http://www.unb.br/noticias/unbagencia/cpmod.php?id=35822>.

<sup>505</sup> Habeas Corpus No. 84.025- 6/RJ.

<sup>506</sup> Habeas Corpus 84.025-6, Rio de Janeiro. Given that ANIS could not be formally the claimant before the STF, the claim was submitted by one of its members, Fabiana Paranhos (Paranhos, Author interview (2012)).

<sup>507</sup> Paranhos, Author interview (2012).

<sup>508</sup> Paranhos, Author interview (2012).

<sup>509</sup> Paranhos, Author interview (2012).

Joaquim Barbosa, who grounded his favorable vote on women's rights to freedom, dignity and autonomy.<sup>510</sup> It was the first time that justices at the STF pronounced an opinion on abortion, and even when the case became moot, his statements were widely commented in the press.

In the aftermath of that case, a meeting was held between members of ANIS, Themis and then-Public Prosecutor Daniel Sarmento, one of the main constitutionalist jurists working in the field of minority rights and sexual and reproductive rights in Brazil, as well a close ally of feminist actors, in order to analyze which would be the most appropriate legal instrument to carry out a judicial case on this issue. Sarmento put forward the proposal of using the ADPF, which was still not a familiar type of claim in the Brazilian legal field.<sup>511</sup> Given Sarmento's position within the State at that time, he suggested contacting Barroso - one of the most renowned Brazilian constitutionalists, who in 2013 became justice at the STF- as a possible litigant-lawyer in this case. Barroso agreed to carry out this endeavor on a pro bono basis.<sup>512</sup> The ADPF was a new instrument, and a key issue to be resolved in this case was the selection of an appropriate legitimate actor to present the claim. Given that national union confederations are among the legitimate actors to submit abstract constitutional claims before the STF, Barroso suggested that the CNTS would be a proper claimant, for it had already been admitted as a legitimate actor in previous cases before the Court.<sup>513</sup> ANIS contacted the CNTS, and a seminar in Brasilia was arranged in order to discuss the medical and legal aspects involved in the case among members of CNTS and ANIS. Daniel Sarmento and a member of Barroso's legal team participated.<sup>514</sup> Following the seminar, the CNTS presented this issue at its national meeting and the medical federations comprising it agreed to pursue, on humanitarian grounds as well as due to the specific interest of the medical profession in the resolution of this issue.<sup>515</sup> Throughout the process, ANIS worked in partnership with Barroso, and provided bioethical and human rights arguments, as well as a theoretical and philosophical perspective to the argumentation of the case.<sup>516</sup>

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<sup>510</sup> The opinion of Justice Barbosa can be found at: [http://www.conjur.com.br/2004-mar-05/leia\\_voto\\_joaquim\\_barbosa\\_interrupcao\\_gravidez](http://www.conjur.com.br/2004-mar-05/leia_voto_joaquim_barbosa_interrupcao_gravidez)

<sup>511</sup> Paranhos, Author interview (2012).

<sup>512</sup> Paranhos, Author interview (2012).

<sup>513</sup> Paranhos, Author interview (2012).

<sup>514</sup> Barroso (2004b).

<sup>515</sup> Barroso (2004b).

<sup>516</sup> Paranhos, Author interview (2012).

The ADPF requested that the STF rule on the unconstitutionality of the application of the abortion criminal law to cases of anencephaly, and to establish the right of pregnant women in that situation to have access to adequate medical procedures for the interruption of pregnancy, without previous judicial authorization.<sup>517</sup> The ADPF asked, in the first place, for an injunction (*medida liminar*) to immediately suspend the requirement of judicial approval to carry out these procedures and, secondly, it requested a declaration of unconstitutionality by the Court with *erga omnes* effects. The ethical and legal argument advanced in this claim was grounded in the factual claim that anencephaly was a malformation incompatible with life outside of the womb. The central argument of the ADPF was that the interruption of the pregnancy of an anencephalic fetus does not fit into the penal definition of abortion, because in this case the factual support required by the law (the potentiality of life) was absent. The ADPF was explicit that the legal discussion on the interruption of pregnancy involves balancing of juridical goods in dispute, but it argued that in the case of anencephalic fetuses, given the lack of potentiality of life, this reasoning was not necessary, and that attention should be focused on the rights of the pregnant woman. The fundamental precepts invoked in the ADPF were the woman's constitutional rights to dignity, (Article 1), which in the argumentation included the right to be free from a threat to moral and psychological integrity, and from the psychological torture caused by the obligation to carry out a pregnancy in cases of anencephaly; the right to freedom and autonomy, grounded in the principle of legality (Article 5); and the right to health (Articles 6 and 196). Notably, the ADPF did not mention the constitutional right to reproductive freedom (Article 226).

The core argument of the claim had been developed by ANIS, and more specifically by Debora Diniz in her bioethical work, which drew also on her ethnographic research. The reasoning was that given that the abortion legislation aims to protect potential life, only the fetus with a physiological capacity to live outside of the womb could be subject to the crime of abortion; without that condition, there existed no juridical good to protect, and no grounds to prohibit a woman from interrupting her pregnancy.<sup>518</sup> Within this framework, Diniz and Diaulas Costa Ribeiro (who was at that time Promoter of Justice for the Defense of Users of the Health System at the Public Ministry of Brasilia) advanced a definition of the medical procedure in these cases as a “therapeutic anticipation of birth”, which became a central

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<sup>517</sup> ADPF 54/DF, Supremo Tribunal Federal, April 12 2012. The text of this decision can be found at: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF54.pdf>.

<sup>518</sup> Diniz and Costa Ribeiro (2003: 106).

reference during this process.<sup>519</sup> This concept had its origin in Diniz's ethnographic research experience during which she accompanied women who were going through the dramatic situation of the diagnosis and treatment in these cases.<sup>520</sup> She found that after receiving such a diagnosis, women did not use the word abortion, but they talked about anticipating unavoidable suffering, and anticipating delivery. The same was found by Costa Ribeiro during his work at the Public Ministry. This led them to redefine the procedure in this circumstance in order to have it reflect women's actual experiences.<sup>521</sup>

The ADPF was presented by the CNTS before the STF on June 17, 2004. On July 1, the day before the STF started its annual leave period, the justice who presided over the case, Marco Aurélio de Mello, upheld the claim on grounds of women's rights to autonomy, health and dignity, and granted the injunction. This type of measure can be decided by the justice in charge of the case, but it must be confirmed by the full Court before it can be effective, except when the Court is on leave. In this way, the injunction was in place until the next time the Court met to discuss the case, on October 20, 2004. On that occasion, the STF revoked the measure by 7 to 4 votes, on the grounds that it was necessary, in the first place, to evaluate the appropriateness of the legal instrument used in the submission of this case, before granting the injunction. On April 28, 2005, the Court decided by a 7 to 4 vote that the ADPF was an appropriate instrument, and it upheld its competence to hear this case, given that it affected women's rights to health, autonomy and dignity. The majority rejected the argument posed by dissident justices that the expansion of abortion permissions corresponds only to the legislative power. During the following years, until April 2012, the Justice-Rapporteur in the case used his prerogative not to bring the case to be decided by the full Court. However, during that period, and also in exercise of his role as Justice-Rapporteur, he convened for the first time a public hearing at the STF, to be held in 2008. Eventually, four public hearings were held on this case.<sup>522</sup> He also accepted the request made in the ADPF that ANIS be admitted as amicus curiae in the case. All other requests to submit this type of brief were rejected by him, in exercise of his discretion as Justice-Rapporteur, including one by the National Conference of Brazilian Bishops.<sup>523</sup> According to the Justice-Rapporteur, this has

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<sup>519</sup> Diniz and Costa Ribeiro (2003: 106).

<sup>520</sup> Diniz (2004b: 22).

<sup>521</sup> Diniz (2004b: 22-23).

<sup>522</sup> They were not the first public hearings to be held at the Court, for another justice in another case convened one before they took place.

<sup>523</sup> Gonçalves and Souza (2008: 149).

been one of the most important cases heard by the STF,<sup>524</sup> which, together with the controversial nature of the case, can explain the Court's decision to expand the legal opportunity structure for the participation of social actors.

During that period, ANIS pursued diverse types of advocacy actions related to its legal strategy, and oriented itself toward influencing the public discussion on this case, as well as toward informing the STF decision-making process. During 2004, after the injunction measure obtained in July, ANIS published three books regarding medical, bioethical and legal aspects involved in the anticipation of birth for anencephaly.<sup>525</sup> In 2004 and 2005, it also carried out a nationwide campaign ("Caravana de Debates: Anencefalia e Supremo Tribunal Federal"), consisting of public discussions organized at universities at 12 Brazilian states.<sup>526</sup> During 2004, also, a dossier was produced by ANIS to be distributed to journalists, and a member of ANIS was designated to coordinate interviews with relevant actors in the media.<sup>527</sup> ANIS also prepared a brief that they handed out to each justice at the STF.<sup>528</sup>

One of the most influential and interesting actions carried out by ANIS was the production of three documentaries, directed by Diniz, about the experience of women who were going through pregnancies of anencephalic fetuses. These films gave voice to the women who decided to have an abortion in that situation, and show how the decisions of public institutions affect them in these dramatic situations. Notably, one of these videos was incorporated by STF justices in their decision-making process. The first documentary was provoked by the statement of one of the justices at the session that revoked the injunction measure in October 2004. On that occasion, he asked: "But, who are those women?" (with reference to those women who had had access to abortion during the period that had elapsed between the injunction decision and its revocation). For this video, ANIS contacted all the legal abortion services existing in the different states and identified 58 women who benefited from the injunction measure.<sup>529</sup> The video tells the story of four of them, and was entitled, following the justice's query, "*Quem são elas?*"<sup>530</sup> During the period of instruction of the case and the

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<sup>524</sup> Vote of Justice Marco Aurélio Mello, ADPF 54, Supremo Tribunal Federal, April 12 2012. Available at: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF54.pdf>.

<sup>525</sup> Paranhos, Author interview (2012).

<sup>526</sup> See Diniz (2004b: 8).

<sup>527</sup> Paranhos, Author interview (2012).

<sup>528</sup> Paranhos, Author interview (2012).

<sup>529</sup> Paranhos, Author interview (2012).

<sup>530</sup> Available at: <http://video.google.com/videoplay?docid=6614084863374455012&hl=pt-BR>.

public hearings at the STF, the Court made 1,500 copies of this video and distributed them; it was the first time that a documentary was used as evidence in a case before the STF.<sup>531</sup> A second video presents the story of Severina (“*Uma historia Severina*”), a woman who was literally on the verge of an abortion allowed by the injunction, but just at the moment that the STF revoked it in October 2004, the procedure was suspended.<sup>532</sup> A documentary entitled “Hábeas Corpus” portraits the experience of Tatielle, a young woman who was about to have an abortion allowed by a lower court’s decision, when a priest presented a *habeas corpus* claim, and the procedure was stopped.<sup>533</sup> These films allowed ANIS to reach universities and social movements, and they were distributed through social networks.<sup>534</sup> In a television interview, Diniz explained that, despite the criticism by some sectors of the academic field (she herself is a well-known academic), the production of documentaries was important because they present a close approach to the suffering of others, which serves to promote nuanced thinking in the abortion debate.<sup>535</sup>

During this process, ANIS worked in partnership with several other feminist organizations, in particular CDD, GEA, *Redesaúde*, as well as with medical associations.<sup>536</sup> In 2005 ANIS obtained the support of the National Council of Health, which issued a favorable resolution regarding the right of the woman pregnant with an anencephalic fetus to interrupt the pregnancy, with a vote of 27 to 3.<sup>537</sup> At the beginning, important sectors of the feminist movement, particularly the *Jornadas*, argued against the efficacy of advocating for legal change in this way. However they modified their opinion in light of the public debate provoked by ANIS’ action.<sup>538</sup>

In April 2012, the STF convened to decide on the ADPF. A most significant shift in the argumentation of the case was advanced by attorney Barroso in his closing statement before the Court. After an eight-year process of public discussion about abortion in cases of anencephaly, he included women’s reproductive rights as one of the main grounds on which

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<sup>531</sup> Paranhos, Author interview (2012).

<sup>532</sup> Available at: <http://video.google.com/videoplay?docid=-5477027628085705086&hl=pt-BR>.

<sup>533</sup> Available at: <http://video.google.com/videoplay?docid=-779349050273222941&hl=pt-BR>.

<sup>534</sup> Paranhos, Author interview (2012).

<sup>535</sup> Video interview available at: <http://www.aads.org.br/wp/?p=1886>.

<sup>536</sup> Paranhos, Author interview (2012).

<sup>537</sup> Talib and Citeli (2005: 27).

<sup>538</sup> Paranhos, Author interview (2012).

the constitutionalization of the right to abortion in these cases should be based.<sup>539</sup> This discourse is important because it was the first time that an argument based on reproductive rights was presented at the STF, and because it introduced a broader claim about women's reproductive freedom, in a case that referred to a narrow exception. The case was decided favorably by the Court on April 12, 2012, by an 8 to 2 vote.<sup>540</sup>

The Court authorized the voluntary anticipation of birth in cases of fetal anencephaly, and it established that the procedure should be provided for free by the Unified Health System, without the requirement of judicial permission. The decision, written by Justice-Rapporteur Marco Aurélio Mello, declared unconstitutional the interpretation of the Criminal Code (Articles 124, 126, 128) that included anencephaly among the crimes categorized as abortion. In this regard, among others, it was aligned with the arguments developed by the claimants, and originally constructed by ANIS. In its opening paragraphs, the decision frames the problem by stating that "there is a difference between abortion and the therapeutic anticipation of birth".<sup>541</sup> It also declares that that the question involves women's dignity, freedom, health and sexual and reproductive rights, and it mentions the tension between those rights and society's interest in the protection of its members, but concludes that in this case there is no real conflict between fundamental rights.<sup>542</sup>

Notably, the first line of argument developed in the body of the decision in order to support that framing develops a lengthy analysis about the secularity of the Brazilian state,<sup>543</sup> and it states that the guarantees of religious freedom and laicity of the State imply that the interpretation of fundamental rights, such as those involved in this controversy, cannot be guided by religion.<sup>544</sup> The argument concludes by citing an interesting proposition advanced by the federal public prosecutor acting in this case regarding the need not to exclude any actor "from the field of interpretation of the meaning of the Constitution", but on the condition that religious groups "duly translated their claims into public reasons".<sup>545</sup> Then, the decision

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<sup>539</sup> The text of Barroso's final oral argument is available at: <http://www.abortoemdebate.com.br/arquivos/FundamentosBarroso.pdf>.

<sup>540</sup> One of the justices (Luiz Antonio Dias Toffoli) recused himself from voting because he had defended the right to abortion in cases of anencephaly in the past, when he was Advocate General of the Union.

<sup>541</sup> ADPF 54, p. 32.

<sup>542</sup> ADPF 54, p. 33.

<sup>543</sup> ADPF 54, p. 34-46.

<sup>544</sup> ADPF 54, p. 45.

<sup>545</sup> ADPF 54, p. 45-46.

proceeds to analyze the issue of anencephaly and in this regard it draws heavily on scientific information presented during at the public hearing before the Court.<sup>546</sup> On the basis on those arguments, it argues that there is no right to life or dignity of the unborn opposing women's rights, because life is not viable in the case of anencephaly.<sup>547</sup> After having stated that, the decision argues that even in the context of a discussion that accepts the premise of the right to life of the anencephalic fetus, this right could not be considered as absolute.<sup>548</sup> This is an important statement, because it transcends the assessment of the specific anencephalic condition, and has implications for the analysis of the constitutionality of the right to abortion in general. In this regard, the decision argues that the Brazilian Constitution does not give priority to the right to life over other rights, and that the protection conferred by the right to life increases according to the different stages of the development of life.<sup>549</sup> The last section of the decision<sup>550</sup> deals with the woman's rights affected by the abortion controversy in the case of anencephaly. It argues that the fundamental rights to dignity, sexual freedom, autonomy, privacy, physical, psychological and moral integrity, and health take prevalence over the interest in the preservation of the anencephalic fetus.<sup>551</sup> In its concluding remarks, the Court recognized women's agency to make a decision in these cases, and acknowledged the value of the opinions heard during public hearings in this regard.<sup>552</sup>

Most of the concurring justices upheld the argument posed by the Justice-Rapporteur, and advanced by the claimants, that the anticipation of birth in these circumstances should not be defined as abortion, and most of them grounded their decision to establish a right to the interruption of pregnancy in these cases on the arguments presented by the claimants regarding the violation of the fundamental precepts of dignity, legality and health. One of the concurring opinions, by Justice Gilmar Mendes, did not follow the argument that the case was not about abortion, but argued that the exception to criminalization for anencephaly was included in the criminal code under the provision that allows for abortion in cases of rape, because – he argued - this provision was established to protect the psychological health of the

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<sup>546</sup> It explicitly states that “the information and data revealed at the public hearing greatly contributed to clarifying what anencephaly is” (ADPF 54, p. 46).

<sup>547</sup> ADPF 54, p. 60.

<sup>548</sup> ADPF 54, p. 65.

<sup>549</sup> ADPF 54, p. 65-67.

<sup>550</sup> ADPF 54, p. 67-80.

<sup>551</sup> ADPF 54, p. 79.

<sup>552</sup> In its conclusion, the decision declares: “as we could hear or read in the presentations during the public hearing, only a person who goes through such anguish is capable of measuring the suffering to which she is subject” (ADPF 54, p. 80).

woman, which is also compromised in the case of anencephaly. Some of the justices framed their opinions in a language that was strongly favourable to women's position in these situations. For example, Justice Carlos Ayres Britto said that "if men got pregnant, the authorization to interrupt a pregnancy in case of anencephaly would have always existed", and Justice Luiz Fux expressed that "to impede the interruption of pregnancy under threat of criminal charges would be equivalent to torture".

The role of female justices in this case has not been particularly salient. In 2005, Justice Ellen Gracie voted against the STF's involvement in this case. During the final decision in 2012, she had already retired, and the two incumbent female justices voted favorably on the woman's right in the anencephaly case, although their argumentation was not particularly feminist in nature. Justice Rosa Maria Weber followed the Justice-Rapporteur's argument regarding the lack of potential life in the case of anencephaly, and thus, she argued, the rights of the mother take precedence. For her part, Justice Cármén Lucia Antunes remarked that this case entailed a tragic decision, and that the pain and the dignity of all persons involved; that is, according to her opinion, the mother, the father, as well as the older brothers should be considered. In fact, their arguments have been perceived as less strongly assertive of the rights of women than those of some male justices, which has been attributed to the pressures to which women are subject in such a position of power, and their willingness to avoid particular criticism of their opinions in an abortion case because of their being women.<sup>553</sup>

In his dissident opinion, the Court's president, Justice Cezar Peluso, argued that the term "interruption of pregnancy" in anencephaly was a euphemism. Rather, in his view it corresponded to the penal type of abortion, and affirmed that the burden of suffering and pain imposed on the woman in such a case could not justify the annihilation of the anencephalic fetus. For his part, Justice Ricardo Levandowski rejected, first, the competence of the Court to decide on this case. He argued that the Court could only act as a negative legislator, but could not introduce an innovation in the normative order. Secondly, he argued that by allowing abortion in the case of anencephaly, the Court would be opening up the possibility of abortion in other cases of fetal malformation and, finally, he affirmed that several provisions in Brazilian codified law protected the right to life from conception.

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<sup>553</sup> Paranhos, Author interview (2012).

This is a decision that places women's rights at center-stage. In this regard, it is much more progressive than the decision on abortion in a case of anencephaly taken by the Argentine Supreme Court in 2001, which was one of the main comparative law references mentioned by the plaintiffs in order to support their claim. The Argentine Supreme Court upheld women's right to health and authorized the induction of delivery of anencephalic fetuses at the stage of viability, that is, after the sixth month of pregnancy. However, the central holding of the decision was that ending a pregnancy before that stage would imply going against the right to life from conception, and that in order to protect that right women should carry on these pregnancies until the stage of viability.<sup>554</sup> In this way, women's right to health was subordinated to the absolute right to life of the *nasciturus*, even in cases of a severe malformation that impedes autonomous extra-uterine life. In contrast, the Brazilian STF did not issue a pronouncement about the beginning of life, because due to the specificities of this case justices considered that it was not required, since the core of the claim was based on the fact of the impossibility of life. It should be noted, though, that the STF had taken a position on the issue of the beginning of life when it authorized stem cell research - a process in which embryos can be destroyed - on grounds that it does not violate the right to life.<sup>555</sup>

The decision of the STF is restricted in terms of the expansion of abortion rights, for it refers only to a specific condition. However, the legal action, its process before the Court, and the final decision are highly significant. The claim dealt with a condition that allowed the petitioners to circumvent the question of the beginning of life. They even framed it as a case that did not refer to abortion. However, from the beginning and for a period of eight years, the controversy inevitably carved out a broad public discursive space on abortion. The original strategy of ANIS had anticipated the potentiality of the case in this regard, but it maintained an argumentation that allowed it to gain legitimacy to access the STF.<sup>556</sup> The STF decision has been considered as a huge political victory for the feminist movement.<sup>557</sup> It also has the symbolic value that pressure by religious forces could not influence the STF actions.<sup>558</sup> Moreover, and fundamentally, it has opened up a new institutional venue for feminist organizations to pursue their claim for abortion liberalization, not least because it has created

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<sup>554</sup> "T. S. c. Gobierno de la Ciudad de Buenos Aires", Corte Suprema de Justicia de la Nación, January 11 2001.

<sup>555</sup> ADI n 3.150/DF, Supremo Tribunal Federal, May 28 2008.

<sup>556</sup> Paranhos, Author interview (2012).

<sup>557</sup> Vieira Villela, Author interview (2012).

<sup>558</sup> Faúndes, Author interview (2012).

a new awareness within the movement regarding the advantages of appealing to the judiciary, in a context in which the political space seems to be reluctant to uphold this type of claim.<sup>559</sup> Finally, the case contributed to changing the terms of the abortion debate in Brazil. As the litigant-lawyer in this case said, when the action was proposed in 2004 the issue was taboo, and after this process the right of the woman to interrupt a pregnancy in this circumstance became common sense.<sup>560</sup>

## CONCLUSION

The Brazilian case presents paradoxical features. On the one hand, the Brazilian feminist movement has been recognized as one of the most important in the region: it is one of the examples in Latin America of how feminists can act as institutional activists within the state, and it has developed a strong national network for advocacy on women's health. The feminist movement also had a decisive influence on the constitutional and legal framework on reproductive rights. On the other hand, the Brazilian Constitution includes a clause on reproductive freedom, and it contains a provision that grants a broadly protected right to health. Brazil is also a pioneer and model in Latin America regarding the implementation of abortion services within the limits of the law, which was made possible by pressure applied by the feminist movement in alliance with the medical profession. Furthermore, since 2003 the party alignment component of political opportunities seemed to be favourable for the advance of abortion right claims. Since that year, the country has been governed by a party that has historically been favorable to social movements' participation and which includes women's reproductive rights in its platform. The year 2010 witnessed the country's first female president taking office. However, Brazil still has one of the most restrictive abortion legislations in the world, only allowing for abortions in cases of rape and risk to the woman's life, and important attempts to reform the law have been halted in Congress. The only successful attempt so far to expand the legal grounds for abortion has been the litigation strategy in the case of anencephaly before the STF.

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<sup>559</sup> See Pitanguy (2010: 657).

<sup>560</sup> See "Luís Roberto Barroso comenta sobre decisão do Supremo que descriminalizou o aborto de fetos anencéfalos", April 17th, 2012. Available at: <http://www.abortoemdebate.com.br/wordpress/?p=3678>

Several points related to political opportunity and the feminist movement's organizational structure and strategies contribute to explaining this development. During the democratic transition, the feminist movement was one of the most successful movements in the country in terms of its penetration of the state's structure as well as of its capacity to influence policies (particularly those related to women's health) and constitutional change. In general, different women, not only feminists, were able to seize political opportunities created during the transition. Since the relative opening up of the dictatorial regime in the mid-1970s, women's organizations formed a strong social movement, in contrast with other forms of collective action at that time, mainly trade unions, which were the main targets of repression. During the last years of the dictatorship, feminists could take advantage of the need of the military government to incorporate new approaches to population and reproductive health, under pressure by international lending institutions, and they developed a model women's health program. Their organization and role during the process of democratization gave them political leverage, and political parties sought their support at key instances of the transition, in particular at the constituent assembly, where the women's movement was one of the most successful ones in terms of the extent that their grievances were incorporated into the constitutional text. Furthermore, at that time, the influence of the Catholic Church in politics was not as strong as it would be later on. In fact, at that time, the Church was redefining its role in the political system, in the aftermath of a conservative turn within the Church worldwide, as well as in Brazil.

However, during the past decade, the rise of religious forces at the Federal Congress, and their taking over of key positions in the legislative process, has blocked the possibility of advancing sexual and reproductive rights through the legislature, while at the same time Catholic and evangelical leaders have exerted pressure on the governing party, which due to electoral incentives committed not to reform the abortion law. The strength of the religious legislative alliance is due in part to the cross-party and cross-religious alliance among different conservative actors at the national Congress. The difficulty in changing the abortion law due to strong conservative pressures is illustrated by the 2008 defeat of the Tripartite Commission project, as well as by the electoral commitment of President Rousseff to refrain from abortion law reform.

Given the difficulty of advancing the abortion legalization cause through the political process, there exists nowadays agreement among important sectors of the feminist movement a need to

consider launching a legal strategy that could promote abortion rights before courts, in particular the STF. The successful action presented by ANIS, and the positions developed by this Court in this case - as well as its jurisprudence in the case of stem cell research - has been decisive in configuring a new legal opportunity and a correlated new awareness by the movement with regard to the convenience of pursuing a judicial strategy. Furthermore, the legal strategy developed by ANIS implied a reframing of the abortion issue by part of the feminist movement, which implied a moderation of feminist claims, including the redesignation of abortion in cases of anencephaly.

However, there is still disagreement within the feminist movement regarding fundamental issues related to framing and strategy, and this impedes the development of a unified claim for the constitutionality of abortion rights through a legal strategy. In particular, there is still resistance by important and broad sectors of movement to adhere to a framing that transcends the discourse based on the woman's right to her own body as the main ground to claim for abortion legalization, and to support a gradualist strategy. The difficulty in coordinating a common legal strategy is related partly to the institutional structure of the movement. Its diverse and territorially spread-out organizations, and the capacity of feminist ONGs to maintain contact with the grassroots movement, is one of the particularities and the strengths of the Brazilian feminist movement. This has been a critical factor in the implementation of legal abortion services and it has produced a strong national coalition that pursued an important legislative reform project (which was derailed by political conditions). Such a widespread and diverse movement may also become decisive for implementation in case of legalization, as well as for resisting backlash. However, the lack of an instance of coordination - for example, a strong, single-issue organization, or a renewed broad alliance or umbrella organization that could reformulate strategies and goals - makes it difficult to overcome existing disagreement on strategies and framings within the movement. This then hinders the ability of the movement to face new political contexts and new legal opportunities.

## **CHAPTER IV**

### **SOCIAL MOVEMENTS AND ABORTION LAW REFORM IN COLOMBIA**

#### **INTRODUCTION**

In May 2006, the Colombian Constitutional Court issued the landmark Decision C-355/2006. This decision liberalized the abortion law, which until then had penalized abortion under all circumstances and was among the most restrictive in the world.<sup>561</sup> The Court established that abortion would not be a crime in three specific circumstances: when the woman's life or health is at risk, in case of severe fetal malformation, and in case of rape. Although the reform was restricted in its scope, it was groundbreaking in terms of its argumentation. It was one of the first judicial decisions in the world to uphold abortion rights on grounds of equality<sup>562</sup> and the first decision by a constitutional court to review the constitutionality of abortion following a human rights framework.<sup>563</sup> Decision C-355 was also the first case in a series of reforms that would liberalize, to different extents, the abortion regulation in four other Latin American countries - Mexico, Brazil, Argentina and Uruguay.

The Court's decision was motivated by an unconstitutionality action that was part of a strategic litigation project (LAICIA, the acronym for High Impact Litigation in Colombia for the Unconstitutionality of Abortion). This project was carried out by the organization Women's Link Worldwide, and was led by a Colombian feminist lawyer. The Colombian case is also salient because it is the first case of strategic litigation at the national level for abortion law reform in Latin America, and the only case so far in which the litigation strategy was carried out from its inception by female lawyers.

Also notable in this case is the process of strategic litigation carried out by feminist organizations in the aftermath of Decision C-355, which was intended to ensure the decision's implementation and resist backlash. Remarkable as well was the active role played by the Court in that process. In a country where the influence of Catholicism on the state was a historic feature, the Constitutional Court proved to be the only state institution to stand against attempts to impose fundamentalist religious visions in the policy-making process.

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<sup>561</sup> Until 2006, Colombia shared with only 4% of the world's population a total ban on abortion (Gonzalez 2006: 128).

<sup>562</sup> Ordolis (2008: 265).

<sup>563</sup> Undurraga and Cook (2009: 241).

The chapter's first section analyses the structure of political and legal opportunities, with an emphasis on transformations in the constitutional justice system brought about by the 1991 constitutional reform and the creation of the Constitutional Court. The second section presents, first, an account of social mobilization for abortion rights in Colombia. Secondly, it analyses the support structure for legal mobilization, the origin of the LAICIA project and the demand of unconstitutionality it presented before the Constitutional Court. Finally, the section includes a reference to counter-mobilization strategies. The third section analyses the Constitutional Court's Decision C-355/2006, as well as the processes of implementation and backlash that followed it. In particular are considered the strategic litigation actions developed by the feminist movement and the role played by the Constitutional Court in those processes.

## I. POLITICAL AND LEGAL OPPORTUNITIES

### I.1. State–Church relationship in Colombia

In the Latin American context, which is marked by a historical influence of Catholicism on the state and culture, the Colombian Catholic Church stands out as one of the most traditional and influential in the country's political life. It is one of most conservative churches in the region, with a strong tradition of clerical authority and close links to elites at all levels.<sup>564</sup> It resisted the progressive changes promoted by the Conference of Latin American Bishops held in 1968 in Medellín. It has also been exceptionally favored by a normative framework that during a great part of the country's institutional history upheld the ideals of Christendom (or Catholic integralism), oriented to maintain a total integration between the State and the Church.<sup>565</sup>

From the mid-nineteenth century up to the first half of the twentieth century, the controversy about the role and status of the Church in society was one of the main points of conflict - even fueling civil wars - between the two political parties that have dominated Colombia's political system: the Liberal and the Conservative parties. The Church has openly identified with the

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<sup>564</sup> Levine (1981: 205).

<sup>565</sup> Levine (1981: 70).

latter.<sup>566</sup> In contrast with the Mexican case, the conflict between liberal and conservative sectors did not lead to the secularization of state institutions. Instead, processes of restoration of conservative power followed – usually through violent paths - short-lived liberal governments. The 1957 plebiscite, ensuing from a compromise between the liberal and the conservative party in the aftermath of a period of civil war and political violence, implied a return to the Catholic confessionality of the State, this time upheld by the two traditional parties as well as by a broad majority of the Colombian population.<sup>567</sup> This framework prevailed, almost unmodified, until the promulgation of the 1991 Constitution.

As happened with other aspects of the country's political and social organization, the institutional relationship between State and Church and the role of religion in the social sphere were affected by the constitutional change in 1991, as well as by subsequent decisions by the Constitutional Court. The new Constitution included provisions on religious freedom and equality, secular education in public schools, and changes in family law that diminished the Church's influence in this field.<sup>568</sup> In the aftermath of the constitutional reform, a process of regulation and judicialization of the relationship between the State and the Church ensued. In 1993, at the request of the *Procurador General de la Nación* (Inspector General), the Court declared that several articles of the Concordat were against the Constitution (Decision C-027/93), and in 1994, also at request of the Inspector General, it invalidated a norm that implied a religious characterization of the country (Decision C-350/94).<sup>569</sup>

## I.2. Political context and the position of political actors in the abortion debate

Colombia has a centralized and unitary system of government. Unlike other countries in the Southern Cone, including prominently Argentina and Brazil, Colombia did not undergo a dictatorial wave between the 1960s and 1980s. The country's political regime has been restrictive to political participation, but it has not been completely sealed.<sup>570</sup> The country has formally been a democracy since 1957, after a civil war period known as *La Violencia*, and it has had a stable political regime, with periodic elections, and formally protected civil

<sup>566</sup> González (1997: 147).

<sup>567</sup> González (1997: 390, 396).

<sup>568</sup> Arias (2003: 300).

