

# Moving Constitutional Courts for Social Change in Latin America

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The process of constitutional creation or reform that has taken place in Latin America since the late 1980s as part of democratization processes has contributed to configuring a new institutional landscape for social struggles across the region. These constitutions included new constitutional rights either through a new charter of rights or through the incorporation of human rights treaties into the constitution or the constitutional bloc; they created or strengthened constitutional courts or supreme courts with ultimate judicial review powers; and they introduced new legal remedies and instruments for the defense of rights. These fundamental changes set the stage for the development of new dynamics in the struggle for rights and social justice throughout the region. Since then, judicial institutions have set out to develop a more activist role in the political system, and some sectors of the legal field have started adopting a neoconstitutionalist approach, which privileges human rights and constitutional principles—in contrast with legal formalism and positivism—and is more apt for the formulation and reception of broad claims for social transformation through the judiciary.

In this way, new constitutions have been a main pillar in the development of new legal opportunities for the pursuit of social change through law and courts in the region. In this setting, social movements started to frame their demands in the language of constitutional law and in terms of constitutional rights. They also set out to use strategic litigation as a new tactic in their struggle for social transformation, which entails the judicialization of emblematic situations of rights violation in search for changes for large social groups. That is, they started developing legal mobilization, and constitutional courts became a new institutional venue for

the pursuit of their grievances and goals, in particular when these were not addressed by the political process.

Beginning in the 1990s, the first emblematic cases that marked a new interaction between social movements and the constitutional justice system were focused on economic and social rights (see Gauri and Brinks 2008; Couso, Huneeus, and Sieder 2010). Over the past two decades, courts have also become key institutional actors in the social conflict around sexual and reproductive rights. In fact, it took more time for feminist and LGBT movements to appeal to constitutional courts, and courts were not generally perceived as amicable forums for these claims. However, after several failed attempts at changing laws through national congresses, since the first decade of the twenty-first century some sectors of these movements turned to constitutional courts in search for long-pursued demands. For their part, courts sided for the first time with progressive claims in this field, and since then they have led important legal processes and issued groundbreaking decisions regarding mostly abortion rights and same-sex marriage, which are central demands of feminist and LGBT movements, respectively, across the region.

This article highlights the role of constitutional courts in these areas of rights and addresses the factors and conditions under which social movements have advanced their causes through constitutional courts in this field in Latin America. These processes show how the use of law and courts has played a key role in feminist and LGBT struggles for abortion and equal marriage rights in Latin America. They also point to the changes

that operate in both social movements and courts when they engage in high-profile strategic litigation and judicial activism.

### **Constitutional Courts in Legal Reforms of Abortion Rights and Equal Marriage**

Over the past two decades, a series of legislative changes and judicial decisions have transformed the legal status of sexual and reproductive rights in the region, after decades of highly restrictive policies in this field. Constitutional courts have been a key institutional venue in this process of legal change. They have played different types of roles, from upholding legislative decisions that expanded abortion and same-sex marriage rights, to liberalizing the existing law themselves or compelling congresses to do so. In this period, courts have also decided against sexual and reproductive rights.<sup>1</sup> However, high courts in Latin America have had a stronger role in advancing legal reforms to extend same-sex marriage and abortion rights than in supporting conservative reactions in this field.

#### **Courts and abortion**

The most notable interventions of constitutional courts in the field of abortion law in Latin America have been their decisions to create new abortion rights. In Colombia, Brazil, Mexico and Ecuador abortion laws have been expanded by the constitutional courts in response to direct actions of unconstitutionality promoted by feminist organizations. Moreover, in the cases of Colombia and Brazil, they have been the only institutions to carry out changes in this field, and in the case of Ecuador the National Congress reformed the law, but only after the constitutional court instructed it to do so.

