

Forms of Countermovement and Counter-Reform in Latin America: Judicial Backlash or Resources and Political and Legal Opportunities?

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Introduction

In Latin America, the fear of judicial backlash has not been at the center of the discussion on courts and social change. Perhaps because of the historically weak and dependent role of the judiciary in the region's political systems, the literature has focused more on judicial independence, and the empowerment and effectiveness of courts to process social demands. However, the judicial backlash thesis has recently emerged in current discussions on judicial politics in the region, particularly in the field of abortion rights. This has been more evident in the Brazilian case, where opponents of sexual and reproductive rights frequently argue against the legitimacy of courts to decide on these issues. More recently, however, progressive voices have expressed concern with the potentially counterproductive effects of the judicialization of abortion, not only for women's rights, but also for its possible backlash effects on other rights and the political system as a whole (see Diniz and Carino 2019).

The backlash question is at the core of the discussion of the role of judicial review in the democratic process. However, the conventional judicial backlash thesis, with its causal claim regarding the role of courts in producing strong reactions against progressive politics (Sunstein 1999; Tushnet 1999; Klarman 2013), does not seem apt to account for the wave of anti-gender campaigns that has been at the center of Latin American politics in recent years. Courts have been key actors in the expansion of abortion rights in the region since the mid-2000s and, certainly, even limited feminist gains in this area of rights have met with strong countermovements and attempts at counter-reform. Furthermore, the abortion rights issue has been pivotal to a larger conservative reaction against progressive politics which has recently swept across the region. The question, though, is how to understand countermobilization and backlash vis-à-vis the role of courts. In this study, I define backlash as the reaction against the advancement of equality claims, in the form of countermovement and counter-reform. In this context, I discuss the soundness of the court-centered approach that is central to the theory of judicial backlash in accounting for anti-abortion rights movements in contemporary Latin America.

Instead of characterizing these processes as a reaction to judicial intervention, provoked by intrinsic features of courts, I seek to understand the particular characteristics and timing of anti-abortion countermovements in the region. I argue that the analysis of social movement dynamics, and in particular the countermovement's resources and opportunities in each context offer a better lens to understand these backlash processes. The study draws on frameworks from social movement studies, such as political opportunities and resource mobilization (McAdam, McCarthy and Zald 1996), and the

further development of these analytical frameworks by legal mobilization scholars through the conceptualization of *legal opportunities* (Hilson 2002) –which include accessible institutional rules and courts’ receptivity to social movement claims-, and *support structures for legal mobilization* (Epp 1998) -which takes into special account the presence of organizations with legal capacities and resources to sustain litigation.

Through the study of countermovement and counter-reform processes in the field of abortion law in Mexico, Colombia, Brazil, and Argentina over the past two decades, this chapter argues that this conservative reaction cannot be explained as a direct or specific response to court decisions. The a-priori stance against the role of courts that characterizes the judicial backlash thesis (Greenhouse and Siegel 2011) is replaced by an empirical examination of the different pathways and mechanisms of this reaction, and the different forms that the interventions of conservative actors have taken in the field of abortion rights in four countries in the region. My analysis intends to contribute to understanding under what conditions countermovements can develop, and what leads them to adopt a particular form of influence on the political and legal fields in the Latin American context, by tracing them back to their interaction with political and legal opportunities. In this way, following Greenhouse and Siegel’s (2011) approach, it addresses the key role played by legal strategies and courts in the abortion rights controversy in the region, as part of larger social and political processes in which courts’ decisions are one element. In line with a central claim of social movement researchers according to whom organized opposition in the form of a countermovement is a normal consequence of a movement that achieves substantial success in its call for equal rights (Meyer and Staggenborg 1996), Greenhouse and Siegel claim that conflict or backlash is a normal feature of constitutional politics when equality claims achieve increased support, and that judicial review may or may not play a role on these processes (2011: 2077).

The study identifies four types of counter-mobilization and counter-reform, according to the predominant and most successful strategy of conservative actors against the advancement of abortion rights in each of those countries, and explains their variation on grounds of their resources and their relationship to the political and legal opportunities in each context. The four countries under study are those in which constitutional courts have had the most relevant role in the liberalization of abortion laws in the region; in each of them, we can identify a particular kind of backlash, or a central form of countermobilization and counter-reform. In this account, Brazil is analyzed as an emblematic case of the influence of conservative forces on the legislature and the formation of an inter-religious caucus at the national Congress; Mexico as a case of pressure on the subnational legislative processes; Colombia as a case of counter-legal mobilization by institutional activists within the national State structure; and Argentina as the most notable case of counter-legal mobilization in civil society and the use of courts by the countermovement. The empirical research for this study draws on fieldwork carried out between 2010 and 2019 in Mexico, Colombia, Brazil, and Argentina, including in-person interviews conducted with social movement activists, lawyers, health professionals, and academics.

The abortion rights controversy in Latin America is especially suited to analyze backlash dynamics and the role of courts in these processes. The legalization of abortion has been a core claim of one of the most important contemporary movements in the region, and the dispute around this issue is a paradigmatic case of interaction between movement and countermovement. Moreover, recent reform processes in this area of rights have prominently involved constitutional courts, which since the mid-2000s have upheld

for the first time feminists' claims to liberalize the normative framework in this field.¹ Furthermore, as shown in the cases under study, and as Gianella's chapter in this book discusses in more detail, the abortion rights dispute in Latin America prominently features the crucial problem of the implementation of regulatory frameworks in the cases allowed by the law. As pointed out in the Introduction to this volume, the strong resonance of conservative values and their organizational capacity in Latin American societies presents huge challenges for the use of courts for progressive social change.

