The Latin American Casebook

"Abortion" junto a Paola Bergallo. En Gargarella, R. y Bertemeu, J. (edits.) *The Latin American Casebook: Courts, Constitutions, and Rights.* Cap. 3. Farnham, Ashgate, 2016.

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Chapter 3

Abortion

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Introduction

Latin American estimates of unsafe abortions and of deaths associated to them are still shameful.[1] Restrictive criminal regulations partially account for such estimates. Even if the voluntary termination of a pregnancy is a safe procedure when conducted legally, by 2015 the criminal laws of the region continue to push women to bear the risks of backstreet abortions. For most of the twentieth century, these restrictive abortion laws and policies have remained untouched. Only recently have some changes begun to take place, especially in the context of important developments in the expansion of constitutional and human rights arguments. Against such a backdrop, this chapter offers an overview of the constitutionalization of abortion disputes throughout Latin America. With that goal in mind, this chapter surveys the main decisions adopted by the high courts of Argentina, Bolivia, Colombia, Costa Rica, El Salvador, and Mexico in the last decade.[2]

* Translated into English by Paula Arturo and revised by the authors.

[1] Elisabeth Ahman and Iqbal H. Shah, *New estimates and trends regarding unsafe abortion mortality*, 115/2 INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS, 121–6 (2011); UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008 (2011).

[2] In 2012, the Supreme Court of Brazil also issued an important judgment on abortion in a claim involving the diagnosis of anencephaly. However, in its decision, issued in 2012, the Supreme Court of Brazil avoided judging the claim as a challenge to the criminal regulation on abortion and instead ruled on the case as if it revolved around the induction of labor. Given its avoidance of the abortion debate, we have decided to exclude the Brazilian decision from this chapter. See Luis Roberto Barroso, *Bringing Abortion into the Brazilian Legal Debate*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES (Rebecca Cook, Joanna N. Erdman, and Bernard M. Dickens eds, 2014).

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Starting in the early 2000s, supreme and constitutional courts of different Latin American countries have had the opportunity to assess the constitutionality of criminal laws regulating abortion. The new judgments reflect a gradual shift in the framing of constitutional discussions about reproductive rights. Although Latin American judges have adopted more conservative positions than their counterparts in the Global North, the new decisions do show an increasing maturity in the approach of one of the most sensitive issues for the Catholic cultures of the continent.

To begin with, the constitutionalization of abortion has implied the establishment of limits on the extent to which congresses have been deemed authorized to use criminal law to restrict abortions. Although criminal law continues to be the preferred tool for the regulation of abortion, its use has been constrained through limits hard to imagine in the past. As a result of these limits, in the countries studied through this chapter, abortion arguments no longer revolve around the constitutional and categorical mandate of totally criminalizing abortion, a mandate that used to be interpreted as a default rule in most of the region's past debates. Instead, current conversations on the use of criminal law have been reoriented towards the definition of situations in which punishment is waived, or situations in which abortions are considered legal under what is known as a model of indications. Moreover, most of the region's high courts have understood that constitutional and human rights treaty provisions mandate the adoption of, at least, a model of indications that should contain certain legal grounds for abortion.

Secondly, another trait in the constitutionalization of the region's legal discourse on abortion stems from decisions such as those from Argentina or Colombia, where the constitutions have been found to require not a mere model of formal requirements, but rather a regulatory framework that effectively ensures access to and provision of legal abortion services. In these decisions, Latin American courts have made original contributions regarding the institutional context of the supply of abortions services, as well as the individual duties of healthcare professionals and public officials for ensuring the right to a legal abortion. Finally, the

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constitutionalization of the criminal treatment of abortion has also yielded more complex judicial arguments about the constitutional status of unborn life and the duty to balance it against increasingly elaborate conceptions of dignity, autonomy, and equality between the sexes.

The rest of the chapter discusses these features of the constitutionalization of abortion debate across Latin America. The first section presents a brief overview of the evolution of the limits established by the courts with regard to the use of the criminal law in regulating abortion. In order to illustrate the development of increasing demands for redesigning and implementing current criminal rules in several Latin American countries, this first part of the text systematizes judgments from the courts of Argentina,[3] Bolivia,[4] Colombia,[5] Costa Rica,[6] El Salvador,[7] and Mexico.[8] The second segment of the chapter focuses on the diverse characterizations of the duty to protect unborn life adopted in judicial framings of the abortion issue. The third part underscores the diverse uses of dignity, autonomy, and equality applied by the courts in the context of abortion rights arguments. The chapter concludes with a brief review of the main changes experienced in the constitutional framing of abortion across the region.

From the Categorical Mandate to Criminalize Abortion to the Identification of the Institutional Dimension of Rights

By 2004, 10 years after the agreements reached in Cairo, few constitutional and supreme courts in Latin America had had the chance of ruling on the criminalization of abortion. Moreover, in the rare instances in which judges faced abortion claims, courts issued highly restrictive judgments, following an extended conservative public consensus on the practice. In Mexico, for example, in a

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[3] Supreme Court of Argentina, case of "F.A.L. s/ Medida autosatisfactiva," March 12, 2012.

[4] Constitutional Plurinational Court of Bolivia, Decision 0206/2014, February 5, 2014.

[5] Constitutional Court of Colombia, Decision C-355/06, May 10, 2006.

[6] Supreme Court of Costa Rica, Constitutional Chamber, Decision 02792-04, March 17, 2004.

[7] Supreme Court of El Salvador, Decision 18/98, November 20, 2007.

[8] Supreme Court of Mexico, Decisions 146/2007 and 147/2007, August 28, 2008.

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decision issued by the Supreme Court in 2002, the judges failed to agree about the legal status of the indications for abortion introduced in 2000 after a reform of the Federal District's criminal code. In that case, the judges were not able to reach a consensus on the status of the indications. The court could not agree on whether the indications for abortion were instances that fell under the *causas de justificación* (justifications), in which case abortions were to be considered legal and thus legally provided for.[9]

A similar situation happened in Colombia, a country that in 1980 eliminated the provisions of the criminal code where abortion was permitted. In spite of its progressive reputation, when the constitutionality of this total ban on abortion was disputed for the case of rape, the Constitutional Court of Colombia was not able to reach an agreement on the constitutional status of certain grounds for abortion.[10] In the case of Argentina, the Supreme Court had dodged the debate on the permission of abortion in cases of anencephalic fetuses. In a lawsuit brought to the court in 2001, the judges authorized the termination of a pregnancy, arguing that, given the delay in the court proceedings, the termination was not an abortion but an "induction of labor."[11] Lastly, another group of courts, headed by the Constitutional Chamber of the Supreme Court of Costa Rica in 2000 and then followed by the highest courts of Argentina and Ecuador, also considered unconstitutional a set of allegedly "abortive" practices, such as the manipulation of embryos in the deployment of

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[9] Francisca Pou Jiménez, *El aborto en México: el debate en la Suprema Corte sobre la normativa del Distrito Federal*, 5 ANUARIO DE DERECHOS HUMANOS, 137–52 (2009).

[10] Constitutional Court of Colombia, Decision C-133/94, March 17, 1994; Decision C-033/97, January 30, 1997; and Decision C-647/01, June 20, 2001. LUISA CABAL, MÓNICA ROA, AND JULIETA LEMAITRE, CUERPO Y DERECHO: LEGISLACIÓN Y JURISPRUDENCIA EN AMÉRICA LATINA (2001).

[11] Rebecca Cook, Martín Hevia, Joanna N. Erdman, and Bernard M. Dickens, *Prenatal management of anencephaly*, 102/3 INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS, 304–8 (2008).

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assisted human reproduction techniques or the authorization to distribute a particular brand of emergency contraception (the "morning after pill").[12]

In these early judgments, Latin American judges were obsessed with the scope of the constitutional mandate to protect the human person, the definition of the right to life of the unborn, and the alleged duty to protect it after conception. Most of these early decisions on abortion revolved around the parameters for defining the beginning of life. In the decisions of the Costa Rican and Argentinian supreme courts, after recognizing the right to life of the embryo, a right that existed, for the courts, even before implantation, the judgments revealed a categorical conception regarding an absolute mandate to protect life after conception. Moreover, in the rulings of the courts of these countries, references included citation of dubious scientific knowledge and junk science, as well as quotations from papal encyclicals. The judges of both the Argentinian and the Costa Rican supreme courts understood that Article 4.1 of the American Convention on Human Rights, and other rules that explicitly or implicitly protected the right to life in the constitutions, mandated the protection of the right to life through rules.[13] As a result, any balancing against other rights or interests in conflict had to be dismissed. At the same time, references to sexual and reproductive rights or gender-based reproductive injustices were completely absent from the judgments.

