

GENDER STEREOTYPES IN THE JUDICIAL PROCEDURE: ANALYSIS FROM THE PERSPECTIVE OF GENDER AND LATIN AMERICAN COMPARATIVE ANALYSIS*

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Abstract

This article analyzes the influence of gender stereotypes in the creation and application of law and explains possible mechanisms for overcoming them. First, some fundamental concepts of gender theory and its critique of law and justice systems are defined and analyzed. Thereafter, on the basis of the examples of Chile, Colombia, Argentina, Mexico and Uruguay, as well as the Inter-American human rights system, the challenges of implementing policies with a gender perspective in the judicial process are considered.

Keywords: *Gender stereotypes; judicial process; gender perspective.*

I. INTRODUCTION

Even though most Latin American constitutional texts contemplate the principle of equality as an essential element, these declarations have not necessarily translated into material equality. Women face detrimental situations in a predominantly

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patriarchal and androcentric socio-cultural context on a daily basis. It is a duty of the State to reduce the social gap caused by discrimination that impinges the full exercise and enjoyment of the rights of girls and women. This obligation also arises from the international human rights protection system. Nevertheless, despite the numerous conventions and protocols on equality and non-discrimination against women, this problem has not been fully addressed by domestic legislations, the Chilean case being is no exception.

The gender issue is a normative problem, but also a socio-cultural one. The law reflects positions of power and domination, which are based on well-established social practices.¹ Dominant sectors are precisely the ones obstructing the establishment of concrete and effective mechanisms aimed at obtaining material equality. The former justifies the need of applying a gender perspective to law, since this viewpoint entails researching the effects or impacts that gender representations have on men and women. In order to effectively realize the right to equality, it is necessary to develop strategies aimed at correcting and guaranteeing to every person the right to live free of fear and violence, allowing everyone to participate in the public sphere. Gender discrimination transcends the treatment given by the State to girls and women.² Judicial proceedings are not the exception, since there is the risk that stereotypes reinforcing patriarchal gender roles exert influence on judicial reasoning.

The aim of this article is to underscore the predominance of gender stereotypes in law and in the administration of justice, as well as setting forth formulas for overcoming them in our cultural context. First, we intend to explain the influence exercised by gender stereotypes in judicial proceedings understood in a broad sense, that is, including judicial sentences, the behavior of judges and court officials, as well as the proceedings themselves. Secondly, we describe and analyze different mechanisms that have been applied in the Latin American context in order to overcome these stereotypes, thus favoring gender equality. In the first section we define and analyze some fundamental concepts of gender theory and its critique of law. In the second section, different experiences regarding the implementation of gender-focused policies in Latin America are compared. Thereby, recent reforms, as well as dogmatic contributions from Chile, Argentina, Colombia, Mexico and Uruguay, are reviewed. In the third section we analyze the guidelines established in the Inter-American human rights system, particularly by the jurisprudence of the Inter-American Court of Human Rights.

1 MACKINNON (1987), p. 40.

2 SCOTT (1990), p. 96.

II. GENDER THEORY AND FUNDAMENTAL CRITIQUES OF LAW

2.1 Androcentric law

Androcentric law is a widespread manifestation of sexism. It underpins masculine views and standards preventing genuine equality before the law, since they transcend the creation and application of legal norms. The masculine experience is perceived as the single relevant human experience.³ Therefore, in order to move forward from formal to substantive equality, feminist movements across the world have forced governments to acknowledge the social, economic and political differences between the sexes.⁴ The State response has adopted diverse ways to eradicate gender-based discrimination. The paradox is that legislation oriented to women and their needs has been adopted, but without listening to them or involving them in the deliberative process. This is due to the circumstance that knowledge and power are notoriously concentrated in the male population.

Legal culture is dominated by patriarchal logic. As McGinley notes, “the Meso-culture of lawyers is traditional and masculine. Law offices in Chile [...] rely on masculine, ‘lawyerly’ traits of aggression, adversarial behavior, and hard-work that freeze into place the gender roles of men as providers and women as caregivers”.⁵ From a perspective informed by male privilege, decisions for women are taken without their involvement. in the place of women.

The hypothesis underlying legal norms are based on a masculinized reality.⁶ Therefore, even the principle of equality is grounded on a sole, biased truth. In order to provide a solution for this problem, it is women, from their reality as subordinates, who must provide their knowledge and perspective regarding any measure or piece of legislation pretending to regulate their rights. To effectively eradicate the inequality underlying androcentric norms, it is necessary that legal rules reflect the bodies and life experiences of women and men. Henceforth, it is essential to distinguish between formal and material equality. The principle of equality formally exists in our legal system, but it does not exist in the reality of women.