In 2006, the Colombian Constitutional Court became the first Latin American court to change the country's abortion law. Through a groundbreaking decision, it established a model of indications, or exceptions to abortion criminalization, ending the complete ban that existed in this country. In 2012, the Brazilian Supremo Tribunal Federal legalized abortion in cases of fetal anencephaly. In this way, it expanded the country's abortion law, which is among the most restrictive in the world, considering that it does not include a health exception. In 2021, the constitutional court of Ecuador ruled that Congress should decriminalize abortion in all cases of rape, which it did in February 2022. Finally, a fundamental change in the role of constitutional courts in this field took place since 2021, when constitutional courts declared, for the first time, that the criminalization of abortion during all the stages of pregnancy was unconstitutional. In September 2021, the Mexican Supreme Court became the first court in the region to do so, and in February 2022 the Colombian Constitutional Court decriminalized abortion up to the twenty-fourth week.

Constitutional courts have also upheld abortion law reforms carried out by subnational legislatures in Mexico, as well as by the National Congress of Chile. In 2002, the Mexican Supreme Court upheld the reform of Mexico City's abortion law carried out by the local Legislative Assembly, which in 2000 had introduced new indications or exceptions to abortion criminalization.<sup>2</sup> In 2008, this court upheld the legalization of abortion approved by Mexico City's Legislative Assembly in 2007. In 2017, the Chilean Constitutional Court approved the legislative reform carried out the same year, which established an indications model and ended the total ban that existed in the

<sup>1</sup> Among the main examples in the field of reproductive rights are the rulings by the Argentinean Supreme Court in 2002 and the Chilean Constitutional Court in 2008 declaring unconstitutional the distribution of emergency contraception pills, the ruling by Costa Rica's Supreme Court in 2000 prohibiting in vitro fertilization (reversed by the Inter-American Court of Human Rights in the *Artavia Murillo* case in 2012), and the 2017 ruling by the Chilean Constitutional Court allowing for institutional conscientious objection by private health providers. In the field of marriage equality, Peru's Constitutional Tribunal rejected in 2020 the recognition of same-sex marriage, in the renowned *Ugarteche* case, and Chile's Constitutional Tribunal did so in 2019.

<sup>2</sup> Mexico is the only Latin American country where penal and civil codes, and thus the laws regarding abortion and equal marriage, can be determined at the subnational level. Since 2019, five more states have legalized first trimester abortion in Mexico (Oaxaca, Hidalgo, Veracruz, Baja California, and Colima).

country. Other reforms passed by legislatures, in particular the legalization of abortion in Uruguay (2012) and Argentina (2020), were not challenged before those country's constitutional courts.

Another group of decisions by constitutional courts established criteria and obligations of different state actors and levels of government in order to ensure the implementation of lawful abortions. In 2012, the Argentine Supreme Court established that the rape exception included in the country's criminal code must be interpreted as decriminalizing abortion in all cases of rape and compelled judicial and political institutions to remove all obstacles to women's access to legal abortions. For its part, the Constitutional Court of Colombia was the main institution that intervened in establishing criteria for the implementation of its own 2006 decision and in deterring the backlash process that ensued in 2009 against that ruling (see Ruibal 2014). Through a series of decisions, the court developed a comprehensive jurisprudence about the way in which the abortion law must be implemented in Colombia. Finally, in 2018 and 2019, the Mexican Supreme Court issued important decisions regarding the criteria that should be followed for the implementation of the health and the rape exceptions in the country's subnational entities.<sup>3</sup>

### **Courts and equal marriage**

Since the vanguard legalization of same-sex marriage by Mexico City's Legislative Assembly in 2009 (upheld by the Supreme Court in 2010) and by Argentina's National Congress in 2010, there has been a wave of progressive legal changes in the field of marriage equality across the region in which constitutional courts have had a leading role. These changes have been part of a gradual process of recognition of a series of rights for LGBT groups, in which constitutional courts were also central actors, including civil partnerships, social security, identity rights, adoption, serving in the military, and so forth (see Corrales 2021 and López Sánchez 2021 for a thorough account). Same-sex marriage has been approved by the

national congresses in the cases of Uruguay (2013) and Chile (2021) and by local legislatures in twenty-six Mexican subnational entities. Studies in this field remark that LGBT movements have appealed to constitutional courts when political opportunities, mostly at National Congresses, were blocked for these changes (Diez 2015; Carvalho Cardinali 2017; López Sánchez 2021). Constitutional courts have been the central institutional venue and have led the reform process in this field in the cases of Brazil (2011), Colombia (2016), Ecuador (2019), and Costa Rica (2020). The Mexican court has also had a central role in the reform process in Mexico (2015).

