

Bodies on Trial

Reproductive Rights in Latin American Courts

**Center for Reproductive Rights and
Universidad de los Andes School of Law
©2003**

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Introduction

I. OBJECTIVES AND CONTENTS OF THIS REPORT

What is *Bodies on Trial*?

Bodies on Trial is a book, published in 2001, and is the first comparative study of sexual and reproductive rights jurisprudence in Latin America. The Spanish-language book describes the political, legal and judicial systems, and examines existing laws and judicial decisions of the high courts of five countries: Argentina, Chile, Colombia, Mexico, and Peru.

The Publication

This publication offers a summary of the book's research findings in a concise and accessible manner.¹ This summary is divided into five chapters, one for each country. Each chapter begins with an evaluation of the possibilities for and obstacles to the advancement of sexual and reproductive rights within the country. It then analyzes the institutional context of the decisions, such as the organization of the judicial system, sources of law, and human rights protection mechanisms, as well as a discussion of the trends of judicial decisions as they relate to each right.²

Why Examine Jurisprudence?

In Latin American countries - where legislation is the dominant framework and the main source of rights - judges are regarded as instrumental agents who simply apply the law in an "objective, apolitical and neutral manner" to a specific case.

The dominance of legislative standards has undermined the importance of jurisprudence and undervalued the role of judges as political actors and interpreters of laws, thereby effacing a judge's ability to reflect the values and changing dynamics of a society.

Bodies on Trial is a response to the need for legal analysis that goes beyond examining how human rights standards have been reflected in

national legal instruments. It examines the judicial discourse of the high courts in relation to women's rights, especially sexual and reproductive rights, during the last decade of the twentieth century. This examination is motivated by complaints from those working on women's rights that legal guarantees have failed to translate into courts protecting individual rights.

OBJECTIVES OF THE PROJECT

General Objective

This study provides a legal tool for advocates and is a source of information for research, lobbying and litigation. By providing an examination of the laws regarding sexual and reproductive rights and the manner in which judges have interpreted those laws, *Bodies on Trial* seeks to underscore judges' role in the application of laws intended to overcome the subordination of and discrimination against women.

Specific Objectives

- To facilitate the development of policies and to provide activists with strategies to promote the role of the judicial branch as protector and guarantor of women's reproductive and sexual rights.
- To monitor the incorporation of international and regional human rights standards and systems of protection into sexual and reproductive guarantees at the national level.
- To contribute to the identification of the most effective mechanisms that non-governmental organizations (NGOs), law schools and the judicial branch can use to promote changes in judicial discourse so that reproductive rights are recognized in accordance with standards established by the international community.

Participating Organizations

This project was originated and produced by the Center for Reproductive Rights, New York, in partnership with the Universidad de los Andes School of Law, Colombia. This project would not have been possible without the participation of the following universities, lawyer's associations and NGOs: *Instituto Social y Político de la Mujer* (Social and Political Institute for Women) and the Universidad de Buenos Aires, Argentina; Universidad Diego Portales, Santiago, Chile; *Instituto de Investigaciones de la Universidad Autónoma de México* (Research Institute of the Autonomous University of Mexico), Mexico City, Mexico; and *Colegio de Abogados de Lima* (Lima Association of Lawyers), Peru.

Countries Studied

This study focuses on five countries in Latin America: Argentina, Chile, Colombia, Mexico, and Peru. These countries were chosen because they share certain basic characteristics that facilitate comparison and are representative of the different sub regions in Latin America. Their similarities and differences illustrate a common background as well as the diversity that characterizes the region.

The legal systems of the chosen countries derive from Roman and Continental European legal traditions. Although the adaptation of these systems varies by country, the systems' basis and the role assigned to the branches of public power, especially to the high courts, is essentially the same. Colombia, Chile and Peru have centralized systems. Argentina and Mexico are federal systems divided into political and administrative provinces and states that have their own constitutions and elect their own executive, legislative and judicial officials.

Several other factors were also taken into account: the Center for Reproductive Rights has worked in collaboration with local organizations in the chosen countries; the countries have signed and ratified international human rights treaties; and the United Nations committees that monitor compliance with the treaties have issued observations and recommendations on

sexual and reproductive rights issues in those countries.

Time Frame

The study covers the 1990s. During this period, many critical changes took place both nationally and internationally. Three world conferences were decisive in the recognition of reproductive rights as human rights: the United Nations World Conference on Human Rights (1993), the United Nations International Conference on Population and Development (1994) and the United Nations Fourth World Conference on Women (1995). Also, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women – the only international convention addressing the issue of violence against women – was adopted. In addition, crimes related to sexual and gender violence were included in the Rome Statute of the International Criminal Court. Finally, the Optional Protocol of the Convention on the Elimination of All Forms of Discrimination Against Women (1999) was adopted and its ratification has gained momentum.