<sup>569</sup> For an account of this process, see Arias (2003: 343, 346).

<sup>570</sup> Dugas (2001: 815).

rights.<sup>571</sup> However, the political agreement that settled the civil war excluded for several decades those who did not align with any of the two main political parties, and had as a priority aim the control of social mobilization and civil society organizations.<sup>572</sup> Nonetheless, the extreme political violence and armed conflict that escalated since the 1980s in Colombia, involving guerrilla movements, state security forces and paramilitary organisations, jeopardized the enforcement of formally recognized rights and civil liberties, and in that context, the authoritarian repression of dissent curtailed the possibilities of social mobilization. Only since the end of the 1980s has there been a move toward effective political liberalization,<sup>573</sup> and the constitutional reform of 1991 was a crucial component of that process. Despite the persisting armed conflict, this process implied an opening for social actors, including the feminist movement.<sup>574</sup>

However, the party alignment component of political opportunities in Colombia has not been favorable for advancing reproductive rights and abortion rights in particular. The two dominant political parties have been opposed mostly with regard to their position vis-à-vis the relationship between the State and the Church.<sup>575</sup> In the abortion debate, the Conservative party has always expressed the moral position of the Catholic Church.<sup>576</sup> For its part, the Liberal party represents a liberal and modernizing standing. The legislative initiatives that intended to liberalize the abortion law were submitted by legislators from this party,<sup>577</sup> but they were advanced on individual basis.<sup>578</sup> But the Liberal party as such does not have the legalization of abortion on its political agenda, nor has it openly defended it in the public sphere. Indeed, leftist parties have been reluctant to support feminists' demands for reproductive rights and abortion in particular. Most significantly, in 1991, the Democratic Alliance M-19 (formed by progressive sectors and former insurgent groups) did not support the proposal for "optional maternity" in the Constituent Assembly.<sup>579</sup>

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<sup>571</sup> The only military dictatorship during the twentieth century in Colombia ruled between 1953 and 1957.

<sup>572</sup> Romero (2002: 354).

<sup>573</sup> Gill (2002: 204).

<sup>574</sup> See Lamus (2010: 240).

<sup>575</sup> Reuterswärd et al. (2011: 815).

<sup>576</sup> Viveros (1997: 9).

<sup>577</sup> Viveros (1997: 8).

<sup>578</sup> In particular, liberal Senator Piedad Córdoba has presented on several opportunities a project for the legalization of abortion, and has been the main advocate for reform in Congress.

<sup>579</sup> Viveros (1997: 9).

In Colombia there have been attempts to establish mediation between some sectors of the feminist movement and female legislators.<sup>580</sup> However, it has been observed that Colombian civil society is somewhat distant from these legislators, and there is a perception that in other South American countries this relationship is closer and involves more dialogue.<sup>581</sup> Prior to 2006, eight projects for the liberalization of the abortion law were submitted by individual legislators, but they failed in the first stage of the legislative process.<sup>582</sup> Those projects were not a direct product of feminist advocacy, although on some occasions feminist organizations provided information or advice to legislators.<sup>583</sup> These previous attempts to advance reforms through Congress seem to have informed the activists' decision to pursue a litigation strategy before the Constitutional Court in order to liberalize the abortion law.<sup>584</sup> This would confirm the hypothesis that when the political processes is halted, social movements may search for other institutional venues, and in particular they may turn to legal strategies - especially when legal opportunities are favorable - to instigate legal changes.

When the demand of unconstitutionality of the abortion law was submitted in 2005, and during its process before the Constitutional Court in 2006, an opportunity window for legal reform through the Court was created by the proximity of the upcoming presidential elections, which would be held in May 2006.<sup>585</sup> The national government was held by conservative President Alvaro Uribe, who framed any type of activism as antipatriotic and close to terrorism,<sup>586</sup> and counted on a great deal of popular support. However, his intention to be re-elected, for which he needed the support of the Constitutional Court, may have led him to remain silent during most of the process, and not to exert pressure over the Court on the abortion issue.<sup>587</sup> When he finally spoke out against the liberalization of abortion, he was the only presidential candidate to openly oppose abortion legal reform, reflecting the shift in public opinion created by the abortion campaign and the attention given to it by the media.<sup>588</sup>

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<sup>580</sup> Wills and Zambrano (2002: 428).

<sup>581</sup> Villarreal, Cristina, Director of Fundación Oriéntame, member of Mesa por la Vida y la Salud de las Mujeres, Author interview, Bogotá, January 28 2013.

<sup>582</sup> Barraza and Gómez (2009: 11-12).

<sup>583</sup> Villarreal, Author interview (2013).

<sup>584</sup> Roa (2006: 221).

<sup>585</sup> See Reuterswärd et al. (2011: 815, 817, 827) for a thorough account of the opportunity window.

<sup>586</sup> Cuéllar, Guillermo. Director of Brújula Comunicaciones, Author interview, Bogotá, February 21 (2013).

<sup>587</sup> Cuéllar, Author interview (2013).

<sup>588</sup> See Reuterswärd et al. (2011: 815, 827).

### I.3. Population and health policy

The Colombian state initially resisted the implementation of population control policies that were part of development programs, due to pressure from the Church as well as pro-natalist positions more generally.<sup>589</sup> However, the government did not restrict the private market and non-governmental initiatives on experimentation and distribution of contraception.<sup>590</sup> In fact, the government upheld international investment in family planning, and Profamilia (the *Asociación Pro-Bienestar de la Familia Colombiana*, which is the International Planned Parenthood Federation's affiliate in Colombia) was for decades responsible for around sixty-eight percent of all family planning activities in the country.<sup>591</sup> In the 1990s, Colombia signed up to the commitments of the UN Conferences of Cairo and Beijing, and eventually, in 2003 the Ministry of Social Protection (since 2011, Ministry of Health and Social Protection) presented a national policy on sexual and reproductive health, which explicitly acknowledged those commitments.<sup>592</sup> However, regarding the health policy more broadly, one of the characteristics of the Colombian health system is that a majority of health service providers are private, and can decide on the types of services they offer, which poses an obstacle for the implementation of lawful abortion services.<sup>593</sup>

Regarding access to abortion methods, the state's policy seems to be similar to its standing on birth control methods more generally. For example, access to misoprostol in pharmacies has been available since 1998, approximately.<sup>594</sup> In fact, the government's position in the field of reproductive rights is ambiguous, for the country had until recently a highly restrictive abortion law, but at the same time it permitted abortion practices that were not clandestine, although they were not legal either. Further, Colombia has been a case of early acceptance of emergency contraception, promoted by Profamilia, and eventually included by the government in the technical norms for family planning in 2000,<sup>595</sup> which implies that the state or private insurances must provide it.

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<sup>589</sup> Corrêa (1995: 38).

<sup>590</sup> Corrêa (1995: 38).

<sup>591</sup> Plata and Calderón (1994: 1105).

<sup>592</sup> See "Política nacional de salud sexual y reproductiva", Ministerio de la Protección Social, Bogotá, February 2003, page 7. Available at: [http://www.unfpa.org.co/home/unfpacol/public\\_htmlfile/%20politicasr.pdf](http://www.unfpa.org.co/home/unfpacol/public_htmlfile/%20politicasr.pdf)

<sup>593</sup> Jaramillo and Alfonso (2008: 153).

<sup>594</sup> Villarreal (2011: 2).

<sup>595</sup> Heimburger et al. (2003: 156).

With regard to the state's policies for women, until the late 1970s, they were confined to maternal-infantile programs within the Ministry of Social Protection, following the requirements of international development strategies and population control policies at that time.<sup>596</sup> As happened in other Latin American countries in the 1990s, an organ for the promotion of gender equality (Presidential Council for Youth, Women and Families) was established within the state structure in Colombia, under the administration of President César Gaviria in 1990. However, in contrast with cases such Brazil and Chile, in this case, this institution (the *Consejería para la Juventud, la Mujer, y la Familia*) was not promoted by the feminist movement,<sup>597</sup> but by the Office of the First Lady, and it produced proposals that were formulated without input from the movement.<sup>598</sup> In 1995, the government created the National Direction for Women's Equity (DINEM), this time promoted by feminist organizations, and initially presided over by a feminist activist.<sup>599</sup> However, in general, the process of institutionalization of gender mainstreaming policies in Colombia has been fragile.<sup>600</sup>

#### I.4. Abortion regulation in Colombia

The Colombian Criminal Code defines abortion as a crime against life and personal integrity. Article 122 establishes prison sentences for the woman who terminates her pregnancy as well as to those perform an abortion.<sup>601</sup> Abortion has been criminalized in Colombia since the nineteenth century. However, criminal legislation of 1837 and 1890 included a therapeutic exception, in which case abortion was not penalized.<sup>602</sup> This exception was eliminated in 1980, which implied the criminalization of abortion under all circumstances.<sup>603</sup> In 2000, the reform of the Criminal Code, on the one hand, made the law slightly more flexible by authorizing judges not to impose criminal charges in extraordinary circumstances (Art. 124), but, on the other hand, it introduced, for the first time in Colombia, criminal charges for "harm to the fetus" (Art. 125).

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<sup>596</sup> Peláez and Rodas (2002: 8).

<sup>597</sup> Alvarez (1998: 3).

<sup>598</sup> Wills and Zambrano (2002: 432).

<sup>599</sup> Olga Amparo Sánchez, from Casa de la Mujer de Bogotá, and founder of the National Women's Network was its first president (Lamus 2010: 240).

<sup>600</sup> Lamus (2010: 434).

<sup>601</sup> Law 599, July 24 2000. Criminal Code /Book 2.

<sup>602</sup> Molina and Roldán (2006: 19).

<sup>603</sup> Molina and Roldán (2006: 20).

In 2006, the Constitutional Court established an indication model, and decriminalized abortion in case of danger to the woman's life or health, in case of unviability of the fetus, and in cases of rape (as well as incest or not-consented artificial insemination). However, disputes about the implementation of the Court's decision have so far obstructed women's access to legal abortion services.

## **I.5. The legal opportunity. Normative framework and institutional rules at the Constitutional Court**

In contrast with other Latin American cases, in Colombia there was a strong tradition of judicial independence, and, similarly to the Argentine case, there was long tradition of judicial review. This tradition dates back to the nineteenth century, and until 1991 was exercised by the Supreme Court. However, until 1991 there existed few constitutionally protected rights and there were no direct mechanisms for their protection.<sup>604</sup> In the context of an alarming level of violence and armed conflict, which had escalated since 1989, a constitutional assembly formed by different sectors in society and promoted by the students' movement<sup>605</sup> brought about a highly progressive Constitution. This Constitution includes an impressive charter of rights, as well as some of the most accessible and effective mechanisms for their protection found in the region. In particular, the Constitution created the Constitutional Court and the *tutela* writ, and conferred new relevance on the pre-existing public action of unconstitutionality by adjudicating this competence to the new Court. Moreover, the Constitutional Court itself contributed to defining its institutional role as an active venue for the protection of citizen's rights. In this way, during the past two decades constitutional justice became the most accessible means for justice for common citizens, and a crucial actor in the country's political system.<sup>606</sup>

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<sup>604</sup> Uprimny (2001: 296).

<sup>605</sup> The Colombian student movement stands out among its counterparts in Latin America in that it had as a core purpose; that is, the promotion of a National Constituent Assembly, as a path to achieve peace and justice (see generally Dugas 2001, and Lemaitre 2007: 16-18).

<sup>606</sup> Rodríguez-Garavito et al. (2003: 156).

### I.5.1. Constitutional and human rights norms

The 1991 Constitution declared Colombia as a social state under the rule of law (*estado social de derecho*) (Art. 1), and incorporated the recognition of rights of different collectives, among them gender justice provisions. It also provided that human rights treaties ratified by Congress take precedence over national laws and constitute interpretative criteria of constitutional rights (Art. 93), and that, in most cases, fundamental rights should be directly applicable (Art. 85). Colombia has ratified all the main international and regional human rights treaties. CEDA W entered into force in Colombia in 1982, through Law 51, 1981, and it approved the Convention's Facultative Protocol in 2007. The Convention Belem do Pará, was ratified in 1992, with the passage of Law 248, 1995.

The Constitution included most of the demands posed by the women's movement during the constituent process.<sup>607</sup> Women were seriously unrepresented in the Constitutional Assembly. However, they organized and mobilized around the constituent process, and obtained the recognition of many of their demands.<sup>608</sup> In particular, the Constitution upheld CEDAW's prohibition of discrimination against women and its endorsement of positive measures in order to achieve substantive equality (Art. 13). Specifically, the Constitution contains a reproductive freedom clause that reads: "the couple has the right to decide freely and responsibly the number of their children" (Art. 42). During the drafting of the new Constitution there was a struggle between feminist and conservative positions around the abortion issue, with the former claiming for constitutional provisions conducive to the liberalization of the abortion law, and the latter demanding the incorporation of a provision regarding the right to life from conception.<sup>609</sup> The Constitution included an article that grants the inviolability of the right to life (Art. 11), but it did not extend that protection from the point of conception.

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<sup>607</sup> Even though the 1991 Assembly is reputed to have included formerly excluded social, political, and ethnic groups (Nunes 2010: 70), only four out of its seventy-four members were women (Morgan 2005: 75).

<sup>608</sup> See Morgan and Alzate (1991); Morgan (1999: 258).

<sup>609</sup> See Morgan and Alzate (1991).

## **I.5.2. The Constitutional Court. Institutional rules and legal instruments for constitutional control**

The Constitutional Court is composed of nine justices (*Magistrados*), who serve a fixed and nonrenewable 8-year term. In March 2001 a female justice was appointed for the first time to the Constitutional Court, and she became the Court's president in 2004.<sup>610</sup> The second woman to join the Court was appointed in 2009.<sup>611</sup> A female justice on the Court in 2005 was one of the signals that the organization Women's Link considered in its evaluation of the possibilities of success of its demand for the liberalization of the abortion law.<sup>612</sup>

In Colombia, besides the constitutional jurisdiction, with the Constitutional Court as its highest instance, there exists a Supreme Court, which is the highest body of a general jurisdiction, as well as a Council of State, which is the highest court in matters related to administrative law, and a special jurisdiction for the rights of indigenous communities. On the other hand, the 1991 Constitution created the Office of the Inspector General of Colombia (*Procuraduría General de Colombia*). This powerful institution has a broad mandate, covering both the duties of Inspector General and Attorney General. It is in charge of the enforcement of the Constitution, general laws, judicial decisions and administrative acts. Its head (the *Procurador*), who is nominated by the President with confirmation by Congress for a four-year term, is in the highest position in charge of the enforcement of human rights, and also has competence to investigate public officials, even those publicly elected, and to remove them from office without criminal trial, for non-compliance with their duties.

The 1991 Constitution also introduced new means for rights protection and access to the constitutional jurisdiction. In particular, it strengthened the mechanism for abstract review and created a writ of protection of fundamental rights called *tutela*. These procedures have resulted in virtual abolition of standing requirements.<sup>613</sup> Any Colombian citizen, without needing to have suffered a violation of a fundamental right, at a low cost and without need of an attorney, can submit an abstract unconstitutionality action to the Constitutional Court regarding a law or decree. The Court is obliged to hear the case and to issue a ruling, which has *erga omnes* effects. For its part, the *tutela* action, for concrete control of constitutionality,

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<sup>610</sup> Clara Inés Vargas served as a Justice at the Constitutional Court from 2001 to 2009.

<sup>611</sup> Justice María Victoria Calle Correa joined the Court in April 2009.

<sup>612</sup> Roa (2005: 1).

<sup>613</sup> Yamin (2011: 105).

is similar to the *amparo* writ of other Latin American countries, but its special features have made it a major instrument for the protection of constitutional rights.<sup>614</sup> A *tutela* claim can be filed by any citizen who is a potential or actual victim of a fundamental rights violation, if there are no other means of obtaining redress. It can be brought before any court, without need of legal representation or written documentation, and must be decided through an expeditious procedure. All lower courts' decisions regarding *tutelas* reach the Constitutional Court, which can discretionally select some of the *tutelas* in order to stop grave human rights violations and develop its jurisprudence, which implies a virtual certiorari mechanism, by which the Court can stabilize its constitutional doctrine, and set its own agenda.<sup>615</sup> Due to the particularities of these mechanisms for rights protection and constitutional justice, it has been claimed that Colombia has perhaps the world's most open system of judicial review.<sup>616</sup>

The decision-making process of the Constitutional Court includes important mechanisms for the participation of external actors. In actions of unconstitutionality, there is a mandatory 15-day public consultation period, and in the case of *tutelas*, the consultation is discretionally decided by the Court. The Justice Rapporteur (*Magistrado ponente*) is responsible for convoking external actors and organizing public hearings,<sup>617</sup> and any Colombian citizen can draft a written intervention stating her opinion regarding a norm that is under review by the Court. The Court also calls for experts, social organizations and public officials to express their points of view.<sup>618</sup> The participation of the Inspector General is the only mandatory intervention, and the most important one, in an action of unconstitutionality proceeding.

The Constitutional Court sits in bank (*Sala Plena*) to hear on unconstitutionality actions, and in a chamber (*Sala*) to decide on *tutela* writs. There is a chamber composed of two justices for the selection of *tutelas*, and a chamber for the revision of *tutelas*, integrated by three justices.<sup>619</sup> Final decisions on actions of unconstitutionality and *tutelas* are made by a single majority, of the membership of the Court and of the revision chamber, respectively. When the Court issues a decision on an action of unconstitutionality, it publishes a communication

<sup>614</sup> See Yamin (2001: 108), Rodríguez-Garavito et al. (2003: 178), Cepeda (2005: 83).

<sup>615</sup> Rodríguez-Raga (2011: 82). In fact, this takes place in approximately 1% of all cases (Rodríguez-Garavito et al. 2003: 159).

<sup>616</sup> Cepeda (2005: 74).

<sup>617</sup> Constitutional Court, Internal Regulations, Available at:  
<http://www.corteconstitucional.gov.co/lacorte/reglamento.php>

<sup>618</sup> Cepeda (2005: 98).

<sup>619</sup> Constitutional Court, Internal Regulations, Available at:  
<http://www.corteconstitucional.gov.co/lacorte/reglamento.php>

stating its decision, which has immediate effects, and some months later it presents the complete text of the decision.

With regard to more contingent aspects of legal opportunity, the Colombian Constitutional Court has stood out so far as exceptionally receptive to citizen's claims. During the first years after its creation, the Constitutional Court itself, through its acts and decisions, contributed to configuring the particular and world-famous Colombian system of constitutional justice. This system has been characterized thus far by the Court's activist standing regarding rights protection and its innovative procedures for the enforcement of its decisions. In some of its most salient decisions, the Court has developed an innovative use of structural and experimentalist remedies.<sup>620</sup> In this way, it has built a reputation of independence and, through its decisions on unconstitutionality actions and *tutelas*, it has shown a remarkable disposition to interpret the Constitution in a progressive way.<sup>621</sup> Further, it has often appeared as the only institution with the will and capacity to stand for vulnerable groups and causes not embraced by the political system.<sup>622</sup>

However, in the field of abortion law, until its 2006 decision the Court had upheld the legislation that criminalized abortion under all circumstances. Before 2006, the Court heard three main cases on abortion (C-133/1994, C-013/1997 and C-647/2001), presented by individuals and not linked to feminist organizations. In all those circumstances it established an absolute protection of the right to life from conception. Moreover, the holding and argumentation of these decisions was also different from the type of arguments advanced by the Court in other related fields of rights. For example, whereas in previous decisions on other issues the Court had defended the laicity of the state,<sup>623</sup> in the abortion decisions it cited papal

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<sup>620</sup> Among its most notable rulings, in Decision T-426/1992 the Court decreed a fundamental right to subsistence (*mínimo vital*) and created the doctrine of "unconstitutional state of affairs", by which an individual claim that affects a class, and is due to structural factors, must be addressed through public policy and structural reform (see Rueda 2010: 33). In T-025/2005, the Court applied the doctrine of unconstitutional state of affairs in the case of forced displacement of persons due to the armed conflict, in what has been considered as the most ambitious attempt to implement a macro-sentence in the Latin American context (see Rodríguez-Garavito and Franco 2010: 84). It also mandated a structural approach to health system reform, in what has been considered to be one of the most progressive judicial decision on the right to health in the world (Uprimny 2001: 299; see also Rodríguez-Garavito et al. 2003: 157).

<sup>621</sup> Uprimny (2001: 299), Rodríguez-Garavito et al. (2003: 157).

<sup>622</sup> Yamin (2011: 106).

<sup>623</sup> For example, Decision C-027/1993 and Decision C-350/1994 that contributed to dismantling the legal framework that sustained the integration between the State and the Church.

encyclicals<sup>624</sup> and declared that abortion should not be allowed in cases of rape because motherhood always dignifies women.<sup>625</sup> In these decisions there were important dissenting opinions by a group of justices who argued for the liberalization of the law.<sup>626</sup> The position of these justices was an important signal considered by Women's Link in its evaluation of the receptivity of the Court to its demand for the liberalization of the abortion law in 2005.<sup>627</sup>

In fact, the specific Court's jurisprudence on abortion can be considered as the only negative aspect of the legal opportunity for the prospects of liberalization of the abortion law through the Constitutional Court. Despite this jurisprudence, Women's Link considered that the likelihood of achieving its demand against the abortion law was higher than at any previous moment in the country's history.<sup>628</sup> They took into account the Court's jurisprudence in other areas of rights, in particular that the Court had defended the need to balance conflicting rights, and had incorporated international human rights arguments as interpretive guidelines<sup>629</sup> In this regard, feminist legal activists considered that a crucial element for a favorable decision was the development, over the former years, of clearer and stronger arguments by the monitoring bodies of human rights treaties in favor of the liberalization of abortion, which could presumably be followed by the Court.<sup>630</sup> They also evaluated more stable or structural aspects of the legal opportunity, in particular the procedural efficiency of the mechanism for abstract control of constitutionality,<sup>631</sup> and the fact that a decision by the Court required a simple majority of justices.<sup>632</sup> Finally, in their assessment of the legal opportunity, they took into account the Court's composition, and in particular the presence of a woman for the first time

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<sup>624</sup> Decision C-133/1994 cites Encyclical *Humanae Vitae* and Decision C-013/1997 cites *Humanae Vitae* and *Evangelium Vitae*.

<sup>625</sup> Decision C-013/1997, p. 45.

<sup>626</sup> Three justices dissented in the first and second decisions (C-133/1994, C-013/1997) and four justices dissented in the last one (C-647/2001).

<sup>627</sup> Roa (2006: 222).

<sup>628</sup> Roa (2005: 2).

<sup>629</sup> Roa (2006: 224).

<sup>630</sup> Roa (2006: 224).

<sup>631</sup> Gomez (2006: 98).

<sup>632</sup> Roa (2005: 3). In fact, they considered that in the first two abortion decisions by the Court, there was a minority of three very progressive justices, who had advanced arguments for the right to abortion at demand of the woman, and a very conservative majority, which grounded its arguments on Papal Encyclicals (Roa 2014). However, the Court's composition changed in 2001, and in its evaluation of Court's decision on abortion that year, Women's Link concluded that there was a highly conservative minority, and although the progressive minority was not present, now there was a moderate majority of five justices (Roa 2014).

on the Court, as well as the presence of a group of justices whose dissenting opinions in the previous abortion cases were in favor of decriminalization.<sup>633</sup>

## **II. SOCIAL MOVEMENTS' MOBILIZATION AND LEGAL MOBILIZATION IN THE FIELD OF ABORTION LAW**

### **II. 1. Feminism and the struggle for abortion rights in Colombia**

Second-wave feminism in Colombia has always had the legalization of abortion as a core demand. One of the particularities of the Colombian feminist movement is that it has developed in the midst of an armed conflict, which has necessarily affected the movement's actions and organizational processes. In a context of violence and internal, non-declared war, the women's movement in general, including feminist organizations, reoriented its actions in order to attend to urgent needs, particularly those of women and families in situations of forced displacement.<sup>634</sup> This reorientation has been favored by international cooperation agencies, which privileged humanitarian actions for the victims of the conflict.<sup>635</sup> This situation posed difficulties for the advance of the original demands of the feminist movement, and in particular the abortion issue. On the one hand, the movement devoted much of its work to attend to issues such as sexual violence against women, which has been pervasive in the context of extreme vulnerability created by forced displacement.<sup>636</sup> On the other hand, the association made by powerful conservative actors between abortion and death made it more difficult for feminists to talk about abortion, in a context where death was a pervasive presence.<sup>637</sup>

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<sup>633</sup> Jaramillo and Alfonso (2008: 49).

<sup>634</sup> It was estimated that by the end of 2009, the number of persons in situation of forced displacement in Colombia was around 3.3–4.9 million, only surpassed by the case of Sudan (Prada et al. 2011: 9).

<sup>635</sup> Lamus (2010: 281, 293).

<sup>636</sup> Thomas, Florence, Feminist scholar, member of Mesa por la Vida y la Salud de las Mujeres. Author interview, Bogotá, February 9 (2013).

<sup>637</sup> Thomas, Author interview (2013). For example, in the context of the Beijing+5 Meeting, the government of President Andrés Pastrana declared that “given the suffering that the Colombian people go through due to generalized violence, we have a definite commitment to the right to life. So, we strongly reject any action that may threaten it, including intentional abortion” (cited in Baquero 2011: 30).

However, feminist organizations, among them those working in the field of women's health, always maintained abortion on the movement's agenda, and developed an approach to access to abortion services that has distinguished them in the Latin American context and has influenced regional interactions and campaigns. Since the mid-1970s, feminist groups started to organize and campaign for legal and free abortion, through a political discourse based on women's autonomy and control of their own bodies, and they organized mostly around small groups and self-awareness activities.<sup>638</sup> Later on, particularly since the end of the 1980s, a process of professionalization and "NGO-ization" of the feminist movement took place in Colombia, which contrasted with the informality and cultural-critique orientation that had previously characterized it.<sup>639</sup> Furthermore, the participation of Colombian delegates at the International Conference on Population and Development in Cairo in 1994 had as a consequence the introduction of a rights-based approach to health in the country,<sup>640</sup> and the participation of feminist groups in the preparatory works for the World Conference on Women that would take place in Beijing in 1995 strengthened the capacities of the feminist movement for negotiating with government agencies.<sup>641</sup>

The *Mesa por la Vida y la Salud de las Mujeres* (Working Table for the Life and Health of Women, thereafter *Mesa por la Vida*), which is the most important coalition for the defense of abortion rights in Colombia, was formed in that context, in the mid-1990s.<sup>642</sup> This coalition was conceived as a technical and interdisciplinary space, formed by organizations and individuals from different fields of expertise, without a hierarchical structure, and linked to the women's movement.<sup>643</sup> It is dedicated to the defense of women's sexual and reproductive rights, and from the beginning it has had the legalization of abortion as a main aim. It is conceived more as a technical than as an activist space, and its work has been related to the development of public health and social justice arguments for the defense of abortion

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<sup>638</sup> Barraza and Gómez (2009: 7), Lamus (2010: 102).

<sup>639</sup> Jaramillo and Alfonso (2008: 119).

<sup>640</sup> Heimburger et al. (2003: 156).

<sup>641</sup> Reportedly, in that context there was for the first time a more symmetric negotiation between the women's movement and the government (Wills and Zambrano 2002: 419).

<sup>642</sup> At the beginning it was called *Colectivo por la Autonomía Sexual y Reproductiva* (Collective for Sexual and Reproductive Autonomy), which started gathering in 1994, and in 1996 it was constituted as the *Mesa*.

<sup>643</sup> Barraza and Gómez (2009: 32). This coalition has tried to avoid formalization and hierachal relationships, and for this reason it has not been constituted as yet another organization or legal person (Villarreal, Author interview (2013). Among the main organizations that form this coalition are the *Red Colombiana de Mujeres por los Derechos Sexuales y Reproductivos*, based in Medellín, the *Red Nacional de Mujeres*, *Fundación Oriéntame* and *Corporación Sisma – Mujer*.

rights.<sup>644</sup> Over time, it became a reference for the Ministry of Social Protection in the field of reproductive health,<sup>645</sup> and it has been a key ally of Women's Link in the demand for the liberalization of the abortion law before the Constitutional Court. Further, it has played a key role in the implementation phase of the Court's decision.<sup>646</sup>

One of the characteristics of the movement for abortion rights in Colombia was its early development of non-governmental initiatives delivering safe abortion services, in a legally restricted context. *Profamilia* (Association for the Well-Being of the Colombian Family), founded in 1965, is the biggest family planning organization in the country and has offered comprehensive advice for safe abortions.<sup>647</sup> The *Oriéntame* Foundation, created in 1977, has been a pioneering organization in Latin America for quality counseling and treatment of women searching for the interruption of pregnancy, and has developed a comprehensive model for the attention of so-called incomplete abortions (i.e., post-abortion complications) aimed at empowering women in this process.<sup>648</sup> This model has allowed this organization to operate even when there was a total ban on abortion in the country, and it has expanded throughout other countries in the region.<sup>649</sup> Other organizations that have worked closely with the *Mesa por la Vida* are the *Red Colombiana por los Derechos Sexuales y Reproductivos* (Colombian Network for Sexual and Reproductive Rights), created in 1996, which promoted the total decriminalization of abortion,<sup>650</sup> and the organization *Sí Mujer*, founded in 1984 in the city of Cali, with the aim of providing reproductive health services and assistance to victims of sexual violence. More recently, two organizations were created with the goal of developing legal mobilization actions and in particular promoting women's access to justice: *Sisma Muje*, founded in 1998, which provides legal advice particularly in the field of violence against women,<sup>651</sup> and the more research-oriented *Humanas*, created in 2005, which tries to

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<sup>644</sup> González Vélez (2005: 625).

<sup>645</sup> Villarreal, Author interview (2013).

<sup>646</sup> Barraza and Gómez (2009: 65).

<sup>647</sup> For an account of some of the main activities carried out by *Profamilia*, see Heimburger et al. (2003: 156).

<sup>648</sup> See "A different approach: A discussion with Cristina Villarreal, Director of *Fundación Oriéntame* in Bogota, Colombia". Available at: <http://www.medicalabortionconsortium.org/video/interview-with-cristina-villarreal-executive-director-fundacion-orientame-colombia-9>.

<sup>649</sup> Through ESAR (Education for Reproductive Health Foundation) -which is an international organization under the same executive direction than *Oriéntame*-, this model has been expanded to Argentina, Bolivia, Ecuador, Guatemala, México, Paraguay and Peru (Villarreal, Author interview 2013).

<sup>650</sup> González Vélez (2005: 21).

<sup>651</sup> Jaramillo and Alfonso (2008: 123).

introduce a gender-based approach to the problem of access to justice.<sup>652</sup> Finally, Catholics for Choice (CDD) is a salient organization linked to this sector of the Colombian feminist movement. It was established in the country in 1998, as an initiative of a group of women working in ecclesial base communities.<sup>653</sup> In Colombia, CDD has always had abortion as its priority issue. It was constituted as an NGO in 2000, and since 2005 it has had a presence, through delegates and spokewomen (*multiplicadoras*) in several cities throughout the country.<sup>654</sup> It was one of the most visible organizations during the litigation process carried out by Women's Link before the Constitutional Court in 2005-2006.

A different sector of the feminist movement, and a very important and influential one indeed, is comprised of more radical organizations. *Casa de la Mujer*, created in 1982, is regarded as the landmark feminist NGO in the country.<sup>655</sup> It has historically been the most vocal organizations in the public sphere in favor of the legalization of abortion on demand in Colombia,<sup>656</sup> and it has participated together with the *Mesa* in different strategies for the defense of abortion rights in the country, though it is not part of that collective. The organization *Ruta Pacífica de las Mujeres*, founded in 1996, has developed grass-roots mobilization throughout the country, with a focus on violence against women in the context of the armed conflict. It was a member of the *Mesa* but later on withdrew from it.<sup>657</sup> As explained below, this sector of the movement has had a more difficult position with regard to the demand presented by Women's Link for the liberalization of the abortion law through the Constitutional Court.

The sources of international financial support for organizations working in the field of reproductive rights and abortion in particular are kept anonymous.<sup>658</sup> The fact that Colombia has been considered as an emerging economy – leaving aside that it is still one of the most unequal countries in the region - has affected the flux of international cooperation for civil society's projects, but given the persistent effect of the armed conflict, these sources have not

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<sup>652</sup> Baquero (2011: 19).

<sup>653</sup> Mazo, Sandra. Director Catholics for Choice. Author interview, Bogotá, January 25 (2013).

