

Sexual and reproductive rights A global legal battlefield



Is there a caption for this photo? Photo: Gaviota Paseandera

Millennium Development Goal number 5 (MDG 5) aims to reduce maternal mortality. In this brief we argue that, in the current global context more rigorous research focusing on the legal battles around women's sexual and reproductive rights – over who gets to control women's bodies – is of critical importance if this goal is to be reached.

When Pope Francisco I was elected last week, his position on sexual and reproductive rights and his stand on abortion was one of the main topics in the media and on social networks all over the world. The debates surrounding the election of the new pope signal the close links between religion, conceptions of morality, public policies and sexual and reproductive rights. For many people in countries where the majority are Roman Catholic, these are key issues. Whether these countries are secular or non-secular states, the Catholic Church is seen as an authority with regard to sexual and reproductive rights (SSR), and on public policies and laws that regulate and define these rights.

The church is not the only actor in this fundamental public policy field. Legal battles to expand and restrict women's sexual and

reproductive rights (SRR) represent a "frontline" illustrating the complexity of rights entitlement, and often showing how these battles extend beyond the formal recognition of SSR by a court ruling or a law. Despite the increasing judicialization of SSR - which aims to both expand and restrict those rights - there is relatively little research analyzing the consequences of these legal battles for peoples' enjoyment of SSR, or which considers the relationships between progressive (rights enhancing or rights expanding) and regressive (rights restricting) uses of legal mobilization. Such debates are not exclusive to the field of SSR. Scholars have raised concerns about the impact of legal mobilization on the enjoyment of economic, social and cultural rights (ESCR). Such research has highlighted the role that different factors play in the implementation

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of rulings and the definition of policy, including the political orientation of governments and other political actors, the nature of public debate, and the nature and intensity of social mobilization around particular rights issues. In the field of SSR, debates about the relationship between religion, private and public morality and public policy are often particularly charged. How do these actors and their orientations and strategies affect patterns of legal mobilization, and the implementation of judicial rulings and policies? This brief presents the actors, the main arguments and the legal strategies used to expand and restrict access to abortion rights and access to contraception.

A GLOBAL BATTLE

SSR debates are common all over the world. Recent electoral campaigns in countries like Angola, Brazil, Nicaragua, Peru and Spain and the United States have featured heated debates on the restriction or defense of rights to abortion. Electoral campaigns are not the only venues for these debates. Legal avenues, including courts and legislatures, are also important arenas. In Nicaragua, Russia and Spain, where abortion has been formerly legalised in some circumstances, the executive branches have promoted new legislation aiming to restrict access. In Hungary as well as in Kenya, efforts to prevent access to abortion were included in the new constitutions through clauses upholding the importance of the protection of human life from the moment of conception. In 2009, the Honduran government prohibited the purchase, use and promotion of all forms of emergency contraception; in 2009 the Peruvian Constitutional Court, overturning a previous ruling from 2006, banned the distribution of emergency contraception (EC) at public health facilities; and in Spain the current government of the Partido Popular is considering making EC available by prescription only. Currently EC is available without a prescription. Between 2008 and 2009 state legislatures in 18 of the Mexico's 32 states passed laws banning or restricting access to abortion; only the federal capital has passed laws expanding access to legal abortion.

At the other end of the scale, legal battles have also been carried out to decriminalize abortion and to make contraceptive methods available at public health facilities. Uruguay's Congress recently approved a new law to decriminalize abortion up to the twelfth week of pregnancy; the Colombian Constitutional Court has issued and ratified a decision which extends the grounds for legal abortion; the Argentine Supreme Court decided in 2012 to decriminalize abortion in case of rape, and; in Mozambique, the Council of Ministers recently approved a new law decriminalizing abortion that is to be discussed by the National Assembly. In 2010, Chile passed a law to restore access to emergency contraception at public health facilities; and, at the end of 2012, and after more than a decade of struggles over the issue, the government of the Philippines ratified a landmark reproductive

health bill that will make free contraception and family planning advice available at public health facilities. (See Map)

SSR BATTLE GROUNDS

A close relationship exists between the strategy adopted by different actors and the different structures of opportunities (e.g. the nature of the legal system, the authorities' political position or specific political conjunctures). It is important to emphasize that legal mobilization takes place both at a national and an international level, occurring within legislative bodies, Supreme and Constitutional courts, regional courts, and UN bodies: the same case can be discussed at the same body more than once, or by different bodies, and the decisions made are not always coherent. This reflects the dynamism and contingency of these processes. Regional and global bodies have tended to take rights enhancing or expanding stances against more restrictive policies on SSR adopted by national states. For example, Peru has been condemned twice for denying access to legal abortion to its citizens, in 2005 by the UN Committee on the Elimination of Discrimination against Women, and in 2012 by the UN Human Rights Committee.