Methodology

For the purpose of this report, existing laws and decisions issued by the high courts between and including the years 1989 to 1998 were compiled. Additionally, relevant decisions issued while this publication was being edited (1999-2001) were included. In instances where high courts had not issued decisions relevant to the study, the jurisprudence of a local representative court was analyzed. In accordance with the particulars of each country, interesting or pertinent cases from local courts and international human rights tribunals were also included.

II. PROMOTION OF SEXUAL AND REPRODUCTIVE RIGHTS: OPPORTUNITIES AND OBSTACLES

A. Liberal Constitutions

As a result of changes brought about in the last decade, all of the countries

studied have constitutions that contain explicit language on sexual and reproductive rights.³ This has served not only to increase public awareness regarding the existence of these rights, but also to obtain effective judicial protection.

B. Mechanisms for the Protection of Rights

Recent constitutional reforms in Latin America have created mechanisms and institutions that aim to safeguard legal rights.

In Argentina, Mexico and Peru these mechanisms take the form of *amparo*, a constitutional remedy that guarantees the inviolability of the rights set forth in the constitution; its Colombian counterpart is the *tutela*, a mechanism of legal protection; and in Chile, the *recurso de protección* is a petition that protects constitutional rights. Of these mechanisms, the Colombian model has produced the best results, boasting two important advantages. First, a *tutela* can be submitted by any person (including a minor), through any medium and before any judge. Second, all *tutelas* are reviewed by the Constitutional Court. The openness and broad availability of this mechanism has allowed marginalized sectors of society to use it as a means to regain their rights. The sheer volume of decisions rendered through the *tutela* has resulted in the incorporation of strong human rights language into the language of public debate. Unfortunately, legal professionals (including judges, lawyers, etc.) and other citizens of Latin American states often fail to utilize these available legal mechanisms.

C. The Importance of Judicial Branch Independence

The case of Peru clearly demonstrates the importance of an independent judicial branch with constitutional remedies that safeguard sexual and reproductive rights. Under the Fujimori administration in the 1990s, the Constitutional court was closed for several years due to its refusal to support the decisions of the executive branch. As a result, the human rights protections established by the constitution were severely weakened.

D. Formalism versus Antiformalism in Judicial Interpretations

Understanding the problem of striking a balance between the text of the law and the implementation of the principles of justice that it seeks to further is important to understanding the advocacy opportunities inherent to each of the legal systems analyzed in this study. In Argentina, Chile and Peru, the majority of decisions issued to date indicate a clear privileging of legal formalities over substantive jurisprudence. Judges utilize legal jargon charged with procedural terminology to make it difficult for laypersons to understand how to use the system. Judges may also emphasize formal evidentiary requirements as well as traditional or narrow interpretations of documents. As a result, forensic examinations are granted more importance than testimony in rape cases and there is sometimes a refusal to widen the catalog of guaranteed rights under established legal mechanisms. In Chile, for example, judges have resisted an expansion of the rights guaranteed by the *recurso de protección*.

In contrast, Colombia has issued a number of decisions that secure justice in practical terms. As a result, judges in the country not only use human rights language more explicitly in public discourse, but have interpreted constitutional texts in ways that advance human rights protections. For example, the Constitutional Court has interpreted the “right to free development of personhood,” which is listed in Article 16 of the constitution, to include the right of all persons to freely choose their sexual orientation and identity. In Mexico, the Supreme Court has initiated a rights-based approach to health care by defining the “right to health” as a social right.

Strict legal formalism produces positive, although perhaps short-term, results when constitutional texts and procedural mechanisms that protect a victim are properly applied. Alternatively, antiformalism also yields positive results, as exemplified in cases from Colombia and Mexico. In the case of Colombia, an antiformalist position has permitted the courts to render a religious interpretation of the constitution that is not supported in the actual text of the document and has been used to sustain the constitutionality of the absolute prohibition on abortion. In Mexico, the Supreme Court has sup-

ported an openly patriarchal position that is in opposition to the reproductive rights guarantees of the constitution, justifying controlling women's sexuality as a symbol of family honor.

E. The Perpetuation of the Ideal of Woman as Mother

Ultimately, decisions relying on both a formalist and an antiformalist legal analysis have resulted in the denial of reproductive freedom for women throughout Latin America. In the end, the role of women as mothers is valued over their freedom to choose whether to be mothers. In Chile and Colombia, the courts have emphatically affirmed the constitutionality of the prohibition on abortion. In Peru, the court has referenced this prohibition and affirmed it even in cases not directly related to the subject. In Argentina and Mexico, despite exceptions to the penal code that permit abortion in certain cases, the courts have resisted authorizing or enforcing authorizations for abortions in cases clearly covered by the legislation.