<sup>654</sup> Mazo, Author interview (2013).

<sup>655</sup> Barraza, Cecilia, Advisor at the Office for Gender Equity Gender Equity. Founder of Humanas, Centro Regional de Derechos Humanos y Justicia de Género (Author interview, Bogotá, February 10, 2013).

<sup>656</sup> Jaramillo and Alfonso (2008: 125).

<sup>657</sup> Lamus (2010: 252).

<sup>658</sup> Thomas, Author interview (2013).

been completely reduced.<sup>659</sup> Colombia continues to be considered the country with the most NGOs in Latin America.<sup>660</sup> In Colombia, the feminist movement for reproductive rights has most of its major organizations in Bogotá, but it also has a presence in other regions of the country, particularly in the cities of Medellín and Cali, where there exist non-governmental providers of abortion services, and where the movement pro-legalization has always been important.<sup>661</sup> This infrastructure has been fundamental, among other things, for the implementation of new abortion norms.<sup>662</sup>

The bulk of the work by feminist organizations in the field of abortion rights has been devoted to the development and enforcement of indications, in the context of a restrictive regulatory framework, and even before the legal sanctioning of an indications model by the Constitutional Court. In fact, reportedly, the Colombian feminist movement has led the work on the health exception in the region, and it is the only Latin American country in which there has existed a comprehensive policy for the enforcement of this indication since the Constitutional Court's decision.<sup>663</sup> Over time, and helped by the repercussions of the Constitutional Court's decision in 2006, Colombian feminists became leading actors in the development of the health exception in Latin America.<sup>664</sup> The *Mesa por la Vida* has had a key role in the articulation of a regional network that works on the development and enforcement of indications, with a particular focus on the development of a common conceptual understanding of the health exception within a human rights framework, as well as training for health professionals.

### ***Legal mobilization and the origin of the LAICIA project***

Since the creation of the Constitutional Court, Colombia has had one of the strongest traditions of public interest litigation in Latin America. One of its particularities is the role played by some academic institutions in this development. In contrast with other countries in the region, feminist lawyers in Colombia could draw on and benefit from that aspect of the support structure for legal mobilization. Specifically, one of the country's elite universities,

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<sup>659</sup> Dalen, Annika, Resarcher at DeJusticia, Centro de Estudios de Derecho, Justicia y Sociedad. Author interview, Bogotá, February 4 (2013). Thomas, Author interview (2013).

<sup>660</sup> Thomas, Author interview (2013).

<sup>661</sup> Barraza, Author interview (2013).

<sup>662</sup> Barraza, Author interview (2013).

<sup>663</sup> Villarreal, Author interview (2013).

<sup>664</sup> Barraza and Gómez (2009: 16).

the Universidad de los Andes, has played an essential role in the development of strategic litigation, and has spearheaded the introduction of the model of legal clinics in Colombia, which has been extended to other universities in the country.<sup>665</sup> This university has also been one of the main intellectual sources of the neo-constitutionalist doctrine developed by the Colombian Constitutional Court, and several justices at the Court were former legal academics.<sup>666</sup>

Mónica Roa, the lawyer who presented the action of unconstitutionality that would lead to the Constitutional Court's Decision 355/2006, was a feminist lawyer educated in that context. Roa was not part of the feminist movement. She studied law at the Universidad de los Andes, and during her post-graduate studies in the United States she established contact with the organization Women's Link Worldwide for her research project on the use of courts by the feminist movement in different countries.<sup>667</sup> Women's Link was founded in Spain in 2001, with the aim of developing an observatory of gender jurisprudence. Roa joined the organization, became program director, and led the development of Women's Link's LAICIA project (the acronym for High Impact Litigation in Colombia for the Unconstitutionality of Abortion). In 2005, in the midst of the development of LAICIA, the organization established an office in Bogotá, formed by a small staff composed of feminist lawyers and political scientists. It has received funding from international organizations.<sup>668</sup> This organization was then, and still is, the main NGO in Colombia for legal mobilization on abortion rights. It was not affiliated with the feminist movement, and it arrived in the country with an already defined and determined project for legal change, which rather logically generated tensions within the movement.

The traditional form of mobilization of the feminist movement in Colombia was oriented toward influencing public policy and the legislative process.<sup>669</sup> In the years following the constituent process, in contrast with the development of strategic litigation by other social

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<sup>665</sup> Lemaitre, Julieta, Law Professor, Universidad de Los Andes. Author interview, Bogotá, February 15 (2013); Parra, Andrea, Director of the Action Program for Equality and Social Inclusion (public interest law clinic), Universidad de Los Andes, Former staff attorney of Women'sLink Worldwide. Author interview, Bogotá, February 19 (2013). Nowadays, there exist three legal clinics at this university (Parra, Author interview 2013).

<sup>666</sup> Lemaitre, Author interview (2013).

<sup>667</sup> Roa (2008b: 20).

<sup>668</sup> Among financing organizations were IPPF/RHO, IPAS, the Ford Foundation, Open Justice Initiative and Libra (Jaramillo and Alfonso 2008: 44).

<sup>669</sup> Jaramillo and Alfonso (2008: 25).

movements, such as those working for the rights of indigenous populations, LGBT rights, and trade unions, there was no strategic litigation for the defense of women's rights, and reproductive rights in particular.<sup>670</sup> Women's organizations generally intervened in proceedings before the Constitutional Court initiated by other actors, or reacted to the Court's decisions, but they did not take the initiative in judicial actions.<sup>671</sup> Activists' perceptions regarding the judicial system may have influenced the lack of recourse taken by feminist organizations to strategic litigation before the Constitutional Court for the liberalization of the abortion law. On the one hand, feminist organizations that supported the LAICIA project, prominently those that comprise the *Mesa por la Vida*, had not perceived the legal opportunity, for they had not imagined that they could appeal to the Constitutional Court and defend their abortion rights claims on constitutional grounds.<sup>672</sup> On the other hand, the other sector of the feminist movement, comprised by historical organizations such as Casa de la Mujer, distrusted this venue, because they perceived both the judiciary and the legislative as conservative institutions, and because they believed that legal change effected by courts would not grant the cultural transformation they searched for.<sup>673</sup> Thus, in 2005, when Women's Link started working in Colombia, there was no organizational structure for legal mobilization within the feminist movement in the country.

However, the work carried out during more than three decades by the feminist movement in Colombia for the defense of abortion rights was an indispensable prerequisite for LAICIA's success. Among other factors, the organizational structure and resources built by the feminist movement was instrumental in the rapid creation of a support network for the project. Feminist organizations working on reproductive health had also produced and disseminated knowledge about the situation of abortion in Colombia, and had situated the abortion debate on the public agenda, which was of course a central contribution to the legal strategy. The network of preexisting feminist actors and organizations, in particular the *Mesa por la Vida*, would also be crucial for implementation of the Constitutional Court's decision. As a historic

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<sup>670</sup> Jaramillo, Isabel, Law Professor, Universidad de Los Andes. Author interview, Bogotá, February 6 (2013).

<sup>671</sup> An exception to this situation was the demand presented by Sisma-Mujer before the Council of State regarding the enforcement of the quota law, which was decided in a negative way by this institution in 2001 (Jaramillo and Alfonso 2008: 26).

<sup>672</sup> Thomas, Author interview (2013).

<sup>673</sup> Jaramillo and Alfonso (2008: 129).

feminist put it, when Roa arrived in Colombia, the issue and the social movement were already built.<sup>674</sup>

At the beginning of the LAICIA initiative, Roa contacted the *Mesa*, which immediately became a partner of the project and put its social capital and resources to its service.<sup>675</sup> Because the *Mesa* was in close contact with the feminist movement, the academia and the sector of the medical profession that worked on the provision of sexual and reproductive health services, it was a key player in the development of the network of actors that supported LAICIA.<sup>676</sup> The idea of a litigation strategy was well received by this sector of the feminist movement.<sup>677</sup> In fact, this experience, as well as the Constitutional Court's decision, has been appropriated by women's organizations.<sup>678</sup> According to an expert analyst of this process, the impact of legal mobilization on the movement was less due to Roa teaching anything to the movement, and more to a change in the way in which the movement set out to perceive opportunities, both in terms of their awareness regarding the possible strategic use of the legal system, and in their capacity for seizing international recourses for litigation. An example of the latter would be in the field of sexual crimes in the context of the armed conflict.<sup>679</sup>

LAICIA's model of legal mobilization has consisted of a top-down strategy, which has allegedly deepened existing conflicts among different movement factions.<sup>680</sup> Critical assessments of its impact on the movement have noted that, while the project gathered support from the more legalistic sectors of the movement, it denied protagonism to historical feminist actors, which increased divisions within the movement.<sup>681</sup> Tensions were aroused, on the one hand, by the very nature of the project, because some organizations within the feminist movement do not agree with the idea of pursuing gradual reforms, which imply demanding the liberalization of the abortion only in extreme circumstances.<sup>682</sup> On the other

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<sup>674</sup> Thomas, Author interview (2013).

<sup>675</sup> Villarreal, Author interview (2013); González Vélez, Ana Cristina, Researcher at CEDES-Argentina, Former National Director of Public Health (2002-2004), Co-Founder of Global Doctors for Choice, Member of Mesa por la Vida y la Salud de las Mujeres, Author interview, Bogotá, February 16 (2013).

<sup>676</sup> Barraza and Gómez (2009: 32).

<sup>677</sup> Mazo, Author interview (2013).

<sup>678</sup> Parra, Author interview (2013).

<sup>679</sup> Jaramillo, Author interview (2013).

<sup>680</sup> Jaramillo and Alfonso (2008: 98).

<sup>681</sup> See Jaramillo and Alfonso (2008: 31, 98, 117, 123).

<sup>682</sup> Löfgren (2008: 52). This contributed to creating conflicts within the movement, although during the process at the Constitutional Court these organizations supported LAICIA's demand.

hand, conflict may have been introduced by the project managers themselves. Firstly, Women's Link did not open up the possibility of discussion about the project, whose terms (especially regarding the legal action and the communication strategy) were non-negotiable.<sup>683</sup> Secondly, Women's Link considered that because Colombian society had a negative perception of feminism as a radical movement, it was better not to give protagonism to the movement during the process of the demand.<sup>684</sup> Finally, the excessive personalization of the strategy, favored by the media, which highlighted the expertise and image of Roa, may have been useful in terms of the credibility of the legal strategy before the general public, but this approach also downplayed more substantive questions related to the struggle for women's reproductive freedom and gender equality.<sup>685</sup>

### ***The action of unconstitutionality before the Constitutional Court***

On April 2005, after having campaigned for the project for six months, Women's Link officially launched LAICIA, which challenged the constitutionality of article 122 of the Criminal Code before the Constitutional Court.<sup>686</sup> LAICIA adopted the model of high-impact litigation which, as explained by one of its main proponents, is a type of strategic litigation based on a specific claim but oriented toward promoting wider social change.<sup>687</sup> In particular, besides legal change, the project was aimed at advancing mobilization around the abortion issue and transforming the public debate on abortion.<sup>688</sup> For that reason, LAICIA integrated three strategies: the legal strategy, a strategy of alliances, and a communication strategy.<sup>689</sup>

The LAICIA team considered the use of the mass media to be a central component of the strategy.<sup>690</sup> Mass media is a matter of major concern for social movements in general. Even

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<sup>683</sup> Jaramillo and Alfonso (2008: 133).

<sup>684</sup> Jaramillo and Alfonso (2008: 117). Women's Link did not call notable feminist figures, who had been part of the movement for reproductive rights for decades, to participate in public debates during the development of LAICIA (Jaramillo and Alfonso 2008: 117). In fact, the project's leaders considered that it was strategically useful that feminists' radical voices - speaking outside of the LAICIA network and demanding the complete liberalization of the abortion law - be heard, because they made the voice of legal strategists sound more moderate (Roa 2005).

<sup>685</sup> Jaramillo and Alfonso (2008: 192).

<sup>686</sup> Complete information about the LAICIA project, as well as an archive of documents related to the process before the Constitutional Court, can be found at: [http://www.womenslinkworldwide.org/prog\\_rr\\_laicia.html](http://www.womenslinkworldwide.org/prog_rr_laicia.html).

<sup>687</sup> Roa (2006: 224).

<sup>688</sup> Roa (2014).

<sup>689</sup> Roa (2014).

<sup>690</sup> Roa (2006: 224).

taking that into account, the case of LAICIA is outstanding among other Latin American cases of legal mobilization on abortion rights in its explicit and conscious use of media strategy. It is, for example, the only case in which this aspect of the project was commissioned to an advertising agency: *Brújula Comunicaciones*, an agency created in 2005, and specializing in strategic communication and human rights. This agency developed a comprehensive evaluation of the social and political context, as well as the intervening arguments and actors, trained the project's spokespersons and managed their public image. The "media-ization" of the LAICIA project was part of a new paradigm for advancing women's rights, which distanced itself from traditional feminist positions.<sup>691</sup> The intention of this strategy was to create a context that facilitated the decision-making process by the Constitutional Court, as well as to promote a wide public debate on the abortion issue that transcended traditional, and generally more extremist, framings.<sup>692</sup> In fact, a central aim of the strategy was that the project was not seen as a feminist issue.<sup>693</sup> The communication campaign placed a strong emphasis on the image of Mónica Roa. As such, she was interviewed by men's and fashion magazines, which was against feminist traditions, and contributed to presenting the issue and its actors as "establishment-friendly" and distanced from radical ideologies.<sup>694</sup>

The media strategy aimed at changing the framing of the abortion debate. Communication specialists ascertained that, in the past, the public discussion on abortion revolved around the moral and criminal dimensions of the issue, and that media sources on this issue were typically a priest, a public official, and a few voices from the public health sector.<sup>695</sup> But speaking in favor of abortion rights was taboo.<sup>696</sup> The objective of the campaign was to frame the abortion issue as a matter of public health, human rights, gender equality and social justice.<sup>697</sup> In fact, these were the arguments that feminists had been developing in Colombia at least since the mid-1990s, but the strategy chose not to give voice to feminist activists.<sup>698</sup> Two main types of arguments were developed since the beginning: a public health argument, based

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<sup>691</sup> Barraza, Author interview (2013).

<sup>692</sup> Roa (2014).

<sup>693</sup> Cuéllar, Author interview (2013).

<sup>694</sup> For example, the men's magazine *Soho* (Barraza, Author interview (2013)).

<sup>695</sup> Cuéllar, Author interview (2013).

<sup>696</sup> Cuéllar, Author interview (2013).

<sup>697</sup> Roa (2006:237), Jaramillo and Alfonso (2008: 181).

<sup>698</sup> In the words of Cuéllar, "the response of the public to an activist is dichotomic: support or non-support, hero or demon. That is why the framework of activism was not good for us" (Cuéllar, Author interview (2013)).

on maternal mortality and cost to the public health system, and the argument that Colombia does not comply with international obligations with regards to women's health, and its legislation on abortion is among the most backward in the world. A social justice argument was introduced later, when the debate was already installed and the two other arguments had taken hold.<sup>699</sup>

LAICIA' advocates emphasized that the strategy would be moderate, and by that it meant in particular that it would pursue the liberalization of the law in only three circumstances.<sup>700</sup> So, moderation in this case consisted in not demanding the total liberalization of abortion, but a gradual liberalization of the law. In fact, the actors that led the legal strategy continued conceiving of the abortion issue as a matter of women's autonomy, and even if the legal argument framed women's right to abortion as a human rights issue, their more general and underlying position continued to be grounded on a claim about women's right to their own body.<sup>701</sup> In fact, this interposed a contradiction in the demand, because a position grounded in women's autonomy would lead to the demand of the total liberalization of abortion, and not only to the establishment of exceptions or indications. But advocates knew that total liberalization was not possible, and that from a strategic point of view they had to request gradual changes. This ambiguity was present in the first claim presented by Roa before the Constitutional Court, and it can be attributed to the fact that the juridification process did not destabilize the traditional framing, based on women's autonomy.

The petition presented by Roa before the Constitutional Court, on April 15, 2005, argued that the total criminalization of abortion established in Article 122 of the Criminal Code violated constitutional rights,<sup>702</sup> as well as the duty of the State to comply with international human rights obligations. It further argued that these obligations were established principally by the recommendations that the monitoring committees of human rights treaties had made to the

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<sup>699</sup> Cuéllar, Author interview (2013).

<sup>700</sup> Jaramillo and Alfonso (2008: 46).

<sup>701</sup> In particular, Roa has defended the feminist motto about women's right to their own body (see Roa 2006: 4). In fact, Colombian feminists, and not only the LAICIA team, have not addressed the discussion about the right to life, and the bioethical aspects involved in the abortion issue. Jaramillo and Alfonso explain that the LAICIA team decided that it was not convenient to respond to moral and religious arguments (2008: 192).

<sup>702</sup> Specifically, the rights to dignity (Preamble and art. 1), life (Art. 11), personal integrity (Art. 12), equality and freedom (Art. 13), free development of personality (Art. 16), reproductive freedom (Art. 42) and health (Art. 49). The transcription of the demand is included in the text of the Constitutional Court Decision C-355/2006, p. 3-4.

Colombian State, which according to the petition, were part of the constitutional block.<sup>703</sup> The first petition presented by Roa before the Constitutional Court articulated two main demands: the declaration of unconstitutionality of the inclusion of abortion in the criminal code, and the declaration of unconstitutionality of the criminalization of abortion in three specific circumstances; that is, in the case of rape, in the case of fetal malformation, and when the woman's life or health is at risk.

On 7 December 2005, the Constitutional Court issued a press communication in which it refrained from deciding this case for procedural reasons.<sup>704</sup> However, it specified that a new demand could be presented against the same article of the criminal code, and gave precise indications about how to pursue it. Women's Link decided to present a new demand, and on December 12, 2005, Roa filed a second version of it before the Court. Among the main changes presented in the second demand presented where the limitation of the petition to the declaration of unconstitutionality in the case of the three exceptions; and the moderation and marginalization of the international law arguments that were central to the first demand.<sup>705</sup> However, the demand maintained the claim that the Court should apply, as a hermeneutical criterion, the jurisprudence of the monitoring bodies of human rights treaties, which, according to the demand, were part of the block of constitutionality.<sup>706</sup>

The demand, in its first and second versions, was supported by amicus curiae briefs submitted by national and international organizations and institutions, as well as individual actors. In fact, this case received more amicus curiae presentations than any other in the Court's history.<sup>707</sup> The Inspector General supported the two versions of the demand. The second

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<sup>703</sup> Women's Link (2007).

<sup>704</sup> The Court argued that it could not pronounce a decision on the merits of the case because, whereas the demand presented important information about the practice of clandestine abortion and its consequences, it did not comply with juridical requirements. In particular, the Court's Communicate argued that an unconstitutionality demand cannot request the conditioned validation of a norm. It also claimed that the petition did not demonstrate its claim that there were new international norms that were part of the block of constitutionality and obliged the Colombian State to liberalize the abortion law. (Constitutional Court, "Comunicado de Prensa sobre las Sentencias relativas al Aborto", December 7 2005, available at: <http://www.convencion.org.uy/lang/es/colombia-comunicado-de-prensa-sobre-las-sentencias-relativas-al-aborto?print=1>). The Inhibitory Decision (C-1299/2005) was published in March 2006

<sup>705</sup> Jaramillo and Alfonso (2008: 64).

<sup>706</sup> See C-355/2006, p. 8, 12.

<sup>707</sup> Parra, Author interview (2013). A full list of organizations and actors that submitted amicus in favor of the demand, as well as the full text of some of those briefs are available at: [http://www.womenslinkworldwide.org/prog\\_rr\\_laicia.html](http://www.womenslinkworldwide.org/prog_rr_laicia.html)

demand was also supported by state institutions that had not supported the first demand. The Human Rights Ombudsman, the Ministry of Social Protection and the Institute of Family Welfare presented before the Court favorable opinions to the decriminalization of abortion in the three specified circumstances.<sup>708</sup> The LAICIA initiative conceived of the submission of amicus briefs in two senses. First, they saw the presentation of amicus as an informative input for justices, regarding technical issues as well as the women's experience in extreme situations related to abortion.<sup>709</sup> This was particularly important given that the action of unconstitutionality was an abstract claim.<sup>710</sup> So, the amicus that presented women's histories and experiences were a way to humanize the constitutional debate. As well, they saw them as a way of promoting social mobilization around the demand.<sup>711</sup>

## II.2. Counter-mobilization

In Colombia, opposition to sexual and reproductive rights and abortion rights in particular, has come mainly from the Catholic Church.<sup>712</sup> Traditionally, the Church's influence on the State was exercised through the National Conference of Bishops and other Catholic leaders.<sup>713</sup> However, since the mid-2000s, and in line with trends in other Latin American cases, a new type of religious activism has emerged in the country, based on civil society organizations and led by lay Catholics who started using the same methods as other social movements, such as legislative lobbying and strategic litigation.<sup>714</sup> Among the main Catholic organizations working in the sphere of civil society are *Red Futuro Colombia*, *Unidos a Dios salvaremos a Colombia*, *Legión de María*, and the *Consejo Nacional de Laicos*.<sup>715</sup>

When in 2005 Women's Link submitted the unconstitutionality claim before the Constitutional Court, the Catholic network set out to campaign against the demand, with support by Human Life International and its Colombian affiliate.<sup>716</sup> Other actions included gathering two million signatures demanding to keep the ban on abortion and a march to

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<sup>708</sup> Jaramillo and Alfonso (2008: 71), Löfgren (2008: 42).

<sup>709</sup> Roa (2014).

<sup>710</sup> Roa (2014).

<sup>711</sup> Roa (2014).

<sup>712</sup> See Viveros (1997: 4-7) for an account of key instances of the Church's intervention in the abortion debate in Colombia.

<sup>713</sup> Lemaitre (2012: 497).

<sup>714</sup> Lemaitre (2012: 498).

<sup>715</sup> Mazo (2006: 80).

<sup>716</sup> Löfgren (2008: 40).

Congress to present them.<sup>717</sup> During the proceedings before the Constitutional Court, these actors submitted amicus curiae briefs, and when the Court issued Decision 355/06, the Catholic Church opposed it through public declarations and excommunicated the Court's justices and the actors who had presented the demand.<sup>718</sup> In the aftermath of the Court's sentence, lay Catholic actors presented forty lawsuits against the decision.<sup>719</sup> Conservative actors also lobbied the Ministry of Social Protection and other state institutions in order to deter the enactment of any kind of regulation regarding the implementation of the Court's decision.<sup>720</sup>

However, the major success of conservative mobilization against abortion rights would come about when conservative activists assumed key positions within the state's structure. In 2009, a conservative actor linked to Opus Dei, Alejandro Ordoñez, was appointed by President Uribe as the head of the Office of the Inspector General, which had until then been favorable to the implementation of Decision 355/06. Ordoñez had openly expressed fundamentalist positions against abortion, gay marriage and the United Nations system,<sup>721</sup> and as a former judge at the *Consejo de Estado* he had issued decisions based on Catholic doctrine.<sup>722</sup> One of his first actions as Inspector General was the appointment of lawyer Myriam Hoyos, professor at an Opus Dei University (*Universidad de la Sabana*) and former president of *Red Futuro Colombia*, to the Office in charge of the protection of sexual and reproductive rights and of overseeing the implementation of Decision 355/06.<sup>723</sup> These actors can be considered as paradigmatic conservative institutional activists. From this office, they have developed a new type of religious mobilization that has defended fundamentalist positions against abortion rights, all the while creating a framing that has appealed to constitutional arguments and has avoided mentioning religious principles.<sup>724</sup> In general, their actions have had a chilling effect on other state officials, due to the power of the Inspector General to dismiss them for non-

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<sup>717</sup> This action was promoted by the rector of The Gran Colombia University, José Galán (Reuterswärd et al. 2011: 814).

<sup>718</sup> Baquero (2011: 25).

<sup>719</sup> Lemaitre (2012: 498).

<sup>720</sup> Löfgren (2008: 53).

<sup>721</sup> See Parra (2010: 40) for an account of the Inspector General's expressions against gay rights and sexual and reproductive rights in general as "against the natural order of things".

<sup>722</sup> Lemaitre (2012: 497).

<sup>723</sup> See Parra (2010: 41), Lemaitre (2012: 497). Hoyos had presented 47 amicus curiae briefs during the decision-making process of Sentence C-355/2006 and had adverted that she would take actions against a Court's decision to liberalize (Parra 2010: 41).

<sup>724</sup> Lemaitre (2012: 498).

compliance with their duties.<sup>725</sup> The presence of these actors within the state's structure has also encouraged other public officials to be vocal in the public space about their convictions against sexual and reproductive rights. <sup>726</sup>

### **III. THE CONSTITUTIONAL COURT'S DECISION AND ITS AFTERMATH**

#### ***The C-355/2006 Decision***

On May 10, 2006, the Constitutional Court issued the landmark C-355/2006 decision that liberalized the abortion law in Colombia. The Justices Rapporteurs in this case were Jaime Araújo Rentería and Clara Inés Vargas, and a majority of six justices at the Court supported the decision.<sup>727</sup> The Court declared Article 122 of the Criminal Code constitutional, but established that abortion would not be a crime under three circumstances: when the woman's life or health is at risk (as certified by a physician); when there are serious malformations of the fetus that make life outside the uterus unviable (as certified by a physician); or when pregnancy is the result of criminal acts, such as rape, incest or non-consented insemination (as backed by the corresponding denounce of the crime).<sup>728</sup> The Court further invalidated the provision of the Criminal Code (contained in Art. 123) that established that consent by women under 14 was not valid to authorize the interruption of their pregnancies.<sup>729</sup> It also established that all health service providers, public and private, are obliged to provide safe abortion in the three specified circumstances. The Court adopted a comprehensive definition of health, which includes mental health.<sup>730</sup> It also pointed out that the right to conscientious objection can only be exercised by individuals, and not by juridical persons or the State.<sup>731</sup> It specified that its decision was immediately applicable and that the rights it protects do not

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<sup>725</sup> For instance, the Inspector General indicated public officials in charge of the implementation of abortion services that misoprostol was an unsafe method, and more expensive than others, and thus, they could go to jail for damaging public finances (Tovar, Ariadna, Senior Lawyer at Women's Link Worldwide, Author interview, Bogotá, February 22 2013).

<sup>726</sup> Tovar, Author interview (2013).

<sup>727</sup> However, the decision was signed only by five of them because Justice Jaime Córdoba Triviño, the Court's President at that time, abstained from voting because he had participated in the drafting of the questioned norm when he was the Nation's General Prosecutor.

<sup>728</sup> C-355/2006, p. 280-281.

<sup>729</sup> C-355/2006, p. 281.

<sup>730</sup> C-355/2006, p. 269.

<sup>731</sup> C-355/2006, p. 271.

require further regulation to be enforced; however, it made it clear that the competent organs could develop public policies in accordance with the decision.<sup>732</sup>

To reach this decision, the Court drew extensively on international human rights treaties, the decisions of interpretive bodies of those conventions, as well as the conclusions of the main international conferences that defined women's reproductive rights as human rights. Although the Court rejected the claim advanced by the demand that the recommendations of human rights treaty bodies are part of the block of constitutionality, it argued that these observations are relevant criteria to interpret those treaties.<sup>733</sup>

The decision is structured along two main argumentative lines. In the first place, the Court pondered the constitutional protection of the right to life of the unborn with women's constitutional rights. The Court's argumentation begins with an evaluation of the constitutional protection of the right to life.<sup>734</sup> It argues that the Colombian constitutional order allows the distinguishing between the fundamental right to life (protected by Art. 11), whose exercise is restricted to born persons, and life as a constitutionally protected good, which protects, although to a lesser extent, those who have not reached that condition.<sup>735</sup> The Court also points out that international human rights treaties which are part of the block of constitutionality, including the Inter-American Convention, do not establish an absolute protection of unborn life, but, on the contrary, oblige to ponder it with other rights and principles.<sup>736</sup> The Court then proceeds to evaluate the fundamental rights of women involved in the abortion controversy.<sup>737</sup> The Court makes a gender equality statement by recognizing that there are situations that affect women in a differential way, especially those related to their body, sexuality and reproduction.<sup>738</sup> The Court develops a comprehensive concept of women's health, based on the definition of reproductive health adopted at the United Nations Conference on Population in Cairo in 1994,<sup>739</sup> as well as in other human rights instruments, in particular CEDAW's provisions on women's access to health.<sup>740</sup> It considers women's sexual

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<sup>732</sup> C-355/2006, p. 272.

<sup>733</sup> C-355/2006, p. 250-251.

<sup>734</sup> C-355/2006, pp. 208-222.

<sup>735</sup> C-355/2006, p. 214.

<sup>736</sup> C-355/2006, p. 222.

<sup>737</sup> C-355/2006, p. 222.

<sup>738</sup> C-355/2006, p. 225.

<sup>739</sup> C-355/2006, p. 226.

<sup>740</sup> C-355/2006, p. 227.

and reproductive rights as human rights and constitutional rights,<sup>741</sup> and argues that one of the essential components of women's right to dignity is their capacity to reproductive autonomy.<sup>742</sup> It also develops an intersectionality argument, by considering the effects of gender violence on women's sexual and reproductive autonomy,<sup>743</sup> and it follows CEDAW and the Convention on the Elimination of Violence against Women of Belem do Para, in arguing that the total prohibition of abortion constitutes a form of discrimination against women.<sup>744</sup> Further, it underscores the obstacles for access to reproductive health of poor, rural and indigenous women, as well as adolescents.<sup>745</sup> The Court concludes the ponderation between the protection of life and women's rights by declaring the total criminalization of abortion is unconstitutional because it implies the complete preeminence of one of the juridical goods, the life of the *nasciturus* and the sacrifice of the fundamental rights of the pregnant woman.<sup>746</sup>

In the second place, the Court examined the liberty of configuration of the legislator in criminal matters, and argued that constitutional principles and rights, in this case women's rights –which the Court interpreted in light of international human rights law- impose limits to that liberty. In this regard, the Court expands its argument about women's dignity, which it considers as one of the limitations to the liberty of the legislator, and emphasizes the meaning of dignity as protection of individual autonomy and the possibility of choosing a life plan.<sup>747</sup> It links the right to dignity to some of the other main dimensions that configure the limitation to the legislator, in particular the right to the free development of personality, the right to health and integrity.<sup>748</sup> Finally, the Court examined the specific case of the Colombian abortion legislation, and established that the legislator can criminalize abortion in order to protect unborn life, but declared that that attribution has limits in the extreme cases included in the three specified circumstances.<sup>749</sup> In fact, by establishing a limit to the liberty of configuration of the legislator to criminalize abortion, the Court obliged the legislature to liberalize the law in those cases, and constitutionalized the right to abortion in those three

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<sup>741</sup> C-355/2006, p. 229.

<sup>742</sup> C-355/2006, p. 228.

<sup>743</sup> C-355/2006, p. 227.

<sup>744</sup> C-355/2006, p. 228.

<sup>745</sup> C-355/2006, p. 227.

<sup>746</sup> C-355/2006, p. 264.

<sup>747</sup> C-355/2006, p. 238.

<sup>748</sup> C-355/2006, pp. 244-246.

<sup>749</sup> C-355/2006, pp. 269-273.

circumstances. The Court also made it clear that the legislator had liberty to extend the decriminalization of abortion to other additional cases.<sup>750</sup>

In terms of the scope of reforms, the abortion law after Decision C-355/2006 remains restrictive, only authorizing it in three narrow circumstances. In fact, the exceptions allowed by Decision cover less than 1% of the abortions that are carried out in the country every year.<sup>751</sup> However, the decision is groundbreaking in general, and pioneering in Latin America, not only for having been the first decision by a Constitutional Court to liberalize the abortion law, but because of its argumentation, which articulated a human rights approach to abortion rights, recognized the link between equality and abortion, and advanced a progressive conception of health, which allows for the further development of the health exception and the enforcement of the right to abortion in cases involving mental health.

In the first place, this is the first decision regarding women's rights in Colombia in which the Court extensively cites international human rights treaties,<sup>752</sup> and it is the first decision by a constitutional court worldwide to review the constitutionality of abortion following a human rights framework.<sup>753</sup> Despite the fact that it did not uphold the stronger claim by the demand that the recommendations of monitoring organs of human rights treaties are part of the block of constitutionality, and thus, are mandatory interpretive criteria, the Court did cite that jurisprudence as well as the conclusions of international human rights conferences as guidelines to interpret fundamental rights. One of the consequences of this is that since Decision C-355 de 2006, abortion in Colombia, beyond feminist circles, started to be approached from a the perspective of human rights, and in particular sexual and reproductive rights<sup>754</sup>

Furthermore, the decision establishes a link between different forms of women's discrimination and lack of access to abortion, which is grounded in international human rights norms. In fact, the Colombian Constitutional Court was one of the first judicial institutions to

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<sup>750</sup> C-355/2006, p. 279.

