

Chile: Cult of Formality

I. IN SHORT . . . WHAT WE FOUND

A. Opportunities

1. RECURSO DE PROTECCIÓN: PETITION FOR PROTECTION OF CONSTITUTIONAL RIGHTS

A *recurso de protección*, or petition for protection of constitutional rights, (*see infra* mechanisms for the protection for human rights) as established in the Chilean Constitution and the laws that regulate it, is an appropriate mechanism to guarantee the effectiveness of human rights. The courts have narrowly interpreted which rights can be protected by this mechanism and they have occasionally used some of these rights to safeguard those that are not as clearly protected. For example, in the case of a pregnant university student who was petitioning for the right to stay in school, the courts protected her right by invoking the property rights she assumed upon matriculation.

2. FLEXIBILITY IN MATRIMONIAL PROCEEDINGS

Although Chilean law still maintains a prohibition on divorce and formally provides that the husband shall administer his wife's assets, judges have generally protected women's assets and have been very flexible regarding evidence in annulment proceedings. These enlightened attitudes demonstrate a desire of the legal system to respond effectively and justly to people's needs. These progressive attitudes can be utilized in other areas, though the extent to which the protection of rights is subject to the whims of individual judges is troubling.

3. VICTORIES

In Chile, the principal achievements have been in the areas of **protection of motherhood** and of the right to **privacy** regarding photographic **images**. The courts have protected the **employment** of **pregnant women** and the right to

day care for their children. Also, they have been very strict in obligating *Instituciones Prestadoras de Salud* (ISAPRES), which are private health-care insurance providers, to **reimburse women** who have complications during pregnancy. Additionally, they have protected the right to privacy of women who have been photographed or filmed in intimate situations, for example in bathing suits or while submitting to a rectoscopy, and of women allegedly infected with HIV/AIDS.

B. Limitations

1. INTERPRETIVE AND EVIDENTIARY FORMALISM

Chilean courts, however, have a tendency toward formalism as evidenced by their narrow interpretation and application of laws and constitutional provisions to factual situations, as well as in the evaluation of evidence. They have affirmed, for example, that removing a television commercial about the prevention of HIV/AIDS does not cause noticeable damage to anyone and that the right to education and to health are not protected under the constitution by the petition for protection.⁷³ The court stated:

[...] the commercials, constitute a grave crime against the honor of women who are used as sexual objects, exacerbate masculinity vis-à-vis the couple, and encourage promiscuous relationships with the sole purpose of encouraging the use of condoms [...] [and] regarding the use of condoms there is no real certainty as to their efficacy, as has been pointed out by authoritative medical opinion both nationally and internationally.⁷⁴

The courts have also considered the testimony of minors in cases of sexual violence to be inadmissible, based not on a principle of protection of the minor, but on a lack of confidence in her statement.

2. NON-INTERVENTION IN “PRIVATE MATTERS”

Chilean courts have also shown a tendency to not intervene in what they consider “private matters.” They have **refused to enforce** Ministry of Education **regulations in private schools** regarding the expulsion of pregnant minors and have declined to **protect women who are abused** by their husbands through the constitutional petition for protection. Unfortunately, this promotes the idea of the separation of the public and private spheres and tolerates violations of rights, generally those related to sexuality and reproduction, in areas considered traditionally beyond the reach of the state.

C. The Road Still Ahead

The **strong protection accorded maternity in Chile** is at the expense of the freedom not to choose this option. **Abortion is penalized in all cases** and the courts have not moved toward limiting the application of the law.

Nor have the courts demonstrated a real interest in **sexual autonomy**. Protection is limited in cases of domestic violence and there are few convictions for crimes of sexual violence. Moreover, the courts have also ruled against HIV/AIDS prevention campaigns. They maintain that they promote promiscuity and, contrary to the conclusions of international experts, that the effectiveness of condoms in the prevention of HIV/AIDS has not been demonstrated.