Despite the lack of protections for women who choose not to become mothers, Latin American courts have failed to secure protections even for those who do choose motherhood. In Chile however, where companies with more than twenty female workers are required to provide day-care facilities, the country's highest court has recognized companies with many branches as only one unit instead of distinct subsidiaries that are individually obligated to comply with the day-care law. In Colombia, the court has ordered the payment of maternity leave through the system of *tutela* (in spite of the subsidiary nature of *tutelas* and the fact that there are other faster mechanisms of securing payment) and has also ordered the reinstatement of pregnant students to the educational system. At the same time, constitutional changes have helped to expand the rights of pregnant women. In Argentina, for example, a challenge to the country's constitution has entitled women who have miscarriages to the same benefits they would receive if a child died.

Yet, despite a trend toward protecting women who choose motherhood, courts continue to impose the costs of maternity disproportionately on women. This is evident in the case of Chile, where the courts consid-

ered women's ability to reproduce to be so risky that higher health insurance fees for women were justified.

F. Privacy as a Negative Liberty

The courts examined in this study have shifted toward a policy of protecting privacy as a negative liberty that the state does not oversee. In Chile, for example, the courts have refused to grant remedies in cases involving private schools (even when pregnant students are expelled); the home, in cases of domestic violence; and for televised messages, which have been prohibited as part of a campaign against HIV/AIDS because the private broadcasting company involved felt the message promoted promiscuity. In Argentina, the court denied legal status to any organization dedicated to the defense of homosexual rights. In Mexico, courts have upheld regulations governing the sexuality of wives and mothers, maintaining that tainting their sexuality would impact familial honor.

In Colombia, in contrast, there exists a broad theory of the right to privacy. This right is known as the "free development of personhood" and has been used to authorize the use of contraceptives by women in prison, affirm the right of hermaphrodites to choose their sexual identity, and guarantee the right to choose sexual orientation.

G. Sexuality for Masculine Pleasure

With some exceptions, the courts have advanced the idea of sexuality as something that is inherently for the purpose of masculine pleasure. In Colombia for example, the Constitutional Court found that the Obligatory Health Plan should include the supply of the drug known as Viagra, which remedies erectile dysfunction in men, because the supply of this drug protects the dignity of life.⁴

At the same time, the majority of courts have been reluctant to condemn sex crimes. In many cases, the courts under study claimed the absence of compelling evidence, or that this type of violence was pathological and incapable of being addressed through incarceration.

The Colombian courts constitute an exception to this trend. On the issue of conjugal sexual violence, Colombian courts have held, in accordance with constitutional principles, that anyone found guilty of this offense should be subject to the same penalties accorded to those who perpetrate violence against a stranger. Both Colombian and Mexican courts have ruled that a victim's sexual past is irrelevant and that the state bears responsibility for rapes committed by military personnel and for the ineffectiveness of the military penal justice code to address these types of crimes.

H. Partial Protection of Sexual and Reproductive Health

Court decisions regarding sexual and reproductive health are divided. However, recently there has been a judicial trend in approaching sexual and reproductive health issues in a less conservative manner (except, in some cases, in Chile). In general, the courts have defended the right to receive medication from the state (Mexico), the right of prisoners to receive health care by means of a habeas corpus petition (Peru), the right of AIDS patients to obtain necessary medication from the state (Colombia), and the right of HIV positive people to retain their jobs (Argentina and Chile). In contrast, Chilean courts have held that it is not the state's obligation to provide AIDS medication and that the prohibition of televised messages promoting condom use for the prevention of HIV/AIDS is not a violation of the right to sexual health.

However, Chilean courts have also rendered some favorable decisions, such as the finding that a husband violates his wife's right to health if he does not enroll her in a health plan, and that private health-care insurance providers, or Instituciones Prestadoras de Salud (ISAPRES), violate the rights of their members if they do not cover sterilization procedures. Nevertheless, the courts found that ISAPRES did not violate women's rights by charging them a higher membership fee than men, because potential pregnancy could lead to higher health-care costs for women.

I. Negative View of Sexuality

The court decisions reveal a negative perception of sexuality. The influence of Catholic morals, machismo and homophobia permeate interpretation of rights by judges in the countries under study. This is very clear in Argentina (where the Argentinian Homosexual Community's legal status was negated), in Mexico (where there was a ruling on military honor and sexual suitability of wives), in Chile (where campaigns promoting the use of condoms for the prevention of HIV/AIDS were prohibited) and in Peru (where the victim's sexual past was deemed relevant evidence in a sexual offense case). Colombia is the only country where the courts have attempted to eliminate the taboo on sexuality by issuing rulings that recognize sexuality as an important and natural aspect of human development.

