

Cristina Motta
Macarena Saez *Editors*

Gender and Sexuality in Latin America - Cases and Decisions

Cristina Motta • Macarena Sáez
Editors

Gender and Sexuality in Latin America - Cases and Decisions



 Springer®

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Gender and Sexuality in Latin America - Cases and Decisions

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Foreword

Gender and Sexuality in Latin America: Cases and Decisions, edited by Cristina Motta and Macarena Sáez, is a long over-due book. It advances understanding of legal developments concerning women and LGBT persons in Latin America. For the first time, English speaking audiences will have access to commentary on decisions of national and international courts concerning rights of women and LGBT individuals in Latin America.

The cases and narratives presented in this volume expose the complexity of legal developments on gender and sexuality in Latin America. This book advances understanding of the rationales used in Latin American judgments concerning identity rights. It exposes the reasoning of judges that at the same time restrict and advance the exercise of rights by women and LGBT persons. It reveals a multifaceted legal reality where these individuals enjoy protections not yet achieved in other parts of the world, but, at the same time, shows how judicial reasoning has restricted their rights in much harsher ways than what is experienced in other regions.

The book explores the interplay between national and international law by analyzing decisions made by international bodies and courts such as the Inter-American Court of Human Rights. The Inter-American Court has been especially effective in strengthening the rights of women and LGBT individuals in the region with groundbreaking decisions that have recognized the right to be free from gender-based violence and the right to non-discrimination on the basis of sexual orientation.

This book is written by Latin American legal scholars with expertise on a broad range of legal issues: Citizenship by Cristina Motta, Family by Isabel Cristina Jaramillo, Health by Lidia Casas, Property by Helena Alviar, Violence by Julieta Lemaitre, Diverse Sexualities by Juan Marco Vaggione, and Violence based on Prejudice by Maria Mercedes Gomes. The chapters help to close the gap between the scholarship on gender and sexuality available in English and in Spanish. *Gender and Sexuality in Latin America: Cases and Decisions* will facilitate collaboration between scholars and activists from the global north and the global south who are interested in exploring the effectiveness of judicial reasoning in advancing the equality of all individuals, irrespective of their gender or sexual orientation.

Professor *Emerita*, Faculty of Law, University of Toronto

Rebecca Cook

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Cristina Motta and Macarena Sáez

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Chapter 1

Introduction

Cristina Motta and Macarena Sáez

Gender and Sexuality in Latin American: Cases and Decisions is designed to provide a valuable resource for law professors teaching in the areas of gender, sexuality, and the law, Latin American law, and comparative law.

The book was originally published in Spanish as the first casebook to cover gender and sexuality decisions in Latin America. With the generous support of the Center for Reproductive Rights in New York, a revised and abridged version of the book is now available in English.

The book analyses an array of decisions from Latin American judges in topics of great impact for women and LGBTI individuals. The decisions included in this volume may not show a particular regional or national trend, but were selected because of their argumentative quality, and their impact in a particular country. The main goal is to present issues faced by women and the LGBTI community in different areas of the law, and show how they have been addressed by courts in different countries. In some cases, statutory analysis is also included.

The book is based on two central ideas: On one hand, it presents a theoretical position that conceives the law as a complex social practice in which judges play active, autonomous and significant roles. On the other, it presents a critical legal analysis based on gender and sexuality perspectives on law.

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1

1.1

The first idea leads to enhancing the position of Latin American judges. Traditionally, they have occupied a subordinate position *vis à vis* political branches of government. A central idea in the separation of powers that guided the Roman-German tradition sought to ensure that the popular will would not be replaced by that of officials who did not represent it. This contributed to judges gradually acquiring an insipid image, not comparable to that of the other two branches of the State. Thus, during most part of the independent history of Latin America, the judicial function developed from the shadows.

In the last decades, however, judges have acquired an unprecedented pre-eminence. Driven among other things by “political institutions in the process of decomposition,” as stated by Paul Ricoeur, judges perform a leading role in large parts of the Western world. High levels of political corruption have contributed to the discredit of legislative branches and of the political class in general. Judges, in some places, have become a new instance of legitimization of the state. This unprecedented role is also supported by the decisive alteration of traditional normative hierarchies produced by a growing weight of supranational norms within national states. The law, borrowing Dworkin’s image, deposits Herculean demands on those who apply it. Thus, closely linked to morals and politics, and infallibly immersed in reality, the law will be applied correctly by judges who understand the theoretical and practical complexity of their mission.

