

Conceptualizing Abortion Lawfare

CONCEITUAÇÃO DE "ABORTION LAWFARE"

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Abstract

Women's sexual and reproductive rights are politicized worldwide, with the most contentious right being the right to safe, legal abortion. In Latin America, where one stands on the issue of abortion has become a central identity marker; a salient issue in electoral mobilization, and a matter of coalition building and high politics. As a consequence, legalized contestation over abortion is raging across Latin America, and indeed much of the world. This article conceptualizes this as "abortion lawfare" and develops a framework for analyzing the complex dynamics and long-term, multi-sited strategies at play in the wars over abortion. The concept of lawfare – despite and, to some extent, because of its ideological uses and connotations – serves as a useful heuristic tool for grasping these dynamics, and the lawfare typology brings out the different facets of the phenomenon in terms of actors, strategies, and arenas and provides the basis for analyzing how, in any given context, actors face multiple and shifting opportunity structures. This, in turn, influences the strategies they pursue and what is achieved.

Keywords

Lawfare; abortion lawfare; lawfare typology; legal mobilization; politicization of abortion.

Resumo

Os direitos reprodutivos e sexuais das mulheres são politizados ao redor do mundo, e o direito ao aborto legal e seguro é o mais controverso. Na América Latina, o lugar que certa pessoa ocupa no debate sobre aborto se tornou um marcador central de identidade, uma questão importante na mobilização eleitoral e um elemento de construção de coalizões e de política. Como consequência, a contestação jurídica sobre aborto está ocorrendo em toda a América Latina e, na verdade, em grande parte do mundo. Este artigo conceitua isso como "abortion lawfare" e desenvolve uma abordagem para analisar a dinâmica complexa e as estratégias multilocalizadas de longo prazo em jogo nas guerras pelo aborto. O conceito de lawfare – apesar de e, em certa medida, por causa de seus usos e conotações ideológicas – serve como ferramenta heurística útil para compreender essas dinâmicas, e a tipologia de lawfare traz à tona as diferentes facetas do fenômeno em termos de atores, estratégias e arenas, além de fornecer a base para analisar como, em qualquer contexto, os atores enfrentam estruturas de oportunidades múltiplas e dinâmicas. Isso, por sua vez, influencia as estratégias que eles perseguem e os resultados que alcançam.

Palavras-chave

Lawfare; abortion lawfare; tipologia de lawfare; mobilização jurídica; politização do aborto.

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INTRODUCTION

This article develops “abortion lawfare” as a framework for analyzing the legalized contestation over abortion that we are seeing across Latin America, and indeed much of the world. It lays out the concept of lawfare and argues that – despite and, to some extent, because of its ideological uses and connotations – the concept serves as a useful heuristic tool for grasping the complex dynamics and long-term, multi-sited strategies at play in the wars over abortion that rage on the continent. The lawfare typology brings out the different facets of the phenomenon in terms of actors, strategies, and arenas and provides the basis for analyzing how, in any given context, actors face multiple and shifting opportunity structures. This, in turn, influences the strategies they pursue and what is achieved.

Women’s sexual and reproductive rights are politicized worldwide, with the most contentious right being the right to safe, legal abortion.¹ In Latin America, where one stands on the issue of abortion – whether one sees the right to abortion services as integral to a woman’s right to health and autonomy, or as a violation of “the right to life from the moment of conception” – has become a central identity marker; a salient issue in electoral mobilization; and a matter of coalition building and high politics. Morally conservative, often religious, groups and political actors – frequently in alliance with right-wing populists – call for stricter abortion laws and policies and harsher punishment for those performing and seeking illegal abortions. Other strong voices, particularly among feminists and public health advocates, call for legalization and liberalization. Electoral and legislative politics are not the only institutional sites of struggle. The battles are taken to church, to school, to movie theaters, and to the streets. They are fought in bureaucracies, in hospitals, within the medical profession, and – a particular focus of this book – in a growing number of domestic and international courts and tribunals.² The abortion-related cases under adjudication are diverse, from

