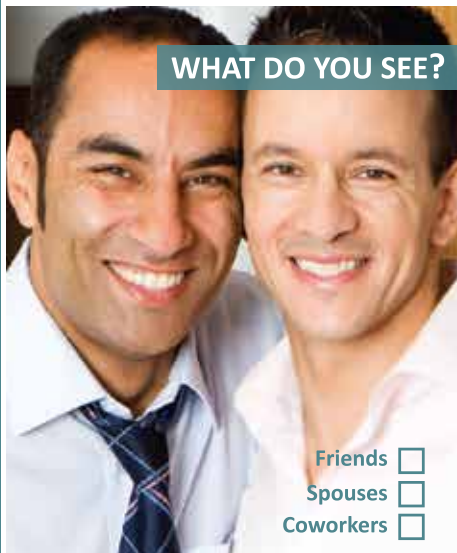
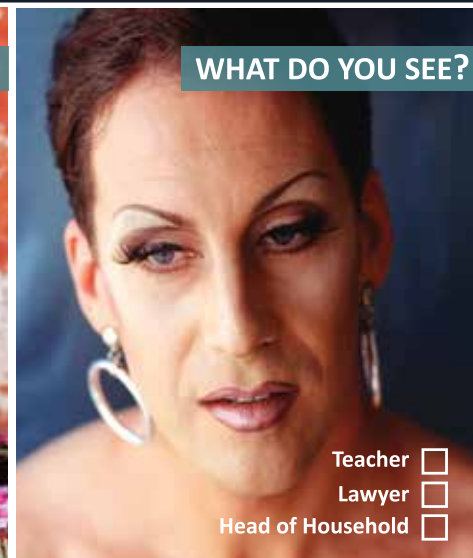
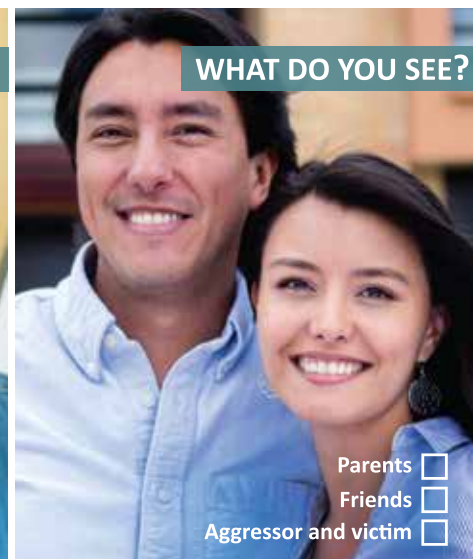
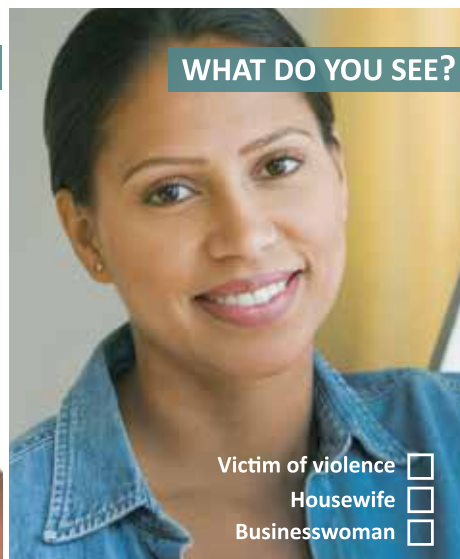
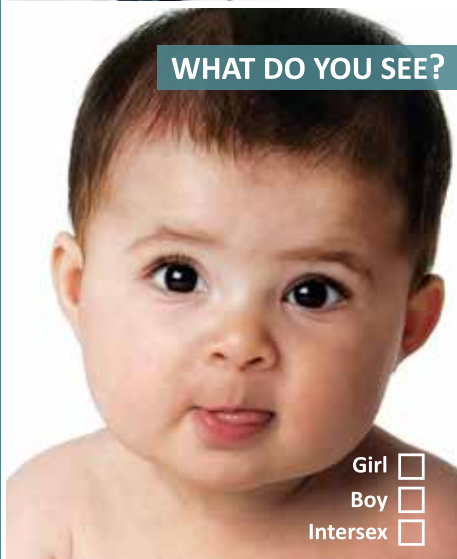




Judicial Decision-Making with a Gender Perspective: A Protocol

MAKING EQUAL RIGHTS REAL





Judicial Decision- Making with a Gender Perspective: A Protocol

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This protocol and its proposed methodology is the result of the knowledge and experience of those who work and have worked in the Gender Equality Unit of the National Supreme Court of Mexico.

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The background is a solid teal color. A white line starts from the top right, goes left, then down, then left again, ending with a dot. In the bottom left, there are three concentric white circles. In the bottom right, there is a vertical white line with a dot at the top and the number 5 below it. On the right side, there are several overlapping circles in different shades of teal.

Introduction & Objectives

Introduction & Objectives

Judicial decisions have both an individual and a collective power. They impact the most intimate details of everyday life, and they also shape the identity of the judiciary. Judicial decisions thus play a major role in defining the character of a democratic nation and in giving meaning to the rule of law. Thus, the Office of the President of the Supreme Court of Mexico aims to promote jurisprudential practices that uphold the principle of the right to equality. Such an effort requires generating tools that can help jurists to adjudicate cases with a gender perspective.

The goal of this Protocol for Judicial Decision-Making with a Gender Perspective is to address and remedy certain problems identified by the Inter-American Court of Human Rights in three recent cases against Mexico: the ‘Cotton Field’ Case (Campo Algodonero)¹, the Ines Fernandez Ortega Case², and the Valentina Rosendo Cantú Case.³ In those cases, the Inter-American Court made clear that Mexican courts must apply, as binding law, the international human rights treaties to which Mexico is party. This Protocol responds to that exhortation by explaining how to implement international human rights treaty law as binding law. It also

¹ *Gonzalez et al. v. Mexico* (“Campo Algodonero” or “Cotton Field” case), see paras. 502, 541, 542 (I.A.Ct.H.R., Nov. 16, 2009).

² *Fernandez Ortega et al. v. Mexico*, see paras. 236 and 260 (I.A.Ct.H.R., Aug. 30, 2010).

³ *Rosendo Cantú et al. v. Mexico*, see paras. 219, 246 (I.A.Ct.H.R., Aug. 31, 2010).

outlines methods by which adjudicators can improve their awareness of women's rights under the law and can build their capacity to employ a gender perspective when deciding cases.

The Protocol will enable judges, magistrates, justices, and other adjudicators to identify and evaluate the following in the cases they are asked to decide:

- Disparate impacts of laws and norms;
- When gender stereotypes inform the interpretation or application of laws or norms;
- How binary constructions of sex and gender lead to the legal exclusion or disenfranchisement of certain persons;
- How inequitable distributions of resources lead to unequal distributions of power; and
- The legitimacy of using differentiated treatment in laws and judicial decisions.

Given that judicial decision-making must be independent and impartial, this Protocol proposes procedures through which the structural circumstances that perpetuate sex and gender-related human rights violations may be detected, emphasizing that any jurisprudential effort must take into account the complexity of the social, economic and cultural context.

The intended audience for this publication is those who impart justice at the state and federal levels, as well as any other persons or institutions involved in legal cases or concerned with access to justice.

The Protocol also responds to findings from an internal knowledge assessment carried out within the Mexican Supreme Court in 2008 and 2009, a 2012 assessment entitled "Knowledge and Perceptions about Gender and Human Rights among Mexican Supreme Court Personnel," and an assessment into gender and work culture carried out in 15 state supreme courts.

KNOWLEDGE ASSESSMENTS AT THE SUPREME COURT OF MEXICO⁴

RESULTS FROM 2008 & 2009

- Almost 7 out of 10 judicial personnel (justices and law clerks) of the Supreme Court (67.7%) believe that it is important to include a gender perspective when analyzing legal issues and in their judicial decision-making processes.
- 18.3% of judicial personnel admit that they do not know what a “gender perspective” means, and half of them are not sure how to include it in their work or do not consider it a priority.
- The majority of judicial personnel erroneously believe that adopting a gender perspective means declining to make any distinctions between men and women.

RESULTS FROM 2012⁵

- Focus groups assessing justices and law clerks’ comprehension of a “gender perspective” yielded comments such as the following:

“I think that what “gender equity” means has not really been made clear. I find it to be a complicated concept.”

“...I think that [the concept] is still not well understood. It is understood mainly as parity, which is to say, if there are five men, we must also have five women...”

- And the focus groups made the following comments when discussing whether judicial decision-making could utilize a gender perspective:

“...in truth, the Supreme Court’s current approach still relies on very distorted ideas about the spectrum of human rights and the idea of a gender perspective.”

“Here, we try to be as fair as possible, and not make distinctions on the basis of gender, race, or religion, and simply resolve cases according to what happened.”

“... today with gender equity we have more tools to resolve family law cases...”

⁴ Office of the Coordinator, Gender Equity Office of the Federal Judiciary (Coordinación General del Programa de Equidad de Género del Poder Judicial de la Federación), *Diagnósticos realizados en la Suprema Corte de Justicia de la Nación (SCJN) en material de equidad de género 2008 – 2009*. Available at <http://www.equidad.scjn.gob.mx/spip.php?article1342>

⁵ “Conocimiento y percepciones sobre género y derechos humanos del personal de la Suprema Corte de Justicia de la Nación.” Applied Opinion Research Group, Institute for Legal Studies (Area de Investigación Aplicada y Opinión del Instituto de Investigaciones Jurídicas), Universidad Nacional Autónoma de México (UNAM), 2012. Available at <http://www.equidad.scjn.gob.mx/IMG/pdf/presentacion-diagnostico-genero-2013.pdf>

KNOWLEDGE ASSESSMENT IN 15 STATE SUPREME COURTS⁶

Despite the fact that the majority of judges and law clerks agreed with idea that they should incorporate a gender perspective into their work, the study still revealed:

- A notable lack of awareness of international treaties and instruments, and of national legislation on women's human rights issues
- Confusion, a lack of awareness, or a superficial or ambiguous level of awareness about what a gender perspective is and what it entails
- Poor awareness of or ability to employ a gender perspective
- An apparent conflict between the idea of incorporating a gender perspective into jurisprudential decision-making and the received wisdom that "to observe a person's situation and resolve it differently than how it has traditionally been done violates the very principle of equality, especially in matters extraneous to family law."⁷
- Adherence to a notion of formal equality that overlooks its substantive and structural components
- A tendency to minimize the impact of poverty or marginalization on gender inequalities, and to emphasize improvements in material wellbeing
- A poor understanding of how judicial decisions can affect the behavior patterns that entrench inequality and discrimination.

This Protocol will serve as a fundamental tool to make the right to equality -- enshrined in both the Constitution and international human rights law -- into a reality. Thus, without constituting a binding source of law, and while respecting the autonomy and independence of the judicial office, this document seeks to aid judges and adjudicators in the task of imparting justice with a gender perspective in accordance with the highest national and international standards, as Article One of the Constitution commands.

⁶ Knowledge assessment of judicial personnel in 15 state supreme courts regarding perceptions of gender equity principles, barriers to applying international treaties and human rights perspectives; and areas of opportunity to advance towards effective access to justice for men and women. General Report, Mexico. Studies and Strategies for Development and Equity (Estudios y Estrategias para el Desarrollo y la Equidad) (EPADEQ), in collaboration with the National Commission of Mexican High Courts (Comisión Nacional de Tribunales Superiores de Justicia de los Estados Unidos Mexicanos) and the National Fund for the Improvement and Modernization of the Justice Sector in Mexico (Fondo Nacional para el Fortalecimiento y Modernización de la Impartición de Justicia en México) (2012). Available at <http://www.amij.org.mx/site/micrositios/equidaddegenero/index.html>

⁷ *Id.* at 25.



Justification

Justification

“Systems of positive law reflect the values of a given society during a given time period. Indeed, looking at the content of laws from older societies allows us to see how those laws reproduced systemic inequalities by imposing a ‘status’ on every individual. ‘Status’ in this sense was not acquired voluntarily, but was imposed by forces outside of one’s control, and meant belonging to a class to whom the law assigned, or from whom the law withheld, certain abilities, and upon whom the law imposed certain legal disabilities. As such, in ancient legal systems the legal position of each individual depended on having been born free or a slave, a noble or a peasant, a native or a foreigner, a man or a woman, etc.”

Eduardo Rabossi, *Human Rights: The Principle of Equality and Non-Discrimination*, Center for the Study of Institutions, Argentina. Available at: <http://maestrias.pbworks.com/f/Rabossi-%2Bdiscriminaci%25C3%25B3n.pdf>

Through a diversity of sources, the law gives meaning to the concept of the “person,” and determines which interests and needs deserve legal protection. For example, denying women the right to vote reflected the sex-based notion that women’s experiences were irrelevant to the public discourse, owing to their supposed incapacity to exercise their citizenship.

Similarly, the legal requirement that women obtain their husbands’ permission to work outside the home arose out of a failure to recognize women as autonomous persons with full control of their life goals.

The persistence of laws and jurisprudential practices that diminish women’s sexual and reproductive autonomy, that devalue -- when compared to men -- the work that women do and the roles to which they have traditionally been assigned; the behavior expected of women within society, the family and at work; the negation of the myriad possible configurations of families, and domestic violence are all based on a social ideology rooted in stereotypes, which, when not detected and questioned by those who administer and impart justice, are instead reproduced.

Structural conditions which impede access to justice and prevent equal enjoyment of human rights, and which condemn persons to predetermined roles based upon their sexual or gender identity,

demand special attention from judges and adjudicators. Those who decide cases and controversies have the power, through the decisions they hand down, to make an impact on people's lives, and to define issues relative to the State and its conduct. Furthermore, judicial decisions establish precedents that greatly influence the public debate.

Judicial decisions play an especially important role in the characterization of women. Judges and adjudicators have the ability to bring the right to equality into reality. For that reason, they must make sure that in the process of interpreting and applying the law, they do not rely on prejudicial notions regarding how persons of a given sex, gender, or sexual orientation "are," or how such persons should behave.

One example of how sex role stereotypes can influence judicial decision-making is a holding upheld by the First Chamber of the Supreme Court from 1994 to 2005, in which the court excluded marital rape from the criminal definition of rape.

• "Normal intercourse, imposed by a spouse, so long as there exists the obligation to cohabit, **is not included in the definition of the crime of rape.** Instead, it is defined as the improper exercise of a right under Article 226 of the Penal Code of the Distrito Federal. Even if this behavior occurred in a jurisdiction in which it were not specifically penalized by the criminal code, **it would only be punishable for any force or violence used in the course of the act.**"

Emphasis added. Jurisprudencia, 9a Época, 1a Sala, S.J.F. y su Gaceta; XXIII, Feb. 2006, P. 277. Tesis de jurisprudencia 12/94. Decided by the First Chamber of the Supreme Court of Mexico (Primera Sala de la Suprema Corte de Justicia de la Nación), in a private session of May 11, 1994, by unanimous vote of the following Justices: President Victoria Adato Green, Samuel Alba Leyva, Ignacio M. Cal, Mayor Gutierrez, Clementina Gil de Lester, Luis Fernandez Doblado.

▲
“When spouses have the obligation to cohabit and one spouse imposes normal intercourse upon the other in a violent manner, **this conduct does not constitute the crime of rape** under Article 265 of the Penal Code of the Distrito Federal, notwithstanding the use of normal tools for statutory interpretation. This is so because **a spouse has the right to have sexual relations with his or her partner, though this right cannot be exercised through the use of violence**. Such conduct is therefore defined by Article 226 of the above-referenced Code as the **improper exercise of a right**. However, the obligation to cohabit can be considered to have ceased, even where not judicially decreed, when a spouse attempts to impose sexual intercourse while in a state of inebriation or drug addiction, while infected with a venereal disease or with AIDS, or while in the presence of other persons; or if the woman has some kind of disease or disability, such as paralysis, that impedes her ability to have sexual relations; or when a legal separation of the spouses is pending. Note that the above are merely hypothetical examples, and are not meant to serve as an exhaustive list.”

Emphasis added. Jurisprudencia, 8a Epoca, 1a Sala, Gaceta S.J.F. 77. May 1994. p. 18. Tesis de Jurisprudencia 10/94. Decided by the First Chamber of the Supreme Court of Mexico (Primera Sala de la Suprema Corte de Justicia de la Nación), in a private session of May 11, 1994, by unanimous vote of the following Justices: President Victoria Adato Green, Samuel Alba Leyva, Ignacio M. Cal, Mayor Gutierrez, Clementina Gil de Lester, Luis Fernandez Doblado.

This analysis relies on the historical concept of husband as master -- the husband has the “right” to the body of his wife, and, accordingly, he can impose sexual relations upon her without it constituting rape. Such a framing deprives the woman of autonomy, and stands for the proposition that the woman’s freedom to make her own choices is a legally irrelevant interest.