WHO ARE THE ACTORS INVOLVED IN THIS TYPE OF LEGAL MOBILIZATION?

The key actors can be described as belonging to either pro-choice or anti-choice groups. The actors are often part of international networks that facilitate and promote the exchange of strategies and arguments. Among pro-choice groups it is possible to find sexual and reproductive rights activists and public health experts, some of them belong to progressive wings of religious groups (such as Catholics for Choice).

Anti-choice actors historically belonged to conservative wings of religious groups and institutions. As in the case of the pro-choice actors, they not only act as part of civil society, they also have representation in parliaments, local and national governments, as well as at international bodies.

These actors appeal to different international frameworks, such as human rights, scientific evidence, and religious norms. Scientific studies are quoted in order to justify a ban on abortion or access to the morning-after pill. Among groups sharing the same faith there are major differences in the interpretations given to their sacred texts with respect to reproduction and sexuality. Conservative groups in developing countries commonly argue that campaigns promoting modern contraceptive methods respond to foreign interests and occidental values aimed at depopulating these countries. Such arguments are also often used by transnational institutions as the Catholic Church.

A key aspect of improving maternal health is

expanding access to safe and legal abortion. Deaths from unsafe abortion account for close to 13% of all maternal deaths around the world each year. It is therefore of vital importance to analyse how political and legal battles are affecting access to this critical reproductive health service, which is only required by women.

In countries where illegal abortion is linked to high maternal mortality rates, such as Angola, Mozambique, or Sri Lanka, national initiatives to legalize abortion are often based on public health arguments, aiming to reduce maternal mortality. These types of arguments do not always imply recognition of women's rights to decide about their own bodies and fertility, or a critical approach to power structures within the society. Thus, the arguments reflect a particular mindset with regard to women's rights, and more broadly, sexual and reproductive rights. Scholars have described major differences between arguments: some focus on the recognition of women as subject of rights, and their rights to decide about their own body and their sexual and reproductive patterns; others recognize that conflicts exist between the rights of the woman and the rights of the embryo and/or the inseminated egg. Some frame the debate about SSR within arguments about population control and public health imperatives. To date hardly any research has been carried out analyzing how these various arguments lead to different outcomes.

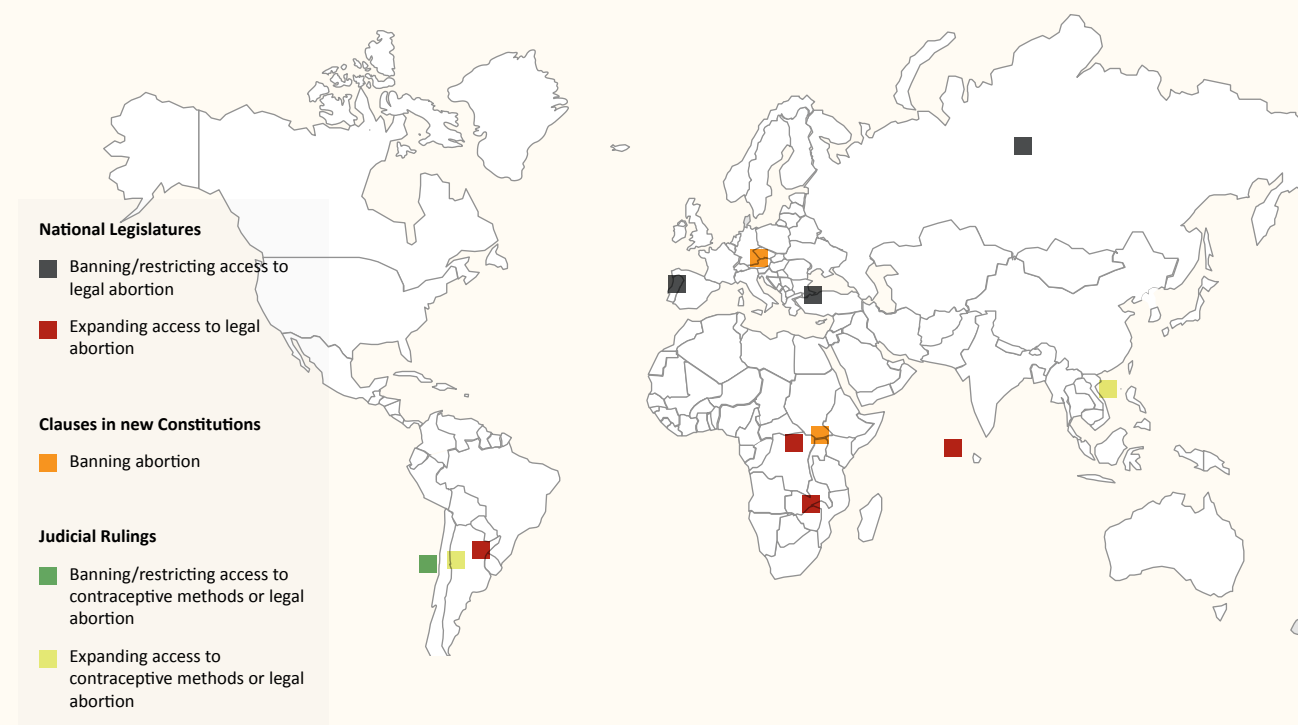
The use of legal strategies is not a static or isolated process. Another element to consider is whether the actors change their arguments over time. Scholars have described how actors including claimants, or political actors that support pro-choice or pro-life positions, change their arguments and even their positions. These changes respond to different variables, such as developments in international jurisprudence, local debates, as well as political and societal events. Greenhouse and Siegel (2012) describe how the discovery of the contraceptive pill, the German measles epidemic in 1965, and the publicized side effects of Thalidomide were keys in the debate on abortion in the USA before the Roe v. Wade ruling. Elections and the fight to win votes have also been identified as a cause for realignments of positions of political actors towards SRR.

