

# USING CONSTITUTIONAL COURTS TO ADVANCE ABORTION RIGHTS IN LATIN AMERICA

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This is a pre-print version of an article published by Taylor & Francis in the journal *International Feminist Journal of Politics*, in 2021, available online: <https://www.tandfonline.com/doi/abs/10.1080/14616742.2021.1947148>

Citation:

Ruibal, Alba. 2021. "Using constitutional courts to advance abortion rights in Latin America." *International Feminist Journal of Politics* 23.4: 579-599.

## ABSTRACT

Over the past two decades, the abortion rights controversy has become the most prominent field of dispute between feminisms and religious conservatisms across Latin America. In this context, the political powers have generally been reluctant to change the region's restrictive abortion legal frameworks, and since the mid-2000s, Latin American feminists turned to courts in search for long pursued reforms in this field. Through the analysis of the role of constitutional courts in the liberalization of abortion laws in Colombia, Brazil, Argentina, and Mexico, this study points out the diverse ways in which courts have contributed to the advancement of abortion rights, becoming an alternative venue for feminist advocacy in Latin America. It highlights how the use of courts has been a way to liberalize abortion laws, ensure the implementation of lawful abortions, and deter backlash processes. Furthermore, it details how courts have offered a platform for public deliberation on the abortion issue. These findings show how the judiciary can be a favourable venue for feminist activism in Latin America when other institutional sites are blocked. They also pose nuances to the critique of the use of courts for social change, which stresses the pernicious consequences of the judicialization of social movement causes.

**Keywords:** Abortion; Judicialization; Courts; Feminism; Backlash; Latin America.

## RESUMEN

En América Latina, en las últimas dos décadas, la controversia sobre el derecho al aborto se ha convertido en el campo de disputa más prominente entre feminismos y conservadurismos religiosos. En este contexto, los poderes políticos se han mostrado generalmente reacios a cambiar los restrictivos marcos legales del aborto en la región y, desde mediados de la década de 2000, sectores del feminismo latinoamericano recurrieron a los tribunales en busca de reformas en este campo. A través del análisis del papel de las cortes constitucionales en la liberalización de las leyes de aborto en Colombia, Brasil, Argentina y México, este estudio señala los diversos modos en que los altos tribunales han contribuido al avance del derecho al aborto, convirtiéndose en un espacio alternativo

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<sup>1</sup> I am especially thankful to Ruth Rubio-Marin, as well as to the anonymous reviewers for their help in writing this article, which is part of my Ph.D. Dissertation in Law, European University Institute, 2015.

para el avance de causas feministas en América Latina. Se señala cómo las cortes han sido una vía para liberalizar las leyes de aborto, garantizar la implementación de abortos legales y enfrentar procesos de reacción conservadora. Asimismo, se detalla cómo los tribunales han ofrecido una plataforma para la deliberación pública sobre el tema del aborto. Estos hallazgos muestran cómo el poder judicial puede ser un ámbito institucional favorable para el activismo feminista en América Latina, cuando otras vías institucionales están bloqueadas. También plantean matices a las críticas sobre el uso de los tribunales para el cambio social, que enfatizan las consecuencias perniciosas de la judicialización de las causas de los movimientos sociales.

**Palabras Clave:** Judicialización; Aborto; Cortes Constitucionales; Feminismo; Contra-Movimientos; América Latina.

## RESUMO

Na América Latina, nas últimas duas décadas, a polêmica pelo direito ao aborto tornou-se o campo de disputa mais proeminente entre feminismos e conservadorismos religiosos. Nesse contexto, os poderes políticos geralmente têm relutado em mudar os marcos legais restritivos do aborto na região e, desde meados dos anos 2000, setores do feminismo latino-americano recorreram aos tribunais na procura de reformas neste campo. Por meio da análise do papel dos tribunais constitucionais na liberalização das leis de aborto na Colômbia, Brasil, Argentina e México, este estudo aponta as várias maneiras em que os tribunais têm contribuído para o avanço dos direitos ao aborto, tornando-se um espaço alternativo para o avanço das causas feministas na América Latina. Ressalta-se como os tribunais têm sido um caminho institucional para liberalizar as leis de aborto, garantir a implementação de abortos legais e enfrentar processos de reação conservadora. Também se detalha como os tribunais forneceram uma plataforma para deliberação pública sobre a questão do aborto. Essas observações mostram como o judiciário pode ser um site institucional favorável para o ativismo feminista na América Latina, quando outros sites institucionais encontram-se bloqueados. Também trazem nuances às críticas ao uso dos tribunais para a mudança social, que enfatizam as consequências perniciosas da judicialização das causas dos movimentos sociais.

**Palavras Chave:** Judicialização; Aborto; Cortes Constitucionais; Feminismo; Contra-Movimentos; América Latina.

## INTRODUCTION

Over the past two decades, Latin American constitutional courts have sided for the first time with feminists' claims to liberalize abortion laws, as part of a process of abortion law reforms, through courts and legislatures, that took place after decades of inaction in this area of rights in the region. During this period, courts have created new abortion rights, have clarified the scope of the existing law, and have upheld legislative reforms in this field. They have recognized abortion as a matter of fundamental rights and have established state obligations to provide for the service. Furthermore, in some cases courts have encouraged a public discussion on the abortion issue by expanding the legal opportunity for the participation of social actors, and have been a more insulated fora from religious pressure than other public institutions, placing limits on the intervention

of fundamentalist actors on the state and deterring backlash processes. As highlighted by Latin American feminist scholars and legal activists, courts have done so as a response to the demands of feminist movements (Diniz and González Vélez 2008; Jaramillo and Alfonso 2008; Lamas 2009; Roa and Klugman 2014).