Applying the principle of sexual autonomy -- which does not change depending on one’s marital status -- in 2005 the Mexican Supreme Court modified its jurisprudence on marital rape, and determined that marriage does not include a right to sexual relations with one’s spouse through the use of violence (moral or physical), without the spouse’s consent. Accordingly, those elements alone can be sufficient to constitute the crime of rape.

“According to the first paragraph of Article 267 of the Social Defense Code of the State of Puebla, the crime of rape requires the following elements: (1) to have sexual relations with any person, regardless of sex/gender; and (2) to obtain said carnal knowledge through the use of physical or moral violence. The legal right that this definition protects is sexual freedom - the notion that **every human being possesses the right to sexual self-determination**. Thus, the crime of rape defined in the above-referenced statute does not contain any exceptions having to do with the type of relationship between the parties, such as preexisting relationships; the crime only requires the use of physical or moral violence in the course of committing the act. As such, **we must conclude that when one spouse imposes sexual relations by violent means - be they physical and/or moral - that conduct constitutes the crime of rape, notwithstanding the existence of a marital relationship.**”

Emphasis added. Jurisprudencia, 9a Epoca, 1a Sala, S.J.F. y su Gaceta; XXIII, Jan. 2006, p. 658. Varios 9/2005-PS. Petition for modification of jurisprudence 1a/J. 10/94, given the contradiction between Tesis 5/92, and the opinions of the First and Third Panels of the Sixth Circuit. (Tribunales Colegiados Primero y Tercero del Sexto Circuito.) Petitioner: Criminal Panel of the Second Circuit. (Tribunal Colegiado en Materia Penal del Segundo Circuito.) Nov. 16, 2005. Five Votes. Author: Olga Sanchez Cordero de Garcia Villegas. Secretary: Ana Carolina Cienfuegos Posada.

Tesis de Jurisprudencia 10/94. Approved by the First Chamber of the Supreme Court (Primera Sala), in a session of Nov. 30, 2005.

Notwithstanding this significant advance - recognized by the Special Rapporteur on Violence against Women, Yakin Ertürk—⁸ courts continue to require elements such as the following:

“To constitute the crime of rape, **it must be credibly established that the victim resisted; that resistance was real, serious, effective, and constant; and that said resistance was successfully overcome only by physical force or fear of imminent harm.**”

Emphasis added. Tesis Aislada; 9a Epoca; Panel of the Twentieth Circuit (Tribunal Colegiado de Vigésimo Circuito), S.J.F. y su Gaceta; II; July 1995, p. 285. Amparo en revision 118/95. Jose Alfredo Citalan Gonzales, May 18, 1995.

Unanimous vote. Author: Carlos Loranca Munoz. Secretary: Luis Armando Mijangos Robles.

⁸ See *Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women*, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Ertürk, Addendum, Mission to Mexico, U.N. Doc. E/CN.4/2006/61/Add.4. Presented to the Human Rights Committee on Jan. 13, 2006, available at <http://www.cinu.org.mx/biblioteca/documentos/dh/mujer.pdf>.

International standards clearly establish that the primary element of the crime of rape must be the absence of freely given, voluntary, and unequivocal consent.⁹ As a result, whether or not the victim has resisted becomes immaterial insofar as determining whether the crime has been committed. Giving legal relevance to the fact or extent of the victim's resistance means shifting responsibility from the rapist to the victim - demanding a behavior of the victim that ultimately places her in greater danger. Such an analysis also reinforces the stereotype that "when women say no, what they really mean is they want to be convinced." The law cannot be a tool that gives force to such stereotypes.

The characterization of persons, and the legal decisions that are based upon said characterizations, make persons, and their interests, visible or invisible. Such legal characterizations determine access to justice, and in some cases, can result in re-victimization.

Introducing a gender perspective into judicial decision-making can help combat arguments based upon stereotypes and can refute attempts to disregard the right to equality. The imperative to decentralize and redistribute power has led to the development of legal tools that can empower victims to recognize their rights and seek redress. This Protocol summarizes a series of institutional efforts undertaken by the Supreme Court that are aimed in this direction.

⁹ See, e.g., International Criminal Court, Rules of Procedure and Evidence; Karen Tayag Vertido *et al.* v. Philippines (CEDAW); M.C. v. Bulgaria (Eur. Ct. H.R.). All available at <http://www.equidad.scjn.gob.mx/>



The Legal Framework

The Legal Framework

“The new constitutional system in Mexico has placed human rights squarely at its center. The change has been profound.”

Remarks of Justice Juan N. Silva Meza, President of the Supreme Court of Mexico and of the Federal Judicial Counsel, upon the signing of the Cooperation Agreement between the Supreme Court of Mexico and the Secretary General of the Organization of American States, by the Executive Secretary of the Inter-American Human Rights Commission. Oct. 14, 2011. Available at http://scjn.gob.mx/presidencia/Paginas/pres_discursos_11.aspx

• The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the protection of people at all times.

Art. 1, para. 2., Constitution of Mexico. English version is the Federal Judiciary’s (Poder Judicial de la Federación).

Available at <http://portal.te.gob.mx/en/consultations/political-constitution-united-mexican-states>.

Of the June 10, 2011 reforms to the Mexican constitution, the most significant was the addition of a paragraph to Article One making clear that the person, and her human rights, shall be the central axis for judicial decision-making. This transformation renews and reaffirms Mexico’s commitment to ensuring that courts apply the international human rights treaties to which Mexico is party, and that judges directly apply international human rights law as domestic law with an international origin.

“The Committee commends the constitutional reform on human rights (2011), which gives constitutional rank to the international human rights treaties ratified by the State party, including the Convention, and which enshrines the pro-personae principle.”

Committee for the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), Concluding Observations: Mexico, 52nd Session, para 4. U.N. Doc. CEDAW/C/MEX/CO/7-8

One of the most useful mechanisms by which the promise of this constitutional reform can be realized is *control de constitucionalidad y convencionalidad* -- the duty of all courts to directly apply the constitution and the international treaties to which Mexico is party, and to ensure that their decisions conform with constitutional and treaty law. This duty arises out of Article 1 of the Constitution, cases against Mexico decided by the Inter-American Court of Human Rights,¹⁰ and the Supreme Court case *Varios 912/2010*,¹¹ which explained how the state would implement the Inter-American Court's *Rosendo Radilla Pacheco* decision.

THE DUTY OF DOMESTIC COURTS TO UPHOLD AND ENFORCE INTERNATIONAL TREATY LAW (*CONTROL DE CONVENCIONALIDAD*)

"When a State has ratified an international treaty such as the American Convention, all of its bodies, including its judges, are also subject to such a treaty, and this obligates them to ensure that the effects of the provisions of the Convention are not diminished by the application of norms contrary to its object and purpose. The Judicial Branch must exercise "control of conformity with the Convention" *ex officio* of the harmonization of the domestic norms with the American Convention, evidently within the framework of their respective jurisdictions and the corresponding procedural rules. In this task, the Judicial Branch should bear in mind not only the treaty, but

"The Supreme Court will have to exercise these new responsibilities with a clear understanding of the intention behind the reforms: to ensure that no interest trumps human rights.

Along with the Federal Judicial Council, federal judges, and magistrates, we will exercise this duty. But not only because Article One is binding on us in the same generic sense that it binds all judicial decision-makers. We will do this because the place we occupy in the structure of the Mexican government compels us to set an example - not just of judicial interpretation and application of our new constitutional scheme - but in demonstrating the duty of Mexican public officials to recognize and effectively enforce human rights law.

Mexican constitutional jurists, in keeping with our competencies and responsibilities, will work vigilantly to ensure that the spirit of this reform is put into practice, and that it benefits all people - without distinctions or exceptions."

Remarks of Justice Juan N. Silva Meza, President of the Supreme Court and the Federal Judicial Council, upon the signing of the Decree amending Chapter One of the First Title and various articles of the Mexican Constitution, June 9, 2011. Available at: http://www.scjn.gob.mx/presidencia/Paginas/pres_discursos_11.aspx

¹⁰ See, e.g., *Gonzalez et al.* ("Campo Algodonero" or "Cotton Field" case), *supra*; *Radilla Pacheco v. Mexico*, *supra*; *Fernandez Ortega et al. v. Mexico*, *supra*; *Rosendo Cantú et al. v. Mexico*, *supra*; and *Cabrera Garcia and Montiel Flores v. Mexico* (Nov. 26, 2010).

also the corresponding interpretation made by the Inter-American Court, the final interpreter of the American Convention.”

Gelman v. Uruguay, para. 193 (I.A.Ct.H.R. Feb. 24, 2011). (Note: In this and all subsequent cites from I.A.Ct.H.R. decisions, the English version used is that from the official version published by the I.A.Ct.H.R.) See also *Cabrera Garcia y Montiel v. Mexico*, para. 225 (I.A.Ct.H.R. Nov. 26, 2010)

In line with this principle, this **Protocol for Judicial Decision-Making with a Gender Perspective** aims to help those who administer justice comply with their obligations, under the Constitution and international treaty law, to enforce, respect, protect, and guarantee – in keeping with the principles of universality, interdependence, indivisibility, and progressivity – the right to equality and to non-discrimination. Those rights are enshrined in Articles 1 and 4 of the Constitution; Articles 2.1, 3, and 26 of the International Convention on Civil and Political Rights; Articles 2.2 and 3 of the International Convention on Economic, and Social, and Cultural Rights; Articles 1 and 24 of the American Convention on Human Rights, and Article 3 of the Additional Protocol to the American Convention on Human Rights on Economic, Social, and Cultural Rights (the “Protocol of San Salvador.”) Additionally, this Protocol reflects the General Law regarding Equality between Women and Men (*Ley General para la Igualdad entre Mujeres y Hombres*), and the Women’s Access to a Life free from Violence Act (*Ley General de Acceso de las Mujeres a una Vida Libre de Violencia*).

The Inter-American Court of Human Rights has explained the obligations the American Convention imposes upon States Parties (“to respect and enforce respect for – guarantee – the protection standards and to ensure the effectiveness of the rights enshrined [in the Convention], in all circumstances and in respect to all persons under their jurisdiction...”), and has stated that those obligations are *erga omnes* in nature.

That Court has also made clear that “**special duties** derive from these general obligations which are ascertainable **on the basis of the**

“It is no exaggeration to say that the Supreme Court’s recent decision, in what has become known as the “Radilla Case”, has opened up a new legal world for us. It will expand Mexican law for the better.”

Remarks of Justice Juan N. Silva Meza, President of the Supreme Court and the Federal Judicial Council, upon the ratification of the Cooperation Agreement between the Supreme Court of Mexico and the Secretary General of the Organization of American States. Available at http://www.scjn.gob.mx/presidencia/Paginas/pres_discursos_11.aspx

particular protection needs of the subject of rights, whether on account of his personal situation or the specific circumstances pertinent to him.”

Emphasis added. Baldeón García v. Perú, paras. 80 - 81 (I.A.Ct.H.R., Apr. 6, 2006).
Internal footnotes omitted.

Formal equality, expressed in general, abstract, and facially neutral terms, has not succeeded at actually securing universal access to and enjoyment of human rights. Achieving equality in the real world – not just the world of theory – requires a process of profound transformations.

Accordingly, today national and international standards recognize that women possess the right to the recognition, enjoyment, exercise, and protection of the full complement of all human rights and freedoms enshrined in law.¹¹

More specifically, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹² and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) set out detailed formulations of states’ duties regarding women’s right to equality, especially the rights to non-discrimination and to a life free from violence.

Of course, recognizing women’s rights on paper does not itself eliminate the factual circumstances and structural forces that frustrate women’s ability to enjoy their rights on an equal basis with men. Indeed, in signing the treaties mentioned *supra*, Mexico has acknowledged that violence against women is one such situation.¹³

¹¹ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (“Convention of Belém do Pará”), Art. 4.

¹² See CEDAW, Preamble, para. 4.

¹³ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (“Convention of Belém do Pará”), Art. 5.

• “Diffuse conventionality control’ converts the domestic judge into an Inter-American judge; into the first and true guardian of the American Convention, of its Additional Protocols (and possibly other international instruments) and of the jurisprudence of the Inter-American Court which interprets those provisions. The national judges and organs charged with the administration of justice have the important mission of safeguarding not only the fundamental rights provided under domestic law, but also the set of values, principles, and human rights recognized by the State when it assumed its international commitment to uphold these international instruments. Domestic judges become the first interpreters of international standards, if we consider the subsidiary, complementary, and contributory nature of the Inter-American organs with respect to those contemplated in the domestic jurisdiction of the American States and the new ‘mission’ that they now have to safeguard the inter-American *corpus juris* through this new ‘control.’”

Concurring Opinion of Ad Hoc Judge Eduardo Ferrer Mac-Gregor Poisot, Cabrera García & Montiel Flores v. Mexico, para. 24 (IACtHR, Nov. 26, 2010).

Discrimination is also a form of violence,¹⁴ in terms of its effect on a woman's ability to direct and control her own life. It is for that reason that the Mexican government, upon signing CEDAW and the Convention of Belém do Pará, committed to, by appropriate means and without delay, prevent, punish, and eradicate discrimination and violence against women by, *inter alia*:

- Ensuring that all officials and institutions comply with their obligations to prevent, punish, and eradicate discrimination and violence against women;
- Taking all appropriate means to eliminate any discrimination against women by persons, organizations, or companies;
- Acting with due diligence to prevent, investigate, and punish violence against women;
- Establishing necessary legal, judicial, and administrative mechanisms to ensure that women victims of violence have effective access to reparations, damages, and other fair and effective means of redress;
- Taking appropriate measures to make the principle of gender equality a reality, and provide effective legal means to uphold and enforce women's right to be free from all forms of discrimination; and
- Progressively implement specific measures and inclusive programs to:
 - Create awareness of and respect for women's rights
 - Improve the capacity of those who interpret the law; and
 - Modify socio-cultural behavior patterns of both men and women, seeking to eradicate prejudices, customs, and other practices based upon the supposed inferiority or superiority of

• “Women in particular, are often denied equal enjoyment of their human rights, by virtue of the lesser status ascribed to them by tradition and custom or as a result of overt and covert discrimination. Many women experience distinct forms of discrimination, due to the intersection of sex with such factors as race, color, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.”

Committee on Economic, Social, and Cultural Rights, General Comment 16, para. 5.

¹⁴ See CEDAW Committee, General Recommendation 19, paras. 1, 7.

one of the genders, or upon stereotyped conceptions of men's and women's roles, which legitimate or exacerbate violence.

Though measures such as those listed above, the State can transform the rights that it has recognized at the international level into realities on the ground, thus giving international treaties a practical effect. Judges have an especially important role to play in making women's human rights real, and in dismantling the structural barriers that prevent women from enjoying their rights.

The right to equality¹⁵ and to access to justice¹⁶ are binding principles of public international law,¹⁷ whose obligations upon states are *erga omnes*.¹⁸ Those who impart justice are especially bound to enforce each of those rights, using the interpretive tools and canons that can assist jurists in interpreting the law. To fail to use the relevant interpretive tools can not only lead to the perpetuation of discrimination and the revictimization of women, but can also constitute a deprivation of rights and a violation of the State's international obligations.

¹⁵ I.A.Ct.H.R., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Sept. 17, 2003, Serie A. No. 18.

¹⁷ *Goiburú et al. v. Paraguay*, Opinion, reparations, and costs. Sept. 22, 2006. Serie C., No. 153, para. 131. See also concurring opinions of Judge A.A. Cançado Tridade in Inter-American Court of Human Rights cases such as *Masacre de Plan de Sánchez v. Guatemala*; *Yatama v. Nicaragua*; *Baldeón García v. Perú*; and *Ximenes Lopes v. Brasil*.

¹⁸ The Vienna Convention on the Law of Treaties explains *jus cogens* as the following: "Article 53. Treaties conflicting with a peremptory norm of general international law '*jus cogens*'. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Article 64 provides: "Emergence of a new peremptory norm of general international law '*jus cogens*'. If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

¹⁹ In the *Barcelona Traction* case, the International Court of Justice explained that *erga omnes* obligations are those which apply to the entire international community, and which reflect the "essential values" of that community. As such, all states have a legal responsibility to comply with *erga omnes* obligations. Alicia Cebada Romero, "Los Conceptos de obligación *erga omnes*, *jus cogens*, y violación grave a la luz del nuevo proyecto de la CDI sobre responsabilidad de los estados por hechos ilícitos." *Revista electrónica de estudios internacionales*, no. 4, 2002. Available at: <http://reei.org/reei4/Cebada.PDF>.

The background is a solid teal color. A white line starts from the top right, goes left, then down, then right, ending with a dot. In the bottom left, there are three concentric white circles. In the bottom right, there are three overlapping white circles of different shades of teal.

IV The Conceptual Framework

IV The Conceptual Framework

In this section, we explain the conceptual bases for incorporating a gender perspective into judicial decision-making and the reasons for so doing. We discuss the theoretical notion of equality as a *principle*, as well as the concept of equality as a *right*. We explain that to enforce that right effectively, judges must utilize certain forms of analysis and take certain substantive content into account. We will show that to ignore such a duty constitutes discrimination and exclusion. In concluding, we outline how judges can determine when a case calls for differentiated treatment, so as to demonstrate how a gender perspective can aid jurists in effectively enforcing the right to equality.