In the case of individuals in disadvantaged groups like women and LGBTI, the transformation of the role of judges is promising. This is apparent in the selection of rulings offered in this book. The review of Latin American case law reveals two general trends among judges with regards to women and the LGBTI population: First, there are cases in which judges faced rules openly detrimental to the interests of women or sexual minorities. For example, there are some cases where gay and lesbian couples have challenged statutes restricting adoption to heterosexual married couples. In those cases, judges could have argued that given the clarity of the rule, and according to the role played by judges in the continental tradition, their hands were tied to a restrictive interpretation of family. Some judges, however, moved away from their traditional function and resorted to arguments with renewed interpretative power. This was the case of the Constitutional Court in Colombia when it ruled that in spite of a constitution that directly links family to marriage, and defines marriage as the union between a man and a woman, the correct normative interpretation of such concept ought to incorporate single women with children, cohabiting couples of gays, lesbians, and heterosexuals, and all those forms of family organization derived from constitutionally protected cultural or religious visions. Thus, in Latin America there are already examples of judges who are exercising their adjudicative function by privileging the application of principles over rules.

These cases, of course, coexist with decisions that show a moral position rejecting the inclusion of non-traditional families. Many times these rulings are supported by literal interpretations of black letter law. Others, represent narrow interpretations of

principles that used correctly should have resulted in the protection of disadvantaged individuals. This is the case of a decision by the Supreme Court of Chile in 2004 that reprimanded the judges from a court of appeals that had affirmed a lower court decision granting custody of her three minor children to a mother who was living with her lesbian partner. The Supreme Court not only overruled the lower courts' decisions and granted custody of the children to the father, but went further to reproach the judges for not applying the best interest of the child principle, according to their own interpretation of it. To the Supreme Court, in this case the affirming judges had "omitted the preferential right of the minors to live and develop in the bosom of a normally structured family, appreciated in the social environment, in accordance with the traditional model proper to them."

1.2

The second basic idea behind this book is to analyze different decisions from the perspective of gender and sexuality studies of law. These theoretical positions, mostly developed in law schools of the United States, have had a strong impact on feminist activism and legal academia in Latin America. Each chapter of this book situates the discussion and analysis of cases within a feminist or critical perspective of the law. Although references to the work of American feminism and theoretical transplants are inevitable and many times beneficial, the book is still a work on Latin American law. The critical legal theories that have guided the analysis of the decisions selected for this book provide a framework for the construction of a modern adjudication narrative. One that exposes the damage derived from male and heterosexual domination. Thus, the book identifies itself with four fundamental notions of these critical perspectives: First, it accepts that sexual inequalities are grounded on the existence of dichotomist models which do not depend on biological sex but are the result of the social construction of the genders. Second, it admits that the values and attributions granted to each gender have triggered an unequal distribution of resources and power between men and women and between heterosexual and non-heterosexual individuals. Third, it recognizes that the law has been a privileged mechanism to preserve inequalities and that through legal constructions some sexual and gender identities have been endowed with legitimacy and legality and others have been denied such legitimacy and legal protection. Fourth, it considers that even though the law and legal institutions have been defined as neutral in terms of gender, they are actually a cultural and political construction that strengthens and naturalizes masculinity and heterosexuality.

These theoretical and critical references not only nurture a particular approach to the problems the book deals with, but they also guide the assessment of the decisions analyzed here. The influence of these perspectives in regional case law is evident. The wide acceptance of substantive equality as a goal, and the support of affirmative actions by some courts attest to this acceptance. More specifically, case law of the Colombian Constitutional Court offers abundant examples of the assimilation

of these perspectives. The holding in which the Constitutional Court attributed monetary value to the domestic work of a “concubine,” the one that prohibits the introduction in rape trials of evidence related to the sexual past of a victim of rape, or the one that reaffirms the constitutional support to mothers heads of household, are conclusive proof of this. At the same time, these judges face within their countries, and sometimes within their own courts, positions that reproduce the traditional model of adjudication. In this sense, the chapters on “Family” (Chap. 3) and “Health” (Chap. 4) offer a variety of illustrative examples.

1.3

The first part of the book focuses on regional case law affecting women. Six chapters deal with various rulings that have defined the scope and have marked the limits of Latin American women’s rights. Each chapter presents a brief conceptual introduction and develops a series of topics arranged through specific problems which, in turn, are illustrated by a ruling, a statute, a report or a document. Once the ruling has been presented, each chapter provides issues for debate and questions aimed at ensuring the pedagogic use of the book.