The abortion question 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 fact, since the democratization process in the region, feminism has been the movement that placed at the center of the political agenda, and more strongly than any other actor, the claim for state laicity and secularity. This claim has been a crucial political demand of the region's liberal elites since the XIX Century. This explains the centrality of the abortion issue for contemporary religious politics in the region, as well as the dimension of the conservative reaction against sexual and reproductive rights. This issue has also become a focal point of reference for diverse types of conservatism, galvanizing different conservative and right-wing aims and projects. In sum, abortion politics and the legal struggle for abortion offer a particularly appropriate field in which to analyze legal processes as part of wide-ranging social and political conflicts, which neither begin nor end with court decisions.

A synthetic panorama of the recent history of the conservative reaction against abortion rights in Latin America will allow us to contextualize its role in the four case-studies that follow. Conservative religious actors in the region, mostly the Catholic Church and increasingly also neo-Pentecostal Churches, continue to exert influence as a de-facto power on State institutions. These actors use traditional and often informal forms of pressure over the political system. However, especially since the 1990s, conservative actors in the field of sexual and reproductive rights in the region have developed new repertoires of collective action that assimilate them to a social movement, or a countermovement. They have created new types of organizations and support structures in civil society, have developed a framing more in keeping with the discourse of democracy and human rights, and have used the institutional channels provided by the democratic system (see González Ruiz 2005; Vaggione 2005; Amuchástegui *et al.* 2010; Lemaitre 2012), i.e., they have seized political and legal opportunities to advance their cause. They have done so as a reaction to the advancement of feminism and the movement for sexual and reproductive rights since democratization processes. In the context of democratic transitions, the first relevant intervention by anti-abortion actors in the legal field was their attempt to influence constituent processes. In that setting, they lobbied for the introduction of a clause to protect the right to life "from the moment of conception until natural death", following the Vatican's campaign in this regard, particularly since the Papacy of John Paul II (Pitangy 2011: 39; Tamés and Andión 2012: 9-10). These attempts were successfully resisted by feminist mobilization in the constituent processes

¹ 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 2008, the Mexican Court upheld Mexico City's legalization of first trimester. In 2012, the Brazilian *Supremo Tribunal Federal* legalized abortion in cases of anencephaly. Also in 2012, Argentina's Supreme Court established that abortion was legal in all cases of rape, and the Uruguayan Congress decriminalized first trimester abortion. In 2017, the Chilean Congress liberalized the abortion law in cases of risk to the woman's life, rape and fetal malformations. The legislative assembly of the state of Oaxaca, Mexico, legalized first trimester abortion in 2019, and Argentina did so in 2020.

of Brazil (1988), Colombia (1991) and Argentina (1994), while in countries such as Chile, Guatemala, Honduras, Dominican Republic and El Salvador they succeeded in doing so (Tamés and Andi3n 2012: 9-10).

Later on, conservative religious actors in the region developed diverse repertoires of actions against feminist advances in the field of reproductive rights, including legal strategies from civil society and state institutions. They also turned their attention to local-level politics by attempting to, for example, stop the local implementation of regulations on lawful abortions, or by influencing legal and constitutional change at the subnational level in federal countries. More recently, the reaction against abortion rights movements has been a pillar and precedent for the development of the contemporary wave of conservative reactions in Latin America. In this regard, Corr3a and Kalil observe that the campaigns against so-called gender ideology that have recently swept through the region, have built up from the preexistent inter-confessional coalitions and organizational infrastructure of anti-abortion campaigns (2020: 33). As the analysis of the four cases that follows shows, to attribute these backlash processes to the use of rights strategies and judicial decisions is a disproportionate causal claim.

I. Abortion countermovements in Latin America: an overview

The typology I present in Table 1 is built off of three questions which identify the key elements that help us explain the main form of backlash in each country: 1) the strength of the political opportunity in terms of presence in parties and legislatures; 2) the existence of a legal opportunity at the Supreme Court; 3) the countermovement’s legal resources, or support structure.

Table 1. A typology of abortion countermovements in Latin America

| | Legal Strategy, in civil society | Political Strategy, National Level | Legal Strategy, within the State | Political Strategy, subnational level |
|--|--|--|--|--|
| | Argentina | Brazil | Colombia | Mexico |
| Do religious conservatives have a political party or allies in legislatures? | Does not have a consolidated conservative party or a religious coalition in Congress. | Strong inter-confessional and inter-party conservative caucus at the House of Representatives. | Conservative party, with religious links, and recently a pro-life coalition in Congress. | Strong conservative party, with religious links. |
| Did the countermovement find a favorable opportunity at the Supreme Court? | Conservative majority and conservative doctrine at Supreme Court during part of the 2000s. | Supremo Tribunal Federal generally favorable to abortion rights. | Constitutional Court systematically favorable to abortion rights. | Majority of Justices favorable to abortion rights, but institutional rules favor deference of Supreme Court toward subnational legislative |

| | | | | |
|--|--|---|---|---|
| | | | | reforms of any sign. |
| Did the countermovement have a support structure for legal mobilization? | Strong support structure for legal mobilization by NGOs. | Weak support structure for legal mobilization | Strong support structure, and strong conservative legal institutional activism. | Weak support structure for legal mobilization |