In 2011, the Supremo Tribunal Federal of Brazil granted recognition to same-sex civil unions, and it was followed by the National Council of Justice's decision to legalize same-sex marriage in 2013. In 2015, the Mexican Supreme Court declared that bans on same-sex marriage by state legislatures were unconstitutional. Although this decision did not legalize equal marriage nationwide, it made it easier for same-sex couples to marry by clarifying the procedures to be followed by judges and courts throughout the country to approve all applications for same-sex marriage, and by making the approval mandatory. This ruling has been decisive for the legalization of same-sex marriage in more than 80 percent of Mexico's federal entities (Kánter Coronel 2022). In Colombia, after a series of rulings that expanded LGBT rights (see López Sánchez 2021), the Constitutional Court legalized same-sex marriage in 2016. Previously, same-sex couples were permitted to enter civil partnerships. Colombia began to take gradual steps toward marriage and parental equality in the 1980s, including protection from discrimination and adoption rights. In 2016, the country's Constitutional Court took the final step toward marriage equality and legalized same-sex marriage.

For its part, the Constitutional Court of Ecuador legalized same-sex marriage in 2019 and ordered the National Assembly to pass legislation broadening the definition of marriage. In

<sup>3</sup> More information about constitutional court decisions in the field of abortion law is available at Ruibal (2021).

its ruling, the court recognized the binding character of the Advisory Opinion OC-24/17 issued by the Inter-American Human Rights Court in 2017 titled “Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples.” In 2018, the Supreme Court of Justice of Costa Rica—following Advisory Opinion OC-24/17, which had been requested by Costa Rica’s government in 2016—established that the article of the Family Code that explicitly prohibited same-sex marriage would be nullified automatically in 18 months if congress took no action to reform it. As a result, equal marriage was legalized in this country in 2020.<sup>4</sup>

### **Movement and Court Dynamics: Conditions That Contributed to Legal Change**

The use of constitutional law and courts to achieve social change involves an interaction between social actors and courts. In general, these are complex cases that entail policy reform, affect large social groups or classes, and usually require a litigation campaign sustained in time. Moreover, high-profile strategic litigation, as has been the case in the abortion and same-sex marriage demands, imply high exposure and mobilization of public opinion, which affect both the movement and the courts. So, when strategic litigation and judicial activism are novel processes, or they have not been developed in a certain area of rights, they can carry on a transformation both in movements and in courts, through which both types of actors redefine and build new forms of action and intervention.

Studies on the judicial politics of sexual and reproductive rights in Latin America show that social movements have been determinant actors in processes of legal reform in the field of abortion rights (Diniz and González Vélez 2008; Jaramillo and Alfonso 2008; Lamas 2009; Ruibal 2021) and equal marriage (Carvalho Cardinali 2017; Corrales 2021; López Sánchez 2021). In general, legal strategies have been carried out by a particular sector of each of these movements,

usually the sector more professionalized and linked to institutional practices. For social actors to be able to develop strategic litigation, they need to count on legal resources or support structures for legal mobilization (Epp 1998), as the interaction with the legal system normally requires technical expertise and there are specific standing requirements to litigate collective rights claims in most judicial systems in the region.

However, when movements decide to turn to the courts, they may not have yet developed their own support structure and legal expertise. We draw on examples from the abortion rights legal struggle to point out some of the solutions found by Latin American feminist movements to start implementing litigation as a new tactic. In the case of Colombia, the model adopted by feminist legal advocates to carry out strategic litigation for abortion rights was the creation, in 2005, of a new NGO in the country with this specific purpose: the Colombian office of Women’s Link Worldwide. This organization submitted the claim of unconstitutionality that led to the landmark decision by the Constitutional Court in 2006. Later, feminist organizations developed further legal resources that allowed for the recent litigation campaign by the alliance Causa Justa, which culminated in the decriminalization of abortion by the Constitutional Court in 2022.