A. Equality

“The notion of equality ... **is linked to the essential dignity of the individual**. That principle cannot be reconciled with the notion that a given group has the right to **privileged treatment** because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with **hostility** or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.”

I.A.Ct.H.R., *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, para 55, Jan. 19, 1984.

Equality has been a central theme in struggles for universal human rights and for the basic material conditions required for human flourishing. Equality can be understood in two senses: as a *principle* and as a *right*.

As a *principle*, the notion of equality gives meaning to, and serves as the foundation for, national and international legal paradigms -- and for more specific laws and practices that flow from these paradigms, be they formal or administrative, legislative or judicial. This understanding of equality means that it must be used as a hermeneutic guide to the creation, interpretation and application of the law.

With respect to the principle of equality, in Advisory Opinion 18/03, issued in response to a request by Mexico,¹⁹ the Inter-American Court of Human Rights explained that the principle of equality:

- Has entered the realm of *jus cogens*, which means that it is non-derogable and that it preempts any domestic law that conflicts with it.
- Applies in every nation, whether or not that government has ratified a given international treaty.
- Means that every state and state actor, both internationally and within its domestic legal system, cannot act in ways that contradict principles of equality and non-discrimination. This prohibition also extends to third parties who act with the state's permission, acquiescence, or negligence.
- Has effects that also apply to relationships between individuals.

Because equality is a universal human rights norm, the Inter-American Court determined that states may only make distinctions between persons or groups that are reasonable and

POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES

ARTICLE 1. In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.

...

Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religious [sic], opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.

ARTICLE 4. Man and woman are equal under the law.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

ARTICLE 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.

ARTICLE 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in

¹⁹ Advisory Opinion OC-18/03, Sept. 17, 2003, Serie A. No. 18.

violation of this Declaration and against any incitement to such discrimination.

INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS

ARTICLE 2.1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ARTICLE 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

ARTICLE 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

INTERNATIONAL CONVENTION ON ECONOMIC, SOCIAL, & CULTURAL RIGHTS

ART. 2.2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ART. 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN

ART. 2. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

AMERICAN CONVENTION ON HUMAN RIGHTS

ART. 1.1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

ART. 24. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS “PROTOCOL OF SAN SALVADOR”

ART. 3. Obligation of nondiscrimination. The States Parties to this Protocol undertake to guarantee the exercise of rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth, or any other social condition.

objective; that such distinctions must be made with due respect for human rights; and that these distinctions must apply whichever rule or law provides the greatest protections for human rights.

As a *right*, equality can be used by individuals to seek access to justice. It grants individuals the license to demand, through various channels, equal access to all other rights.

As both a *principle* and a *right*, the notion of equality places affirmative burdens on the state, arising out of both the constitution and international law.

However, giving substantive content to the concept of equality requires making comparisons with some point of reference. In this sense, equality is a relational concept,²⁰ not an intrinsic one. Determining whether the right to equality has been violated requires comparing the situations of different individuals within the overall context, which should be analyzed from the standpoint of individual autonomy and human rights.

But this is not to say that there exists a hypothetical point of reference or some “universal neutral subject” that embodies the aspirations of all people. The idea of equality is not to “assimilate” all people into identical molds; it is to recognize, instead, that diverse life choices are both possible and valid.

The principle point of reference for the “aspirational model” is human rights, which open the door to countless possibilities. In the words of Jack Donnelly, human rights instruments “do not tell us much about what life is actually like in most countries... they say ‘here is how you have to treat a human being, and they

²⁰ Amparo en revision 1629/2004. Inmobiliaria Dos Carlos, S.A. de C.V., Aug. 24, 2005. Five votes. Author: José Ramón Cossío Díaz. Secretary: Juan Carlos Roa Jacobo. 9a. Época; 1a. Sala; S.J.F. y su Gaceta; XXII, Nov. 2005; p. 40.

“Adopting the principle of non-discrimination does not mean treating men and women exactly the same; it means granting equal consideration to the recognition of their differences. In other words, it means responding legally and politically to the pluralist and egalitarian nature of the contemporary social milieu. Similarly, ending racial discrimination does not mean refusing to ‘see’ skin color; it means defending the notion that no race should prevail over any other in the social order.”

Gender Equity Office, Supreme Court of Mexico, The Principle of Non-Discrimination and Judicial Ethics (*El principio de no discriminación y la ética judicial*), Boletín “Género y Justicia”, No. 2., Aug. 2009. Available at: www.equidad.scjn.gob.mx

“...Applying the concept of equality, as both a principle and a right, does not mean seeking some kind of **mathematical formula to calculate and achieve absolute homogeneity**. Instead, the concept of equality must be understood substantively. It requires equal treatment for equals, different treatment for those who are differently situated, and special treatment for groups whom, though they are considered equal from one perspective, from another perspective merit special treatment from the State.”

Emphasis added. Constitutional Court of Colombia, *Case C-862/08*.

enumerate a list of human rights, which establish the framework within which a legitimate government must act.”²¹

As we shall see in the coming sections, comparative determination means analyzing a specific case within its particular context, taking human rights and individual autonomy as the point of departure. This task also requires assessing whether different treatment is objective and reasonable, whether any suspect classes are implicated, and what effects are produced by any different treatment.

To understand what the right to equality implies, we must approach the concept from formal, material, and structural perspectives.

²¹ Jack Donnelly, *Universal Human Rights: In theory and practice*.

EQUALITY

FORMAL

Through many sources of law (but primarily legislation) the same rights are accorded to all persons.

It is irrelevant if one is a man, woman, indigenous, LGBT, or Muslim – all of the same rights are accorded to all, in universal terms.

MATERIAL

Despite formal anti-discrimination prohibitions, sex, gender, sexual orientation/preferences, race, and religion – *inter alia* – create barriers that block individuals from effective enjoyment of their human rights.

Sex, race, disability, and sexual orientation/preference are relevant insofar as they can condition the exercise and enjoyment of rights. As such, the State has a duty to take specific actions to remedy improper unequal treatment; or to impose affirmative actions that respond to the identified inequalities.

STRUCTURAL

Some individuals belong to historically marginalized and subordinated groups, by virtue of factors that they did not control and could not choose. Such groups include women; Afro-descendent persons; older adults; indigenous persons; migrants; and the economically disadvantaged.

Belonging to a historically-disadvantaged group is relevant because it reveals a position of subordination and indicates historical limitations on access to rights. Accordingly, the State must take measures to transform the conditions that generate systematic legal, social, cultural, and economic exclusion.

Art. 1. Political Constitution of the United Mexican States

“In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights...”

Art. 4.1. Convention on the Elimination of All Forms of Discrimination Against Women

“Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”

Art. 8. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women

“The States Parties agree to undertake progressively specific measures, including programs... [b.] to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs, and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize and exacerbate violence against women...”

The CEDAW Committee has stated its view that:

“...a purely legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, which the Committee interprets as **substantive equality**. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve **equality of results**. It is not enough to guarantee women treatment that is identical to that of men. Rather, **biological as well as socially and culturally constructed differences between women and men must be taken into account**. Under certain circumstances, non-identical treatment of women and men will be required to address such differences. Pursuit of the goal of substantive equality also calls for an effective **strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power** between men and women.”²²

No constitutional provision prohibits women from holding elected office. On the contrary – the constitution recognizes, in general, that all persons have the right to be elected into political posts. However, to fail to recognize that sex is a variable that distorts access to rights, and that historical factors and structures exist which impede women from gaining political power, would violate the right to equality. Establishing gender quotas for candidates for office is one response to the historical exclusion of women from those arenas.

Notwithstanding the existence of quotas, certain factors nevertheless continue to structurally marginalize women and to systematically exclude women, as a group, from elected office. These factors include stereotypes regarding acceptable roles for women; which stereotypes then inform social realities. These stereotypes reduce women’s ability to exercise their rights – including the right to political participation and representation – under conditions of true equality.

²² Emphasis added. CEDAW Committee, General Recommendation 25, para. 8.

EQUALITY & ACCESS TO JUSTICE

“To fulfill the purpose of proceedings, the actual inequality status of those who are brought before the courts must be taken into account. Thus, the principle of equality before the law and the courts and the related prohibition against discrimination shall apply. Said inequality conditions call for the adoption of redressing measures that help reduce or eliminate the obstacles and deficiencies that hinder or reduce the effective protection of individual interests. If these redressing measures, widely recognized at various stages of proceedings, were not available, it would be difficult to sustain that those who suffer disadvantages truly enjoy the right to fair trial and due process of law on an equitable basis compared to those who are not affected by said disadvantages.”

Baldeón García v. Perú, para. 202 (I.A.Ct.H.R. Apr. 6, 2006). Internal footnotes omitted.

Stereotypically female roles “do not include holding public office, occupying a position in government, or being an authority figure.”²³ Illustrating the persistent reach of this norm is the fact that upon the swearing in of the LXI lower house of Congress (*Cámara de Diputados*) in Mexico, eight newly-elected Congresswomen immediately attempted to give up their seats. All eight women requested permission to have their seats filled by men – their brothers, husbands, or former bosses.

To ensure a sufficient number of female candidates, and to preclude the possibility that women candidates under the quota system would abdicate their seats to men once elected, the Electoral Tribunal of the Federal Judiciary decided case 12624/2011. In that case, the Tribunal held that “for candidacies which conform to the gender quota under paragraph 1 of Article 219 of the Federal Code of Electoral Procedure and Institutions (minimum 40% of total candidacies), the full formula (the main candidate and the substitute office-holder) shall be of the same gender.”

However, efforts geared toward acknowledging equal rights in both the formal and material senses – affirmative actions – are not enough. To make the right to equality real, the state must take *transformative* actions. And such actions must, *inter alia*, combat the stereotypes that give rise to discrimination and then legitimate it.

Another structural barrier to equality is legal invisibility. Certain persons and groups are legally invisible, which means that their aspirations are not acknowledged as cognizable rights. Examples include same-sex couples, or intersex or transgendered persons. Equality, then, in any sense, requires recognition, redistribution, and representation.

“....States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination. The States are obliged to take affirmative measures to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligations to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain, or promote discriminatory situations.”

Atala Riffo and daughters v. Chile, para. 80 (I.A.Ct.H.R., Feb. 24, 2012). Internal quotation marks and footnotes omitted.

²³ Margarita Daltón, *Democracia e igualdad en conflicto. Las presidentas municipales en Oaxaca* (Tribunal Electoral del Poder Judicial de la Federación – CIESAS, 2012), at 552. Available at http://portal.te.gob.mx/sites/default/files/democracia_igualdad.pdf

RECOGNITION, REDISTRIBUTION, & REPRESENTATION

In “Scales of Justice,” Nancy Fraser provides a three-dimensional account of justice, encompassing recognition, redistribution, and representation. According to Fraser, **recognition** means valuing a diversity of persons and perspectives, giving equal respect to all, without demanding conformity to dominant sociocultural norms. It means inclusively recognizing, *inter alia*, cultural, ethnic, racial, and gender “differences.” **Redistribution** is primarily the economic dimension of justice. It means fair and just distribution of resources and the conditions necessary for wellbeing. **Representation** is the political dimension of justice. It is aimed at achieving equal participation in the definition of fairness and in the creation of decision-making procedures by which human rights are defended and enforced.”

Emphasis added. Gender Equity Office of the Supreme Court of Mexico, *Reconocimiento, Redistribución, y Representación en la Interpretación Judicial*, Boletín “Género y Justicia,” No. 44, Feb. 2013. Available at: www.equidad.scjn.gob.mx. Internal footnotes omitted.

This comprehensive understanding of equality requires states to, *inter alia*, establish differentiated treatment when necessary to respond to the material and structural conditions that can impede access to human rights. However, different treatment must be objective and reasonable, it must include a ‘suspect class’ analysis, and it must not disproportionately affect the exercise or enjoyment of a right. To do otherwise would violate the right to equality, and would implicate the state in an act of discrimination.

“...the Court considers that the right to equality before the law and non-discrimination is comprised of two concepts: **a negative concept** related to the prohibition of arbitrary differentiation of treatment, and **an affirmative concept** related to the obligation of States Party to create real equal conditions towards groups who have been historically excluded or who are exposed to a greater risk of being discriminated [against].”

Emphasis added. *Furlan and family v. Argentina*, para. 267 (I.A.Ct.H.R. Aug. 31, 2012). Internal footnotes omitted.

THE RELATIONSHIP BETWEEN EQUALITY AND NON-DISCRIMINATION

“...it appears clear that the concepts of equality and nondiscrimination are reciprocal, like the two faces of one institution. Equality is the positive face of nondiscrimination. Discrimination is the negative face of equality. Both are the expression of a juridical value of equality that is implicit in the very concept of law as an order of justice for the common good.”

I.A.Ct.H.R, Advisory Opinion 4/84, para. 10, Concurring & Dissenting Opinion of Judge Rodolfo E. Piza Escalante.

Differentiated treatment constitutes discrimination when it is neither objective nor reasonable. Discrimination can be conceptualized as:

Any distinction, exclusion, or restriction on grounds of sex, gender, sexual preferences, age, disability, a perceived future disability, a previous disability, or the perception of a current or past disability, social condition, health condition, religion, opinion, marital status, race, color, language, national, social, or ethnic origin or heritage, economic status, place of birth or any other social condition, whose object or effect is to impede, reduce, or negate the recognition, enjoyment, or exercise, in conditions of equality, of any human right or fundamental freedom in the political, economic, social, cultural, or civil sphere, or in any other context.²⁴

Direct discrimination occurs when an act or policy purposefully imposes some kind of illegitimate different treatment. *Indirect* discrimination occurs when facially neutral laws, policies, or practices have the effect of imposing a disparate impact on the rights of certain persons or groups.

"States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination."

I.A.Ct.H.R., Advisory Opinion OC-18/03, para. 103.

"...the enforcement of a law manifestly in violation of the Convention by agents or officials of a state results in international responsibility for that state."

I.A.Ct.H.R., Advisory Opinion OC-14/94, para. 57.

²⁴ This definition has been crafted to conform with the pro-personae principle, taking into account the prohibitions on discrimination contained in the Mexican Constitution, as well as those contained in: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Art. 1.1; CEDAW, Art. 1; the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, Art. 1.2. See also Convention of the International Labor Organization (ILO) on Discrimination in Employment and Occupation (No. 111); and the UNESCO Convention Against Discrimination in Education (1960).

"According to the third paragraph of Article 1 and the first paragraph of Article 4 of the Mexican Constitution, **the right to non-discrimination is a true guarantee to which all individuals are entitled.** This aligns with the right of all persons governed by a state to be treated equally, and with the corresponding legal obligation of state actors to guarantee identical treatment to all similarly-situated persons. In line with those precepts, **in Mexico all forms of discrimination that affront human dignity, or negate or diminish the rights and freedoms of men and women, are prohibited. Both men and women must be protected by law,** without any distinction, independent of preferences, and as such, must enjoy the same rights and equality of opportunity to exercise their fundamental freedoms in the political, economic, social, cultural, or civil sphere – or in any other context."

Emphasis added. Tesis Aislada; 9a. Época; 2a. Sala; S.J.F. y su Gaceta; XXVI, Aug. 2007, p. 639.

Amparo directo en revisión 881/2007. Ángel Flores Merino. July 4, 2007. Five votes.

Author: Sergio Salvador Aguirre Anguiano.
Secretary: Alberto Miguel Ruiz Matías.

“the concept of indirect discrimination... implies that a law or practice that appears to be neutral has particularly negative repercussions on a person or group with specific characteristics. It is possible that whoever established this law or practice was unaware of these practical consequences and, in that case, the intention to discriminate is not essential, and an inversion of the burden of proof is in order.”

Artavia Murillo *et al.* (“in vitro fertilization”) vs. Costa Rica, para. 286 (I.A.Ct.H.R Nov. 28, 2012). Internal footnote omitted.

EXAMPLES OF DISCRIMINATION

DIRECT OR INTENTIONAL

Civil Code of the State of Oaxaca

Article 143. Marriage is a civil contract between one man and one woman, the purpose of which is to create a union for the perpetuation of the species and for the provision of mutual support.

What about marriages of same-sex couples, intersex persons, or transgendered persons? This law is not neutral, and instead imposes an unjustified unequal treatment. This law directly prevents individuals from enjoying the right to marriage, on the basis of sex and sexual preferences/orientation.

See Amparo en Revisión 581/2012 (derivado de la facultad de atracción 202/2012). Author: Arturo Zaldívar Lelo De Larrea. Secretary: Arturo Bárcena Zubieta.

INDIRECT OR DISPARATE IMPACT

Regulations Governing the Employment of Federal Judges, promulgated by the Federal Judicial Council (*Acuerdo General del Pleno del Consejo de la Judicatura Federal*)

Article 20. The Judiciary may re-employ any person previously employed as a Circuit or District Judge, who resigned from his or her office for personal or legal reasons, so long as there is no serious or irreconcilable impediment to resumption of the post...