<sup>751</sup> Research by the Guttmacher Institute showed that only 0.08 percent of the approximately 400,400 induced abortions carried out in 2008 in Colombia were performed at health institutions because they fell under some of the three exceptions (2011: 5).

<sup>752</sup> Jaramillo, Author interview (2013).

<sup>753</sup> Undurraga and Cook (2009: 241).

<sup>754</sup> Parra (2010).

ground a decision on abortion on a broad conception of equality.<sup>755</sup> The Court points out several situations that place women in conditions of great vulnerability, and create a disproportionate impact of the prohibition of abortion on them. An equality-based approach is allegedly linked to the establishment by the Constitutional Court of positive obligations of the State regarding the provision of abortion services.<sup>756</sup> The Court's approach to equality in this case focuses on situations of discrimination that affect women in extreme situations of vulnerability. In this sense, it may be argued that its intersectional approach to gender discrimination in the abortion case is more a social justice argument than a gender equality rationale. The limitations of the equality framework advanced by the Court has been criticized for reinforcing the view that only women who suffer the most extreme circumstances are entitled to reproductive choice.<sup>757</sup> The consequence of this approach in terms of the outcome of the decision is that women are allowed the right to abortion only in desperate cases, in which they are victims of an external situation (poverty, forced displacement, forced sexual intercourse and violence in general). But, in fact, this is what the Court had been called to do in this case. Nonetheless, the decision explicitly mentioned the possibility of the legislator broadening the grounds for legal abortion in the future.

With regard to the role of the Justices Rapporteurs in this case, interviewees for this study<sup>758</sup> pointed out that Justice Jaime Araújo Rentería was first appointed to perform this role. However, he had a liberal position and supported the legalization of abortion on demand, and it would not have been possible for the Court to issue a moderate decision while the Rapporteur held a different position. So, Justice Clara Inés Vargas was designated as a second Rapporteur, because of her more moderate position in favor of liberalization of the law in exceptional circumstances. Interviewees also observed that it is difficult to assess the role of Justice Vargas in the deliberation process, because the Court's sessions are closed to the public. However, they pointed out that the two leading justices in the opinion-formation in this case were Justice Araújo Rentería and Justice Manuel Cepeda, who attempted to consolidate a centrist position. More generally, interviewees observed that female justices on the Court have had to struggle against machismo within the institution, and that leading such a controversial debate could have been extremely strenuous for them. In this regard, they also

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<sup>755</sup> Ordolis (2008: 265).

<sup>756</sup> Ordolis (2008: 280).

<sup>757</sup> Ordolis (2008: 286); Undurraga and Cook (2009: 236).

<sup>758</sup> With regard to this point, interviewees requested anonymity.

highlighted that in other areas of women's rights, such as violence against women, female justices have made a much more obvious impact.<sup>759</sup>

### ***Implementation, litigation and Constitutional Court's jurisprudence in the aftermath of Decision C-355/06***

The Constitutional Court established that its decision, which was legally binding since May 16, 2006, had an immediate effect, and no further regulation was needed for its enforcement. However, the decision was followed by important governmental measures to ensure its implementation. Conscious of other Latin American cases in which the model of indications was not enforced, and women had virtually no access to legal abortions, feminist organizations in Colombia lobbied the government, especially the Ministry of Social Protection, demanding clear rules for the provision of abortion services.<sup>760</sup> Since 2005, when the demand was submitted before the Constitutional Court, the *Mesa por la Vida* began working with the Ministry of Social Protection on the drafting of new regulations.<sup>761</sup> Other organizations, in particular the Center for Reproductive Rights, based in the United States, were also vital to this process.<sup>762</sup> The synergy between the Ministry and feminist organizations was facilitated by the presence of institutional activists, knowledgeable of the state structure, and in contact with decision-makers.<sup>763</sup> In fact, the Ministry was interested in preparing a response from the health sector in case the Court decriminalized abortion in some circumstances.<sup>764</sup> Other state institutions, such as the Office of the Inspector General, also showed a will to ensure compliance with the Court's decision.<sup>765</sup>

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<sup>759</sup> Interviewees who said this requested their names not to be disclosed.

<sup>760</sup> Key actors in this process explained that the intention of the Mesa was that the Court's decision "would not be dead letter" (Villarreal, Author interview, 2013), and that their work in this regard was based on their "knowledge that in many countries indications were not applied" (González Vélez, Author interview 2013). So, the Mesa was convinced that a new regulation should be ready by the time the Court issued a decision (Barraza and Gómez 2009: 39). The main purposes of the regulations were "to empower women and to give certainty to health professionals, which are the two main conditions for the enforcement of indications" (González Vélez, Author interview 2013).

<sup>761</sup> Barraza and Gómez (2009: 40).

<sup>762</sup> González Vélez, Author interview (2013).

<sup>763</sup> In particular, Cristina González Vélez, a renowned public health expert, who had been the National Director of Public Health until 2004, and was close to *Mesa por la Vida*.

<sup>764</sup> Barraza and Gómez (2009: 40).

<sup>765</sup> Villarreal, Author interview (2013).

As a result, immediately after the Court's decision was announced, the Ministry issued a new normative framework, which specified conditions for the implementation of the indications model by the public health service as well as by private health services providers. In the first place, the regulation adopted the World Health Organization's 2003 Technical Norm for the Voluntary Interruption of Pregnancy.<sup>766</sup> Secondly, it enacted decree 4444.<sup>767</sup> The voluntary interruption of pregnancy in the cases allowed by the Court was incorporated as part of the services to be provided by the public health system (*Plan Obligatorio de Salud*).<sup>768</sup> The Ministry of Social Protection has also worked on the diffusion of the new normative framework, in collaboration with feminist organizations.<sup>769</sup> The new normative framework has been praised for the rapidity of its enactment, as well as its content, which includes the gratuitousness of the service, the recognition that conscientious objections can only be exercised on individual grounds and can never be institutional, the establishment of a maximum five-day wait for the provision of the service from the time of the woman's demand, and the responsibility of the Ministry of Social Protection for training health professionals on the provision of this service.<sup>770</sup>

With regard to the actual implementation of these measures, in the aftermath of the Court's decision, two special centers for the provision of lawful abortion services (*centros amigables*) were created in Bogotá, and, reportedly, public health services have shown increased commitment to abortion cases.<sup>771</sup> However, there have been serious obstacles for the implementation of the Court's decision, and women have found systematic difficulties in their search for access to abortions within the limits of the law. Among the main obstacles are the lack of information regarding the new legal framework, especially in regions and cities far from the main urban centers,<sup>772</sup> the addition of requirements beyond those established by the

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<sup>766</sup> Ministry of Social Protection. "Norma técnica para la atención de la interrupción voluntaria del embarazo (IVE)", Bogotá, December 2006. Available at: [www.womenslinkworldwide.org/pdf\\_programs/es\\_prog\\_rr\\_col\\_legaldocs\\_normatecnica.pdf](http://www.womenslinkworldwide.org/pdf_programs/es_prog_rr_col_legaldocs_normatecnica.pdf).

<sup>767</sup> Ministerio de la Protección Social. "Decreto 4444 por el cual se reglamenta la prestación de unos servicios en salud sexual y reproductiva", Bogotá, December 13 2006.

<sup>768</sup> Acuerdo 350, Consejo Nacional de Seguridad Social en Salud, Bogotá. December 22 2006.

<sup>769</sup> Díaz et al. (2010: 123).

<sup>770</sup> Villarreal, Author interview (2013). See Barraza and Gómez (2009: 40) for similar assessments.

<sup>771</sup> Mazo, Author interview (2013).

<sup>772</sup> In this regard, it has been observed that there has not been political will to provide information throughout the country, beyond the cities of Bogotá, Barranquilla, Cali and Medellín (Thomas, Author interview (2013)).

Court's decision, the presentation of collective or institutional conscientious objection by health service providers,<sup>773</sup> the claim for judicial conscientious objection in order not to grant *tutelas* to women who encountered obstacles to the exercise of their abortion rights, disregard of the autonomy of young girls to make a decision, unjustified waiting periods and discriminatory treatment by health service providers.<sup>774</sup>

In this context, the Constitutional Court issued a series of decisions, motivated by demands presented by individual women as well as feminist organizations, to ensure the implementation of the C-355/06 decision. In fact, one of the particularities of the Colombian case is the impressive jurisprudence developed by the Court in the aftermath of its decision that liberalized the abortion law, in which it specified the conditions for the application of that decision, obliged public authorities (including lower judges), as well as private health services providers to comply with it, and consolidated the constitutional doctrine in the field of abortion.

The main instrument used in this stage of the judicialization process was the *tutela* writ. Notably in comparative terms with other Latin American cases, but in line with the development of constitutional justice in Colombia since the 1991 constitutional reform, individual women commonly used *tutelas* when they were denied access to abortion services in the cases allowed by the law. As such, it has been remarked that women did not ask for judicial authorization - as is common practice in other cases in the region, even if it is not required by the law - but they denounced the obstacles to access and demanded their rights through a proper legal mechanism.<sup>775</sup> On their part, feminist organizations, in particular Women's Link and the *Mesa por la Vida*, developed a remarkable process of strategic litigation, based on the difficulties they encountered during the implementation process.

The Court selected some of the cases presented by individual women as well as by NGOs, and developed a very structured and powerful jurisprudence about the way in which the abortion law should be implemented in Colombia.<sup>776</sup> However, since the start of the backlash

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<sup>773</sup> In particular, private providers linked to Catholic organizations refused to perform legal abortions by "institutional conscientious objection", which was later on specifically outlawed by the Constitutional Court (Jaramillo and Alfonso 2008: 153).

<sup>774</sup> Roa (2008a : 83-85), Parra (2010).

<sup>775</sup> Tovar, Author interview (2013).

<sup>776</sup> Tovar, Author interview (2013).

process in 2009, state actors demanded the annulment of the C-355/06 decision, as well as of subsequent Court's sentences regarding its implementation. These petitions were systematically denied by the Court's *Sala Plena*.<sup>777</sup> Through this process, not only has the Court heard concrete cases of violation of the right to abortion in the three circumstances allowed by the law, but it has also developed general criteria for the elimination of barriers for access to health services in these cases, it has indicated obligations of state institutions with regards to the implementation of the abortion law more generally, and it has established exemplary penalties to health services as well as state officials who denied that right. It has been noticed that the general pattern since the Court's decision in 2006 has consisted in negative decisions by lower courts of first and second instance, which systematically denied *tutelas* (even by applying an illegal judicial conscientious objection), and favorable and important decisions by the Constitutional Court in the cases it selected in order to develop its jurisprudence.<sup>778</sup>

Among the main decisions by the Constitutional Court against non-compliance with its C-355/06 sentence,<sup>779</sup> some of the most significant are T-988/2007, in which the Court reminded healthcare providers that placing further requirements on women seeking lawful abortions was illegal. In T-209/2008 the Court specified the conditions for the exercise of conscientious objection by health service providers, and imposed sanctions on institutions that invoked it collectively. This case is also significant because it involved persistent violence against a minor and her mother, and the lack of enforcement of the Court's decision motivated the request of urgent measures (*medidas cautelares*) by Women's Link to the Inter-American Commission of Human Rights, which ordered the Colombian state to provide the necessary measures to protect both women.<sup>780</sup> T-946/2008 was the first decision in which the Court condemned judicial conscientious objection and ordered investigation of judges who invoked it. In T-388/2009 the Court integrated the criteria that it had developed in former decisions,

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<sup>777</sup> Tovar, Author interview (2013). In this regard, Mónica Roa pointed out that in these cases the Court has reminded the petitioners that the nullity procedure proceeds only when there have been serious due process violations, and that it cannot be used to re-open debates already settled by the Court's constitutional jurisprudence (interview, cited at: "Este es un fallo ejemplarizante", *El Espectador*, April 8, 2012).

<sup>778</sup> Mónica Roa, interview, at: "Procurador obstaculiza aborto legal": líder de la despenalización", *El Tiempo*, May 12, 2012.

<sup>779</sup> For a thorough account of the main decisions of the Constitutional Court regarding the implementation of abortion law, see Parra (2010: 32-41) and Salgado (2010: 19-22).

<sup>780</sup> MC 270/09 – X y XX, Colombia. Inter-American Commission, September 21 2009. For an account of this case, see Parra (2010: 34). See also Women's Link Worldwide, Press Communicate. Available at: [http://www.womenslinkworldwide.org/pdf\\_press/es\\_press\\_release\\_20090925.pdf](http://www.womenslinkworldwide.org/pdf_press/es_press_release_20090925.pdf).

and develops a comprehensive framework for the effective enforcement of its mandate to grant access to legal abortion, including the state's obligation to implement massive education campaigns regarding access to legal abortion.<sup>781</sup> Decision T-841/2011 is outstanding in that it imposed effective monetary sanctions to health service providers for denying access to abortion to a 12-year old girl; it reaffirmed that risk to mental health was a sufficient reason to demand the right to abortion, and it developed the concept of a right to a timely and high-quality diagnosis, including risk assessment when indicated.<sup>782</sup>

This process, characterized by a gradual development of criteria for the enforcement of the Court's decision, and a positive dynamic between feminist NGOs and different state sectors in an effort to implement the new abortion norms, started to change in 2009, with a strong backlash process led by institutional activists within the state structure.

### ***Backlash and intervention of the Constitutional Court***

Since the presentation of the demand for the liberalization of the abortion law, and even more so after the Court's decision, there has been a conservative reaction intended to obstruct the implementation of the new law. However, that reaction was not coordinated and had no leadership until the appointment of institutional activists Alejandro Ordoñez and Myriam Hoyos at the powerful Office of the Inspector General, in charge of the enforcement of the Constitution, human rights and judicial decisions, and with competence to investigate and remove public officials. From there, they would develop a belligerent and carefully crafted strategy that triggered a backlash process. Since their term, this Office has promoted actions oriented toward blocking the implementation of Decision 355/06, and ultimately toward reversing that jurisprudence. Feminist organizations have used litigation and other legal actions to parry backlash, and the Constitutional Court has had a prominent role in this

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<sup>781</sup> This is an outstanding decision, in which the Court requests several state institutions as well as the *Mesa por la Vida* to submit information regarding compliance with C-355/2006. Among its main provisions, the decision emphasizes that consent by girls younger than 14 years old should be enough to grant them access to abortion; it establishes that the right to individual consciousness objection by health care professionals is not absolute; and it reiterates the prohibition of judicial conscientious objection. The description of this case is based specifically on the analysis presented by Parra (2010: 41-42).

<sup>782</sup> This case was litigated by lawyer Paola Salgado and also sponsored by the *Mesa por la Vida y la Salud de las Mujeres*. See interview with Salgado, in "Este es un fallo ejemplarizante", *El Espectador*, April 8, 2012.

process. The presence of powerful figures within the state, disposed to openly defy the Court's authority may have motivated the strong intervention of the Court in order to ensure the implementation of its decision, and also to preserve its institutional standing vis-à-vis other powers.

In 2009, the Office of the Inspector General ordered an investigation into and the suspension of the construction of the *Clínica de la Mujer* (Women's Clinic) in the City of Medellin, projected to provide sexual and reproductive health services. The Office also exerted pressure on the city's public officials in charge of this project, who were asked to resign their positions.<sup>783</sup> The most important action, though, in terms of its consequences for the general implementation of the Court's decision was the demand for the suspension and annulment of Decree 4444 issued by the Ministry of Social Protection, containing regulation for the implementation of Decision 355/06. In 2009, the Inspector General presented a lawsuit before the Council of State, requesting an injunction and the annulment of that decree, arguing that the national government did not have constitutional powers to regulate a decision by the Constitutional Court without the previous enactment of a law by Congress (Constitutional Art. 189). The Council of State upheld the demand, immediately suspended the decree, and eventually declared it null in March 2013.<sup>784</sup> The legal effects of the suspension and annulment of the decree are not its most significant consequences, in that the Court had indicated that its decision was directly applicable, and it specified that the reference for its implementation were the WHO guidelines; further, the Court itself developed a solid jurisprudence regarding the adequate criteria for implementation. However, the suspension, and later the annulment of the decree produced deep confusion among the general public and health service providers about the status of the Court's decision and, thus, about the right of women to legal abortion services.<sup>785</sup>

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<sup>783</sup> Two female officials, in charge of the City's gender policy and of the execution of this project within the Secretary of Health, respectively, were asked to resign (Luna and Villarreal 1994: 203). As soon as Medellin's Major announced the project of construction of this clinic, the Office of the Inspector General opened an investigation and stopped the project ("Procurador obstaculiza aborto legal": líder de la despenalización", *El Tiempo*, May 12 2012). Finally, in 2010, the regional health authority denied the authorization for the construction of the clinic.

<sup>784</sup> Exp. 11001-03-24-000-2008-00256-00, March 13 2013. Sentence. Action of Nullity against Decree 4444 of 2006. Council of State.

<sup>785</sup> Dalen, Author interview (2013); Roa and Potts (2009: 1); Mazo and Umaña (2001: 126). Directives issued by the Office of the Inspector General to health service providers contributed to confusion, by indicating that since the Decree had been suspended, providers were not obliged to perform abortions ("Esta anulación ni quita ni pone": Mónica Roa", *El Espectador*, March 18 2013).

In this backlash process, the Constitutional Court has been the most important actor within the state structure with the capacity and will to oppose the conservative reaction against its decision. In the first place, the Court has rejected several actions of nullity presented by the Inspector General against Decision 355/2006. In 2009, the Office of the Inspector General presented a demand of nullity of the Court's decision T-388/2009, before the same Court, because of alleged procedural failures. It has been observed that this was the first time that an Inspector General presented a demand of nullity against a decision by the Constitutional Court oriented to protect rights.<sup>786</sup> The Court rejected the petition and its arguments in 2010.

The most significant Court decision to counter the backlash process was motivated by a *tutela* writ presented on September 21, 2011 by Women's Link and signed by 1201 Colombian women. In the writ, they denounced the Inspector General as well as two other officials from his office (Delegate Inspectors Myriam Hoyos and María Eugenia Carreño) for having systematically transmitted false and distorted information regarding women's reproductive rights, violating in this way their right to receive accurate and high-quality information on this topic.<sup>787</sup> The *tutela* was submitted at Bogota's section of the Judicial Council, and it was rejected at the first and second instance. The Constitutional Court decided to consider it on appeal. In Decision T-627/2012, it upheld the claim, reaffirmed the duty of state officials to provide accurate and truthful information as a basic requirement for the exercise of fundamental rights, and obliged the Inspector General and the other two officials to rectify the information they had disseminated.<sup>788</sup> This is considered a most significant and unprecedented

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<sup>786</sup> Parra (2010: 41).

<sup>787</sup> The right to information is a fundamental right (protected by Constitutional Art. 20, as well as by Art. 13 of the Inter-American Convention of Human Rights), and this was the first time that it was used as a receptor's right (it had only been used before in cases of censorship). The demand argued about the right of the receptor to receive information that complies with standards of quality regarding accuracy, opportunity and reliability (Tovar 2013). The demand argued that since 2009 the Office of the Inspector General had lied in the following situations: a) when it argued that emergency contraception was an abortive agent (while the WHO as well as jurisprudence by the Council of State had considered it as contraceptive); b) when it indicated the Ministry of Social Protection and the Commission for the Regulation of Healthcare that misoprostol was a dangerous drug (while the WHO recommends its use for several gynecological procedures, including abortion); c) when it communicated public officials health officials that institutions could be conscientious objectors (while the Constitutional Court had already specified that only individuals had this right); d) when it told the Department of Health that they were not obliged to remove obstacles to access to abortion (while the Constitutional Court had established that health authorities were obliged to investigate and sanction institutions that failed to provide abortion services (Tovar 2013).

<sup>788</sup> The Inspector General complied with the Court's decision -had he not done so, he could have been condemned for contempt (Tovar 2013). However, activists have regretted that the rectification carried out by the Inspector General was not proportional to the damage caused by his

decision, and the first case worldwide in which a Court recognized the right to information as a receptor's right to receive quality information.<sup>789</sup>

With regard to the dynamics between mobilization and counter-mobilization, the Colombian case shows how a high level of polarization, such as that created by the presence of fundamentalist institutional activist within the state's sphere may galvanize liberal actors in society in an attempt to resist the advance of an extreme religious position. In fact, this situation may be an opportunity for feminists to gather allies from other social sectors, who may support their cause in opposition to the conservative reaction. In this case, the General Inspector's radicalism contributed to the union of secular actors, among them journalists, academics, women's organizations, which created an Alliance for a Secular State, led by feminist organizations, with the purpose of overseeing the Inspector's actions.<sup>790</sup>

## CONCLUSION

The Colombian case confirms the hypothesis that when the political process is blocked for the advance of social actors' demands, they may search for other institutional venues, and specifically they may resort to legal strategies to instigate legal change. This may occur in particular when legal opportunities are favorable, as in the Colombian case, with an emblematic Constitutional Court in the protection of human rights. In effect, in a country where Catholicism has historically penetrated the State, during the backlash process after its Decision C-355 the Constitutional Court has proved to be the only institutional venue with the capacity to place limits on the intervention of religious actors and doctrines on the State. Beyond its limited scope, Decision C-355 set a landmark jurisprudence that not only liberalized the abortion law, but also grounded the right to abortion on an equality and human rights rationale. This case also shows that courts may have an important role in the process of implementation of their own decisions, as well as resisting backlash. This case also confirms that the presence of women justices is a signal about the receptivity of courts for the advancement of their claims.

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misconduct (see “Rectificación del Procurador deja sin sabor entre mujeres”, *Terra Noticias*, September 20 2012. Available at: <http://noticias.terra.com.co/nacional/rectificacion-del-procurador-deja-sinsabor-entre-mujeres,0995266f2e1e9310VgnVCM4000009bcceb0aRCRD.html>).

<sup>789</sup> Tovar (2013).

<sup>790</sup> Mazo, Author interview (2013); Thomas, Author interview (2013).

This case also confirms that the opportunities must be perceived by the movement in order for them to be seized. In this regard, for many years after the 1991 Constitution, the movement's perception that the judicial field was not a proper venue for the advance of abortion rights claims may have contributed to the lack of recourse by feminist organizations to strategic litigation for the liberalization of the abortion law. This factor contributes to understanding why a court reputed to be an icon of progressive activism in Latin America and elsewhere did not develop a progressive jurisprudence on abortion until 2006. However, this factor may account for only part of the explanation, given that the Court had three opportunities, before 2006, to develop a more progressive jurisprudence on abortion rights, even if not demanded legally by the feminist movement.

With regard to political opportunities, this case shows that electoral politics may offer opportunity windows that may be favorable for reformers. In this case, electoral incentives may have led a conservative president to maintain a low profile during the abortion debate at the Constitutional Court. This case also shows that entry points to the state, for example for the implementation of legal reforms, may exist even under a conservative government. In effect, under the conservative Uribe's administration, the Ministry of Social Protection and the Office of the Inspector General were key actors in the process of the implementation of the Constitutional Court's C-355/2006 decision. The case also highlights the importance of institutional activists within the State, in this case of conservative activists who occupied powerful positions and since 2009 altered the political opportunity structure for the advance of abortion rights.

The legal action carried out by Women's Link in Colombia is the first case in Latin America, and the only one so far, in which the legal strategy for abortion law reform through courts was designed and carried out from the start by female lawyers. This can be explained, at least to an extent, by the support structure for legal mobilization in society, not within the feminist movement, but in universities and in a public interest law tradition, driven by the 1991 Constitution and the institutional role of the Constitutional Court in the political system. In addition, however, the legal strategy benefited from a preexisting support structure for advocacy on abortion rights within the feminist movement, although not related to legal mobilization, but centered on public health, and which has taken a leading role in this field in

Latin America. This structure was fundamental especially in the phase of the implementation of the Court's decision.

The Colombian model of legal mobilization, consisting of a top-down strategy carried out from outside of the feminist movement has had an impact on the movement. On the one hand, it raised consciousness within feminist organizations of the possibility of using courts, and in particular the Constitutional Court, as a venue for the advancement of their claims. On the other hand, this particular model of legal strategy triggered conflicts within the feminist movement, by downplaying the role of historic feminist activists, and privileging the voices of more legalistic sectors of the movement.

With regard to the framing of the abortion issue, the legal strategy implemented by Women's Link was aimed both at changing the law and changing the terms of the public debate on abortion by introducing human rights, public health and social justice arguments. However, this discourse did not imply a substantial change with regard to the preexisting discourse at least of some sectors of the feminist movement. Feminist organizations, especially those working in the area of public health, had already developed a discourse based on human rights, public health and social justice. Moreover, legal strategists continued to hold a traditional feminist discourse based on women's right to their own body. So, they did not transform the feminist framing on abortion, but in their pursuit of a legal strategy they moderated their claims. Women's Link and its allies did not claim that abortion was grounded on women's right to autonomy and reproductive freedom, but they chose other arguments, based on public health and social justice, and they did not openly requested the legalization of abortion on demand, but only under certain circumstances.

With regard to conservative mobilization, as predicted by social movement theory, and in line with contemporary developments in other Latin American cases, in the Colombian case religious and in particular Catholic activism for abortion rights has adopted the characteristics of a social movement, including the presence of institutional activists within the state structure, as well as a new discourse based on constitutional and human rights. The analysis of the dynamics between mobilization and counter-mobilization in this case indicates that the presence of highly partial religious actors within the State may galvanize liberal sectors of society, which may become allies of feminists in their struggle for legal change in the field of abortion law.

## **CHAPTER V**

### **SOCIAL MOVEMENTS AND ABORTION LAW REFORM IN ARGENTINA**

#### **INTRODUCTION**

The Argentine case presents a relatively late development of feminist mobilization for abortion rights, as compared for example with the cases of Mexico and Brazil. However, a broad-based feminist campaign for the legalization of abortion was formed in the 2000s, which nowadays is arguably the most widespread and strongest national feminist network for abortion rights in Latin America, in terms of its territorial insertion, its federal character, the diversity of actors involved and its capacity to put forward and maintain a legislative project for abortion legalization. In fact, this is the only case in this study in which there is an active project for legislative reform in this field promoted by the feminist movement, although it has not yet been treated by Congress.

Despite the existence of a favorable legal opportunity during the past decade for constitutional litigation before the Supreme Court - after the constitutional reform in 1994 and the Court's reform in 2003 -, litigation strategies for abortion rights, and in fact for women's rights in general, are underdeveloped in the country. So far, the field of litigation on reproductive rights before the Supreme Court has been dominated by conservative activism, which has appealed to the Court in order to block the advancement of women's reproductive rights. However, the process of mobilization for abortion rights during the last decade has changed the terms of the public debate on this issue and has gathered broad support from social and political sectors.

In that context, the Supreme Court issued a landmark decision in 2012, addressing a longstanding legal controversy regarding the interpretation of the rape exception included in the Criminal Code since 1921. The Court established that this provision should be interpreted as decriminalizing abortion in all cases of rape, and that the only requirement was the woman's declaration before a doctor in a public hospital. It also established the state's obligation to provide access to abortion in those cases, and compelled the different actors and levels of government involved in this issue to remove all types of obstacles for women's access to abortion and to issue protocols for the proper attention of lawful abortions.

The chapter's first section analyses the structure of political and legal opportunities, with an emphasis on transformations in the constitutional justice system brought about by the constitutional reform of 1994, and the Supreme Court reform in 2003. The second section presents, first, an account of social mobilization for abortion rights, with an emphasis on the development of the National Campaign for the Right to Abortion. Finally, the section includes a reference to counter-mobilization strategies. The third section analyses the Supreme Court decision that liberalized the abortion law in 2012, with an emphasis on the interaction between the Court and social actors in this process.

## I. POLITICAL AND LEGAL OPPORTUNITIES

### I.1. State–Church relationship in Argentina

Although in Argentina the confrontation between liberal forces and the Catholic Church during the period of state formation in the nineteenth century did not have the intensity and scale it had in other Latin American countries, such as Mexico, Uruguay, Colombia or Chile,<sup>791</sup> the implementation of measures that implied a separation between the spheres of the State and the Church in the 1880s<sup>792</sup> complicated the relationship between the government and the Church.<sup>793</sup> However, clerical forces started gaining new ground from the beginning of the twentieth century,<sup>794</sup> and their influence was consolidated by the military coup of 1930, which signaled the beginning of the convergence between militarism and Catholicism that would mark the country's political life until the democratic transition in 1983.<sup>795</sup> Since the 1930s, the influence of the Church was modeled on the ideal of Catholic integralism - oriented to achieve a total integration between the State and the Church - and gradually penetrated all institutional sectors in the state and society.<sup>796</sup>

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<sup>791</sup> Barrancos (2005: 93).

<sup>792</sup> Among those measures were the 1884 Law on secular, gratuitous and mandatory education (Law 1420); the Law on Civic Registration, of the same year; and the laws on civic marriage and the secularization of cemeteries, of 1888.

<sup>793</sup> Those measures provoked a strong ecclesiastical reaction, which led the government to temporarily cut off diplomatic relations with the Vatican in 1884. The relationship was resumed in 1900.

<sup>794</sup> The massive flow of immigrants from Catholic countries, as well as the State's need to incorporate them into the nation, is singled out as one of the main sources of empowerment of the Catholic Church in the country's political life (Catoggio 2008: 106).

<sup>795</sup> The country's political process during the twentieth century was marked by successive coups d'état - in 1930, 1943, 1955, 1962, 1966 and 1976 - and all of them had a Catholic signature.

<sup>796</sup> Mallimaci (2008: 245).

During the 1970s, and in contrast with the Church's standing vis-à-vis the dictatorial regimes in countries such as Brazil and Chile, in Argentina the Catholic hierarchy endorsed state terrorism, which damaged the public image of the Church in this country.<sup>797</sup> The ascension to power of the moderately pro-laicism UCR (*Unión Cívica Radical*) party in 1983 brought about some reforms vehemently opposed by the Church, such as the derogation of restrictive laws on access to contraception in 1984 and the divorce law in 1987.<sup>798</sup> Consequently, the relationship between the government and the Church was characterized by tension.<sup>799</sup> However, during the two terms of President Carlos Menem (1989-1999), the Church was again a privileged actor in the decision-making process in policy fields that were of its interest, regarding in particular sexuality and education.<sup>800</sup> Menem appointed Opus Dei members to the Supreme Court and the Ministry of Internal Affairs, as well as in other key positions within the State.<sup>801</sup> The government's collusion with the Church included prominently the alignment of the Argentine State with the Vatican during the Population Conference in Cairo, in 1994; the unsuccessful attempt to introduce a clause on the protection of life from conception into the constitution in 1994; and the issuing of Presidential Decree No. 1406, in 1999, which established March 25 as the Day of the Unborn Child.

The relationship between the State and the Church deteriorated under the government of President Néstor Kirchner (2003-2007), due partially to the government's policies regarding human rights abuses during the last dictatorship, and even more so due to the appointment of a Health Minister who defended reproductive rights, including abortion. The conflict escalated when the military vicar declared that given his pro-abortion position, the Minister of Health deserved to be "put a stone around his neck and cast into the sea".<sup>802</sup> This expression resounded with the so-called death flights carried out during the dictatorship, and the government suspended the military vicar. However, diverse types of agreements between the State and the Church (such as the public financing of Catholic schools), and interference of the Church in public affairs, continue to characterize Argentine politics,<sup>803</sup> and the Church

<sup>797</sup> See Htun (2003: 99); Blofield (2006: 148); Mallimaci (2008: 249).

<sup>798</sup> See Htun (2003: 99-102, 119-123) for a thorough account of these reforms.

<sup>799</sup> Esquivel (2000: 26).

<sup>800</sup> Esquivel (2006: 27).

<sup>801</sup> González Ruiz (2005: 98).

<sup>802</sup> "Merece que lo tiren al mar", *Página 12*, February 19 2005.

<sup>803</sup> Donatello and Mallimaci (2013: 172).

never lost one of its main privileges, that is, its constitutionally granted financing by the State (Constitutional Art. 2).

