



Contentious Politics and the Conservative Legal Counter-Mobilization Against Abortion Rights in Colombia

La política contenciosa y la contramovilización legal conservadora del aborto en Colombia

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Abstract: This essay analyzes the legal mobilization of conservative activists against abortion in Colombia from 2006 to 2020. In the first part, it examines in depth the nullities presented before the Constitutional Court and the State Council by conservative lawyers against reproductive rights of women. In the second part, it studies the demands of unconstitutionality presented before the Constitutional Court to protect life from the moment of conception. All these legal strategies consolidated a legal counter-mobilization to prevent or deny access to abortion. Based in the literature of social movements and their use of law, the article seeks to understand the dynamics of contentious politics where social movements dabble, dividing them in two cycles depending on the legal strategies used and the actors involved. In this context, an explanation is given of why the judicial forum is privileged over the legislative to promote gender backlash with the intention of limiting reproductive rights of women by Catholic activists in Colombia. Their legal strategies are, thus, theoretically understood as a *legal counter-mobilization*.

Key words: legal counter-mobilization, abortion, conservative, Colombia, legal strategies, contentious politics

Resumen: El presente artículo estudia la movilización legal de los activistas conservadores en contra del aborto en Colombia en el periodo comprendido entre 2006 y 2020. Para tal propósito, en primer lugar, analiza a profundidad las nulidades promovidas en contra del aborto ante la Corte Constitucional y el Consejo de Estado. En segundo lugar, estudia cada una de las demandas de inconstitucionalidad a favor de la protección de la vida prenatal promovida por abogados/as conservadores/as en contra del aborto. Todas estas estrategias consolidaron una contramovilización legal para retroceder en el acceso al aborto, o impedirlo y obstaculizarlo. Con base en la literatura de los movimientos sociales y el uso del derecho, el artículo busca entender las dinámicas de la política contenciosa en las que los movimientos sociales

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incursionan, dividiéndolas en dos ciclos contenciosos según el uso de las estrategias legales y los actores involucrados. En este contexto, se explica por qué se ha privilegiado el foro judicial (sobre el legislativo) para intentar generar retrocesos que limitan los derechos fundamentales de las mujeres por parte de los activistas católicos en Colombia, caracterizando sus estrategias legales teóricamente como una «contramovilización legal».

Palabras clave: Contramovilización legal, aborto, conservadores, política contenciosa, Colombia, estrategias legales

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I. INTRODUCTION

This paper presents an analysis of the legal mobilization against abortion rights by Catholic activists and organizations in Colombia between 2006 and 2020. Conservative litigation challenging abortion rights seeks to foster institutional changes in keeping with Catholic doctrine on the right to life of the unborn, taking advantage of issues related to the interpretation and application of formal regulations. While there is a debate in the literature on social movements regarding the precise meaning of the term *legal mobilization*, in this paper we use it to refer to the exercise, via legal institutions, of the right to mobilize and advance a social cause (Boutcher & Chua 2018; Epp, 1998; Hilson, 2002; Lehoucq & Taylor, 2020; Lemaitre, 2009; McCann, 2006). Thus, legal mobilization entails the use of legal resources in institutional settings as part of an overall strategy to advance a particular social cause or worldview.

The objective of this paper is to identify when and how conservative activists mobilized against abortion in Colombia. That is, to understand their legal strategies and goals, analyzing the effectiveness of their appeals to the courts chosen. In doing so, we hope to contribute to the understanding of the dynamics of social movements' engagement in contentious politics (Tarrow, 2011, p. 16) by offering an explanation as to why Catholic activists have preferred the judicial forum, rather than the legislative one, in their efforts to restrict Colombian women's

reproductive rights, describing this strategy theoretically as a *legal counter-mobilization*.

As we will demonstrate in our analysis of the different appeals filed by Catholic activists in courts, the Constitutional Court Ruling C-355 of 2006, which decriminalized abortion in Colombia in three particular circumstances (when the pregnancy is a result of sexual violence, when there is a risk to the woman's health, and when a fetal malformation is detected), marked a significant turning point in the conservative legal counter-mobilization. The Constitutional Court deemed that the right to terminate a pregnancy is consistent with the fundamental rights of women to dignity, health and the free development of personality. It also established a series of obligations for providers of reproductive health services (Ruling C-355, 2006). This high-impact lawsuit was filed by a lawyer supported by Colombian feminist organizations (Jaramillo & Alfonso, 2008).

Based on the Court's decision, the Ministry of Social Protection issued a decree and the Superintendence of Colombia a circular confirming the legality of pregnancy termination. As these administrative rules established legal regulations for abortion access, they can be reviewed by the Council of State. After Ruling C-355 of 2006 was handed down, the Ministry of Social Protection issued Decree 4444, in December of that year, regulating "the provision of certain sexual and reproductive health services" and thus implementing the Constitutional Court's decision within the Colombian health care system. The regulation included many details which may at first seem unimportant in legal terms, but which in practice are often fundamental for the protection of women's rights. Thus, due to the advocacy advanced by a coalition of feminist organizations, Decree 4444 of 2006 determined the obligations of insurance providers (the EPS) and health care providers regarding legal abortion (Ruibal, 2014, pp. 42-43).

Conservatives' legal counter-mobilization began in 2006 when conservative lawyers linked to Catholic networks filed a nullity to overturn Decree 4444 of 2006. Since then, conservative lawyers have consistently filed nullities before the Council of State and the Constitutional Court challenging abortion regulations. In addition to impede advances in the recognition and practice of women's reproductive rights, the conservative legal mobilization aims for the Catholic doctrine on the right to life of the unborn to be reflected in law. In Latin America, conservative legal advocacy has historically focused on the protection of the fundamental rights of the unborn and invoked natural law as the basis of its argument against the legalization of abortion (Alvarez Minte, 2017; Heumann *et al.*, 2015; Htun & Weldon, 2015; Lemaitre, 2012; López *et al.*, 2021; López, 2021; Yamin & Bergallo, 2017).