The application for re-employment must be submitted in writing, demonstrating respect and motivation. It must include the following attachments:

- a) Curriculum Vitae;
- b) A summary of professional activities undertaken during the time away from the post;
- c) A summary of academic activities undertaken during the same time period.

This rule is facially neutral. However, what happens to judges who leave their position in order to care for family members? Caregiving duties do not add value to a CV, and nor are they considered “professional” or “academic activities.” But as a result of their historically-assigned roles, it is women who are more likely to undertake caregiving duties. Thus, this rule has a disparate impact on women.

Women who leave their judicial position to attend to family responsibilities will not have fulfilled the requirements to return to the job, and will accordingly not be reinstalled.

See Recurso de Revisión Administrativa 144/2010. Petitioner: María del Carmen del Razo Soto. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/Detallepub.aspx?AsuntoID=123072&SinBotonRegresar=1>

In General Comment 20²⁵, the Committee on Economic, Social, and Cultural Rights (CESCR), explained that discrimination can be *multiple* and *systemic*. The Committee noted that some individuals or groups are discriminated against on more than one prohibited bases: for example, women who belong to an ethnic or religious minority group. Such cumulative discrimination has unique and concrete effects, and thus requires special consideration and special methods tailored to combat its cumulative effects. This kind of discrimination is referred to as *multiple* discrimination.

The CESCR Committee describes *systemic* discrimination as something that is omnipresent; deeply entrenched in the organization of society and in social behaviors. Systemic discrimination includes unquestioned discrimination and indirect discrimination. It generates comparative disadvantages for some groups and privileges for others, and thus produces asymmetrical power relationships. The CEDAW Committee, in General Recommendation 28, explained how understanding *intersectionality* is essential to fully understanding discrimination and the scope of states' obligations to combat it.

• INTERSECTIONALITY

"The discrimination of women [sic] based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men [sic]. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures..."

CEDAW, General Recommendation 28, para. 18. See also CEDAW, General Recommendation 25, para. 12.

²⁵ See paras. 10, 12, and 17.

- An intersectional or contextual approach to discrimination recognizes that individuals do not experience discrimination in a vacuum, but within social, economic, and cultural contexts that construct and reproduce privileges and disadvantages. As such, individuals do not face discrimination based upon who they are, but based on whom they are thought to be, or what they are thought to represent. In other words, they are discriminated against on the basis of negative social or cultural stereotypes.

In these cases, in addition to applying a strict proportionality test to determine whether a given form of different treatment is justified or not, courts must also do the following:

1. Analyze the context in which the discrimination occurred and the person's social position within that context;
2. Take into account the complexity of the experience of discrimination – as it is experienced by the victim;
3. Consider not just objective evidence of discrimination (such as statistical data on inequality) but also subjective evidence (the role of stereotypes in the case; the various motives that influenced how the person was or is treated); and
4. Recognize the fact that discrimination tends to take subtle, systemic, and institutionalized forms.

This perspective allows us to see that cases of discrimination are not just about the specific event that led to the legal case (such as an episode of domestic violence). Instead, cases involving discrimination should be understood within the context of the historical and social processes that lead to disadvantage and subordination for certain groups of persons.

This intersectional approach requires courts to acknowledge that the experience of victimization is frequently just one link in a chain of discriminatory acts – each of which gives rise to the next – such that the whole is greater than the sum of its parts.

Cultural stereotypes, marginalization, poverty, poor access to education and health care – among other factors – increase one's susceptibility to violence and impede access to justice and to means of redress. This creates a vicious cycle, in which the multiple disadvantages faced by certain social groups become mutually reinforcing. For example, the disadvantages faced by poor women in the labor market are reinforced when a woman has a physical disability caused by material obstacles, which are then reinforced by gender-based or socio-economic-status-based prejudices.

Source: *El Principio de Igualdad de Género en la Jurisprudencia Comparada. Una muestra analítica de criterios internacionales y nacionales.* Women's Link Worldwide and Gender Equity Office, Supreme Court of Mexico (Programa de Equidad de Género, Suprema Corte de Justicia de la Nación). Forthcoming.

The cases of Inés Fernández Ortega and Maria de Lourdes da Silva Pimentel illustrate how the intersections of sex, race, and economic status can precipitate discrimination and violence – which impede access to basic rights.

INTERSECTIONAL DISCRIMINATION

INÉS FERNÁNDEZ ORTEGA

An indigenous Me'phaa woman was threatened, beaten, and raped by three members of the Mexican Army, at her home in the state of Guerrero.

After a prolonged attempt to seek justice at the domestic level, in August of 2010 the Inter-American Court of Human Rights declared Mexico responsible for violating Ms. Fernández Ortega's human rights to personal integrity, dignity, privacy, and to be free from arbitrary intrusions into her home. In its decision, the Court held that the state's failure to take into account the victim's particular vulnerabilities – based upon language and ethnicity – constituted a violation of the state's "obligation to guarantee, without discrimination, access to justice..." (para. 201).

Moreover, the Court explained that to effectively ensure access to justice for indigenous people, "it is indispensable that States offer effective protection that considers the particularities, social and economic characteristics, as well as the situation of special vulnerability, customary law, values, customs, and traditions." (para. 200).

For more regarding the case of Inés Fernández, see the winning entry in the 2010 "Gender and Justice" documentary competition, entitled *Inés y Valentina: Dignidad y Justicia*, by Alejandra González, Cristina Hårdaga, Laura Salas and Román Hernández, and produced by Tlachinollan - Centro de Derechos Humanos de La Montaña and Organización del Pueblo Indígena MePhaa, OPIM. Available at: www.equidad.scjn.gob.mx

MARIA DE LOURDES DA SILVA PIMENTEL

An Afro-Brazilian citizen, who was married and had one daughter, died after a miscarriage because of a lack of adequate medical care during her pregnancy and after her sudden miscarriage.

In July 2011, the CEDAW Committee (Communication 17/2008) declared the Brazilian government responsible for multiple discriminations on the basis of sex, race, and economic status. (See paras. 7.7 and 8).

We have seen that discrimination is the consequence of illegitimate different treatment. The chart below outlines several elements that may be used to detect which types of different treatment compromise the right to equality.

Different treatment that does not compromise the right to equality

Two women and one man, all of whom are indigenous and all of whom are small business owners, each make the same arguments when seeking a permit to set up a food business.

One administrative official considers the historic and systemic inequality faced by indigenous women and decides to give the permit to the women but not the man.

Different treatment that compromises the right to equality but is not discriminatory

Three small business owners, all of whom are indigenous men, each makes the same argument when seeking a permit to set up a food business.

One administrative official denies a permit to two of them and gives the permit to the other one.

Different treatment that compromises the right to equality and is presumptively discriminatory

Three small business owners, two of whom are indigenous and one of whom is not, each makes the same argument when seeking a permit to set up a food business.

One administrative official denies the permit to the indigenous men but it to the non-indigenous man.

Why is there a presumption of discrimination in one case but not another?

In this case, the different treatment is not between equals but is based on the recognition of sex as a suspect class. Women, on the basis of sex, have been historically denied equal opportunity and equal rights. As such, the different treatment here is a form of affirmative action.

Here, the different treatment is between equals. It is not based on a suspect class. This unequal treatment could therefore be considered arbitrary. It compromises the right to equality but does not constitute an act of discrimination as such.

The different treatment in this case is not between equals and is based on a suspect class category. Thus, courts must apply strict scrutiny to determine whether the decision to deny permits to the two indigenous men had anything to do with the fact that they were indigenous.

The Inter-American Court of Human Rights²⁶ has contrasted *differentiation* with *discrimination*. *Differentiations* are “differences that are compatible with the American Convention because they are reasonable and objective.” Discrimination, in contrast, means “arbitrary differences that result in harm to human rights.” The relationship between the “act” and the “point of reference” tells us whether we are dealing with *discrimination* or *differentiation*.

ACT	POINT OF REFERENCE	RESULT
Equal treatment	Between those who are equally situated	Presumptively legitimate
Equal treatment	Between those who are unequally situated	Presumptive <i>discrimination</i> as a result of the act
Unequal treatment	Between those who are equally situated	Presumptive <i>discrimination</i> in the act
Unequal treatment	Between those who are unequally situated	Presumption of <i>differentiation</i> and thus of legitimacy
How do we determine whether an act is legitimate?	How do we decide if people are equally situated?	What dictates whether discrimination has taken place or not?
On the basis of its objectivity and reasonableness.	By identifying, with a focus on human rights and personal autonomy, whether a suspect class is implicated, and by looking at structure and context.	Whether there has been an unjust and disproportionate effect on the exercise of a right.

Next, we discuss the three elements that distinguish between *differentiation* and *discrimination*: 1. Objectivity and reasonableness, 2. Suspect classes, and 3. Effect on the exercise of rights.

²⁶ Artavia Murillo *et al.* (“in vitro fertilization”) v. Costa Rica, para. 285. (I.A.Ct.H.R. Nov. 28, 2012.)

In setting out her definition of justice, the American political philosopher Iris Marion Young defines oppression as a structural phenomenon that prevents the social development and community involvement of certain social groups. In other words, persons are oppressed when, by means of institutional and social structures, they are robbed of their capacities to organize and to communicate. Young identifies five faces of oppression: exploitation, marginalization, powerlessness, cultural imperialism, and violence.

With respect to the second face of oppression, **marginalization**, Young explains that persons who are marginalized are those who are excluded from formal employment and remuneration. In Mexico, older adults, indigenous peoples, and people living in poverty frequently suffer from this type of exclusion, which then creates a vicious cycle as it perpetuates their lack of opportunity. Participating in the formal economy creates useful employment networks as well as exposure to social dynamics of organization and collaboration. As such, being kept from remunerative employment does not just have material consequences, it also means being

A.1. Objectivity & Reasonableness

The Inter-American Court of Human Rights has explained that not every form of different legal treatment is discriminatory, because “not all differences in treatment are in themselves offensive to human dignity.”²⁷ Citing the European Court of Human Rights, the Inter-American Court held that discrimination is defined by acts that lack an objective and reasonable justification. Moreover, it explained that:

“There may well exist **certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position.** For example, it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests. [...]

Accordingly, **no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things.** It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on **substantial factual differences** and there exists a **reasonable relationship of proportionality between these differences and the aims of the legal rule under review.** These aims may not be unjust or unreasonable, that is, they **may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.**”²⁸

²⁷ I.A.Ct.H.R., Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Jan. 19, 1984. Serie A. No. 4, para. 56.

²⁸ Emphasis added. *Id.* paras. 56 - 57.

deprived of social interaction and social recognition.

What follows exploitation is the third face of oppression – **powerlessness**. Under this rubric, Young compares two groups of working people: professionals and non-professionals. The first group enjoys a status that gives them authority and social power. Members of the second group, by contrast, have little or no work autonomy, little or no opportunity to be creative or make choices, and are employed in work that does not give them relevant professional skills. This difference does not matter solely in the employment context. Whether one is a professional or not has a major impact on how much respect and influence one commands in society in general. Society attributes sharply differing values between those employed to plan and those employed to execute, while it is those with power who then profit most from those who labor.

Gender Equity Office of the Supreme Court of Mexico, *La injusticia como forma de opresión*, Boletín “Género y Justicia,” No. 21, Mar. 2011. Available at: <http://www.equidad.scjn.gob.mx>. Original footnotes omitted.

The *objectivity* of any distinction, exclusion, restriction or preference is determined by whether or not the distinction was made using criteria free from stereotypes and based upon human rights. The *reasonableness* of a given distinction, on the other hand, lies in the proportionality between the goal -- the design and execution of a dignified life within the framework of personal autonomy and human rights -- and the means taken to achieve that goal.

One member of the Inter-American Court, Judge Piza Escalante, adds an additional element: “*suitability*.”

“...a distinction, even though reasonable...**may still be discriminatory and illegal in view of the relative historical, political, economic, social, cultural, spiritual, ideological, and similar circumstances of the specific society in which the standards or behavior questioned occur or produce their effects.** In this regard, it is possible for certain restrictions or preferences, for example, for reasons of educational level, reasonable, proportioned, and justified in a developed society in that field, could be unacceptable in a society with a high illiteracy index: it is obvious that, in light of democratic principles, the requirement to be able to read and write in order to participate in elections or to be elected could not be characterized as the same in a society in which the bulk of the population is illiterate as in one in which it is not.”²⁹

Affirmative actions are examples of different treatment that is both objective and reasonable. These are temporary measures meant to accelerate the equal participation of vulnerable or disadvantaged individuals in political, economic, social, or other contexts.³⁰

“...failing to account for relevant differences, or requiring identical treatment for people unequally situated, is just as discriminatory as giving unequal treatment to those equally situated.”

Anne F. Bayefsky. *The Principle of Equality & Non-Discrimination in International Law*. Available at: <http://www.programamujerescdh.uchile.cl/media/publicaciones/pdf/18/46.pdf>

“States may only establish objective and reasonable distinctions when these are made with due respect for human rights and in accord with the principle of applying the norm that grants protection to the individual.”

I.A.Ct.H.R., Advisory Opinion OC-18/03, para. 105.

²⁹ *Id.*, para. 16, Concurring Opinion of Judge Rodolfo E. Piza Escalante.

³⁰ See Human Rights Committee, General Observations 18 & 28.

The CEDAW Committee has stated that the purpose of affirmative action is to eliminate “the causes and consequences of [women’s] de facto or substantive inequality,” and to effect the “structural, social, and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation.” The Committee does not consider affirmative action to be an exception to the norm of non-discrimination, but instead part of a necessary strategy for achieving substantive equality between men and women in the exercise of human rights and fundamental freedoms.³¹

In *Jacobs v. Belgium*, the United Nations Human Rights Committee determined that the establishment of gender quotas was both objective and reasonable.

When considering whether different treatment is *objective*, we must pay special attention to stereotypes and the role they play in issues relating to gender and to women’s human rights.

³¹ CEDAW Committee, General Recommendation 25. Special temporary measures (CEDAW, Art. 4, para. 1), paras. 14, 15, 18. See also CEDAW, Art. 4.

A.2. Stereotypes

Are these lines the same length?

Although the line on bottom appears longer than the line on top, they are in fact the same length. However, we cannot say that we see them as equals.

Using this image as a point of departure, the Nobel-Prize-winning economist Daniel Kahneman urges us not take our first impressions for granted, but rather, to constantly question what we perceive and experience. Kahneman explains that what we “see” is never neutral, and as such, we need to come to a stop and reconfigure our point of view. Our first impression of something can be an illusion; but once we make the effort to readjust our perspective, we can discover our error. Preexisting conceptions can ascribe characteristics to people - who they are and how they act - based on sex, gender, sexual orientation/preference, ethnic origin, religion, etc. Understanding and identifying those stereotypes helps us to combat this kind of error, which keeps us from effectively recognizing persons and their rights.

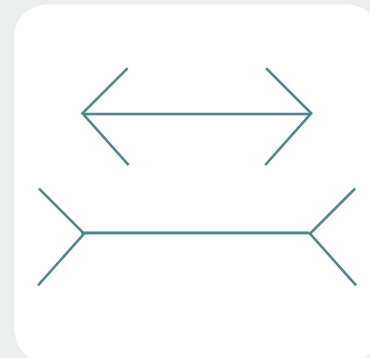


Image source: Daniel Kahneman, *Thinking, Fast and Slow* (2011), p. 27.

Stereotypes are the characteristics, attitudes, and roles that are structurally assigned to individuals in society on the basis of a “suspect class.” Stereotyping is a process of simplification through which we approach and understand the world.³² Stereotypes are fundamentally ingrained in, and accepted by, the society that creates, reproduces, and transmits them. However, problems arise when these characteristics, attitudes, and roles take on legal effects -- such as limiting access to rights -- or when they have social consequences, such as unfavorable hierarchization within the paradigm of the so-called “universal neutral subject.”

³² Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (2009), p. 1.

When gender stereotypes are pervasive and persistent, they can lead to the social stratification and subordination of women. Stratification and subordination occur when gender stereotypes are perpetuated by individual factors (i.e. behavior of individuals), situational factors (i.e. predispositions in contexts such as employment, the family, the courts, and the criminal justice system), and broader factors (i.e. historical, cultural, religious, and legal factors).

Amicus Curiae brief of the International Reproductive and Sexual Law Program, University of Toronto Faculty of Law and el Centro por la Justicia y el Derecho Internacional (CEJIL), Dec. 2008, in *Gonzalez et al. v. Mexico* (“Campo Algodonero” / “Cotton Field”), decided by the I.A.Ct.H.R. Nov. 16, 2009.

Gender stereotypes are characteristics that are socially and culturally assigned to men and women and which arise out of sex-based physical differences. While it is true that stereotypes affect men as well as women, their impact on women is worse. This is because women have historically been assigned to societal roles that minimize their relevance and contributions, and which have been, and are, considered inferior to the roles assigned to men.