## I.2. Political context and the position of political actors in the abortion debate

The two main political parties in Argentina are the Radical Civic Union (*Unión Cívica Radical*, UCR), a middle-class-based party founded in 1891, and the Justicialist Party (*Partido Justicialista*, PJ, formerly called *Partido Peronista*), a labor-based party<sup>804</sup> founded in the 1940s by Juan Domingo Perón, which nowadays is divided into three internal factions. The Front for Victory (*Frente para la Victoria*) faction, first led by Néstor Kirchner and later on by Cristina Fernández, represents the party's leftist faction, and has governed the country since 2003. The ascension of PJ to national power in the 1940s was accompanied by the reinforcement of the influence of the Catholic Church in the political sphere,<sup>805</sup> and in 1974 PJ President Isabel Perón banned access to anti-contraception for the first time in the country. For its part, UCR traditionally had a modernizing and anticlerical image, and each time it ascended to national power it was highly opposed by the Church.<sup>806</sup> UCR won the first elections after the democratic transition in 1983, and it included in its electoral platform some of the issues that were crucial for the feminist movement at that time, in particular the promise of the promulgation of the divorce law, the shared exercise of parenting authority and the ratification of CEDAW.<sup>807</sup> During the 1994 constitutional reform, when then President Carlos Menem, from PJ, attempted to introduce a constitutional clause on the right to life from conception, UCR opposed that provision.<sup>808</sup>

But the main political parties in Argentina generally do not take an institutional position on the abortion issue, and legislators who support legalization do it on individual grounds.<sup>809</sup> Mainstream politicians avoid the issue during presidential campaigns and, when questioned

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<sup>804</sup> However, see Levitsky (2003) on how the Menem's government in the 1990s dismantled the party's traditional mechanisms of labor participation.

<sup>805</sup> Mallimaci (1994: 466).

<sup>806</sup> Mallimaci (1992: 242).

<sup>807</sup> Feijoo (2002: 188).

<sup>808</sup> See Gutierrez (2007: 11) for an account of the position of the different political parties on this issue during the Constitutional Assembly.

<sup>809</sup> Di Liscia (2011: 154). In Argentina, abortion is an issue that cuts across the main political forces and it cannot be resolved through party-discipline mechanisms (Martino, Julia, Legislative Staff Adviser for the Socialist Party block at the Deputies Chamber, member of the National Campaign for the Right to Legal, Safe and Free Abortion. Author interview, Buenos Aires, September 6, 2013).

about it, the leading figures of the main political parties have generally said that they are against legalization.<sup>810</sup> Since the democratic transition and throughout the 1980s and 1990s, some leftist parties were the only ones to take a favorable position regarding the liberalization of abortion laws.<sup>811</sup> However, in very recent years, and presumably as a consequence of women's mobilization, a change has been detected in that politicians who used to assume that a pronouncement in favor of abortion liberalization would diminish their electoral support, now cannot openly say that they are completely against it.<sup>812</sup> In this context, in 2013 legislative elections abortion became for the first time a salient electoral issue.

For her part, President Cristina Fernández (2007 - reelected 2011) declared herself against abortion,<sup>813</sup> and her government, which enjoyed a majority in both legislative chambers since 2012, did not promote legislative debate on this issue. But neither did the parties in the opposition, which could have formed a parliamentary majority between 2009 and 2011 in order to advance congressional debate on abortion.

In fact, the political process has systematically been shown to be closed to the advancement of abortion liberalization.<sup>814</sup> Beyond political alignments, institutional rules governing the legislative process are a further obstacle for the promotion of abortion legislation. In the case of abortion, once a bill is introduced at the Deputies Chamber, it is sent to the Committee on Criminal and General Legislation, which is the head committee in this case, as well as to the Family, Women and Children's Commission, and the Social Action and Public Health Commission, whose favorable opinion (*dictamen*) is necessary for the project to be submitted for debate at a plenary session.<sup>815</sup> This requirement has allowed for conservative actors, or politicians acting on pressure exerted by external conservative forces, to block any relevant

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<sup>810</sup> For concrete examples, see Di Liscia (2011: 154).

<sup>811</sup> Di Liscia (2011: 153); Blofield (2006: 132); Martino, Author interview (2013).

<sup>812</sup> Díaz, Estela, Gender Secretary, Confederation of Argentine Workers (CTA) and member of the National Campaign for the Right to Legal, Safe and Free Abortion, Author interview, Buenos Aires, September 12 (2013).

<sup>813</sup> In 2003, she declared herself to be against abortion, and argued that Argentina was not prepared to legalize it ("Cristina Kirchner: no soy progre, soy peronista", *La Nación*, November 27 2003).

<sup>814</sup> The first initiative in this regard was presented in 1989 by a UCR female Deputy (Florentina Gómez Miranda), whose proposal to decriminalize abortion in cases of rape faced strong opposition by the Catholic Church, and even her own party withdrew informal support for it (Blofield 2006: 132). From 1989 to 2001, eleven legislative initiatives were introduced to further decriminalize abortion in certain circumstances, or to legalize it, but none of them could pass the commission stage in the legislative process (Blofield 2006: 132).

<sup>815</sup> Blofield (2006: 138).

legislative proposal,<sup>816</sup> or to delay its debate at the commissions' level, until it loses parliamentary status.

### I.3. Population and health policy

Until the mid-1980s the Argentine State, whether under democratic or dictatorial regimes, held a pro-population growth and pro-natalist ideology.<sup>817</sup> In fact, in contrast with the situation in other countries in the region, the decrease of the fecundity rate started early in Argentina, at the end of the nineteenth and the beginning of the twentieth century,<sup>818</sup> and while during the second half of the twentieth century Latin American countries such as Mexico and Brazil were targeted by international organizations for the implementation of population control policies, including forced sterilizations, in Argentina pro-natalist discourses were a constant.<sup>819</sup> In 1974, invoking "reasons of state" and the "persistent low population growth rates", the constitutional government of President Isabel Martínez de Perón banned, for the first time in the country, free access to contraception.<sup>820</sup> Under the same rationale, in 1977, the military dictatorship prohibited the diffusion of information on contraception, as well as the mentioning of the word *abortion* in the media.<sup>821</sup>

The first democratic government, headed by President Raúl Alfonsín (1983-89), repealed most of the decrees and laws that restricted access to family planning methods.<sup>822</sup> However, during the 1990s, that is, the crucial decade for the development of a new approach to population and women's reproductive rights, the government of Carlos Menem (1989-1999) became the poster child both of the neoliberal program for the developing world, and of the Vatican in its crusade against sexual and reproductive rights. The Argentine delegation to Cairo in 1994 and Beijing in 1995 was part of the conservative coalition that opposed the inclusion of the term "gender" and struggled for the elimination of provisions on reproductive

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<sup>816</sup> Blofield (2006: 138).

<sup>817</sup> Llovet and Ramos (1986: 27); Torrado (1991: 12). However, as noted by Barrancos, during the twentieth century the country did not develop active pro-natalist policies, with exception of the anti-contraception decree of 1974 (2005: 86).

<sup>818</sup> Petracci and Pecheny (2007: 30).

<sup>819</sup> Felitti (2010: 793).

<sup>820</sup> Felitti (2008: 520); Petracci and Pecheny (2007: 30). Through Decree No. 659/74, the president vetoed a law that allowed for the free sale of contraceptives, and ordered the closure of more than 60 family planning services under the public health system (Bellucci 1997: 101; Blofield 2006: 126).

<sup>821</sup> Blofield (2006: 126).

<sup>822</sup> See Di Liscia (2011: 153). However, it was only in 1992 that the military decree of 1977 was derogated (Novick 1999: 25).

rights from the final documents of these conferences. Eventually, the government signed the Programme of Action agreed to at Cairo, but it stipulated a series of reservations.<sup>823</sup> The government's position at Cairo led to the resignation of the president of the recently created National Advisory Council on Women (*Consejo Nacional de la Mujer*, CNM),<sup>824</sup> and her replacement by a conservative woman who responded to President Menem's interests.<sup>825</sup> Since then, the Council has increasingly lost its institutional hierarchy, and has not been occupied by feminists.<sup>826</sup>

It was only in 2002, two decades after the democratic transition that a law on reproductive health (Law 25673) was passed in Argentina, much later than in countries such as Brazil, Mexico and Colombia. This law created the National Program for Sexual Health and Responsible Procreation, which includes among other elements the provision for contraceptive information and services to the population without discrimination.<sup>827</sup> During the presidency of Néstor Kirchner (2003-2006) the abortion issue became for the first time part of the government's public health agenda. Kirchner appointed a well-known public health expert-physician as Minister of Health, Ginés González García, who made maternal mortality a central issue, argued that the criminalization of abortion was one of its causes, and defined reproductive health as a main pillar of the public health policy.<sup>828</sup> He promoted the drafting of a Technical Guide for the Attention of Non-Punishable Abortion, which was published in 2007.<sup>829</sup> However, the implementation of these measures found strong resistance; they are still contested at the subnational level, and under Cristina Fernández's government they have not been promoted by national health authorities. When President Cristina Fernández took office, she appointed Graciela Ocaña as Health Minister, who held that abortion did not belong to this area of policy, but was a matter of the criminal justice system.<sup>830</sup> In 2009, Ocaña was

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<sup>823</sup> Among them are the reservation to the concepts of sexual and reproductive health, reproductive rights, family planning and contraception, for the country did not admit the inclusion of abortion under these concepts (Alonso and Romero 2004: 18).

<sup>824</sup> The first president of the Women's Council was feminist sociologist Virginia Franganillo.

<sup>825</sup> Feijoo (1998: 43).

<sup>826</sup> Since 2002 the Council lost institutional hierarchy, and it currently administrates on an extremely low budget (Mariana Carbalal, “¿Dónde está el Consejo Nacional de la Mujer?”, *Página 12*, June 6 2008).

<sup>827</sup> See Piscopo (2014) for a thorough assessment of the politics of the legal reform process.

<sup>828</sup> Petracchi and Pecheny (2007: 43).

<sup>829</sup> “Guía técnica para la atención integral de los abortos no punibles”, Ministerio de Salud y Ambiente, available at: [http://www.despenalizacion.org.ar/politicas\\_protocolos.html](http://www.despenalizacion.org.ar/politicas_protocolos.html).

<sup>830</sup> Di Liscia (2011: 155).

replaced by Minister Jorge Manzur, who has been absent from any initiative or discussion about women's reproductive rights.<sup>831</sup> In 2010, the Technical Guide for the Attention of Non-Punishable Abortion was updated, but the Health Minister has refused to give it the status of a Ministerial Resolution, even after the Supreme Court's decision in 2012, which mandated the different organs and levels of government to issue clear and enforceable criteria for the attention of legal abortions.

#### I.4. Abortion regulation in Argentina

The Argentine Criminal Code considers abortion at all stages of pregnancy as a crime against life. Article 86 of the Criminal Code, dating back to 1921,<sup>832</sup> establishes that abortion practiced by a certificated doctor, with the woman's consent, is not punishable under two exceptions: when the life or health of the woman is at risk; and if pregnancy was caused by "rape or an indecent assault against a mentally handicapped or mentally ill woman". In fact, Argentina was one of the first countries in the world to establish that abortion was not a crime when performed after rape, and this model was later incorporated in criminal code reforms during the 1930s in México, Bolivia, Ecuador, Cuba and Brazil.<sup>833</sup>

However, since that date women's access to lawful abortions has been virtually non-existent in Argentina.<sup>834</sup> Among the main obstacles for the implementation of the indications model has been the judicialization of cases allowed by the law. Public hospitals require the intervention of ethics committees<sup>835</sup> and oblige women to ask for judicial authorizations, despite the fact that these conditions are not established by any legal norm. The procedural barriers imposed in practice in cases of lawful abortions move the locus of decision-making from the woman to a series of actors (among them, ethics committees, judges and psychologists). This practice has been driven by a narrow and inconsistent interpretation of the Criminal Code by lower courts,<sup>836</sup> which has created legal uncertainty and fear of

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<sup>831</sup> See Piscopo (2014: 106) on how reproductive health programs have been weakened under Cristina Fernandez government.

<sup>832</sup> Article 86 provisions were modified in the twentieth century, but the current letter of the law is the same as it was in 1921 (see Bergallo and Ramón Mitchell 2011: 2).

<sup>833</sup> Jiménez de Asúa (1942: 977), cited in Htun (2003: 143).

<sup>834</sup> Cavallo (2011: 45); Szulik et al. (2008: 33).

<sup>835</sup> The bioethics committee is "an interdisciplinary organ of voluntary consultation for doctors and its decisions are not binding" (Böhmer et al 2006: 66).

<sup>836</sup> See Bergallo (2010) and Bergallo and Ramón Mitchell (2011) for a thorough analysis of lower courts' decisions on abortion.

participating in illegal behavior among most of the actors involved, further fueling judicialization. Months may elapse before authorization is granted through judicial procedures. Oftentimes, the authorization will be granted only on appeal.

The crucial point of legal controversy regarding non-punishable abortion in Argentina has historically been related to a narrow interpretation of the scope of Article 86, and in particular to the allegedly ambiguous phrasing of the rape exception, which gave place to a historic debate about whether it includes all pregnancies that are a result of a rape or only those that affect mentally handicapped women.<sup>837</sup> Feminists, as well as a sector of legal academics and practitioners, have argued that the correct interpretation of the scope of Article 86 includes all women who have been raped, while restrictive positions affirmed that this exception only covered mentally handicapped women. Lower court decisions in this regard had been mostly restrictive, and the absence of higher courts' jurisprudence on this issue created uncertainty for many actors.<sup>838</sup> Finally, in 2012 the Supreme Court issued a decision in which it clarified the scope of Article 86, and confirmed the right of all raped women to have access to abortion.

## **I.5. The legal opportunity. Normative framework and the Supreme Court**

### **I.5.1. Constitutional and human rights norms**

In contrast with the constitutional texts of Brazil, Mexico and Colombia, the Argentine Constitution does not include a reproductive freedom clause. However, the country has ratified international and regional human rights treaties on women's rights, particularly CEDAW, which protect reproductive rights.<sup>839</sup> In a similar way, the text of the Argentine Constitution contains no explicit provisions about a right to health, but human rights treaties ratified by the country, in particular the International Covenant on Economic, Social and Cultural Rights and CEDAW establish a duty of the state to protect it. Moreover, the constitutional reform of 1994 conferred constitutional status to human rights treaties ratified by Congress (Article 75, inc. 22) and in August 2013 the Supreme Court established that the

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<sup>837</sup> The health exception has also been a matter of controversy, and during the past years conservative groups have also challenged it, but lower courts have more consistently upheld the constitutionality of this permission (Bergallo and Ramón Mitchell 2001: 3).

<sup>838</sup> Bergallo and Ramón Mitchell (2011: 3).

<sup>839</sup> CEDAW was approved by the National Congress in 1985, and its Facultative Protocol was ratified in 2006.

Argentine State must take into account the recommendations of the Inter-American Commission of Human Rights –which has so far upheld women’s reproductive rights.<sup>840</sup>

On the other hand, the Constitution does not include an explicit protection of the right to life. The most explicit provision protecting pre-natal life in the Argentine legal framework is Article 4 of the American Convention on Human Rights. During the constitutional debate in 1994, the Executive attempted to include a clause about the protection of the right to life from conception. However, due to a strong reaction by the women’s movement, as well as to the significant presence of women representatives at the Constitutional Convention, this provision was not introduced. The relatively high presence of women at the Convention (there were 88 women and 222 male representatives, that is, 26.4% female representation), contrasts with the low female representation at the constitutional assemblies in Brazil in 1988 and Colombia in 1992, and was a result of the application of the recently promulgated gender quota law.<sup>841</sup> The final compromise clause established that the State should create a “special social security system to protect children in situations of vulnerability from pregnancy until the end of elementary education, and the mother during pregnancy and lactation” (Art. 75, inc. 23). The ambiguity of this phrasing has made it non-operational.<sup>842</sup>

### **I.5.2. The Supreme Court. Institutional rules and legal instruments for constitutional control**

In Argentina, the system of constitutional control is diffuse and every judge has competence to determine the constitutionality of a norm.<sup>843</sup> The Supreme Court is the final interpreter of the Constitution and federal laws. The constitutional review system in Argentina is concrete; thus, the Court can only decide on the constitutionality of norms in the course of a trial or appeal about a substantive issue, and its decisions are binding only for the particular case.

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<sup>840</sup> Corte Suprema de Justicia de la Nación, “Recursos de Hecho, Carranza Latrubesse, Gustavo c/ Estado Nacional - Ministerio de Relaciones Exteriores – Provincia del Chubut”, August 6 2013.

<sup>841</sup> In 1991, Argentina became the first country to establish a gender quota law for legislative elections, which established that at least 30% of party candidates should be women. This law applies only to the Deputies Chamber, not to the Senate. According to Barrancos, the passing of the quota law was facilitated because President Menem supported it, in order to contain the claims of important female sectors of his own party, which were critical of the government’s position on reproductive rights (2002: 152).

<sup>842</sup> Feijoo (2002: 197).

<sup>843</sup> The Supreme Court has centralized review powers only in matters that fall within its original and exclusive competence.

Although in Argentina there is no formal *stare decisis*, the Court itself has established that lower courts must follow its precedents, unless they are able to offer valid reasons to decide contrariwise.<sup>844</sup>

The most common way to access the Court is the so-called extraordinary appeal (“*recurso extraordinario*”), which must be first examined by the respective lower court, and the complaint proceeding (“*recurso de queja*”), which is presented directly by the appellant before the Supreme Court in case the extraordinary appeal is denied by the lower instance. Mainly through these provisions, the Court controls the acts of lower courts and uniformizes the interpretation of the constitution and sub-constitutional federal laws.<sup>845</sup> In all of these instances the Court can decide on constitutional issues that may arise in these processes. Moreover, there are provisions specifically designed to protect constitutional rights and to enforce the supremacy of the Constitution. The main instruments in this regard are the writs of *amparo* (designed to protect constitutional rights in general) and *habeas corpus* (when physical liberty is involved), which are expeditious ways to denounce rights violations. Article 43 of the national Constitution, introduced by the constitutional reform of 1994, widened the scope of *amparo* and *habeas corpus* briefs, by conferring legal standing to social actors (if they can demonstrate that their institutional aims are related to the issue at stake) and by allowing for the use of these remedies to defend rights that have a collective dimension. In this way, the reform set the institutional framework for collective proceedings, and broadened the legal opportunity for public interest litigation in the country.

The Supreme Court sits in full to decide every case, and it can refuse to hear a case with a vote of a majority of justices. Cases are decided by majority rule, although each justice in the majority can issue a concurrent opinion with a different argumentation. The Court does not have official control over its docket. However, it can exercise some discretion over its agenda, by choosing the timing of its decisions and, more fundamentally, it can discretionally use what has been called “negative writ of certiorari”<sup>846</sup> by which it can refuse to hear an extraordinary appeal when considering that there is no federal question at stake, or that the issue lacks due relevance.

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<sup>844</sup> This has been called the “binding, although conditional, effect” of the Court’s decisions (Sagüés 1998: 5).

<sup>845</sup> Sagüés (1998: 93).

<sup>846</sup> Sagüés (1998: 92).

The Supreme Court appointed by the first government after the democratic transition (headed by President Raúl Alfonsín, 1983-1989) has been recognized as oriented toward the protection of fundamental civil rights and liberties,<sup>847</sup> and it had a notable role in divorce legal reform.<sup>848</sup> However, President Carlos Menem (1989-1999) promoted the Court's expansion and appointed a group of justices popularly called the “automatic majority” in the Court, since they systematically upheld presidential decisions. The majority of so-called *Menemist* justices were publically identified with the most conservative Catholic sectors in Argentina, particularly Opus Dei.

In the aftermath of a legitimacy crisis that placed the Court at the center of popular protests during the social and political crisis of 2001-2002 in Argentina, the Court was reformed. The reform was carried out through a presidential decree that established more transparent and participative procedures in the selection of Supreme Court justices and set new criteria for the nomination of candidates, among them the need for gender diversity. It did not introduce a mandatory requirement regarding the incorporation of female justices at the Court, and even less a quota system, and it did not mention whether the candidates were expected to have gender expertise. However, it established for the first time that the nomination of new members of the Court should be carried out with attention to the Court's composition in order to promote “as far as possible, gender diversity [...]”<sup>849</sup>.

After this institutional change, the justices identified with the so-called Menemist majority at the Court, who were accused of corruption charges, renounced or were removed through impeachment, and four new justices were appointed. The newly appointed justices were known to be independent of political factions or interest groups close to the government, and have ample professional credentials. After its renewal, through a series of internal agreements (*acordadas*), the Court itself has carried out reforms that broadened the means for the participation of social actors in the Court's procedures, mainly by regulating public hearings and *amicus curiae* submissions. These changes configured a new legal opportunity for social actors.

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<sup>847</sup> Gargarella (2004: 184).

<sup>848</sup> See Barrancos (2005: 78); Htun (2003: 98-99).

<sup>849</sup> Decree 222/03, June 19, 2003. Available at: <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=86247>.

Among the new justices there were two women, Justices Carmen Argibay and Elena Highton, who were the first women to be appointed at the Court under a democratic government in Argentina. Highton did not arrive at the Court with a gender agenda, but she got involved with gender issues during her term, and assumed a leading role in the promotion of judicial policies in the field of gender violence.<sup>850</sup> The position of Argibay with regard to gender was much more defined, since she was one of the founders of the International Association of Women Justices (IAWJ), as well as the first president of Argentina's Association of Women Justices (AMJA), created in 2003. As part of her work at AMJA, she promoted training and awareness on gender issues within the judicial power.<sup>851</sup> She had also been part of the International Criminal Court for the former Yugoslavia, where she played a relevant role in challenging gender-based stereotypes in judging women's experiences of war and conflict.<sup>852</sup> During her nomination process, her appointment was resisted by conservative forces due to Argibay's previous declarations in favor of the decriminalization of abortion.<sup>853</sup>

Furthermore, in the aftermath of reforms, there has been an unprecedented receptivity to rights claims made by social actors at the Supreme Court. In prominent cases that involved public policy and rights, the Court has upheld collective *habeas corpus* and *amparo* briefs presented by NGOs. It has also allowed for the participation of NGOs as third parties as well as the presentation of *amicus curiae* briefs, and has convoked public hearings in several cases.<sup>854</sup> In relevant public law cases the Court has addressed violations of collective and individual rights from a more dialogical perspective; it has not established the policies that should be implemented by other powers, but has promoted a process of negotiation between different types of actors, and has assumed an important role in the implementation of remedies.<sup>855</sup> This approach indicates an incipient new relationship between the Court, the political power and bureaucratic agencies, and civil society.

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<sup>850</sup> Chaher, Sandra, Journalist specialized on gender and Executive Director of “Artemisa Comunicación”, NGO on gender and communication, Author interview, Buenos Aires, December 21 (2010).

<sup>851</sup> Chaher, Author interview (2010).

<sup>852</sup> Chappell (2010: 490).

<sup>853</sup> See “Sobrevolando los prejuicios”, *Página 12*, February 5 2004.

<sup>854</sup> For an account of these cases, see ADC (2008).

<sup>855</sup> The most emblematic cases in these regards referred to imprisonment conditions (“Verbitsky, Horacio s/ *habeas corpus*”, CSJN, May 3 2005) and to environmental damages (“Mendoza, Beatriz S. y otros v. Estado Nacional, Provincia de Buenos Aires y Ciudad Autónoma de Buenos Aires s/daños y perjuicios”, June 20 2006).

In the field of women's rights, after its reform the Court implemented innovative measures through the creation of two non-jurisdictional offices within its structure. In 2008, the Court established the Office of Domestic Violence, which is coordinated by Justice Elena Highton, and aims to improve access to justice for victims of this type of violence and to develop statistics in this field. In 2009, it opened the Women's Office, coordinated by Justice Carmen Argibay (until she died in May 2014). This Office is geared to promoting gender mainstreaming strategies within the judiciary, mainly through training and research on gender equality within the judicial power throughout the country. The processes of nomination and confirmation of Justice Argibay galvanized opposition by conservative groups who criticized, among other issues, the justice's progressive stand towards sexual and reproductive rights,<sup>856</sup> and generated high expectations from defenders of these rights.

A most important, though less visible actor in the configuration of the new legal opportunity for the advance of women's rights before the Supreme Court is the National General Defender, Stella Maris Martínez, who in 2005 became the first woman to occupy that position in the country. In Argentina, the National General Defender is the public defender before the Supreme Court in civil and criminal trials. In 2007, Martínez created the Commission on Gender Issues, within the National Public Ministry, which preceded the creation of similar offices within the Supreme Court, and appointed a feminist lawyer and public law specialist (Raquel Asensio) as the Commission's Coordinator. The Commission aims to introduce a gender perspective both at the institutional level within the judiciary as well as in judicial decisions, and to promote women's access to the judicial system.<sup>857</sup>

The main Supreme Court's abortion-related jurisprudence previous to its decision in 2012 had been motivated by a claim against emergency contraception pills presented by the Catholic organization "*Portal de Belén*", which was upheld by the Court in 2002.<sup>858</sup> On that occasion, the Menemist majority at the Court argued that life begins at fertilization, and that the pill could prevent a fertilized egg from attaching to the uterus, and so it could provoke the death of a human being. In this way, the Court argued that the authorization of this drug contravened the protection of life from conception, under the Convention on the Rights of the

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<sup>856</sup> See ADC (2004).

<sup>857</sup> Herrera, María de la Paz, Commission on Gender Issues, Defensoría General de la Nación Author interview, Buenos Aires, September 10 (2013).

<sup>858</sup> "Portal de Belén – Asociación sin Fines de Lucro c. Ministerio de Salud y Acción Social de la Nación s/amparo", CSJN, March 5, 2002.

Child and the American Convention on Human Rights, and declared it unconstitutional.<sup>859</sup> In its aftermath, the allegation of abortive effects of contraceptive methods that impede implantation became for many years the “epicenter of judicial debate” on reproductive rights in the country.<sup>860</sup> This doctrine has had important effects on subsequent cases on reproductive rights at lower courts, as well as on a decision by the Supreme Court in 2006, made after its composition had changed.

In 2006, the Supreme Court upheld a claim submitted by the conservative association “*Mujeres por la Vida*”, in which it analyzed if this NGO had legal standing to challenge the constitutionality of Law 25.673, which created the National Program on Sexual Health and Responsible Procreation.<sup>861</sup> Based on the precedent set in “*Portal de Belén*”, the plaintiff had argued in 2003, before a local court, that the Program allowed for the distribution of emergency contraception pills that, it argued, had abortive effects and were, thus, against the right to life of the unborn. The case reached the Court through extraordinary appeal. In a brief decision, a majority at the Supreme Court said that the NGO had legal standing to challenge that law through an *amparo* brief, under Constitutional Article 43, because it had among its organizational aims “to promote and defend the establishment of social conditions that allow the effective enforcement of the right to life from conception”. In fact, the case was about legal standing, but in order to justify the organization’s interest in the case, the Court had to accept the plaintiff’s claim that emergency contraception drugs were abortive.

## **II. SOCIAL MOVEMENTS AND LEGAL MOBILIZATION IN THE FIELD OF ABORTION LAW**

### **II.1. Feminism and the struggle for abortion rights in Argentina**

In Argentina, contemporary or second-wave feminism started developing at the beginning of the 1970s, in a difficult relationship with leftist political groups.<sup>862</sup> At that point, the feminist

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<sup>859</sup> The Court’s decision only applied to the commercial name *Imediat*, so the pill continued to be commercialized under another trademark.

<sup>860</sup> Puga and Puga (2005: 107).

<sup>861</sup> “Mujeres por la Vida - Asociación Civil sin Fines de Lucro -filial Córdoba- c/ E.N.-P.E.N.-M° de Salud y Acción Social de la Nación s/ amparo”, CSJN, October 31, 2006.

<sup>862</sup> As happened in other Latin American countries in the 1960s and 1970s, within leftist movements feminist demands were considered as secondary to the class struggle, which affected priorities and strategies (Feijoo 1998: 32).

camp was comprised of small groups, influenced by the model of consciousness-raising groups developed by US feminists,<sup>863</sup> and abortion began to be an object of their concern.<sup>864</sup> However, most of these organizations were dissolved as a consequence of state terrorism unleashed since the military coup in 1976.<sup>865</sup> On the eve of the regime's collapse, feminists started to reorganize,<sup>866</sup> and the democratic transition allowed for the reemergence of an incipient feminist movement. However, during the 1980s abortion was not situated as a political issue in the public sphere,<sup>867</sup> and only at the end of that decade and the beginning of the 1990s did feminists begin to demand abortion law reform in the political space.<sup>868</sup>

Since 1989, abortion has been a core issue at Women's National Encounters,<sup>869</sup> which are the main instances of women's mobilization in Argentina. Toward the end of the 1980s and beginning of the 1990s, the first organizations with abortion as a central concern were created. This occurred contemporaneously to the process of professionalization and institutionalization of the feminist movement.<sup>870</sup> In 1987, Catholics for Choice (*Catolicas por el Derecho a Decidir*, CDD) was established in the country. Its main office for advocacy and political incidence has been located since its foundation in the city of Córdoba.<sup>871</sup> In 1988, feminist activists created the Commission for the Right to Abortion (*Comision por el Derecho al Aborto*), which was a precursor to the development of a feminist political position on abortion.<sup>872</sup>

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<sup>863</sup> For an account of the main feminist organizations at that time, see Feijoo and Gogna (1990: 100); Bellucci (1997: 100); Feijoo (1998: 32); Felitti (2010: 794). The UN-declared Women's Decade (1975-1985) contributed to the development of these first autonomous feminist organizations (Felitti 2010: 794). At that time, these groups did not have interlocution with the State (Feijoo 2002: 186).

<sup>864</sup> Bellucci (1997: 101).

<sup>865</sup> State terrorism during the last military dictatorship (1976-1983) was explicitly directed at repressing armed leftist groups, but in fact it ferociously repressed all kinds of social organizations, including prominently workers unions, student groups and grassroots religious mobilization.

<sup>866</sup> See Feijoo and Gogna (1990: 103-104); Feijoo (2002: 140).

<sup>867</sup> Blofield (2006: 132).

<sup>868</sup> Bellucci (1997: 102); Feijoo (2002: 140).

<sup>869</sup> Blofield (2006: 140).

<sup>870</sup> The movement's professionalization and institutionalization evolved together with feminists rethinking their position vis-à-vis the state, and the incorporation, mainly during the 1990s, of feminist activists into state institutions (see Feijoo and Gogna 1990: 105-108; Ciriza 2013: 77; Felitti 2010: 807).

<sup>871</sup> CDD's office in the city of Buenos Aires has focused more on theological work, and when this office was closed, CDD in Córdoba started to be called CDD Argentina (Peñas 2013).

<sup>872</sup> See Bellucci (1997: 102); Gutierrez (2007: 12); Di Marco (2012: 229); Ciriza (2013: 77).

Among other important organizations that struggle for abortion rights in the country are the Forum for Reproductive Rights, established in 1991; the National Consortium on Reproductive and Sexual Rights (CoNDeRS), created in 2003; and the Gender, Law and Development Institute (INSGENAR) established in 1994 in the city of Rosario. Most of these organizations have been financed by international donors.<sup>873</sup> In the context of the Constituent Assembly in 1994, more than 100 organizations formed the Self-Convened Assembly of Women for the Right to Decide in Freedom (*Mujeres Autoconvocadas para Decidir en Libertad*, MADEL), in order to resist the incorporation of a clause on the right to life from conception.<sup>874</sup> Except for MADEL, which had a highly significant but short existence, most of these organizations, and in particular the Commission for the Right to Abortion, have been leading actors in the development of the National Campaign for the legalization of abortion. Also relevant within the Campaign is the Latin America and Caribbean Committee for the Defense of the Women Rights – Argentina (CLADEM Argentina). Other organizations that have had a prominent role in advocacy for reproductive rights in Argentina, which are also part of the National Campaign, are the Center for Studies on State and Society (Centro de Estudios de Estado y Sociedad, CEDES, and in particular its Health, Economy and Society Area) and the Foundation for Women's Studies and Research (Fundación para el Estudio e Investigación de la Mujer, FEIM), founded in 1989.

### ***The National Campaign for the Right to Legal, Safe and Free Abortion***

The most important coalition for abortion rights in Argentina is the National Campaign for the Right to Legal, Safe and Free Abortion. The National Campaign was developed from within the women's movement, and was launched in 2005. It was a product of the continuity of previous feminist abortion mobilization, as well as of an unprecedented convergence of women's struggles from different sectors and organizations in the aftermath of the country's 2001-2002 economic and political crisis. Crucial to its development have been the National Women's Encounters, which constitute the most important and perdurable instance of women's mobilization in Argentina. The Encounters started to be held in 1986 at the initiative of a group of feminists, and later on became pluralistic and massive instances of participation of women from diverse sectors and organizations, not only feminists, from all over the

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<sup>873</sup> Blofield (2006: 140).