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- 1 Reproductive and sexual rights span a broad field: one set of rights relates to *protection against gender-based violence* (including rape, domestic violence, femicide, hate crimes, and female genital mutilation); another to *sexual orientation and gender identity and expression*; and yet another to *reproductive rights*, of which abortion rights form a part. Reproductive rights rest on the recognition that all individuals and couples have the right to control and decide freely and responsibly on matters related to their sexuality and reproduction, including the number, spacing, and timing of their children – and to have the information and means to do so. Sexual and reproductive rights also include the right to attain the highest standard of sexual and reproductive health (understood as a state of physical, mental, and social well-being in matters relating to the reproductive system and its functions and processes, including the ability to have a satisfying and safe sex life, the capability to reproduce, the freedom to decide if, when, and how often to do so, and access to appropriate sexual and reproductive health care services). See, e.g., United Nations Committee on the Elimination of Discrimination against Women (1992); International Conference on Population and Development (1994); Fourth World Conference on Women (1995); IPPF (2008); and *The Yogyakarta Principles* (2006).
- 2 For examples and analyses of pro- and anti-reproductive rights activism and litigation in Latin America, see, e.g., the special issue on abortion and human rights in *Health and Human Rights Journal* (v. 19, n. 1, 2017),

bold attempts by reproductive rights activists to decriminalize abortion or at least broaden the grounds on which abortion is legal, to more cautious attempts to enforce compliance with existing laws and secure access to abortion in cases falling within the existing permitted grounds. Anti-reproductive-choice groups have gone to court to, among other things, extend the right to conscientious objection, restrict the grounds on which abortion is permitted, and establish the principle that “life begins at conception.” With the adjudication of contested sexual and reproductive rights cases, courts and treaty bodies are turned into sites in this heated political struggle. The term “lawfare” – a portmanteau of “law” and “warfare” – with its dual connotations of war and the use of legal tactics, aptly describes the phenomenon where rights, legislation, and litigation are strategic tools in a broader sociopolitical battle between organized, antagonistic groups.

The growth of abortion lawfare generally, and court-centered strategies particularly, raises difficult and urgent questions for scholars and practitioners: when and why do activists – especially those seeking to expand abortion rights, but also those fighting to restrict access to abortion – use courts as a site of contestation rather than, or in addition to, legislative bodies and other forms of mobilization? What do they gain and lose by judicializing the conflict? What determines the fate of abortion-related cases once they are in court? And what is at stake for the judiciary? Under which circumstances do court-centered strategies bring desired changes in the law and on the ground – and when do they increase the risks of triggering a backlash? To what extent are these processes influenced by variation in the social, political, and legal contexts? And how do they change over time?

This article clarifies the concept of lawfare and its utility as an analytical lens to understand the drivers, dynamics, and effects of the legalized battles over abortion rights. The first part lays out the lawfare concept and its different uses and facets and constructs a lawfare typology. The second part of the article constructs a dynamic framework for analyzing the conditions under which the different actors in contestations over abortion rights in Latin America pursue various forms of lawfare, and when they succeed.

1. THE GENEALOGY OF LAWFARE

“Lawfare” is a relatively new but increasingly common term in both general use and the academic literature. A Google search in October 2020 returned 1.5 million hits for “lawfare.”

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including Yamin and Bergallo (2017); Machado and Alves Maciel (2017); Lemaitre and Sieder (2017). See also Peñas Defago and Morán Faúndes (2014); Gianella and Yamin (2018); Ruibal (2015); Ruibal and Fernandez Anderson (2020); Paine, Tamés Noriega, and Beltrán y Puga (2014). For an overview of the legal developments in the region, see Bergallo and Ramón Michel (2016).

This is up from 279,000 hits in 2016, 5,000 in 2010, and 70 in 2000. The academic literature reflects this rapidly upward trend. A search on Google Scholar in October 2020 gave 11,400 hits for “lawfare,” of which only 581 date from before 2010. References to lawfare first appeared in the 1970s, and throughout its history the concept has been used in very different ways both by academics and in public debate.

The Lexico Oxford Dictionary defines “lawfare” as “[l]egal action undertaken as part of a hostile campaign against a country or group” (www.lexico.com/en/definition/lawfare). The term has often been used to criticize what is regarded as *misuse* of the law and courts for strategic reasons. This is reflected in the Wikipedia entry for the term, which states that lawfare “is the frivolous abuse of domestic or international law to damage and delegitimize an opponent, win a public relations victory, financially cripple an opponent, or tie up the opponent’s time” (WIKIPEDIA, n.d.). This mirrors the position of Alan Dershowitz and others linked to the Lawfare Project, who, on the project’s webpage, define lawfare as “the negative manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted,” with particular reference to nongovernmental organizations’ use of international law to delegitimize Israel (LAWFARE PROJECT, n.d.; see also HERTZBERG, 2010). But this negatively charged and ideologically laden “human rights groups abusing the law” use of the term is only one of several lawfare concepts in the literature.

