

The Decriminalization of Abortion in Latin America: A Tale of Gradual Judicialization

Jordi Díez, *University of Guelph, Canada*

Alba Ruibal, *Consejo Nacional de Investigaciones Científicas y Técnicas, Argentina*

Latin America historically has had some of the strictest abortion laws in the world, making unsafe procedures a main cause of mortality among women and girls. However, in the context of the Green Wave, three countries recently have amply decriminalized access to abortion: Mexico (2021, 2023), Colombia (2022), and Argentina (2020) (Uruguay did so in 2012). The recent wave of decriminalization is the culmination of larger, historical processes that involved the gradual judicialization of reproductive rights in the region. Courts have been a central part of the story. In these three cases, arguments advanced by state and nonstate actors in favor of decriminalization significantly built on jurisprudence developed over many years. The process of abortion decriminalization has been partly a tale of gradual judicialization.

This process is partly explained by the broader judicialization of politics that has taken root in some Latin American countries during the past 25 years. In Mexico, Colombia, and Argentina, high courts—which, in comparative historical terms, enjoy important degrees of judicial independence—have assumed policy-making authority as they have asserted strong constitutional review powers. This process gradually has opened the judicial door to demands from nonstate actors, including the expansion of reproductive justice. Given the contentiousness of these issues and the timidity with which elected officials have approached abortion—including leftist representatives—the courts have responded to feminist demands with gradual decriminalization. The judicialization of abortion politics also has included the adoption of *erga omnes* principles (i.e., court rulings with universal applicability) by the high courts. This means that—as the last arbiters of contentious issues and regardless of systems of government (i.e., unitary versus federal)—their rulings have expanded democratic citizenship for all women and girls and, more recently, pregnant persons in general. These countries warrant attention because they have completely decriminalized abortion during the past four years. The high courts have played a significant role.

MEXICO

In 2021, the Mexican Supreme Court became the first court in Latin America to declare that the criminalization of abortion during all the stages of pregnancy was unconstitutional (AI 148–2017). Responding to a constitutional challenge to Coahuila State’s Criminal Code, the Court ruled that three main activities were constitutional: first-trimester IVE (i.e., the Spanish acronym for “voluntary interruption of pregnancy”); its support by specialists (including the provision of medicines); and IVE as a result of rape beyond 12 weeks of pregnancy. It further established that no federal judge could prosecute gestating people in those three circumstances. Expanding on that decision and motivated by an *amparo* (i.e., rights suit protection) filed by *Grupo de Información en Reproducción Elegida*, the Court ruled in September 2023 that the criminalization of abortion in the Federal Criminal Code is unconstitutional 267/2023. The Court relied on more than two decades of its own jurisprudence to justify these decisions.

The regulation of abortion in Mexico historically has been a patchwork of regimes, given its federal system and its particularity that civil and criminal codes are under the jurisdiction of states. However, it became judicialized at the turn of the century. In a constitutional challenge to reforms made in 2000 to Mexico City’s Criminal Code, which waived some penalties for the procedure under some circumstances (i.e., in cases of risk to health, fetal malformation, and non-consented artificial insemination), the Court upheld the reform. The ruling did not include arguments based on health or the right to decide, but it invited discussion on the issue at a later time (Bonifaz Alfonso and Mora Sierra 2024).

The judicialization of abortion continued apace with the Mexican Supreme Court’s 2008 decision (AI 146/147–2007) on the landmark reform to Mexico City’s Criminal Code, which had decriminalized abortion within the first 12 weeks of pregnancy in 2007. In its ruling, the Court advanced a broader analysis that relied on comparative and international law and validated, in an 8–3 vote, Mexico City’s reform. Although the ruling’s rationale was based on whether Mexico City had the liberty to legislate on the matter (it argued that it did), the

decision set important jurisprudence because it consented to the relationship that the local legislature had established among abortion, public health, and women's rights.