<sup>874</sup> See, in particular, Gutierrez (2007: 10-12) for a thorough account on the development of MADEL. See, also, Bellucci (1997: 103); Feijoo (2002: 197; Chejter and Laudano (2002a: 42).

country. They take place every year in a different province, gathering around 20,000 participants in the latest ones.<sup>875</sup> The Commission for Abortion Rights organized a Workshop on Contraception and Abortion within the Encounters, which has taken place every year since 1988.

At the beginning of the 2000s, the struggle for abortion rights was intensified, diversified and federalized, moves which eventually led to the creation of the National Campaign. Two factors were instrumental in this development.<sup>876</sup> The legalization of abortion became a common claim of the wider women's movement, which strengthened and extended the abortion rights struggle. This was possible because in the context of the political crisis of 2001-2002, new forms of popular mobilization emerged, among them neighborhood assemblies and popular assemblies,<sup>877</sup> which permitted communication between feminist activists and grass-roots women's movements, and the introduction of traditionally feminist abortion claims into new and wider women's struggles for social justice. In January 2003, women from different neighborhood assemblies together with long-time feminist activists, in particular those that had founded the Commission for the Right to Abortion, created an Assembly for the Right to Abortion, which gathered in the City of Buenos Aires. As a result of this mobilization process, the 2003 Women's Encounter in the city of Rosario was notable for the participation of women from popular movements as well as for the centrality gained by reproductive health, and the abortion issue in particular.<sup>878</sup> On that occasion, an Assembly for the Right to Abortion was organized for the first time within the Encounter. The Assembly decided to create a Workshop on Strategies for the Right to Abortion within the Encounter, which since then take place every year and would in turn gave birth to the National Campaign.<sup>879</sup>

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<sup>875</sup> Di Marco (2011: 177).

<sup>876</sup> See Di Marco (2011: 172-179).

<sup>877</sup> The economic crisis detonated in December 2001 further deepened an extant crisis of political representation in the country, and triggered a massive social insurrection. Social discontent and contestation was expressed through street riots, pickets and the formation of new instances of popular organization, such as neighborhood assemblies, cooperatives and the workers self-management (*fábricas recuperadas*) movement. Feminist activists participated in neighborhood assemblies and introduced the abortion issue, and the legalization of abortion also started to be discussed by women from popular movements at the diverse new forms of grassroots mobilization as well as at the Women's National Encounters (see Di Marco 2011: 174; Chaves 2012: 234). On the role of the crisis in the development of the movement for abortion rights, see Chaves (2012: 235); Di Marco (2012: 230); Anzorena and Zurbriggen (2013: 31); Ciriza (2013: 78).

<sup>878</sup> Di Marco (2011 178); Di Marco (2012 p. 231).

<sup>879</sup> The Workshop on Strategies was created because the already existing Workshop on Contraception and Abortion was attended also by conservative Catholic women, who did not allow to

The mobilization/counter-mobilization dynamic was also instrumental in the radicalization of the struggle for abortion rights. During the 2003 Encounter as well, mobilization by conservative women intensified, instigated by the local Catholic Church.<sup>880</sup> The announced intensification of counter-mobilization at the Encounter contributed to the radicalization of the women's pro-abortion movement, and fueled the massive participation of women at the assembly on abortion rights carried out at the beginning of that Encounter.<sup>881</sup>

During the 2004 Encounter in the city of Mendoza, the Workshop on Strategies proposed the creation of a National Campaign for the Right to Abortion. At this point, Catholics for Choice pushed for a meeting, which would take place in Córdoba in May 2005, where the National Campaign for the Right to Legal, Safe and Free Abortion would be further defined and launched.<sup>882</sup> There, it was decided to adopt the motto "Sexual Education to Decide, Contraceptives to Avoid Abortion, Legal Abortion to Avoid Death", which identifies the main demands and the basic agreements of the movement,<sup>883</sup> and to use green scarves as a distinctive symbol, along the lines of the traditional white scarf that identifies the Mothers and Grandmothers of Plaza de Mayo.<sup>884</sup>

The National Campaign is made up of more than 3000 organizations, including feminist organizations, political parties, unions and human rights organizations, and it is considered "a movement of movements".<sup>885</sup> In fact, despite serious internal cleavages,<sup>886</sup> the Campaign has

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advance the discussion on legalization (Gabarra, Mabel, Coordinator of the Institute of Legal and Social Studies for Women, Rosario; member of the National Campaign for the Right to Legal, Safe and Free Abortion, Author interview, Buenos Aires, September 5, 2013). Instead, participants at the Workshop on Strategies have to agree on the need of legalization, and the discussion is about the strategic actions to be followed (Rosenberg, Martha, Member of the Forum for Reproductive Rights, and the National Campaign for the Right to Legal, Safe and Free Abortion, Author interview, Buenos Aires, September 10, 2013).

<sup>880</sup> The archbishop of Rosario, who was also the president of the Episcopal Conference had ordered local priests to recruit Church attendants with the capacity to confront the "anti-family" feminist positions at the Encounter (Chaves 2012: 236).

<sup>881</sup> See Tarducci (2005: 401); Di Marco (2011: 178); Chaves (2012: 236).

<sup>882</sup> Gabarra, Author interview (2013).

<sup>883</sup> This motto expresses the basic agreements within the Campaign and helps to maintain its unity, despite differences among its members on many other issues. According to Rosenberg (2013), this is one of the Campaign's strengths.

<sup>884</sup> Green scarves had been used for the first time in 2003 at the massive demonstrations carried out at the end of the Women's Encounter, which, as in previous years, was attended also by some Mothers and Grandmothers of Plaza de Mayo.

<sup>885</sup> Di Marco (2012: 235). Thorough information about the Campaign, as well as a complete list of its adherents can be found at: <http://www.abortolegal.com.ar>.

succeeded in the difficult challenge of pursuing a common struggle with middle-class activists and women from grassroots social movements,<sup>887</sup> and with professionalized and less-institutionalized groups, as well as of federalizing the movement and achieving territorial insertion throughout the country.<sup>888</sup> This contrasts with the situation in the 1990s, when the abortion rights claim was almost exclusively advanced by feminist organizations.<sup>889</sup> Economic support for the Campaign is provided mostly by Catholics for Choice, which has in practice acquired a leading role in a movement that, formally, is horizontal and does not have official leadership.

In 2006, the Campaign set out to draft a legislative proposal for the legalization of abortion, which is the first legislative project submitted by the movement in Argentina, and became the main focus of mobilization and the primary strategy pursued by the Campaign. The proposal was drawn up by a group of activists, some of them lawyers,<sup>890</sup> and it is called “Bill for the Voluntary Termination of Pregnancy”.<sup>891</sup> Among its major points, it proposes the legalization of abortion at the woman’s demand during the first twelve weeks of pregnancy, as well as the state’s obligation to provide free access to legal abortion services. On May 28, 2007, the Campaign submitted it to the Deputies Chamber, and since then, due to legislative inaction, it had to resubmit it four times, the last one being April 9, 2014. The bill has been stuck in committee and has not yet been discussed in plenary sessions. However, for the first time in the country, on November 1, 2011, it was discussed at the Commission on Criminal and General Legislation, which has carried out two congressional public hearings on the issue,

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<sup>886</sup> The main conflicts within the Campaign have been related to the position of different groups with regards to the national government, under the presidencies of Néstor Kirchner and Cristina Fernández. Other important differences have been related to the contradictions caused by the country’s centralization in the city of Buenos Aires, and the attempt to federalize the Campaign.

<sup>887</sup> There is a clear leadership by feminists in the Campaign, but there is also an important presence of the wider women’s movement (Díaz, Author interview, 2013).

<sup>888</sup> The federalization of the Campaign is considered important, among other reasons, because local religious actors exert a strong influence on local legislators, and they have to be pressed, and supported, by the movement (Martino, Author interview, 2013).

<sup>889</sup> Chaves (2012: 235).

<sup>890</sup> Among them were gynecologist Alicia Cacopardo (who had been, together with Dora Coledeski, a vanguard of the abortion rights movement in Argentina), as well as lawyers Mabel Gabarra and Natalia Brugo (Gabarra, Author interview (2013)).

<sup>891</sup> The text of the bill can be found at: <http://www.abortolegal.com.ar/wp-content/uploads/2011/08/Fundamentos-y-Proyecto-Ley-IVE.pdf>.

also for the first time in the country.<sup>892</sup> Moreover, the project has gathered increasing support by deputies from different parties, who signed the proposal prior to its submission.<sup>893</sup>

With regard to framing, the National Campaign did not bring about a significant change as compared to previous feminist framings of the abortion issue. As in other Latin American cases, at the end of the 1990s, Argentine feminists began using the recently internationally adopted concepts of reproductive rights and reproductive health,<sup>894</sup> and this is the discourse invoked by the Campaign, without significant modification. The Campaign's main motto, and in particular the phrase "contraceptives to avoid abortion, legal abortion to avoid death", had been backed by the Commission for the Right to Abortion in the 1990s.<sup>895</sup> However, the Campaign's formulation of a project for legal change implied some moderation of feminist claims. For example, the name of the legislative project does not use the term abortion explicitly, but alludes to the "legal interruption of pregnancy". The moderation of the feminist language on abortion has produced tensions within the movement.<sup>896</sup> However, Argentine feminist groups have not engaged in a discussion about the right to life. In general, the feminist abortion discourse in the country is based on women's rights to autonomy and health,<sup>897</sup> although feminist legal arguments in different legal processes are more moderate and are not grounded on a radical claim about women's right to their own bodies. Feminist legal activists are disposed to admit the constitutionality of the (non-absolute) protection of intra-uterine life.<sup>898</sup> However, some feminist activists acknowledge that the movement is ill-prepared to launch this discussion.<sup>899</sup>

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<sup>892</sup> The first public hearing took place on November 30 2010, and the only presenter was Marianne Mollmann, legal advisor of Amnesty International. The second hearing was carried out on July 13 2011, and the sole presenter was Luz Patricia Mejía, then Special Rapporteur of the IACtHR for women's rights for Argentina, Bolivia and Ecuador.

<sup>893</sup> The signature of legislators is symbolic, it simply implies commitment on the part of those who sign the proposal (Martino, Author interview, 2013). In April 2014, the project was submitted with support by more than sixty signatures, and the only legislative block that was not represented among the signatories was *Frente Renovador* ("Con los pañuelos verdes en busca de un derecho", *Página 12*, April 10 2014). The list of deputies who signed the project in 2014 can be found at: <http://www.abortolegal.com.ar/?p=462>.

<sup>894</sup> Bellucci (1997: 102).

<sup>895</sup> Di Marco (2011: 180).

<sup>896</sup> See Ciriza (2013: 79).

<sup>897</sup> Durán, Josefina, Director of the Legal Area, Latin American Justice and Gender Team, ELA, Author interview, Buenos Aires, September 3 (2013).

<sup>898</sup> Gherardi, Natalia, Executive Director of ELA, Equipo Latinoamericano de Justicia y Género (Latin American Team of Gender and Justice), Author interview, Buenos Aires, September 3 (2013).

<sup>899</sup> Long-time feminist activist Marta Rosenberg explains that there is no position within the feminist movement regarding the right to life, and argues that in general activists are reticent to engage

### ***Support structure for feminist legal mobilization***

The Argentine abortion rights movement has developed a rights discourse and has mobilized the law in different ways, but has not yet seized a presumably favorable legal opportunity for strategic litigation on abortion rights before the Supreme Court.<sup>900</sup> The only strategic litigation case on abortion in Argentina so far was pursued by feminist rights advocacy organizations that belong to the National Campaign, but it was presented before the UN Human Rights Committee. In 2007, Catholics for Choice, CLADEM and INSGENAR submitted a claim before the Committee and against the Argentine State for its failure to provide abortion services to a mentally handicapped girl who had been raped. On March 9, 2011, the Committee sentenced the Argentine State in the most important decision against the Argentine State so far in this field.<sup>901</sup> The development of this case had a significant impact in the enactment of protocols for the attention of lawful abortions,<sup>902</sup> and the Committee's decision contributed to the further development of legal arguments by the feminist movement,<sup>903</sup> and was cited by the Supreme Court in its 2012 decision on abortion. However, the National Campaign for Legal Abortion does not have litigation among its salient strategies,<sup>904</sup> and although some of its most prominent activists are lawyers, it has not focused on developing resources for strategic litigation or a litigation strategy before the Supreme Court.

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in that discussion (Rosenberg 2013). She maintains that the obstacle for this discussion is the religious conception of abortion and the right to life, and that it would require well-prepared people to discuss it, which, she contended have been so far lacking (Rosenberg 2013).

<sup>900</sup> More generally, feminist legal activists point out that strategic litigation is “a sub-utilized tool in the pursuit of women’s rights” in the country (Gherardi, Author interview 2010).

<sup>901</sup> *L.M.R. c/ Estado Argentino*, Comunicación No 1608/2007. UN Doc. CCPR/C/101/D/1608/2007 (Human Rights Committee). The claim was about a mentally handicapped young woman who was pregnant an act of rape, and whose case was judicialized and reached the Supreme Court of the Province of Buenos Aires, which authorized the abortion. However, the procedure was not performed on time by public hospitals, which alleged consciousness objection, and had to be done in a private clinic. The Committee sentenced the Argentine State to pay reparations, including an adequate monetary compensation, and to take measures to avoid similar violations of the law in the future.

<sup>902</sup> Then Minister of Health Ginés González García started working with feminist lawyers and doctor on the development of a guide for the provision of legal abortions just when this case started developing (Bergallo, Paola, Law Professor, Universidad de Palermo, Author interview, Buenos Aires, September 4, 2013). The national government reedited that guide in the aftermath of the Committee's decision (Cárdenas, Edurne, Member of the International Work Team, Center for Legal and Social Studies (CELS), Author interview. Buenos Aires, September 10, 2013).

<sup>903</sup> Cárdenas, Author interview (2013).

<sup>904</sup> Gabarra, Author interview (2013).

Among the reasons mentioned for the lack of litigation by the feminist movement in Argentina is that, given the historical exclusion of the women's position from law-making and legal texts in the country, when women started to mobilize, in the 1960s and 1970s, they saw those spaces as "the superstructure of masculine domination".<sup>905</sup> The lack of relevant education or training on gender matters at law schools was also mentioned as an obstacle for the development of strategic litigation on women's rights.<sup>906</sup> Moreover, feminist lawyers, such as Paola Bergallo, as well as members of feminist rights advocacy organizations, such as the Latin American Justice and Gender Team (*Equipo Latinoamericano de Justicia y Género*, ELA), do not intend to pursue a litigation strategy by themselves, without the initiative coming from the movement.<sup>907</sup> Other reasons for the lack of strategic litigation have been linked to the mobilization/counter-mobilization dynamics, for the feminist movement has been on the defensive in the field of judicialization and litigation on reproductive rights, given the aggressive litigation campaign by conservative sectors in this field.<sup>908</sup> Beyond the lack of strategic litigation for abortion rights, feminist legal mobilization contributed to create legal arguments particularly regarding non-punishable abortions, and litigated an abortion case at the international level, which were instrumental in the 2012 Supreme Court decision that liberalized the abortion law.

On the other hand, in Argentina there exist strong human rights organizations that emerged mostly during the last dictatorship, as well as a well-established practice of public interest litigation.<sup>909</sup> However, for many years, the women's movement and the big rights advocacy and human rights organizations in the country did not work together. In fact, the feminist movement in the country has grown outside of the sphere of the large human rights NGOs,<sup>910</sup> and for many years the NGOs with a strong background in strategic litigation had a different agenda, focused on civil and political rights and the fight against impunity in cases of state terrorism –this was particularly so until the Supreme Court's decision to overturn the laws

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<sup>905</sup> Puga, Mariela, Public interest lawyer and Executive Director of Mujeres del Sur. Author interview. Córdoba, December 29 (2010).

<sup>906</sup> Gerhardi, Author interview (2010).

<sup>907</sup> Gerhardi, Author interview (2010); Bergallo, Author interview (2013). One of the reasons for this may be that, allegedly, the model implemented by Mónica Roa in Colombia generated distrust on the part of long-time feminist activists for the right to abortion in Argentina.

<sup>908</sup> Cárdenas, Author interview (2013).

<sup>909</sup> Puga, Author interview (2010).

<sup>910</sup> Gerhardi, Author interview (2010).

that granted impunity to crimes of the last dictatorship, in 2005.<sup>911</sup> Since 1996, the Center for Legal and Social Studies (*Centro de Estudios Legales y Sociales*, CELS), which is one of the oldest and certainly the most resourceful and powerful rights advocacy organization in the country, included a section on women's rights in each of its annual reports on human rights in Argentina,<sup>912</sup> possibly as part of donors' requirements. But it has not devoted resources to litigation on gender rights, and for a long time it did not participate in legal claims on women rights. For its part, until at least 2002, the Argentine chapter of Amnesty International (AIAR) did not include specific denunciations of women's rights in its local reports.<sup>913</sup> The Association for Civil Rights (*Asociación por los Derechos Civiles*, ADC), which is one of the most important rights advocacy organizations in the country, took the lead in incorporating women's rights and reproductive rights in its strategic litigation agenda, but it did so only very recently. This situation in the field of human rights organizations in Argentina has had an impact on the material resources and support structure available for legal mobilization for women's rights in the country.

However, there have been positive changes in recent years, presumably due to the development of the National Campaign as well as to the impact of the 2012 Supreme Court decision that liberalized the abortion law. On the one hand, there is a growing recognition by feminist organizations of the importance of strategic litigation, both because of its practical and its symbolic effects on a broader political process.<sup>914</sup> Feminist lawyers have organized a National Network of Female Lawyers for Human Rights, which allows them to share experiences on litigation for women's rights, to and organize more rapidly when cases present in different points throughout the country.<sup>915</sup> Moreover, feminist organizations inside the National Campaign, mainly Catholics for Choice, are receiving more financing and have adopted more proactive litigation strategy.<sup>916</sup> Other important organizations, which are not part of the Campaign, in particular ELA, which is a key feminist advocacy organization founded in 2003, started to receive significant financing in recent years, and is preparing to

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<sup>911</sup> Bascary, Lourdes, Member of the Area of Economic, Social and Cultural Rights, Center for Legal and Social Studies (CELS), Author interview, Buenos Aires, December 20 (2010).

<sup>912</sup> CELS's Annual Reports can be found at: <http://www.cels.org.ar/documentos/?ids=3&info=publicacionesTpl&lang=es&ss=126>

<sup>913</sup> Chejter and Laudano (2002b: 146).

<sup>914</sup> Gherardi, Author interview (2010); Puga, Author interview (2010).

<sup>915</sup> The organization of this network was proposed by feminist lawyer Paola Bergallo (Ripa, Author interview, 2014).

<sup>916</sup> Juliá, Silvia and Angélica Peñas. 2010. Lawyers of the NGO Catholics for Choice. Author interview. Cordoba, December 18.

pursue strategic litigation.<sup>917</sup> Finally, as a consequence of the 2012 decision on abortion by the Supreme Court, feminist rights advocacy organizations have mobilized for its implementation and have established stronger links with other organizations and individuals that work on the abortion issue, in order to analyze possible judicial strategies.<sup>918</sup>

On the other hand, in the last years, and most probably influenced by the development of the National Campaign, there has been a shift in human rights organizations' approach to women's rights and abortion rights in particular. In fact, one of the Campaign's aims was to ground the abortion discussion on general discussion on human rights, and to link the women's rights agenda with the strong tradition of human rights mobilization in the country.<sup>919</sup> Other organizations, such as CEDES, have worked toward the abortion issue being treated by CELS and ADC.<sup>920</sup> Since approximately 2008-2009, a more intense relationship has started to develop between feminist organizations and the more traditional rights advocacy and human rights NGOs. As signs of this trend, there is an incipient relationship between Catholics for Choice and the Association for Civil Rights (ADC); CELS has recently appointed feminist lawyers who had previously worked on reproductive rights,<sup>921</sup> and ADC and CELS have incorporated feminist lawyers and social scientists in their boards.<sup>922</sup> For its part, ELA has now a closer relationship with ADC and CELS.<sup>923</sup> In recent years, CELS has carried out workshops and legal training on the abortion issue.<sup>924</sup> As for Amnesty International, in March 2014 the organization launched the global campaign "My body, my rights", which includes prominently the legalization of abortion, and its Argentine chapter is pursuing this campaign in the country, and has recently collaborated with organizations such as CEDES and ADC on this issue.

### **II.3. Counter-mobilization**

One of the first organized actions by conservative forces in the field of abortion rights was its mobilization against the first legislative initiative to reform the abortion law presented in 1989

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<sup>917</sup> Gherardi, Author interview (2013).

<sup>918</sup> Durán, Author interview (2013); Gherardi, Author interview (2013).

<sup>919</sup> Díaz, Author interview (2013).

<sup>920</sup> Bergallo, Author interview (2013).

<sup>921</sup> Cárdenas, Author interview (2013).

<sup>922</sup> Bergallo, Author interview (2013).

<sup>923</sup> Gherardi, Author interview (2010).

<sup>924</sup> Bergallo, Author interview (2013).

by a female UCR deputy. However, during the 1980s and the beginning of the 1990s, a proper conservative movement against reproductive rights in Argentina did not yet exist - possibly because the country lacked strong mobilization for reproductive rights<sup>925</sup> - and the Church's reaction against the bill consisted in mobilizing Catholic school students to attend public demonstrations.<sup>926</sup>

At the beginning of the 2000s, however, conservative Catholic groups implemented new forms of mobilization, mostly based on legal mobilization strategies by organizations in civil society. These organizations seized the new legal opportunity created in 1994 by the introduction of collective *amparo* briefs and the incorporation of human rights treaties into the Constitution.<sup>927</sup> The Argentine case is a paradigmatic example of the use of progressive tools for counter-mobilization. In fact, conservative groups were the first ones to develop strategic litigation actions on the abortion issue in Argentina, and they have led the field of litigation strategies on reproductive rights before the Supreme Court in the country.

Conservative religious actors in Argentina do not count on a strong congressional coalition, as is the case in Brazil, nor on an openly Catholic party, such as PAN in Mexico or the Conservative Party in Colombia. In fact, when fundamentalist actors within the Deputies Chamber tried to form an anti-abortion coalition, they failed to do so.<sup>928</sup> Some of the features of this counter-movement contribute to explaining their use of litigation strategies, as well as their success in court. On the one hand, they are "elite-oriented"<sup>929</sup> and have strong contacts and familiarity with the judicial power.<sup>930</sup> On the other hand, they have counted on material resources for litigation, provided mainly by Human Life International.<sup>931</sup>

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<sup>925</sup> Blofield (2006: 152). The most visible voices against the first governmental initiative to liberalize the law on reproductive rights in the 1980s – that is, President Alfonsín's decree, which repealed the ban on contraception established during the 1970s - came from anti-divorce groups, which were more organized at that time (see Blofield 2006: 152). At the beginning of the 1990s, during the Menem administration, the anti-abortion initiative was mostly a top-down governmental strategy, instead of the product of social or political mobilization (Blofield 2006: 154).

<sup>926</sup> Blofield (2006: 132).

<sup>927</sup> The main argument of anti-abortion activists in the country is that Article 4 of the American Convention on Human Rights, which includes the right to life from conception, implies the prohibition of abortion under all circumstances.

<sup>928</sup> Deputy Cynthia Hotton and Senator Liliana Negre attempted to create an anti-abortion caucus, but they did not generate attention for their proposal (Díaz, Author interview, 2013).

<sup>929</sup> Bascary, Author interview (2010).

<sup>930</sup> Puga, Author interview (2010).

<sup>931</sup> Juliá and Peñas, Author interview (2010).

Among the main conservative organizations working against reproductive rights in Argentina are the *Pro-Vida*, *Pro-Familia*, *Viva Cristo Rey*, *Portal de Belén* and *Mujeres por la Vida*. The latter two organizations have been central actors in the judicialization of reproductive rights in Argentina, and they have pursued litigation strategies before the Supreme Court, which motivated the development of the Court's conservative doctrine about the absolute right to life from conception. This doctrine stood until 2012. In 2002, conservatives also took advantage of the favorable legal opportunity created by the presence of a conservative majority at the Supreme Court. But they have also pursued strategic litigation before the Court after its renewal and, most notably, even the F., A. L. case, which originated the most progressive Supreme Court decision on abortion rights in the country, was motivated by litigation strategies of conservative actors.

### **III. THE 2012 SUPREME COURT DECISION ON THE F.,A.L. CASE**

On March 13, 2012, the Supreme Court issued a decision on a case regarding a 15 year-old girl who had become pregnant as a result of rape and had requested authorization of the judicial system in the province of Chubut to carry out an abortion, on grounds of the exception to criminalization allowed by Article 86 of the Criminal Code. The *F., A. L.* case (as it is known, for the initials of the girls' mother, who submitted the demand in the first instance) constituted the first opportunity for the Court to decide on the scope of lawful abortions, and specifically to intervene in the long-standing legal dispute regarding the right to abortion in cases of rape in the country. In its decision, the Court declared that the Criminal Code should be interpreted as decriminalizing abortion in all cases of rape, exhorted the different levels of the judicial power to abstain themselves from judicializing access to lawful abortions, established the state's obligation to provide abortion services under this exception, and detailed a series of criteria to be followed by the different levels of government and actors involved for the adequate implementation of its decision.<sup>932</sup>

The claim had been submitted before the Court in March 2010, through extraordinary appeal, by a Subrogate Defender of the Province of Chubut, on behalf of the rights of the unborn, against a decision by the Superior Tribunal of the province of Chubut, which had authorized

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<sup>932</sup> Corte Suprema de Justicia de la Nación, *F., A. L. s/medida autosatisfactiva*, Expte. 21912, March 13, 2012.

the abortion under Article 86 of the Criminal Code.<sup>933</sup> The claimant requested the declaration of unconstitutionality of the wide interpretation of the rape exception carried out by the Superior Tribunal. Although the case had become moot, for the abortive procedure had already been carried out, the Court decided to make a decision in the abstract, due to the institutional importance of the case, and in so doing it confirmed the decision under appeal. It grounded the justiciability of this case on the difficulty of cases related to pregnancy, or its interruption, to reach the Court before turning abstract, which frustrates the Court's capacity to deal with important constitutional questions presented by such cases, and precludes it from establishing criteria to avoid their repetition in the future.<sup>934</sup> The Court considered that its intervention was necessary in order to clarify the extant confusion regarding the scope of permissions under the current abortion law, and to avoid the frustration of the right to access to legal abortions, and the subsequent potential international responsibility by the State.<sup>935</sup> In particular, the Court considered that the requirement of judicial authorization for granting access to abortion services “by virtue of its repetition constitutes a truly institutional practice (in addition to being unnecessary and illegal)”.<sup>936</sup>

In the first and longer part of the sentence, the Court pursues a comprehensive analysis of Article 86, and interprets the scope of the rape exception under constitutional and human rights provisions, as well as according to the recommendation of treaty monitoring bodies. In so doing, the Court thoroughly analyzes the arguments that are usually put forward to restrict the scope of non-punishable abortions in Argentina. The Court argues that international human rights treaties (specifically, the American Convention on Human Rights, the Convention on the Rights of the Child, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Declaration of the Rights and Duties of Man) do not imply a prohibition of abortion in cases of rape.<sup>937</sup> The Court interprets these norms in light of the intentions at the moment of their drafting, as well

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<sup>933</sup> Superior Tribunal de Justicia de Chubut, “*Delitos contra las personas. Aborto. Abortos no punibles. Menor. Embarazo proveniente de una violación. Medida autosatisfactiva solicitada para la madre que ordena la interrupción del embarazo. Riesgo en la salud psíquica de la menor*”, March 8 2010. This was the first decision by a provincial Superior Tribunal to uphold the constitutionality of abortion in the case of the rape of a non-mentally handicapped woman (Bergallo 2010: 33).

<sup>934</sup> F., A. L., p. 5.

<sup>935</sup> F., A. L., p. 17.

<sup>936</sup> F., A. L., p. 21. The Court remarked that disinformation had led medical professionals to request judicial authorization, and that this procedure had obstructed access to legal abortion since the 1920s (F., A. L., p. 17).

<sup>937</sup> F., A. L., pp. 9-13.

as according to the subsequent decisions by the respective treaty monitoring bodies. The Court concludes that constitutional and human rights norms do not mandate a restrictive interpretation of the rape exception contained in Article 86, and argues that, on the contrary, other provisions of equal hierarchy as well as basic hermeneutical principles adopted by the Court mandate a broad interpretation of that exception.<sup>938</sup>

In the first place, the Court argued that principles of equality and the prohibition of all forms of discrimination are a fundamental basis of the Argentine constitutional order. This, the Court contended, had a direct application in this case, for a restrictive interpretation of Article 86 would imply unreasonable unequal treatment and discrimination of some of the victims of sexual violence, which does not respond to any valid criterion of differentiation.<sup>939</sup> Secondly, the Court maintained that the principle of the dignity of the person, recognized by several human rights instruments, proscribes the utilitarian treatment of individuals in favor of other persons or the higher good. In this sense, the Court explained that the obligation to carry through a pregnancy which is the result of the violation of the most fundamental of human rights implies a disproportionate burden and an extreme sacrifice, which is not congruent with that principle.<sup>940</sup> In the third place, the decision is grounded on the principle of legality and the *pro-homine* principle, which oblige the Court to interpret norms in a way that protects as well as possible the rights of the individual vis-à-vis the state. The Court linked this principle to a doctrine of minimal intervention of the penal law to regulate social issues.<sup>941</sup>

In the second part of the decision, the Court urges national and provincial authorities as well as the authorities of the Autonomous City of Buenos Aires to issue “norms of the highest level” and hospital protocols, in order to grant comprehensive assistance to every victim of sexual violence.<sup>942</sup> It also establishes a series of criteria for correct approach to the attention of legal abortions by the health system.<sup>943</sup> Among the most important criteria set by the Court, it declared that access to abortion in cases of rape should be granted only under the woman’s attestation (through a sworn declaration) before the attending professional.<sup>944</sup> It ordered the elimination of further obstacles, such as administrative procedures or waiting periods that

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<sup>938</sup> *F.*, A. L., p. 13.

<sup>939</sup> *F.*, A. L., pp. 13, 14.

<sup>940</sup> *F.*, A. L., p. 16.

<sup>941</sup> *F.*, A. L., p. 16.

<sup>942</sup> *F.*, A. L., p. 29.

<sup>943</sup> *F.*, A. L., p. 27.

<sup>944</sup> *F.*, A. L., p. 26.

delay attention, and it established that health service providers should ensure the exercise of the right to conscientious objection did not preclude the proper attention to lawful abortions in every institution.<sup>945</sup> The Court also instructed the different levels of government in all jurisdictions to implement public information campaigns, with a special focus on vulnerable sectors, in order to publicize the rights of rape victims.<sup>946</sup>

The concurring opinions, by Justices Carmen Argibay and Enrique Petracchi, confirmed the constitutionality of abortion in all cases of rape. However, they do not mention implementation measures and do not specify the responsibilities of the different levels of government in ensuring adequate service provision. Also in contrast with the majority's opinion, the respective votes of these justices do address the question about the status of fetal life and its balancing with the rights of women. In so doing, both justices used the term "unborn person", advanced by the claimant, which was not at all mentioned by the majority's opinion. Furthermore, Justice Argibay argued that the woman's sworn declaration was not enough to attest for rape to have taken place, but it was also necessary to produce a physician's verification.<sup>947</sup>

This decision is a landmark step in a longstanding legal controversy regarding the interpretation of Article 86 of the country's criminal code, and it was aimed at definitely clarifying the scope of the rape exception and putting an end to the judicialization. The decision is notable in that the Court adopted an activist position, which implies the recognition of its political role, in two main respects. On the one hand, it decided to hear the case even though by the time it reached the court it had become moot, and it did so by explicitly stating that this type of situation required an institutional response in order to avoid its repetition in the future.<sup>948</sup> On the other hand, although it dealt with an individual case, it sets criteria for the implementation of all cases of lawful abortions throughout the country, and exhorts public authorities of the different levels of government to carry out institutional or structural reforms in implementing the Court's decision.

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<sup>945</sup> *F., A. L.*, p. 27.

<sup>946</sup> *F., A. L.*, p. 29.

<sup>947</sup> See *F.,A.L.*, concurring opinions by Justices Carmen Argibay ( p. 32-48) and Enrique Petracchi (49-53).

<sup>948</sup> *F., A. L.*, pp. 5-6.