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Catholic constitutionalism in Latin America, understood as the influence of Catholic beliefs on constitutional law, holds several substantive arguments to support its anti-abortion claims: the violation of women's right to equality in the decriminalization of abortion, the suffering abortion causes to women, the right to life from the moment of conception, and the right of doctors to conscientiously object legal abortion procedures. These arguments are tied to the Catholic Church's theological notion of human life and a defense of traditional gender roles (Lemaitre, 2016, p. 310). Since the 1960s, the Vatican has defended the sanctity of human life from the moment of conception, opposing policies against abortion and contraception¹.

These arguments are also consistent with the tendency, identified by the socio-legal literature, of conservative movements in Latin America to offer "scientific, legal and bioethical justifications for conflating a women's sexuality with her reproductive potential" (Vaggione, 2018, p. 328). Despite Colombia's religious pluralism, Catholic constitutionalism is evident both in the legal resources used by Catholic lawyers challenging abortion rights and in the judicial reasoning of members of the country's highest courts. Certain Catholic judges have even proposed that "the Constitutional Court be inspired by the contents of the Bible" (Malagón, 2020, p. 128).

Therefore, this paper maps the conservative actors, their strategies and the legal arguments employed in the counter-mobilization against abortion, identifying connections and common elements between them. We also discuss the objectives of the lawsuits filed with the Colombian high courts during the period from 2006 to 2020 in order to identify the key cycles of contentious politics around abortion. First, we discuss the nullities filed before the Constitutional Court and the Council of State to restrict access to abortion established in legal regulations. Second, we analyze the actions of unconstitutionality filed by conservative lawyers which sought to defend the right to life of the unborn. Together these strategies represent a legal counter-mobilization aimed at preventing access to abortion, continuing the social mobilization led by the Catholic Church in the 1990s (Arias, 2003).

Our methodology consists of an analysis of the context of the legal proceedings challenging women's rights to access an abortion between 2006 and 2020 in Colombia. We classify the legal resources used by conservative activists (nullities and constitutional actions filed before the courts), analyzing the arguments employed in order to identify common threads among the different actors. A compilation of articles from *El Tiempo* and *El Espectador*, the two most widely read national newspapers

¹ In the 1968 encyclical *Humanae Vitae*, Pope Paul VI decried the use of contraceptives, as well as family planning policies, as being against the Catholic creed. See Paul VI (1968).

in Colombia, from the period in question helped us to characterize several of the conservative actors and portray their legal strategies in the public sphere. We conclude that their legal arguments follow the lines of past conservative discourses, but that conservative organizations and activists have introduced an important innovation regarding their legal strategies employed over the last two decades in their efforts to impede the exercise of reproductive rights, specially access to abortion.

II. THE CONSERVATIVE LEGAL COUNTER-MOBILIZATION AND CONTENTIOUS POLITICS AROUND ABORTION

Social movements interact dynamically, according to the political opportunities of the historical context they are embedded in. The advancement of their interests depends on the resources they have against the elites and the State, and their reactions to the threats from their opponents (Tarrow, 2011, pp. 28-29). This dynamic of social interaction is known as *contentious politics*, an arena where discourses, alliances and the strategies between movements and their opponents take place (Tarrow, 2011; Leachman, 2013; Snow *et al.*, 2013). According to Tarrow (2011), changing political opportunities and the constraints of the context in which social movements' causes develop are perhaps the most important factors that shape cycles or waves of contentious action (p. 2).

Contentious politics regarding abortion reflect the “culture wars” between the feminist movement, which advocates for women’s reproductive rights, and the conservative groups which promote the sacredness of human life, deserving protection from the moment of conception. Constitutional law appears as their battleground (Lemaitre, 2012; Nejaime *et al.*, 2020; Post & Siegel, 2007; Rodriguez & Machado, 2017). These are two antithetical worldviews which often find themselves in opposition in constitutional courts. The socio-legal literature on social movements has analyzed the factors which give rise to legal mobilization by conservative organizations and activists, understood as those groups for whom human sexuality is inextricably bound to reproduction and a religious conception of the world which they seek to translate into laws and public policy (Bergallo *et al.*, 2018; Blee & Creasap, 2010; Yamin *et al.*, 2018; Ziegler, 2016). The findings of socio-legal scholars are that political opportunities, resource mobilization, transnational networks, perceived threats from opponents, the worldviews at stake, and the links between conservative advocacy and churches are determinants for the emergence and sustainability of conservative legal mobilization (Ayoub, 2014; Hoover & Den Dulk, 2004; Lehoucq, 2021; McVeigh & Sikkink, 2001; Southworth, 2005, 2008; Wilson & Hollis-Brusky, 2014; Yamin *et al.*, 2018).

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Although the dynamics of mobilization and counter-mobilization among feminist and conservative movements regarding abortion have been analyzed, there has been little empirical analysis of these over time, despite some notable exceptions (Banaszak & Ondercin, 2016; Ruibal, 2014, 2015). Most of the studies of the dynamics of mobilization and counter-mobilization in Latin America have not dealt with the legal strategies of conservative actors in sufficient detail (Gianella, 2018; Lehoucq, 2021; Lemaitre, 2012; López, 2021; Morán Faúndes *et al.*, 2016). Researchers describing conservative counter-mobilization generally consider it a *reaction* to feminist mobilization, to promote a backlash against the advances of the women's movement (Ruibal, 2015; Vaggione, 2018; Yamin *et al.*, 2018).

We consider counter-mobilization to be part of the contentious politics of social movements, examining conservative activists' use of legal strategies as a way to reopen the abortion debate in the courts of Colombia as a particular characteristic of the conservative counter-mobilization between 2006 and 2020. Such legal strategies are part of the range of collective actions employed by social movements to influence decision-makers, cooperate with other actors or groups pursuing similar objectives, and interact with their opponents (Jasper *et al.*, 2015, p. 399). In this sense, the strategy behind the legal challenges to abortion rulings has been intentionally developed by conservative actors in order to influence judges, fostering cooperation among lawyers who share the same ideology, counteracting the advances of their feminist opponents. Therefore, two distinct cycles in the contentious politics of abortion in Colombia can be identified, based on the legal strategies employed by conservative actors.