One of the earliest references to lawfare is that by John Carlson and Neville Yeomans, who in 1975 used the term to dismissively describe the utilitarian concept of law, fundamental to the adversarial system of trials, where the issue is not about searching for the truth but about winning “with words rather than swords” (CARLSON and YEOMANS, 1975). But the idea is much older. John Comaroff explains how, in eighteenth-century colonial South Africa, “Tswana-speaking peoples famous for their imagery of overrule, referred to the appurtenances of the law—courts, papers, contracts, agents—as ‘the English mode of warfare’” (COMAROFF, 2001, citing MACKENZIE, 1887). From this notion, Comaroff constructs his initial concept of lawfare as “the effort to conquer and control indigenous peoples by the coercive use of legal means” (COMAROFF, 2001, p. 306).

In the international relations and public international law literature, the term lawfare is regularly used to denote strategies “using or misusing law as a substitute for traditional military means to achieve military objectives” (RABKIN, 2004). Relying on law rather than traditional military means is likely to reduce human suffering, yet there is a palpable skepticism or ambivalence in much of this literature toward the use of law as a tool of war. This is highlighted in debates on the war on terror. The strategic use of law by the US government (for example, in the context of Guantanamo) has been heavily criticized for engaging in lawfare — and even more anger is directed toward critics of this policy, who are accused of lawfare on behalf of terrorists by “political pundits who decry as ‘lawfare’ virtually any attempt to apply the rule of law to the conduct of the United States’ war on terror” (WATERS, 2010, p. 327).

Major General Charles Dunlap, who is credited with coining the lawfare term within this field, insists on the legitimacy and importance of lawfare in war, but underscores that “lawfare is much like a tool or weapon that can be used properly in accordance with the higher virtues of the rule of law – or not. It all depends on who is wielding it, how they do it, and why” (DUNLAP JR., 2008, p. 148).

In the seminal volume *Law and Disorder in the Postcolony* (2001), Jean and John Comaroff use a broad conception of lawfare in their analysis of the use of law for political and economic ends: “the resort to legal instruments, to the violence inherent in the law, to commit acts of political coercion, even erasure” (COMAROFF and COMAROFF, 2008, p. 30). This includes the use of law and law enforcement by the state as a tool of repression, but also as a weapon of the weak:

Lawfare can be limited or it can reduce people to “bare life”. In some postcolonies, it has mutated into a deadly necropolitics with a rising bodycount [...]. But it always seeks to launder brute power in a wash of legitimacy, ethics, propriety. Sometimes it is put to work, as it was in many colonial contexts, to make new sorts of human subjects; sometimes it is the vehicle by which oligarchs seize the sinews of state to further their economic ends; *sometimes it is a weapon of the weak, turning authority back on itself by commissioning the sanction of the court to make claims for resources, recognition, voice, integrity, sovereignty*. But ultimately, it is neither the weak nor the meek nor the marginal who predominate in such things. It is those equipped to play most potently inside the dialectic of law and disorder. (COMAROFF and COMAROFF, 2008, p. 31, emphasis added)

In *Law and Disorder in the Postcolony*, the Comaroffs and their coauthors demonstrate how modern governance relies on rule by law and use the demarcation of *illegality* for the purposes of dominance, discipline, and dispossession. They give the example of Zimbabwe’s policy of forced removals, justified by the illegality of the settlements, but they could as well have described contemporary treatment of illegal immigrants – or the criminalization of abortion to control women’s sexuality and reproduction.

Concepts such as “guerrilla lawfare,” “insurgent lawfare,” and lawfare as “a weapon of the weak” are used approvingly in the literature to describe strategies by which the relatively powerless can make advances by using the law (see, e.g., RANGANATHAN, 2016, p. 292; CORDER and HOEXTER, 2017; TRIMBUR, 2020). Although the effect to which they do so is often questioned. The Comaroffs have described marginalized groups’ engagement in “insurgent lawfare” to further their aims as a futile “Lilliputian strategy” on a turf where the ruling elite is likely to prevail (COMAROFF and COMAROFF, 2006). In a later work, they seem to have more faith in the potential of insurgent lawfare (COMAROFF and COMAROFF, 2009, p. 56). Yet it is important to keep in mind and heed their warning that lawfare, particularly lawfare by weak social groups, must always be analyzed against the background of legal conditions,

the force of the broader legal structure, and how lawfare dynamics and their effects are constrained by power relations in society.

