

Judicial Affairs & LGBT Rights

In many Latin American countries, the courts have become key players in shaping policy on a wide variety of social, political, and economic matters. Using entries from the LGBT Rights in the Americas Timeline, we can consider the role of national and international courts in the progression (and regression) of LGBT rights. In doing so, we can come to understand how LGBT rights in Latin America and across the world can be advanced. Looking at the data, we find three general levels of Latin American court involvement in LGBT rights: active change, deferral, and active opposition. Additionally, the involvement of international courts, such as the Inter-American Commission on Human Rights, has been minimal but nonetheless important in establishing protections where legislatures and national courts have fallen short.

Overall, eleven countries in the LGBT Timeline contain entries in the “judicial affairs” category, which is one of the fourteen categories organizing our data. There are fifty-one sourced entries in this category and seventy percent of these entries are events that have occurred within the last decade. It is unclear whether this trend is an indicator of a transformation in the role of the courts or the wave of LGBT rights advancement. Nonetheless, we can gain insights into the role of the judiciary in the progression of LGBT rights in Latin America.

Active Change

Brazil & Colombia

These two countries have achieved a significant level of progress in the development of LGBT Rights through their highest courts following inaction and even outright opposition from their legislature. In Brazil, the highest court in the country upheld same-sex civil unions in 2011. This decision came after a request by the Brazilian Attorney General’s office, citing the fact that Congress had been stalling on legislation allowing for same-sex civil union rights for more than a decade. Five months later, the highest appeals court overturned two lower courts’ rulings, thus permitting two women to legally marry. On April 14, 2013, the National Justice Council legalized same-sex marriage nationwide. Following a decade of legislative passivity, the judiciary quickly introduced equal marriage rights for same-sex couples.

The Colombian Constitutional Court has ruled in favor of same sex unions, important discrimination protections, and inheritance rights over the past 15 years. The Court has attempted to enforce the implementation of these rulings against pushback from anti-gay groups, lower courts, and the legislature. In 2011, the Constitutional Court ruled that legislators had two years to implement laws in favor of same-sex civil unions; judges were instructed to begin issuing marriage license should the national legislature fail to comply. When the two-year period elapsed in 2013 with no new legislation established, clerks began issuing marriage licenses to same-sex couples and the Inspector General immediately ordered them to stop, claiming that the Constitutional Court’s ruling was unconstitutional. In early 2015, a local judge refused to allow adoption papers to a lesbian couple even though the Constitutional Court’s ruling legally allowed it. Thus, even with important rulings in favor of LGBT rights, institutional troubles have impeded on the progress made by the Colombian Constitutional Court. The United States and Mexico, with their recent same-sex marriage legalizations, would also fit into this category of active change. This level indicates that where the legislature fails to advance the rights of a minority group, the judiciary can step in and make rulings in favor of human rights.

Deferral

Costa Rica & Venezuela

These countries' judiciaries have made progress in establishing legal protections from discrimination based on sexuality and gender, but have also made decisions that pass the responsibility of instituting same-sex unions onto other institutions. In 2006, the Costa Rican Supreme Court ruled that the Constitution does not require the government to recognize same-sex marriage and that the decision is to be made by the national legislature. The Supreme Court did, however, shut down a Catholic Church-supported same-sex marriage referendum, ruling that a majority vote cannot determine minority rights. This judiciary is thus passive in the development of equal marriage rights but works to maintain the legal structure that requires the legislature to decide on the issue in a just manner. Similarly, the Venezuelan Supreme Tribunal struck down discriminatory laws and upheld discrimination protections but also determined that legalizing same-sex unions is up to the legislature. With different Constitutions comes varying degrees of flexibility in the interpretation of the legality of same-sex unions. In these cases, the structure of the Supreme Court did not permit them to make active change but rather led them to defer decisions to the national legislature. Countries in this category have achieved some progress through the courts, but the judiciary has not acted to legalize same-sex unions.

Active Opposition

Chile & Puerto Rico

It is important to understand how courts can actively impede the progress of LGBT rights so that activists may be able to better focus their resources and efforts to develop institutional protections and equality in these countries. Countries in this category have historically ruled against LGBT rights. The Puerto Rican Supreme Court, for example, upheld the ban on same-sex adoption, ruling that the state had no obligation to grant same-sex relationships the same rights as heterosexual ones. With regards to same-sex unions, the Puerto Rican Justice Department defended laws banning same-sex marriage to a federal judge, who ruled in their favor. When the lawsuit reached the 1st US Circuit Court of Appeals, however, the Justice Department decided to end its case and cease defending the laws. Thus, even in states with judiciaries that have a history of ruling against LGBT rights, challenging these decisions can be an important move towards equality. Admittedly, the case of Puerto Rico is peculiar, since it is a territory not a nation, but it shows that challenging laws can still be an effective activist strategy when working against a resistant state judiciary.

Unlike Puerto Rican courts, Chilean courts have not relented in their defense of anti-gay laws. In a 9-to-1 decision in 2011, the Constitutional Tribunal ruled that same-sex marriage rights were not protected under the constitution. In 2004, the Supreme Court denied a lesbian woman custody of her children based upon her sexual orientation. Activists and international organizations mobilized and condemned the decision. After nearly eight years, following campaigns by international human rights organizations, the OAS Human Rights Court took up the case. This international entity determined that this denial of custody was a human rights violation. In many cases, international organizations have power over its signatory's policies if they violate the organization's conditions. Thus, even in scenarios where a state's judiciary is resistant to establishing LGBT rights, international organizations can serve as effective mechanisms to advance these rights.

There are, however, only a handful of events in the LGBT Timeline that document the intervention of international organizations in LGBT rights issues. These international organizations have mostly remained neutral on same-sex unions and tend to intervene following pressure from international human rights organizations (such as in the case of Chile) on non-marriage discrimination issues. They are, nonetheless, important mechanism that can protect LGBT populations when legislators and the judiciary violate their human rights.

Conclusion

As this is a preliminary analysis derived from our LGBT Timeline data, consideration of outside academic literature and the use of other categories found in the LGBT timeline for additional context are the obvious next steps in this analysis of Latin American LGBT judicial affairs. From the information presented here, we understand that the judiciary can significantly advance LGBT rights in a nation, impede on the progress of these human rights, or stand somewhere in between.

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