The decision unleashed a legal battle at the subnational level on the constitutionality of abortion: conservative states attempted to shield themselves from the ruling by introducing

COLOMBIA

Colombia's Constitutional Court decriminalized abortion within 24 weeks of pregnancy in its 2022 historic (5–4) ruling (C-055-2022). This decision was not entirely unexpected because it expanded on the Court's jurisprudence developed through a series of rulings handed down over 25 years.

The cases warrant attention because they have completely decriminalized abortion during the past four years. The high courts have played a significant role.

into their constitution a clause on the right to life from conception. The Supreme Court also upheld these reforms on grounds of the states' freedom to define when life begins and what type of legal protection that life should have. However, the Court continued to set precedent by expanding the arguments in favor of freer access to abortion. In two important rulings AI 1388/2015 and AI 438/2020, it introduced a gender perspective and argued that the right to health must be understood in its fullest way (including physical, mental, emotional, and social health) and that it is disproportionate to establish penalties in cases of rape.

This jurisprudence set the basis for the 2021 and 2023 rulings. In these decisions, the Mexican Supreme Court's main argument was based on the right of gestating individuals to decide. Recognizing the need to weigh rights, it argued—rather precisely—that the right to decide does not nullify the right to life. Protection of both must be balanced. Expanding on the introduction of a gender lens, the Court further argued that discussions of IVE must draw on a gender-identity perspective to include pregnant individuals beyond women and girls. Arguing that dignity is a necessary condition for the enjoyment of other rights, it declared that gestating people must enjoy the right to bodily autonomy and to build their identity autonomously (Bonifaz Alfonso and Mora Sierra 2024). These rights are important, it argued, for gestating people to build their life projects based on individual decisions. According to the Court, the state cannot decide when it is time to stop a pregnancy because that is an invasion of personal privacy. Furthermore, the rulings drew on the Court's previous antidiscrimination perspective to argue that the state should eliminate discrimination and stereotypes that force people to reproduce.

The Mexican Supreme Court expanded on its jurisprudence on the right to health by establishing that the state must provide all conditions for its full exercise. The decision draws on the 2007 ruling to argue that limits on IVE must be reasonable and, building on ideas based on proportionality (AI 438–2020), the Court applied its ruling to the entire federal judiciary. Relying on available official statistics, the Court also argued that the social context must be considered, and it established necessary conditions to guarantee sexual and reproductive health.

Although historically Colombia's Criminal Code had exceptions for access to abortion, they were eliminated in 1980. However, the Constitutional Court slowly read national and international law more flexibly and gradually allowed access to abortion. In a 1997 ruling (C-013-97), the Court maintained its previous position that abortion was criminally punishable (C-133/94) but introduced the idea of the appropriateness of graduated sentencing on proportionate and reasonable grounds. In 2001, the Court ruled (C-647-01) that the waiving of penalties by judges on certain exceptional circumstances was constitutional, cementing the idea of graduated sentencing and proportionality. It is important to note that in a concurring opinion in the same ruling, four justices introduced the idea of the need to balance rights, which also expanded the 1997 ruling. These justices argued that although the Constitution protects the right to life, Congress cannot go “to the other extreme” of ignoring women's rights, including the right to life, integrity, health, equality, human dignity, personal autonomy, privacy, and freedom of conscience. As a result, in the concurring opinion, the legislature's criminal policy-making ability was constrained by the need to balance these competing interests and to guarantee the fundamental rights of all parties. The weighing of rights that undergirded this argumentation was part of an increased reliance on proportionality analysis by some justices at the Constitutional Court, serving as the basis for the historic 2006 decision (C-355-06)—the first to decriminalize abortion in Latin America.

The landmark C-355-06 decision introduced a model that allowed for access to abortion under three specific circumstances (i.e., *causales*): rape, serious fetal malformations, and risk to the pregnant woman's health and/or life. The Constitutional Court's majority opinion followed its previous jurisprudence in that it deployed a “proportionality test” to balance rights, arguing that the legal protection of the unborn must be weighed against various women's rights (e.g., health and dignity). Taking a gendered and intersectional approach, the Court further argued that racialized and poor women are disproportionately affected by unequal access to health care. The introduction of a health-based argument was crucially important: six months later, the Health Ministry established that voluntary abortions under the new model should be covered by public health.