Androcentric rules prevent an efficient administration of justice, which is reflected in several judicial cases in Chile. In these cases, the law understood from a formalist and traditional point of view, is insufficient and does not solve conflicts. Although controversial, the feminist critique of androcentric patterns of law strives for the emancipation of woman. In this sense, “[w]e ought to create legal arguments that contribute to emancipation, using laws, doctrine and jurisprudence that are able to answer to the declaration of the equality ideals contained in our charters of law”.⁷

3 LACEY (1998), p. 5.

4 FACIO (1999), p. 203.

5 MCGINLEY (2018), p. 231.

6 ARROYO (2010), p. 41.

7 UNDURRAGA (2013), p. 12.

2.2 Sex, gender and the origin of inequality

The conception of gender has evolved in the last 50 years, understanding the concepts of sex and gender as different categories. Ann Oakley's distinction between sex and gender, formulated in 1972, has been employed by feminist authors for understanding that the subordination of women has been a social construct that lacks a biological justification.⁸ Isabel Jaramillo argues that sex is a parameter which creates categories, differentiating between men and women, or between males and females within the human species. Gender refers to social characteristics attributed to individuals from each sex.⁹ According to Robert Stoller, gender corresponds to large areas of human conduct, feelings, thoughts and fantasies, that are related to the sexes but have no biological grounds or basis.¹⁰ Gayle Rubin conceptualizes a sex-gender system, indicating that they are a set of dispositions by which a society transforms biological sexuality into products of human activity, and in which those transformed human necessities are satisfied.¹¹

Whereas sex refers to physical, biological and anatomical aspects, the concept of gender encompasses the characteristics that are socially and culturally assigned to men and women, using those biological differences as a basis.¹² Therefore, gender analysis as such turns into a complex social category, since gender is a constituent element of social relations and significant power relations. According to Butler, "In other words, the political construction of the subject proceeds with certain legitimating and exclusionary aims, and these political operations are effectively concealed and naturalized by a political analysis that takes juridical structures as their foundation".¹³ Gender is a social construct that must be analyzed based on social, cultural, age, economical, and political features. Butler considers that gender can be understood as a repeated series of acts that are actualized according to the historical moment, implying an assumption by the individual of something that affirms his or her belonging to either the male or the female universe.¹⁴

These distinctions triggered significant disagreements, since Butler and Donna Haraway argue that both gender and sex are cultural constructions. It is the gender what gives biology a supposedly innate significance.¹⁵ The essence of the distinction is that sex does not condition gender. Moreover, the concept of gender widens to include diverse personal options, for example transgender persons or those who do not identify with a binary sexual category that implies typecasting between female and

8 FRÍES & LACRAMPETTE (2013), p. 59.

9 JARAMILLO (2000), p. 105.

10 FACIO & FRÍES (2005), p. 268.

11 FRÍES & LACRAMPETTE (2013), p. 60.

12 ASOCIACIÓN DE MAGISTRADAS CHILENAS - MACHI (2015).

13 BUTLER (1997), p. 1.

14 ZUROLO & GARZILLO (2013), p. 808.

15 SCOTT (1990), p. 96.

male. Patriarchal reality does not make a correct distinction between sex and gender, because it does not consider the social and cultural scope which the latter presents. The consequence is that the masculine displaces the feminine.

The social construction of gender is dichotomous and opposing, since it confronts the masculine to the feminine. Thus, whereas men are strong, woman must be sensitive; whereas men are rational, women are emotional. The problem of this dichotomous relation is that it produces hierarchies that translate into subordinate relationships, which not only affect women, but all other diversities encompassed by gender. An expression of this phenomenon is what theory calls the dichotomy between the public and the private spheres.¹⁶ So, the oppression of women has its origin in biology itself and in procreation; a natural or original inequality which is the base of women's oppression and the source of masculine power. Men, by confining women to the realm of reproduction, freed themselves to engage in the businesses of the world, thus creating and controlling culture.

2.3 Stereotypes and gender

Gender bias also causes cultural or biological traditional definitions to become stereotypes. Stereotypes are preconceptions about attributes of members belonging to a certain group or the roles they must fulfill.¹⁷ Stereotypes turn into a negative charge that stigmatizes and attributes roles or wrong notions. The concepts of stereotype, prejudice and discrimination are tightly connected, since a negative quality is attributed without verification of truth. From a gender perspective, men and women grow up culturally immersed in stereotypes. The masculine is related to strength and virility, whereas the feminine is linked to weakness and fragility, pigeonholing social roles or qualities that both men and women may or may not have.

Cook and Cusack have argued that “gender stereotypes are resilient; they are dominant and persistent. They are socially dominant when they are articulated through the social sector and culture, and they are socially persistent because they are articulated through time”.¹⁸ A stereotype can possess great force if it is not eradicated or if the population does not obtain a proper gender education, including the members of the judiciary. The conflict arises if social preconceptions interfere with law.