Starting in 2004, this categorical and simple-minded framing was to experience some changes, especially in the context of a new set of cases discussing the constitutionality of various

[12] Between 2000 and 2010, several high courts' decisions addressed the constitutionality of the authorization to sell and distribute emergency contraception across Latin America. The Argentinian, Chilean, and Peruvian supreme courts are among the courts that adopted the most restrictive approach to the issue. Maria Alejandra Cardenas, *Banning Emergency Contraception in Latin America: Constitutional Courts Granting an Absolute Right to Life to the Zygote*, 6/3 HOUMBOLT AMERICAN COMPARATIVE LAW REVIEW (2009).

[13] Verónica Undurraga, *Proportionality in the Constitutional Review of Abortion Law*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES (Rebecca Cook, Joanna N. Erdman, and Bernard M. Dickens eds, 2014).

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criminal laws on abortion. As of that year, the high courts of Costa Rica, Colombia, El Salvador, Mexico, Argentina, and Bolivia—in that order—began to adopt approaches that took into account the collision of values emerging from the clash between the right to prenatal life and the rights of women. Courts began to appeal to proportionality tests or the need to balance interests and rights and thus they became the starting point of the new constitutional framing of abortion in several countries. From the decisions in countries with more restrictive rules, such as El Salvador, to those of the progressive Constitutional Court of Colombia that applied a more rigorous proportionality test, all courts were encouraged to apply a balancing test to assess the constitutionality of the various models of criminal regulation of abortion that had been in effect since 2004. Although, for over three decades, courts in North America and Europe had assumed the existence of a conflict of interests and rights and the need to apply a balancing test or proportionality analysis, it was only in 2004 that Latin American judges began to apply such a balancing approach to the conflict regarding the rights or interests posed by the regulation of abortion.

To these very precarious beginnings two other traits were added to the courts' framing of the constitutional debate over abortion in the new generation of decisions which will be studied in the following pages. On the one hand, in the decisions issued by the six courts since 2004 and considered in this chapter, the judges agreed upon the utility of the criminal regulation as a tool to protect unborn life, and they did so without questioning whether the criminal law was an effective tool to achieve that goal. Moreover, the judges also agreed that it was the duty of democratic legislators to define the extent of the use of the criminal law towards abortion. Therefore, in the six judgments analyzed in the following pages, Latin American courts focused, first, on the definition of the scope of the mandate to protect unborn life, in order to establish, later, what range of discretion was awarded by the constitutions to lawmakers for choosing the alternative employment of criminal punishment over abortion.

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These shared premises yielded different results in the arguments of the Latin American courts studied in this chapter.[14] This was in part a consequence of the fact that the cases brought to the courts confronted different regulatory frameworks regarding abortion. In Colombia and El Salvador, for instance, the litigants were requesting the adoption of a model of indications for abortion, given the fact that both countries had abandoned such a style of regulation to adopt a total ban on abortion (in the case of Colombia in the late 1970s, and in the case of El Salvador at the end of the 1990s).[15] In other countries, such as Argentina, Bolivia, and Costa Rica, judges confronted longstanding rules which established a model of indications for abortion that had been operating ambiguously, either as *excusas absolutorias* (acquittals) or *causas de justificación*, and which in practice had led to the total prohibition of abortion.[16] That is, in these countries, the courts were facing a model of indications "on the books," that "in practice" operated as a model of total criminalization. Finally, the Supreme Court of Mexico had to deal with a case in which a conservative actor was challenging the constitutionality of the trimester regulation, approved in 2007 by the legislature of Mexico City, which authorized voluntary abortions performed before the twelfth week.

Yet the cases studied in the following pages differ not only in the style and extent of the criminal regulations being challenged, but also in the diversity of the interests represented by the

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[14] These three shared basic aspects in the approach of the debate included: a) the need to apply a balancing or proportionality test to the assessment of the constitutionality of abortion; b) the assumption of the usefulness of criminal law; and c) the agreement about the central role of the democratic legislator in determining the scope of the use of criminal law over abortion.

[15] In Colombia, grounds for abortion had been removed from the criminal code in 1979. In El Salvador, in 1997, the criminal code was reformed and the new norm and code did not contain the grounds in the previous code that dated back to 1973.

[16] Paola Bergallo, *The Struggle Against Informal Rules on Abortion*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES (Rebecca Cook, Joanna N. Erdman, and Bernard M. Dickens eds, 2014).

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stakeholders challenging the constitutionality of the abortion laws at stake. While some cases involved women objecting to restrictive rules, as in the claims filed in Colombia, El Salvador, Argentina, and Bolivia, on other occasions, such as Mexico City's, the litigation was confronting what was perceived as too liberal regulations.

The increase in the number of high courts' decisions on abortion studied in this chapter clearly reflects the significant activation of the confrontation about abortion rights experienced in the last decade across Latin America. Such an increase also reveals the development of civic organizations and their interest in using courts as a battlefield in which to fight for rights or resist changes, both from liberal and conservative perspectives.[17] In that context of changes, the courts studied here reached different conclusions regarding the constitutionality of abortion regulations. Decisions contrasted fundamentally on two levels. On one level, courts differed in their interpretation of the extent to which they understood that the legislative branches were mandated or authorized by their constitutions to resort to the criminalization of abortion. On another level, courts also disagreed in their understanding of the constitutional mandate to reduce uncertainties and to warrant access to the type of abortions considered legal under the model of indications.

In the variety of judicial responses given by the courts in these two dimensions of the judicial debate over abortion, it is also possible to observe how women and their rights have finally become key visible actors. This new presence of women in the judicial consideration of the abortion controversy has oscillated, however, between the recognition of their mere presence in the conflict to the understanding that visibility is only the first step on the road to guaranteeing women's rights, which will require important commitments in order to achieve even a minimum degree of implementation. The following paragraphs, therefore, trace the stages of this transformation process regarding the constitutional framing of abortion and exhibit the move from the increased

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[17] Camila Gianella-Malca and Siri Gloppen, *Access denied. Abortion rights in Latin America*, 13/1 CHR. MICHELSEN INSTITUTE BRIEF (2014).

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visibility of women towards the recognition of the importance of guaranteeing the supply of abortion services while fighting uncertain regulations and barriers to access.

A Minimum Demand: Women Enter the Scene, but Guaranteeing their Rights Can Wait

The constitution establishes that criminal law will not be used regarding certain types of abortions, but it does not provide a specific body of rules to provide legal certainty to women seeking abortions under those exceptions. This decision summarizes the views expressed by the supreme courts of Costa Rica and El Salvador while evaluating the constitutionality of criminal abortion laws in their judgments from 2004 and 2007 respectively. Those judgments were subscribed to by judges willing to accept the existence of a conflict between women's rights and the rights of the fetuses, but they were the results of cautious views about the role of judges in establishing constitutional limits on legislative discretion in the use of criminal law on abortion.

In its 2004 decision, the Constitutional Panel of the Supreme Court of Costa Rica undertook the abstract review of the constitutionality of standards decriminalizing abortion in a case where the health of the woman was at risk. The case was brought to the court by a conservative litigant who objected to the constitutionality of the unequal treatment granted to born and unborn life in a series of private and criminal law rules. With quotes from a judgment of the same chamber that, in 2000, had found assisted reproduction techniques unconstitutional for violating the right to life of embryos, the plaintiff demanded the repeal of the indications for abortion in cases of rape or where the life or health of a woman was compromised.

The Costa Rican judges dismissed the claim and found that:

> in such a case -the concrete variables which the Chamber cannot and should not consider in the abstract, but that should be verify and reported by competent judicial authorities—it is neither misguided nor unconstitutional that the legislature has refrained from punishing abortion in cases of risk to the woman's

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> health, if she is going to be seriously injured by the pregnancy to the degree of seriously affecting her dignity as a human being and ultimately her life.[18]

As the foregoing paragraph makes clear, the Costa Rican justices were willing to accept the constitutional status of the model of indications established by the criminal code. Their acknowledgment of the health risk and the dignity of women is a recognition of the role of women when dealing with the abortion issue. However, the judges held that authorizing an abortion had to be done by a competent court on a case-by-case basis.

A few years later, the Constitutional Chamber of the Supreme Court of El Salvador had to evaluate an abstract review request filed by two litigants challenging the constitutionality of the lack of exceptions to the criminalization of abortion in the country's new criminal code, approved in 1997. In its decision from November 2007, the Supreme Court of El Salvador dismissed the petition. For these judges, "the legislature has chosen not to establish a model of indications under the belief that the cases that could arise under each of such indications could be treated with the general excuses provided in Article 27 of the criminal code."[19] The generic definition of the circumstances authorizing the state of necessity and the general excuses for criminalization were sufficient to satisfy the constitutional duty to balance the right to life of unborn persons against the rights of women in the specific situations identified by the plaintiffs in the case.