The first began as a response to Ruling C-355 of 2006, which established the fundamental right of women to voluntarily end a pregnancy in three particular circumstances. This Constitutional Court ruling in favor of women's constitutional rights, and the resulting Decree 4444 issued by the Ministry of Health in 2006 to implement it, triggered a legal counter-mobilization which was subsequently sustained over time in the high courts of Colombia by lawyers and organizations with Catholic backgrounds. During this first cycle, between 2006 and 2017, the following stand out as preferred legal strategies of the conservative movement: a) filing actions to the Constitutional Court to overturn prior rulings, thus halting the advances achieved in the form of *tutelas*², or writs of protection of fundamental rights, presented by women who faced barriers to access abortion services, and b) filing nullities before the Council of State challenging the constitutionality of Ruling C-355

2 *Translator's note:* The *tutela* is a Colombian constitutional remedy for the protection of fundamental rights, similar to the writ of *amparo* or protection in other legal systems of the Spanish-speaking world.

of 2006 and the regulations established in Decree 4444, issued the same year.

These strategies were devised by *Red Futuro Colombia*, a Catholic organization, and a former attorney general of the country, a conservative Catholic politician who had personal links with Red Futuro's lawyers. The second cycle covers the years from 2018 to 2020, when conservative actors' legal strategies focused on defending the right to life of the unborn at the constitutional level, by filing actions before the Constitutional Court challenging the constitutionality of prior abortion rulings. In addition to using different arguments, the advocates presenting these actions were new lawyers within the conservative movement, which had no links among them. They did, however, continue to develop the arguments of Catholic constitutionalism in the region.

In both cycles, conservative activists used the courts to a) restrict women's access to reproductive health services, that is, to make the Constitutional Court's jurisprudence irrelevant in practice, and b) reopen the constitutional debate on the decriminalization of abortion in order to setback the Court's rulings protecting women's fundamental rights. In addition, despite the prevalence of the judicial forum as the target of the conservative legal counter-mobilization during both cycles of contention, a number of anti-abortion bills were also presented in Congress by conservative politicians (including Catholic and evangelical legislators), seeking to eliminate the rights of women protected by Ruling C-355 of 2006 and reverse the advances achieved through the jurisprudence of the Constitutional Court in 2018³. To date, none of these bills have been become laws, or even passed the first debate in Congress (Niño & Rincón, 2018, p. 391). Also, there has been no visible connection between the Catholic lawyers opposing abortion in courts and the conservative congressmen pushing for new legislation in this regard.

III. THE FIRST CYCLE OF CONTENTIOUS POLITICS: *THE PROCEDURAL SHIFT BY THE CONSERVATIVE ANTI-ABORTION MOVEMENT (2006-2017)*

The conservative legal counter-mobilization in Colombia between 2006 and 2017 was characterized by the filing of a series of claims, based on formal and procedural arguments, before the Constitutional Court and the Council of State, requesting that they overturn prior rulings in favor of women's rights to access legal abortions. This is a *procedural shift* in

³ See, for example, Bill 06 of 2011, which contained anti-abortion provisions, presented by more than sixty Conservative Party congressmen. The provisions sought to protect life from the moment of conception until natural death, to advance a total prohibition of abortion and euthanasia. The bill did not pass the first debate in Congress, with 56% of votes in favor of not discussing it (El Espectador, 2010).

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conservatives' arguments attacking women's fundamental rights. It is evident from these formal arguments that the plaintiffs sought to restrict, using procedural strategies, the fundamental rights of women established in Ruling C-355 of 2006 and the corresponding regulations issued to implement the ruling. In addition, their objective was to reopen the debate on the decriminalization of abortion in the Constitutional Court.

This legal strategy was pursued by a number of lawyers from Catholic organizations, some of them very close to religious politicians such as the former attorney general of Colombia, Alejandro Ordóñez, known for his Catholic anti-abortion activism. When Ordóñez was elected attorney general, he was labeled by the press as a "religious fundamentalist" who was against sexual and reproductive rights (El Espectador, 2013a). Most of these activists share a religious worldview which holds that abortion should be criminalized without exception based on the right to life (Hoyos, 2006, pp. 60-62).

In 2008, when he was elected attorney general, Ordóñez became one of the principal protagonists of the conservative and Catholic legal counter-mobilization seeking to obstruct Constitutional Court decisions in favor of abortion. Acting as attorney general (from 2008 to 2016), five petitions were filed to overturn *tutela* rulings protecting women's reproductive rights, which will be further discussed. The Office of the Attorney General participates directly in constitutional matters as a legitimate party to give a legal opinion in the constitutional process when laws and actions of other authorities are challenged before the Constitutional Court. As attorney general Ordóñez appointed as delegate for constitutional affairs, Ilva Myriam Hoyos Castañeda, an Opus Dei lawyer from La Sabana University who in 2007, as president of Red Futuro Colombia, had filed a petition to overturn Ruling C-355 of 2006 (Court Resolution 012, 2017).

The use of nullities by Catholic lawyers during this time before the Council of State to advance the conservative cause against abortion is no coincidence. This judicial body has "a reputation for leaning towards a more formal, conservative application of the law" (Niño & Rincón, 2018, p. 388). On the other hand, conservatives have also consistently filed lawsuits before the Constitutional Court, despite the lack of majority of Justices to overturn abortion rulings in this judicial forum, considering it has direct jurisdiction to review criminal laws regarding abortion. The following is a description of the legal context and strategies employed during the first cycle of contention, divided according to the legal authority involved.