The courts’ interpretation of the **right to equality** is also of great concern. In general, the courts have found classifications admissible, despite the use of criteria such as gender (i.e., in cases involving insurance companies or soccer referees) or pregnancy (i.e., in cases involving private schools) to separate one category of actors from another.

[...] we only pursue the objectives of the sport, and we believe that a woman is not in a condition to direct a soccer game where men are playing and where all the members are young and fast moving, attri-

*butes suitable to be directed by men and not women referees [...]. We make this petition to protect their feminine integrity and also to avoid any insult and impropriety that they could receive [...].*⁷⁵ (Defendant's statement. The court denied the woman's petition for protection.)

The **silence** of the courts in the areas of **sexual and reproductive privacy and sexual orientation** is also evident.

II. TENDENCIES IN JUDICIAL INTERPRETATION

A. *The Judicial System*

1. THE JUDICIAL BRANCH

The **Supreme Court**, consisting of 21 ministers,⁷⁶ is the highest body of the judicial branch. "Directive, correctional and economic oversight of all the courts of the nation is reserved to it."⁷⁷ The **Constitutional Court** has seven members: three members of the Supreme Court, named by that court; a lawyer designated by the president; two lawyers elected by the National Council of Security; and a lawyer elected by the senate.⁷⁸ The court has control of **the theoretical constitutionality** of laws, proposed laws and international treaties.⁷⁹

2. SOURCES OF LAW

The constitution is the highest law in the Chilean legal order.⁸⁰ The principal source of law is legislation.⁸¹ Custom is only used as a legal standard when it is expressly referred to by a law.⁸² Judicial decisions are only binding on the parties,⁸³ including Supreme Court decisions examining the unconstitutionality of a law in a particular case.⁸⁴ The decisions of the Constitutional Court, however, are definitive and binding even on the Supreme Court.⁸⁵

Generally, international treaties have equal standing with laws.⁸⁶ However, the constitution establishes that it is the duty of the state "to respect

and promote” the rights guaranteed by international treaties that have been ratified by Chile.⁸⁷

3. CONSTITUTIONAL REVIEW

The judicial system establishes **constitutional review on both a practical and theoretical level**. The **Supreme Court** reviews the constitutionality of **procedure**. It hears petitions for inapplicability due to unconstitutionality when a doubt as to the constitutionality of a law arises related to the procedure of a judicial proceeding.⁸⁸ The Supreme Court decides the recourse in plenary.⁸⁹ The **Constitutional Court** provides the control of **substance**. The Constitutional Court does this by preliminarily reviewing the constitutionality of organic laws and of those laws that interpret constitutional provisions; attending to questions of constitutionality of proposed laws and international treaties, whether they are presented by the president of the republic, the congress or a quarter of the members of one of the chambers; and deciding on the constitutionality of decrees and presidential resolutions when the comptroller’s office requests it.⁹⁰

4. MECHANISMS FOR THE PROTECTION OF RIGHTS

The Constitution sets out two specialized mechanisms for protection of rights: the petition for **protection** and petition for *amparo*. The petition for **protection** is to reestablish a right when a deprivation, perturbation or threat to the rights specifically outlined in the Constitution has taken place.⁹¹ The petition can be presented in person or by proxy before the respective court of appeals. The petition should be decided immediately.⁹² The petition for *amparo* guarantees the rights to individual liberty and security. Any individual who “has been arrested, detained or held prisoner in a manner violating the constitution or the law” can present a petition.⁹³

B. Decisions on Sexual and Reproductive Rights

1. THE RIGHT TO HEALTH AND TO REPRODUCTIVE HEALTH

Constitution: “Art. 19. The constitution assures every individual: No. 1. [...] The law protects the life about to be born. [...] No. 9. The right to the protection of health. The state protects free and equal access to the promotion, protection, and recuperation of health and the rehabilitation of the individual. [...]”