CAREGIVING ROLES

Based on the stereotype that, because women carry and give birth to children they are naturally more qualified to care for and raise them, the role of childcare continues to be socially assigned to women. This stereotype leads to the economic and social value of childcare going unseen and unremunerated.

Another gender stereotype is that of women as “naturally” more understanding, compassionate, and patient. This stereotype leads to the supposed “fact” that women are better suited for caring for older adults, or for the sick and disabled.

In contrast, men are expected to function as providers; that is, their gender-assigned role is to be the sole economic provider for their families. In some cases, this responsibility excludes them from participating in any other type of caregiving activity.

TEST: GENDER STEREOTYPES

I believe:

Yes ☐ No ☐ It is unjust for a man to have to pay alimony to his ex-wife if, while they were married, he worked while she stayed at home.

Yes ☐ No ☐ Women who experience domestic violence are responsible for their continued abuse if they do not file charges against the abuser and continue to live with him.

Yes ☐ No ☐ Women are sexually assaulted because of the way they dress or because of their body language.

Yes ☐ No ☐ Laws and policies regarding gender equality discriminate against men.

Yes ☐ No ☐ Certain jobs are better suited for women than men. One example is secretarial work.

Yes ☐ No ☐ A woman should not work outside the home if it would cause her to neglect her role as mother and homemaker.

We invite you to visit the Gender Equity Office’s website, where you can find more information on stereotypes, can fill out our questionnaires, and can take a diagnostic quiz to identify stereotypes used in various social contexts, including employment and the family.

www.equidad.scjn.gob.mx

When stereotypes about what men and women should or shouldn't do become accepted and seen as "natural," such stereotypes legitimate, perpetuate and obscure instances of illegitimate different treatment. Discrimination on the basis of stereotypes has consequences both in terms of society's ability to recognize the dignity of all persons, and for the just distribution of public goods.³³

GENDER STEREOTYPES³⁵

TYPE	EXAMPLE	MANIFESTATION IN STATE ACTION (UNJUSTIFIED DIFFERENT TREATMENT)
Sex stereotype Based upon physical and biological differences between men and women	Men are physically stronger than women	Women are prohibited from working at night De facto and de jure limits on the extent to which women are allowed to use weapons
Sexual stereotype Based on sexual qualities that men or women are believed to have, as well as on ideas about sexual interactions between the sexes	Women's sexuality is linked to procreation	Same-sex marriage is prohibited
Sex-role stereotype Based upon roles or behaviors attributed to, and expected of, men and women, arising out of social and cultural constructions or physiology	Within the family, men should be the primary providers, while women should be the primary caregivers for children and should take care of domestic matters	Civil codes which declare that the husband has the duty and right to control finances and property, while the wife has the duty to care for the home and children
Compounded stereotypes When a gender stereotype interacts with another type of stereotype. These attribute different characteristics and roles to different subgroups of women	Single women and lesbians are not good mothers	Refusals to allow lesbians or single women to adopt children

³³ *Id.*, p. 76.

³⁴ This chart uses explanations and examples from Cook & Cusack, *supra*, at pp. 29 - 36.

These stereotypes have problematic ramifications for both private and public life. They impede individuals from self-actualization, and they circumscribe an individual's life chances. Their prevalence also means that those who question or transgress them - by failing to comply with prescribed traits, attitudes, or roles - can face further exclusion and marginalization. Such marginalization can occur in diverse arenas ranging from the family and the social sphere to work and the legal ambit.

When laws, policies, and judicial decisions that purport to be “neutral” actually end up sanctioning, reproducing, consolidating, and perpetuating stereotypes, the result is discrimination. This practice violates the constitutional and international treaty-based mandate for state actors to act in ways that effectuate the right to equality.

In *RKB v. Turkey*, the CEDAW Committee explained that “gender stereotypes are perpetuated through a variety of means and institutions including laws and legal systems and that they can be perpetuated by State actors in all branches and levels of government and by private actors.”³⁵

Accordingly, judges and adjudicators must be capable of detecting stereotypes in order to decide whether an instance of different treatment is informed by stereotypes, and thus is not *objective*. But adjudicators will not be able to combat stereotypes if they do not have the tools to *identify* them. Cook and Cusack have indicated that there is no single correct way to assess, in a given instance, whether the state is applying, imposing or perpetuating a stereotype. Thus, they propose a methodology, comprised of the following questions, to be used in identifying stereotypes.³⁶

³⁵ *RKB v. Turkey*, para. 8.8 (CEDAW Committee, Communication 28/2010, July 14, 2009).

³⁶ Cook & Cusack, *supra.*, pp. 57 - 88.

1. How does a law, policy, or practice stereotype men and women?

Is there evidence that gender stereotypes have been assigned?

What are the operating gender stereotypes and the forms they take?

What are their contexts, their means of perpetuating themselves, and by what means could we eliminate them?

2. How does a law, policy or practice that applies or perpetuates a gender stereotype harm women?

Does it withhold a benefit from women for a reason having to do with the stereotype?

Does it impose a burden on women for reasons having to do with the stereotype?

Is it degrading to women, does it compromise their dignity, does it marginalize them in some way that has to do with the stereotype?

Even if it is true, as noted above, that stereotyping is an indispensable mental process that allows us to organize and categorize information so as to better understand the world, this cognitive function becomes legally problematic when, under the test proposed by Cook and Cusack,³⁷ a stereotype does any of the following:

1. Denies a right or a benefit

2. Imposes a burden

3. Marginalizes a person or compromises her dignity.

One example of how stereotypes can be perpetuated by the state is civil codes that ascribe different responsibilities to husbands and wives within marriage. These gender-assigned duties are based on gender stereotypes. They deny rights, impose unjustified costs, and result in marginalization.

³⁷ *Id.* p. 59.

In the *María Eugenia Morales de Sierra* case, for example, the petitioner challenged the different roles ascribed to husbands and wives by the Guatemalan Civil Code. The challenged provision had been upheld by the Guatemalan Constitutional Court, and contained the following distribution of rights and duties:

STEREOTYPES IN DISTRIBUTION OF RIGHTS AND DUTIES WITHIN MARRIAGE

DUTIES LEGALLY ASSIGNED TO HUSBAND

- Legal representation of wife
- Control of marital property
- Aid and protection of wife

DUTIES LEGALLY ASSIGNED TO WIFE

- Care of home and children
- May hold a job or take on other responsibilities outside the home, so long as they do not cause her to neglect her duties in the home, and so long as the husband (if he is adequately providing) does not object (with valid reasons).

The Inter-American Commission on Human Rights found that this division of rights and responsibilities created inequality between spouses. As such, the Commission held it was incompatible with the American Convention on Human Rights.

Another context in which gender stereotypes feature heavily is in the area of reproductive and sexual rights. *LC v. Peru*, a case before the CEDAW Committee, involved the following facts:

When she was 11 years old, LC began suffering sexual abuse at the hands of a 34-year-old. His sexual abuse led to her becoming pregnant at the age of 13. LC attempted suicide by jumping off the roof of a building. She was taken to a hospital. Medical staff determined that she needed surgery. She was paralyzed from the neck down, but required surgery keep her condition from becoming worse. However, when medical personnel discovered that she was pregnant, they decided to put off the surgery, as it would have endangered the fetus. But because abortion in such cases was legal under Peruvian law, LC and her mother petitioned for a legal abortion. Their request was denied multiple times, in multiple forums. LC ultimately suffered a miscarriage.

Three and a half months after her doctors had decided she needed the urgent surgery, LC was finally able to undergo it. At the time her case was filed with CEDAW, LC remained paralyzed from the neck down, with partial mobility in her hands.

In this case, numerous decisions about a young woman's health were made based on stereotypes. Those decisions destroyed LC's life chances, and those of her family. If women cannot decide what will take place inside their bodies, and if medical personnel are allowed to decide that the primordial role of a woman is to be a mother - *even* in the face of irreversible health consequences - then a right is denied to women (the right to health and to physical and mental integrity); a cost is imposed upon women (to continue with a forced pregnancy, to give birth and to assume the legal and moral consequences of parenthood); and the woman's dignity is jeopardized (by the state failing to recognize her autonomy, and, in the LC case, the rights of the mother). All of the above are acts of violence and discrimination.

As we will see in this Protocol through the use of concrete examples, stereotypes permeate the work of courts and adjudicators. Stereotypes can cause court personnel to expect certain types of behavior from certain people involved in a case; they can cause us to believe that "neutral" norms are non-discriminatory; and they can even influence the language that we use. But when stereotypes infiltrate judicial decision-making, this is at odds with one of the law's purposes -- to redress instances of disproportionate distribution and exercise of power. Judicial decisions are how those with legal power respond to asymmetrical power dynamics. As such, judges have the potential to make those power asymmetries visible, and to reverse the effects of stereotype-based power structures that cause exclusion and marginalization.

The paradigmatic case of discrimination in access to justice is *González et al. v. Mexico* (the “Cotton Field” or “Campo Algodonero” case), decided in November 2009. In that case, the Inter-American Court of Human Rights (I.A.Ct.H.R.) ruled against Mexico, holding that police officers and other authorities in the Mexican state of Chihuahua had acted in ways influenced by gender stereotypes, which reflected a view of woman as inferior and perpetuated a “culture of discrimination.”

The I.A.Ct.H.R. noted that from the very start of the investigation into the young women’s disappearances, state officials mentioned that the victims were “flirtatious” or that they were probably “out with their boyfriends,” thus attempting to justify their inaction prior to the murders. The state’s failure to pursue the case diligently, the I.A.Ct.H.R. held, constituted discrimination in access to justice; and its failure to capture and punish those guilty of the crimes “sends the message that violence against women is tolerated, which leads to [its] perpetuation.”

Applying the test proposed by Cook and Cusack allows us to see that the actions of the public officials in the Cotton Field case were influenced by stereotypes of women’s sexual roles, and that state officials made access to justice contingent upon a certain type of behavior that they considered stereotypically morally correct. This meant that when the young women’s disappearances were brought to the police’s attention, officials disregarded the allegations and blamed the victims for their own fate, be it because of the way they dressed, where they worked (factories), where they were when they went missing (bars or restaurants), or the fact that they had gone out in the streets at night. These stereotype-driven refusals to take action constituted a denial, for the women and their families, of the right to access to justice. Moreover, these stereotypes imposed a cost upon the families of having to search for their daughters themselves -- and the cost of having to prove to the police that their daughters were “good girls” in order to have their disappearances taken seriously. The stereotypes also compromised the dignity of the women and their relatives by preventing public officials from seeing the young women as full holders of rights.

International law makes clear that the state may not act in ways that are influenced by stereotypes. Moreover, treaties ranging from the Convention of Belém do Pará to CEDAW require Mexico to take action to modify cultural patterns that perpetuate stereotypes.

- **Stereotype: “Women who experience domestic violence have only themselves to blame if they continue to live with the abuser and do not press charges.”**

Intimate partner violence is much more complex and multifaceted than the above statement contemplates. The statement relies on stereotypes about how a person should react under “normal,” non-violent conditions.

One of the many factors that can cause women to stay in abusive relationships is the fact that abuse is cyclical. Domestic violence does not occur at every hour of every day. Instead, it is intermittent. In the periods between violent episodes, the abuser is considerate, acts repentant, and behaves lovingly and affectionately; this confuses the victim, and gives her hope that he has changed for good. Other factors that prevent women from leaving abusive relationships include economic dependence, the lack of a support network, and the social messages sent to women (“it’s your cross to bear,” “How could I take the kids away from their father,” “keeping a family together is a woman’s responsibility,” “if he’s jealous it’s because he loves you,” etc.) all of which can make women feel responsible for or deserving of their

Article 5. States Parties must take appropriate measures:

a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

Convention on the Elimination of All Forms of Discrimination Against Women

Article 8. The States Parties agree to undertake progressively specific measures, including programs:

b. to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs, and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.

Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, "Convention of Belem do Para"

Accordingly, to decide whether an act is objective, we must assess whether it is based upon stereotyped notions of how people are and how they are expected to behave based on sex, gender, sexual orientation or preference - all of which are suspect classes. Suspect class determinations thus play an important role in deciding whether an instance of different treatment is legally permissible.

A.3. Suspect Classes

Suspect classes - or prohibited bases for discrimination - serve as "red flags" for public officials, especially judicial decision-makers. Suspect classes trigger strict scrutiny and a weighing of evidence to determine the legitimacy or necessity of a different treatment, exclusion, restriction, or preference.

situation. This perception is reinforced by social acceptance, tolerance and normalization of this sort of violence.

Nevertheless, constitutional law and international treaty law require state officials to prevent, investigate, punish, and remedy violence against women. As such, state actors may not ignore the calls for justice made by victims of domestic violence, nor may they shift responsibility for abuse on to victims.

The validation that women feel when they are heard and given redress by the justice system leads to women's empowerment. When the justice system is known to effectively respond, that fact can help women make the decision to leave an abusive situation.

Understanding "battered women's syndrome" and paradoxical attachment syndromes are also useful in fully understanding the complex responses women have to abusive relationships.

See www.equidad.scjn.gob.mx

In case C-481 in 1998, the Constitutional Court of Colombia explained that “...in contemporary constitutional law, we identify a categorization as a “suspect class” if:

- (i) it is based upon immutable characteristics that an individual cannot voluntarily change or hide without jeopardizing his or her identity;
- (ii) these characteristics have, historically, been culturally undervalued; and
- (iii) they do not constitute, per se, criteria upon which it would be possible to base an effective, rational and equitable distribution of good, rights, or social responsibilities.”

Under this test, the category of black female is a compound characteristic that has historically been the basis for discrimination and cannot be changed or hidden. The color of one’s skin and the form of one’s body are immutable characteristics. Thus, it is a suspect class. But does “sexual orientation/preference” qualify under the same test?

The American constitutional scholar Kenji Yoshino has argued that this doctrine presupposes that any characteristic that can be eliminated or hidden should be, and that it thus requires individuals with non-mainstream characteristics to absorb the costs of having to assimilate into the majority. Yoshino calls this doctrine “assimilation,” and explains that in an ostensible effort to recognize the humanity of all persons, it requires us to abandon everything that makes us unique. Yoshino uses the case of gay men and lesbians to reveal the limitations of an anti-discrimination doctrine rooted exclusively in the test outlined above.

Yoshino argues that, in fact, or at least in the minds of some, gays and lesbians are able to assimilate in three ways: conversion, passing, and covering. Conversion occurs when one alters the essence of one’s identity. For example, when a lesbian, despite her desires, decides to have relationships exclusively with men; it may be said that she converts into something that she originally was not. On the other hand, it may be that a lesbian does not renounce relationships with women, but decides to pass as a heterosexual, keeping her intimate relationships a secret. Finally, a lesbian can cover up her relationships; in this case, identity is not altered or hidden, but is downplayed.

Interestingly, Yoshino extrapolates this way of thinking into other contexts, such as race and sex. Blacks have the right to vote, but do they have the right to wear traditional African hairstyles or clothes? Women have the right to work -- but only so long as they don’t get pregnant? Latinos can be TV

announcers, so long as they don't speak with an accent? If we persist in this line of argumentation, don't we end up saying "it's fine to be indigenous, so long as you do not wear traditional dress and do not speak your mother tongue? "People who use wheelchairs can work, but cannot demand that all buildings be designed to accommodate them?" How far do we go in demanding that people assimilate to the paradigm of the majority? How far do we go in seeking to annihilate differences? Until people themselves are annihilated? When does this approach itself constitute discrimination -- grounded, paradoxically enough, in notions of equality? Applying strict scrutiny is the least that we can do when faced with these questions.

Gender Equity Office, Supreme Court of Mexico, *Qué identidades? Qué discriminación?*, Boletín "Género y Justicia," No. 28, Oct. 2011. Available at: www.equidad.scjn.gob.mx. Internal footnotes omitted.

Suspect classes include sex, gender, sexual orientation/preference, age, disability, record of a disability, condition resulting from a previous disability, perception of a present or past disability, social condition, health status, religion, opinion, marital status, race, color, language, national, social, or ethnic origin or heritage, economic status, birth, or any other status.³⁸ This list is in no way exhaustive.

According to the Committee on Economic, Social, and Cultural Rights (CESCR Committee), "the nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds..."³⁹

³⁸ These categories have been recognized by the Mexican Constitution, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), CEDAW, and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities. See also the Convention of the International Labor Organization concerning Discrimination in Respect of Employment and Occupation (No. 111), and the UNESCO Convention against Discrimination in Education (1960).

³⁹ Committee on Economic, Social, and Cultural Rights, General Comment 20, para. 27.

SUSPECT CLASSES

In some cases, judges must scrutinize different treatment especially carefully in light of the right to equality, and must be more rigorous when determining whether the law has respected this right.

Article 1 of the Mexican Constitution mentions several specific situations in which strict scrutiny is called for. The third paragraph of Article 1 suggests that the right to equality extends to contexts beyond those having to do with the fundamental rights explicitly named in the Constitution, because it prohibits the legislature from discriminating, in the general scope of its work, on the basis of various enumerated categories.