According to the Salvadoran court, the absence of express grounds authorizing abortion in certain circumstances did not constitute an unconstitutional omission. The provisions of Article 27 of the Salvadoran criminal code contained "exemptions from illegality, *causas de justificación*, [justifications] and exemptions from the personal liability of the perpetrator, *causales de inculpabilidad*, [exculpation cause]."[20] The legislature did not fully criminalize or absolutely

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[18] Supreme Court of Costa Rica, Constitutional Chamber, Decision 02792-04, March 17, 2004, point VII.

[19] Supreme Court of Justice of El Salvador, Constitutional Chamber, Decision 18/98, November 20, 2007, Point II, paragraph 3.

[20] Ibid., Point II, paragraph 4.

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decriminalize abortion, but the legislature was not obligated to provide clarification on the status of cases in which abortion was justified or exempted from punishment. Moreover, as the "general provisions of the criminal law" provided both unspecific grounds of justification as well as exceptions to the criminalization of abortion, the judges did not see any problem in the uncertainty that stemmed from the fact that the legality of supplying abortions for the cases of the indications was not clarified in the legislation.

In this respect it should be taken into account that the Salvadoran judges recognized that there was a partial failure "to regulate beforehand and within a criminal process"[21] how to face the controversy over the rights of the woman and the unborn child. In this regard, the court found that

> … the legislature is constitutionally obligated to establish, within legal standards, which state agency has to afford jurisdiction to hear and decide on the situation, the requirements laid out and the conditions under which it will be decided if certain grounds are admissible or not, prior to the criminal prosecution of the conflict. Relying solely on the criminal system is another irresponsibility of a State, which focuses only on the effects of social problems and not their causes.[22]

In this 2007 decision, the Salvadoran Constitutional Chamber showed a minor concern over the need to regulate how to decide when non-punishable abortions should be allowed for. A few years later, however, the judges gave up even this very basic concern. In fact, when, in 2013, the same chamber faced the case of *Beatriz*, where a woman was requesting access to an abortion due to the life-threatening risk posed by an anencephalic fetus, the judges overtly failed to consider the

[21] Ibid., Point VI, paragraph 3.

[22] Ibid. Point VI, paragraph 8. See also: "That is why the legislature is free to consider the possibility of regulating, within the Salvadoran legal system, whether a clash between the rights of the mother and the unborn child is resolved prior to any action detrimental to the rights of the latter and is not subject to prosecution in criminal trial; that is, legislation that establishes that the alleged conflict can be recognized and adjudicated outside of criminal proceedings and without consummating the action that will affect one or more rights" (Ibid., Point VI, paragraph 10).

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claimant's allegations about the uncertainties caused by the lack of medical guidelines regulating cases such as hers, and, thus, denied the abortion in question.

The Road towards a Model of Indications Implemented without Prior Judicial Authorization

The constitution demands or permits the regulation of abortion through a model of indications. The indications derive from the understanding that abortions are justified in certain circumstances and, therefore, permitted abortions are authorized by law and do not require prior judicial authorization. The courts of Colombia, Argentina, and Bolivia arrived at this conclusion in a new generation of abortion controversies decided after 2006. In these very moderate and conservative set of judgments the courts continued to show their main concern about the protection of prenatal life. At the same time, however, women's rights began to gradually occupy some room in the new decisions, a place they had totally lacked in previous judgments on abortion.

In 1979, Colombia was the first country in the region to eliminate the indications for abortion provided in its criminal code. Twenty-five years later and, despite the widespread tolerance for the practice of abortion in the country,[23] "on the books," Colombian law continued to deny explicit exceptions to the criminalization of abortion. Against that legal backdrop, and after having rejected several lawsuits filed in the nineties, the Constitutional Court issued in 2006 its renowned ruling C-355/06.[24] In the judgment, the court recognized an objective interest in the protection of fetal life under the 1991 constitution. However, the court also understood the need to perform a proportionality test that took into consideration the interest in protecting unborn life and the various women's rights that could clash with it, and that came from considerations of equality, autonomy and dignity. Unlike the Salvadoran judges, the Colombian court concluded that the legislature's margin of appreciation regarding the use of criminal law to regulate abortion required

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[23] ISABEL JARAMILLO SIERRA AND TATIANA ALFONSO SIERRA, MUJERES, CORTES Y MEDIOS: LA REFORMA JUDICIAL DEL ABORTO (2008).

[24] Constitutional Court of Colombia, Decision C-355/06, May 10, 2006.

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providing at least four specific indications for abortion: when there was a risk to the woman's life, or a risk to her physical or mental health, in the case of rape, and when there were malformations "incompatible with life." The judges accepted the need for balancing and applied a test of proportionality that highlighted the obligation to provide grounds of justification for abortion, i.e. situations where the behavior of women and other participants would not be unlawful and therefore would not require prior judicial authorization. In addition, in defining these grounds, the court provided certain minimum demands for the regulation of the supply of abortions in the cases of the indications. The court specified, for instance, that in the case of risk to the mental or physical health of the woman the risk should be confirmed by only one doctor rather than by a committee. Other requirements included the need to previously report the rape in order to access an abortion for that cause, and still others concerned the regulation of conscientious objectors.

The Constitutional Court recognized the conflict between an objective interest in protecting fetal life and the various rights of women, accepted the need for a proportionality test, and excluded from the legislative discretion a regulation model that could totally ban abortions.[25] The court thus laid out the foundations of a constitutional framing that judges from Argentina and Bolivia were to expand and develop in the course of the following decade.

In the context of *F.A.L.*,[26] a lawsuit decided in March 2012, the Supreme Court of Argentina, for the first time since 1922, considered the constitutionality of the model of indications established in the criminal code. In that case, a teenager who had been raped by her mother's husband approached a court in the province of Chubut seeking authorization to terminate her pregnancy. The case was decided in 2010 in her favor by the superior court of the province, but the General Public Defender of Minors appealed the decision before the national Supreme Court,

[25] Verónica Undurraga and Rebecca Cook, *Constitutional Incorporation of International and Comparative Human Rights Law: the Colombian Court Decision C-355/2006*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL RIGHTS (Susan Hoffman Williams ed., 2009).

[26] Supreme Court of Argentina, case of "F.A.L. s/ medida autosatisfactiva," March 13, 2012 (F. 259. XLVI).

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arguing that the judgment violated the right to life that the constitution and human rights treaties protected after conception.

After a detailed analysis of the constitutional and conventional rules in play, the Argentinian court concluded in *F.A.L.* that the rule of the criminal code that allowed abortion in the case of rape was constitutional and conventional. It was a regulatory option that democratic lawmakers had made within the boundaries of their discretion as defined by the constitution, which did not call for the total criminalization of abortion. Due to the debate that arose because of this "permission," the judges went on to state that all victims of rape, and not only those with a mental disability, could demand a legal abortion.

Unlike their Colombian counterparts, the Argentinian judges chose not to expressly address whether the indications for abortion provided in Article 86 of the criminal code were to be treated as causes of justification ("*causas de justificación*") or excuses ("*excusas absolutorias*"). However, other references and conclusions of the judgment suggest that their interpretation was that the indications should be considered causes of justification ("*causas de justificación*"), and, hence, the conduct of the women seeking the abortions and those performing them should be understood as legal. First, the judges emphasized that there was no need for prior judicial authorization in order to perform abortions requested by rape victims. Secondly, they expressly recognized a right to the abortions provided for in Article 86 of the criminal code and urged authorities in the health system to regulate and to ensure access to such legal abortions. Moreover, the Argentinian court clarified that the only requirement to be posed to rape victims as a precondition to accessing a legal abortion was the demand of an affidavit notifying the rape. In this point, the Argentinian court diverged from its Colombian counterpart, which had specifically requested that abortions in the case of rape be performed once evidence of their report had been provided.

The Constitutional Court of Bolivia considered a partially similar debate in 2014. In 2008, the constitution of the Plurinational State of Bolivia had incorporated several provisions

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recognizing the reproductive rights of women. Appealing to these constitutional innovations, Congresswoman Patricia Mansilla Martínez requested the Constitutional Court of Bolivia to adjust various articles of the criminal code which preceded the enactment of the new constitutional text. Congresswoman Mansilla Martínez argued, first, that the new constitution and the international human rights treaties signed by Bolivia demanded that abortion be regulated through a trimester law decriminalizing abortion before the twelfth week, for which it was also necessary to regulate "the conditions of the healthcare system and the health facilities where the abortions were to take place."[27] Secondly, the litigant requested the court to remove special requisites that had become a precondition in order to access to non-punishable abortions. She focused, in particular, on the practice of requesting prior judicial authorization to access decriminalized abortions, the need to begin proceedings against the alleged perpetrator in the case of rape, and the threat of punishment for those providing legal abortions. In their extensive judgment, the justices of the Constitutional Court understood that there was a duty to

> … assess whether the criminalization of abortion was an appropriate and necessary tool for protecting life and restoring the balance and harmony that supports the new paradigm of 'good living' (suma qamaña).[28]

After tracing the roots of the protection of prenatal life and the treatment of abortion in prior centuries, the court concluded that

> While it is true that the Supreme Norm guarantees the sexual and reproductive rights of all its citizens, the Article 66 of the ECC does not establish that reproductive rights include abortion; therefore, the exercise of sexual and reproductive rights does not imply a recognition of a right to have an abortion.[29]

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[27] Constitutional Plurinational Court of Bolivia, Decision 0206/2014, February 5, 2014, Point I.1.1, paragraph 17.