Court decisions in this field become even more relevant considering that in some cases court pronouncements, even if limited in their scope, are the only changes so far in the abortion legal framework of their respective countries. In fact, the wave of legislative reforms in most areas of women's rights after democratic transitions in the region placed Latin American countries as vanguards in the area of gender quota laws and produced exemplary laws on gender violence. However, reforms in the abortion rights field have been slow, gradual and highly limited, and national congresses have not been leading actors in most of them. This situation should be understood in the context of a strong reaction of religious conservatisms against the advancement of women's rights in the region since democratization processes. In this setting, the abortion issue became a focal point of dispute between liberal and conservative actors around secularism and the laicity of the state, and for several years since the democratic transitions, political elites did not embrace the abortion cause. In this scenario, constitutional courts have been crucial institutional venues for the advancement of feminists' demands on abortion rights in the region.

Through the analysis of the role of constitutional courts in the liberalization of abortion laws in Colombia, Brazil, Argentina and Mexico, this paper points out the diverse ways in which courts have contributed to the advancement of abortion rights in Latin America since the beginning of the 2000s. It also describes the obstacles found in political institutions, mostly given the pressure of religious factors on the region's political systems. The study identifies five main ways in which courts have acted to expand or ensure abortion rights and to promote public deliberation on this issue: 1) In response to feminist strategic litigation, courts expanded the abortion law, by creating new exceptions to its criminalization (Colombia 2006; Brazil 2012); 2) they upheld legislative reforms legalizing first trimester abortion (México 2008); 3) they established criteria and obligations of different state actors and levels of government for the implementation of lawful abortions (Colombia since 2009; Argentina 2012, Mexico 2018, 2019); 4) they were key institutional actors in countering backlash processes, by upholding feminist claims against conservative institutional activists working within the state structure (Colombia since 2009); and 5) they have promoted public deliberation, through the creation of new institutional channels for the participation of social actors in their decisional processes (Mexico 2008; Brazil 2008). More recently, strategic litigation by feminist actors in Brazil has asked for the first time in the region the legalization of first trimester abortion to the constitutional court (*Supremo Tribunal Federal*), which in 2018 convoked public hearings on this case, eliciting the widest public debate on abortion at a state institution so far in this country.

The study of the role of constitutional courts in these cases allows us to assess in a more nuanced and contextualized way the assumptions of part of the literature on the use of courts for social change, which has warned, often from progressive positions, on the pernicious consequences of the judicialization of social movement causes. The critique of the use of legal strategies by social movements, developed mostly by critical legal scholars and political scientists, has highlighted the ideological biases and co-optative functions of law, as well as the limitations of litigation as compared to political tactics

(Scheingold 1974; Rosenberg 1991; Silverstein 2009). According to this perspective, activists have placed too much value in pursuing reform through courts, enthused by what Scheingold called "the myth of rights" (1974: 3), and more recently was termed as "the law's allure" (Silverstein 2009). One of the main objections posed by this literature is the difficulty to implement progressive judicial decisions, given courts' lack of independence and resources (Rosenberg 1991). Under a different rationale, but leading to similar conclusions, constitutional theorists have argued that courts do not have democratic legitimacy to solve so-called hard cases and that their principle-based pronouncements stop political dialogue and negotiations (Tushnet 1999; Waldron 2006), which among other consequences produces backlash (Sunstein 1999; Klarman 2013). This perspective recommends that in highly controversial issues courts should maintain a minimalist position and should defer the more substantive questions to legislatures. Overall, both lines of argumentation generally offer an a-priori explanation of the role of courts based on normative positions regarding the allegedly more democratic functioning of legislatures, as well as on empirical evidence that is generally counterfactual in its assumption that the same undesired results would not have been provoked by legislative acts instead of court decisions (see Cummings 2013).

However, legal strategies and the use of courts may not be caused by law's allurement or capacity for mystification, but because judicialization and the use of courts is one of the possible tools for social movements, among the limited options available to them in contemporary regimes (see McCann 1992). Furthermore, as claimed by Greenhouse and Siegel (2010), judicial deferral to legislatures to decide over fundamental rights may result in those rights not being guaranteed. In fact, the recent processes of abortion law reform in Latin America, where courts have been in some cases the only institutional venue to effect even small legal changes, have been key actors in implementation, have promoted civic deliberation, and have countered backlash processes, offers a more complex picture of the role that courts may play in contexts that have been for the most part hostile to transformative politics in this area of rights. In particular, they show how courts can become a venue for feminist claims when political institutions are blocked, in contexts signed by a historical influence of conservative religious actors on state institutions.

The four cases under study are those in which constitutional courts have had the most salient role in processes of progressive abortion law reform in the region. The empirical research for this study draws from semi-structured in-person interviews conducted by the author in Brazil, Colombia, Argentina and Mexico from 2010 to 2014, and in 2019, with feminist activists, lawyers and academics in each country, as well as from primary source documents, in particular the main case law by constitutional courts, and secondary sources on each case. The paper is structured in six sections. The first section contextualizes the role of courts in recent processes of abortion law reform in the region, and it is followed by five sections, each corresponding to one of the five types of court intervention identified by this study.

## **I. Abortion as a "debt of democracy" and the role of Courts**

After more than three decades from democratic transitions, Latin American feminists call the legalization of abortion "a debt of democracy". In fact, in a region with some of the most restrictive abortion laws in the world, abortion continues to be "the frontier of the

right to decide” (Lamas 2001: 8).<sup>2</sup> During the first decades of the 20th century, some Latin American countries included exceptions to the criminalization of abortion, which placed them as “vanguards in the field of the abortion law” (Htun 2003: 143). But since then and until recently, most countries in the region did not change their abortion laws - as had occurred in European and North American countries during the 1960s and 1970s (see Rubio-Marin 2014)-, and the enforcement of legally accepted exceptions to criminalization, or lawful abortions, has been systematically contested and obstructed.