It is important to keep in mind that a stereotype does not necessarily possess a negative connotation. Nevertheless, contexts are subject to change, and something that seems positive at first, can also produce the opposite effect. Analyzing the legal phenomenon entails addressing its different components: normative, political, cultural and structural elements. Gender theory allows recognizing the influence of androcentric biases, as well as proposing new wordings or interpretations, so that it does

16 ASOCIACIÓN DE MAGISTRADAS CHILENAS - MACHI (2015).

17 COOK & CUSACK (2010), p. 11.

18 COOK & CUSACK (2010), p. 25.

not turn into a form of discrimination against women.¹⁹ The main problem with a gender stereotype is that it may impose an undue burden on women. For instance, they are accorded an unequal role in care or domestic responsibilities, or the violence exercised against them is justified by virtue of said stereotypes.²⁰ This is certainly applicable to the stereotypes that inspire legislation.

2.4 Gender stereotypes in the judicial process

Even though justice aims to be established with equality and without discrimination, gender stereotypes are also present in those who administer it. Judges, being immersed in a patriarchal and sexist society, unavoidably tend to replicate culturally and ideologically prevalent gender stereotypes. Even seeking impartiality, judges are influenced by prejudices –positive or negative– that are reflected in their judgments in a more or less decisive manner.

The law is not shaped in an isolated manner, so juridical reflection cannot be confined to a formal-normative discussion. In every society there are structural elements that influence the way in which rules are worded, interpreted and enforced. Legal debate also implies addressing cultural aspects, customs, uses and beliefs. It is culture what determines the place that corresponds to men and women in society, as well as the rights that they are accorded.²¹ For this, it is essential that those who take part in the administration of justice incorporate a gender perspective in the exercise of their duties. In this way it will be possible to detect cultural influences that may lead to discrimination against women.

III. MODELS OF APPLYING A GENDER PERSPECTIVE IN LATIN AMERICA

In this section we will present some examples of policies with a gender perspective that have been incorporated in the judicial procedures of some Latin American countries. These are disparate mechanisms and formulas whose objective is to overcome gender stereotypes in the behavior of judges and court officials, as well as in judicial procedures and decisions.

3.1 Chile

In Chile, there are clear examples of discriminatory enforcement of gender stereotypes. In the case of Lorenza Cayuhán, a pregnant Mapuche woman who was deprived of liberty, the Court of Appeals of Concepción (*Corte de Apelaciones de Concepción*) rejected the writ of habeas corpus that had been requested in order to

19 FACIO (1999), pp. 215-216.

20 COOK & CUSACK (2010), p. 80.

21 ASOCIACIÓN DE MAGISTRADAS CHILENAS - MACHI (2015), p. 23.

protect her.²² In the 32th week of her pregnancy, the petitioner went into labor and it was necessary to make an emergency transfer to a hospital. During the transfer, Gendarmerie officials kept her in shackles, measure that remained in force during birth. Moreover, Gendarmerie personnel remained inside the delivery room even during the moment of birth. Subsequently, the newborn girl and her mother were separated prematurely, which also affected the bonding with the mother as well as the breastfeeding process.²³

In its judgment, the Court neither considered nor referred to the unnecessary constraint measures exerted on Lorenza Cayuhán by the Chilean Gendarmerie (*Gendarmería de Chile*). From an intersectional gender perspective, the affected falls under several “suspect classifications”: she is a woman, a member of the Mapuche ethnicity, and she is also deprived of liberty. Intersectionality is a methodological-conceptual tool that contributes to explain how several categories that are suspected of discrimination intersect and impact an individual or collective.²⁴ Therefore, it is not the same to be a white woman of a comfortable socioeconomic status, than to be a black, poor, immigrant or transgender woman. To the special condition of subordination and vulnerability that affect women in general, additional conditions of vulnerability can be added. In this particular case, Lorenza Cayuhán was treated as if she represented a higher danger, without evidence from which that could be inferred; very much to the contrary, the petitioner was in a situation of special vulnerability that was not considered.

In 2015 the Chilean judiciary (*Poder Judicial*) carried out a diagnostic study on gender equality and non-discrimination.²⁵ In this study it was concluded that there is a huge lack of knowledge of gender issues in the Chilean judiciary.²⁶ This deficit means that there could exist constitutional violations, especially against the provision established on article 5° subparagraph 2° of the Constitution.²⁷ For example, the Convention on the Elimination of All Forms of Discrimination against Women (henceforth, CEDAW) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (henceforth, Convention of Belém do Pará) are bodies of law that demand States to eradicate every form of discrimination and violence against women.²⁸ Nonetheless, in practice there is “an

22 Defensoría Penal Pública Penitenciaria con Gendarmería de Chile (2016).

23 Defensoría Penal Pública Penitenciaria con Gendarmería de Chile (2016).

24 CRENSHAW (1989), p. 145.

25 PODER JUDICIAL (2015).

26 PODER JUDICIAL (2015), pp. 94-96.

27 “The exercise of the sovereignty is limited by the respect to the essential rights that emanate from the human nature. It is the duty of the State’s organs to respect and promote those rights, guaranteed by this Constitution, as well as by international treaties which have been ratified by Chile and that are in force”.