III.1. Conservative petitions of nullity to overturn prior rulings filed with the Constitutional Court between 2006 and 2016

Since its creation in 1991, the Constitutional Court of Colombia has been perceived as tribunal that protects the human rights of minorities (Niño & Rincón, 2018, p. 385). In contrast to the Council of State, which is perceived as a more conservative legal authority, the Constitutional Court is considered progressive. Conservative legal strategies employed in this judicial forum have attempted to connect formal arguments related to violations of due process with substantive violations of constitutional rights, such as the plaintiffs' freedom of conscience.

The conservative activists who filed most briefs in the Constitutional Court between 2006 and 2016 had a Catholic background: Red Futuro Colombia, Ilva Myriam Hoyos and Alejandro Ordoñez, at the head the Office of the Attorney General. In general, the Attorney General's Office claimed procedural violations in an attempt to restrict reproductive rights of women recognized in constitutional law and reopen discussions on the decriminalization of abortion under Ruling C-355 of 2006. After 2016, when a new attorney general took over, no further petitions to overturn abortion rulings were filed to the Constitutional Court.

The first petition of nullity was filed in 2007 by Ilva Myriam Hoyos, requesting the court to overturn Ruling C-355 of 2006. Hoyos was then president of the Catholic organization Red Futuro Colombia and had publicly expressed her concern that "the Court I respect has justified the action of killing someone" (El Tiempo, 2006). Days after this statement, together with Luis Rueda Gómez and other Catholic citizens, she filed the petition to overturn the ruling. Most of the arguments expressed in the petition had a formal nature. They alleged violations of due process, claiming an inconsistency between the holding and the decision of the ruling, since the interventions of other authorities had not been taken into account, or because certain Justices did not have a competent profile to discuss the issue, among other formal arguments. A number of the arguments also cited the defense of the right to life established in the Constitution. For example, it was argued that the Court had omitted the citizens' evidence showing that life begins at conception, as established in the Inter-American Convention on Human Rights, and that the 1991 National Constituent Assembly had rejected the proposition of voluntary motherhood as a fundamental right.

The Court denied the petition to overturn Ruling C-355 of 2006 in its Resolution 360 of 2006, considering that the figure of nullity "is not an appropriate means to reopen the debate over the evidence, nor to review the ruling, as it has not yet been written into law, nor does it constitute a new instance, nor does it have the nature of a legal

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resource” to overturn constitutional decisions (Court Resolution 360, 2006). The Court therefore concluded that no valid reasons had been presented by Catholic lawyers, rather it could be seen that “the purpose disclosed, i.e., to reopen a debate already resolved by the Court, means the grounds for the petition are not valid” (Court Resolution 360, 2006).

Subsequently, between 2007 and 2016, the Court issued fifteen *tutelas*, mostly in cases of women who were denied legal abortion services by health or insurance providers or who had faced barriers to access abortion procedures (Rulings T-171, 2007; T-988, 2007; T-009, 2009; T-209, 2008; T-946, 2008; T-388, 2009; T-585, 2010; T-841, 2011; T-959, 2011; T-636, 2011; T-627, 2012; T-532, 2014; T-301, 2016; T-697, 2016; T-731, 2016). During this period the Constitutional Court reiterated in its rulings of the *tutelas*, the right of women to voluntary end a pregnancy when it: “(i) fits one of the particular circumstances defined by the Constitutional Court in Ruling C-355 of 2006, and (ii) chooses, by her own free will, this alternative over the option of carrying the pregnancy to term” (Rulings T-585, 2010; T-301, 2016). Analysis of the *tutela* rulings has found that the constitutional debate proposed by Catholic advocates focused in challenging the “evidence” based on the facts to promote “disputes about the appropriate and accurate verification of the circumstances of the woman requesting the abortion” (Niño & Rincón, 2018, p. 386).

During 2009, seven petitions of nullity were filed to the Constitutional Court arguing against five of the fifteen *tutela* rulings protecting women’s access to abortion. On average, lawyers filed petitions challenging one of every three *tutelas*. This figure demonstrates the consistent use of the legal strategy by different conservative activists in the first cycle of contention of legal challenges to Constitutional Court rulings. These rulings established important precedents to protected the fundamental rights of women guaranteeing access to legal abortion services and regulating doctors’ objections to perform abortions (Rulings T-388, 2009; T-585, 2010; T-841, 2011; T-627, 2012; T-301, 2016).

Four petitions of nullity were filed by the Office of the Attorney General under Alejandro Ordoñez, challenging Rulings T-585 of 2010, T-841 of 2011, T-627 of 2012, and T-301 of 2016 of the Constitutional Court. Rulings T-585 of 2010, T-841 of 2011 and T-301 of 2016 established important precedents for reproductive rights, integrating constitutional jurisprudence recognizing a women’s right to have an abortion is a fundamental right. Thus, the Constitutional Court denied two of the petitions and declined to review the other two since they were presented extemporarily. The Constitutional Court’s arguments on the first two petitions examined were that they lacked compelling arguments, since the claims did not demonstrate a clear and express violation of due

process; there were no changes in the case law to study the issue, and that “the petition seeks to reopen the debate and asks the Court to reexamine matters which have already been decided” (Court Resolution 038, 2012). As such, the Court reaffirmed its holdings regarding the lack of arguments in favor of overturning the prior rulings and the soundness of its legal reasoning on abortion as detailed in Ruling C-355 of 2006.

The resolutions discussed above demonstrate that the petitions of nullity to overturn prior rulings were the principal strategy employed by conservative lawyers between 2006 and 2016 in their campaign against abortion. The petitions were unsuccessful and all their requests were denied. However, the conservative movement persisted in their efforts to fight subsequent decisions in favor of women’s rights filing similar petitions to the Court afterwards that were also denied (Rulings T-388, 2009; T-585, 2010; T-841, 2011; T-627, 2012; T-301, 2016). The persistent use of nullities was a form of institutional surveillance over the Constitutional Court by another authority which must abide by its decisions. This may have had a symbolic impact on the constitutional court rulings in the sense that the Justices knew that they were constantly being monitored by the Attorney General’s Office. This cycle ended when Alejandro Ordoñez was removed from the office for corruption, and Ilva Myriam Hoyos was forced to leave her position at the Attorney General’s Office as well. After they left, no further petitions to overturn prior constitutional rulings on abortion had been filed. This shows Ordoñez and Hoyos used this public office to promote their conservative agendas.