[28] Ibid., Point III.8.7, paragraph 6.

[29] Ibid., Point III.8.7, paragraph 7. The court also understood that: the performance of all types of abortions at any state of the embryo's development was not constitutionally permissible and the duty to comply with the constitutional protection of the right to life of an implanted embryo was a sufficient cause for the Legislative Body to resort to all kinds

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Ultimately, the court rejected the constitutional challenge arguing that the plurinational constitution required the legislature to also protect the fetus through criminal law before the twelfth week. In spite of their conclusion, the judges admitted the request to establish certain rules in order to guarantee access to legal abortions and concluded that a) no prior judicial authorization should be requested in order to provide a legal abortion, and b) no rape report could be demanded from victims seeking access to a legal abortion. In that sense, the justices found that:

> … the phrase 'provided that criminal proceedings are initiated' in the first paragraph of Article 266 of the Criminal Code and the phrase 'judicial authorization where applicable' in the last paragraph of that same Article are understood to constitute provisions that are incompatible with the rights to physical, psychological and sexual integrity, the rights not to be tortured, not to suffer cruel, inhumane, degrading or humiliating treatments, the right to physical health and the right to dignity with respect to the free development of personality and empowerment of women enshrined in Articles 15, 18 and 22 of the Constitution.[30]

The request for a previous judicial authorization in order to obtain a legal abortion and the demand that criminal proceedings began before performing an abortion to rape victims were construed by the Bolivian court as instances of torture and cruel treatment. The Bolivian judges were finally joining their Argentinian and Colombian peers in eliminating the prerequisites to implementing a model of indications for abortion that would begin to gradually imply the actual supply and accessibility of certain abortion services.

Individual and Institutional Duties Resulting from the Right to a Legal Abortion

of policies needed for their protection, policies that necessarily involve the use of criminal law in the later stages embryonic development.

Ibid., Point III.8.7, paragraph 21.

[30] Ibid., Point III.8.8, paragraph 10.

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The judgments discussed in the preceding article laid out the groundwork for a new interpretation of the prerequisites that, according to the courts, regulated abortion in Argentina, Bolivia, or Colombia.[31] Yet the judges also advanced a constitutional reading of abortion that would incorporate a number of central innovations to ensure the practical decriminalization of abortion on several grounds, innovations that show some of the more interesting and creative features of the recent Latin American case law on abortion. A comprehensive review of all the original considerations made in this regard would exceed the scope of this chapter. Therefore, the following paragraphs highlight three important contributions that evidence the courts' central concern regarding the implementation of their decisions.

A first interesting contribution by the Argentinian court was the identification of certain contextual dynamics that were hindering the actual supply of legal abortions. The judges clearly understood that the delay or lack of supply of abortion services in fact resulted in an "implicit total prohibition"[32] and, therefore, in a *contra legem* practice that restricted access to legal abortions. The court also reminded the healthcare professionals, as well as the national and provincial judicial actors, that the legality principle demanded that a practice which was not prohibited at a national level could not be restricted. At the same time, the judges recognized that, there was "a significant degree of misinformation" and a context of "general confusion"[33] regarding the requirements that the health system could demand in order to provide legal abortions. Such confusion revolved around issues like the need to require a judicial authorization, a requisite established nowhere in the applicable laws. In addition to these broader contextual references to the operation of the model of indications in action, the court also underscored that the illegal practice of denying non-

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[31] In the case of Colombia, the initial C-355/06 decision was supplemented by several other judgments where the Constitutional Court considered different barriers in the supply of legal abortions. In this regard, see Decisions T-988/07, T-209/08, T-946/08, T-388/09, T-585/10, T-636/11, and T-841/11.

[32] Supreme Court of Argentina, case of "F.A.L. s/ medida autosatisfactiva," March 13, 2012 (F. 259. XLVI).

[33] Ibid.

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punishable abortions was "encouraged by health professionals and validated by different judicial players"[34] who requested additional formalities to those established by law. The irregular practices generated by the imposition of these requirements, which were not stipulated by existing rules, and their potential to thwart the right of access to legal abortions, could be interpreted, according to the judges, as an act of institutional violence under the provisions of the "Law for the Integral Protection, Prevention, Punishment and Eradication of Violence against Women in Interpersonal Relationships."[35] For the judges, these practices also had the potential to expose the country to international liability given its duty to fight gender violence arising from different international human rights treaties. Moreover, the court also pointed out the risk of individual criminal, civil, and administrative liabilities that could result from the illegal obstruction to the health services requested by women seeking legal abortions.

A second type of innovation contained in the Argentinian and Colombian cases stems from the clarifications offered by the courts on the institutional responsibilities from different public offices in order to ensure access to legal abortions. In this sense, the Argentinian court emphasized: a) the duty to provide medical and sanitary conditions for the performance of legal abortions; b) the duty to implement and make operational hospital guidelines regulating the supply of those abortions; c) the duty to regulate the exercise of conscientious objection; and d) the duty to implement information campaigns.[36] More specifically, the Colombian court developed a detailed set of standards for regulating the exercise of conscientious objection by medical workers. According to the Constitutional Court:

> (i) Conscientious objection is a fundamental constitutional right that, as every right within a regulatory framework that is open to guaranteeing protection and fostering cultural diversity (article 1 and article 7 of the Constitution), cannot be

[34] Ibid.

[35] Argentinian Law 26,485.

[36] Supreme Court of Argentina, case of "F.A.L. s/ medida autosatisfactiva," March 13, 2012 (F. 259. XLVI).

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> exercised in an absolute fashion. (ii) The exercise of the fundamental constitutional right to conscientious objection is in the private sphere, by way of article 18, a very extensive protection that can only be limited in the event that its implementation interferes with the third parties' exercise of rights.[37]
>
> Conscientious objection is individual, not collective, or institutional, or judicial, or of public officials. Regarding the Voluntary Termination of Pregnancy, it can only be exercised by health professionals directly involved in the process.[38]
>
> Only medical personnel whose role involves direct participation in the intervention aimed at terminating the pregnancy can claim conscientious objection; thus, this is a nonexistent possibility for administrative staff, medical personnel who perform preparatory work only and medical personnel involved in the patient's recovery phase.[39]

Finally, a third type of innovative considerations consisted in underlining the different liabilities that could potentially arise from the lack of supply and access to legal abortions. As we mentioned earlier, the Argentinian court warned public officers and health professionals about potential professional, civil, administrative, and criminal liabilities to which they could be open by impeding access to legal abortions. The Colombian justices went even further when in concrete cases they applied fines for the obstruction of access to the abortions deemed constitutional under judgment C-355/06.

The Legislative Margin of Appreciation neither Demands nor Excludes a Trimester Model in the Regulation of Abortion.

Most of the abortion decisions discussed so far have dealt with regulatory frameworks adopting a model of indications where both the constitutional status of the regulation and its implementation were at stake. In deciding such claims, courts have moved slowly from the elementary recognition

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[37] Constitutional Court of Colombia, Decision T-388/09, May 28, 2009.

[38] Constitutional Court of Colombia, Decision C-355/06, May 10, 2006; Decision T-209/08, February 28, 2008; Decision T-388/09, May 28, 2009.

[39] Constitutional Court of Colombia, Decision T-388/09.

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of the constitutional status of the indications to the specification of certain regulatory and institutional duties required to increase access to legal abortions. Yet, at least in two tribunals, Latin American judges have also considered the margin that legislative bodies have to establish a periodical style of regulation, allowing for abortion on demand in the early stages of pregnancy.

In Decision C-355/06 the Colombian judges evaluated the existence of a constitutional duty to establish a trimester model and they concluded that the margin of legislative appreciation encompassed the capacity to provide for the decriminalization of abortion, authorizing abortion on demand for certain cases. However, the court also understood that this was one of the options available to legislators, who could choose between a model of trimester or indications, depending on their policy goals.[40]

In Mexico, judges also addressed this question, but they did so in the context of an abstract petition challenging the constitutionality ("unconstitutionality action") of the regulation of abortion in Mexico City. In 2007, Mexico City's legislators had amended the criminal code in order to incorporate a periodic regulation decriminalizing first-trimester abortions. The constitutionality of such rules had been immediately challenged in two cases filed by the Attorney General of Mexico and the president of the National Human Rights Commission. For the plaintiffs it was clear that the legislators had stepped outside the rules of separation of powers by approving a regulation that harmed the right to life of the unborn, discriminated against the male parent and embryos less than three months of age, and infringed the principle of legality.