28 Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer – CEDAW (1979). Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer (1994).

abyss between legally recognized rights of women, whether in the internal order or in the international system, and their effective enforcement”.²⁹

An essential mechanism to achieve an egalitarian justice administration is to implement a gender perspective in the education of lawyers and judicial officials, especially judges and other professionals that take part in the administration of justice. This entails providing the necessary tools for identifying how people are affected by gender stereotypes, and distinctively women who are harmed due to discrimination. This perspective is beneficial to both men and women, since roles, burdens and expectations are also assigned to the former based on masculinity stereotypes.³⁰ Following Facio, “men as well as women should choose to include the category of gender as a core element of any analysis, because these category allows for a vision closer to reality and therefore more objective and scientific”.³¹

The CEDAW Committee refers to gender stereotypes and prejudices within the justice system and the importance of building the capacity of women.³² The main recommendations regarding access to justice are: a) giving credibility to the testimonies of women; b) eradicating inflexible standards on proper behavior for women. Furthermore, it recommends increasing knowledge about the negative aspects of gender stereotypes in the justice system, and about the international legal framework on human rights and the rights of women as well. In order to get the judiciary to perform its duties in accordance with the principle of equality established by the Constitution, it is a “fundamental prerequisite for re-building the democratic legitimacy of the State and making its organization more receptive and sensitive to women’s rights protection and the representation of feminine interests, views and experiences”.³³

By virtue of this need the Supreme Court Plenary (*Pleno de la Corte Suprema*) created the Secretary of Gender and Non-discrimination (*Secretaría de Género y No Discriminación*), which was put into effect in mid-2017.³⁴ Among its main objectives is the promotion of working spaces for the members of the judiciary that are egalitarian, free of violence and discrimination. Another goal is to drive the development of public policies and actions aimed at guaranteeing everyone equality and non-discrimination regarding access to justice. As part of the fulfillment of said objectives, the Booklet of Best Practices for Incorporating the Gender Perspective in Judgements (“*Cuaderno de Buenas Prácticas para Incorporar la Perspectiva de Género en las Sentencias*”) was drafted, which seeks to work as a guide to be used by judges when resolving cases.³⁵ The Booklet ex-

29 ASOCIACIÓN DE MAGISTRADAS CHILENAS - MACHI (2015), p. 26.

30 PODER JUDICIAL (2018), p. 52.

31 FACIO (1999), p. 189.

32 Comité para la Eliminación de la Discriminación contra la Mujer (2015).

33 BERGALLO (2007).

34 Pleno de la Corte Suprema (2016).

35 PODER JUDICIAL (2018).

plains the concept of stereotype, including a list of examples of judgements that have incorporated them in their decisions. The Booklet States that “a gender perspective represents the necessary eyeglasses for detecting and eradicating these stereotypes”.³⁶

3.2 Colombia

Since the enactment of the 1991 Constitution, new opportunities and tools for the inclusion of a gender perspective were included in the Colombian judiciary.³⁷ In the year 2008, the National Commission for Gender of the Judicial Branch (*Comisión Nacional de Género de la Rama Judicial*), “thanks to the requirements set forth by international bodies to the Superior Council of the Judiciary regarding the enforcement of international treaties”.³⁸ The international bodies of law referred to are the CEDAW, the Convention of Belém do Pará, and the American Convention on Human Rights. On this basis, gender stereotypes as obstacles to access to justice were analyzed, focusing efforts on judges and legal operators. Accordingly, the Commission created tools for monitoring the decisions taken by officials that administer justice. The Criteria of Equity for an Administration of Justice with Gender Perspective (*Criterios de Equidad para una Administración de Justicia con Perspectiva de Género*) and the Verification List (*Lista de Verificación*) were created as a “help to the magistrates, judges and users of the judicial branch, for finding the way of enforcing the right to equality, to eradicate asymmetry and discrimination”.³⁹ Its focus is predicated upon the diversity of situations in which judicial officials find themselves, who “can guarantee the effectiveness of human rights in the building of a jurisprudence that rediscovers the gender content in the juridical rule, making it applicable to matters of daily occurrence”.⁴⁰