However, in recent years, and as a result of feminist activism in this field, the restrictive legal frameworks of abortion in Latin America has started to change, as legislative reforms and high court decisions have liberalized, to different extents, the abortion law in Colombia, where in 2006 the Constitutional Court introduced exceptions to criminalization in cases of risk to the woman’s life or health, severe fetal malformation, and rape; Mexico City and the Mexican state of Oaxaca, where local legislatures legalized first trimester abortion in 2007 and 2019, respectively; Argentina, where the 2012 Supreme Court ruling declared that the rape exception covered all cases of rape, and the National Congress legalized abortion in 2020; Brazil, where the *Supremo Tribunal Federal* introduced a new exception to criminalization for cases of anencephaly in 2012; Uruguay, where the National Congress legalized first trimester abortion in 2012 and Chile, where the National Congress introduced exceptions to criminalization in 2017. In these cases, except from Uruguay, constitutional courts, or supreme courts with ultimate judicial review powers, have played a central role. In some cases, such as Argentina, Colombia and Brazil, the only changes in this field have been obtained through the courts.

It should be noted that in some instances high courts in the region have also sided with counter-movements, and have ruled against women’s reproductive rights. Among the main examples in this regard are the rulings by the Argentinean Supreme Court in 2002<sup>3</sup> and the Chilean Constitutional Court in 2008<sup>4</sup> declaring unconstitutional the distribution of emergency contraception pills, as well as Costa Rica’s 2000 Supreme Court ruling prohibiting in-vitro fertilization, which did not deal with abortion, but had broad implications for the defense of reproductive rights in general, and was reversed by the Inter-American Court of Human Rights in 2012.<sup>5</sup> More recently, after the Chilean

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<sup>2</sup> See map of the “World’s Abortion Laws”, Center for Reproductive Rights, available at: <https://reproductiverights.org/worldabortionlaws>. Nowadays, a group of six countries in the region –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 the latter cases there have been great difficulties in accessing legal abortions, because of unnecessary judicialization and governments’ reluctance to implement abortion services. Finally, there is a third group of jurisdictions where abortion upon request of the woman is legal: Cuba since 1965, Puerto Rico since the 1970s, the Guyana since 1995, Mexico City since 2007, Uruguay since 2012, the Mexican state of Oaxaca since 2019, and Argentina since 2020.

<sup>3</sup> “Portal de Belén – Asociación sin Fines de Lucro c. Ministerio de Salud y Acción Social de la Nación s/amparo”, Corte Suprema de Justicia de la Nación, March 5, 2002.

<sup>4</sup> *Sentencia Rol 740-07-CDS*, Tribunal Constitucional, April 18, 2008.

<sup>5</sup> *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, Inter-American Court of Human Rights, Case No. 12.361, November 28, 2012.

Congress passed a Law in 2017 that decriminalized abortion in cases of risk to life, fetal malformations incompatible with life, and rape, the Chilean Constitutional Court issued a decision in 2019 allowing for institutional conscientious objection by private health providers (see Maira, Casas and Vivaldi 2019).<sup>6</sup> But, overall, high courts in Latin America have had a strongest role in advancing legal reforms that expanded abortion rights than in supporting reactionary or backslashing processes in this field.

The role of courts stands out in a setting where, as the case-studies show, national congresses had for the most part not responded to feminist demands on abortion rights, and conservative religious actors have exerted a strong influence on the political process. In fact, feminist movements in Latin America first appealed to legislatures in search for the expansion of abortion rights, as their most usual repertoire of action was political mobilization and congressional lobby (Lamas 2009). However, movements often change institutional venues when opportunities at their most familiar institutions are closed to their demands. The blockage at political institutions and the strength of the conservative offensive led some sectors of the feminist movement in the region to try other unexplored venues, in particular the court system. The displacement of part of feminist movements' actions to the legal field did not take place without intra-movement conflicts (see Jaramillo and Alfonso 2008). While sharing the historical distrust of the leftist camp towards the judiciary, the feminist movement in Latin America had further difficulties in appealing to a system that it had reasons to consider as a site of masculine domination. The patriarchal structure and interpretation of norms and the male hegemony in the legal field have been among the many pervasive obstacles for women's access to justice and have contributed to the reproduction of gender injustices in the region (see Facio and Fries 2005; Birgin and Gherardi 2008). However, the role played by courts particularly in the field of abortion rights has been instrumental in signaling feminist movements that the judiciary can be one of the possible venues to pursue women's rights (see Roa and Klugman 2014).

Abortion law reforms in Latin America are still insufficient in their scope and not yet consolidated, as they their implementation has been highly contested, as in Colombia and in Argentina before its legalization; 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. However, for the first time in decades, through these reforms, some degree of protection for abortion rights went from being taboo to being part of the region's legal frameworks and constitutional jurisprudence, and constitutional courts have had a key role in these processes, as explained in the following sections.<sup>7</sup>

## **II. The role of courts in expanding the abortion law: Colombia and Brazil**

The most notable interventions of constitutional courts in the field of abortion laws in Latin America have been their decisions to create new abortion rights. Colombia and Brazil are the two cases in the region where the abortion law was expanded by the constitutional courts in response to direct actions of unconstitutionality presented by

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<sup>6</sup> *Sentencia Rol N° 5572-18-CDS / 5650-18-CDS (acumuladas)*, Tribunal Constitucional, January 18, 2019.

<sup>7</sup> See also Bergallo and Ramón Michel (2016) for a thorough analysis of the role of constitutional jurisprudence in the liberalization of abortion laws in the region.

feminist organizations. In both cases, reforms have been limited in their scope, but significant in their argumentation, and they have been also the only progressive changes in decades in the abortion laws of both countries. These cases also show how the recourse to litigation and courts came after several failed attempts to achieve legal change in this field through the legislatures.