Whenever legislation involves a classification on the basis of a suspect class and involves fundamental constitutional rights, judges must use an especially stringent analysis so as to ensure the principles of equality and non-discrimination are effectively upheld.

Jurisprudencia 37/2008, Supreme Court of Mexico, First Chamber, 9a Epoca, 1a Sala; S.J.F. y su Gaceta, XXVII, Apr. 2008, p. 175.

International law recognizes that human rights treaties are living instruments, and that their “interpretation must go hand in hand with evolving times and current living conditions.”⁴⁰ In the Karen Atala case, the Inter-American Court applied this principle along with the *pro-personae* rule. Ms. Atala had been denied custody of her children on the basis of her sexual orientation. The Inter-American Court explained that even though “sexual orientation” was not specifically listed as a suspect class in the American Convention on Human Rights, “the specific criteria by virtue of which discrimination is prohibited do not constitute an exhaustive or limitative list, but [are] merely illustrative.” Thus, the Court found that discrimination on the basis of sexual orientation was prohibited under the category of discrimination on the basis of “any other social condition.”⁴¹

The Court’s reasoning makes clear that those who apply the law must scrutinize and reevaluate the definitions of prohibited bases for discrimination when necessary. Judicial decision-makers must also be cognizant of the increasingly sophisticated means by which discrimination and its attendant rights violations occur.

The Inter-American Commission on Human Rights’ report on Access to Justice for Women Victims of Violence in the Americas states:

“...the Inter-American system of human rights and the case law of the supreme courts of a number of countries of this hemisphere have held that [where gender is used as grounds for unequal treatment,] **the discriminatory nature of the restrictive measure or policy is presumed. Therefore, when those suspect factors are the basis for treating an individual or group differently, they have to be more closely**

⁴⁰ *Atala Riffo and daughters v. Chile*, *supra*, para. 83.

⁴¹ *Id.* para. 83-93.

scrutinized to determine whether they are reasonable... Therefore, for the Commission a sex-based restriction must be based on very compelling reasons; the burden of proof rests with the State. Hence, when a restriction is premised on a ‘suspect category,’ the Commission accepts the ‘reversal of the burden of proof’ and the ‘presumption of invalidity.’”⁴²

Sex, gender, sexual orientation/preference, and all other *suspect classes* entail various presumptions about behaviors stereotypically associated with those categories. For example, there is a presumption that gays and lesbians are not suited to be good parents. This stereotype informs legal prohibitions on adoption and family formation for gays and lesbians. Similarly, a married woman who works outside the home may be presumed to be neglecting her children and thus a “bad mother.”

Recognizing *suspect classes* means acknowledging that factors such as sex, gender, religion, and race have long been used to justify the subordination and exclusion of certain persons or groups. In other words, these categories have cultivated and endorsed asymmetrical power dynamics.

Suspect classes serve as “red flags” for judges. This means that when a different treatment is predicated on one of those categories or has a disproportionate effect on people who belong to one of those categories, that act of different treatment is presumed to be illegitimate. The presumption of illegitimacy can be rebutted or confirmed through the lens of strict scrutiny, as discussed above. Affirmative action that favors women survives strict scrutiny, because though affirmative action is a form of different treatment, it is an objective and reasonable response to de facto or structural conditions that disadvantage women - and women, as a group, have been historically subordinated on the basis of sex.

⁴² Emphasis added. Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, Jan. 2007, paras. 80, 87. Available at <http://www.cidh.org/women/Access07/Report%20Access%20to%20Justice%20Report%20English%20020507.pdf>

A.4. Effects of Discrimination on the Enjoyment of Rights

Another essential element that must be considered when determining whether different treatment is justified is its effect. To be discriminatory, a different treatment must - either on purpose or in effect - impede, annul, or diminish the recognition, enjoyment, or exercise, of a human right or a fundamental freedom -- in any context -- under conditions of equality.

This means that while certain forms of different treatment may be unjust from a moral and ethical standpoint, not all such treatment will be legally impermissible. For example, when a person chooses to have intimate relationships only with those who live up to Western standards of beauty, such a choice may be unfounded, and may be ethically and morally repugnant. But that kind of personal choice does not, in principle, impede, annul, or diminish anyone's legal rights - and as such it cannot be considered an act of discrimination under the law.

If, on the other hand, an employer uses this Western standard of beauty - and the stereotypes that it entails - to deny employment to a person who otherwise meets all of the technical requirements for a job, that would have an effect on a legal right, and would thus presumptively constitute discrimination under the law -- in addition to offending ethical and moral principles.

“...whatever the origin or form it assumes, any treatment that may be considered discriminatory regarding the exercise of any of the rights guaranteed in the Convention is *per se* incompatible with it.”

Atala Riffo and daughters v. Chile, para. 78 (I.A.Ct.H.R., Feb. 24, 2012).

Thus, to determine whether we are dealing with *differentiation* or *discrimination* requires the decision-maker to determine whether the act is objective and reasonable, to identify the role played by suspect classes, and to decide whether the treatment has an effect on anyone's enjoyment of a legal right.

A gender perspective with an intersectional approach is one method by which we can uncover the presence of different treatment based on sex, gender, or sexual preference/orientation, and by which we can determine whether such treatment is necessary and legitimate or, conversely, whether it is arbitrary and disproportionate, and therefore discriminatory. This perspective is particularly relevant for those who engage in judicial decision-making. Deciding cases and resolving disputes means solving specific problems and attributing legal consequences to specific facts and actions. In more than one sense, then, judicial decision-making can have a transformative resonance.

B. A Gender Perspective

We cannot understand what a gender perspective means until we first distinguish between two concepts: *sex* and *gender*.

Sex: is biologically determined.

Gender: is culturally constructed.

Sex refers to biological characteristics of the human body, while **gender** refers to the set of characteristics, attitudes, and roles that have been socially, culturally, and historically assigned on the basis of sex. While biology may determine one's identity up to a certain point, cultural contributions can be modified⁴³

⁴³ Postmodern feminism argues that to establish something as a “given” – such as biology – delimits our ability to understand contributions from other sources, such as culture. This argument is based on the premise that a person's body is never a “brute fact,” but rather a pre-interpreted “situation.” As such, postmodern feminism holds that to consider biological sex to be “natural” or “pre-cultural,” that is, as something supposedly incontrovertible or immutable, is always already a consequence of the cultural environment. See Judith Butler, *Gender Trouble*, p. 10. Preguntas Frecuentes, www.equidad.scjn.gob.mx.

Understanding the difference between sex and gender allows us to see how society and its legal infrastructure impose different consequences based on the anatomy of our bodies.

“All around the world, human beings confront the structural fact that we have anatomical differences...Today, we use the word “gender” to refer to the ways by which societies have symbolized the anatomical differences [between men and women]. This cultural logic is the underlying force that makes it difficult for societies to treat men and women, straights and gays, and transexual and intersex persons as “equal” citizens. The differences that human beings manifest in terms of sexuality, sexual identities, and sexual practices become socially translated into inequality, discrimination, stigmatization, and even, on occasion, lead to social lynching and death.”⁴⁴

BIOLOGICAL BODY TYPE	
MAN	WOMAN
ASSIGNED CHARACTERISTICS ON THE BASIS OF GENDER ⁴⁶	
• Sexually attracted to women • Married • Works outside the home, provider • Strong, intelligent, has the capacity for abstract thought • Operates in the public sphere	• Sexually attracted to men • Married, faithful • Homemaker • Emotional, physically attractive, interested in superficial things • Operates in the private sphere

In creating categories on the basis of biological sex, we exclude transgendered and intersex people. And in creating categories according to gender, we construct a false dichotomy. That false dichotomy imposes social, cultural, and legal expectations upon persons, which limit persons’ freedom and reduce their ability to control their own life’s project.

⁴⁴ Marta Lamas, “Dimensiones de la diferencia,” in Rodolfo Vazquez and Juan A. Cruz Parcerro (eds.), *Genero, Cultura, y Sociedad* (2012), p. 1.

⁴⁵ See conference remarks of Dr. Alda Facio on legal argumentation with a gender perspective; Mar. 5, 2010, Cuernavaca, Morelos, Mexico. Available at: http://www.equidad.scjn.gob.mx/spip.php?page=actividad&id_article=758.

Our legal and social schemes only make room for two types of bodies - those of women and those of men. However, “in reality, the same [biological] perspective shows that there are also intersex persons. The five physiological factors that we use to determine the “biological sex” of a person - genes, hormones, gonads, internal reproductive organs, and external reproductive organs (genitals) - can be arranged in various combinations. These components control various biological processes that exist in *continuum*, not in a dichotomy. (Fausto-Sterling, 2000). Within this continuum, we encounter a surprising variety of possible combinations, with hermaphroditism in the middle”.⁴⁶

“At least five biological sexes are recognized under this approach:

1. Men (people who have two testicles)
2. Women (people who have two ovaries)
3. Hermaphrodites or *herms* (people who have one testicle and one ovary at the same time)
4. Masculine hermaphrodites or *merms* (people with testicles, but who have other female sexual characteristics)
5. Feminine hermaphrodites or *ferms* (people with ovaries, but who have other male sexual characteristics).”⁴⁷

A gender perspective dismantles this false dichotomy based on body types, and ameliorates the consequences it imposes. A gender perspective does the following:

- Identifies the differing roles and duties that are socially assigned on the basis of sex, gender, or sexual orientation/preference
- Reveals the different rights and opportunities that these social assignments precipitate
- Exposes the power relationships that these differences create
- Accounts for the links between gender and race, religion, age, political beliefs, etc.
- Inquires into the different impacts that laws and policies have on the bases of these assignments and power differentials, and
- Determines whether a different treatment is either arbitrary or necessary, in light of the above.

⁴⁶ Marta Lamas, *supra*, p. 8.

⁴⁷ *Id.*

CHARACTERISTICS OF THE “UNIVERSAL NEUTRAL SUBJECT” PARADIGM, REFLECTING AN ANDROCENTRIC WORLD VIEW		
	WHO THE PARADIGM EXCLUDES	SOME EXAMPLES OF HOW THE PARADIGM IS MANIFESTED IN LEGAL, CULTURAL, AND SOCIAL STRUCTURES
Man	Women, transgendered, transexual, or intersex persons	• Laws and policies that recognize the existence of intersex persons and allow surgical interventions to assign them whichever sex is considered most medically accurate
Heterosexual	Gays and lesbians, men who have sex with men, bisexuals, anyone identifying as queer	• Lack of legal recognition for same sex couples or for diverse forms of family composition • Refusals to allow same-sex couples to adopt • Criminalization of certain forms of erotic expression
Adult	Children, adolescents, and older adults	• Denying autonomy to those considered incapable of making appropriate decisions⁴⁸ • Determining the needs of children based upon the needs of adults • Designing children’s toys to reflect “what you’re going to be when you grow up”
White	Black, Asian, and indigenous persons, <i>inter alia</i>	• Employment selection criteria based on physical appearance • Entrenched Western standards of beauty • Lack of translators of indigenous languages and culture in legal proceedings⁵⁰ • Assumptions that indigenous peoples do not have legal systems until they are incorporated into a non-indigenous municipality • Making indigenous persons into folkloric objects
Non-disabled	Persons with physical, mental, intellectual, or sensory disabilities	• Spaces which are inaccessible to people who use wheelchairs or rely on a support animal • Non-inclusive education policies • Segregation of people with disabilities into “special” schools • Lack of legal autonomy • Limitations on participation in legal proceedings

⁴⁸ See Protocolo de actuación para quienes imparten justicia en casos que afecten a niñas, niños, y adolescentes (Mexico, Supreme Court 2012), *available at* www.equidad.scjn.gob.mx.

⁴⁹ See Protocolo de actuación para quienes imparten justicia en casos que involucren derechos de personas, comunidades y pueblos indígenas (Mexico, Supreme Court 2013). *Available at* www.equidad.scjn.gob.mx.

A gender perspective questions this paradigm of the “universal neutral subject,” which is based on a white, heterosexual, able-bodied, non-indigenous man, and rejects the norms and categories that this paradigm presupposes. This is why a gender perspective is not a methodology meant only for cases involving women, but is instead a strategy that allows us to recognize people as fully autonomous, yet situated within diverse contexts and with diverse needs.

Alda Facio argues that sexism is the confluence of every societal belief based on myths about male superiority -- which then generates privileges for men.

Facio posits that while sexism is a phenomenon in and of itself, it is helpful to try to disaggregate sexist behaviors into different categories, even though all forms of sexist expression are interrelated, and even though it is sometimes hard to tell what kind of sexism is being expressed.

To understand some of sexism’s different forms, Facio uses a taxonomy created by Margrit Eichler: 1. Androcentrism, 2. Overgeneralization / overspecification, 3. Gender insensitivity, 4. Double standards, 5. Notions of sex appropriateness, 6. Sexual dichotomism, and 7. Familism.⁵⁰

⁵⁰ Alda Facio, *Cuando el genero suena cambios trae. Una metodologia para el analisis de genero del fenomeno legal*. Available at: http://www.catedradh.unesco.unam.mx/SeminarioCETis/Documentos/Doc_basicos/5_biblioteca_virtual/2_genero/3.pdf. See also Manual: *Caminando Hacia la Igualdad Real*, available at <http://www.risalc.org/portal/publicaciones/ficha/?id=1352>.

MANIFESTATIONS OF SEXISM⁵²

1. ANDROCENTRISM

- This occurs when a study, analysis, or investigation focuses only on male subjects or male perspectives, and presents these as reflective of human experience in general. An androcentric approach studies female populations only as they relate to the needs, experiences, or concerns of males.
- Misogyny or gynopia are two extreme forms of androcentrism. The former means antipathy towards women; the latter occurs when women's experiences are made totally invisible.

2. OVERGENERALIZATION AND OVERSPECIFICATION

- Overgeneralization is when a study only analyzes the behavior of men, and then generalizes the findings as if they are valid for both sexes. It also occurs when a study fails to indicate the sex of its research subjects or where it is difficult to determine the sex of the subjects.
- Overspecification occurs when certain needs, attitudes, and interests are portrayed as applying to only one sex, when in reality they apply to both.

3. GENDER INSENSITIVITY

- Gender insensitivity means ignoring sex as a socially important variable. An example of gender insensitivity is when a study of the effects of a law or policy fails to inquire into the different effects the law or policy may have on men and women by virtue of, e.g., their different sexual roles, the different valorization of each gender, and men's and women's different uses of time and space.

4. DOUBLE STANDARDS

- Double standards exist when the same behavior, the same situation, or the same human characteristic is evaluated differently depending on sex. This can mean that different standards or instruments are used for men as compared to women. Double standards are intrinsically linked to sexual dichotomism as well as to notions of sex appropriateness.



⁵¹ *Id.*

5. SEX APPROPRIATENESS

- This concept refers to the notion that there are certain behaviors or characteristics that are more appropriate for one sex than for the other.

6. SEXUAL DICHOTOMISM

- This means to treat men and women as if they were categorically different groups, instead of treating them as groups with just as many similarities as differences.

7. FAMILISM

- Familism means to conflate the concept of woman-as-human-being with woman-as-part-of-a-family. In other words, familism means to situate women's identities and concerns as radiating out of their role within a nuclear family. On this view, women's position within the family is the central axis that dictates how women's needs should be studied or approached.

In paragraph 10 of General Recommendation 25, the CEDAW Committee makes clear:

“The position of women will not be improved as long as the underlying causes of discrimination against women, and their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted toward a real transformation of opportunities, institutions and systems **so that they are no longer grounded in historically determined male paradigms of power and life patterns.**” (emphasis added).

Gender roles also impact and discriminate against men. Because gender roles ascribe characteristics, behaviors, and privileges to persons on the basis of sex, men as well as women are precluded from expressing their identity in ways that subvert those expectations.

For example, because men are customarily assigned to the role of the primary breadwinner, men may be expected to bear all of their family's financial responsibilities -- which keeps men from playing a more active role in parenting. Moreover, if a man is unsuccessful economically, he is stigmatized as "less" of a man.

A gender perspective allows us to see a diversity of body types and potential life projects. It helps us understand why we must revise our gender assumptions, and it helps us notice how those assumptions affect peoples' lives. It allows us to determine when different treatment is either necessary or impermissible.

It is important to note that policies focused on women are responses to the historical and proven fact that women are and have been the targets of discrimination. This discrimination has prevented women from self-actualization and from participation, within certain spheres, on equal terms with men. These policies are aimed at leveling the playing field so that men and women may have equal opportunities to pursue and achieve their goals.

A gender perspective also acknowledges that to categorize human beings on the basis of only one criterion - such as sex - is to ignore the complexity of a person's identity, and is likely to lead to a person's rights being violated. In *Identity and Violence*, Amartya Sen discusses the "terrible effects of the miniaturization of individuals",⁵² and emphasizes how dangerous it is to categorize a person based on only one element of her identity.