In its 31 pages, the text of the sentence is clear and concise, by usual Argentinian standards, which may contribute to one of the aims of the decision, that is, to eliminate what it considers a high level of disinformation, and to clarify, for all the actors involved, the rights of women who request to have an abortion in cases of rape. Furthermore, the decision was endorsed by unanimity (with two concurring opinions), which may strengthen the Court's position on this issue vis-à-vis other social and state actors, and signals the possible perdurability of the Court's criteria.

With regard to the role of female justices, this decision does not reveal a particular standing or pattern of behavior that could be influenced by gender. In fact, this decision was taken at a time in which there were more female justices at the Court than ever before, but each of them had a different position in this case, particularly regarding the right-to-life arguments, as well as with respect to the Court's role in indicating criteria for the implementation of the decision.<sup>949</sup> Whereas Justice Highton joined the majority's opinion in downplaying arguments regarding the right to life in this case, Justice Argibay considered it necessary to balance this right with the woman's rights. The latter justice used the expression "unborn person," and argued that a woman's declaration was insufficient without the attestation of a physician. In fact, not only does this requirement imply mistrust of the woman's declaration, but it is also impracticable for a doctor to attest that a rape took place weeks before the abortion procedure is requested. Moreover, Justice Argibay did not follow the majority in indicating the steps to be followed for the implementation of the decision, or in adjudicating responsibilities to the different actors involved.

The opinion of the Defender General of the Nation, who assumed the defense of the girl, appears to have been informed by the previous work done at her office regarding the right to abortion, and more generally with regard to active policies regarding gender and judging.<sup>950</sup> In her opinion, not only did Stella Maris Martínez recommend that the Court declare the

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<sup>949</sup> In this regard, feminist lawyer and member of the National Campaign Mabel Gabarra opined that there were high expectations regarding the role that Argibay could have in an abortion case, but that her actual position in this case was more technical and avoided the majority's more political standing, perhaps just as a consequence of being a woman and of having been interrogated for being openly favorable to abortion rights in the past (Gabarra, Author interview (2013)).

<sup>950</sup> According to Stella Maris Martínez, under her direction, the office of the Defender General of the Nation had posed the abortion issue a long time before the *F.,A.L.* case was presented, but given the time constraints of the judicial process, it unlikely that a concrete case will be dealt with by the Supreme Court (Martínez, Stella Maris, Defender General of the Nation, Author interview, Buenos Aires, September 10, 2013).

constitutionality of abortion in all cases of rape, but she also advanced arguments that reflected a gender-sensitive position, which had been elaborated with assistance by the Commission on Gender Issues, and particularly by its coordinator, Raquel Asensio.<sup>951</sup> One of the most salient elements of the opinion is the argument that all pregnancies that were the result of rape are not only allowed to be terminated by the rape exception, but also sexual violence implies a risk to the woman's psychic health – that is, that the rape exception is a particular case in the more general hypothesis of danger to the health of the pregnant woman.<sup>952</sup> Furthermore, in this process Asensio established contacts with feminist organizations and feminist legal actors, who provided materials for this case.<sup>953</sup> Hence, this case also reveals the power that gender commissions may have within state institutions, and the importance of staffing these institutions with gender-trained officials.

With regard to the role of social actors, it is striking that the first case to reach the Supreme Court on the scope of the abortion law was presented by a conservative actor, even when the legal opportunity at the Supreme Court was presumably more favorable for feminist claims in this regard. However, it can be argued that the work done by the feminist movement as well as by feminist lawyers in the field of abortion in Argentina was decisive for the development of this case.<sup>954</sup> In the first place, during the decisional process of the case at the first instance court as well as in the appellate court in Chubut, local legal actors received and cited legal works on abortion developed and sent to them by feminist lawyers.<sup>955</sup> Secondly, the National Campaign, and in particular its federal character, facilitated the mobilization of contacts and resources that were instrumental in the development of the case at the local level in Chubut,

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<sup>951</sup> Martínez, Author interview (2013).

<sup>952</sup> Defensoría Oficial ante la Corte Suprema de Justicia de la Nación, “*Expediente Letra “F”, N° 259, Libro XLVI, Año 2010, caratulado “F., A. L. s/ Medida Autosatisfactiva”*”, November 1 2010, p. 16-18.

<sup>953</sup> Martínez, Author interview (2013).

<sup>954</sup> Bergallo, Author interview (2013); Cárdenas, Author interview (2013); Díaz, Author interview (2013); Martino, Author interview (2013).

<sup>955</sup> When the case was first presented in February 2010, local legal actors contacted feminist lawyer Paola Bergallo, who sent them the drafts of articles that would be later on published in the book edited by Bergallo (2011), as well as an article by Romina Faerman (Bergallo, Author interview, 2013). In discussing the legal status of the country's reservations and interpretive declarations regarding human rights treaties, the Superior Tribunal of Chubut included a reference to Faerman's piece (Superior Tribunal de Justicia de Chubut, “Delitos contra las personas. Aborto. Abortos no punibles. Menor. Embarazo proveniente de una violación. Medida autosatisfactiva solicitada para la madre que ordena la interrupción del embarazo. Riesgo en la salud psíquica de la menor”, March 8 2010, p. 28). See Ripa (2011: 122-148) for an analysis of the main jurisprudence and normative framework on abortion in the province of Chubut, which has been a vanguard in the country in this field.

as well as for its national repercussions. Third, the movement had already placed the abortion issue in the public sphere, with insistence on the lack of enforcement of the legislation.<sup>956</sup> Fourthly, the Court's decision reflects all the grievances of the movement with regard to non-punishable abortions, and in particular it advanced human rights arguments for the defense of abortion in cases of rape had been put forward by the women's movement as well as by feminist lawyers in the country.<sup>957</sup> Moreover, the decision grounds the international responsibility of the State to grant access to lawful abortions in human rights treaties as well as in the recommendations and rulings by treaties monitoring bodies to the Argentine State, and the most important of these decisions had been issued by the UN Human Rights Committee in the *L.M.R.* case, which had been pursued by feminist rights advocacy organizations.

Finally, several national and international academics and NGOs working on women's rights,<sup>958</sup> as well as anti-abortion rights individuals and institutions<sup>959</sup> presented *amicus curiae* briefs on this case before the Supreme Court. However, the decision does not cite *amicus* or other external sources.<sup>960</sup>

In October 2012, the Supreme Court intervened in order to ensure the enforcement of its decision in the case of a woman who had escaped from a sex trafficking network and had requested to have an abortion in a public hospital in the City of Buenos Aires. The NGO PROFAMILIA intended to prevent, through a last-minute injunction, the abortion from being provided. The first instance judge approved the procedure, but the NGO resubmitted the claim to a court presided over by an anti-abortion judge, who argued that there was no proof of rape

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<sup>956</sup> Díaz, Author interview (2013).

<sup>957</sup> Gabarra, Author interview (2013).

<sup>958</sup> Among the many actors that presented amicus briefs in support of abortion rights are the Association for Civil Rights (ADC); Catholics for Choice; Human Rights Watch; Women's Link Worldwide (Colombia); Centro de Pesquisas em Saúde reproductiva (Brasil). A complete list of institutions and individuals that submitted amicu curiae briefs before the Supreme Court in this case can be downloaded from: [http://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fwww.argentinosalerta.org%2Ffiles%2FAMICUS%2520CURIAE%2520ABORTO%2520NO%2520PUNIBLE.doc&ei=39geVMqPFYLbsASzyoCYBQ&usg=AFQjCNENggpXmxhR7ChHsgNRfKKmwXCodA&sig2=6cCyQ96HTve\\_\\_N2Ya0Ykbg&bvm=bv.75775273,d.cWc](http://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fwww.argentinosalerta.org%2Ffiles%2FAMICUS%2520CURIAE%2520ABORTO%2520NO%2520PUNIBLE.doc&ei=39geVMqPFYLbsASzyoCYBQ&usg=AFQjCNENggpXmxhR7ChHsgNRfKKmwXCodA&sig2=6cCyQ96HTve__N2Ya0Ykbg&bvm=bv.75775273,d.cWc)

<sup>959</sup> Among conservative actors presenting amicus curiae in this case are Portal de Belén; Asociación Civil Con Mirada de Mujer; Universidad Austral; Corporación de Abogados Católicos; Americans United for Life and Alliance Defense Fund.

<sup>960</sup> The only sources cited by the Court are two doctrinal works by Argentine constitutionalist Carlos Nino (p. 16).

and ordered the suspension of the procedure.<sup>961</sup> On October 11, 2012, the day after the precautionary measure was granted, the Supreme Court nullified it and ordered the woman's access to the abortion service. Eventually, on September 17, 2013, the Court published its final decision on this case. In a brief and unanimous decision, it argued that although the case had become moot, it was necessary to take further measures in order to dismantle the possible consequences of undue judicial interventions.<sup>962</sup> The Court ordered the judicial investigation and, when appropriate, sanctioning of the actions of the petitioner and the lawyer who had obstructed the woman's access to a lawful abortion, and it also mandated the evaluation and potential sanctioning of the judge's conduct by the National Magistrates Council.<sup>963</sup>

Beyond this case, one of the main direct effects of the Supreme Court's decision in *F.A.L.* was the virtual elimination of the former systematic practice of judicialization. Nowadays, resistance by sectors of the medical profession to the implementation of the decision is mostly related to the use of the conscientious objection and their unwillingness to offer information about access to abortion services, but after unsuccessful initial attempts they have stopped asking for judicial authorization.<sup>964</sup> Secondly, a (small) group of provinces have complied with the Court's directives regarding the need of protocols for the attention of lawful abortions,<sup>965</sup> and the implementation of these directives has been closely checked by women's organizations in conservative local contexts where it was previously impossible to exert this kind of social control on governmental actions affecting abortion rights.<sup>966</sup> Third, the decision has also had an impact on the legislative discussion on abortion. In particular, it put an end to the debate on legislative proposals regarding non-punishable abortion, which were usually deployed in order not to deal with the legalization of abortion on demand.<sup>967</sup>

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<sup>961</sup> The resubmission of the claim before the court presided by Judge Myriam Rustam violated the rules that establish the random assignment of cases to judges in that jurisdiction.

<sup>962</sup> Corte Suprema de Justicia de la Nación, "Asociación para la defensa y promoción de la familia –PROFAMILIA- s/ medidas precautorias" Expte.82.259/2012, September 17, 2013, p. 2.

<sup>963</sup> PROFAMILIA, pp. 2, 3.

<sup>964</sup> Durán, Author interview (2013). Judicialization has been stopped because medical actors are conscious that they would have trouble if they engaged in that behavior (Díaz, Author interview, 2013).

<sup>965</sup> According to a research report issued by the Association for Civil Rights (ADC) on the degree of compliance with the Court's decision in the different jurisdictions, by December 2013 eight provinces had issued protocols in accordance with the decision (ADC 2013).

<sup>966</sup> Gabarra, Author interview (2013).

<sup>967</sup> Martino, Author interview (2013).

However, the national Executive Power has ignored the Court's decision and has not taken any measure to comply with its directives. The Minister of Health has neither issued a public statement in this regard, nor has he convened the Federal Health Council in order to discuss with local health authorities the measures to be taken in order to grant access to lawful abortions. Furthermore, the national government did not transform the Technical Guide for the Attention of Non-Punishable Abortion into a Ministerial Resolution, which would confer it higher institutional hierarchy. The lack of initiative by national authorities in this field has contributed to the lack of compliance with the Court's decision by local authorities in several jurisdictions throughout the country. While some provinces have complied with the Court's indications, the implementation of the sentence has met with resistance in several provinces, as well as in the Autonomous City of Buenos Aires, which have either issued protocols including additional requirements for access to abortion, or have totally disregarded the decision and have not issued any type of directive for implementation at the local level.<sup>968</sup>

Given the situation, on February 11, 2014 a group of rights advocacy organizations (ELA, ADC, CELS and AIAR) requested that the Supreme Court convoke a public hearing so that the Court could be informed about the implementation of its decision, and could take measures to ensure its enforcement. However, on March 6, 2014, the Court issued a resolution in which it rejected the request and argued that it did not have competence to convoke a public hearing, for the *F.,A.L.* case was closed and there was no other case on abortion under its jurisdiction at that moment; it also made it clear that it would continue intervening to clarify these issues should new concrete cases be presented under its jurisdiction in the future.<sup>969</sup>

## CONCLUSION

The Argentine case presents a late development of the feminist political claims for abortion rights, but one of the strongest recent women's movement for abortion legalization in Latin America. This case shows a lack of strategic constitutional litigation for abortion rights, and reproductive rights more generally. The constitutional reform of 1994 introduced human

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<sup>968</sup> According to ADC, eight jurisdictions issued protocols but included further requirements for access to abortion, and nine provinces have not yet taken any action in this regard (ADC 2013).

<sup>969</sup> Corte Suprema de Justicia de la Nación, "Asociación por los Derechos Civiles (ADC) y otros s/ solicitan audiencia pública en los autos "F.A.L. s/ medida autosatisfactiva, expediente F-259/2010-REX", March 6 2014, pp. 1, 2.

rights treaties into the Constitution and created new legal instruments for the defense of rights, thus configuring a new legal opportunity for the advancement of social actor's claims through courts. However, during the 1990s the Supreme Court was captured by a majority of extremely conservative justices, who were highly dependent on the Executive, which for its part was aligned with the Vatican's position in the field of sexuality and reproduction. Both aspects configured a propitious legal opportunity for conservative actors, which in fact took advantage of it, and were the first ones to develop strategic litigation in the field of reproductive rights in Argentina. Counter-legal mobilization in this field was also favored by the close links of conservative actors with the judicial system in the country.

Later on, the 2003 reforms in the Supreme Court changed the legal opportunity, both in terms of the Courts' procedures and institutional standing, as well as with regard to the Court's receptivity to rights claims. It opened a new legal opportunity for progressive rights advocacy organizations, many of which soon seized that opportunity and found receptivity to their claims at the Court. However, the feminist movement has not taken advantage of this new opportunity for the development of strategic litigation on abortion rights at the Court. Partly as a result of this, until 2012 the Court maintained a jurisprudence on reproductive rights that was in consonance with claims of the most conservative sectors in society. In this sense, it is also notable that the first case to reach the Supreme Court on the scope of the abortion law was presented by a conservative actor, even when legal opportunity had changed, and the Court eventually decided against the conservative petition.

This case also shows that the presence of female justices has been inconsistently consequential for the advancement of gender justice through the Court. They have been the protagonists of the institutional changes produced through the creation of the two offices for women within the Court, but their presence at the Court has not been determinant for the development of a gender-sensitive abortion jurisprudence, or reproductive rights jurisprudence more generally. This case also highlights the importance of gender commissions within state institutions (in this case, a gender commission within the Public Defender's office) in introducing a gender perspective in governmental decisions, and particularly in developing gendered arguments during judicial processes involving women's rights. In this regard, it underscores as well the role of women in positions of power (it was the first female Public Defender who created that commission in the first place).

With regard to political opportunity for the development of abortion rights struggle, this case shows that a massive political and social crisis configured an opportunity window that contributed to the expansion and strengthening of the abortion rights movement. This case also shows that opportunities do present themselves, but movements have to seize them. Feminists did so through their participation in the newly organized grass-roots experiences that emerged in the context of the crisis. This interaction accounts for the accomplishment of a difficult task in the struggle for abortion rights; that is, the union of middle-class feminist claims with wider women's movements and claims.

Finally, this case shows that the presence of women in political positions may not necessarily favor the advancement of abortion rights, even if that government is generally favorable to the progress of other areas of rights, and sexual rights in particular. This may be especially so if female politicians hold a declared ideological position that is contrary to abortion, as happened in the Argentine case.

## CONCLUSIONS

For many years, Latin American feminists shared the same view: the occasional public discussion on abortion took place between extremist positions held by feminists and the Church's spokesmen. In fact, the feminist struggle for the legalization of abortion had not been able to develop an argument that went beyond the usual opposition of women's autonomy to decide on their own bodies and the counter-movement's idea that abortion was against human life; that is, the movement had had difficulty building a framing that appealed to common values shared by other groups in society. As such, feminist abortion struggles were for the most part solitary campaigns, carried out without the participation of other social actors. In that context, a common endeavor for Latin American feminists was to take the abortion issue outside of the feminist movement and transform it into a public issue.

Over the last decade, some fundamental changes have taken place in the discussion on the legality of abortion in these countries. Feminists have gathered the support of the broader women's movement, as happened in Argentina in the 2000; they have made alliances with traditional human rights organizations; they have presented the abortion issue in the public space as a matter of equal citizenship and human rights, and as involving larger questions regarding who takes legitimate decisions in a democratic system. Their campaigns have galvanized other actors in society –journalists, lawyers, intellectuals - who defend the secularity of the state and recognize abortion as a crucial issue in that dispute, and they have made alliances with doctors, as shown by the emblematic case of Brazil. In the midst of those changes, during the past decade Constitutional Courts have sided for the first time in the region with feminists' claims to decriminalize abortion in certain circumstances. In other words, in these countries, some degree of protection for abortion rights went from being taboo to being part of the legal canon.<sup>970</sup>

The cases in this study show that recent changes to the abortion laws in Latin America have responded to direct claims by feminist actors in civil society. In the cases of Colombia, Mexico, Brazil and Argentina, feminist organizations have advanced legal claims and strategies that have found reception at constitutional courts, in contexts in which the national political process has proved to be resilient to women's abortion claims. In effect, on repeated

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<sup>970</sup> Beltrán and Díaz de León (2011) pointed that out with regard specifically to the Mexican case, but their terms could be applied also to the other three cases in this study.

occasions a majority of justices at constitutional courts have been favourable to women's demands on abortion rights, and their decisions have been in line with the human rights discourse used by feminists to ground their abortion rights claims, as well as with particular ways of framing the abortion issue advanced by feminists in some of these countries. In this regard, the analysis of these cases confirm the claim by democratic constitutionalism scholars who argue that social movements can be pivotal agents in the development of legal arguments that, on certain occasions, may become institutionalized through state law.

In the Mexican case, not only have reforms advocated by the feminist movement been passed in Mexico City and upheld by the Supreme Court, but also the rationale given by local public authorities to legalize abortion during the first trimester has been in line with the framing developed by feminists over the former two decades. The reform was grounded on a discourse about the necessity of balancing constitutional goods, and about the compatibility between the interruption of pregnancy during the first trimester and the protection of fetal life, which was one of the most important arguments developed by GIRE and its allies.

In Colombia, the Constitutional Court upheld the petition by feminist actors to liberalize the abortion law under three circumstances, and it grounded its decision on international human rights treaties, which had been the main legal grounds of the demand. In fact, the demand had been pathbreaking, in Latin America and at the global level, in its framing of the right to abortion following human rights treaties and the decisions of monitoring organs of those conventions. It was the first time that the Court used the human rights framework in a decision about abortion, and, in fact, it was the first time it grounded a decision on women's rights in general on an extensive interpretation of human rights treaties. In taking credit for this development, Mónica Roa noted that prior to her work the Colombian Constitutional Court had become a global leader in the incorporation of human rights into the constitutional block, but that nobody in Colombia had pushed for abortion to be framed as a human rights issue. In fact, she explained, in this country there was a perception that human rights law prohibited abortion.<sup>971</sup> Due to the development of feminist strategic litigation, the Court changed its jurisprudence in this field, and upheld abortion rights in a context in which the political process sustained its total prohibition, and did so following the argument of the petitioners that human rights treaties mandated liberalization. Moreover, the Colombian Constitutional Court has played a vanguard role in the region, and possibly worldwide, in the

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<sup>971</sup> Roa (2014).

implementation of abortion legal reform. In a country where Catholicism has historically penetrated the political sphere, the Court proved to be the main State institution to stand against attempts to impose fundamentalist religious views through the policy-making process, and to support feminist claims for the full implementation of Decision C-355. In this way, the Colombian case shows the important role courts may have, not only in issuing groundbreaking legal reforms in support of women's reproductive rights when the political process is stagnant, but also in ensuring the enforcement of their own rulings, in countering backlash, and in providing social actors an institutional venue for seeking the enforcement of their rights.

For its part, the Brazilian Supremo Tribunal Federal upheld the claim pursued by a feminist organization regarding the constitutionality of the interruption of pregnancy in cases of anencephaly. Most notably, the holding of the decision followed one of the most important aspects of the framing developed by the petitioners; that is, that these cases should not be classified as abortion, but should be considered as a therapeutic anticipation of birth. In the Argentine case, the claim that motivated the Supreme Court's decision that established a broad interpretation of already-existing exceptions to criminalization was presented by a conservative actor. However, in its decision the Court took an activist role that most surely would have been impossible to assume without the background of the work done during the former five years by the National Campaign for the Right to Abortion. Moreover, the decision upheld the claim developed by the feminist movement that abortion was a matter of women's human rights. More generally, Constitutional Court decisions in the four countries in this study established the state's obligation to provide women access to legal abortion. In this sense, all the decisions follow a common feature of the framings developed by Latin American feminist on the abortion issue, that is, that abortion is not as a matter of privacy vis-à-vis the State, but as a right that should include the provision of the service through the public health system.

This concluding chapter offers a comparative assessment of the cultural, political and organizational factors and dynamics involved in the development of the abortion rights struggle as well as in the social-legal process that led to the liberalization of abortion laws in Mexico, Brazil, Colombia and Argentina. It points out common trends, as well as the way in which particular developments in each country illuminate certain aspects of these processes.

Emphasis is placed on movements' interaction with the state, with particular focus on its relationship with constitutional courts. The analysis is organized following the main frameworks developed by social movement research. The first section addresses the political and legal opportunities; the second section analyses the development of strategies and framings, and the third section, the organizational dimensions involved in these process. Finally, the fourth section includes an assessment of counter-mobilization and backlash processes.

## **I. POLITICAL AND LEGAL OPPORTUNITIES FOR ABORTION RIGHTS ACTIVISTS IN LATIN AMERICA**

The political opportunities of contemporary social movements' work in Latin America have been generally affected by authoritarianism and democratization processes. The particular characteristics of authoritarian regimes in each country during the 1970s, precisely when second-wave feminism started developing in the region, have influenced the way in which the abortion issue emerged as a feminist demand in the public sphere in each case. In Mexico, under a hegemonic party regime whose repressive components were not as extreme as in the Southern Cone, feminism could develop more autonomously, and the movement could make an open demand in the public realm for abortion legalization. In that context, the Mexican feminist movement could formulate a project of legal reform that included the legalization of abortion, and submitted it to the national congress by the end of that decade. Probably given this comparatively early development, and the subsequent early awareness that the political process at the national level would not deliver reforms, Mexican feminists also developed legal mobilization on the abortion issue earlier than their counterparts in the region.

In contrast, the military dictatorships in the Southern Cone hampered the development of the feminist movement, and in particular the possibility of it claiming abortion rights in the public sphere. Not only did the context of authoritarian rule preclude the possibility of feminists publicly demonstrating and make claims on the State, but it also affected the way they had to deal with gender issues, their specific condition of domination, and in particular the abortion question. On the one hand, feminists were generally part of leftist political groups, which at that time argued that so-called specific claims should be put aside in favor of the more general class struggle as well as the fight against the military regime. The traditional left also

denounced family planning measures as genocidal and imperialist-imposed. In that context, the question of autonomy for feminists was posed not only with regard to the State, but with regard to other political parties and organizations, with which they shared ideals and strategies. As a consequence, potentially conflictive issues, and in particular abortion, were avoided by feminists in public discussions and dealt with only in small and private groups.

On the other hand, the cases in this study confirm that there is no linear causality between closings and openings of political opportunities and the mobilization and influence of social movements. Or, at least, the definition of openings and closures is not simply dictated by the repressive character of the state. In Brazil, dictatorship affected the broad women's movement and the feminist movement in particular, in a different way than it affected other social movements. The dictatorial context also had a different impact on the feminist movement in the Brazilian and Argentine cases. Brazil witnessed the emergence of civil society in the midst of the dictatorial period, and new women's organizations - which were not a target of military repression as were male-dominated political parties and trade unions - were principal actors in that development. However, the need to resist the repressive regime in alliance with leftist actors and the progressive Church led Brazilian feminists to downplay abortion grievances. In an interesting turn, however, during the long transition to democracy, the military government, under pressure from international financial institutions to develop population control policies, opened up spaces within the state structure that were taken by feminist activists who developed one of the most influential and vanguard programs on women's health and reproductive rights. In Argentina, on the contrary, feminism, as well as other social movements, except for the strong human rights movement that emerged during the dictatorship, could not develop much less enter into a dialogue with the state until the regime collapsed. The case of Colombia is different from the other cases in this study, since it has been marked not by authoritarian regimes but by an armed conflict that has also affected the feminist movement. While abortion has always been one of feminists' main concerns, in that context the movement had to devote much of its energy to the issue of violence against women.

The influence of transnational factors, or the international opportunity, has been a common enabling factor for the feminist movement in Latin American countries. The 1975 UN-declared Women's Year played an important part in legitimizing women's claims and

opening up opportunities for women to organize, particularly in cases such as Brazil, under dictatorship. Most crucially, the 1994 UN-sponsored Conference on Population in Cairo, and the 1995 Conference on Women in Beijing produced a paradigm change in the approach to sexuality and reproduction, by moving the axis of debate from population control to reproductive rights, and they have also been fundamental for feminist mobilization at the national level and for feminists' relationship with national states. Feminist organizations became crucial interlocutors for drafting national proposals for those international meetings, and for the implementation of agreements and programs in their aftermath. Most importantly, the platforms and documents of those conferences continue to be a focal point for reproductive rights claims at the national level in Latin America.

Shifting conditions in international opportunity have also affected the financial means of feminist organizations in the region, although with a different intensity in each case. Recently, the international economic crisis has affected the availability of financing from US and European sources, especially for a country such as Brazil, which is considered as an emerging economy. Paradoxically, economic growth, with its consequence of the diminution of international funding for that country, has placed abortion rights advocacy organizations in a difficult position, for the abortion issue is not supported by national governments, independent of the relative well-being of the national economy.

Among the most crucial components of the political opportunity for abortion rights advocates in Latin America is the relationship between State and Church and the degree of secularism. The influence of Catholic and in the past years in some countries also Protestant churches on the public sphere is one of the main obstacles for the advancement of abortion rights in the region. In fact, Mexico and Uruguay are the two most secular countries in Latin America, and are also the two countries where the most progressive reforms to abortion laws have been passed in Latin America in recent years. So, it is not religious devotion that explains variation: Brazil and Mexico are the two countries with the highest Catholic populations in the world, and present contrasting results in terms of abortion law reform (with Mexico City as a vanguard case in the region, and Brazil holding a highly restrictive abortion regulation). Instead, the influential factor in this regard is related to the cultural understanding about the proper separation between the spheres of State and Church – that is, to what degree relevant social sectors of the population value secularism- as well as the institutional arrangements that sustain this separation. This component of political opportunity is highly specific for

movements that advocate for sexual and reproductive rights. In Mexico, the history of secularism and the current courting of the Church by political leaders in search for external sources of legitimacy, in the context of political realignments, was an opportunity seized by feminists to gather support for their abortion rights claims by important liberal sectors in Mexican society.

To all accounts, given the centrality of the fight against abortion rights in current religious politics, the abortion claim has become a central issue in the struggle for secularization. It is perceived in this way by liberal actors in key positions in society, such as lawyers, journalists and academics, many of them men, who see this struggle as an opportunity to claim for Church-State separation, and who may become important allies of feminists. This element has been noticeable in Mexico, where broad sectors of society have historically defended the secularity of the state. But it is also visible, as an emerging trend, in other countries, such as Colombia and Brazil, where the appointment of highly controversial fundamentalist figures at key governmental positions (the Office of the Inspector General and the presidency of the human rights commission at the Deputies Chamber, respectively) galvanized claims for secular policy-making. As an illustration of the movement/counter-movement dynamic, the presence of these conservative institutional activists within the state's structure, who have been openly partisan in their attempt to impose religious morality as the basis of public policy, have triggered an incipient mobilization by relevant actors in society, who are taking sides with feminists and other social actors in their struggle for a secular policy on sexual and reproductive rights.

Another relatively stable aspect of the political opportunity for reproductive rights defenders is the country's population and health policy. For not only are reproductive rights a field of dispute between conservative and liberal forces. Other interests and factors also converge in this field, which have influenced the evolution of the reproductive rights field in each country. Mexico is a unique case in Latin America in this regard, in that it is the only country with an explicit anti-natalist population policy since the 1970s, which has been accompanied by a progressive governmental position regarding reproductive rights at the national and international levels. Brazil and Colombia, although they have not had a clearly defined demographic policy, have also developed a progressive framework for women's health, especially in the 1980s and 1990s. However, the existence of progressive health laws, as well as of participatory state organs for its promotion, as in the case of Brazil, has not been an

influential factor for the legalization of abortion on demand. This policy environment may, nonetheless, provide a more favourable framework for the implementation of abortion services within the limits of the law. The Brazilian women's health policy, and in particular the presence of feminist institutional activists at state organs in charge of its formulation and functioning, have been significant factors in access to legal abortion, particularly in cases of violence against women. In Colombia, after the Constitutional Court decision in 2006, the Ministry of Health, and in particular the experience of an institutional feminist activist within this institution, was a fundamental factor for the process of implementation of that decision. For its part, Argentina presents the most backward case in terms of the development of women's health policy, with a government that in the 1990s aligned with the Vatican, and its first comprehensive law in this field sanctioned as late as in the 2000s.

Also among the stable variables of the political opportunity in each country, differences in the system of government are important factors in abortion politics and in the possibilities of social movements to influence it. Particularly relevant in this regard is the centralist or federal organization of the state, and the type of institutional organization of federalism in each country. Among the cases under study, Colombia is the only centralized system, and Mexico, Brazil and Argentina are considered strong federal systems. However, among these federal countries, the salient characteristic of Mexico with regard to the abortion issue is that in this country each state has its own penal code and health law, whereas in the other two countries these regulations are determined at the national level. The location of abortion policy in Mexico, different from the rest of Latin America, may have favoured feminist claims for reform in Mexico City, where progressive forces are more relevant than in the other states. The downside of this aspect is that Catholic conservative forces, with a strong influence over local elites and politics, have also been able to exert influence for legal change at the level of Mexican states, where reforms can be passed with much less public visibility and accountability. In countries such as Brazil and Argentina, the federal structure implies that the states have competences to regulate the implementation of the national health law, which has been reinforced by decentralization process, so there are marked differences in the way in which national laws are implemented at the local level. These cases show that, particularly in federal systems, commitment by local executives is an important factor in fostering the implementation of legal abortions (Mexico City and São Paulo are the most salient examples). The role of local authorities may also decisively hinder the implementation of abortion within the limits of the law, as it happened in the case of several Argentine provinces, where local

governors have resisted the implementation of the decision taken by the Supreme Court in 2012.

With regard to more variable aspects of political opportunities, abortion law reforms in Latin America show that shifting party alignments may have an influence, but they do not allow one to predict the occurrence of legal change. In effect, the two most progressive reforms, in Mexico City and Uruguay, were carried out under local and national governments, respectively, headed by leftist parties. However, the ideological or programmatic standing of political parties seems to be an influential but not determining factor in advancing abortion law reform. In Mexico and Brazil there exist prominent political parties (PRD and PT, respectively) identified with a leftist political program, which include in their platforms the defense of women's reproductive rights. PRD politicians were pivotal actors in Mexico City's reform. Furthermore, the Mexican case shows how the presence of a feminist candidate from a small party in a presidential race moved the issue of abortion onto the agenda of political parties, whose candidates were then obliged to express their position on this question. However, the cases of Brazil and Argentina suggest that government by leftist or socially progressive parties does not seem to be a determining factor in abortion reform, even if governments are headed by women. In fact, since the 2000s there have been in many Latin American countries shifts in political alignments, with the ascension of progressive governments which have been more open to social movement claims. However, under these governments the political process seems to be closed for the advancement of abortion legalization claims, as the Brazilian and Argentine cases illustrate.

Regarding more contingent aspects of political opportunities, and in particular party alignments, previous research has shown that leftist parties are generally more favorable to feminist claims, although they do not guarantee their fulfillment. In Latin America, the two most successful abortion law reforms, that is, those of Mexico City and Uruguay, were carried out under governments headed by left-wing politicians who have maintained open, modern leftist positions on several issues. However, other leftist governments in the region have openly opposed liberalization to abortion laws, sometimes on ideological grounds, as in the Argentine case during Cristina Fernandez's government, or have responded to pressure by conservative sectors, most notably in the Brazilian case during the electoral race that would bring Dilma Rousseff to government. Other leftist governments in the region (Venezuela, Bolivia, Ecuador) have also opposed the liberalization of abortion laws. So, although

progressive political alignments and especially leftist parties in power may contribute to favorable changes in the field of abortion rights in the region, other conditions may also be necessary for left-oriented politicians to advance the abortion cause.