III.2. Conservative petitions of nullity to overturn prior rulings filed to the Council of State (2009-2016)

The Council of State is the judicial body responsible for the constitutional review of decrees issued by the government. Thus, the Council reviewed decrees and circulars clarifying abortion rights issued in 2006 by the Ministry of Social Protection and the Superintendence of Colombia. The lawyers who filed most lawsuits against these decrees were all Catholics: Luis Rueda Gómez and Hernando Salcedo Tamayo, of Red Futuro Colombia; Ilva Myriam Hoyos, former Attorney General’s Office delegate for constitutional affairs; and the director of Javeriana University’s San Ignacio Hospital, who had no apparent political connection with the other lawyers. All of them had links with the Catholic Church. No Christian, evangelical or other religious groups participated.

Between 2009 and 2016, Luis Rueda Gómez and Ilva Myriam Hoyos were identified as the two lawyers who filed most of the petitions of nullity to overturn judicial decisions on abortion before the Council

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of State, since it was perceived as being more conservative than the Constitutional Court. However, the repeated filing of petitions with the Council of State by Hoyos on behalf of the Attorney General's Office was also due to Alejandro Ordoñez's political past. He was a member of the Council of State between 2000 and 2008 and was included in the shortlist proposed by the Council as a candidate to be attorney general (Council of State, 2016).

Salcedo succeeded Luis Rueda upon the latter's death in 2011. A Catholic trial lawyer with a history of arguing against the fundamental rights of women and LGBTI people, Salcedo had filed a petition of nullity in 2012 together with the Attorney General's Office to overturn a prior ruling in a same-sex adoption case (Court Resolution 115, 2013). He additionally filed a petition to overturn Ruling T-627 of 2012, a decision on the suit filed by Mónica Roa and 1279 other women against the Attorney General's Office, which they claimed had ordered a large-scale campaign against abortion (Court Resolution 330, 2016).

Beginning in 2009, four lawsuits were filed challenging administrative health regulations on abortion. The first one in December 2006 challenging Decree 4444, which regulated "the provision of certain sexual and reproductive health services", formalizing the Constitutional Court's decision within the Colombian health system. Decree 4444 of 2006, which determined the obligations of insurance providers and health care providers and their personnel, was issued as a result of the advocacy done by a coalition of feminist organizations (Ruibal, 2014, pp. 42-43).

Red Futuro Colombia, represented by Luis Rueda Gómez⁴, filed a petition with the Council of State to overturn Decree 4444 of 2006. The main argument of the lawsuit was that the President had exceeded the regulatory powers granted to him by the Constitution and thus the ministries had no legal competence to regulate abortion issues. The argument was formal, but the motivation was substantive: to invalidate the regulations regarding the practice of abortion by health care providers. In 2013, the Council of State overturned Decree 4444 of 2006, noting that:

the Government does not have jurisdiction in the matter, neither through the National Board of Social Security in Health Care nor any other public body, and thus cannot determine public policy on health and social security matters, especially regarding the Compulsory Health Plan, related to the issues which were the focus of the ruling decriminalizing abortion.

4 Luis Rueda Gómez was a frequent litigant until his death in 2011. For further reading, see Colombia Pro Vida (2011).

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Decree 4444 of 2006 was thus overturned. However, Ruling C-355 of 2006 established the constitutional obligations of abortion providers and continued to apply. In the decision of the Council of State, the conservative activist movement had the first and only triumph of the legal counter-mobilization against abortion rights. *El Espectador* covered the issue considering “financing abortion with public health money is illegal; no ruling aside from that which was overturned by the Council of State permits it” (El Espectador, 2013c). Despite the “media triumph”, Decree 4444 of 2006 had been provisionally suspended in 2009 and definitively in 2013. Nevertheless, this did not eliminate the responsibilities of insurance providers related to the provision of reproductive health services; that is, the claim concerning financing was false, and as such confusing (El Tiempo, 2013).

In 2012, the director of Javeriana University’s San Ignacio Hospital (a Catholic hospital), filed a lawsuit with the Council of State challenging the Superintendence of Health Circulars 058 of 2009 and 003 of 2011, whose objective was to specify health care providers’ responsibilities regarding the practice of abortion. Since 2006, this hospital had publicly opposed abortion and has been sanctioned twice for refusing to provide legal abortion services, in 2009 and 2021. The argument in the hospital’s lawsuit alleged that the Superintendence did not have jurisdiction to regulate the right to life or the doctors’ right to conscientious objection. Thus, it had no authority to apply the provisions of an invalidated norm, attacking the legal regulations on abortion (Decree 4444, 2006). The two circulars were annulled by the Council of State on May 23, 2014 (Council of State, 2009).

Later, in April of 2013, the director of San Ignacio Hospital filed a new lawsuit challenging the Superintendence of Health Circular 003, which issued directions related to abortion based on the fundamental rights of women protected under Colombia’s Constitution, international treaties and the rulings of the Constitutional Court. The Council of State annulled Circular 03 of 2011, citing arguments related to the lack of jurisdiction and regulatory powers of the government. The Circular contained administrative measures to be adopted by health providers, the regulation of conscientious objection and the right to a fetal diagnosis, among other topics. Catholic networks backed up the claims: Hernando Salcedo Tamayo, Red Futuro Colombia, Red Familia Colombia, and the Fundación Marido y Mujer presented legal opinions before the Council. The last two had previously filed opinions against same-sex marriage. Other groups also presented legal opinions against the petition, including *La Mesa por la Vida y la Salud de las Mujeres* (the Association for Women’s Health and Lives), Dejusticia, Women’s Link Worldwide and the Center for Reproductive Rights, feminist and human rights organizations in favor of legal abortion. They claimed the

Catholic petition did not comply with the case law of the Constitutional Court protecting women's rights (Council of State, 2013).