Several scholars link the turn to law and litigation as the vehicle for political struggle “from below” to the growth of neoliberalism. Derrick Fay illustrates the ambiguous nature of this development by showing how neoliberal conservation policies constituting communities as legal entities have fostered “a turn to contract and law as the medium of relationships, conflicts and politics” (FAY, 2013, p. 170). But while neoliberal policies and the liberal constitutional state may enable lawfare, they also leave few other avenues for social mobilization and contestation by eroding the conditions for democratic politics through a “downsizing of the state, fragmentation of sovereignty and the formation of socially and economically heterogeneous networks of actors” (FAY, 2013, p. 170).

This quick survey of the literature shows, on the one hand, that lawfare is a controversial term that often has strong ideological connotations. Normatively and politically, lawfare is often criticized and rejected on various grounds: for some, the instrumental use of law for political ends is perceived as violating the sanctity of the law itself; others reject lawfare on political grounds for advancing the wrong aims; and yet others are skeptical of the utility of lawfare from below, dismissing it as a futile strategy and a product of the neoliberal capture of politics.

At the same time, there is broad agreement on the analytical core of the term. Across the different uses and criticisms, lawfare is understood as *the strategic use of rights, law, and litigation to advance contested political, social, and economic goals*. This analytical core can – and, I argue, should – be separated from the normative assessment of whether it is a good or bad thing. With its connotations of warfare, the lawfare concept is uniquely suited to analyze long-term, iterative struggles between different sides who play out ideological battles in multiple (legalized) arenas – and where their strategies and tactics are developed in response to shifting opportunity structures and the anticipated actions of their opponents.

2. THE LAWFARE TYPOLOGY

When building lawfare as an analytical concept, a useful start is to distinguish between the different forms of legalized contestation that different actors pursue in various arenas. In the broadest sense, *any use of rights and law to advance a sociopolitical goal can constitute lawfare, provided that it forms part of a broader, hostile contestation between organized social interests*. Different types of lawfare are regularly employed by a variety of actors.

State lawfare can be undertaken by the executive branch for personal, political, or economic gain. It includes actions by the executive branch to undemocratically entrench its rule by the use of legalistic means (*autocratic lawfare*) – for example, by changing presidential term limits, electoral regulations, or other “rules of the game”; by using the power of appointment to place allies in courts and other important positions; or by obstructing the

opposition through the use of trumped-up or criminal charges or accusations, or strategically timed, selective prosecutions.³ It also includes efforts to mobilize public support through legalized campaigns against “public enemies”, typically socially or politically stigmatized population groups such as immigrants, indigenous peoples, Roma, homeless people, street vendors, sexual and gender minorities – and abortion seekers. These efforts may include the criminalization of poverty as a substitute for social policy, typically through laws against “illegal” settlements or livelihoods (such as begging, sex work, and street vending). It also – prominently and increasingly – includes the criminalization of abortion and reproductive health services, including contraception and comprehensive sex education.

Other state actors, including civil servants, may also engage in state lawfare, using their positions, competences, and discretionary powers to shape the implementation of laws and regulations in line with their partisan interests or ideological convictions (see, e.g., PETERS, 2002). In the context of abortion, this commonly includes obstructing the implementation of permissive abortion legislation by failing to put in place regulations or guidelines; allowing and encouraging conscientious objection; and imposing controls on abortion providers aimed at restraining or discouraging their work. On the other hand, pro-reproductive rights individuals within the civil service may use their discretionary powers to soften restrictive abortion laws and introduce permissive policies and practices.

Lawfare politics is employed by actors in political society (defined as such by their competition for political power, as opposed to civil society actors, who seek to influence policy and social change without aiming for political positions). Examples include opposition politicians’ claims of unconstitutionality or illegality, as well as court actions challenging legislation and executive actions or seeking the impeachment or dismissal of key office holders. This type of lawfare also includes efforts to prevent particular candidates from being appointed to judicial or other key positions. Lawfare politics engaged in by the opposition is often reactive, responding to state lawfare targeting them or seeking to change the rules of the game, but it can also be proactive, using legal tactics to advance policy positions and to increase their chances of gaining power.

Lawfare from below is when civil society actors – such as social movements, nongovernmental organizations, churches, academics, corporations, and labor unions – use legal arenas and strategies such as litigation, rights-based lobbying, and rights talk in various social arenas in an attempt to secure policy change, profits, ideological hegemony, and social transformation. This type of lawfare frequently also includes alliances with international actors.

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3 For a more in-depth discussion of autocratic lawfare as conceptualized here, see Gloppen (2017); Gloppen and Gerzso (forthcoming). See also Scheppele (2018); and Popova (2018).