The chapter on Citizenship (Chap. 2) offers an alternative and complementary analysis of the study of constitutional law. The chapter deals with the evolution of case law on citizenship from two different viewpoints: citizenship as an aspiration, in which the objectives of equality, reparation and emancipation of women through the law are studied and citizenship as belonging, in which the problems of identity and culture as new challenges to the traditional concept of citizenship are analyzed.

Regional case law shows a remarkable evolution. In terms of equality and reparation it is worth highlighting the adoption of substantive equality and the support of affirmative actions. With regards to emancipation, there is an evolution towards the support of horizontal effects of fundamental rights and courts are more willing to accept state intervention in private relations characterized by the defenselessness of one of its members. The chapter also discusses the conflicts that have their origin in the constitutional respect for cultural diversity and the challenges of massive migrations and globalization.

Overall, the chapter on Citizenship (Chap. 2) attests to the transformation of the role of judges and the use of critical perspectives of the law in the adjudicative processes.

The chapter on Family (Chap. 3) deals with problems derived from the institutionalization of the family in Latin America. It discusses various aspects related to the recognition of rights and the equality of women in the family showing a discouraging scenario for women. The chapter analyses the rights of concubines, as well as child custody and the treatment given to domestic and sexual violence within the family. The decisions covered by the book in this area show that there are some relationships deserving of state’s protection and others that are left out as inexistent. For example, courts regularly deal with property division for cohabiting partners.

Some of these decisions present a conflict between different societal values. Should a court recognize cohabitation and distribute property when the woman claiming property rights has unknowingly cohabited with her own father? Courts tend to side with the protection of societal values grounded in moral or religious criteria to the detriment of protecting the weakest or innocent party to the conflict.

This chapter also explores the problem of equality already dealt with in the chapter on “Citizenship,” (Chap. 2) but this time from the perspective of family law. Women’s pre assigned roles are more apparent in the realm of the family. Judges tend to favor “motherhood” even to the detriment of women’s autonomy. Thus, the chapter shows how maternity, in Latin America, is viewed as a privilege and not a right, among other things because mothers must assume the costs that fall upon those who do not actively participate in the labor market. To illustrate this statement the chapter examines the regional models that define child custody and it studies the cultural valuation of care work. In the case of child custody it concludes that case law tends to allocate child custody using arguments such as the moral quality of the mother; in the case of care work, it shows a mixed regional reality. In some cases unpaid domestic work is vindicated as economically valued, strengthening the idea that women are best fit to carry out care work. In other cases, domestic work is seen as an obligation of both spouses.

Finally, the chapter tackles the problem of violence in the family concluding that the norms on sexual violence and marital duties have been generally applied by judges but not without applying first traditional social norms that lead women to bear important doses of aggression before ending relationships, especially if children are involved. Family case law is still deeply anchored in the model of a family structure imposed by the Roman Catholic tradition, and several of these rulings are eloquent examples of the way in which the law has been a privileged method of conservation of the conditions and the consequences of inequality.

The chapter on Health (Chap. 4) deals with four major issues: reproductive autonomy, which is illustrated by the position of judges regarding forced sterilization and the role that religious or moral beliefs of health care providers play in the provision of reproductive services; abortion, which is studied on the basis of the judicial response to the conflict between confidentiality and the duty of doctors to report crimes, and the judges’ responsibility in the profound legal insecurity in which non punishable abortions are carried out in the region; contraception is reviewed by analyzing the legal regulation of emergency contraception; last, the chapter analyzes the problems of reproductive health in teenagers, area in which the principle of the best interest of the child sometimes conflicts with teenagers’ progressive autonomy and in others it is openly used to suppress such autonomy.

On these four subjects, the regional case law offers an uneven and imprecise picture. For judges, voluntary sterilization is a procedure inscribed within female autonomy; even though it is an option that social welfare systems may limit, the traditional requirements of judicial authorization to carry out the procedure have been mostly eliminated. Additionally, some decisions have limited conscientious objection of health care providers regarding these types of procedures to individual objectors, thus mandating institutions to provide the service by replacing the objector personnel.

Concerning abortion, until recently the Argentinean case was one of the most dramatic examples of lack of normative precision. Decisions that revolved around confidentiality, the obligation to denounce crimes, and the constitutional guarantee of non self-incrimination were inconsistently applied. In addition, this situation generated legal uncertainty in the face of a hypothetical duty of women to request legal authorization -or not- when they were about to practice a non-punishable abortion. Despite various legal decisions stating that in the case of non-punishable abortions such authorizations were unnecessary, doctors had insisted on requesting them. At least for the case of rape, this situation recently changed with the decision of the Supreme Court of Argentina allowing abortion in the case of rape without the need of a previous judicial authorization.