In a judgment questioned for its minimalist approach, the Mexican judges, as for most of their peers in the region, began by clarifying the constitutional mandate to protect the value of life as it was entrenched in the Mexican legal tradition. After that clarification, the justices went on to scrutinize the duties, prohibitions, and powers of democratic lawmakers to criminalize and decriminalize behaviors, and concluded that the challenged rules were within the scope of

[40] Constitutional Court of Colombia, Decision C-355/06, May 10, 2006.

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facultative criminalization, and therefore could not be deemed in violation of the constitution. For the justices of the Supreme Court of Mexico,

> [t]he Legislative Assembly of the Federal District has the power to determine, by a majority of its members and through open debate, which behaviors should or should not be reproached by criminal law, and in the absence of an express constitutional obligation, it has the duty to weigh the various events, issues and rights that may be in conflict.[41]

As Francisca Pou has noted,[42] in this case the judges missed a valuable opportunity to further develop a constitutional reading of women's rights and reproductive rights as enshrined in the constitution. However, even conceding that the court lost the chance to expand the constitutional interpretation of women's rights, the court's assertion that the legislative margin of appreciation encompassed the option to eliminate the criminalization of abortion in the early stages of pregnancy constituted the most permissive approach to the constitutionalization of abortion across Latin America.

The Constitutional Status of Gestational Life

Discussions of the legal status of unborn life have been at the core of most contemporary confrontations regarding abortion. The duty to protect fetal life was at the heart of pioneer decisions such as *Roe v. Wade* or the famous German Supreme Court rulings. In our region, the definition of the legal status of unborn life has also occupied a central place in the drafting of the American Convention on Human Rights as well as in several of the constitutional assemblies held in recent decades. The inter-American human rights system has also participated in the debate on the status of gestational life through two specific rulings on abortion: the opinion of the Inter-American

[41] Supreme Court of Mexico, Decisions 146/2007 and 147/2007, August 28, 2008, 180.

[42] Francisca Pou Giménez, *El aborto en México: el debate en la Suprema Corte sobre la normativa del Distrito Federal*, 5 ANUARIO DE DERECHOS HUMANOS, 137–52 (2009).

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Commission on Human Rights in *Baby Boy*[43] and the recent decision of the Inter-American Court of Human Rights in *Artavia Murillo v. Costa Rica*.[44]

As we have already mentioned, the clarification of the legal status of gestational life has also monopolized domestic constitutional debates in the region's courts. In spite of the recent contributions of certain judgments underscoring women's rights, and a duty to balance potential conflicts, the issue remains at the heart of the interpretive disputes surrounding abortion.

When it comes to the judicial assessment of the legal status of fetal life, it is possible to place the conclusions reached by the courts of Costa Rica and El Salvador, which have recognized the personhood of unborn children, at one end of the spectrum. Other courts, such as the Supreme Court of Mexico and the Constitutional Court of Colombia have understood that unborn life should be considered, respectively, a constitutionally protected right or a constitutional value. Moreover, the judges of the Constitutional Plurinational Court of Bolivia have recognized an imperfect right to life of the unborn. Finally, the Argentinian court has avoided expressly ruling on the status of the unborn but concluded that neither the constitution nor the human rights treaties incorporated to it mandated the total criminalization of abortion as a tool to realize the right to life of the unborn.[45]

The courts of Costa Rica and El Salvador have arrived at the most conservative reading of their constitutional provisions, recognizing the legal personhood of the unborn and its right to life. The Costa Rican court arrived at this conclusion through an unsophisticated interpretation of the

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[43] Inter-American Commission on Human Rights, case 2141 "Baby Boy," March 6, 1981, 25/OEA/ser. L./V./II.54, available at http://www.wcl.american.edu/pub/humright/digest/Inter-American/english/annual/1980_81/res2381.html.

[44] Inter-American Court of Human Rights, case of "Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica," November 28, 2012, CDH-12.361/177. See also FERNANDO ZEGERS-HOCHSCHILD, BERNARD DICKENS, AND SANDRA DUGHMAN-MANZUR, *Human Rights to In Vitro Fertilization*, 123/1 INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS, 86–9 (2013).

[45] As noted, most Argentinian constitutionalism has made no appeal to the formula involving the state's interest in intrauterine life in *Roe v. Wade* and upheld in *Planned Parenthood of Southeastern Pa. v. Casey*, and *Gonzales v. Carhart*, as a basis for their decisions.

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international human rights instruments and the constitution. For the Costa Rican judges, the law did not distinguish between born and unborn life:

> … once conceived, a person is a person and, as such, a living being, who is entitled to protection by law, as demonstrated below. This second conclusion is in line with the rules of International Law of Human Rights in force in Costa Rica.[46]

The Salvadoran court reacted similarly, although with a somewhat higher degree of sophistication. The judges embraced a literal interpretation of the constitutional text, in which Articles 1 and 2 refer to life as a fundamental right guaranteed to "every person," and concluded that those provisions referred to a right recognized to "every human being from the moment of conception."[47] For the court, "the view of the Salvadoran drafters of the Constitution implied that there was a human life from the moment of conception," and, therefore, "the State and other subjects were obliged to guarantee life from that moment."[48] This determination of the status of prenatal life did not prevent the court from accepting the need to address the issue, as mentioned above.

In the judgment of the Constitutional Court of Bolivia, the reasoning about the legal status of unborn life dealt with different dimensions of its constitutional protection. First, the court devoted several paragraphs to the description of the different conceptions of life and death of indigenous nations and peoples, from a perspective of the plurality not only of cultures but also of lives (as expressed in the preamble to the constitution). For centuries, life has been viewed by the majority of the country's indigenous communities as part of the cosmos and *pacha* (Mother Earth), i.e. not as an isolated event, but as a creation of *pacha*. Hence, humanity is connected to other living beings and deities. According to the court, most indigenous and peasant communities identify with

[46] Supreme Court of Costa Rica, Constitutional Chamber, Decision 02792-04, March 17, 2004, Point V.

[47] Supreme Court of El Salvador, Decision 18/98, November 20, 2007.

[48] Ibid.

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a dynamic culture of life, where nothing is irreparable and abortion is seen as part of the cycle of life.[49]

Then, the court set aside these philosophical and cultural considerations and went on to focus on the dimension of international human rights law and domestic regulations and the treatment granted by them to unborn life. In doing so, the judgment quoted several provisions on the right to life from the Inter-American Convention and reproduced articles of the opinion in the *Baby Boy* case, concluding that: "Article 4.1 of the Convention cannot be read as a recognition of an absolute right to life from conception."[50] The ruling also pointed out that the country's constitutional assembly had discussed two proposals on the right to life and had chosen one that omitted to specify that life begun "from conception."

At this point, however, the court started to recede and explicitly concluded that the mandate to protect human life is gradual: the more it seems like a cell, the less protection it will have, but it will never be fully unprotected. To the extent that it develops and begins to resemble a human being, the protection of the right to life increases. In other words, the fetus is constitutionally and legally protected, but to a lesser extent than a person born alive (an imperfect right to life). This legal determination allowed the court to dismiss the challenge of unconstitutionality of criminal laws punishing abortion generically, while still answering positively the request to improve the conditions of access to abortion in cases of rape.

The Constitutional Court of Colombia, on the other hand, relied on an extensive menu of arguments including references to comparative law, interpretations of international law about human rights, and conceptual developments surrounding the evolution of intrauterine life, to interpret the constitution of 1991 as granting life the status of a fundamental value and right. This generic protection of life means that the state has an obligation to protect life in both a positive and

[49] Constitutional Plurinational Court of Bolivia, Decision 0206/2014, February 5, 2014.

[50] Ibid.

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negative sense. The court distinguished between life as constitutionally protected property and the right to life as a subjective right of a fundamental nature. In its reading of the constitution and international human rights instruments—construed as constituting a *bloque de constitutionalidad* (constitutional block) in Colombia—the court did not recognize a constitutional right to life of the unborn. This conclusion, according to the court, was compatible with recognizing that the state has an obligation to protect unborn life, precisely because life in the Colombian constitutional system is—in addition to a right—a fundamental value. In this way, the court argued that the protection of unborn life does not have the same degree and intensity as the protection of the human person, but both must be protected. On the other hand, the court saw a constitutional duty to apply a balancing test, and thus asked if the absolute protection of unborn life (through the absolute criminalization of abortion) was constitutional in light of other constitutional rights (of women). The court answered its question by recognizing that it could not be alleged that the right to life of the unborn or the duty to take legislative action by the state was absolute and concluded that the constitution requires a model of indications to regulate abortion.[51]

Lastly, the Supreme Court of Mexico found that life is a constitutionally protected right. While this implies a duty to protect unborn life, according to the court it does not necessarily translate into an explicit mandate obliging states to criminalize abortion; instead, there is a discretionary margin for defining the type and scope of the regulation of abortion.