This has meant that judges must consider: the concrete situation of women; hermeneutical gender tools; the burden of proof; the voice of women; experts; feminist groups or specific groups of women. More importance is assigned to the fact that “the judge is to make a huge effort to take decisions that recognize the category of gender which corresponds to women in relation with their rights, but avoiding the risk of assigning them a role with an already contaminated vision”.⁴¹

These initiatives have facilitated the introduction of a gender perspective in the Colombian judiciary. Moreover, the number of judges that have been able to acknowledge and understand discriminatory practices has increased considerably. Concerning judicial decisions, there is a positive number of judgments contemplating the right to equality and the principle of non-discrimination, asserting positive arguments in defense of women and invalidating those that justify violence against them.⁴²

36 PODER JUDICIAL (2018), pp. 51-59.

37 GARCÍA (2015), p. 82.

38 CABELLO (2018), p. 19.

39 CABELLO (2018), p. 14.

40 COMISIÓN NACIONAL DE GÉNERO DE LA RAMA JUDICIAL (2014), p. 31.

41 COMISIÓN NACIONAL DE GÉNERO DE LA RAMA JUDICIAL (2014), p. 40.

42 COMISIÓN NACIONAL DE GÉNERO DE LA RAMA JUDICIAL (2014), p. 171.

3.3 Uruguay

In 2016, Uruguay introduced an action plan in order to address gender violence. In a term of three years, the State committed to adopt a set of measures aimed at eradicating gender stereotypes, as well as promoting that both men and women could exercise their rights without risk of suffering gender violence. To that end, it is indispensable to include measures that adequately promote the rights of women.⁴³ Uruguay contemplated in this plan measures specific to the justice system, such as the incorporation of prosecution units for the city of Montevideo that are specialized in gender issues, the strengthening of domestic violence care services in said city, as well as the enhancement of the expert services used in those cases.⁴⁴

Concerning legal matters, the action plan considered legislative proposals regarding gender violence, ranging from the inclusion of femicide as a penal type to sanctioning street harassment. It was also contemplated to train public officials through the promotion of postgraduate programs and studies on gender violence against children, girls and women. This plan is part of a sustained effort in Uruguay, since the establishment of the National Institute for Women (Instituto Nacional de la Mujer) in 2006, and the enactment of the Act on Equal Opportunities and Rights Between Men and Women (*Ley de Promoción de la Igualdad de Oportunidades y Derechos entre Hombres y Mujeres*) in 2007.⁴⁵

Uruguay also has established measures aimed at studying and monitoring the different ratified international treaties concerning women's rights. For instance, the Ley N° 17.684 encompasses within the functions of Parliament supervising the observance of international treaties ratified by the State, including the Convention of Belém do Pará on the Prevention, Punishment and Eradication of Violence against Women.⁴⁶ Moreover, in 2018 the Act N° 19.580 was enacted, whose object is to guarantee and protect women's rights in cases of gender violence. Its Article 8° establishes how a correct judicial procedure must be; for instance, a testimony cannot be underestimated on the basis of stereotyped discrimination.⁴⁷ More recently, the National Institute for Women and the Center for Judicial Studies (*Centro de Estudios Judiciales*) signed an agreement whose aim is to train judges and public defenders in matters of gender violence. Training in said subject, including sexual exploitation and discrimination, is also provided through workshops and seminars in which the different court auxiliaries can participate.

3.4 Argentina

From 2011 onwards, the Office for Women (*Oficina de la Mujer*) of the Supreme Court of Justice of the Nation of the Argentinian Republic (*Corte Suprema de Justicia de*

43 CONSEJO NACIONAL CONSULTIVO DE LUCHA CONTRA LA VIOLENCIA (2018), p. 49.

44 CONSEJO NACIONAL CONSULTIVO DE LUCHA CONTRA LA VIOLENCIA (2018), p. 81.

45 INSTITUTO NACIONAL DE LAS MUJERES (2014), p. 2.

46 Ley N° 17.684 of 2003.

47 Ley N° 19.580 of 2018.

la Nación de la República Argentina) has endeavored to sensitize on gender issues. Within the framework of the modernization of the judicial system, a gender perspective has been incorporated in the judiciary, in order to fulfill the demands contemplated in international treaties.⁴⁸

In order to reach all judicial staff in the shortest time possible, the method of training replicators was developed. This idea consists in training the entire judiciary on gender issues in a manner that is coordinated, gradual and constant. As yet, the Office for Women has developed six specific workshops since its creation: gender perspective, human trafficking and sexual exploitation, domestic violence, crimes against humanity, as well as regional workshops of senior judicial authorities on national and international standards regarding gender subjects, through theoretical-practical as well as normative contents, with the help of literary and audiovisual material.