The various actors potentially engaging in lawfare in a given context are represented in the leftmost column of Table 1 below. Furthermore, as the first row of the table illustrates, lawfare can be pursued across a range of different domains or sites, and within each site different actors may engage in a repertoire of strategies and tactics, as indicated in the various cells.

The legislative arena is an important site of lawfare, both by way of legislation and through constitutional reform. In the context of abortion, common legislative lawfare strategies include civil society actors' efforts to lobby and build alliances with political representatives to adopt more liberal (or restrictive) abortion laws, or to introduce (or remove) constitutional provisions protecting "life from the moment of conception".

The bureaucracy and public service is the site of diverse administrative lawfare strategies aiming to influence the interpretation and implementation of legislation and regulatory provisions. Governments can do this through a range of strategies, including issuing executive orders or new regulations and guidelines or by defunding, marginalizing, or discrediting cumbersome agencies or staffing them with more like-minded personnel.⁴ Civil society activists typically engage in more low-profile, but often highly consequential, efforts to build alliances with like-minded people in the public administration (see, e.g., RUIBAL, 2014). This can, for example, involve collaboration on policies and guidelines for the implementation of exceptions to restrictive abortion laws. Both progressive and conservative activists are also engaged in efforts to train and "sensitize" actors at various levels of the public service, including the police, hospitals, and universities, which also shape how laws are interpreted and implemented. In the context of abortion, this is an important battlefield, for example with regard to conscientious objection by doctors and nurses, which often prevents the delivery of abortion services even where it is *prima facie* permitted.

The judicial arena is the focus of court-centered lawfare strategies. These take two main forms. The first and most common is to bring cases before courts (and other legal and quasi-legal bodies at the domestic and international levels). This is similar to lawfare in the administrative arena in that it seeks to trigger change by working from within the existing law, aiming to change its interpretation and enforcement. Courts are different, however, in that they have the power to issue authoritative interpretations of statutes, constitutional provisions, and international treaties, and give (in theory) binding orders regarding their application and enforcement. Many higher courts can also strike down statutes for unconstitutionality, and read new provisions into existing laws, which gives them substantive lawmaking powers. While actors from across the spectrum can and do take cases to court, the government generally has greater ability to use criminal law as a lawfare tool against political

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⁴ For an illustration of such tactics, see Prado (2020).

opponents and as a campaign strategy, including in the field of sexual and reproductive rights. The second type of judicial lawfare includes battles over the courts themselves, with different types of actors seeking to influence the jurisprudence of legal bodies through judicial training, judicial appointments, and so forth. While governments, again, have the greatest opportunity to influence the composition and ideological orientation of the courts, civil society actors, including academic institutions and transnational professional bodies and activist organizations, can also exert influence through various forms of training and judicial dialogues.

Societal lawfare strategies seek to change social discourses, norms, and behaviors in less institutionalized ways, including through various forms of “rights talk” in media campaigns, curriculum development, street protests, art, advocacy, education and training, and other awareness-raising strategies to change legal consciousness.

This broad lawfare typology, summarized in Table 1, brings out the various facets of the law; the many sites where legal norms are made, changed, and used; and the different legal strategies and tactics that may serve as alternate and complementary avenues for social actors seeking to transform society in different directions.

By differentiating the various actors potentially engaging in lawfare and the multiplicity of arenas and strategies they might employ, the typology opens up the analytical field, enabling a mapping of which actors engage in particular forms of lawfare and how this varies between geographical and sociopolitical contexts, issue areas, and, not least, over time. As noted earlier, the time dimension is crucial when analyzing lawfare processes, and the typology can also be used for longitudinal analysis, tracking the routes of significant actors over the map, and their interplay over iterative rounds of battle.