The courts have protected **pregnant women’s** right to health and the life of **unborn children** in the case of a mother who objected to a **blood transfusion for religious reasons**,⁹⁴ where one of the ISAPRES refused to **grant prenatal** leave required by the plaintiff;⁹⁵ and in a case involving an ISAPRES’ decision to suspend the plaintiff’s **paid leave** that had been recommended due to the risk of miscarriage.⁹⁶ They have also considered a husband’s **exclusion** of his wife as a beneficiary for **health payments** to be a grave violation of the right to health and to physical and psychological integrity.⁹⁷

In contrast, the courts have found that it is not a violation of the right to health and life when the **transmission of television ads** for the prevention of HIV/AIDS is **prohibited**⁹⁸ or when a **person living with HIV is refused necessary medications** and those medications are not readily available.⁹⁹

2. THE RIGHT TO PHYSICAL INTEGRITY AND TO BE FREE FROM VIOLENCE

Constitution: “Art. 19. The constitution assures every individual: No. 1. The right to life and to physical and psychological integrity of the person [...]”

See also: Law 19,617, modifying the chapter on sexual rights in the Penal Code; Law 19,325, Domestic Violence Law.

Evaluation of Evidence in Sex Crimes

In the area of sexual violence, where many important legal reforms have

been made, the evidentiary analysis of the essential elements of rape indicates a continuation of non-protection of and discrimination against women. In the legal treatment of sex crimes, the tendency of the decisions indicates that rape can only be proven by the presence of injuries, without giving any evidentiary value to the victim's testimony. This leads to paradoxical situations that judges resolve in contradictory ways, generally to the detriment of the victim. One example is a case in which a man was convicted for the assault, but not rape, of his daughter. The visible injuries pointed to assault, not rape. Although another daughter witnessed the attack, the testimonies of the victim, her sister, and the emergency room personnel who attended the victim and found evidence of semen were not taken into account.

The courts have established that in order to **convict** a defendant for **rape** it is necessary that the **victim show injuries**,¹⁰⁰ or evidence of the use of weapons or superior force.¹⁰¹ Thus, the victim's **testimony is insufficient**,¹⁰² particularly in the case of minors¹⁰³ and the mentally ill.¹⁰⁴

Sexual Harassment

Regarding **sexual harassment**, the courts have determined that **delay** in notifying the authorities of the alleged harassment is an **important indicator** in establishing if a crime really occurred.¹⁰⁵

Intervention by the State in Domestic Violence Cases

Regarding domestic violence, generally the courts have found that the **petition for protection** is not suitable for resolving spousal disagreements.¹⁰⁶ Judges have ruled that they cannot intervene in domestic violence cases unless there is evidence of physical violence. In one case, the court found that **violence within the home was not a crime** and it belonged to the realm of the reciprocal rights and obligations of spouses.

3. THE RIGHT TO EQUALITY AND TO BE FREE FROM DISCRIMINATION

Constitution: "Art. 19. The constitution assures every individual: [...] No. 2. Equality before the law. In Chile there are no privi-

leged individuals or groups. In Chile there are no slaves and whoever sets foot on its territory is free. Men and women are equal before the law. [...]"

Sex Discrimination in Sports

The **Court of Appeals of Copiapó**, using a narrow concept of equality, has established that **the right to equality of a woman referee was not violated** when the Chilean National Association of Referees **refused to assign** her to games, citing as proof that she had failed to complete the required training course, despite having expressed on multiple occasions that the decision was in fact due to the desire to protect her **feminine integrity**.¹⁰⁷

Differential Health Insurance Quotas

The **Court of Appeals of Santiago** has found that it **does not violate the right to equality to require a woman to contribute a larger sum** than her husband for the **inclusion of their minor daughter** in the same health plan. The court agreed with the insurance companies and found that higher insurance costs, due to women's statistical risk of maternity,¹⁰⁸ justifies higher fees for women and that the law permits the different rates.¹⁰⁹ The case is before the Inter-American Commission of Human Rights.¹¹⁰

Discrimination against Pregnant Students

The **Court of Appeals of La Serena**, whose decision was confirmed by the Supreme Court, has found that regulations in **private educational establishments** can include **expulsion of students for pregnancy**.¹¹¹ The **Court of Appeals of Santiago** decided in the same way in a similar case.¹¹² In contrast, this same court ruled that a **university student** had recourse to the petition for protection for the same reason and that the private university had **violated the student's right to property**.¹¹³ It is ironic that the only way that courts have protected the rights of young pregnant women is through the property rights they assume upon university matriculation; this exposes the value system of the Chilean judicial system.