In 2015, the Argentinian judiciary drew up the “Interactive Guide of International Standards on Women’s Rights” (*Guía Interactiva de Estándares Internacionales sobre Derechos de las Mujeres*), thus acknowledging the difficulty of accessing to international instruments and applying them in judgments.⁴⁹ This guide is available on line to the interested public, and it is structured in ten analytic categories of women’s rights. The website includes hyperlinks to the original treaties and to international documents which complement the information.⁵⁰ For example, in the fourth category, entitled “Right to effective judicial protection” (*Derecho a la tutela judicial efectiva*), five sub-categories are mentioned: access to justice and due diligence, precautionary measures, evidence, the victim in the judicial process, and the duty of training public officials. Each one of them includes specific sources of the Inter-American Commission on Human Rights and the CEDAW Committee. In practice, it is intended that “once preliminary information is added to the instrument, the official is able to verify whether is viable to incorporate the gender perspective in the studied case”.⁵¹

3.5 Mexico

In Mexico, from 1999 onwards “there have been proposals of integrated information systems for conducting follow-up monitoring with regard to diverse conventions and international agreements referred to the rights of women”.⁵² Furthermore, one of the immediate aims of the judiciary is to “guarantee the quality of the contents covered by training programs, as well as to implement them incorporating the gender perspective and the intersectional approach”.⁵³ To that end, different instruments were designed, such as the “Protocol for Sentencing with a Gender Perspective:

48 CORTE SUPREMA DE JUSTICIA DE LA NACIÓN (2011).

49 CORTE SUPREMA DE JUSTICIA DE LA NACIÓN (2015).

50 CORTE SUPREMA DE JUSTICIA DE LA NACIÓN (2015).

51 COMISIÓN PERMANENTE DE GÉNERO Y ACCESO A LA JUSTICIA (2015a), p. 23

52 INSTITUTO DE LAS MUJERES DEL DISTRITO FEDERAL (2010), p. 9.

53 EQUIS (2017a), p. 4.

Realizing the Right to Equality” (*“Protocolo para juzgar con perspectiva de género: Haciendo realidad el Derecho a la Igualdad”*), and “Methodology for Analyzing Judicial Decisions from the Gender Perspective”. (*“Metodología para el análisis de las decisiones jurisdiccionales desde la perspectiva de género”*). This document, created and developed by the Mexican judiciary in 2008, intends to open “ways of detecting structural circumstances that perpetuate human rights violations by virtue of the sex or gender identity of individuals, underscoring the importance of the fact that the jurisdictional labor takes into consideration the complexity of the social, economic and cultural context”.⁵⁴ This protocol is essential for addressing specific cases of violence and discrimination, since it works as a guide for applying international and national instruments that also provides conceptual clarifications and proper criteria for acting according to them. However, it is an optional instrument without prejudice to due judicial independence and impartiality. It is a mechanism aimed at persuasion and educational ends.

It can be argued that Mexico has carried out considerable work in recent years, incorporating development plans for resolving disputes with a gender perspective. Nevertheless, those improvements have not eradicated discrimination, and vulnerable social groups still have poor access to justice. Evaluations carried out by independent agencies show that the judiciary has not yet yielded sufficient results. There is lack of knowledge, as well as resistance against training on gender matters on part of justice operators, who are reluctant to acknowledge the persistence of stereotypes in adjudicating judicial cases.⁵⁵ The Mexican experience indicates that there are problems of access to justice for women and for every person subjected to asymmetric power relations on the basis of gender and judicial orientation.

3.6 The Ibero-American Model for Incorporating a Gender Perspective in Judgments

The Second Round of Workshops of the XVIII Ibero-American Judicial Summit (*Segunda Ronda de Talleres de la XVIII Cumbre Judicial Iberoamericana*) took place in Bogota, Colombia, from the May 27th to May 29th, 2015. In this meeting, an important step was taken regarding the provision of tools to the participating countries, by adopting the “Model for Incorporating a Gender Perspective in Judgments” (*“Modelo de Incorporación de la Perspectiva de Género en las Sentencias”*) Said model seeks to effectively apply a gender perspective in judicial decisions. Its background can be found in the work carried out by the Permanent Commission on Gender and Access to Justice (*Comisión Permanente de Género y Acceso a la Justicia*), originated in the XVIII Ibero-American Judicial Summit (*XVIII Cumbre Judicial Iberoamericana*), held in Santiago de Chile in 2014.

The text “contributes to start a process of internalization of the introduction of a gender perspective on part of judicial officials with regard to judicial decisions,

54 SUPREMA CORTE DE JUSTICIA DE LA NACIÓN DE MÉXICO (2015), p. 8.

55 EQUIS (2017b), p. 37.

what makes this document an essential instrument for attaining this goal”.⁵⁶ This undertaking meant consolidating and systematizing independent works accomplished by the countries that took part in the Ibero-American Judicial Summit, some of which have already been reviewed, for example, the “Protocol for Sentencing with a Gender Perspective: Realizing the Right to Equality” from Mexico and the “Criteria of Equity for an Administration of Justice with Gender Perspective” from Colombia.