The categories are not necessarily mutually exclusive, but the typology corresponds to the major and most effective strategies of conservative actors to deter the advancement of abortion rights in each case so far. However, it should be noted that in recent years, as sexual and reproductive rights were brought to the center of the contemporary political dispute in Latin America, conservative political strategies have been strengthened in the four countries. As highlighted in the case-studies, a distinctive element of this process has been the emergence, in Colombia, Mexico and Argentina, and their consolidation in Brazil, of religious conservative political parties, mostly neo-Pentecostal. These parties have the opposition to sexual and reproductive rights at the center of their political platforms, and they turn to a strategic alliance with traditional catholic groups when dealing with political or legal reforms on this area of rights. Another component of relevance to this process is the presence, for the first time, of presidential candidates running on an anti-gender platform, as it happened in recent elections in Brazil and Argentina. Furthermore, conservative religious actors with an anti-gender discourse have headed the destitution of democratic elected governments, as in the cases of Brazil and Bolivia. Finally, the use of the anti-gender discourse, with anti-abortion claims at the center, by the right-wing opposition to the peace processes in Colombia, has been an acute instance of the role of sexual and reproductive rights, and abortion in particular, in the development of conservative projects in Latin America.

II. Counter-legal mobilization in civil society: Argentina

Argentina is a case that patently shows the inadequacy of the judicial backlash thesis to account for conservative reactions, as the most important instances of conservative mobilization against reproductive rights did not take place after feminists' gains in courts, but in the aftermath of advances in the National Congress. In fact, in Argentina, conservative groups set out to use courts and legal opportunities before the feminist movement started developing legal strategies; indeed, they have led the field of litigation strategies on reproductive rights at the Supreme Court. They have pursued strategic litigation that motivated the development of the Court's conservative doctrine on the absolute right to life from conception, which stood between early 2000s until 2012. Even the Court's progressive decision on abortion rights in the 2012 *F.,A.L.* case was motivated by a legal claim submitted by a conservative actor.

One of the first organized actions by conservative forces in the field of abortion rights in Argentina was their mobilization against the first bill to reform the country's

abortion law, presented in 1989 by a female deputy from the *Unión Cívica Radical* party. But during the 1980s and the beginning of the 1990s, a proper conservative movement against reproductive rights in Argentina did not yet exist, and the Church's reaction against the bill consisted mainly of mobilizing Catholic school students to attend public demonstrations (Blofield 2006: 132).

However, at the beginning of the 2000s conservative Catholic groups implemented new repertoires of action, mostly based on counter-legal mobilization against reproductive rights by organizations in civil society. Regarding the support structure for counter-legal mobilization, some of the main conservative organizations working against reproductive rights in Argentina are *Portal de Belén* and *Mujeres por la Vida*, based in the city of Córdoba, which have been central actors in the judicialization of reproductive rights in the country. These organizations seized the new legal opportunity created by the constitutional reform of 1994, which extended legal standing to social actors through the introduction of collective *amparo* briefs, and incorporated human rights treaties to the Constitution. 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, entails the prohibition of abortion under all circumstances. Their litigation strategies led to the two most important Supreme Court decisions on reproductive rights in the country ("*Portal de Belén*" and "*Mujeres por la Vida*"), until the Court issued its progressive decision in the *F.,A.L.* case in 2012 and clarified the scope of legal abortions under the rape exception.²

Prior to *F.,A.L.*, the Supreme Court's abortion-related jurisprudence had been motivated by a collective *amparo* claim against emergency contraception pills filed by *Portal de Belén*, on grounds of their alleged abortive effects. This claim was upheld by the Court in 2002,³ and it had important effects on subsequent reproductive rights cases in lower courts, as well as on a decision the Court made in 2006. That year, the Court upheld a claim submitted by *Mujeres por la Vida*, in which it analyzed if this NGO had legal standing to challenge the constitutionality of the law that created, in 2002, the National Program for Sexual Health and Responsible Procreation.⁴ 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 had abortive effects and were, therefore, against the right to life of the unborn. The case reached the Court through extraordinary appeal. In a brief decision, a majority of Justices said that the NGO had legal standing to challenge that law through an *amparo* brief, 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". The case was about legal standing, but to justify the organization's interest in the case, the Court had to accept the plaintiff's claim that emergency contraception drugs were abortive.

More recently, soon after the Supreme Court's *F.,A.L.* decision urged subnational authorities to issue protocols for the implementation of lawful abortions, *Portal de Belén* challenged the constitutionality of the protocol enacted in the province of Córdoba, through a collective *amparo* claim. This led to a 2012 decision from a provincial court

² CSJN, "F.,A.L. s/medida autosatisfactiva", March 13 2012.

³ CSJN, "Portal de Belén c. Ministerio de Salud y Acción Social de la Nación s/amparo", March 5 2002.

⁴ CSJN, "Mujeres por la Vida c/ E.N.-P.E.N.- Ministerio de Salud y Acción Social de la Nación s/amparo", October 31 2006.

that suspended, for seven years, the implementation of that directive in the province. The blockage of the local protocol ended when in December 2018 the highest provincial court (*Tribunal Superior de Justicia de Córdoba*) rejected *Portal de Belén's* claim. One year later, the same court denied that organization's demand to reach the national Supreme Court through extraordinary appeal.