During the next 12 years and through 18 decisions, the Constitutional Court reiterated its position and eventually summarized its jurisprudence in a 2018 ruling (SU-096-2018): that is, access to legal abortion is a fundamental right because it is about access to health care. The Court also clarified the modalities of access to the procedure under each condition (Jaramillo Sierra 2023).

This jurisprudence formed the basis for the 2022 ruling. The Constitutional Court agreed with the constitutional challenge presented by the feminist coalition *Causa Justa*, which had argued that the existing model violated women's rights to health care established by the Court itself as a fundamental right and that the state had failed to guarantee it. Expanding on its previous intersectionality reasoning and using data available until 2020, the Court argued that racialized and poor women, as well as women in irregular migration conditions, were disproportionately affected by unequal access to health care, violating equality principles. It further built on the right to dignity and argued that a component of this right involves freedom of conscience, which is at the core of deciding whether to have an abortion. The ruling drew on its precedent on proportionality reasoning to argue for the need to balance rights: given the disproportionate costs borne by girls and women, criminal law cannot be used as the main tool to protect life. This also reasserts that criminalization cannot be used as a means to shape social behavior. Expanding on 25 years of precedent, the Court reaffirmed its position that access to abortion is a fundamental right.

ARGENTINA

Argentina's Congress approved a bill in December 2020 that legalized abortion within 14 weeks of pregnancy and kept existing indications for risks to health and rape beyond that timeframe. Congress also enacted legislation—colloquially known as the “1,000-Day Plan”—that provides comprehensive health care and social assistance to pregnant individuals and those with small children. This historic policy change built on years of effort by state and nonstate actors to liberalize access to abortion, which partially relied on Supreme Court jurisprudence to craft arguments that have been effective in decriminalization.

Advanced at the time, Argentina first banned abortion in its 1921 Criminal Code, making the practice punishable by up to four years in prison in all stages of pregnancy except when the life or health of the person is at risk and when the pregnancy is the result of “rape or indecent assault against a mentally handicapped or mentally ill woman” (Article 86). The Article was not substantially reformed during the next nine decades, and the indications it included for lawful abortions were rarely implemented until the 2000s.

The first serious legal test to the Criminal Code's limits and constitutionality occurred during the 2006 LMR Case, which was emblematic of the treatment of lawful abortions in the country. VDA, on behalf of her underaged and mentally disabled daughter LMR, requested an abortion after testing revealed that she was pregnant as a result of rape. Despite the Criminal Code's provisions, antiabortionists secured an

injunction against a hospital to prevent the procedure on grounds of the unconstitutionality of Article 86. The case was delayed for six weeks by first- and second-instance courts. VDA appealed to the Buenos Aires Supreme Court, which expeditiously ruled that the abortion could take place. However, the hospital declined to perform the procedure, arguing that the pregnancy was too advanced. LMR eventually obtained an illegal abortion. Three feminist organizations—Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM); Gender, Law, and Development Institute (INSGENAR); and Catholics for Choice—took the case to the United Nations Human Rights Committee (UNHRC). In 2011, the HRC condemned Argentina for illegitimate judicialization of LMR's right to an abortion and declared that it had violated international law. The LMR case was important for three reasons: (1) it was the first time an Argentinean court pronounced on the constitutionality of abortion; (2) it led the province of Buenos Aires to issue in 2007 the first protocol in the country for the attainment of lawful abortions; and (3) it contributed to a growing international consensus that restricting access to abortion was cruel, inhumane, and degrading treatment, which amounts to torture.

These developments served as foundation for the landmark 2012 FAL ruling (*A.F. s/Medida Autosatisfactiva, F.A.L.*) by Argentina's Supreme Court. The decision came as a result of an *amparo* suit filed by ALF before a lower court in the Chubut Province on behalf of her 15-year-old daughter who had been raped by her stepfather. ALF's team argued that her situation qualified for the rape exception. After a long and tedious judicial process, the case arrived at the Supreme Court in August 2010, after the abortion had been performed. Following 19 months of deliberations, the Court handed down a historic decision, on a moot case, that amply expanded access to abortion in Argentina. The ruling marked a paradigm shift and it reframed the country's debate on abortion (Yamin and Ramón Michel 2023), setting the stage for further liberalization efforts.