In all the cases cited, references to international human rights law occupied a prominent place in the judicial reasoning concerning the definition of the legal protection of gestational life. However, not all the courts arrived at the same conclusion or shared the same reading of the central rule in dispute: Article 4.1 of the American Convention on Human Rights. In November 2012, the Inter-American Court extensively ruled on the interpretation of this article in the case of *Artavia Murillo v. Costa Rica*, in which a group of couples objected to the decision of the Constitutional

[51] We must remember that most of the rulings analyzed above are prior to *Artavia Murillo v. Costa Rica*.

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Chamber of the Supreme Court of Costa Rica, which in 2000 had considered unconstitutional the decree regulating in vitro fertilization in the country. In its judgment, the judges of the Inter-American Court devoted lengthy paragraphs to offering an interpretation of the scope of Article 4.1 that is likely to impact future domestic decisions on the abortion.

The status of intrauterine life has a decisive influence in shaping our understanding of the constitutional status of abortion regulations. As suggested by Alejandro Madrazo in describing the conflict over abortion as a narrative,

> the status of prenatal life determines who is the main character of such narrative and, in doing so, it determines how the situation is framed, which is the conflict at stake, which are the acceptable answers, and over all, who are the opposing players in the story. Basically, all the elements upon which the narrative is built upon.[52]

Even if this has often been the case in Latin American confrontations over abortion, it is feasible to imagine a world in which the definition of the legal status of unborn life, including the recognition of a right to life of the unborn, would not be the factor fatally defining constitutional answers on abortion.[53]

Dignity, Autonomy, and Equality as Tools to Constrain the Use of Criminal Law

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[52] Alejandro Madrazo, *Narratives of Prenatal Personhood in Abortion Law*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES (Rebecca Cook, Joanna N. Erdman, and Bernard M. Dickens eds, 2014).

[53] In 1975, and then in 1992, the German Constitutional Court revised the legislation partially decriminalizing abortion, approved by the Federal Parliament. Both times, the court found that the state had a constitutional obligation to protect the fetus against the claims of the pregnant woman. It supported this on a triad: the right to intrauterine life, life as a supreme value derived from human dignity, and the duty (not just the interest) of the state to protect it. In the first judgment (1975), most German judges ruled that the state could only fulfill this obligation by using criminal punishment. Dissenting judges, on the other hand, held that criminal law was an unnecessary and inappropriate way to regulate abortion. Years later, in a second ruling, the majority adopted the view of the dissent in 1975 and concluded that the state was entitled to protect fetal life through different mechanisms, and amongst these mechanisms some were more efficient than others. One mechanism for doing so was to ensure women sufficient social support from the government.

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The decisions studied in the prior articles also exhibit an incipient but incremental development in the consideration of the rights of women in constitutional deliberations across Latin America. Although this consideration has reached different degrees of complexity, that women and their rights have become visible in the constitutional arguments of the region's courts is definitively a sign of progress. In this chapter we emphasize in particular the presence of dignity, privacy, and equality, three rights and values that have occupied a place of increasing relevance in the treatment of abortion by Latin American high courts. Although it would exceed the analysis we can offer in these pages, it should be noted that the decisions studied here have also included references to the right to health, while making certain progress in the articulation of the concept of sexual and reproductive rights, a realm in which the debate is still lacking argumentative quality.

References to dignity have been prominent in recent constitutional arguments recognizing both women's rights as well as protecting unborn life. Privacy, however, has still not been accepted as a substantial part of the argumentative toolkit in the constitutional field of abortion, but it has appeared in some marginal references. Moreover, equality-based arguments have not yet deployed their full potential, despite this being one of the most exploited values in Latin American constitutional debates. However, with varying degrees of presence, the three ideals can be currently identified as part of the set of rights-based arguments of the constitutional narrative on abortion in the region.

Dignity has been an ambivalent ideal in the field of abortion rights. As already mentioned, this concept has been used from very different perspectives, including some conflicting ones.[54] In fact, local and international human rights forums on reproductive rights have invoked dignity both to rank the status of prenatal life as well as to defend the rights of women. For some authors, such

[54] Reva Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates Over Abortion and Same-Sex Marriage*, 10/2 *I•CON*, 355–79 (2012), available at http://ssrn.com/abstract=2137596.

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as Reva Siegel, it is precisely this open texture, its permeability to future constructions of meaning, which makes it an interesting notion.[55]

Dignity has considerable abstract weight in most constitutional systems of the Western tradition. At least four human rights conventions contain explicit references to human dignity.[56] Based on these instruments, both the universal human rights system and the inter-American system have interpreted dignity in their legal analysis on reproductive rights and abortion. National courts have also recurrently appealed to the argument of dignity.[57]

Among the examined rulings, Colombian judgment C-355/06 is the one that most overwhelmingly and densely resorts to the idea of dignity.[58] It is likely that, in contemporary comparative constitutional jurisprudence, this is the decision on abortion that best develops the analysis of this value. For this court, dignity must be understood as a limit to the discretionary margins of the legislator. The absolute criminalization of abortion violates the dignity of women, for even in the worst situations the legislator would be imposing on women the role of reproductive instrument. The idea of supererogatory terms and conceptual implications of dignity appear in the analysis of proportionality made by the court for considering the position of women in view of certain events (the danger to the health of the pregnant woman or the case of rape). According to

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[55] Reva Siegel, *The Constitutionalization of Abortion*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld and Andras Sajo eds) (2012).

[56] The American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, the American Convention on Human Rights, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belem Do Para").

[57] Constitutionalism on abortion in Germany is characterized by assigning a central place to dignity, associating it to "life." This allowed the Constitutional Court to remove its support, first, to oppose the liberalization of abortion, and then, to recognize certain rights of women and to justify restrictions (namely counseling and a mandatory waiting time).

[58] Reva Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates Over Abortion and Same-Sex Marriage*, 10/2 *I•CON*, 355–79 (2012), available at http://ssrn.com/abstract=2137596.

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the court, in such cases "it is clearly excessive to demand sacrificing a developed life to protect a life in development … "[59]

This reading of dignity as an anti-instrumentalist principle can also be seen in the discourse of the Supreme Court of Argentina:

> from human dignity … stems the principle by which they are ends in themselves and their utilitarian treatment is prohibited … In fact, the attempt to demand from all other victims of sexual crimes to carry a pregnancy to term … is, clearly, disproportionate, and contrary to the postulate … that prohibits demanding that people make sacrifices, for the benefit of others or for the greater good, of immeasurable magnitude.[60]

In the judgments of Colombia and Argentina, the dignity argument also appears embodied as the right to freedom from torture and mistreatment, which is based on the decision of the United Nations Committee on Human Rights in the case of *K.L. v. Peru*, which found that the lack of regulation of abortion in case of anencephaly violated several articles of the Covenant on Civil and Political Rights.[61]

The judges of Bolivia also appealed to this dignity-based argument. To declare unconstitutional the requirement of filing criminal proceedings for accessing abortion in cases of rape, the court relied especially on the right not to be tortured, or suffer cruel, inhumane, or degrading treatment, the right to physical health, and the right to dignity and its components, the free development of personality and autonomy of women. Moreover, besides this classic formulation, the Bolivian court has also used dignity in a slightly different way. It indicated that

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[59] Constitutional Court of Colombia, Decision C-355/06, May 10, 2006, Point 10.1.

[60] Supreme Court of Argentina, case of "F.A.L. s/ medida autosatisfactiva," Point 16.

[61] United Nations Human Rights Committee, "K.N.L.H. v. Peru," Communication No. 1153/2003, UN Document CCPR/C/85/D/1153/2003, October 24, 2005.