Some of the features of this countermovement contribute to explaining their use of litigation strategies, as well as their success in court. In the first place, in contrast with the feminist movement, conservative religious actors in Argentina did not have a wide constituency, but were "elite-oriented" and have strong contacts and familiarity with the judicial power (Bascary, author interview 2010). Secondly, they have counted on material resources for litigation, provided mainly by Human Life International (Juliá, author interview 2010).⁵ Thirdly, at the beginning of their litigation campaign in 2000, conservative organizations took advantage of the favorable legal opportunity created by the presence of a conservative majority at the Supreme Court, appointed under the presidency of Carlos Menem's (1989-1999). Some of those justices belonged to Opus Dei, the most activist branch of Catholicism against abortion rights in Argentina. Finally, regarding the political opportunities, in particular those related to their capability to pursue legislative bills, it can be highlighted that conservative religious actors in Argentina count neither on a strong congressional coalition, as in the case of Brazil, nor on a consolidated political party, such as *Partido Acción Nacional* in Mexico or the *Conservador* party in Colombia. When in the mid-2000s fundamentalist actors within the National Congress -in particular, Congresswomen Cynthia Hotton, of Evangelic affiliation, and Liliana Negre, from the Opus Dei- tried to form an anti-abortion caucus, they did not gather attention for their proposal (Díaz, Author interview, 2013).

However, conservative political actors gained new strength and renewed their attempts to organize in the political sphere, as part of the backlash process that ensued in the aftermath of the defeat of the bill to legalize abortion in the Senate, in August 2018. The legislative process of that bill, approved by the Deputies Chamber in June that year, showcased the strength of the feminist movement, with massive public manifestations of support. This represented a real threat to conservative sectors. Immediately after the rejection of the bill, conservative actors redoubled their activism, with a focus on opposing sexual education, joining the "Don't mess with my children" movement, started in Lima at the end of 2016. This movement, which is part of the larger campaign against so-called gender ideology, had a strong presence in other countries throughout the region (see Gutiérrez 2018), but it did not have a footing in Argentina until the backlash process started in 2018. In this context, fundamentalist religious actors, with strong Evangelic presence, launched anti-choice parties and electoral fronts, with an eye to the 2019 elections. For example: on March 28, 2019, Hotton relaunched the party *Valores para mi País*, gathering anti-choice political actors from different religious and party affiliations. She also allied with an ultra-nationalist conservative actor to run for the country's presidency in 2019 under an electoral front (*Frente Nos*) that obtained enough votes in the primary to compete the first round of the presidential election. This was the first time that a presidential candidate in this country focused their electoral platform on the opposition to sexual and reproductive rights, and abortion in particular. Furthermore, in June of that same year, a provincial coalition of anti-gender Catholic and Evangelic actors

⁵ Human Life International is a coalition of 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 across the region (Htun 2003: 152).

founded by an Evangelical Pastor (*Frente Unite por la Vida y la Familia*) obtained 20% of the vote in elections for provincial legislators in one of the country's most progressive jurisdictions, Santa Fe province, running on an anti-abortion campaign financed by evangelical groups. In this way, the movement/countermovement dynamics created a new opportunity for conservative actors and helps explain the backlash and their renewed momentum to act in the political sphere.

III. Controlling the legislative process at the national level: Brazil

In Brazil, the epicenter of conservative mobilization and the stronghold of abortion opponents is the Federal Chamber of Deputies. In contrast to the Argentine case, conservative mobilization in Brazil is not predominantly based on the development of NGOs as an expression of religious groups in civil society, and it does not use litigation as a central strategy. The two distinctive aspects of conservative mobilization in Brazil are its direct participation in the legislative process and the coalition between Catholic and Evangelical actors in Congress, forming a religious caucus. This has created an increasingly favorable political opportunity for conservatives' opposition to abortion rights, and for their intervention in the country's political process more generally.

The Catholic Church has been a traditional opponent of abortion rights in the country, and as early as 1949, it promoted a legislative project aimed at eliminating the two exceptions to abortion criminalization in the penal code (Casanova 2000: 71). Besides this early relevance of Catholicism, Brazil has become the most striking example of the increasing influence of Evangelical, mostly Neo-Pentecostal churches, in the region's politics. The Brazilian Universal Church of the Kingdom of God (*Igreja Universal do Reino de Deus*), the main Neo-pentecostal church in the country, got its first federal deputy elected as early as 1986. Since then, its influence on the National Congress, together with *Assamblea de Deus* and other Evangelic groups, has not stopped growing (Almeida 2017). The presence of these groups in the Chamber of Deputies has been crucial for the recent ascension of extreme-right forces to national power, with the presidency of Jair Bolsonaro.

Conservative groups in Brazil argue that their reluctance to use legal strategies is due to the lack of legitimacy of courts to decide on abortion, and on so-called moral issues in general. As such, their strategy has been to de-legitimize the role of the country's highest court, the *Supremo Tribunal Federal* (STF) in the advancement of abortion rights (Rondon, interview 2019). The only change to the abortion law over the past decades has been motivated by litigation strategies before the STF carried out by the feminist NGO ANIS, *Instituto de Bioética*. In responding to these legal challenges, in 2012, the STF expanded the abortion legal framework by incorporating a new exception to its criminalization, in cases of fetal anencephaly.⁶ Furthermore, in 2017 the STF received a challenge to legalize first-trimester abortion, becoming the first constitutional court in the region to face this request, on which it has yet to decide.⁷ In this context, conservative legislators have argued that the intervention of the STF in this field violates the division of powers, by surpassing legislative competences, and that it is contrary to popular sovereignty (Coutinho 2019: 139). As observed by Batista (interview, 2019), it remains

⁶ STF, ADPF 54, July 1 2004.

⁷ STF, ADPF 44, March 8 2017.

to be seen what their position in this regard would be in case the legal opportunity changes at the STF, if new Justices with a conservative position on abortion rights are appointed.