In 2016, the Council of State partially overturned Circular 003 of 2013, leaving many of its main provisions in force, including those related to the rights to information, confidentiality, the rights of people with disabilities, the prohibition of discrimination through gender-based prejudices, denouncing women who request abortions and the sanctions for non-compliance with the directions. However, four aspects of the health guidelines were nullified arguing that the government did not have the jurisdiction to intervene.

The most recent petition filed before the Council of State was presented by Hernando Salcedo Tamayo, from Red Futuro Colombia in 2017, challenging the Attorney General's Office Directive 006 of 2016, which established guidelines for the investigation and prosecution of the crime of abortion, urging prosecutors to use criminal law as a last resort (*ultima ratio*) and to cease proceedings related to cases involving abortions practiced under the three legal circumstances (Directive 006, 2016). The arguments of this lawsuit were that the Attorney General's Office did not have jurisdiction to regulate this issue, and that the directive violated the opportunity principle as well as international human rights norms (Dejusticia, 2018). This lawsuit has not yet been decided. The petition requests that the annulment of abortion regulations and the competence of judicial authorities to investigate alleged abortion crimes.

Thus, during this period conservative lawyers found the Council of State to be more receptive forum to their lawsuits, considering some of their procedural arguments challenging abortion regulations were successful. After the provisional suspension of Decree 4444 of 2006 and the partial annulment of Circular 003 of 2013, Catholic lawyers continued to file petitions to overturn prior rulings hoping to obstruct and create new obstacles for the provision of abortion services. However, the procedural arguments of anti-abortion activists do not have sufficient legal scope to alter the constitutional framework of abortion in Colombia. However, they can create obstacles for women to access abortion services. This conservative strategy represents a sophisticated use of law and legal resources with the objective of promoting a backlash without citing arguments related to the right to life of the unborn or substantive arguments derived from their philosophical beliefs.

IV. THE SECOND CYCLE OF CONTENTIOUS POLITICS: LAWSUITS ALLEGING UNCONSTITUTIONALITY FILED WITH THE CONSTITUTIONAL COURT (2017-2020)

Between 2017 and 2020, conservative activists employed a new legal strategy against women's fundamental rights. They filed four actions of

unconstitutionality before the Constitutional Court and challenged also a *tutela* before the Constitutional Court. None of the individuals who filed lawsuits challenging abortion rights had connections to or acted on behalf of any Catholic organization, but they can be identified as Catholic lawyers. The arguments of these lawsuits were not procedural, as in the previous phase. Rather, they were consistent with the historical Catholic doctrine defending the right to life from the moment of conception. In this context, their new arguments were: the psychological harm abortion causes women and the consequences of abortion for people with disabilities. Some new faces of the legal counter-mobilization also appeared. The lawsuits were filed by lawyers with Catholic ideologies defending the right to life of the fetus, who sought the restriction or amendment of Ruling C-355 of 2006. The following is an analysis of the arguments presented in the lawsuits, the profiles of the advocates and their results.

In 2017, Andrés Eduardo Dewdney Montero, a Catholic lawyer with no affiliation to any institution, filed a lawsuit challenging the constitutionality of Article 122 of Law 599 of 2000 arguing the violation of the right to life protected in the Constitution (Art. 11) and in Article 4 of the American Convention on Human Rights, seeking to set a time limit on legal abortions. Dewdney is a frequent plaintiff in the Constitutional Court and the Council of State, filing suits related to health, social security and medical ethics issues, but this was his first anti-abortion action⁵. He does not publicly identify with any conservative movement or anti-abortion group, but his arguments to restrict the practice of abortions had the same objectives of several conservative groups (El Espectador, 2017a, 2017b; El Tiempo, 2017).

During this lawsuit, the majority of the interventions by universities and public institutions in favor of reproductive rights requested that the Court to refuse to hear the case as a matter of *res judicata* (settled issue) and to reaffirm the constitutionality of the laws challenged.⁶ In its request, the Ministry of Health emphasized that “this is an attempt to reopen a debate which has already been resolved by the Constitutional Court” (Ruling C-341, 2017). Since the lawsuit did not present new arguments to support the claim that life was constitutionally protected from the moment of conception, the Constitutional Court did indeed

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5 Dewdney has filed lawsuits challenging the constitutionality of more than ten laws which have resulted in the following rulings, among others: C-155 of 2004, C-119 of 2008, C-381 of 2008, C-177 of 2009, C-762 of 2009 and C-1020 of 2012.

6 See the interventions by Externado University of Colombia (*res judicata/enforceability*), University of Cartagena (that the court refuse to hear the case), University of La Sabana (that the court refuse to hear the case/*res judicata*), Del Rosario University (that the court refuse to hear the case), the Public Defender's Office (that the court refuse to hear the case/constitutional *res judicata*), the Ministry of Health (*res judicata/enforceability*), the Ministry of Justice (*enforceability*) (Constitutional Court of Colombia, Ruling SU-096, 2018).

refuse to hear the case, deeming the claim to be without merit by eight votes to one.

This majority of votes in favor of the decision shows that the plaintiff did not present solid arguments against an issued already resolved by the Court (*res judicata*). Thus, his efforts to establish a time limit on abortions had no legal basis and reveal that he aimed for the Court to reevaluate the constitutionality of Ruling C-355 of 2006. However, the conservative counter-mobilization does have allies on the Constitutional Court. The single dissenting judge on this issue was Cristina Pardo, a Catholic Justice who is openly anti-abortion. Pardo argued that allowing abortion without time limits is unconstitutional and infringes the right to life of the fetus (RCN Radio, 2018; El Espectador, 2018b).