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this principle, combined with plurality, precludes the imposition of "a certain type of morality or a conception of good and bad," because that should be determined by each person.[62]

In a similar vein, though occupying a marginal place in the argumentation, dignity has also been employed by the Constitutional Court of Colombia as regards the right to autonomy—understood as the free development of personality—which prohibits "assigning women stigmatized gender roles or deliberately subjecting them to moral suffering."[63]

Lastly, the ambiguity of the possible uses of dignity seems clear in the courts of El Salvador and Costa Rica, which resorted to the notion of a conservative argument both to confirm the constitutionality of restrictive regimes and to justify the existence of grounds for exemption from punishment. The court of El Salvador noted the incidence of the dignity of the human person as a constitutional value and the recognition of personhood (expressed in the preamble and Article 1) in the controversy over abortion. In fact, the court combined a concept centered on fetal personality with dignity to stress that "the human person is not only the object and purpose of any State activity, but also the legitimizing element of that activity."[64] At the same time, the decision outlines the use of dignity as a limit to the exploitation of women. The justices considered that:

> … the law may not require heroic behavior or, in any case, cannot impose a Decision when in extreme situations someone prefers to perform an unlawful act before sacrificing their own life, physical integrity, or other personal rights.[65]

In this case, the appeal to the dignity argument was used to justify the requirements for abortion. However, as in the famous judgments of the German Supreme Court, the principle of

[62] Constitutional Plurinational Court of Bolivia, Decision 0206/2014, Point III.8.7, paragraph 11.

[63] Constitutional Court of Colombia, Decision C-355/06, May 10, 2006, Court Considerations and Rationale (VI), paragraph 8.1.

[64] Supreme Court of El Salvador, Decision 18/98, Point IV.1.A., paragraph 5.

[65] Ibid., Point V.2.A., paragraph 7.

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dignity also seems to translate into positive state obligations, a kind of duty of care towards the most vulnerable. According to the court, human dignity has the

> ability to determine the orientation of the goals or tasks of the State towards institutional policies … and to secure the help of the powers or authorities against attacks or behaviors from entities of that nature or private actors.[66]

From this perspective, the court interpreted that resorting to "the criminal punishment of certain conducts" is ultimately constitutional when ensuring human dignity. However, the court later made an effort to weigh in and sustained that "the drafters of the constitution clearly intended to extend State protection to prenatal life;" lawmakers have the duty "to also regulate other interests at stake, to which the pregnant woman is entitled."[67] This interpretative line allowed the court to conclude that the existing framework, encompassing a general rule of criminalization and requirements for abortion (as a state of acquitting or exonerating necessity), is consistent with the duty of lawmakers to enhance the rights "both of the mother and the unborn."

Finally, of all the judgments analyzed, that of Costa Rica is the one that most clearly makes a conservative use of the argument of dignity, which operates mainly to justify criminalization. Both the Costa Rican judgment and the Salvadoran judgment assimilates the lives of the woman and the fetus and recognize that both have "equal" dignity. These uses amply illustrate the elasticity of the argument, and the tensions, as noted by Siegel, are deeply associated with the definition of dignity when it comes to gender.[68]

From these different approaches, we can note, first, the effort by the region's courts to incorporate dignity into the consideration of "women's" issues. These advances are not achieved,

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[66] Ibid., Point IV.1.A., paragraph 12.

[67] Salvadoran lawmakers are thus facing a mandate "to legislate and promote the content of rights established in the Constitution, both of the mother and the unborn."

[68] Reva Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates Over Abortion and Same-Sex Marriage*, 10/2 *I•CON*, 355–79 (2012), available at http://ssrn.com/abstract=2137596.

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of course, without ambiguities or resistance, as reflected by the judgments of Costa Rica and El Salvador. However, it is possible to envision a redefinition of the dominant framing of the concept of dignity that has achieved more conceptual and legal wealth by their applications on abortion. As we have seen, it is a concept that has been associated with physical and mental integrity, the right to freedom from torture and ill-treatment, and the principle of non-instrumentalization. Although with regards to this last point there is still a need to address all the implications of embracing a consideration of dignity as instrumentalization, some progress has been made. One might question to what extent and in what ways a model of restrictions fails to instrumentalize women who, without fitting the frame for abortion as currently defined, do not wish to carry their pregnancies to term. At the same time, it is also noteworthy that the references to more traditional dimensions of dignity appeal to the worst aspects and ignore the affirmative consequences (in terms of duties to protect the comprehensive health and wellbeing of women and of state obligations to improve their life conditions).[69]

Advances achieved in the treatment of dignity contrast with the inertia observed, instead, in appeals to autonomy, or one of its formulations, privacy. The high courts, including even the most progressive courts, have been less likely to engage with this value. In fact, of the six judgments analyzed here, only the Colombian and Mexican courts made references to autonomy and privacy.

In the judgment of the Constitutional Court of Colombia, autonomy appears as reproductive autonomy in relation to motherhood and the free development of personality. The court defines individual autonomy as "the vital area composed of matters which concern only the individual" and that "takes on the character of a constitutional principle linking public authorities,

[69] Rosalind Dixon and Martha Nussbaum, *Abortion, Dignity and a Capabilities Approach*, in FEMINIST CONSTITUTIONALISM (Beverly Baines, Daphne Barak-Erez, and Tsvi Kahana eds, 2011).

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whom are forbidden from interfering,"[70] thus, according to the court, making a preference for the unborn would mean denying her ethical condition, reducing her to an object.

On the other hand, the Mexican court, which had the opportunity to lay the constitutional foundations of the most liberal rule in the region, did not provide a strong argument based on autonomy. In general, the votes that addressed the topic used the privacy argument to criticize the alternative criminalization of abortion, but not to make an affirmative point about liberalization. Some individual votes, however, deserve attention for their consideration of this value. One of the dissenting votes, for example, offers a broad reading of privacy that covers not only the physical space in which privacy normally operates (intimacy) but also intrusions in this area reserved for private life (privacy in the broadest sense). Although it makes no advances in formulations of life plans, self-referential behaviors, and other notions classically associated with autonomy, it is a valuable vote because it tackles what others have eluded. In that sense, the judge looks at several privacy issues related to abortion and concludes that:

> the right to privacy of women is violated when the State forces others to denounce or expose the abortion, while also results in a state of vulnerability, as fear of an accusation leads to the avoidance of safe medical services in cases of complications or other effects resulting from an illegal abortion. The scope of the right to privacy of women also obeys acquired rights recognizing the autonomy and control of sexuality, even in cases when they have a partner.[71]

The same phenomenon that prevents the autonomy argument from progressing probably had an impact on the conservative approach of some quotes with respect to the more specific right to the body in exceptional cases in which judges alluded to it. The court of El Salvador explicitly denied that there is a right to the body and sustained that such a claim was constitutionally prohibited given the recognition of the human person. In other courts, silence has been the norm,

[70] Constitutional Court of Colombia, Decision C-355/06, May 10, 2006, Point 8.2.

[71] Supreme Court of Mexico, Decisions 146/2007 and 147/2007, Point b.6.2, paragraph 5.

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and only marginally have the courts of Colombia and Mexico taken into account women's liberty to decide over their bodies.

Unlike autonomy, which has been a more elusive value in Latin American jurisprudence, equality, in the traditional sense, and understood as equity, is a more deeply rooted ideal in the region's constitutional tradition. Perhaps this explains its incipient yet wider role in the examined judgments. Although references to equality did not receive the same attention as the right to life, in a gradual and selective sense courts that favored a certain liberalization of abortion have given equality increasing room. This framing by the courts constitutes a promising contribution as it gives the discussion on abortion greater constitutional transcendence.

The Constitutional Court of Colombia paved the way for women to achieve legal equality. For that, it relied on the 1991 constitution and new provisions on equal opportunities, the prohibition of discrimination against women and affirmative action. In fact, it is one of the few courts that referred to gender equality. However, the court did not develop the argument further; instead, it limited itself to referring to the Convention on the Elimination of All Forms of Discrimination against Women to emphasize that the laws criminalizing health interventions particularly affecting women are discriminatory and violate the obligation of states to respect internationally recognized rights.

The most original and abundant judgment addressing equality was that of the Constitutional Plurinational Court of Bolivia. The court incorporated strong references about sexism, patriarchy, and colonization that were absent in the rest of the region's jurisprudence. These ideas were also reinforced with allusions to the commitments of the constitutional reform on gender equality, social justice, and quality of life. Moreover, the court devoted a special article, "State reconstruction based on paradigms of equality: gender and patriarchalization," in which sociological considerations are made of the inequality between men and women to later stress the constitutional commitments assumed to retrace those structures. Among these commitments, the court also emphasized that, since the constitutional reform of 2008, gender equality had become a

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constitutional value (Article 8 of the constitution) and therefore should guide state performance and goals (Article 9 of the constitution). It is clear, then, that although the ruling dismissed several claims of unconstitutionality, favoring abortion only as permitted under criminal law, the judgment was structured under a paradigm of gender equality incorporating the material and historical dimension of inequality.

Of course, from a more critical point of view, and considering the liberalizing power of equality-based arguments when strongly embraced, the development achieved by the constitutional discourse of the region may be considered even more limited and uneven. From this critical view, the difficulties faced by more progressive courts for pointing overwhelmingly to the criminalization of abortion as a form of gender-based discrimination, are noteworthy when attempting to account for the burden of unwanted pregnancy in its physical and social dimension, and for articulating the idea of equality in difference.