The strength of this religious legislative coalition is due in part to the cross-party and cross-religious alliance among different conservative actors in the Brazilian Congress. The so-called *bancada evangélica* (evangelic caucus) is the main articulator of anti-abortion parliamentary fronts. The conservative influence in the legislature started gaining prominence since the beginning of the 1990s (Corrêa and McIntyre 2003: 36). During the period elapsed from that time through the beginning of the 2000s, the correlation of forces between defenders and opponents of abortion rights in Congress was more balanced, and legislators from different confessions worked separately (Rodrigues, interview 2012). But, since the mid-2000s, religious groups have developed more coordinated actions, mostly through the creation, in 2005, of the Evangelic Parliamentary Front (*Frente Parlamentar Evangélica*) and the Parliamentary Front for the Defense of Life against Abortion (*Frente Parlamentar Mista em Defesa da Vida Contra o Aborto*). At crucial junctures, the religious caucus presided the most important legislative commissions dealing with the abortion issue: the Commission on Social Security and Family, and the Commission on Human Rights and Citizenship, both at the Deputies Chamber (Almeida 2017). Moreover, since 2007 there has been a constant increase in the number of religious legislators from different parties who vote together to block the advance of abortion rights, as well as the rights of sexual minorities (Viana 2011: 168). In 2014, the inter-party religious caucus represented almost one-third of the members of the Chamber (Miguel, Biroli and Mariano 2017: 231).

Over the past fifteen years, these congressional groups presented more than thirty projects against reproductive rights (Batista, interview 2019). One of the most important legislative initiatives presented by conservative legislators at the Deputies Chamber has been the bill on the so-called Statute of the Unborn. This bill aimed to eliminate the right to abortion in all circumstances, even those currently allowed by the law (PL 478/2007). More recently, the focus of these legislative groups has been on a constitutional reform proposal aimed at introducing a constitutional clause on the right to life from conception and an explicit prohibition of abortion under all circumstances (PEC 181/2015, so-called “*PEC da vida*”). Thus far they have not achieved any legislative victory. However, they have successfully stopped progressive initiatives to change the country’s abortion law, which is among the most restrictive in the World, as it does not include an exception in cases of risk to women’s health.

Beyond their incidence in the field of sexual and reproductive rights as a single-issue caucus, this conservative religious block in Congress has been a crucial actor in the process that led to the destitution of President Dilma Rousseff and, eventually, to the ascension of the extreme right to the national government. The abortion issue was a central element in the offensive against the Workers’ Party (PT), and in the conservative turn in Brazilian politics. During the 2010 presidential race, and due to pressures from Catholic and Evangelic sectors, abortion became the single most relevant issue (Pitanguy 2011: 42). During the second round, and at the instance of religious leaders, then-candidate Rousseff signed a public commitment pledging not to promote changes in the abortion law or any other issue related to the family. Eventually, Rousseff was elected as Brazil’s first female President, and during her government she was loyal to that commitment, while affirming a compromise to grant access to lawful abortion (Negrão, interview 2012). It was precisely around the regulation of legal abortions that conflict

escalated, in 2014, between the government and religious Deputies, over the enactment of an Executive order (*Portaria* 415) aimed at regulating access to legal abortions in the public health system (Coutinho 2019). The successful opposition to this measure, which made the government de-enact that measure seven days after its enactment, was led by Eduardo Cunha, then leader of PMDB (Party of the Brazilian Democratic Movement) at the Deputies Chamber. This victory gave Cunha a prominent role in leading the Evangelic caucus and allowed him to become the Chamber's President in 2015, defeating the PT's candidate in the first round (Coutinho 2019). From that position, Cunha headed the parliamentary coup against President Rousseff in 2015-2016, which led to the provisional presidency of Michel Temer (see Limongi 2015) and eventually to the election of Jair Bolsonaro in 2018.

This political process, led from the lower chamber of Congress, and aimed at banishing the PT from the country's political scene, was articulated with a broader process of polarization in Brazilian politics, which allowed right-wing political forces to capitalize the social unrest manifested in the cycle of street protests started in June 2013. Progressive sectors of the legal profession pointed to the judicialization of abortion as the cause of backlash when the action of unconstitutionality (APDF 442) asking for the legalization of first-trimester abortion was filed in 2017. However, given the dynamics of the political conflict that was in course in the country at that time, this appears as a disproportionate attribution.

IV. Conservative institutional activists and counter-legal mobilization within the State: Colombia

In Colombia, conservative institutional activists working at a key national-level institution, the Office of the Inspector General (*Procuraduría General de la República*), headed the main form of backlash against abortion rights so far in the country. In 2006, the Constitutional Court issued its landmark decision C-355/2006, which decriminalized abortion under three circumstances.⁸ When the unconstitutionality challenge was filed in 2005, and as it was discussed in the Court, conservative President Alvaro Uribe did not intervene in the public discussion, and he did not exert pressure on the Court, allegedly due to his intention to be re-elected, for which he needed the Court's approval to reform the Constitution (Cuéllar, interview 2013). However, the political opportunity changed after his reelection, and he appointed an ultra-conservative institutional activist, Alejandro Ordoñez, at the *Procuraduría* (Office of the Inspector General). Ordoñez systematically worked to block the implementation of the Court's decision.

The traditional opposition to sexual and reproductive rights in Colombia came mainly from the Catholic Church and, more recently, also from neo-Pentecostal churches, which have started gaining influence on the political sphere. The Catholic Church's influence on the State was exercised through the National Conference of Bishops and other Catholic leaders (Lemaitre 2012: 497). However, since the mid-2000s, and in line with similar trends in other Latin American countries, a new type of religious mobilization emerged in the country. Based on civil society organizations and led by lay Catholics—most prominently from Opus Dei—these organizations started using the same methods as other social movements, such as legislative lobbying and strategic litigation

⁸ Corte Constitucional, C-355/06, May 10 2006. The Court established that abortion would not be a crime in cases of risk to the woman's life or health, serious fetal malformations, and rape.