To have women in positions of power is an indisputable democratic requirement, and the presence of women in the state has an impact in many dimensions of women's rights. However, the specific issue of abortion evidences how complicated the politics of gender equality can be, when, for example, prevailing social prejudices more swiftly stigmatize women as abortionists, making it even more difficult for women than for men as heads of state to advance abortion reforms, in highly contested political processes such as those that have taken place in Latin America during the past decade. In fact, immediate male predecessors of Presidents Rousseff and Fernandez -ex Presidents Lula and Kirchner- who held the same governmental program as them, expressed a much more favourable public position regarding the abortion issue (nevertheless, Lula refrained from advancing abortion reform at a crucial moment, and he even used the abortion issue as a bargaining chip, and Kirchner never promoted abortion legalization). In fact, in Brazil there is no strong ideological opposition to the legalization of abortion within the government, but a pragmatic decision to attend to conservative claims and commitments made during the electoral campaign. In Argentina, President Fernandez has openly expressed her opposition to abortion legalization, although some sectors of her government would be more favourable to reform, but there is also political calculation regarding the mobilizing power of the Catholic Church. This point was manifest in declarations by prominent members of the governing party, who said that after the appointment of a pope of Argentine nationality, which fuelled patriotic and religious manifestations in the country, it will be impossible to pass abortion reform in Congress.

Regarding the presence of women in government, in general, so-called institutional activists in governmental positions are considered positive assets for the pursuit of movement's claims, and may facilitate entry points to the state. In the Brazilian case, the women's movement intersection with the state is the most notable in the Latin American context, and it shows that the presence of institutional activists does not necessarily imply a deradicalization of the movement's demands of the state. However, the presence of institutional activists in the state does not seem to have contributed to advancing the legalization of abortion on demand in Latin American countries. The legalization of abortion is clearly the most difficult issue in the

interaction between women and the state in the region. For example, in Brazil, the appointment during President Rousseff's government of a historical radical feminist and women's health advocate as head of the Ministry for Women has been celebrated by the feminist movement, although at the same time feminists regretted that she was conditioned by government's compromises not to advance the abortion agenda.

Divisions between elites are also important components of variable or volatile political opportunities. The Mexican case suggests that this may be an important factor for the prospect of the feminist movement to influence abortion law reform. In Mexico, inter-party polarization and intra-party cleavages made abortion an issue that allowed a sector of the political elite to embrace the abortion reform cause in Mexico City as a way to differentiate itself from its political opponents. As predicted by social movement research, polarization may have led Mexico City's authorities to attend to social movements' demands in order to differentiate themselves from the national government, in the aftermath of highly contested presidential elections. On the other hand, as also predicted by social movement studies, shifting political alignments may lead political actors to search for support by external sources, in this case the Catholic Church, and this may incline them toward advancing conservative reforms, as occurred in Mexico at the states' level, where the PRI, which had historically held a pro-secular position, responded to Church pressures in order to obtain electoral support for the upcoming national electoral race.

Finally, among variable opportunities are so-called entry points to the state. In the cases of Brazil and Colombia, the Ministry of Health has generally been a favorable actor for the implementation of legal abortion services. In Colombia, after the liberalization of the abortion law by the Constitutional Court in 2006, the Ministry of Health was essential to the implementation of that decision, and it did so in the context of a conservative national government. The Brazilian women's health policy, and in particular the presence of feminists institutional activists in charge of its formulation and functioning, provided a favourable framework for the implementation of abortion services within the limits of the law. These cases confirm that the state is not a unitary actor with regard to the representation of gender interests, and reaffirms the need to consider different institutional venues and levels of norms making and implementation – that is, the need to pursue a multi-institutional analysis - in order to assess the structure of opportunities for the advancement of the movement's goals.

### ***Legal opportunity and Constitutional Courts***

The acknowledgment by feminist organizations of the obstacles for the advancement of abortion legalization through national politics in most Latin American countries has led the movement, or some sectors of it, to turn to the judiciary in search of long-pursued reforms. This highlights the importance of analysing the availability of different institutional venues for the advancement of a social movement's claims at each juncture, in order to understand movement's strategies and actions. In particular, the cases in this study show that when the political process is blocked for the advance of abortion rights - for example, due to external pressure, because political actors search for legitimacy in other sources, or because crucial institutions are led by conservative activists - independent courts may prove to be a forum more insulated from religious pressure, which may place limits on the intervention of fundamentalist actors on the state, and they may offer a more impartial ground for dealing with the abortion controversy. In fact, legal opportunities at the highest courts of Colombia, Mexico, Argentina and Brazil, seem to offer a more stable and predictable institutional venue than political institutions for the advancement of abortion rights claims.

The legal opportunity for citizen's rights claims has been expanded in Latin America, especially since the 1990s, with the inclusion of new constitutional rights and legal remedies, and new or reformed constitutional courts in most countries in the region. Movements create political opportunities, and also legal opportunities, and in this way they shape the terrain of future struggles. One of the most effective feminist interventions in the definition of the normative framework was their mobilization to resist the introduction of a clause on the right to life from conception in the constitutions of Brazil (1988), Colombia (1991) and Argentina (1994). However, it took some time for Latin American feminists to set out to consider the convenience of a legal strategy, and to perceive the judiciary as an alternative venue to advance abortion rights claims. The recognition of a favourable legal opportunity depends in part on the experience and expertise of movements' organizations, as well as on perceptions regarding the possibilities offered by different institutional venues, and the judicial system in particular. For example, in Colombia feminist organizations, in particular those working in the field of women's reproductive health, had been working for a long time in the pursuit of abortion rights, but for many years the movement did not recognize the favorable opportunity at the Constitutional Court. A favorable legal opportunity was recognized by a feminist

entrepreneur lawyer who did not belong to the feminist movement, and she initiated a litigation strategy.

Recent favorable decisions by constitutional courts have confirmed to feminist activists that it may be worth investing in rights strategies and litigation as alternative means to pursue their claims, when the political process is halted. Furthermore, the Mexican and the Brazilian cases show that in highly contentious cases, judges may even have incentives to create new institutional channels for social actors' participation in their decision-making process, that is, they may decide to expand the legal opportunity. Significantly, the Brazilian and Mexican constitutional courts created new institutional mechanisms for access by social movements when they had to deal with the abortion constitutional controversy. In countries such as Mexico and Brazil, where courts are in the process of building and defining their institutional roles in their respective political systems, the abortion cases have been critical to the development of procedural mechanisms and for advancing a new type of relationship between courts and civil society. It should be noted that in Colombia and Argentina, mechanisms for social actors' participation before the Constitutional Court were already in place when the courts heard recent abortion cases. This supports Siegel's argument that when dealing with conflictive cases, justices may be willing to foster citizens' participation in constitutional interpretation.

Regarding the role of female justices in the configuration of legal opportunity, this study confirms that their presence on high courts may be a signal for the feminist movement regarding courts' receptivity. In Colombia, Women's Link considered this as a positive sign in its evaluation of the possibility of success of its demand before the Constitutional Court. However, the influence of female justices is neither direct, nor unidirectional. In the Brazilian and Mexican cases, however, female justices have not yet played a significant role in the development of a gender-sensitive jurisprudence on abortion. On one hand, in the Mexican case it has been argued that they do not play an informational role in the Court's deliberation processes, and their arguments in the abortion decisions are not grounded in a feminist argumentation. Interestingly, however, in Mexico, the role of one of the women sitting on the Court has changed throughout her term in office, and this has been attributed to her response to critiques by the women's movement, particularly to the first decision on abortion issued by the Court, which she was in charge of writing. This case highlights the symbolic weight that the presence of women may have in power positions, which may transform their role in

response to expectations by other actors regarding interest representation. On the other hand, in the Argentine case the appointment of one of the two female justices to the Court raised high expectations among feminists, due to her public positions regarding abortion rights, but they were just disappointed by the justice's actual opinions in abortion decisions.

Finally, Latin American feminists have seized the international legal opportunity. In fact, they appealed to international legal venues before they turned to national judicial systems. Particularly important in this regard have been legal actions before the Inter-American Human Rights system and the UN Human Rights Committee. The decisions by international human organs have always been favorable to abortion advocates, and they have had strong symbolic significance, particularly in emblematic cases such as the Paulina case in Mexico settled at the Inter-American Commission, and the 2005 decision by the UN Human Rights Committee's against the Peruvian State for its failure to grant access to abortion in a case of anencephaly. Later on, feminist advocates used international legal instruments and pronouncements by international organs to support their claims at national courts, which, in the cases covered in this study, have started to uphold these claims. It is in fact notable that, even when the constitutions of Mexico, Colombia and Brazil contain an exceptional reproductive freedom clause,<sup>972</sup> the feminist struggle for abortion rights, as well as the decisions by Constitutional Courts in these countries have not been preeminently grounded on this constitutional provision. This suggests that, beyond formal provisions granting broad reproductive autonomy, the constitutional culture in Latin American countries is resistant to accepting the full agency of women to make decisions about their reproductive lives. Instead, it would seem that a long process of framing and reframing, of moderating women's rights claims and balancing different constitutionally protected goods, has to take place for even small legal changes to be carried out in the region. Moreover, the preeminence conferred to human rights treaties, as well as to the decisions by treaty-monitoring bodies – which in fact do not contain a specific abortion rights clause or even an explicit reproductive freedom provision - raises the question of the authority of different legal sources in each context, and allows one to hypothesize that in the case of the highly controversial abortion issue in Latin America, international norms and the prestigious human rights discourse in the region since the

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<sup>972</sup> In fact, the reproductive freedom clause included in the Mexican, Colombian and Brazilian constitutions stand out in comparative terms with most other constitutional texts (see Baines and Rubio 2004: 16-17).

democratic transitions carry more weight than local normative frameworks, even in the case of the Constitution.

## **II. STRATEGIES, FRAMING AND LEGAL MOBILIZATION FOR ABORTION RIGHTS**

For many years, feminist mobilization for abortion rights in the region was focused on attempts to influence legislative change to the abortion law, as well as on demands to the state regarding the enforcement of lawful abortion. Feminists also denounced national states at international human rights forums for lack of access to legal abortion. More recently, however, some sectors of the feminist movement have started pursuing legal strategies at the national level. The effort to present their political demands as legal claims at national forums has lead feminist activists to reframe their claims for the strategic defense of abortion rights.

Prior to this development, Latin American feminists shared the perception that national legal systems and courts were fields of masculine domination, and were suspicious of this institutional venue, even several years after institutional reforms that created a new legal opportunity for social actors' claims in the region. In this regard, these cases confirm the influence of social actors' perceptions regarding the judicial system, in their decisions to pursue, or not, legal mobilization. This factor has been most manifest in the case of Colombia, where the Constitutional Court had become a worldwide reference point of progressive constitutionalism, and the system of constitutional justice was one of the most open to individual citizens and social actors in the world. However, the feminist movement had not identified the Court as a possible venue for its reproductive rights claims until a feminist lawyer and a feminist organization, neither of whom were part of the movement, introduced a litigation strategy for abortion rights.

In recent years, the relationship between the feminist movement and national juridical systems has begun to shift. Mexican feminists were the first ones to modify their strategies and to create new types of organizations and a new framing, at the beginning of the 1990s. Their new approach included the development of legal mobilization for abortion rights, which was not oriented toward litigation in particular, but which implied a new way of organizing and the construction of a new framing, related to a rights strategy, including the consideration

of the abortion controversy as a constitutional dispute among different legally protected goods. Assuming that movements change institutional venues when opportunities at their most familiar venue prove closed, the comparatively early development in the Mexican case may be related to the fact that in this country the feminist movement has had increased freedom to organize since the 1970s. In particular, they were able to openly position the abortion issue in the public sphere, and to develop a proposal for legislative reform at the end of that decade. So, the early failure of that initial attempt to produce change may have led them to move toward a rights strategy earlier than in other cases, where feminists started mobilizing for legislative change, and experienced the failure of this venue, later than in the Mexican case.

Nowadays, a legal strategy is one of the main strategic choices at the disposal of contemporary social movements in the region. This decision has created tensions within the feminist movement. Pursuing a legal strategy with the aim of achieving the constitutionalization of abortion requires balancing of constitutional goods, and at least in the Latin American context it requires also accepting gradualism, for courts are not expected to create a right to abortion on demand. This entails the moderation of feminist abortion claims. Some sectors of the movement have resisted the advance of more moderate strategies and framings, including for example the acceptance of gradualism, a trimester framework, and balancing. Some of the literature on legal mobilization decries the decision of movements to pursue a rights strategy. These theorists adduce a number of important problems, most of them associated with the fear that such a strategy would substitute for political mobilization, and that it may ultimately lead to demobilization. However, the Latin American cases show that legal mobilization has not replaced but rather complemented a broader political strategy, which has as its ultimate goal the legalization of abortion at the demand of women. In the Mexican case, for example, professionalized feminist organizations pursued a process of reframing that included gradualism and the recognition of the value of fetal life. But feminists were ready to pursue a claim for the legalization of abortion on demand, and to seize political and legal opportunities for this claim. The case of Colombia shows how feminist reproductive rights networks were revitalized by the legal strategy pursued by Women's Link. Contrariwise, the case of Mexico at the end of the 1970s and Brazil in 2008 show that it was the failure of legislative proposals for abortion legalization that discouraged the feminist movement and led to demobilization. In fact, these findings contradict claims that litigation or professionalization are necessarily responsible for demobilization.

Since the 1970s, the feminist framing of abortion rights in Latin America has traditionally been grounded on arguments based on public health and social justice. At that time, feminists also advanced a radical discourse based on women's right to their own bodies. More recently, the decision to pursue abortion rights through a legal framework has significantly impacted on the shift in feminist strategies and framings. Without abandoning previous arguments, the pursuit of legal mobilization has implied the moderation of feminist claims, and the incorporation of new framings of the abortion issue, which has taken different forms in each country. A radical discourse, which in the abortion case is based on women's right to their own bodies, may work well to mobilize movement participants, but in societies that are deeply influenced by Catholic doctrine and power, and in which the claim of the right to life from conception has taken hold, that discourse does not work for sensitizing the public, building outside movement alliances, or demanding changes by public authorities. Furthermore, that discourse cannot be easily translated into legal language, and it does not address the counter-claim about prenatal personhood involved in the abortion controversy, which also draws on a human rights framework.

In the cases under study, there is an emerging trend, at least in some sectors of the feminist movement, to adopt a more moderate discourse for the defense of the right to abortion, which is not framed on grounds of women's right to their own bodies. One of the instances in which this process has been more explicit is the Mexican case, where the terms of a constitutional controversy were fundamental to shaping the cultural framework through which the movement redefined its struggle, its strategies and its position vis-à-vis the counter-movement. In particular, Mexican feminists understood that by framing the issue in constitutional terms, they would have to confront the conservative's claim that fetuses are persons with legal rights. They in fact engaged in a discussion about the right to life, which directly addressed that counterclaim, and this partially explains their success in the process of legalization. In fact, Mexico is a paradigmatic example of the fact that juridification of a movement's claims entails framing changes.

The position advanced by Mexican feminists regarding the right to life claim, by which they intended to show that the abortion controversy was not a zero-sum game, is the most notable example of a framing transformation. The Mexican case shows that feminists can downplay radical claims about women's rights on the abortion issue and incorporate a concern about the

value of fetal life without compromising their position regarding women's freedom and capacity to decide (within a certain timeframe). This case also suggests that, at least because of strategic reasons, the debate in favor of the legalization of abortion could include a discussion about life, which has been omitted by feminists and the progressive camp in general in other contexts.<sup>973</sup> At least in contemporary, highly morally charged controversies in Latin America, it may prove an effective strategy for the feminist movement to dispute the conservative claim about the right to life, and not only to oppose this claim with arguments about women's rights, public health or social justice. For, in fact, these arguments do not undermine the idea that abortion is a crime and that women's self-determination cannot be used to kill a person.<sup>974</sup> Disputing in an effective way this argument will not put an end to the conflict, but it could channel the abortion controversy through more reasonable terms, which could in turn allow for more reasonable solutions.<sup>975</sup>

The other cases in this study also show that in their pursuit of legal strategies feminist organizations and lawyers have moderated their claims and framings. In the case of Colombia, the demand made by Women's Link did not consider the argument about the right to life, and advanced arguments based on women's rights that in fact would have allowed for the total legalization of abortion, although in the second demand they were asking for the partial decriminalization of abortion in exceptional cases. In contrast with the Mexican case, in which the legal strategy included a complex process of reframing that incorporated a consideration of their opponents' claims about the right to life, in the Colombian, case the actors that led the legal strategy continued conceiving the abortion issue as a matter of women's autonomy, and they explicitly refused to enter into the moral discussion about the right to life. Juridification did not destabilize the framing in that regard. However, the four cases under study present an emerging trend, at least by part of the feminist movement, to adopt moderate strategies for the defense of the right to abortion in order to make advances in the legal field. Not only have they included gradualist strategies, but they have also, for example, re-designated key terms in order to mitigate the negative reactions provoked by abortion among some sectors in society. In the Brazilian case, the demand presented in the anencephaly case called it "voluntary anticipation of birth"; in Mexico feminist allies, as well as Mexico City's legislative assembly adopted the term "legal interruption of pregnancy", and

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<sup>973</sup> See Sandel (1989: 531-533); Borgmann (2008: 558-564).

<sup>974</sup> See Ortiz-Millán (2009: 19).

<sup>975</sup> Borgmann (2008: 502).

argued that when it was carried out during the first trimester it was not an abortion; in Colombia feminists have termed it as “voluntary interruption of pregnancy”; and in Argentina the legislative project pursued by the National Campaign calls it “voluntary termination of pregnancy”. These findings are in line with Reva Siegel’s assertion regarding the moderating effect that the attempt to influence legal and constitutional change has on social movements’ framings. Following Siegel, the moderation of feminist claims, and the downplay of arguments about women’s autonomy to decide over their own bodies can be understood as an effort to adjust to the public value condition, and as a response to the counter-movement’s claims, in order to achieve support by the broader political community.

### **III. SUPPORT STRUCTURE FOR FEMINIST ADVOCACY AND LEGAL MOBILIZATION FOR ABORTION RIGHTS**

Movement structure or the internal network of a movement is a key dimension to understanding several aspects of movement activity, among them, for example, the movement’s capacity to coordinate a common strategy, and the possibility of a particular framing to become hegemonic within the movement. With respect in particular to legal strategies and framings, their capacity to become leading tactics within the movement may depend where legal organizations are situated within the movement network. The placement of rights advocacy organizations in a central position is likely to be more favorable in this regard than their location in the movement’s periphery.

Single-issue organizations, and the centralization of the movement, as in the paradigmatic case of GIRE in Mexico, may encourage strategy coordination. Further, disputes about framing, tactics and goals may be solved when there is a clear leading institution, such as GIRE, or when a new and small institution achieves rapid success in pursuing a strategy that had not been advanced by the movement, as done by Women’s Link in Colombia. Single-issue and professionalized organizations such as GIRE in Mexico and Women’s Link in Colombia, have proved to be effective in promoting legal change, and gathering elite allies. They have had difficulties, though, in relating to grass-roots sectors of the feminist movement. However, these difficulties cannot be attributed necessarily to the professionalization of feminist organizations. In fact, the case of CFEMEA in Brazil, and the role of Catholics for Choice in the National Campaign for abortion rights in Argentina attest

that it is possible for professionalized and legalistic organizations to maintain a fluid interaction with the grass-roots women's movement.

A shortcoming of centralization through a powerful single-issue organization, however, is that this type of concentration may hinder the movement's territorial embedment. The degree of insertion of a movement network throughout the national territory may be crucial for the movement's capacity to scrutinize the implementation of legal reforms, as well as to resist conservative reactions. This is particularly important in federal systems, and especially in the case of abortion, given that conservative groups usually exert a strong influence on local-level politics, as shown by the difficulty of the Mexican movement to respond to backlash at the states' level because of the lack of movement infrastructure throughout the country.

Coordination may be also achieved through the existence of a national umbrella group that can weave together different types of associations at the national and local levels. This is the case in Argentina, where the National Campaign for abortion rights is composed of nearly 300 associations throughout the country which, beyond their divisions, defend a common project for legislative change of the abortion law. This was also the case of the *Jornadas* in Brazil, which gathered more than 300 associations, and was able to advance a common legislative reform proposal, although it has lost its initial force after that project was defeated in Congress.

With regard to the resources and organizational infrastructure of the feminist movement for abortion rights, social capital and the involvement of support groups and allies from outside of the movement can be crucial because of their expertise – for example, legal or medical in the case of advocacy for abortion rights - as well as to legitimate and strengthen the movement's standing in society. They may also facilitate links with other relevant actors. A strong network can give organizations leverage even if they are composed of a small staff. In the case of mobilization for reproductive rights, a particularly relevant aspect is the relationship of the feminist movement with the medical profession. In this regard, the cases in this study present different models. In Colombia, feminist public health specialists occupy a central position within the movement for reproductive rights, and abortion rights in particular, whereas medical professional associations have not been supportive of abortion rights. For its part, the Brazilian case shows a change from within the medical establishment, through some professional associations that have been proactive in the implementation of legal abortion

services and abortion campaigns more generally. This change has been unique in the Latin American context, and has started to be promoted in other countries in the region, through regional medical associations in which pioneering doctors working in Brazil have taken a chief role. In Mexico City, since the liberalization of the law in the 2001, and particularly since the legalization of abortion in 2007, there has been a state-led change in medical provision of abortion services, with support by an expert feminist organization working on women's reproductive health.

Also important is the relationship of feminist organizations with bioethical bodies or committees. In this respect, the Mexican and the Brazilian cases show that the interventions of bioethical specialists during legal reform processes have been fundamental to address some of the most difficult questions – particularly those concerning the beginning of life, in the Mexican case, and with the ethical implications of anencephaly - involved in the abortion debate. In Mexico, the creation of the main bioethical organization was linked to the struggle for abortion rights; lawyers and philosophers as well as doctors, number in its ranks, and abortion is considered a privileged issue of bioethical concern. In Brazil, instead, the bioethical establishment has not dealt with the abortion issue, but ANIS has been a key organization in the introduction of a bioethical discourse in the feminist field.

### ***Support structure for legal mobilization***

With regard in particular to the support structure for legal mobilization, in order to break their historic exclusion from the legal field and legal mobilization, one of the models developed in Latin America has been the search by feminist organizations for partners and allies in the legal profession, outside of the feminist movement. This was the initial strategy of GIRE in Mexico and ANIS in Brazil. Notably, these two organizations, which led the pursuit of a legal strategy for abortion rights in their respective countries, were directed by anthropologists (Marta Lamas and Devora Diniz, respectively). They contacted male lawyers with expertise in public interest litigation, who in part due to their intervention in the abortion cases became the most well-known lawyers in their respective countries in the area of sexual and reproductive rights. These lawyers translated feminist grievances into legal claims, although the main conceptions and positions on which the legal framing was grounded in both cases came from feminist actors. Later on, GIRE developed legal training for female lawyers as part of its mission as an organization, and nowadays it counts on a strong legal area comprised of

feminist lawyers. Despite intra-movement resistance to the legal strategy and framing advanced by GIRE and its allies, their discourse gained ground within the movement, as well as among a network of allies, formed by lawyers, doctors, scientists, philosophers and journalists, who collaborated to develop and expand that framing. The centralization of the movement's network, with a prominent and leading single-issue organization, allowed for that discourse to become hegemonic, and to be presented in the public sphere as a solid feminist standing. Given that GIRE was also the main rights advocacy organization in the feminist field, its legal strategy also became at some point the main tactic of the abortion campaign.

The other model, developed in Colombia, is the creation of a litigating organization (Women's Link), which had no initial ties to the feminist movement. Colombia is the only case in which an organization was specifically created by an entrepreneurial lawyer with the aim of pursuing strategic litigation in the field of abortion rights. The Colombian case is also notable in that it has been the only Latin American country in which from the beginning litigation for abortion rights has been carried out by feminist lawyers. In Argentina, the most litigation-oriented organization for several years was Catholics for Choice, although it was mostly focused on international litigation. More recently, big human rights NGOs (in particular ADC and CELS) have been involved with reproductive rights, and a new feminist legal organization (ELA) was established with the purpose of pursuing strategic litigation in the area of gender equality. However, in this country no organization has taken the lead in pursuing a rights strategy and there is not yet a defined orientation or project for litigation in this field.

In general, it has been difficult for Latin American feminists to count on support by legal advocacy organizations outside of the movement. This has been so in particular because in cases such as Brazil and Mexico, traditional and strong human rights organizations were linked to progressive Catholicism, and were as a consequence inimical to the defense of reproductive rights. In Argentina, these organizations were focused on crimes linked to state terrorism and state repression, and later on social and economic rights, and only recently have added women's rights to a list of their main concerns. This may explain why, when in need of legal advice feminist recurred to individual attorneys and not to established rights advocacy organizations. The case of Colombia highlights the importance of an existing support structure for feminist legal mobilization, provided in particular by a one of the strongest tradition of public interest law in Latin America, as well as by legal education at one of the

countries elite universities, which has been one of the main intellectual sources of the neo-constitutionalist doctrine developed by the Colombian Constitutional Court.

#### **IV. COUNTER-MOBILIZATION: NEW STRATEGIES FOR AN UNMODIFIED CLAIM**

Particularly since the 1990s, conservative actors in the field of sexual and reproductive rights in Latin America have created new types of organizations and support structures in civil society, and have opposed abortion on human rights grounds. They have set out to use the institutional channels provided by the democratic system and the new legal instruments for the defense of rights incorporated by constitutional and judicial reforms; that is, they have seized political and legal opportunities for the advancement of their cause. Moreover, they have done so as a reaction to the development of feminism and the movement for sexual and reproductive rights. To be sure, the strategies of incidence pursued by feminists had a demonstration effect on the counter-movement. This change of language on the part of conservative actors can be seen as a consequence of the dynamics between mobilization and counter-mobilization, as well as an adaptation of conservative positions to the context of democracy and the ascent of the human rights discourse.

Beyond the deployment of the human rights discourse, religious activists have not, however, modified their claim about the embryo's absolute right to life. Thus, their discourse and demands have not undergone a process of modification that has been considered to be characteristic of the role of social movements in the development of a constitutional culture. While conservatives have adapted their strategies to the new framework of democracy and pluralism, they have done so without true relativization of their demands. They continue portraying Catholic morality in the field of sexuality and reproduction as universal and natural, which implies the denial of pluralism.<sup>976</sup> With regard specifically to the discourse on the right to life, the conservative field has not developed an elaborated argumentation, as it continues to argue about it as an absolute right. They have been economically assisted in this endeavor by Human Life International, as well as by local businessmen and businesswomen as in the case of Mexico.

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<sup>976</sup> Amuchástegui et al. (2010a: 999).

Four types of counter-mobilization strategies and organizations can be identified in the respective country-studies, reflecting the predominant and more successful strategy of conservative actors countering the advancement of abortion rights in Mexico, Brazil, Colombia and Argentina, respectively. Mexico is a case of influence and backlash at the local level, where people have mobilized and produced backlash at the states' level and have taken advantage of politicians need for external support, in the context of pre-electoral national politics. Brazil is a paradigmatic case of conservative religious influence on the legislative branch, and of taking advantage of electoral politics at the national level to demand a commitment to refrain from reforming the abortion law. For its part, Colombia is a case of conservative institutional activists functioning within the state structure; these have been the main source of backlash to the Constitutional Court's decision. Finally, Argentina is a case of early conservative legal mobilization and judicialization.



## APPENDIX

### INTERVIEWS BY THE AUTHOR

#### **MEXICO**

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Beltrán, Alma and Fernanda Díaz de León. 2011. Members of the Legal Area of GIRE, Author interview, México DF, September 29.

Cruz Parcero, Juan Antonio. 2011. Professor Institute of Philosophical Research-UNAM. Author interview, México DF, September 14.

Echarri, Carlos. 2011. Professor Center for Demographic and Urban Studies-El Colegio de México. Author interview, México DF, September 13.

Figueroa, Juan Guillermo. 2011. Professor Center for Demographic and Urban Studies-El Colegio de México. Author interview, México DF, September 13.

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Lamas, Marta. 2011. Director of *Debate Feminista*; ex Director of GIRE. Author interview, México DF, September 29.

Lara, Roberto. 2011. Law clerk at the Supreme Court (office of Justice Cossío). Author interview, September 12.

Lerner, Susana. 2011. Professor Center for Demographic and Urban Studies-El Colegio de México. Author interview, México DF, September 23.

Morales, Pedro. 2011. Litigant lawyer; member of the College of Bioethics; Director of Medilex. Author interview, México DF, September 7.

Ortiz-Millán, Gustavo. 2011. Professor Institute of Philosophical Research-UNAM, member of the College of Bioethics. Author interview, México DF, September 26.

Pou Jiménez, Francisca. 2011. Professor Law Department-ITAM; ex Law clerk at the Supreme Court (office of Justice Cossío). Author interview, México DF, September 7.

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- Belloque, Juliana. 2012. Public Defender do Estado de São Paulo; member of the Commission on Reform of the Criminal Code. Author interview, São Paulo, August 28.
- Blay, Eva. 2012. Sociologist; ex National Senator for the Social-Democratic Party (1992-1995). Author interview, São Paulo, August 29.
- Davis Mattar, Laura. 2012. Program manager, Conectas Human Rights; member of Global Doctors for Choice/Brazil. Author interview, São Paulo, August 31.
- Faúndes, Aníbal. 2012. Coordinator of the Sexual and Reproductive Rights Committee of FIGO; Founder and Senior Investigator of CEMICAMP. Author interview, Campinas, August 30.
- Ferreira Gonçalves, Lidiane. 2012. Technical Advisor, Area of Women's Health, Ministry of Health. Author interview, Brasilia, August 15.
- Galli, Beatriz. 2012. Human Rights Advisor of IPAS Brazil. Author interview, Rio de Janeiro, August 10.
- Gonçalves, Tamara. 2012. Coordinator of CLADEM /Brazil (Latin American and Caribbean Committee for the Defense of Women's Rights). Author interview, Brasilia, August 16.
- Paranhos, Fabiana. 2012. Member of ANIS: Institute of Bioethics, Human Rights, and Gender. Author interview, Brasilia, August 14.
- Rodrigues, Kauara. 2012. Member of CFEMEA (Feminist Centre for Studies and Advisory Services). Author interview, Brasilia, August 13.
- Sarmento, Daniel. 2012. Federal Public Prosecutor. Author interview, Rio de Janeiro, August 9.
- Soares, Regina. 2012. Sociologist; Member of Catholics for Choice Brazil. Author interview, São Paulo, August 27.
- Vieira Villela, Wilza. 2012. Professor, Member of the Research Group on Women's Health and Gender Relations, Universidade Federal de São Paulo. Author interview, Rio de Janeiro, August 9.

## **COLOMBIA**

- Barraza, Cecilia. 2013. Advisor at the Office for Gender Equity Gender Equity. Founder of Humanas, Centro Regional de Derechos Humanos y Justicia de Género. Author interview, Bogotá, February 10.

Cuéllar, Guillermo. Director of Brújula Comunicaciones. Author interview, Bogotá, February 21.

Dalen, Annika. 2013. Researcher at DeJusticia, Centro de Estudios de Derecho, Justicia y Sociedad. Author interview, Bogotá, February 4.

González Vélez, Ana Cristina. 2013. Researcher at CEDES-Argentina. Ex-National Director of Public Health (2002-2004), Co-Founder of Global Doctors for Choice. Member of Mesa por la Vida y la Salud de las Mujeres. Author interview, Bogotá, February 16.

Jaramillo, Isabel. 2013. Law Professor, Universidad de Los Andes. Author interview, Bogotá, February 6.

Lemaitre, Julieta. 2013. Law Professor, Universidad de Los Andes. Author interview, Bogotá, February 15.

Mazo, Sandra. 2013. Director Catholics for Choice. Author interview, Bogotá, January 25.

Parra, Andrea. 2013. Director of the Action Program for Equality and Social Inclusion (public interest law clinic), Universidad de Los Andes. Former staff attorney of Women'sLink Worldwide. Author interview, Bogotá, February 19.

Thomas, Florence. 2013. Feminist scholar. Member of Mesa por la Vida y la Salud de las Mujeres. Author interview, Bogotá, February 9.

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