### ***Colombia***

In May 2006, the Colombian Constitutional Court issued its landmark Decision C-355/2006 that liberalized the country's abortion law, which since 1979 had penalized abortion under all circumstances and was among the most restrictive in the world. The 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 and not-consented artificial insemination). This was the first sentence by a constitutional court to expand the abortion law in Latin America. The Court's ruling was motivated by an unconstitutionality action submitted in 2005 by the Colombian feminist lawyer Mónica Roa, head of the Colombian office of Women's Link Worldwide, with support by the *Mesa por la Vida y la Salud de las Mujeres*, which is the most important coalition for the defense of abortion rights in the country.

After the reform, the Colombian abortion law still remains restrictive, in that it covers only a small number of the abortions carried out each year in the country (see Guttmacher Institute 2011: 5). However, the Court's ruling was groundbreaking, not only for having been the first ruling by a Constitutional Court in Latin America to liberalize the abortion law, but also 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, allowing for the further development of the health exception. In fact, it was the first decision on women's rights in Colombia in which the Court extensively draws on international human rights treaties (Jaramillo, Author interview 2013) and the first decision by a constitutional court worldwide to review the constitutionality of abortion following a human rights framework (Undurraga and Cook 2009: 241).

With regard to alternative institutional venues for this type of legal change, prior to 2006 eight bills proposing the liberalization of the abortion law had been submitted by individual legislators, but failed in the first stages of the legislative process (Barraza and Gómez 2009: 11-12). Feminist organizations provided information or advice to legislators on some of those projects (Villarreal, author interview 2013). These previous attempts to advance reforms through Congress informed legal activists' decision to pursue a litigation strategy before the Constitutional Court (Roa, author interview 2014). This process confirms that when the political processes is halted, social movements search for other institutional venues, and that they may turn to legal strategies and courts to instigate changes. This can take place especially when legal opportunities are favorable, as in the Colombian case, with a Constitutional Court that has been emblematic in the region and the World in terms of rights protection (see Rodríguez-Garavito and Franco 2010).

### ***Brazil***

On April 12, 2012, the Brazilian Supremo Tribunal Federal (STF) expanded the Brazilian abortion law, which 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, for cases of rape and life-threatening circumstances. The STF declared unconstitutional the interpretation of the Criminal Code (Articles 124, 126, 128) that included the interruption of pregnancy in cases of fetal anencephaly among the crimes categorized as abortion, and authorized the voluntary anticipation of birth in these cases.<sup>8</sup> It also established that the procedure should be provided free of charge by the Unified Health System, without the requirement of judicial permission. This was the first case on reproductive rights to be decided by the STF. Through this decision, it became the second constitutional court in Latin America to expand the limits of the abortion law.

The STF ruling is restricted in terms of the expansion of abortion rights, for it refers only to a specific condition. However, it is highly significant not only because it has been the only change so far in this area of rights in Brazil, but also because of its framing and its opening of a new constitutional understanding of the abortion question. The decision placed women's rights at center-stage, in that it declared that the therapeutic anticipation of birth in cases of anencephaly involves women's dignity, freedom, health and sexual and reproductive rights (Diniz 2016, Machado and Cook 2018; Rondon 2020). It argued that even in the context of a discussion that accepted the premise of the right to life of the anencephalic fetus, this right could not be considered as absolute (ADPF 54, p. 65), which opened a space for further expansion of the abortion law. Furthermore, it framed the question at stakes as concerning the secularity of the state (ADPF 54, p. 34-46).

The origin of this decision was an action of unconstitutionality (Claim of Noncompliance with a Fundamental Precept, ADPF No. 54), submitted before the STF on June 17 2004 (see Diniz 2016). It was part of a strategic litigation campaign promoted by ANIS, Institute of Bioethics, the feminist NGO that has since then led the field of strategic litigation for abortion rights in Brazil. This was the first case of strategic litigation for abortion rights carried presented by a feminist organization before a constitutional court in Latin America, and it has been so far the most successful advocacy action for abortion law reform in Brazil, in terms of its impact in the legal framework. Eventually, in 2017, ANIS promoted a new unconstitutionality action (ADPF 442), which asked the STF to decriminalize first trimester abortion, on grounds of a series of women's fundamental rights and public health reasons. This was the first time that a feminist organization demanded the decriminalization of first trimester abortion to a constitutional court in the region. This case is still pending a decision by the Court.

The actions of the STF in response to ANIS litigation campaign have taken place in the context of a political process that since the 1990s has been increasingly blocked for the advancement of sexual and reproductive rights. In fact, the main advocacy actions by the Brazilian feminist movement since the democratic transition in the 1980s were directed to the legislative, and there were several attempts at legislative reforms in this field, including for the specific case of anencephaly (Linhares 1992; Rocha 2006). But these bills were defeated due to the increasing influence of fundamentalist actors in the

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<sup>8</sup> Supremo Tribunal Federal, Arguição de Descumprimento de Preceito Fundamental (ADPF No. 54), July 1 2004.



legislative process, particularly at the Federal Deputies Chamber, where confessional groups, mostly Catholic and Evangelical, have created inter-party and inter-religious alliances, and since the mid-2000s begun to function in a more coordinated way (Rodrigues, interview 2012). Since 2007 there was a notable increase in the number of religious legislators from different parties, who vote as a bloc against abortion rights and the rights of sexual minorities (Viana 2011, 168). In 2014, this inter-party religious caucus represented almost one third of the members of the Chamber (Miguel; Biroli and Mariano 2017, 231). The presence of these groups in Congress has been crucial for the recent ascension of extreme-right forces to the national government, reinforcing their influence over the political process.