TABLE 1 – THE LAWFARE TYPOLOGY

ARENA ACTORS	LEGISLATIVE	ADMINISTRATIVE	JUDICIAL	SOCIETAL
GOVERNMENT AND STATE ACTORS (INCLUDING PUBLIC SERVANTS)	WEAPONIZATION OF • CONSTITUTIONAL REFORM PROPOSALS • LEGISLATION • EXECUTIVE ORDERS	WEAPONIZATION OF • REGULATIONS AND GUIDELINES • POLICY • INTERPRETATION • CONSCIENTIOUS OBJECTION	• SELECTIVE PROSECUTION • STRATEGIC APPEALS • STRATEGIC JUDICIAL APPOINTMENTS • STRATEGIC ALTERATION OF JURISDICTIONS, TERMS, AND CONDITIONS	WEAPONIZATION OF • PUBLIC INFORMATION • CURRICULUM DEVELOPMENT
POLITICAL ACTORS (ELECTED POLITICIANS, CANDIDATES, PARTIES)	WEAPONIZATION OF • CONSTITUTION-MAKING • LAWMAKING	RIGHTS AND (IL)LEGALITY ARGUMENTS REGARDING • POLICY • IMPLEMENTATION	• CONSTITUTIONALITY TESTING • JUDICIAL REVIEW • LITIGATION • JUDICIAL CONFIRMATIONS	RIGHTS AND (IL)LEGALITY TALK IN • ELECTORAL CAMPAIGNS • PUBLIC STATEMENTS
CIVIL SOCIETY ACTORS (ACTIVISTS CHURCHES, ACADEMIA, BUSINESSES)	RIGHTS AND (IL)LEGALITY ARGUMENTS IN LOBBYING OF • GOVERNMENT • POLITICAL ACTORS	RIGHTS AND (IL)LEGALITY ARGUMENTS IN • INPUT TO POLICY DEVELOPMENT, REGULATIONS, AND GUIDELINES • TRAINING OF PUBLIC SERVANTS, (POLICE MEDICAL STAFF)	• STRATEGIC LITIGATION - DOMESTIC COURTS - INTERNATIONAL COURTS - QUASI-JUDICIAL BODIES - THREATENED LITIGATION • TRAINING AND SENSITIZATION OF JUDGES	RIGHTS AND (IL)LEGALITY TALK IN • ADVOCACY • CIVIC EDUCATION • MEDIA • DEMONSTRATIONS • ART

Source: Author.

3. ACTORS’ CHOICE SITUATION AND OPPORTUNITY STRUCTURE

After establishing the lawfare typology, the next step is to add a framework for analyzing the opportunities for action that, in a given context and time, are open to actors with a particular social or political agenda. This facilitates further analysis of why and when actors engage in particular forms of lawfare. It also provides a tool for understanding how different actors’ lawfare strategies trigger and influence one another across the field (within and

across countries), as actors on opposing sides develop their strategies and tactics in these iterative processes, often with long-term time horizons.

The framework for analyzing the factors that influence actors' choice of strategies and tactics at a given point in time is illustrated in Figure 1. This framework consists of two parts. The first one is their *choice situation* – illustrated by the oblong circle at the center of the figure – that is, the actors' epistemological and normative embeddedness that shapes their outlook on the world, their goals, and their perceived opportunities for action (both what is seen as factually possible and as normatively acceptable). The second aspect of the framework is actors' *opportunity structure*, which is the sum of external factors bearing on the actors' decisions, seen in terms of resources and barriers.⁵

When analyzing actors' strategic choices, the first step – analytically, if not in practice – is to establish their short- and long-term *goals*. In the case of abortion battles in Latin America, these can be goals related to the issue itself (to expand access to – or totally prohibit – abortion), as well as unrelated aims (related to competition for political power, votes, political alliances; religious hegemony; institutional survival and advancement; personal prestige; and so forth).

The second step is to establish how actors' decisions are influenced by (perceived) *barriers* that may prevent them from reaching their goals. For abortion activist, for example, these barriers can be *political* (e.g., hostile government, lack of electoral support for abortion reform, or an unresponsive political system). They may also be bureaucratic or *administrative* (e.g., civil servants who interpret the law in detrimental ways, or health personnel and institutions declining to follow the law due to conscientious objection). In addition, the *legal system* may present barriers (e.g., laws that criminalize abortion, a judiciary with a conservative or religiously imbued legal culture, or a high threshold for access to the courts that makes legal mobilization difficult or expensive). Or there may be *social and cultural* barriers (e.g., bias and censorship in the media, or religious or traditional norms in society relating to gender and sexuality) that influence public opinion and discourses and may present serious obstacles to changes in abortion laws and practices.

The observant reader will have noticed that the discussion of barriers mirrors the sites of action in the lawfare typology (political/legislative; bureaucratic/administrative; legal; and societal/sociocultural). This is no coincidence, since the opportunity-structure framework describes the underlying conditions and driving forces that, in different constellations, produce the patterns of action that make up the lawfare typology.