4. THE RIGHT TO CONSENT TO MARRIAGE AND TO FORM A FAMILY

Constitution: “Art. 1. [...] The family is the basic unit of society.”

See also: Civil Code, art. 102: “[M]atrimony is a solemn contract by which a man and a woman join together, now and indivisibly, for the rest of their lives [...],” Civil Marriage Law.

Lack of Divorce and Resort to Annulments

Due to the lack of divorce, judges have established discretionary **annulments of marriage**. The primary grounds are incompetence of the official who certified the **witness’s statements**.¹¹⁴ In these cases it has been important that the spouses are in agreement in their desire for an annulment.¹¹⁵ In other cases, however, judges have affirmed that declarations cannot be the only evidence and that an **agreement** between spouses can be an indication of intent to **deceive** the judge.¹¹⁶ Although some judges find ways to circumvent the legal vacuum created by the lack of divorce, it is disturbing that the decision depends on the willingness of the judge and on his or her opinion of the constitutionality of divorce.

The courts have also established that one cannot claim fraud to obtain an **annulment of a second marriage** when the first is valid.¹¹⁷ On the other hand, one can obtain an annulment when the first marriage has been **declared null fraudulently**.¹¹⁸

Domestic Partnerships

The jurisprudence of the Supreme Court, supported by doctrine, has described cohabitation or concubinage as “the enduring and stable union of two persons of the opposite sex that make a marital life with all the appearances of a legitimate marriage.”¹¹⁹ However, the Court of Appeals of Valparaíso limited this definition stating that “concubinage excludes all abnormal relations between persons of the same sex”,¹²⁰ reinforcing the idea that not only marriage but also cohabitation should be between persons of different genders in order to be recognized.

The Chilean courts have protected **female domestic partners** who are in

a situation of non-protection due to death or separation from their partner.¹²¹ They have refused however, to establish joint ownership for the sole reason of cohabitation.¹²²

5. THE RIGHT TO DECIDE THE NUMBER AND SPACING OF CHILDREN

The constitution does not contain any explicit reference to the right to decide the number and spacing of children.

See: Ministry of Health, Responsible Paternity Laws, 1993, Penal Code, arts. 342 and following.

Extenuating Circumstances for Abortion

The Supreme Court has established that **women in sex work** have the right to invoke the defense of **extenuating circumstances** for abortion for reason of **dishonor** because the protection of honor is a personal matter.¹²³ The Court of Appeals of Santiago has established that such **extenuating circumstances are lawful** when the woman alleges having had the **abortion for fear of being rejected** in her socioeconomic sphere.¹²⁴

Reproductive Health Services

The courts have defended the right of women to choose voluntary **sterilization**, and have also found that **women who are mentally ill** do not require the authorization of their parents to undergo the same treatment.¹²⁵ In addition, they found that the ISAPRES **cannot refuse to reimburse the costs** of the surgery because the sterilization was voluntary.¹²⁶

Professional Confidentiality

The Supreme Court has established that if a doctor cannot determine if complications resulted from an induced or spontaneous abortion, the doctor is not criminally responsible for not having reported the patient.¹²⁷

6. THE RIGHT TO EMPLOYMENT AND TO SOCIAL SECURITY

Constitution: “Art. 19. The constitution assures every individual: [...] No. 16. Freedom of work and its protection. [...] No. 18. The right to social security. State action will be directed to guaranteeing all inhabitants access to the enjoyment of basic and uniform benefits, whether offered by public or private institutions. [...]”