### **III. The role of courts in upholding the legalization of abortion: Mexico**

The Mexican Supreme Court is the only constitutional court so far that has upheld a reform legalizing first trimester abortion in Latin America. The Court approved in two opportunities abortion law reforms carried out by Mexico City's Legislative Assembly.<sup>9</sup> In 2002, the Court upheld the legal reform carried out by the City's legislature in 2000 introducing new exceptions to abortion criminalization in the local criminal code, based on congenital fetal malformation, risk to the woman's health and non-consented artificial insemination.<sup>10</sup> Eventually, in 2008 the Court upheld the law passed by Mexico City's Legislative Assembly in 2007, which legalized the voluntary interruption of pregnancy during the first twelve weeks.<sup>11</sup> It should be noted that Mexico is the only Latin American country where abortion laws can be enacted at the subnational level (Htun 2003: 10), which has allowed for the legalization of first trimester abortion by the local legislatures of Mexico City in 2007 and the state of Oaxaca in 2019.

The Court ruling in 2008 did not constitutionalize abortion rights, as the final text of the decision avoided a pronouncement on substantive questions and fundamental rights involved in the abortion constitutional controversy. Instead, the decision was grounded on the liberty of configuration of legislatures to criminalize, or not, specific behaviors in order to safeguard constitutionally protected goods. This rationale allowed the Court, in 2011, to uphold, under the same arguments, the counter-reforms carried out by the legislatures of two Mexican States, which incorporated a right to life from conception in their respective local constitutions, as part of a similar backlash process in a total of seventeen Mexican states since 2008. The counter-reforms were challenged before the Court through actions of unconstitutionality (AI 11/2009 and AI 62/2009). In September 2011, four Justices upheld these counter-reforms. In fact, a majority comprising seven Justices voted against their constitutionality. But one of the particularities of the Mexican system of judicial review is that a qualified majority of 8 out of 11 Supreme Court Justices is required to overturn a national or state law through an action of unconstitutionality. In fact, since its 2002 decision, there has been a consistent majority at the Supreme Court in favor of the liberalization of abortion laws. However, in 2011 the numerical majority of Justices against the constitutionality of the counter-reforms fell short by one vote from

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<sup>9</sup> See Lamas (2009) and Madrazo (2009) for thorough accounts of the evolution of Mexico City's abortion law.

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

<sup>11</sup> Action of Unconstitutionality 146/2007 and *acumulada* 147/2007, decided on August 28, 2008.

rejecting these legal changes, and the decision of four Justices to leave them standing prevailed. In fact, in Mexico, the legal opportunity at the Supreme Court, both in terms of institutional rules governing actions of unconstitutionality and in terms of the Court's federalism doctrine in abortion rights cases, favored the Court's deference toward any type of abortion-related decision made by subnational legislatures. This explains the seemingly contradictory position of the Court vis-à-vis different types of state-level abortion law reforms.

#### **IV. The role of courts in ensuring the implementation of lawful abortion: Argentina, Colombia, Mexico**

The criticism of the use of courts grounded on the difficulty to enforce judicial decisions is not particularly useful to understand the implementation of abortion laws in Latin America. This is a region where indications models enacted through national laws that date from the first decades of the XX Century have not been effectively implemented, and access to abortions allowed by existing laws has been systematically obstructed. In fact, constitutional courts, particularly in the cases of Colombia, Argentina, and Mexico have proved to be effective institutional venues to advance the implementation of lawful abortions, as they have been at the forefront of an effort to make legal abortion services effective.

##### ***Argentina***

On March 13, 2012, the Argentinean Supreme Court issued a landmark decision, known as the *F.,A.L.* case, addressing a longstanding legal controversy regarding the interpretation of the rape exception included in the country's Criminal Code since 1921.<sup>12</sup> The Court established that this provision 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 legal abortion services, 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.

In this way, the Court put an end to a historic legal dispute regarding the right to abortion in cases of rape in the country. In fact, among the main obstacles for the implementation of the regime of indications in Argentina had been the judicialization of cases allowed by the law. This practice has been driven by a narrow and inconsistent interpretation of the Criminal Code by lower courts, which created legal uncertainty and fear of participating in illegal behavior among most of the actors involved, further fueling judicialization (see Bergallo 2014). The *F.,A.L.* decision was motivated by a claim submitted at the Supreme Court by a conservative actor, challenging a decision by an subnational tribunal that had authorized the practice of an abortion in the case of a young victim of rape, and it constituted the first opportunity for the Court to decide on the scope of lawful abortions.

The Court's decision is notable in that it adopted an activist position, in two main respects. In the first place, the Court decided to hear the case even though by the time it reached

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<sup>12</sup> Corte Suprema de Justicia de la Nación, *F.,A.L. s/medida autosatisfactiva*, Expte. 21912, March 13, 2012.

the court it had become moot, as the abortive procedure had already been carried out. The Court said, in this regard, that this type of situation required an institutional response in order to avoid its repetition in the future (*F.,A L.*, 5-6). It grounded the justiciability of this case on the difficulty of a case 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 (*F.,A L.*, 5). It should be noted in this regard that, in contrast to the other cases in this study, in Argentina there is no abstract action of unconstitutionality. This institutional feature makes it more difficult for feminist actors to reach the Court through strategic litigation on abortion rights. In the second place, although the claim was about an individual case, the Court set criteria for the implementation of all cases of lawful abortions throughout the country, and exhorted public authorities of the different levels of government to carry out institutional or structural reforms in order to to grant access to legal abortion services.

The Court urged national and subnational authorities to issue "norms of the highest level" and hospital protocols, in order to grant comprehensive assistance to every victim of sexual violence (*F.,A.L.*, 29). It also established a series of criteria for correct approach to the attention of legal abortions by the health system. In particular, it declared that access to abortion in cases of rape should be granted only under the woman's attestation (through a sworn declaration) filled with the medical professional. It ordered the elimination of further obstacles, such as administrative procedures or waiting periods that 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. It 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.