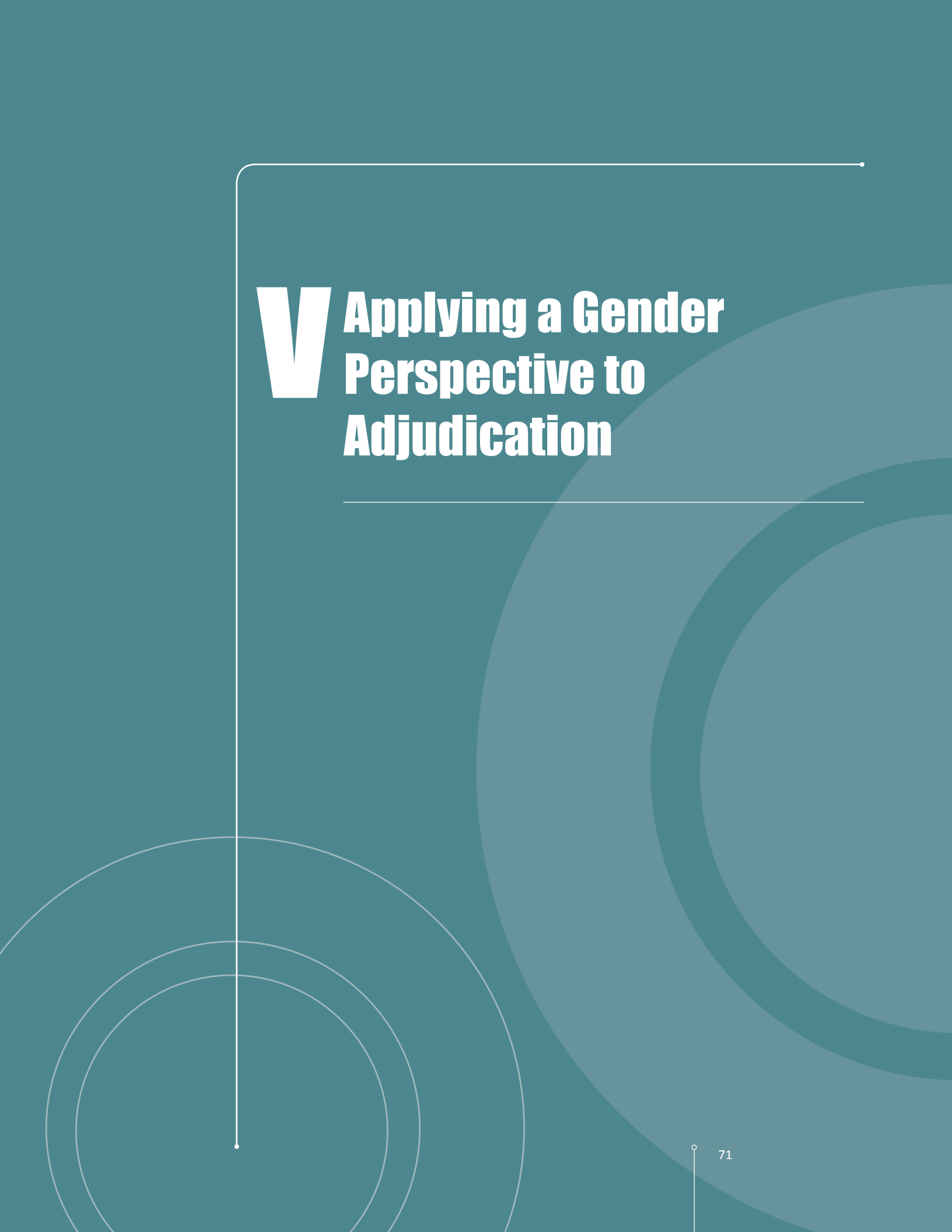
To recognize the right to equality for all people, in compliance with the constitution and international human rights treaties, means to recognize, and vindicate, all of the multifaceted identities that a person may have. This duty requires judicial decision-makers to take a new approach to the law and to the pursuit of justice.

⁵² Amartya Sen, *Identity and Violence: The illusion of destiny* (2007), p. 17.

The same system of laws that precipitated women's subordination can also play a role in their emancipation. Judges and judicial branch actors owe a duty to society to make sure that their judicial decisions never rely on or accept any notion or presumption that violates the principle of equality.

Judicial opinions are one of the most tangible products of the justice system: they are evidence of due process and of encounters between people and the apparatus of the law. By means of judicial decisions - and the language and argumentation used therein - judges and adjudicators intervene in the realities and day-to-day lives of people, making certain facts legally cognizable, and giving certain behavior legal consequences. Thus, in order to make the right to equality into a reality, it is essential that judges be able to identify and combat illegitimate forms of different treatment.

The next section proposes a methodology for judicial decision-making that is aimed at achieving just results while avoiding stereotypes. Using a gender approach ensures that the right to equality is upheld, allowing courts to make access to justice effective, and to combat impunity.



V Applying a Gender Perspective to Adjudication

V Applying a Gender Perspective to Adjudication

Judicial decision-making with a gender perspective enables courts to make the right to equality into a reality. Constitutional and international law require states to eradicate discrimination, and the judiciary is one key mechanism through which states must discharge this duty. Thus, judges must be capable of guaranteeing access to justice and of remedying asymmetrical distributions of power in the cases brought before them. A gender perspective is an essential response to this mandate. Through this analytic approach, the law and its institutions can become emancipatory tools, and can empower human beings to design and undertake their life projects in conditions of dignity, autonomy, and equality.

A LIFE PROJECT

“We all live in time, which eventually consumes us all. Precisely because of this self-perception we have of ourselves as existing in time, each one of us seeks to envisage a life project. The term ‘project’ implies in itself a temporal dimension. The concept of life project has therefore an essentially existential value, grounded in the idea of complete personal achievement. In other words, within the framework of a transient life, **people have the right to make the [choices] they feel are best, of their own free will, in order to achieve their ideals.** Therefore, endeavors to achieve a life project appear

to have great existential value, and the potential to give meaning to each person's life...

When this quest is suddenly torn apart by external factors caused by man [sic] (such as violence, injustice, discrimination), which unfairly and arbitrarily alter and destroy and individual's life project, **it is especially serious, -- and the Law cannot remain indifferent to this.**

Life -- at least the one we know -- is the only one we have and has a time limit, and **the destruction of the life project almost always implies a truly irreparable damage or [one that is] sometimes reparable only with great difficulty...**

Within the scope of the ample, general obligation of the States Parties to the American Convention on Human Rights embodied in Article 1(1) to respect and to ensure respect of all the rights enshrined in the Convention, **public authorities must ensure to all persons subject to the jurisdiction of said States the full exercise of protected rights, which is essential to the achievement of each individual's life project."**

Emphasis added. *Gutierrez Soler v. Colombia* (I.A.Ct. H.R.), concurring opinion of Judge A.A. Cancado Trindade, paras. 3, 4, & 5.

A democratic society depends on judges being committed to the principle of equality. Moreover, the new Mexican constitutional order requires that judges adhere to the new constitutional scheme and apply international human rights law. By using a gender perspective, judges can create precedents that will serve as scaffolding for a national structure that upholds human rights.

A. Why Employ a Gender Perspective?

Because the judiciary is constitutionally and internationally mandated to pursue and achieve equality.

Under Article 1 of the Constitution, the judiciary is tasked with enforcing and effectuating all of the human rights enumerated

in the international treaties ratified by Mexico. Some of these rights include, e.g. under the Convention of Belém do Pará:

Article 4. Every woman has the right to the recognition, enjoyment, exercise, and protection of all human rights and freedoms embodied in regional and international human rights instruments...

Article 5. Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights...

Similarly, CEDAW establishes states' obligations to eliminate arbitrary, unjust, or different treatment between men and women on the basis of sex or gender - whether these occur in the context of access to justice, in civil or criminal procedure, or in substantive law.

With respect to violence against women, which, under Article 6 of the Convention of Belém do Pará, includes discrimination against women, that Convention requires jurists to establish just and effective precedents in their decision-making.

In the "Cotton Field" case, the Inter-American Court held that when it comes to violence against women, Article 7(b) of the Convention of Belém do Pará imposed "even greater obligations"⁵³ on the state to exercise due diligence to prevent, investigate, and punish violence.

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: ...

c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination...

Article 2, CEDAW

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish, and eradicate such violence and undertake to: ...

f) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures...

Article 7, Convention of Belém do Pará

⁵³ González *et al.* v. México, *supra*; para. 284; Rosendo Cantú *et al.* v. México, *supra*, para. 177.

Courts have the power to give human rights law real meaning in peoples' lives; to demonstrate the state's commitment to justice; and to prevent the revictimization of those whose rights have been violated. Moreover, domestic courts are able to give victims effective remedies at the national level, so that their quests for justice need not snowball, over the course of prolonged delays, into international incidents.

Using a gender perspective in judicial analysis is a way of effectuating the right to equality by ensuring that the principle of equality informs the process by which courts arrive at just resolutions to cases. Using this approach will benefit individual parties by enabling them to control and achieve their life projects, and it will enhance conceptions of the state as the guarantor of that right.

● “Non-discrimination on the basis of gender is a true individual right, which flows from the right of all people to be treated equally. It also flows from the related duty of the state to guarantee equal treatment to all similarly-situated persons, without distinctions on the basis of gender or other status, apart from those distinctions which are precisely targeted at achieving equality.

With respect to women, this principle means that women cannot be unjustifiably treated differently than men so as to inhibit their equal enjoyment of rights and their equal opportunity to enjoy their fundamental freedoms.”

Supreme Court of Mexico. Report on constitutional investigation, case 3/2006 (the Atenco Case).

● “The Committee attaches importance to States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.”

General Comment 31, Human Rights Committee, para. 15.

B. Who Must Use a Gender Perspective and When?

Enforcing and effectuating the right to equality is a mandate that flows from the Constitution and from international treaties. This mandate binds all who apply the law. As such, all jurists and adjudicators must use a gender perspective in their decision-making. Moreover, a gender perspective may be used even when the parties to a case have not explicitly referred to it in their pleadings or arguments.

A gender perspective is not only useful in cases involving women. A gender perspective accounts for the ways that certain norms impose disparate impacts on certain people, and helps the jurist respond to those impacts. Thus, a gender perspective should always be used in any case in which there are asymmetrical power relationships or structural inequalities that have to do with sex, gender, or sexual preference/orientation.

Nor does the substantive content of a given case dictate whether or not to apply a gender perspective. Power imbalances and structurally unequal situations can present themselves at any stage of a legal proceeding, and can occur in diverse subject areas ranging from criminal law to civil, administrative, constitutional, labor, agricultural, or commercial law.

As such, what determines whether to use a gender perspective in a given case is not whether or not a woman is involved, nor whether or not it is a civil matter, nor whether or not the case is in a constitutional court. In every case, courts or other adjudicatory bodies must look for asymmetries of power and structural inequality. If the court uncovers this kind of asymmetry or inequality, a gender perspective is an appropriate method by which to derive a solution that complies with the law.

One example of how asymmetrical power dynamics and structural inequalities can present themselves is the case of Teresa González and Alberta Alcántara.

In March of 2006, these two indigenous Hñáñú women, who knew very little Spanish, were convicted and sentenced to prison for crimes under the health code and for the “deprivation of liberty” (in this case, ‘kidnapping’) of six federal agents. The agents had been part of an operation targeting pirated goods production in Santiago Mexquititlán, Querétaro.

It is well known that indigenous persons in Mexico (suspect class: ethnic origin) live within a situation of *structural inequality* which exposes them to increased risks of abuse and rights violations. Moreover, the circumstances by which women (suspect class: sex) were involved should have set off alarm bells for the judges who handled this case.

The *power asymmetry* in the case was evidenced by the fact that the ‘confrontation’ occurred between, on one side, federal agents, and on the other side, indigenous women (who had apparently been acting as part of a large group of people) who were defending their place of work. The fact that their place of work was in the informal economy was another factor evidencing their heightened vulnerability. In contrast, the federal agents’ superior preparation and resources (e.g. the fact that they had guns) gave their side a clear *advantage*.

In March of 2010, the Supreme Court of Mexico affirmatively took on the case, and after deliberation, it ordered the immediate release of Teresa González and Alberta Alcántara.

More information about this case is available in the “casos paradigmáticos” section of the Gender Equity Office’s website: http://www.equidad.scjn.gob.mx/spip.php?page=ficha_biblioteca&id_article=338.

In the next section, we present a suggested method for the use of a gender perspective in judicial analysis, summarized in the following chart. We conclude with a general checklist for use with this method.

HOW TO USE A GENDER PERSPECTIVE IN JUDICIAL ANALYSIS

INITIAL PROCEDURAL ISSUES

1. Does the case require a protection order?
2. Does deciding whether or not to admit a claim require a gender analysis?

FACT DETERMINATIONS AND INTERPRETATION OF EVIDENCE

1. What was the context in which the facts took place?
2. Is any party poor, marginalized, vulnerable, or facing discrimination on the basis of sex, gender, or sexual orientation/preference?
3. Is there an asymmetrical power relationship between any of the parties? How might this influence the evidence or testimony requested, and the weight given to it?
4. Is any member of a traditionally-subordinated “suspect class” involved?
5. Does any party belong to a historically disadvantaged group?
6. Does any party have characteristics evincing possible overlapping discrimination? For example, an indigenous woman in a divorce case, or a pregnant lesbian woman in an employment case.
7. Does the behavior that we expect of the parties or of the victims conform to stereotypes or to one of the manifestations of sexism?
8. Would our expectations of the victim’s response be different if we imagine her being replaced with a man or, e.g., a heterosexual? What would change in our expectations of behavior if we assigned a stereotypically “feminine” role to a party? For example, if it were a man who were seeking paternity leave.

DETERMINING THE APPLICABLE LAW

1. What domestic and international legal framework applies to the case?
2. Are there any cases or opinions from international bodies which address the question at issue?
3. Are there any international cases decided against Mexico that must be followed?
4. Do any General Observations from U.N. treaty-monitoring bodies, or analyses from the Inter-American Commission on Human Rights, contain relevant legal analysis to the issue(s) in the case?
5. What conception of the person underlies the applicable legal framework?
6. Does that norm reflect a stereotyped or sexist view of the person?
7. Does the norm impose a different impact on the person or the context at issue?
8. What law best guarantees the right to equality for the victims or parties in the case?
9. What legal strategies can counteract a norm that is discriminatory on purpose or in effect?
10. Does the case require us to deconstruct a paradigm, concept, or legal construct? How could our analysis do that?
11. What tools does the applicable legal framework provide to resolve power asymmetries and structural inequalities in the case? Does the case merit differentiated treatment?

REASONING

1. Apply the constitutional principles of equality, universality, interdependence, indivisibility, and progressivity.
2. Apply, and explain your reasons for applying, the law or rule that provides the best protection to persons who face power asymmetry or structural inequality. This means not just citing to, e.g., international treaties, but explaining the reasons for applying those principles the case and explaining why they control the outcome.
3. Interpret the law and the case in accordance with the more recent constitutional paradigms, which have replaced older hermeneutic approaches such as literalism, hierarchy, and specialization.
4. Understand the problems that can arise from the use of interpretive legal approaches such as analogy, when formal, material and structural equality are not taken into account.
5. Incorporate persuasive gender-related analyses from comparative law and from legal scholarship.
6. Explain why applying a given norm in the case would cause a different or discriminatory impact.
7. Elucidate the stereotypes and sexism detected in the facts, in the way the evidence was interpreted, in the allegations and claims of the parties, or in the norms that could have been applied.
8. If we must undertake any balancing test, be sure to adequately account for power asymmetries.
9. Explain why an unequal power relationship, or structural inequality, underlies the case.
10. Determine the appropriate legal strategy to minimize the impact of the structural inequality in the case.
11. Recognize and describe any gender biases encountered at any stage in the process.
12. Make sure that neither the reasoning nor the ultimate outcome of the opinion revictimizes or stereotypes the victim in any way.

REMEDIES

1. Did any party suffer disproportionate harm on the basis of sex, gender, or sexual preference/orientation?
2. What type of remedies could best provide redress for this kind of different impact?
3. If we identified power asymmetries and structural inequality, what remedies would be most useful in undoing those asymmetries and inequalities?
4. Does the remedy we selected reflect stereotyped or sexist notions?
5. Given the sex, gender, and sexual preference/orientation of the victim -- and the type of harm suffered -- what remedy would be the most appropriate way to make the victim whole?
6. When deciding on the form of redress, are we taking the victim's desires into account?
7. How did the problem affect the familial, workplace, and community roles and responsibilities of the victim? How could the remedy selected address those impacts?
8. Is there any kind of collective damage in the case? Is it possible to redress it?
9. Did anyone suffer a harm based on any kind of group membership?
10. Will the remedies we selected provide redress for all of the different types of harm that we identified?

C. How to Incorporate a Gender Perspective into Judicial Decision-Making:

Using a gender perspective when deciding cases means nothing more than ensuring that the principle of equality controls how we conduct legal analysis. To do this effectively, we must start with at least three basic assumptions:

1. The purpose of the law is to ameliorate the asymmetrical distributions of power and systematic inequalities that can circumscribe individuals' ability to craft and control their own life's projects.
2. Courts have the enormous potential to remedy formal, material, and structural inequalities. Those who have the power to decide cases -- judges and adjudicators -- are agents of change who can transform peoples' lives, giving them the ability to control their life's course.
3. The right to equality requires that judges and other legal decision-makers scrutinize, and when necessary, deconstruct, the methods by which they interpret and apply the law.