Social norms also form part of political, administrative, and legal barriers, particularly for institutionally embedded actors. Within the health system, changes in abortion laws may run

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⁵ The opportunity structure framework as developed here builds on Gloppen (2015).

counter to professional norms for acceptable behavior among doctors and nurses, and judges who get abortion-related cases on their table have to negotiate them in the context of what is regarded as good judging within the relevant professional legal culture (as well as how it will influence their social and family life). For activists seeking social change, the norms of such other actors are important external barriers – though their own norms can also serve as internal impediments against forms of action that may be desirable based on effectiveness considerations (that is, according to a *logic of consequence*) but that run against what the actors see as normatively permissible (according to a *logic of appropriateness*). Since lawfare is defined as the use of legal strategies in pursuit of contested sociopolitical goals, normative barriers are always salient, and *actors with an opposite agenda* are important barriers to achieving the goal (for example, the liberalization of abortion laws). In Figure 1, (potential) *adversaries* (domestic and international) are illustrated as black dots, forming part of the different aspects of the opportunity structure and differing in size according to the strength of the challenge they pose.

The analysis of the barriers present in different parts of relevant actors' opportunity structures is interlinked with an analysis of the *resources* they have or can mobilize that allow them to potentially overcome the various barriers, and the extent to which these resources are better suited to certain strategies. Resources – such as legal and other relevant expertise, money, access to the media, political influence, and normative support for their case in public opinion or with particular groups – can reside with the actors themselves or can be acquired through domestic or international alliances. In Figure 1, (potential) allies that are relevant to each aspect of the opportunity structure are illustrated as white dots, with the size of the dot illustrating their importance. Actors' assessment of the value of their resources for particular forms of action may also depend on what they know or assume about the arsenal of resources available to the other side. In this context, understanding their opponents' goals, strengths, and weaknesses, as well as being able to predict their strategies, are central resources.

Actors' choice of strategy is also closely related to their perception of the *potential effects* of available strategies (referred to above as considerations based on a *logic of consequence*). The types of effects that are most relevant to the actors depend on the nature of their goals, but it is important to note that in contestations over abortion, *material changes* in access to safe abortions may not be what matters most to the contestants. Particularly in economically developed societies with relatively well-functioning health systems, maternal morbidity and mortality may be low, and women may generally be able to access safe abortions, even with restrictive laws. What matters most to the contestants in the battles over changes in abortion laws and policies may here be what is often termed *ideational* or *symbolic effects*. These include changes in how society (and the state) regards women's autonomy and right to bodily integrity in relation to pregnancy, or women's personhood in relation to fetal development.

In many contexts, including Latin America, abortion battles are as much about the direct and indirect *political effects* – expansion of religious influence, political leverage and alliances, electoral gains, and, ultimately, regime change – as they are about the abortion issue itself.

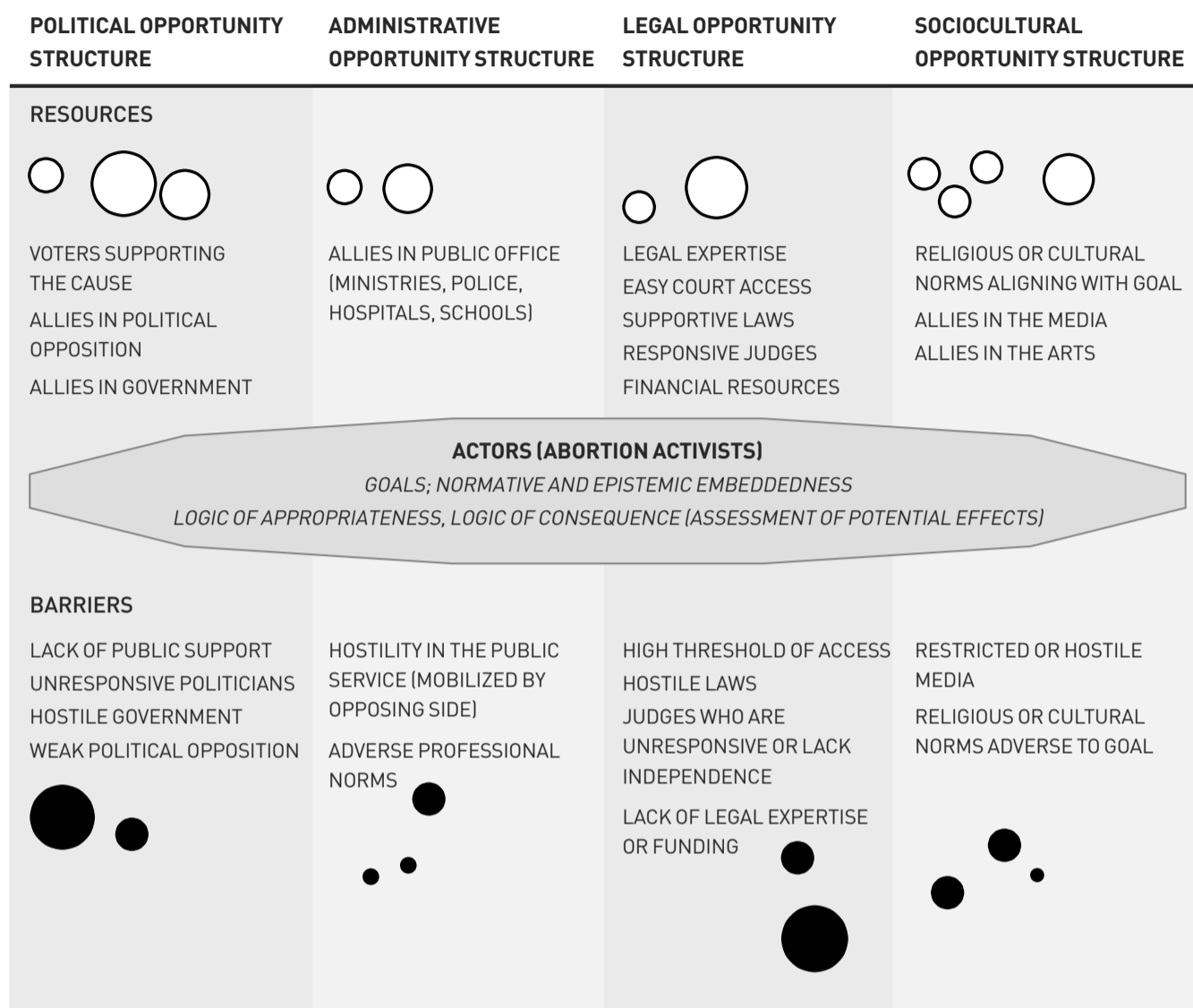
Adverse political effects – that is, possibilities for triggering organized resistance and *backlash* (setbacks rendering the situation materially worse) – may also feature in the calculations that are based, among other things, on previous experience and assumptions about how opponents will react and what they will achieve given their opportunity structures.