Despite the mootness of the case, Argentina's Supreme Court argued that it had to pronounce clearly on the constitutionality and interpretation of the abortion law to end the historic judicialization and lack of implementation of lawful abortions. This was in line with international law, mentioning the UNHRC condemnation of the LMR case. This decision is important for several reasons. It refers to the legal interruption of pregnancy, shifting the debate away from “nonpunishable abortion”; it declares—based on equality, nondiscrimination, and *pro-homine* principles in national and international law—that abortion access in cases of rape should not be limited to mentally disabled people; it frames the debate around women's health and adopts a broad definition of health; and it considers the idea of “protocols,” exhorting all provinces in the country to adopt them.

This ruling provided pro-abortion actors with legal and discursive tools to advance the cause at the National Congress. A bill to legalize abortion was introduced eight times between 2007 and 2018 but stalled. The successful 2020 legal change expanded on jurisprudence and previous policy

changes. Drafted by the Executive Branch, the bill explicitly called it an IVE initiative and strategically presented it as a public health issue (introducing the 1,000-Day Plan). This rendered the state responsible for supporting whichever decisions gestating people make regarding IVE by providing full coverage under the social security system. Analyses of the debate in Congress reveal that the arguments deployed by pro-abortion legislators revolved mostly around three areas: health and prevention (23.39% of interventions), women's rights and autonomy (18.07%), and unsafe conditions to seek abortions (13.49%) (Centro de Estudios de Estado y Sociedad 2021, 14).

CONCLUSION

The gradual development of Latin American jurisprudence on abortion rights allowed courts to slowly carve out a decisional space and establish themselves as legitimate actors to rule on one of the most controversial issues in Latin America. It also allowed for the incorporation of new human-rights standards into the most recent decisions, taking advantage of a new context shaped by the Green Wave.

When Latin American courts began to decide on abortion in the 2000s, they did so within a limited scope by upholding legislative changes (Mexico), liberalizing the exceptions under which abortion should not be criminalized (Colombia), and interpreting the existing law in a more progressive way (Argentina). The courts' rationales were constrained; whereas they did address women's rights, they were not grounded on autonomy or reproductive freedom but instead on other constitutional rights and public health considerations.

Recent rulings drew on frameworks advanced in previous jurisprudence while also expanding the scope of their decisions to incorporate broader declarations on the unconstitutionality of abortion criminalization, as well as developing bolder rationales based on reproductive freedom. The recent decisions by the Colombian and Mexican Courts were framed for the first time as a matter of reproductive self-determination, drawing on long-standing constitutional provisions on the freedom to decide on the number and spacing of children. In both cases, the subjects of rights are gestating persons instead of only women (as in the case of Argentina's reform). These common developments address the progressive incorporation of women's and gender-expression rights by Latin American courts that rather timidly had begun deciding on the abortion issue two decades ago.

CONFLICTS OF INTEREST

The authors declare that there are no ethical issues or conflicts of interest in this research. ■

REFERENCES

- Bonifaz Alfonso, Leticia, and Rosalba Mora Sierra. 2024. "Decriminalization of Abortion by Mexican Supreme Court." *International Journal of Gynecology and Obstetrics* 165 (1): 375–81.
- Centro de Estudios de Estado y Sociedad. 2021. *El aborto en el Congreso: Argentina 2018–2020*. Buenos Aires: Centro de Estudios de Estado y Sociedad.
- Jaramillo Sierra, Isabel. 2023. "The New Colombian Law on Abortion." *International Journal of Gynecology and Obstetrics* 159 (3): 345–50.
- Yamin, Alicia, and Agustina Ramón Michel. 2023. "Using Rights to Deepen Democracy: Making Sense of the Road to Legal Abortion in Argentina." *Fordham International Law Journal* 46 (3): 377–424.