The second conservative attempt to restrict reproductive rights in this cycle of contentious politics took place in 2017, when Justice Pardo was assigned to analyze the *tutela* of a woman pregnant with a fetus with a severe fetal pathology. The petitioner claimed she had the right to a legal abortion considering the pregnancy imposed a severe risk to her mental health. Faced with multiple barriers while seeking legal abortion services, the woman filed a *tutela* action against her health insurance company (EPS). Cristina Pardo requested the *tutela* to be examined in a plenary session of the Constitutional Court, with the objective of unifying the case law on abortion. In addition, she sought to foster scientific and medical debate on mental illness during pregnancies, including the mental health risks caused to pregnant women and post-abortion depression. She argued fetal viability should be considered as a time limit for the practice of abortions in the health system, requesting scientific evidence and legal interventions to support her argument from several universities as well as doctors' and psychologists' associations in Colombia (Ruling SU-096, 2018).

Justice Pardo's draft ruling had two clear purposes. First, to propose a limit of twenty-four weeks of gestation for the practice of abortions, based on the medical argument of fetal viability and the emotional argument concerning the suffering of the fetus, leaving a limited window for women to voluntarily terminate a pregnancy. And second, to eliminate fetal malformations as a legal circumstance to perform abortions (Ruling SU-096, 2018), in order to protect the right of persons with disabilities. As such, her arguments intended to demonstrate that a new medical reality existed which had not previously been considered by the Court. Thus, the principle of *res judicata* at the constitutional level will not apply, opening the door to impose restrictions on legal abortions.

However, prior to the Constitutional Court debate, the media began to discuss the issue and the latent threat of the draft ruling in favor of imposing a time limit for abortion (El Espectador, 2018a, 2018b;

El Tiempo, 2018a, 2018b). Justice Pardo's draft did not gain consensus within the Court and the case was assigned to Justice José Fernando Reyes Cuartas, who followed her in alphabetical order. Reyes' decision represented a fundamental shift in the abortion debate in the Constitutional Court. What had begun as a challenge to abortion regulations resulted in constitutional principles in favor of women's reproductive rights (El Espectador, 2018b; El Tiempo, 2018b).

The Constitutional Court thus unified the case law concerning the practice of abortion in Ruling SU-096 of 2018, stating constitutional parameters outlined in previous *tutela* rulings. Based on Ruling C-355 of 2006, the Court framed the right to abortion as a constitutional right which "protects women's autonomy and right to choose", and which "belongs to the category of reproductive rights and as such has the same legal basis and is subject to the same directions and obligations" (Ruling SU-096, 2018) as other rights in that category. As a unifying ruling, it draws binding regulations for "all State officials and bodies, as well as public and private insurance providers and individuals" (Ruling SU-096, 2018).

One month after the publication of this ruling, Senator María del Rosario Guerra, together with twenty congressmen from different right-wing political parties such as *Centro Democrático*, *Colombia Justa Libres* (a Christian party), *Cambio Radical* and *Partido de la U*, filed a petition before the Constitutional Court to overturn it (El Tiempo, 2019). The Constitutional Court declared the petition inadmissible arguing the plaintiffs had no legal capacity to request that a judgement which did not affect them directly be overturned. In addition, the decision reiterated that SU-096 of 2018 referred to all prior decisions of the Constitutional Court which recognized the termination of pregnancy as a fundamental individual right (Court Resolution 558, 2019).

The third attempt to restrict reproductive rights in this second cycle of contentious politics took place in 2019. Two lawsuits challenging the constitutionality of prior rulings were filed by attorney Natalia Bernal Cano, who identifies herself as "Researcher, founder and director of the European Center for Comparative Law Research". This center is based in Paris and exclusively publishes writings by Bernal, who also serves as editor (Bernal, 2017). Bernal identifies herself as a Catholic but has no affiliation to any religious network or organization (El Espectador, 2019). The lawsuits challenged the constitutionality of Articles 90, 91 and 93 of the Colombian Civil Code, regarding the civil status of persons, the civil protection of the unborn and the legal presumption related to conception respectively. She alleged that they violate the right to dignity, to prenatal life, the right of children to be protected by the State from the moment of conception and the inviolability of the life

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of every living being, as enshrined in Articles 1, 2, 4, 5, 11, 12, 13, 14, 42, 44, 47, 94 and 95 of the Constitution (Ruling C-089, 2020).

Bernal argued in favor of the right to life and fetal personhood, drawing also on the negative effects of abortion on women and their mental health, arguing that “there is no constitutional balance regarding the protection of pregnant mothers and unborn children” (Ruling C-089, 2020). The psychological effects of abortion are known as the *post-abortion syndrome*. Here she was employing the classic arguments of Catholic constitutionalism concerning equality, non-discrimination and the implementation of pro-life public policies as a means to solve the problem of abortion (Lemaitre, 2010, 2016). However, Bernal did introduce an additional argument: the violation of the woman’s human right to not be subjected to cruel or inhuman treatment or violence, based on the United Nations Convention Against Torture, considering “legal abortion is torture and a form of violence against women and against their unborn children” (Ruling C-089, 2020).

In addition, Bernal filed a series of briefs which, in her opinion, “proved the harmful emotional effects of abortion” (Ruling C-089, 2020). In filing this lawsuit, she hoped the Court would urge Congress “to amend legislation” allowing abortion, calling on legislators and the Ministry of Health to “organize national campaigns for the prevention of abortion and large-scale information campaigns on the risks to pregnant mothers who undergo legal or clandestine procedures” (Ruling C-089, 2020).

Bernal’s legal strategy was not successful. Although the lawsuit garnered attention from the media, the draft ruling was written by the liberal Justice Alejandro Linares, who proposed the decriminalization of abortion during the first trimester, and in certain specific circumstances in later stages (El Tiempo, 2020). On May 20, 2019, Bernal filed a motion for the recusal of Justice Linares, which the Court rejected, declaring that “the arguments for recusal are not pertinent” (Ruling C-088, 2020). Nonetheless, Linares’ project was defeated as it did not receive the minimum of four votes in favor. The case was therefore assigned to the judge who followed in alphabetical order: Antonio José Lizarazo.

