

Reproductive Justice and the Rule of Law in Latin America[†]

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Outline

- Confrontations about reproductive rights in Latin American courts.
- The Inter-American Court of Human Rights: *Artavia Murillo vs. Costa Rica*
- The Argentine Supreme Court: *F., A.L.*

[†] Editor's note: The following is a reproduction of presentation slides that accompanied the author's talk. A narrative or prose style text of the presentation was not available. The information contained in the present format is naturally somewhat limited, but it still provides a great deal of valuable information and useful context for the subject. Slides are reproduced and printed here to maximize their readability.

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Domestic confrontations about reproductive rights: 1980s-2014

- **Assisted reproduction techniques (ART)**
 - Regulation focused on techniques or on embryos
 - Regulation of coverage of ART
 - A majority of countries without ART regulations
 - Total ban of IVF in a constitutional decision: Costa Rica
 - Litigation seeking access to ARTs: Argentina
- **Emergency contraception**
 - Court decisions and regulations prohibiting EC: Argentina, Chile, Perú, Ecuador, Brazil
 - Court decisions considering EC constitutional and rules mandating coverage: Argentina, Perú, Colombia, Mexico, Brazil
- **Abortion laws**
 - New laws establishing a total ban on abortion
 - New court decisions creating indications or fostering the enforcement of abortion indications
 - New laws establishing periodic/trimester laws

Artavia Murillo et al. vs. Costa Rica (ICtHR – 2012)

Artavia Murillo vs. Costa Rica (ICtHR – 2012)

- **Facts**

- 1995 Decree regulating IVF
- 2000 Decision of the Constitutional Chamber of the Supreme Court of Costa Rica banning IVF
- 2001 Plaintiffs: 17 infertile women and men filed a case

- **Inter-American Commission process**

- 2004 Admissibility report
- 2010 Article 50 Report – Recommendations
- 2011 Case taken to the Inter-American Court
- 2012 Decision of the Inter-American Court

Articles 1.2. and 4.1. of the American Convention on Human Rights

- **Article 1.2.**

For the purposes of this Convention, "person" means every human being.

- **Article 4.1.**

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

The protection of “life, in general, since conception”

- Embryos are not persons.
- Conception begins with implantation not fertilization.
- Duty to protect life is not absolute.
- Life is incrementally and gradually protected by law.
- Conflict of rights – Balancing.
- Proportionality test applied to the total ban on IVF.

Proportionality assessment

- **Reproductive rights of women and men**
 - Right to private life (art. 11.2 ACHR)
 - Right to personal integrity (art. 5 ACHR)
 - Right to liberty (art. 7 ACHR)
 - Right to form a family (art. 17.2 ACHR)
 - Right to health
 - Right to be free from discrimination
 - As result of a disability (infertility) (art. 18 San Salvador Protocol)
 - Based on gender stereotyping (art. 16 CEDAW)
 - Based on economic situation

- **Proportionality test**
 - Purpose and impact of the total ban
 - Severity of the total ban
 - Arbitrary and excessive

Impacts & Controversies

- New court cases
- Challenges to new laws: Uruguay
- Beatriz case (El Salvador) Precautionary measure of the Inter-American Commission
- Same-sex couples / disability rights:
 - Focus on infertility as a disease and a disability?
- Justice García-Sayán's observation on coverage.

F., A.L. (ARGENTINE SUPREME COURT – 2012)

40 years of change in the books and in practice

1970-1980	1980-2004	2005-2010	2011-2013
<p>H1 547 number (1974)</p> <p>Argentina (1971) Bond (1974+) Venezuela (1986) Uruguay (1983) Brazil (1980) Colombia (1988)</p> <p>Chile (1991-Código San Martín)</p> <p>Altepec (various)</p> <p>Ecuador (1971) Bolivia (1972) Guatemala (1975) Ecuador (1974) Nicaragua (1977) Panama (1977)</p> <p>Costa (1967-1971 págs. 2)</p>	<p>Colombia (1980) Honduras (1989) Chile (1989) El Salvador (1997) Nicaragua (2004)</p> <p>Argentina Bolivia Ecuador Brasil Guatemala México Uruguay</p> <p>Panamá (1983) Perú (1991) Paraguay (1991) Venezuela (2000)</p>	<p>Chile H1 547 number Honduras Nicaragua México</p> <p>Brazil Bolivia Ecuador Guatemala Perú Uruguay</p> <p>Venezuela (2000) Panamá (2007)</p>	<p>Honduras Ecuador Guatemala Ecuador Perú Venezuela</p> <p>Argentina Ecuador (2001-2012) Colombia (2006, 2008, 2011) México</p> <p>Argentina Ecuador (2012-2012) Colombia México</p>
<p>Costa (1967-1971 págs. 2)</p>	<p>México Código Federal (1971) Costa (1987-1988 págs. 2)</p>	<p>Costa México (1971)</p>	<p>Costa México (1971)</p>

The model of indications: 1921-2014

- **First stage: The model of indications in the books**
 - 1921
 - 1968-1973, 1976-1983

- **Second stage: The consolidation of a *de facto* total ban on abortion**
 - Late 1980s cases
 - 1994 Constitutional Amendment
 - 1995-2002 New cases and obstruction to reproductive health laws

- **Third stage: The shift towards proceduralization: Abortion protocols and individual litigation**

- **Fourth stage: The constitutionalization of abortion and new enforcement struggles: F., A.L.**

F., A.L.: The Supreme Court Decision (2012)

- **Constitutionality and conventionality of Article 86 of the Criminal Code**
- **Scope of the rape indication**
- **Socio-legal context: Legality in the application of Article 86**
- **Institutional dimension**
 - **Social right dimensions**
- **Weak remedies: exhortations**

F., A.L.'s characterization of (il)legality as integral to constitutional arguments

- *A contra legem practice*
- **Uncertainty and misinformation**
- **Informal rules with extra requirements**
- **Lack of understanding of the principle of legality**
- **Obstructions and access barriers**
- **Lack of public policies to prevent violence against women**
- **Abuse of Conscientious Objection**

Learning from the failure of the procedural turn?

- Framing and enforcement
 - The *un-workability* (of the model of indications) argument:
 - Universal limitations
 - Contingent limitations
 - Weak remedies and follow up strategies
 - Exhortations
 - Follow up hearings
 - Compliance mechanisms: Mexico, Costa Rica and Russia?

Learning from the failure of the procedural turn?

- Legal reform in anomic contexts
 - Informal vs. formal rules
 - Legal relativism
 - The struggle for densification
 - Experimental/Dialogic remedies
 - Enforcement of court orders