### *Colombia*

In Colombia, immediately after the Court's decision was announced in 2006, the Ministries of Health and Social Protection worked for its implementation, in collaboration with feminist organizations, particularly the *Mesa por la Vida* (Villarreal, Author interview 2013). However, there were anyway obstacles for the implementation of the decision, and women encountered systemic difficulties in their search for access to abortion within the law. In this context, the Court played a vanguard role in the region, and arguably worldwide, in the implementation of abortion legal reform. Its jurisprudence in this regard was motivated by *tutela* writs filed by individual women and feminist organizations, in particular Women's Link and *Mesa por la Vida*, seeking redress for the violation of women's fundamental rights.<sup>13</sup> The Court selected some of these claims and developed a comprehensive jurisprudence about the way in which the abortion law should be implemented in Colombia (Tovar, interview 2013).

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

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<sup>13</sup> *Tutela* claims are a legal instrument similar to the *amparo* writ of other Latin American countries, with special features that have made it a major instrument for the protection of constitutional rights in Colombia.

general criteria for the elimination of barriers for access to health services in these cases, it has indicated obligations of state institutions with regard 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 (Tovar, Author interview 2013). Two key decisions in this regard are T-988/2007, in which the Court specified the conditions for the exercise of conscientious objection by health service providers, and T-946/2008, in which the Court condemned judicial conscientious objection and ordered investigation of judges who invoked it. In its outstanding Decision T-388/2009, the Court integrated the criteria it had advanced in former decisions, and developed a comprehensive framework for the effective enforcement of its mandate to grant access to legal abortion, including the State's obligation to implement public education campaigns regarding access to legal abortion.

More recently, on October 11, 2018, the Court issued ruling SU-096/2018, in which it unified and consolidated its progressive jurisprudence regarding the implementation of C-355/2006. This decision is considered as the most significant since 2006, in that it was the first abortion rights decision by the Court sitting in full (*Sala Plena*) since then. In it, the Court exhorted Congress to advance in the liberalization of the abortion law, and ordered the Ministry of Health to unify all the criteria previously established by the Court and to translate them into public policy (Ardila, interview 2019; Martinez, interview 2019; Mazo, interview 2019).

## **Mexico**

In 2018 and 2019, the Mexican Supreme Court issued three important decisions regarding the implementation of abortions rights in subnational entities. In 2018, the Court upheld two key claims on the rape exception, and established that access to abortion services in cases of rape should be granted without a police attestation or an authorization by the Public Ministry.<sup>14</sup> In 2019, the Court issued a decision on the right to health, in which it followed the argument advanced by feminist organizations that, although there is not a health exception in all the country's federal entities, abortion should be considered legal when the woman's health is at risk, on grounds of the constitutional right to health (Méndez, interview 2019; Díaz de León, interview 2019).<sup>15</sup> These decisions were motivated by a turn in the legal defense of abortion rights by feminist organizations in Mexico, marked by the use of strategic litigation on concrete cases, through *amparo* claims (Díaz de León, interview 2019; Méndez, interview 2019; Romero, interview 2019). These claims were submitted by GIRE (Information Group on Reproductive Choice), the largest abortion advocacy NGO in the country, and were accompanied by allied feminist organizations. As explained by a key litigant lawyer in these processes, in both cases the strategy was to frame the claim as a matter of constitutional rights, in order grant the same type of protection for all women throughout the national territory (Méndez, interview 2019).

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<sup>14</sup> Suprema Corte de Justicia de la Nación, *Amparo en Revisión* 601/2017, and *Amparo en Revisión* 1170/2017.

<sup>15</sup> Suprema Corte de Justicia de la Nación, *Amparo en Revisión* 1388/2015.

## **V. The role of Courts in deterring backlash: Colombia**

The Colombian case shows that courts themselves can play a key role in countering backlash processes. Since 2006, the process of implementation of legal abortions in Colombia was characterized by the gradual development of criteria developed by the Court for the enforcement of its C-355/2006 decision, and a positive dynamic between feminist NGOs and different sectors of the State in an effort to make effective the new abortion norms. This situation was interrupted by a strong backlash process, which took place since the appointment of conservative institutional activists in key positions within the State's structure. In 2009, then President Alvaro Uribe appointed prominent conservative public official, Alejandro Ordoñez, as the head of the powerful Office of the Inspector General (*Procuraduría General de Colombia*), in charge of the enforcement of the Constitution, human rights and judicial decisions, and with competence to investigate and remove public officials, this institution set out to work against the implementation of the Court's ruling. One of his first actions as *Procurador* was the appointment of conservative attorney Ilva Myriam Hoyos, linked to Opus Dei, as head of the office in charge of protection of sexual and reproductive rights and of overseeing the implementation of Decision C-355. From there, they would develop a belligerent and carefully crafted strategy against the Court ruling.

Feminist organizations used strategic litigation to fight back against this conservative reaction, and the Constitutional Court proved to be the only state power to stand against attempts to impose fundamentalist religious visions in the policy-making process. One of the most significant Court decision in this context 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 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. In its Decision T-627/2012, the Court 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. This is considered a most significant and unprecedented decision, and the first case worldwide in which a Court recognized the right to information as a receptor's right to receive quality information (Tovar, interview 2013).

## **VI. The role of Courts in promoting public discussion by expanding the legal opportunity: Mexico, Brazil**

When hearing abortion rights cases, the Mexican and the Brazilian Constitutional Courts opened up new institutional channels for social actors' participation in their decision-making process, and promoted public deliberation on this issue during its proceedings. In both countries, the abortion cases have been critical to the development of procedural mechanisms and for advancing a new type of relationship between the courts and civil society.