(Lemaitre 2012: 498). This process entailed the formation of a support structure for counter-legal mobilization, helped by the presence of *Universidad de la Sabana* –an Opus Dei University that has been a seedbed for conservative legal activists. 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* (Mazo 2006: 80).

When the Colombian office of the feminist organization Women’s Link Worldwide presented the action of unconstitutionality that motivated the Constitutional Court’s decision C-355/2006, the Catholic network set out to campaign against it. With support from Human Life International and its Colombian affiliate (Löfgren 2008: 40), lay Catholic actors presented forty lawsuits against the decision (Lemaitre 2012: 498) and lobbied state institutions to obstruct its implementation. However, until 2009, that reaction was not coordinated and had no leadership.

In 2009, Uribe appointed a conservative lawyer linked to Opus Dei, Alejandro Ordoñez, as the head of the crucial *Procuraduría*. This office had, until then, been favorable to the implementation of the Court’s decision. This powerful institution is charged with enforcing human rights and has the competence to investigate public officials, even those publicly elected, and to remove them from office for non-compliance with their duties, without criminal trial. Before taking office, Ordoñez had openly expressed fundamentalist positions against abortion and gay marriage, and as a former judge at the *Consejo de Estado* he had issued decisions based on Catholic doctrine (Lemaitre 2012: 497). One of his first actions as Inspector General was the appointment of lawyer Myriam Hoyos, professor at *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 (see Parra 2010: 41). Hoyos had presented 47 amicus curiae briefs during the decision-making process of ruling C-355/2006 and had stated that she would take actions against a Court’s decision that liberalized abortion (Parra 2010: 41).

From their institutional positions, these actors developed a backlash legal strategy aimed at blocking the implementation of Decision 355/06, and ultimately at reversing this jurisprudence. Their actions had a chilling effect on other state officials, given, for example, the indication of the Inspector General to public officials in charge of the implementation of abortion services that misoprostol was an unsafe method, and more expensive than others, and that, therefore, they could go to jail for damaging public finances (Tovar, interview 2013). The role of these conservative institutional activists also encouraged other public officials to be vocal in the public space about their convictions against sexual and reproductive rights (Tovar, interview 2013).

In this process, the Constitutional Court was the most important actor within the state structure with the capacity and willingness to oppose the conservative reaction. The Court’s position in this regard configured a steadily favorable legal opportunity for feminist struggles to achieve the implementation of the new legal framework, and to resist backlash. Feminist organizations used strategic litigation and other legal actions to counter the backlash, and the Constitutional Court responded to their petitions, ensuring the implementation of its decision, and also preserving its institutional standing vis-à-vis other state powers. In the first place, the Court rejected several actions of nullity presented by the Inspector General against ruling C-355/2006. In T-388/2009, for example, the

Office of the Inspector General demanded the nullity of the Court's decision on grounds of procedural failures. This was the first time that an Inspector General presented a demand for nullity against a decision by the Constitutional Court protecting rights (Parra 2010: 41). 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 filed on September 21, 2011, by Women's Link and signed by 1,201 Colombian women. In the writ, they denounced the Inspector General as well as two other officials from his office, including Myriam Hoyos, for having systematically transmitted false and misleading information regarding women's reproductive rights, violating in this way their right to receive accurate and high-quality information. The *tutela* was filed before Bogota's section of the Judicial Council, and it was rejected in the first and second instances. The Constitutional Court decided to consider it on appeal. In ruling 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. The Court ordered the Inspector General and the other two officials to rectify the information they had disseminated. The Inspector General complied with the Court's decision -had he not done so, he could have been condemned for contempt (Tovar, interview 2013). This is considered a highly relevant 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).

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 one since 2006, in that it was the only abortion rights decision by the Court sitting in full (*Sala Plena*). 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).

The Court ruled in 2018 in the context of the ascension of right-wing actors to the national government. Ivan Duque, from the *Uribista* Centro Democrático party, won the presidential elections in May that year, after a fierce struggle over the ratification of the Peace Agreement for the termination of the conflict between the Colombian government and the FARC (Revolutionary Armed Forces of Colombia), at the plebiscite of October 2016. The mobilization against the peace process is considered as a watershed (Martínez, interview 2019). It showed the increasing political presence of neo-Pentecostal churches (Mazo, interview 2019) as well as the centrality of anti-gender and anti-abortion positions in the more general political contest. Conservative forces led by ex-President Uribe mobilized neo-Pentecostal constituencies to vote "No" on the plebiscite, on grounds that the text of the Peace Agreement promoted gender ideology and abortion (see Botero 2017; Gil 2020). On that occasion, there was a strategic use of the gender issue by these sectors to mobilize religious constituencies, and there was a disinformation campaign, claiming that the Agreement said things that were not in the text (Ardila, interview 2019). The political victory of rightist sectors at the plebiscite paved the way for their victory in the 2018 elections, and for the consolidation of a conservative anti-gender coalition in Congress. This coalition includes parties with a clear religious affiliation, as well as conservative politicians from different parties opposed to so-called gender ideology.

Together, this group constitutes a majority in both legislative chambers (Gil 2020: 56, 64). The political opposition to sexual and reproductive rights is led by the party Centro Democrático (Ardila, interview 2019; Martínez, interview 2019), but they form a coalition with the traditional *Conservador* party, as well as with neo-Pentecostal parties, most prominently MIRA (*Movimiento Independiente de Revolución Absoluta*) founded in 2000, and Colombia Justa Libres, created in 2017 (Mazo, interview 2019). In this context, the Constitutional Court continues to be trusted by feminist activists as an institutional venue that can guarantee the implementation of abortion rights and deter conservative reactions in this field (Ardila, interview 2019).