There is also evidence that the courts' interpretations and opinions on such issues can be flexible, revealing the susceptibility of the Courts to developments in jurisprudence, shifting political context and also to changes of Supreme and Constitutional Courts members.

SECURING RIGHTS IN PRACTICE

Movements and campaigns to ensure access to modern contraceptives and abortion rights have led to a decrease in abortions. In fact, recent research has found that abortion rates were lower in subregions where more women live under liberal abortion laws. According to WHO, the majority of the unsafe abortions are

EXAMPLES OF LEGAL STRATEGIES USED WORLDWIDE TO RESTRICT OR EXPAND SSRRS (2006 - 2013)



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performed in developing countries, despite existing legal restrictions.

Legal victories expanding access to modern contraception and safe abortion are hollow if they go unimplemented. And with respect to abortion, resistance among different sectors of society can undermine women's access and expose them to abusive treatment, forcing them to seek clandestine abortions or to continue pregnancies against their will. In Zambia for example, an abortion procedure requires the approval of several doctors, including a specialist—in a country where all doctors and specialists in particular are scarce. In Pakistan, where abortion is allowed under certain circumstances, administrative requirements, as well as attitudes of health workers are among the main barriers to access to safe abortions

This type of administrative barrier, as well as abuses perpetrated by health providers have led to heated legal battles. Poland was recently condemned by the European Court of Human Rights for the inhumane and degrading treatment of a 14-year-old rape victim whom the authorities tried to stop from having an abortion; in Colombia, in the case of a 12 year-old girl whom health authorities denied access to safe abortion, despite meeting all the necessary requirements, the Constitutional Court ruled that an irreparable harm had been caused and ordered compensation as well as unlimited mental health services to the girl.

THE IMPORTANCE OF RESEARCH ON THE JUDICIALISATION OF SSR

Sexual and reproductive rights have always been highly sensitive and contested, raising complex moral, religious, legal, cultural and economic issues. However, legal battles over these rights increasingly define the relationships between private and public morality, and public policy. This underlines the need for a more comprehensive understanding on the capacity of legal mobilization to genuinely guarantee the enjoyment of SSR. The literature on social movements and courts to date has tended to focus on rights-expanding judicialisation, bringing greater conceptual clarity regarding the justiciability of SSR and more broadly economic and social rights (ESCR), and analyzing the increased use and promotion of legal strategies by local and international actors, such as strategic litigation, to advance the protection of rights. Analysts have focused less on the capacity of this type of intervention to genuinely improve policies. This would involve analyzing what happens after rulings are issued, what levels of compliance with court decisions exist, and which factors could influence the level of compliance and implementation of court rulings and new laws. Research also needs to focus on the nature and impacts of legal campaigns to expand and restrict SSR, considering the role factors such as actor networks, legal traditions and religion play in shaping legal campaigns and determining their outcomes.