J. Where Do We Go From Here? Recommendations for Action

This study attempts to promote the use of the courts as fora for political confrontation that include advocates for sexual and reproductive rights. The results of this study, which are summarized in this report, provide important information for activists, judges and schools of law. This report also identifies key opportunities and obstacles for each of these actors as they work to promote sexual and reproductive rights both regionally and nationally.

We offer the following specific recommendations for further action:

1. RECOMMENDATIONS FOR ACTIVISTS

- ***Publicize decisions of the high courts***

Exercise political control over the courts by praising decisions that protect human rights and criticizing those that do not, and strengthen the language of human rights in public discourse.

- ***Strategically utilize the judicial arena***

Although the feminist movement in the countries under study has at times become involved in judicial decisions, it has not seriously

considered the courts as possible arenas for political confrontation. This study demonstrates that congressional-level accomplishments run the risk of being overruled by the courts in specific cases. Because of this, activists should challenge judges' formalist interpretations, while also ensuring that the promotion of antiformalism does not bring about a violation of the rights established by the law. In general, a formalist stand hinders more than it helps a long-term advocacy strategy aimed at protecting women's rights. On the one hand, it contributes to the belief that judges simply "apply" the law, with no political significance to their decisions, which creates both the appearance of objectivity and imperviousness to criticism from the public. On the other hand, formalism contributes to the perpetuation of traditional and conservative interpretations of the law, and it impedes progress toward a broadening of human rights and incorporation of international standards. For this reason, people or institutions that idealize legal formality should be viewed with a critical eye.

At the same time, the openness of antiformalism can also lead to rulings that are contrary to human rights. The idea, then, is to reclaim the political aspect of justice while avoiding interpretations that are contrary to human rights, which inevitably occurs once judges feel enabled to incorporate their politics into the interpretation of laws.

- ***Litigate for the protection of the right to reproductive health and the right to equality***

The absence of reproductive health jurisprudence is obvious, despite the fact that each of the countries in this report has issued at least a few decisions in support of reproductive health. In some instances this is simply because these cases may have been assigned to lower courts that were more likely to issue rights-based decisions.

There have also been only a few cases of women pursuing their right to equality in the courts in the countries under study. Colombia is the only country in which there have been a number of important cases of women demanding equal rights before the courts, though not always successfully. In the rest of the countries under study, it appears that women either do not perceive the difference in the treatment they receive or they simply lack confidence in the legal mechanisms at their disposal. Both scenarios should be addressed.

An increase in legal actions related to sexual and reproductive rights forces the courts to decide on these matters and eventually generate positive jurisprudence. The more cases filed, the more difficult it becomes for judges to ignore national and international standards calling for the protection of these rights.

- ***Utilize regional and international human rights instruments***
Although each of the countries under study has established mechanisms for the protection of legal rights that seem adequate on paper, these mechanisms are sometimes insufficient in practice. Regional and international human rights instruments, on the other hand, may lack provisions for direct implementation of their decisions, but offer States the possibility of addressing rights abuses either through the resolution of individual petitions or by issuing observations while evaluating their compliance with ratified international human rights agreements.

2. RECOMMENDATIONS FOR JUDGES

- ***Inform local judicial decisions with international and comparative experience***

Since most of the legislative and constitutional provisions relevant to reproductive and sexual rights are similar, one can “import” the arguments that have been successful in other countries and before international bodies to convince local judges to take a position that protects sexual and reproductive rights.⁵

- ***Emphasize privacy as a positive right***

It is important to emphasize the idea of privacy as a positive right that enables one to freely make decisions about one’s own body without interference. The right to privacy is almost completely lacking in the decisions analyzed for this report. Greater emphasis on privacy could help promote sexual and reproductive rights in extreme situations where there is an absolute prohibition on abortion and an absence of reproductive health protections.

3. RECOMMENDATIONS FOR SCHOOLS OF LAW

- ***Include an understanding and analysis of reproductive rights in legal curricula***

One cannot over-emphasize the importance of the judiciary’s role in remedying the inefficient process of implementing human rights provisions. It is therefore necessary to involve both legal professionals and members of the judicial branch first in recognizing that judges are not apolitical, objective or neutral actors and that they must therefore be made conscious of the moral, political or religious positions through which they interpret the law. In addition, legal professionals and members of the judiciary must reform legal education so that an understanding and analysis of norms and national and international reproductive rights jurisprudence are incorporated into academic curricula, which traditionally include constitutional law, penal law, family law, civil law, and labor law, among other fields.