Also, as with the arguments based on dignity, equality arguments have been aided by conservative claims. That was the case in Costa Rica, where the plaintiff was demanding a violation of the duty of equal treatment between the protection of unborn life and the born person. Also, the plaintiffs in Mexico claimed the right of men to participate in the decision to terminate the pregnancy.

What is also curious is the absence of arguments that combine gender with socioeconomic status, especially when one considers that the impact of unsafe abortion lies more strongly in women with fewer economic resources. Part of these argumentative inhibitions is structurally associated with the difficulties of establishing an equal right to freedom of women, in relation to pregnancy and motherhood, in a legal tradition built on the male experience.

The most interesting case to highlight the difficulties of the courts in dealing with the idea of "equality in difference" is offered by the judgment from El Salvador, which denied that there had been a violation of the right to equality. The plaintiffs alleged that the failure to regulate abortion requirements included as one of the grounds for excluding criminal responsibility

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constituted a violation of the equality of women because they were in an entirely different factual situation as that of any other person facing one of the grounds for excluding criminal responsibility contemplated in the general regime. The court dismissed this argument very expeditiously. The judges ruled that the plaintiffs posed no *tertium comparationis* (basis for comparison) of sufficient significance to justify an ad hoc or specific regulation. The court held that:

> a factual or purely descriptive element is insufficient, if the legal significance of the differences or similarities alleged is not demonstrated, especially in relation to the purpose and comparative perspective, for concluding that the distinction is arbitrary or, as in this case, that the legislative equation lacks objective and reasonable grounds.[72]

In the case of Costa Rica, the plaintiff also supported the claim with conservative demands as to the right to equality. The actor claimed that the difference in the punishment between murder and abortion, among other norms, violated the principle of equality by differentiating between born and unborn life. This distinction, they argued, had become unconstitutional since the judgment of the court in 2000 that recognized the legal personhood of the fetus.[73] The court did not admit this argument, but neither did it advance its reasoning on gender equality enough to reject it. The court denied directly that the 2000 judgment had changed the legal status of individuals in Costa Rica's legal system: the fetus was considered a person before that judgment, because the criminal treatment of abortion stemmed precisely from the notion that abortion violated the right to human life. Secondly, the court held that the legislature could consider circumstances other than the quality of personhood of anyone suffering the action, and thus establish different sanctions, causes of exclusion of liability, etc. Thirdly—and here the court appears to deviate from its more

[72] Supreme Court of El Salvador, Decision 18/98, Point 5.3, paragraph 3.

[73] Supreme Court of Costa Rica, Constitutional Chamber, Decision 2306-2000, March 15, 2000.

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conservative script—the court found that the legislature was free to address criminal matters, as long as that the constitutional system and human rights were respected.[74]

In the case of Mexico, two major objections, in addition to the issue of life, were made against the law of the Federal District that the Supreme Court had to resolve, which also brought up the issue of equality. The objections revolved around the participation of men in a woman's decision to have an abortion (gender equality) and the lack of specific regulation for teenagers (equality—or inequality—by reason of age). The court deemed that the case revolved around provisions in the law that the legislature had the power to define. Among other arguments, the court appealed to the differences between women and men to dismiss the claim, offering one of the few paragraphs in all the examined judgments where the difference in equality was successfully dealt with. The court said:

> The continuation of an unwanted pregnancy has distinctly permanent and profound consequences for women … and it is this asymmetrical involvement in the life plan that provides the basis for differentiated treatment … The

[74] There was no clarification of those limits by the lawmakers:

" … *First*, the Chamber admits that, although in both cases they are human beings, it is also true that they are in distinct stages of development, not only from the medical point of view, but also from a social perspective … *Second,* in the case of the unborn person in particular there is an absolute dependence on a second person … this entails a new differentiating circumstance … the fundamental rights of the mother thus need to be taken into account, which does not occur in the case of homicides where their specific relationship with other people and their fundamental rights are specified. *Third*, in favor of the validity of the differentiation in the severity of the sanction, the fact that it responds as it does, as indicated, to a particular perception, experience and sentiment not only of our society but, in all those that make up our cultural environment, as may be seen through the mere review of the way in which other Latin American and European countries have legislated on this, always opting for a decrease in state criminal reaction … it is noteworthy that, because of its relativistic nature, it is evident that it could never trump other arguments nor supplant other principles that the Chamber has recognized as the foundation of our legal system and—in particular—could not prevail over the respect and consideration of human dignity, for example."

Supreme Court of Costa Rica, Decision 02792-2004.

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> involvement of women and men is different not simply because … there are consequences of the unwanted pregnancy that only fall on the woman who experiences it, but also because, although there are other burdens that could potentially be assumed by the male participants, its guarantee by the legal system is imperfect. In fact, the future possibility of opening a judicial process oriented at a certain person being recognized as the parent of a minor, or at contributing financially to supporting their needs is too uncertain and imperfect to cancel the original asymmetry between the position of the potential father and mother …[75]

Conclusion

The judgments studied here are episodes of the judicialization process and are part of a broader dispute around the regulation of abortion in Latin America. In the last decade, courts have played a typically counter-majoritarian role in a region where abortion is still a marginal and unfriendly right for the majority, or at least for most policymakers. The process of constitutionalization described in this chapter has been rudimentary. Moreover, the process shows some traits typical of the context against which the law and legal disputes operate in the region.

Like several European courts, Latin American courts have moved to accept the need to balance a set of interests and competing rights. These judgments also reveal the development of a rights-based approach, locating the classical arguments on abortion in international human rights law, the obsessions of the legal and Catholic culture for the sanctity of embryonic life, and a broader list of rights and values.

In that context, the balancing approach performed by the region's courts has begun to offer an approach for playing down the dramatic nature of the conflict over abortion. This has created a promise of moderation, negotiation, and conciliation to positions that were formerly staged as deeply antagonistic. In addition to its potential benefits and philosophical bases, the balancing approach replaced categorical attitudes that used to restrict the opportunities for increasing the legal supply of abortions, while resulting in a good foundation for justifying judicial decisions, inspiring

[75] Supreme Court of Mexico, Decisions 146/2007 and 147/2007, 188.

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the search, at least, of reasonable solutions that recognize and optimize the rights and interests at stake, offering an alternative to the all-or-nothing game. Although some of these expectations seem, in some sense, to have been fulfilled in the development of judicial discourse observed in the judgments discussed in this chapter, it is also true that the balancing exercise put in place by the courts has been deficient and incomplete. Among the most significant deficiencies of the balancing approach, the most noteworthy are, first, the difficulty for judges in critically examining the suitability of criminal law. Far from identifying the persistent inefficiency of criminalization, the courts have naturalized its role in the regulating abortion. In fact, constitutional debates have increased their sophistication in terms of the scope of the requirements or exceptions that justify not applying criminal punishment, but the option of abandoning punitive sanctions has not been seriously discussed by the region's courts.

A second clear deficit in the balancing approach applied by the courts resides in their inability to address and rule on how unwanted pregnancies can affect women. As illustrated in the article on rights-based arguments, even today it is extremely difficult for judges to identify and address the impact of unwanted pregnancies as a violation of women's autonomy and a breach of the duty of equal treatment by the state.

Although the studied cases are not the last word or even a "settlement" in the constitutional debate on abortion, they constitute significant contributions for the definition of public policies and for the increasing access to legal abortions. The impact of each of the judgments examined has differed according to the extent to which they confirmed or changed existing regulations on abortion at the time of the decision. In the cases of Argentina and Mexico, the decisions contributed to consolidating the liberalization process that had been opened before the introduction of new legislation embracing a trimester model or the development of a procedural shift toward the guarantee of legal abortions. In other cases, the judgments clearly involved significant constitutional changes, such as in Colombia, where requirements served to inaugurate new safe abortion policies. In the context of Bolivia, however, the contribution is more likely to have been

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intermediate: although the court did not introduce new grounds, it eliminated excessive requirements for accessing abortions in cases of rape. Lastly, in El Salvador and Costa Rica, the courts contributed to reinforcing restrictions while moderating the previous discourse by recognizing conflicting rights.

Questions

a. What are the most emblematic characteristics of the process of constitutionalization of abortion in Latin America?
b. The text makes several references to the outstanding role that international human rights law has occupied in the assessment of the criminal laws on abortion in Latin America. What transformations can be observed in the use of that source in the different judgments examined in the chapter?
c. In the judgments discussed by the authors it is possible to see how Latin American judges have naturalized the role of criminal law for regulating abortion. What arguments have the courts of the Global North deployed in order to justify the repeal of criminal sanctions?
d. How do arguments about dignity, autonomy and equality developed in relation to abortion compare to the same values when applied to other conflicts studied in the rest of the book?
e. Identify differences in the balancing exercises deployed by the judgments of the courts studied in this chapter.

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