In those initial stages, movements may also decide to work with partners and allies in the legal profession until they develop their own legal resources. The main organizations that led legal strategies for abortion rights in Mexico (GIRE, Information Group on Reproductive Choice, created in 1991) and Brazil (ANIS, Institute of Bioethics, Human Rights, and Gender, founded in 1999) followed this path. These organizations contacted external lawyers with expertise in public interest litigation, who assisted them in carrying out a legal strategy. Afterward, both organizations developed their own resources for legal mobilization, and they have trained and incorporated young feminist lawyers. Both organizations are currently headed by female

<sup>4</sup> More information about constitutional court decisions in the field of marriage equality is available at López Sánchez (2021).

lawyers, have developed extensive litigation campaigns, and have become key legal actors in the feminist camp as well as in the area of public interest law more generally in their countries.

A second factor that has been identified by the literature as crucial for the advancement of abortion and equal marriage rights through constitutional courts in Latin America is the receptivity of courts to movement claims, and to progressive and human rights claims more broadly (Jaramillo and Alfonso 2008; Ruibal 2021; Carvalho Cardinali 2017; López Sánchez 2021; Corrales 2021). In this regard, studies on LGBT rights point out that the most activist and favorable court in the region in this field has been the Colombian Constitutional Court, whereas the Chilean Constitutional Tribunal has systematically ruled against these rights (Carvalho Cardinali 2017; Corrales 2021). Recent empirical evidence in the field of abortion rights speak of a similar pattern with regard to the Colombian Constitutional Court as the court in the region that has gone further in the decriminalization of abortion.

Court receptivity to movement claims is one of the components of legal opportunities, the other one being the institutional rules that regulate access by social actors to courts (Hilson 2002). In transitional contexts, when courts are in the process of building or redefining their institutional roles and legitimacy in the political system, some emblematic cases can be decisive for them to engage in a new type of relationship with social movements. The decision-making process in abortion law cases by the Mexican Supreme Court and the Brazilian Supremo Tribunal Federal show how this issue motivated courts to open new institutional channels for the participation of social actors. When dealing with the demand for abortion in cases of anencephaly, the Brazilian court, for the first time in its institutional history, convoked a public hearing, which took place in 2008. For its part, the Mexican Supreme Court developed for the first time a comprehensive communication strategy and promoted the participation of social actors in its decision-making process when it dealt with Mexico City's abortion law reform in 2008.

Among other actions in this direction, the court established a special forum on its website for the publication of documents and comments on the abortion case; it invited email correspondence from social actors; it received several amicus curiae briefs; and, most fundamentally, it established a procedure for public hearings for especially relevant cases. As for the reasons to expand the legal opportunity for social actors in these cases, the justices in charge of the respective processes in each country declared that these were some of the most important cases in the institutional history of the respective courts (see Ruibal 2021).

A further relevant factor for the advancement of the jurisprudence on sexual and reproductive rights in Latin America have been the decisions by international and regional human rights organs, whose positions have been systematically favorable to the demands of Latin American feminist and LGBT movements. The impact of the 2017 Advisory Opinion of the Inter-American Court on Human Rights in the legalization of marriage equality by the constitutional courts of Ecuador and Costa Rica is eloquent in this regard. In the field of abortion law, the most important jurisprudence is the Inter-American Court judgment on the *Artavia Murillo* case of 2012, which rejected the claim on the legal personhood of embryos. Previous decisions by the Inter-American Commission and the United Nations Human Rights Committee had been milestones in the legal struggle for abortion rights in the region (see Wechselblatt 2020).

Finally, movement litigation strategies and court decisions in both areas of rights have generally followed a gradualist pattern. In the field of abortion law, the first demands and court rulings were about the expansion of the exceptions to abortion criminalization, whereas the latest decisions decriminalized abortion during the first stages. In the case of same-sex marriage, there has been a gradual process of recognition of diverse families by courts, as well as by legislatures.

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