V. Influencing the legislative process at the subnational level: Mexico

In México, the main form of backlash against abortion rights has taken place in state legislatures. In 2007, Mexico City's Legislative Assembly legalized first-trimester abortion, which placed the City at the vanguard of abortion rights in Latin America. The reform was challenged before the Supreme Court by the Federal Prosecutor's Office (PGR) and the President of the National Human Rights Commission (CNDH). In 2008, the Court approved the new law. This triggered a counter-reform process in Mexican states: since 2008, seventeen have modified their constitutions to include the right to life from conception. In 2011, the Supreme Court also validated these changes. As a result of the backlash process, these local constitutions—as well as the constitution of the state of Chihuahua, since 1994—now contain a similar provision that declares the protection of life from the moment of fertilization.

Notably, the constitutional reforms have not produced changes in the states' criminal codes, all of which contain exceptions to the criminalization of abortion—including a rape exception that is common to all states. Moreover, although the counter-reforms were meant to deter the occurrence of reforms similar to Mexico City's in other places (Mejía, interview 2017), in September 25, 2019, the Legislative Assembly of the state of Oaxaca legalized first-trimester abortion. Oaxaca, whose constitution is among those that enshrine the right to life from conception, thus became the second jurisdiction in the country to legalize abortion. Still, the legislative counter-reforms have had a negative impact against women's rights and liberties at the state level. Among their chief consequences are the creation of uncertainty regarding the legal status of abortion (Mejía, interview 2017; Díaz de León, interview 2020), as well as further obstacles to women's access to reproductive health, and the prosecution of women who decide to terminate their pregnancies or suffer spontaneous abortions (Tamés and Andión 2012: 6).

The reaction of conservative groups to the process of abortion law reform in Mexico City in 2007 was of vast proportions. For example, the Catholic hierarchy threatened any person promoting the bill, and in particular the deputies who voted for it, with summary ex-communication (Lamas and Bissell 2000: 20). However, after the Supreme Court decision in 2008, a truly coordinated strategy against the reform developed. The constitutional challenge against Mexico City's law nationalized the abortion discussion. According to an active participant in this process, the fact that the abortion question reached the Supreme Court, gave this issue a national platform that it would not have had, had it remained only as a legislative decision in Mexico City (Ortiz Millán, interview 2011). In the same sense, it was observed that many sectors of the country had been unaware of the debate in Mexico City, mostly because there was a

favorable majority at the City's Legislative Assembly and there was no need for massive feminist mobilizations, but when the issue reached the Supreme Court, it became a national debate (Cruz Parcerro, interview 2011).

However, this does not mean that the Supreme Court as such triggered backlash. The conservative movement was established in Mexico long before Mexico City's reform. The largest anti-abortion organization working in Mexico at that time was the National Pro-Life Committee, *Provida*, which was composed of more than 140 organizations (González Ruiz 2005: 71). The countermovement had significant resources, mainly from Human Life International (González Ruiz 2005), and increasingly from prominent Mexican business actors. The daughters of Lorenzo Servitje (Bimbo Group) and the daughter of Carlos Slim have reportedly financed several conservative campaigns. More recently, and in line with similar developments throughout Latin America, there has been a growing influence of Evangelic churches in Mexico's political sphere, and the countermovement against sexual and reproductive rights in the country has joined the crusade against so-called gender ideology, mostly through the formation of the National Front for the Family (*Frente Nacional por la Familia*). This umbrella organization was created in 2016 by more than 1000 Catholic and neo-Pentecostal churches, organizations and political actors. At present, this is the main anti-gender and anti-abortion coalition in the country (Romero, interview 2019; Moneta, interview 2019).

A core purpose of conservative mobilization in Mexico since the 1990s had been the introduction of the Vatican sponsored phrasing regarding the right to life into state and federal constitutions and laws. Since 1995, *Provida* was advised by Human Life International in its attempt to introduce constitutional reforms that incorporated this provision in Chihuahua, Nuevo León, Guanajuato, and Jalisco, states that were governed by the Catholic National Action Party, PAN (Lamas 2003: 97). For many years, these attempts failed, except in Chihuahua in 1994 (González Ruiz 2005). However, the PAN continued to pursue bills on this issue in legislative debates at the state-level (Lamas 2003: 98).

The political and legal opportunities in the aftermath of Mexico City's reform contribute to explain the success of this conservative project in effecting counter-reforms in state constitutions since 2008. Mexico is the only Latin American country where civil and criminal codes are determined by each of the 31 states and Mexico City, and thus, it is the only country in the region where abortion laws can be enacted at the local level (Htun 2003: 10). The location of abortion policy in Mexico was favorable both to the feminist movement in Mexico City, where there was a progressive government since 1997, and to the countermovement at the state-level, as it allowed Catholic conservative forces to influence regional 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 are much heightened, and political majorities for and against abortion rights would have probably been much more difficult to reach.