See also: Labor Code.

Labor Guarantees for Women

In the area of labor law there are many provisions that theoretically protect women. However, these provisions take a paternalistic approach that supports the idea of women as more expensive workers due to the quantity of benefits and leave to which they are entitled. In other words, women, not society, continue to be responsible for the costs of reproduction.

The courts have established that the **dismissal of a pregnant worker is not valid** when it is not judicially authorized, **even when the employer was unaware of the pregnancy**,¹²⁸ and also **when the work contract is temporary**¹²⁹ **or of a specified length for a particular job**.¹³⁰ However, pregnancy must be proved during the proceedings.¹³¹ They have also determined that the employer’s bankruptcy **is not an excuse** for not paying adequate benefits.¹³²

The law states that companies with twenty or more employees are obligated to have **day care** facilities for the children of its workers. For the protection of women who are mothers, the courts have established that a company **includes all local offices** as one unit.¹³³ On the other hand, they have found that a **mother does not have the right** to require that a private company **order her transfer** to a site closer to the place of residence of her children.¹³⁴

Social Security

Regarding the right to social security, the courts have ruled that ISAPRES

are responsible for damages caused by personnel who are hired as doctors but are not in fact doctors.¹³⁵ They have also obligated insurance companies to pay the medical costs incurred by policy holders when necessary medical examinations to determine preexisting conditions were not performed,¹³⁶ when the procedure is included in the *Fonasa* (National Health Fund) list of benefits,¹³⁷ and when the contract is too technical for the policy holder to understand at the moment of enrolling in the plan.¹³⁸ However, the courts have not found a violation of the right to social security when private companies do not pay the medical costs for a hysterectomy that is necessary due to preexisting uterine fibroids,¹³⁹ or when women are charged higher prices than men for similar procedures.¹⁴⁰

7. THE RIGHT TO BE FREE FROM SEXUAL EXPLOITATION

See: Penal Code, arts. 367, 373 and 495; Health Code, art. 39.

The Court of Appeals of San Miguel has found that the owner of a **brothel** should be given the **benefit of the doubt** when she claimed to not know the age of a **minor** she employed. The court's opinion, coinciding with the allegations of the accused, stated that the 17 year-old appeared to be 22 or 23 years old.¹⁴¹

The Supreme Court has established that it **does not violate** the right to **property** when the competent authority **closes a building** where activities related to **sex commerce** take place.¹⁴²

8. THE RIGHT TO EDUCATION ¹⁴³

Constitution: "Art. 19. The constitution assures every individual: the right to education. Education has as its objective the full development of the person in different stages of life. [...]"

Unfortunately, the only case protecting a pregnant adolescent's right to education did so through her right to property because she had paid her matriculation fee to obtain a university degree.

9. THE RIGHT TO PRIVACY

Constitution: “Art. 19. The constitution assures every individual: [...] No. 4. The respect and protection of public and private life, and the honor of a person and of their family [...]”

See also: Procedural Penal Code; Law 18,334 of 1989; Health Code.

Privacy, Images and Reputation

The Supreme Court has also found that a woman’s right to privacy was violated by a newspaper that **published a photograph** of her and confirmed that she was **HIV positive**.¹⁴⁴ Similarly, the Court of Appeals of Santiago decided to allow the use of the petition for protection against a newspaper that published a **photograph of a woman in a bathing suit** without asking her permission.¹⁴⁵ Additionally, the Court of Appeals of Santiago found a woman’s right to privacy violated when she was **filmed undergoing a rectoscopy** by a private company contracted by the clinic for that purpose.¹⁴⁶

Chilean jurisprudence has not developed the concept of the right to privacy as a right to reproductive autonomy. Regarding sexual privacy, it is important to note that the legislature repealed Chile’s anti-sodomy law in 1999, thus decriminalizing sexual relations between men.¹⁴⁷