When considering the potential for material advances (in policies, access to abortion services, or abortion figures), actors are likely to assess the likelihood of success in getting a decision in their favor in legal and political bodies, as well as the institutional capacity of the relevant institutions to translate the decision into policy reform and on-the-ground change. Relevant considerations here include the authority of courts vis-à-vis policymakers, and the political will and implementing capacity of the government.

In any given context, actors' decisions regarding which strategies and tactics to pursue are determined by their goals; how they perceive the constellation of barriers and resources in different parts of their opportunity structure; and their expectations regarding which strategies are more feasible and effective – given the resources and (anticipated) actions of the opposing side.

The nature and weight of the different factors vary between actors and over time, and the opportunity structure framework, illustrated in Figure 1, helps conceptualize the dynamic and multidimensional nature of the choice contexts in which decisions regarding abortion lawfare strategies are made. In general, actors' strategies and tactics will depend on the balance of barriers and resources in different domains. Actors whose political resources outweigh the political barriers are more likely to pursue a legislative strategy for abortion reform, while those with strong legal expertise – or who have few political resources or allies – may opt for a court-centered strategy, even if the legal opportunity structure is not particularly promising.

FIGURE 1 – THE OPPORTUNITY STRUCTURE FRAMEWORK



Source: Author.

CONCLUSION

The opportunity structure framework, combined with the lawfare typology, is useful for bringing out patterns in Latin American abortion battles by showing how actors on different sides are actively engaging in legal strategies but tend to pursue different paths. It also enables an analysis of how activists influence one another’s tactics and choices. While trajectories differ between countries, a common pattern emerging from the chapters in this volume is that activists working to liberalize abortion laws have been more court-centered in their strategies than conservative activists, who have pursued primarily legislative strategies to restrict abortion laws and to counter liberal gains, often bolstered by church-led societal strategies. However, over time, strategies have changed and broadened on both sides. Conservative actors have started engaging in court-centered strategies (for example, to strengthen the scope of conscientious objection and thus restrict practical access to legal abortion services), and the pro-abortion side is taking on legislative strategies (both pushing

for liberal abortion laws and engaging in lower-level development of guidelines and regulations to ensure that legal gains are effectively translated into access to abortion services on the ground).

The joint lawfare typology and opportunity structure framework can thus contribute toward an understanding of why actors in a given context choose particular paths of action in their abortion struggles, and what makes them more or less successful in doing so. The framework also allows for investigation of what difference it makes whether a social struggle is taken to court – which is a central question in the law and society literature.

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