The political opportunity in the states was favorable to conservative claims. Three main factors contribute to explaining the backlash process. In the first place, although formal church-state relations are a national-level variable, regulated by the Constitution and national laws, which express the long Mexican tradition of secularity and State-Church separation, there exist subnational differences in terms of informal rules and de-facto influence of the Catholic Church over local politics. The influence of the Church is

much stronger at the state-level than in Mexico City or at the national level (Moneta, interview 2019). Conservative religious actors were able to influence legal change in the states through their influence as a de-facto power over governors and local legislators (Mejía, interview 2017; Moneta, interview 2019; Romero, interview 2019). Secondly, at the state-level there is less visibility and accountability mechanisms. By contrast to the process in Mexico City, where there was an intense legislative and public discussion, the counter-reforms were passed without public or legislative debate (Lamas, interview 2011).

Third, national electoral incentives and politician's search of support by the Catholic Church at the local level help explain the political incentives for the backlash process. The counter-reforms were promoted by conservative subnational governments headed by PAN, but they would not have been passed by local legislatures without support from the PRI (Institutional Revolutionary Party). The PRI is a historically anticlerical party, which had developed progressive policies in the field of reproductive health. At the time of the reforms the party was led by declared-feminist Beatriz Paredes. So, the party's position in this process was surprising to activists and observers (Lamas, interview 2011). After the first counter-reforms took place, feminist organizations demanded that national authorities of political parties, in particular Paredes, stopped the backlash process. However, Paredes only addressed her party on this issue through a letter presented at the PRI annual meeting in 2010, when the bulk of counter-reforms had already been passed (Beltrán and Díaz de León, interview 2011). The explanation given by relevant actors in this process is that PRI made pacts with the Catholic hierarchy, seeking their support for the presidential election in 2012 (Beltrán and Díaz de León, interview 2011; Ortiz-Millán, interview 2011). At the time of the counter-reforms, PRI's main concern was to regain its hegemony at the national level, which it had lost in 2000 for the first time after governing the country for seven decades. In that pre-electoral context, the support of the Church at the local level was fundamental.

A seemingly puzzling aspect of the process of reform and counter-reform in Mexico is that the Supreme Court upheld both types of legal change, in a short time-lapse and without significant changes in the Court's composition. The institutional rules that shape judicial review in Mexico contributed to the configuration of a favorable legal opportunity for counter-reforms, despite the presence of a favorable majority at the Court for the expansion of abortion rights. The rules governing actions of unconstitutionality require a qualified majority of 8 out of 11 Justices to declare unconstitutional a law sanctioned by federal or state legislatures (National Constitution, art. 105). In the case of subnational laws, this requirement favors a strong form of federalism. This institutional feature helps explain why, while a majority of Justices at the Court voted consistently in favor of the legalization of abortion in Mexico City in 2008 (eight out of eleven Justices voted in favor of the new law),⁹ and against the counter-reforms in 2011 (seven out of eleven Justices voted against their constitutionality),¹⁰ the resulting Court decisions were favorable to both types of subnational reforms. In fact, given the super-majority rule, a significant majority fell short by one vote of rejecting the counter-reforms, and the decision of four justices to leave them standing ultimately prevailed.

⁹ AI 146/2007 and *Acumulada* 147/2007.

¹⁰ AI 11/2009 and AI 62/2009.

After the cycle of abortion law reform and counter-reform, in which abstract actions of unconstitutionality had a prominent role, feminist organizations started pursuing strategic litigation on concrete cases, through *amparo* claims (Díaz de León, interview 2019; Méndez, interview 2019; Romero, interview 2019). These actions had as a result important decisions by the Court, in 2018 and 2019, regarding the interpretation of subnational abortion laws in cases of rape and risk to the woman's health.¹¹ As explained by a key litigant lawyer in this process, these claims aimed at obtaining the same type of protection throughout the country, on grounds of constitutional rights (Méndez: interview 2019).

Conclusions

Through the analysis of the main forms of counter-mobilization and counter-reform in the field of abortion law in four Latin American countries, this study intended to question in empirical terms the applicability of the judicial backlash thesis as a lens through which to read the abortion rights constitutional controversies in Latin America. In contrast to the judicial backlash thesis, which attributes a causal role to courts in provoking conservative reactions when adjudicating on so-called hard cases, this study showed that distinct conditions in different countries have shaped the ways the anti-abortion countermovements have developed. To understand these, we need to look at the countermovement resources and the prevailing legal and political opportunity structures that are linked to these forms of mobilization.

The study showed that, in some instances, the opposition to reproductive rights by religious fundamentalism in the region, and its organization for political and legal activism, is prior to courts' intervention in the field of abortion rights. In Argentina, conservatives were indeed the first ones to use the courts, and the only ones to have appealed to the National Supreme Court through strategic litigation, in several opportunities. Secondly, drawing on the Colombian case, it showed that constitutional courts can play an active role in countering backlash processes, which is usually overlooked in the examination of the use of courts for policy change. Finally, the four cases show an increasing centrality of sexual and reproductive rights, and abortion in particular, in the region's contemporary political dispute, with a growing presence of Neo-Pentecostal actors in the opposition to sexual and reproductive rights, as well as an alliance between Evangelical and Catholic sectors in their anti-gender struggle. In this regard, the study shows that the abortion issue has been strategically used in the process of polarization linked to the ascension of right-wing forces to power in cases such as Brazil and Colombia. In this context, given among other aspects the dimension of the conservative offensive against progressive politics, it appears as an out-of-scale attribution to blame the use of a particular strategy and institutional venue, such as litigation and courts, to provoke backlash.

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¹¹ In 2018, the Court established that access to abortion services in cases of rape should be granted without a police attestation or an authorization by the Public Ministry (*Amparo en Revisión* 601/2017 and *Amparo en Revisión* 1170/2017). In 2019, the Court established that abortion should be considered legal when the woman's health is at risk, on grounds of the constitutional right to health (*Amparo en Revisión* 1388/2015).

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