The Permanent Commission on Gender and Access to Justice intends to collaborate, through the education and training of judicial officials, to solve the problems that have been recognized by the Inter-American Court of Human Rights (henceforth, IACHR) due to violations of the principles of equality and non-discrimination, or because of gender violence. This model endeavors to avoid discriminatory treatment in judicial proceedings, including case judgements. It is expected that the judiciary branches of all the countries of the region comply with international legal standards in the exercise of their duties, thus contributing to the eradication of gender violence, “since their judgements and acts send a message to society as a whole”.⁵⁷ The model is a useful consulting tool that permits judges to take gender perspective-based decisions. In order to fulfill that function it is imperative that the model is an easy to spread and readily accessible instrument, not only for legal operators, but for the interested public in all Latin American countries as well.

3.7 Gender perspective and Inter-American Human Rights System

The IACHR has gradually incorporated a gender perspective in its judgments. Following the World Conference on Human Rights held in Vienna in 1993 and the Conference on Women, it has been remarked that States should actively endeavor to adopt mechanisms seeking equality between men and women, as well as including a gender perspective. As for gender perspective and stereotypes, the IACHR has adjudicated cases related to gender discrimination on several occasions and has also emphasized the need to put an end to gender stereotypes contributing to said discrimination.⁵⁸ The gender perspective that the Court incorporates is predicated upon the fact that women can suffer specific violations of their rights and that said infringements affect men and women differently.⁵⁹ However, only from 2009 onwards the IACHR started considering the conditions of affected women and valuing the way in which the Inter-American Commission of Human Rights (henceforth, IAHR-Commission) has incorporated a gender perspective. Previously, even though the Court condemned acts of violence against women, it did not recognize the specific character of such violence, directed to victims by virtue of being women. Consequently, it can be claimed with certainty that only in the last ten years the IACHR has included a gender perspective in its decisions.

56 COMISIÓN PERMANENTE DE GÉNERO Y ACCESO A LA JUSTICIA (2015b), p. 3.

57 HASANBEGOVIC (2016).

58 TRAMONTANA (2011), p. 152.

59 TRAMONTANA (2011), p. 173.

In what follows we review the most significant jurisprudential contributions in this matter, through which the application of law in the region can be illustrated, including the Chilean judiciary.

3.7.1 *González et. al* (“Cotton Field”) vs. Mexico case

In this case the IAHR-Commission argued that the Mexican State infringed its obligation of guaranteeing the right to live of three young women, for not counting with the appropriate measures for preventing gender-based crimes, regardless of the high gender violence rates that are prevalent in the country. Furthermore, the investigation concerning the disappearance and subsequent demise of the young victims was carried out in an inadequate manner.⁶⁰ The IACHR defined the concept of stereotype in its judgment and recognized that these are harmful to women, since they contribute to their situation of subordination. They were conceptualized as “a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women”.⁶¹

The Court incorporated the gender perspective understanding that in this case police and investigative officers had a treatment that was discriminatory against women. First, because according to the Commission, the common element of the disappearances was the victims’ gender, who also suffered sexual violence. Secondly, the Court acknowledged that these crimes were influenced by a cultural framework of discrimination against women, associated to the breaking of traditional schemas within the family and the conflicts arising from it. The manner in which the State answered to these crimes is indication of stereotyped conceptions that exist in society that detrimentally affected the impartiality of the investigation.⁶²

3.7.2 *Atala Ríffo and Daughters vs. Chile case*

In this case, the Chilean Supreme Court adjudicated the custody of two girls to their father. The Court considered that the mother had caused harm to her daughters by putting her personal interests before theirs. However, the Court’s reasoning was predicated on stereotypes based on the sexual orientation of the mother.⁶³ The Supreme Court held that the behavioral study was not based on the sexual orientation of the claimant, but in a speculative injury test according to which “confusion of roles” and “developmental risk” were regarded as damages. The Tribunal of Minors (*Tribunal de Menores*) of Villarrica asserted that the decision to tell the girls about her homosexual relationship was a clear example of putting her personal interests before those of her daughters.⁶⁴

60 *González y otras* (“*Campo algodonero*) vs. *México* (2009), par. 109.

61 *González y otras* (“*Campo algodonero*) vs. *México* (2009), par. 401.

62 *González y otras* (“*Campo algodonero*) vs. *México* (2009), par. 293.

63 *Atala Ríffo y niñas vs. Chile* (2012), par. 138.

64 *Atala Ríffo y niñas vs. Chile* (2012), par. 98.