As it is evident, women's health, profoundly linked to reproduction, constitutes the space in which the female body is the center of ideological appropriation. Health is also the sphere in which the critique of the law from a gender perspective is most necessary.

The chapter on Property (Chap. 5) deals with a right that, in spite of being considered fundamental and of being guaranteed in all legal systems, is enjoyed by a very small number of women in the world. The cases analyzed in the book cover three thematic axes: the consequences of linking the female identity to maternity and access to property; the configuration of privileged access to property; and the tensions among marginalized groups. On the first point, it is stated that even though identifying women with care givers and men as breadwinners restricts the possibilities of the former of being owners, sometimes judges have valued reproductive work by giving it an economic value, allowing, therefore, access of women to property. The chapter analyzes how most legal systems in the region have repealed legal provisions that banned women from administering and owning property or businesses. On the second subject – the configuration of privileged access to property – the chapter presents the case of special treatment for reasons of population displacement derived from the Colombian armed conflict. It discusses, from the perspective of access to property and allocation of housing, the problem of women head of household also discussed in the chapters on “Citizenship” and “Family.” Regarding the issue of marginalized groups, the chapter points out the difficulties faced by case law in establishing hierarchies among disadvantaged groups in matters such as the agrarian reform.

The chapter on Violence (Chap. 6) deals with three main themes: the paradoxes of criminalization, which questions the convenience of the use of criminal law and of the punitive power of the state to achieve women's emancipation. This subject is illustrated with the presentation of two regional pressing problems: femicide and rape as torture. On the first point, the book discusses the reports of the Inter American Commission on Human Rights and Amnesty International on the dramatic circumstances of violence against women in Ciudad Juárez. The second theme of the chapter is the evolution of international jurisprudence regarding states' responsibility derived from their inability to prevent rape as a general concern. Secondly, the chapter deals with the problems of criminal technique inherent in the definition of the crimes of violence against women. The chapter analyzes the use of force, the lack of consent,

and the use of objective criteria to determine self-defense in cases of sexual violence. In general Latin American decisions have been slowly evolving to positive responses and a better understanding of violence against women.

The chapter on Violence (Chap. 6) also deals with restrictions to women's autonomy derived from the penalization of the conducts that victimize them. Two cases in which there is a conflict between autonomy and the interests of the State are considered. The first is the use of conciliation or mediation techniques in cases of family violence. The second deals with human trafficking and the difficulty of tackling the issue in a global context, in which the interest of protecting human rights, especially of women, coincide with the intention of developed countries of stopping illegal immigration.

Undoubtedly, in the subject of violence against women the claims of legal feminism, especially its radical version, have penetrated with great strength and have triggered greater consensus in the normative field than in other areas. Regional case law has appropriated a discourse of protection of women against the persistent violence that characterizes social and family relations in Latin America. The few exceptions to this rather generalized trend respond to the difficulties that senior judges have to face in order to consolidate their authority in the national sphere.

1.4

The second part of *Gender and Sexuality in Latin America: Cases and Decisions* covers case law related to LGBTI individuals. Chapters 7 and 8 deal with tensions between law and sexualities at two different levels: the sphere of family rights and the practices of violence based on prejudice. "Families beyond heteronormativity" analyzes how the family structure is gradually reconfigured on the basis of the existence of diverse sexualities. In their roles as same sex couples, as gay and lesbian parents, or as sons and daughters with different sexual orientations or gender identities, LGBTI individuals challenge different religious, moral, and legal conceptions of the family. The chapter focuses on the ways in which case law on sexuality not only widens the legal spaces for recognition of rights, moving the boundaries of the established family as a unique reality, but it also criticizes the characteristic heteronormativity of most legal rationales. In particular, case law is reviewed in three spheres of family rights: same-sex couples, the right to adoption, and child custody.

The chapter on "Prejudice-Based Violence" (Chap. 8), that closes this book, provides a theoretical framework of this particular type of violence. The chapter shows how violence against certain individuals that do not fit the heterosexual norm surpasses its individual dimension and acquires the quality of a message. After making a conceptual contribution on violence, sexual prejudice, heterosexuality as a rule, and the allocation of value to the difference, the chapter carefully examines the normative aspects of violence based on prejudice.

The legal issues that arise from violence based on prejudice are illustrated by analyzing three different problems: the invisibility of the homophobic motives