### ***Brazil***

During the process of ADPF 54 on the anencephaly case, the Brazilian STF convoked for the first time in its institutional history a public hearing at the Court, which took place in 2008, and was followed by three more on this case.<sup>16</sup> There were no specific regulations for public hearings at the STF, but it decided to adopt the Federal Congress's procedures for public hearings. The Justice in charge of organizing and directing this case (Justice-Rapporteur), Marco Aurélio Mello, 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 (Gonçalves and Souza 2008, 149). According to the Justice-Rapporteur, this has been one of the most important cases heard by the STF in its institutional history.<sup>17</sup> The controversial nature of the case, and its acknowledged institutional relevance for the Court help explain why, when dealing with it, the Court decided to expand the institutional channels for the participation of social actors at its proceedings. More recently, during the process of ADPF 442 on the decriminalization of first trimester abortion, the most important public discussion on abortion at a Brazilian state institution took place, through public hearings convoked by the STF and held in August 3<sup>rd</sup> and 6<sup>th</sup>, 2018.

### *Mexico*

In 2002, during the process of the first abortion case to be decided by the Mexican Supreme Court, which was one of the first cases involving a broad social conflict that the Court had to deal with, 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 (Morales, interview 2011). Later on, when the Court had to deal with Mexico City's 2007 abortion law, an unprecedented public discussion on abortion took place in the country, which was also the broadest public debate about a decision by the Mexican Supreme Court until that moment. In this process, the Court regulated the procedure for public hearings, and at the end of March, 2008, it called upon a variety of social and political actors 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. 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. It established a special online forum within its website for the publication of documents and comments on the abortion case; it organized the receipt of e-mails from social actors; it received several *amicus curiae* briefs from national and international individuals and institutions; and most fundamentally, it regulated the procedure for public hearings for cases that had special juridical interest or national significance. Finally, the Court's President for the first time in the Court's institutional history, convened six public

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<sup>16</sup> In fact, since the first public hearing was convoked and the time of its actual occurrence, another hearing took place at the STF, on the stem cell research case (ADI 3510/DF 2008).

<sup>17</sup> Vote of Justice Marco Aurélio Mello, ADPF 54, Supremo Tribunal Federal, April 12 2012.

hearings, three of them for the presentation of arguments in favor of the reform, and three for counter-arguments against it, which were broadcast through the Judicial Channel.

This case has been considered as paradigmatic in terms of the Court's ability to develop a novel approach to civil society (Lara, author interview 2011). 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 (Cruz Parceró, interview 2011).

## **CONCLUSION**

This study has shown that the use of law and courts has played a key role in the feminist struggle for abortion rights in Latin America, a region where national congresses have been reluctant to effect changes in this field, and where in some cases political institutions have been captured by fundamentalist actors who blocked the chances of advancing abortion rights through legislatures, and obstructed the implementation of existing laws. In a context where abortion rights have historically not been secured, courts have been in some instances the only institutional venue to effect legal change. The use of courts has also been effective in the implementation of abortion laws, as well as for deterring backlash processes. In terms of public deliberation, the participation by feminist actors and their allies in judicial proceedings has also been a way to maintain the issue on the public agenda, in a context of ascension of fundamentalist forces to national power, particularly in the case of Brazil.

In contrast to theoretical positions that a-priori deny the transformative potential of legal change through courts, this analysis suggests the need of assessing the role of courts on highly divisive social questions in a more contextualized way, and to evaluate their actions in comparison with alternative institutional venues, avoiding beforehand assumptions about the convenience of using legislatures and political mobilization, instead of courts and legal strategies. The study does not intend to be conclusive in discussing these positions, for, in the first place, the cases under study show the still limited advances of abortion rights claims in the region. More fundamentally, it does not intend to offer a general defense of courts and rights strategies, and to replace one normative position for another. Instead, it aims at following McCann's (1992) advice to turn normative and a-priori assumptions about courts and social change into empirical questions and empirical research. In this regard, the analysis of the role of courts in the abortion rights field in Latin America offers elements to assess in a more nuanced and empirically-based manner the different ways in which courts can be used to advance abortion rights in the context of contemporary Latin American politics.

## **REFERENCES**

Barraza, Cecilia and Claudia Gómez. 2009. "Un derecho para las mujeres la despenalización parcial del aborto en Colombia". Bogotá: Mesa por la Vida y la Salud de las Mujeres.

- Bergallo, Paola. 2014. "The struggle against informal rules on abortion in Argentina". In Rebecca Cook, Joanna Erdman, and Bernard Dickens, eds. *Abortion in transnational perspective: cases and controversies*, Philadelphia: University of Pennsylvania Press. 143-65.
- Bergallo, Paola and Agustina Ramon Michel. 2016. "Abortion". In Juan González Bertomeu and Roberto Gargarella, eds., *The Latin American Casebook: Courts, constitutions and rights*. London: Routledge.
- Birgin, Haydee and Natalia Gherardi. 2008. "El acceso a la justicia como un derecho humano fundamental: retos y oportunidades para mejorar el ejercicio de los derechos de las mujeres" In Aldo Etchegoyen, Aldo ed., *Mujer y Acceso a la Justicia*, Buenos Aires: El Mono Armado.
- Cummings, Scott. 2013. "Empirical Studies of Law and Social Change: What is the Field? What are the Questions?" *Wisconsin Law Review* 171: 171-204.
- Diniz, Debora. 2016. "A Arquitetura de uma Ação em Três Atos-Anencefalia no STF" *University of Brasília Law Journal* 1 (2): 693.
- Diniz, Debora and Ana González Vélez. 2008. "Aborto na Suprema Corte: o caso da anencefalia no Brasil" *Estudos Feministas* 16 (2): 647-652.
- Facio, Alda, and Lorena Fries. 2005. "Feminismo, género y patriarcado" *Academia. Revista sobre Enseñanza del Derecho de Buenos Aires* 3 (6): 259-294.
- Gonçalves, Tamara and Thaís de Souza. 2008. *Aborto e Religião nos Tribunais Brasileiros*. São Paulo: Instituto para a Promoção da Equidade.
- Greenhouse, Linda and Reva Siegel. 2010. *Before Roe v. Wade: voices that shaped the abortion debate before the Supreme Court's ruling*, New York: Kaplan Publishing.
- Guttmacher Institute. 2011. "Embarazo no deseado y aborto inducido en Colombia: Causas y Consecuencias", New York: Guttmacher Institute.
- Htun, Mala. 2003. *Sex and the State: Abortion, Divorce, and the Family under Latin American Dictatorships and Democracies*. Cambridge: Cambridge University Press.
- Jaramillo Isabel Cristina, and Tatiana Alfonso. 2008. *Mujeres, cortes y medios: la reforma judicial del aborto*. Bogotá: Siglo del hombre editores and Universidad de los Andes.
- Klarman, Michael. 2013. *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, New York: Oxford University Press.
- Lamas, Marta. 2009. "La despenalización del aborto en México" *Nueva Sociedad* 220: 154-172.