In the discussion before the IACHR, the Chilean State argued that the custody of the girls was not adjudicated based on disparaging the mother, but on the analysis of the circumstances surrounding the father, which were deemed better for taking care of the girls. The IACHR considered that this analysis must include specific behaviors of the parents and their impact on the minors, the sexual orientation of the mother being inadequate as a criterion for making said assessment. Emphasizing that element reinforces a stereotyped view of the ability of parents to care for their children, thus justifying a discriminatory decision. The Chilean Supreme Court failed to substantiate its decision on non-stereotyped arguments, hence being unable to demonstrate that the judgment was based on the best interests of the girls. Its arguments did not convince the IACHR of the risk that the claimant's partnership supposedly entailed, having committed therefore a discriminatory act, contrasted with other judgments on custody in which sexual orientation was not considered. Thus, the Supreme Court not only incurred in a gender stereotype due to its assertion that the mother gave preference to her own personal interests before those of her daughters, but also based its decision on a closed and traditionalist concept of family.

3.7.3 Fornerón and Daughter vs. Argentina case

Just as the previously described case, gender stereotypes regarding roles played by men and women in raising children influenced this case's judgments. Mister Fornerón lost the custody of his biological daughter, since the girl's mother placed the child for adoption. The judge of first instance who adjudicated the custody of the minor to the adoptive marriage affirmed that the biological parents had no intention of starting a family, and Mister Fornerón did not know the girl and was not married, what could affect her. The Argentinian Superior Court of Justice also decided that the behavior of Mister Fornerón had contributed to the mother's decision of placing the girl for adoption.⁶⁵

The IACHR established that the aforementioned assertions constitute stereotypes regarding the roles that women and men play in parenting, since not only do they presuppose the need of emotional ties between the parents in order to start a family, but a supposed protective role of the father with regard to the pregnant woman.⁶⁶ The IACHR determined the international responsibility of the State for the infringement of judicial guarantees concerning the protection of the family and of the rights of the child.

3.7.4 Velásquez Paiz et. al vs. Guatemala case

In this judgment the IACHR reiterated the definition of stereotype set forth in *González et. al vs. Mexico*, as well as condemned the practices of State agents by virtue of which gender stereotypes are assigned to the victim, thus preventing a fair trial and equal treatment before the law. The Court recognizes that stereotypes are contrary to human rights and contribute both to discriminatory treatment and to justify-

65 *Fornerón e hija vs. Argentina* (2012), par. 91.

66 *Fornerón e hija vs. Argentina* (2012), par. 94.

ing violence perpetrated against women solely based on their gender.⁶⁷ In this case, the Guatemalan authorities did not duly investigate the crime committed against the victim because of external features, namely: the clothes of the victim, the place where the body was found, among others.⁶⁸ The IACHR reiterated the meaning of gender stereotypes and how these contribute to violence against women. According to surveys carried out in this case, the presence of stereotypes motivated the authorities to act under the assumption that the body found belonged to a woman who did not deserved an investigation.

IV. CONCLUSIONS

The existing law presents androcentric features, in which cultural, social and historical aspects influence the conceptualization of both gender and sex. Legal interpretation and judicial decisions are usually influenced by gender stereotypes that prevent the realization of equality between men and women. The administration of justice in Chile and Latin America must be subjected to change processes leading to the incorporation of a gender perspective in the exercise of their duties in order to effectively guarantee everyone access to justice.

The study of comparative models presented in this article allow us to ascertain that the perspective of gender and non-discrimination against women has been addressed by several Latin American countries through diverse mechanisms. The approaches adopted in the region are not uniform. Each country has carried out its own diagnosis of the problem, considering their social and cultural peculiarities. Applying a gender perspective is among the most important challenges that our continent faces regarding equality and justice. With the aim of designing adequate mechanisms, it is useful to observe the experiences of Latin American countries that have addressed the same problem. The instruments designed for incorporating a gender perspective are of different sorts and therefore they present different degrees of enforceability. In any case, said guidelines and standards must be coherent with the progress achieved in the Inter-American human rights system, as well as remain open to independent civil society surveys.

Through these examples it can be argued that, first and foremost, it is the duty of judges to resolve legal controversies applying a gender perspective and to avoid justifying their decisions on the basis of stereotypes. Training judges is thus paramount to achieve this end, and so it is that judicial officers and court auxiliaries possess knowledge of these matters and have in place suitable practices for dealing with them. Gender hermeneutics does not at all put in jeopardy neither the impartiality nor the independence of judges, and it entails no privilege in favor of women. What the incorporation of a gender perspective in the judicial sphere proposes is adjudicating cases genuinely considering the lives, bodies and experiences of women and avoiding the influence of patriarchal gender stereotypes.

67 *Velásquez Paiz y otros vs. Guatemala* (2015), par. 180.

68 *Velásquez Paiz y otros vs. Guatemala* (2015), par. 177.

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