However, Natalia Bernal Cano persisted on requesting the Court to overturn Rulings C-088 and C-089 of 2020, arguing that the Court had violated constitutional due process by failing to properly assess the evidence submitted concerning abortion as a public health issue. Her argument marked a return to the procedural strategies previously employed by conservative lawyers, during the first cycle of contentious politics. She also claimed that the existence of life in the “maternal womb”, documented through more than forty-five videos and ultrasound images, proved that the “epistemological framework,

[concerning] social and scientific evolution” surrounding the issue had changed (Court Resolution 393, 2020).

The fourth and final lawsuit of this cycle was filed also by her in 2020, based on similar arguments to those she used in her two previous lawsuits (Rulings C-088, 2020; C-089, 2020). The Court dismissed her petition citing the two previous decisions by the Constitutional Court reaffirming abortion regulations to be constitutional. Bernal filed a further appeal, insisting that the Court did not understand her arguments and evidence concerning the right to life and protection from the moment of conception (Court Resolution 400, 2020). Her continuous submission of photographic and audiovisual material related to abortion in a non-constitutional proceeding, resulted in the Constitutional Court submitting a request to the Supreme Judiciary Council to impose a disciplinary action against her for contempt to the Court (El Tiempo, 2020; El Espectador, 2020).

The conservative lawsuits challenging the constitutionality of rulings during this cycle cannot be characterized as being *reactive* to the feminist movement, considering conservative lawyers initiated independent litigation processes, employing substantive and scientific arguments aligned with the Catholic doctrine. No conservative networks of Catholic organizations were identified in the litigation. The constitutional lawsuits were filed by lawyers acting on their own initiative and without coordination among them. However, all the briefs included bibliographies, videos, texts and arguments against abortion. The briefs of Bernal are “self-centered” since she regularly quoted her own writings to support her legal claims. The constitutional lawsuits also relied on procedural arguments, but these were secondary.

V. CONCLUSIONS

This paper shows that in 2006 the conservative legal counter-mobilization against abortion rights underwent a *procedural shift*, as lawyers began to use formal arguments such as claiming lack of jurisdiction or faculties to regulate abortion from state authorities. Their objective was to dismantle the regulatory framework of abortion and impede access to abortion in the health care system. Several common characteristics were identified among the conservative lawyers. They were all Catholic and relied on formal arguments to push their political agenda without exposing their true intentions. Despite the religious pluralism in Colombia, the legal counter-mobilization against abortion rights is inextricably linked to the history of Catholic constitutionalism, since no lawyers identifying as Christian, Evangelic or any other religion participated in legal actions.

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In addition, we found that a number of anti-abortion lawsuits were encouraged by a Catholic Justice of the Constitutional Court, using medical and scientific arguments including the psychological “harm” abortion causes to women, the “torture” suffered by both the woman and the fetus, and the negative consequences of abortion for persons with disabilities. The arguments were generally in keeping with the arguments of Catholic constitutionalism in Latin America, supplemented with reference to the “harm” caused to women and discrimination against fetuses with genetic malformations.

Another trend identified in the narrative and in the analysis of the Catholic strategies is that conservative activism in Colombia has shown a preference for the courts over the legislature in its efforts to advance the legal counter-mobilization against abortion. The reason for this is that women’s fundamental rights have historically been protected by the courts, and it is more difficult to gather votes and build political consensus in favor of either cause (feminist or conservative) in the legislative arena. This legal counter-mobilization has been characterized by the use of the same judicial forums used by the feminist movement to advance women’s reproductive rights. The filing of petitions to overturn prior rulings and lawsuits challenging their constitutionality by Catholic lawyers is part of a legal strategy to prevent progress in the case law defining the meaning and scope of women’s constitutional right to abortion.

Anti-abortion activism is more likely to succeed with procedural arguments against health regulations than through efforts to reopen the constitutional debate on the protection of life from the moment of conception. In this sense, the success of the legal strategy before the Council of State to overturn Decree 4444 of 2006, filed by Luis Rueda Gómez of Red Futuro Colombia, is noteworthy. Through formal arguments, such as the lack of jurisdiction of the health authorities to issue abortion regulations, conservative activists managed to suspend guidelines for the legal practice of abortions.

The petitions to overturn rulings filed by anti-abortion activists in the first cycle of contentious politics (between 2006 and 2016) were more successful when they were filed in a court perceived as “conservative” in its rulings and by lawyers from Red Futuro Colombia. In contrast, all of the petitions filed before the Constitutional Court were rejected. Similarly, it should be noted that the Attorney General’s Office also crafted the *procedural shift* in its lawsuits challenging rulings in favor of abortion, although he failed to overturn them. These petitions demonstrate conservative advocates were tracking and monitoring reproductive rights advances very closely.

The second cycle of contentious politics (between 2017 and 2020) was marked by constitutional actions filed by a diverse range of conservative activists with a common Catholic background and no apparent links between each other. They did not form any alliance during the legal counter-mobilization. All of these individuals acted on their own initiative, without building networks with religious organizations or Christian movements. Their legal strategies consistently sought to reopen the constitutional debate and promote restrictions on women to access abortion, moving from filing petitions to nullify prior rulings to filing lawsuits challenging the constitutionality of civil laws. Their constitutional arguments were aligned with the Catholic doctrine of the protection of the right to life from the moment of conception. In addition, they employed arguments related to the physical and psychological harm caused to women by the practice of abortion and the negative consequences of allowing abortions due to fetal malformations for the rights of persons with disabilities. This radical, individual conservative activism, however, proved less successful when litigation was advanced before a court perceived as more progressive and protective of women's fundamental rights.

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