Lamas, Marta. 2001. *Política y reproducción. Aborto: la frontera del derecho a decidir*. Ciudad de México: Plaza y Janés.

Linhares, Leila. 1992. "Legalização e descriminalização do aborto no Brasil: 10 anos de luta feminista." *Estudos Feministas*: 104-130.

Machado, Marta and Rebecca Cook. 2018. "Constitutionalizing abortion in Brazil." *Revista de Investigações Constitucionais* 5: 185-231.

Madrazo, Alejandro. 2009. "The evolution of Mexico City's abortion laws: From public morality to women's autonomy", *International Journal of Gynecology & Obstetrics* 106.3: 266-269.

Maira, Gloria, Lidia Casas, and Lieta Vivaldi. 2019. "Abortion in Chile: The Long Road to Legalization and its Slow Implementation", *Health and Human Rights* 21.2: 121.

McCann, Michael. 1992. "Reform litigation on trial." *Law & Social Inquiry* 17.4: 715-743.

Miguel, Luis Felipe; Flávia Biroli and Rayani Mariano. 2017. "O direito ao aborto no debate legislativo brasileiro: a ofensiva conservadora na Câmara dos Deputados". *Opinião Pública* 23.1: 230-260.

Roa, Mónica, and Barbara Klugman. 2014. "Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia." *Reproductive Health Matters* 22.44: 31-41.

Rondon, Gabriela. 2020. "O gênero da dignidade: humanismo secular e proibição de tortura para a questão do aborto na ADPF 54." *Revista Direito e Práxis* 11.2: 1137-1165.

Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: The University of Chicago Press.

Rocha, Maria Isabel. 2006. "A discussão política sobre aborto no Brasil: uma síntese." *Revista Brasileira de Estudos de População* 23.2: 369-374.

Rodríguez-Garavito, César and Diana Franco. 2010. *Cortes y cambio social: cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia*. Bogotá: DeJusticia.

Rubio-Marin, Ruth. 2014. "Abortion in Portugal: New Trends in European Abortion Constitutionalism". In Rebecca Cook and Joanna Erdmann, eds., *Abortion Law in Transnational Perspective: Cases and Controversies*, Philadelphia: University of Pennsylvania Press. 36-55.

Ruibal, Alba. 2015. "Social movements and constitutional politics in Latin America: reconfiguring alliances, framings and legal opportunities in the judicialisation of abortion rights in Brazil." *Contemporary Social Science* 10.4: 375-385.

Silverstein, Gordon. 2009. *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*, New York: Cambridge University Press, 2009.

Scheingold, Stuart. 1974. *The Politics of Rights*. New Haven: Yale University Press.

Sunstein, Cass. 1999. *One Case at a Time: Judicial Minimalism on the Supreme Court*, Cambridge: Harvard University Press.

Tushnet, Mark. 1999. *Taking the Constitution away from the Courts*, Princeton: Princeton University Press.

Undurraga, Verónica, and Rebecca Cook. 2009. "Constitutional incorporation of international and comparative human rights law: the Colombian Constitutional Court Decision C-355/2006." In Susan Williams, ed. *Constituting equality: Gender equality and comparative constitutional law*. New York: Cambridge University Press. 215-247.

Waldron, Jeremy. 2006. "The Core of the Case against Judicial Review", *The Yale Law Journal*, 115: 1346-1406.

## **AUTHOR INTERVIEWS**

Ardila, Mariana. 2019. Director of the Legal Area, Women`s Link Colombia. Bogotá, November 29.

Cruz Parceros, Juan Antonio. 2011. Professor Institute of Philosophical Research-UNAM. Ciudad de México, September 14.

Díaz de León, Fernanda. 2019. Coordinator of Policy and Advocacy for Ipas Mexico. Ciudad de México, September 25.

Jaramillo, Isabel. 2013. Law Professor, Universidad de Los Andes. Bogotá, February 6.

Lara, Roberto. 2011. Law clerk at the Supreme Court. Ciudad de México, September 12.

Martínez, Juliana. 2019. Coordinator Mesa por la Vida y la Salud de las Mujeres. Bogotá, November 6.

Mazo, Sandra. 2019. Director Catholics for Choice Colombia. Bogotá, November 7.

Méndez, Alex Ali. 2019. Coordinator of the Case Documentation and Litigation Department at GIRE. Ciudad de México, September 24.

Morales, Pedro. 2011. Litigant lawyer; GIRE's legal advisor; member of the College of Bioethics; Director of Medilex. Ciudad de México, September 7.

Roa, Mónica. 2014. Programs Director. Women's Link Worldwide. January 6.

Rodrigues, Kauara. 2012. Member of CFEMEA (Feminist Centre for Studies and Advisory Services). Author interview, Brasilia, August 13.

Romero, María Eguenia. 2019. Director of Equidad de Género, Familia y Trabajo. Ciudad de México, September 26.

Tovar, Ariadna. 2013. Senior Lawyer at Women's Link Worldwide. Bogotá, February 22.

Villarreal, Cristina. 2013. Director of Fundación Oriéntame. Member of Mesa por la Vida y la Salud de las Mujeres. Bogotá, January 28.