While no two cases will ever be procedurally or substantively identical, we can nevertheless provide a basic guide for using a gender perspective at every stage of a case.

For the purposes of this Protocol, we will assume that a case has the following procedural steps prior to its resolution:

- Determining the facts and admitting evidence.
- Establishing the applicable law.
- Legal analysis and reasoning.
- Deciding upon remedies.

In the next section we will show how to use a gender perspective in each of those phases. First, however, we will address initial procedural issues, and explain how these too should be approached from a gender perspective.

“...a gender perspective provides legal-theoretical tools by which we can acknowledge and take seriously the social transformations of the last few decades. We can thus increase substantive equality for all our citizens under the social contract...a gender perspective invites jurists to incorporate into their cases an analysis of any discriminatory bias that the law may contain, be it implicit or explicit.”

Gender Equity Office of the Supreme Court of Mexico, “*Argumentacion juridica con perspectiva de genero*”, Boletín Genero y Justicia, No. 1. July 2009. Available at www.equidad.scjn.gob.mx.

C.1. Initial Procedural Issues

◎ PROTECTION ORDERS

Because courts are obligated to use due diligence and to guarantee rights to all persons, judges must assess whether a victim requires special protective measures wherever there is reason to suspect it.

Article 27 of the Women's Access to a Life free from Violence Act (*Ley General de Acceso de las Mujeres a una Vida Libre de Violencia* (LGAMVLV)) gives courts the ability to grant protection orders to prevent serious harm to women and, if applicable, to their children.⁵⁴ This law defines protection orders as “fundamentally preventative and precautionary orders for immediate protection in accordance with the best interests of the party at risk. Protection orders must be authorized by a competent authority immediately upon learning of facts likely to constitute crimes or infractions involving violence against women.” Under article 33 of the LGAMVLV, courts may also issue orders which are “similar” to protection orders.⁵⁵

Additionally, Article 4 of the General Victims Law provides that “when the victim's life or personal integrity is threatened, or when there are other reasons to believe that her rights are at risk by virtue of a crime or human rights violation she has suffered, public officials...in accordance with the scope of their authority, shall immediately take necessary measures to prevent the infliction of harm.”

● Under the LGAMVLV, protection orders can fall into the following categories:

- Emergency. These can force the aggressor to vacate the victim's home, even if he is her spouse. These can also prevent the aggressor from coming near the victim's home, her place of work, her school, the homes of her parents or children, or any other place that the victim frequents.
- Preventive. These can prohibit, *inter alia*, the aggressor from possessing a firearm.
- Civil. These can temporarily suspend the aggressor's child visitation rights, can prohibit the aggressor from selling or otherwise alienating any marital property, can impose temporary liens on the aggressor's property, etc.

⁵⁴ See Gender Equity Office, SCJN. *El deber de proteccion*, Boletín “Genero y Justicia” No. 26, Aug. 2011. Available at <http://www.equidad.scjn.gob.mx> [Article 27 of the General Law regarding Access for Women to a Life Free from Violence]

⁵⁵ For more information, please see the video of the seminar on “Constitucionalidad de las ordenes de proteccion en casos de violencia familiar,” June 3, 2009, organized by the Gender Equity Office of the SCJN, the Department of Latin American Social Sciences and Institute for Legal Research of UNAM, available at http://www.edquidad.scjn.gob.mx/spip.php?page=actividad&id_article=262]

Decisions granting protection orders or similar measures must be made in light of the principles of protection, necessity, proportionality, confidentiality, opportunity, and efficacy.⁵⁶

Moreover, under article 41, “protective measures must be proportional to the risk of harm, and must take into account any special vulnerabilities of the victims, so as to respect the victims’ dignity in all cases.”

Thus, in every case the judge must consider whether a protective measure is called for. This decision must take into account the victim’s wishes, as well as the nature and seriousness of any threats, the risks of harm to third parties, and the type of preventive measures that would be most likely to succeed.

© ADMITTING A CLAIM OR CONTROVERSY

We can also use a gender perspective when considering whether or not to accept a matter for consideration. This kind of initial determination includes establishing competency, admitting a complaint or claim, or making a decision about procedural compliance. One example of this kind of preliminary question is whether or not to consider a paternity determination action when the child was born to a woman who is married to another man. As we will explain, answering this kind of question requires a gender perspective. On this issue the Supreme Court has held as follows:

“Articles 430 and 345 of the Civil Codes of Guanajuato and Nuevo Leon, respectively, categorically prohibit paternity actions brought by third parties regarding children born within wedlock to another couple whom the husband recognizes as his child. **These prohibitions fail the constitutional test because they lack adequate rationality. Thus, prohibitions of this nature**

⁵⁶ For example, in the state of Campeche protection orders are granted by the state Attorney General’s office (*Ministerio Público*). See Circular C/001/2011, Attorney General of the state of Campeche; available at : www.equidad.scjn.gob.mx/spip.php?page=ficha_biblioteca&id_article=1156

ON THE *PRO-PERSONAE* PRINCIPLE AND THE ADMISSIBILITY OF CLAIMS

“One way in which this [*pro-personae*] principle is utilized is as an interpretive preference... which means...that judges must interpret laws in whatever way most favors fundamental rights... **Judges must rigorously review any legal restriction on access to the court system**, so as to enable as many cases to be initiated as possible, and, to protect claimants’ **right to be heard by the courts**. Optimizing this right can mean making sure that an action is admitted and considered; it can also mean giving the claimant the proper remedy. The rights to access to courts and to an effective remedy are found in Articles 8.2(h) and 25 of the American Convention on Human Rights; and the Inter-American Court of Human Rights has made clear that this right requires remedies to be both prompt and effective. By applying the broad *pro-personae* and *pro-actione* interpretive principles, we can expand and optimize methods for bringing and accepting legal challenges.”

Emphasis Added. Non-binding opinion (Tesis Aislada), 10a Época, Fourth Civil Panel, First Circuit (Cuarto Tribunal Colegiado en materia civil del Primer Circuito); S.J.F. y su Gaceta; Libro XII, Sept. 2012, Tomo 3, p. 1945. Case 5/2012. Fidel Almaraz Berra, June 21, 2012. Unanimous decision. Author: Francisco J. Sandoval López. Secretary: Raúl Alfaro Telpalo.

▲ cannot be reconciled with the human rights enshrined in the constitution and in the international treaties to which Mexico is party -- most importantly, the right of access to the justice system. A categorical prohibition on paternity actions is impermissible because there are situations in which the third party will have the right to have his complaint heard. However, whether a court should admit such an action shall always depend on a balancing test.

The court shall weigh all the factors present in the case. The court should consider the general family situation, including family cohesion and the state of the marriage -- especially the nature of each spouse's relationship with the child. Those factors shall be balanced against the right to identity; among other important factors.

In light of the evidence provided by the claimant or otherwise obtained by the court, the judge shall consider whether the rights the claimant seeks to legally enforce harmonize with the best interest of the child, as determined by means of various analyses. This balancing test will ensure that, should the judge deem it appropriate to admit the claim and to initiate the proceeding, all those involved will have equal opportunities to be heard, as required by law."

Emphasis added. Supreme Court of Mexico. Jurisprudencia; 10a. Epoca; 1a. Sala; S.J.F. y su Gaceta; Libro X, July 2012, Tomo 1; p. 705. Contradicción de tesis 152/2011. Resolving a circuit split between the Second Panel of the Auxiliary Center of the Third Region Circuit (Segundo Tribunal Colegiado de Circuito del Centro Auxiliar de la Tercera Región) accord Second Civil Panel of the Sixteenth Circuit (Segundo Tribunal Colegiado en Materias Civil y de Trabajo del Décimo Sexto Circuito) with the First Civil Panel of the Fourth Circuit (Primer Tribunal Colegiado en Materia Civil del Cuarto Circuito), Nov. 23, 2011.

Majority of four votes. Dissent: Jose Ramon Cossio Diaz. Author: Jorge Mario Pardo Rebolledo.

Secretary: Alfonso Francisco Trenado Rios. Tesis de jurisprudencia 15/2012 (10a). Approved by the First Chamber (Primera Sala) of the Supreme Court, Jan. 18, 2012. ●

The "case by case" approach that the Mexican High Court has prescribed for paternity actions is important, because an a priori rule holding that third party paternity challenges are always or never allowed would not always promote the best interests of the child, the rights of women, or the stability of families. A categorical rule, with no exceptions, would render courts incapable of responding adequately to the circumstances of each case.

In deciding whether to admit a paternity challenge, in addition to the elements discussed by the Supreme Court, judges should also consider:

- The fact that identity goes beyond the purely genetic. Identity involves a child's sense of belonging and his or her cultural heritage. The law can recognize this reality by imposing some limits on the extent of biological parents' rights, as it does, e.g., in the law of adoption.
- To permit a man who is not a woman's husband to contest the paternity of her child at any time and under any circumstance is to effectively allow a third party to accuse a woman of adultery. This kind of accusation, given the social and cultural stereotypes regarding acceptable sexual behavior for women, could have harmful social and legal consequences for the woman.
- Whatever its outcome, a paternity action impugns the woman and can expose her to moral condemnation. Being accused in this way increases the risk of marital strife for the woman, which conflicts could lead to domestic violence, divorce, and even to losing custody of her children. We must consider those risks in light of General Comment 7 of the Committee on the Rights of the Child, which emphasizes that "realizing children's rights is in large measure dependent on the well-being and resources available to those with responsibility for their care."
- To allow any third party to question the paternity of any child born within a marriage, at any time, could constitute an arbitrary intrusion -- not solely into the private and family life of the woman, but into the lives of all of the members of the family. The interest the law protects (knowledge of a child's biological paternity) may be outweighed by the harms that could result (family instability and family violence).

- We must ensure that any paternity action, from the start, takes the mother's desires and those of the children into account. When deciding what weight to give to the children's opinions we must consider their age and maturity; and, if necessary, we must solicit expert opinions regarding the probable impacts of the proceeding on the children and on their family situation, and we must take that expert opinion into account when deciding whether to allow the challenge to proceed.

The following case also illustrates the importance of using a gender perspective at the initial procedural stages of a case. This example is taken from "Six Voices on Gender and Justice in the Federal Judiciary II" (*Seis Voces Sobre Justicia y Genero en el Poder Judicial de la Federacion II*).⁵⁷

In an *amparo* complaint,⁵⁸ a woman challenged the constitutionality of the state's decision – admitted by the state's Attorney General – not to prosecute the father of her children for the crime of nonsupport. The complaint alleged that the father of the woman's children had failed to pay them any child support for two years and thus the mother struggled to meet her children's basic needs. The state decided not to press charges against the father because the mother held a job as a mobile street-food vendor and thus the prosecutor's office felt that the children had sufficient support.

The Court held that the state's failure to press charges was unconstitutional, because, *inter alia*, it had not been proven that the children had sufficient resources to survive. Instead, what had been proven was that the father had abandoned his

⁵⁷ Gonzalo Higino Carrillo de Leon, *Nuevos Horizontes Constitucionales para el Ejercicio de la Dignidad de las Mujeres*, in *Seis Voces Sobre Justicia y Genero en el Poder Judicial de la Federacion II* (Emma Meza Fonseca, ed.) (2012).

⁵⁸ Translators' note: An *amparo* lacks a direct comparator in Anglo-American procedure, but is roughly analogous to an individual complaint for violations of constitutional or other human rights.

children and left the mother with the duty of caring for them. Thus, the Court held that the State's decision not to press charges constituted violence against women, because it resulted in the mother having to take care of the children by herself -- a form of unequal treatment.

Finally, the authoring judge made the following observation:

It is clear that the instant case can be resolved using well-established criminal law doctrines, or by using the principle of the best interests of the child, which all courts are obligated to apply in cases involving children. But in my view, what is equally clear is that the victim of the crime of nonsupport is also the mother. This is so because in these situations, which are all too common in Mexico, only the mother is forced to face financial hardship in order to provide for her children's basic needs. Moreover, the mother may experience pain and suffering in seeing her children go without adequate sustenance due to their father's irresponsibility. To impose this kind of suffering on women runs afoul of the right enshrined in the sixth paragraph of Article 4 of the Convention of Belém do Pará.

This international legal principle is especially relevant given the innumerable cases of children abandoned by their fathers. When seen through this lens, those cases can be viewed as an indirect form of violence against women, as it is women who must directly confront all of the well-known harms that children suffer when they are abandoned by their fathers.

Gonzalo Higinio Carrillo de Leon, Nuevos Horizontes Constitucionales para el Ejercicio de la Dignidad de las Mujeres, in Seis Voces Sobre Justicia y Genero en el Poder Judicial de la Federacion II (Emma Meza Fonseca, ed.) (2012), p. 37

Once a court has considered a protection order and granted one if appropriate, and has employed a gender perspective when deciding whether or not to admit the case or controversy, the court can next turn to specific analyses of the facts, the evidence, the determination of applicable law, legal analysis, and the determination of appropriate remedies.

• PROCEDURAL AND JURISDICTIONAL ISSUES

In Advisory Opinion 11/90, the Inter-American Court of Human Rights touched on issues of structural inequality as follows:

- “...if a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigency [*sic*]) prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law.”
- “...if it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies.”
- “...if a person, for a reason such as the one stated above, is prevented from availing himself of the domestic legal remedies necessary to assert a right which the Convention guarantees, he cannot be required to exhaust those remedies. The state’s obligation to guarantee such remedies is, of course, unaffected by this conclusion.”

I.A.Ct.H.R., Advisory Opinion OC-11/90, paras. 22, 31-33.

Because domestic courts must apply international human rights treaty law under the principle of *control de convencionalidad*, domestic judges must utilize reasoning such as the I.A.Ct.H.R.’s when deciding whether to admit claims on behalf of parties immersed in situations of fear or who face historical or structural discrimination.

One instance of barriers to justice ultimately led to the Supreme Court of Mexico’s decision implementing the I.A.Ct.H.R.’s *Rosendo Radilla* case. That Supreme Court decision shows that some of the most transformational developments in human rights law can occur in the jurisdictional and procedural ambit. Following the constitutional command to apply international human rights treaty law directly, the Mexican High Court explained that the *Radilla* decision controlled how they would interpret the Constitution and a domestic statute. The Court held:

“Because Mexico must comply with the decision of the Inter-American Court of Human Rights in the case of *Rosendo Radilla v. Mexico*, the Federal Judiciary must, *ex officio*, assess whether Article 57, section II, of the Code

of Military Justice, is constitutional and in compliance with international human rights treaty law. We now undertake that analysis and find that provision to be incompatible with Article 2 of the American Convention on Human Rights.

The Inter-American Court of Human Rights held that while Mexico need not facially amend Article 13 of the Constitution [on military tribunals], we must interpret it to align with international and constitutional principles of due process and access to justice; as set out in our Constitution and in Article 8.1 of the American Convention. As such, we interpret the instant section of the Code of Military Justice **to preclude the use of military jurisdiction in cases of human rights violations involving civilians**. We come to this conclusion because when military tribunals are used to adjudicate human rights violations of civilians, they claim jurisdiction not only over the accused - who must be a person on active duty military status - but over the civilian victim. Civilian victims have the right to participate in their criminal case, not only to seek redress, but to exercise their rights to truth and justice. Thus, in strict compliance with the Inter-American Court's holding, we must interpret Article 13 of our Constitution to avoid conflict with Article 2 of the American Convention. This means that Article 13 cannot narrow the scope of the due process or access to justice rights enshrined in the Convention -- namely, those set out in Article 8.1 -- which guarantees the right to a hearing before a competent and impartial tribunal. For all of the above reasons, we hold that the current version of Article 57, section II, of the Code of Military Justice, is incompatible with Article 13 of the Constitution, as we have interpreted that Article to avoid conflict with Articles 2 and 8.1 of the American Convention on Human Rights."

Emphasis Added. Tesis Aislada; 10a Epoca; Pleno; S.J.F. y su Gaceta; Libro III, December 2011, Tomo 1; p. 554.

Requiring civilian human rights claims to be adjudicated by military tribunals amounts to a denial of the right of access to justice. This principle has also been affirmed by the Inter-American Court in the Ines Fernandez Ortega and Valentina Rosendo Cantú cases.

C.2. Fact Determinations and Evidentiary Questions

The first step in resolving a legal dispute is to establish the facts, which requires deciding what evidence to admit and then interpreting it. This process can be contaminated by stereotyped conceptions of the parties' behavior, as well as by assumptions regarding the context in which a given incident occurred. To avoid this kind of contamination, a gender perspective invites the jurist to stop and ask:

- ❶ What was the context in which the facts took place?
- ❷ Is any party poor, marginalized, vulnerable, or facing discrimination on the basis of sex, gender, or sexual preference/orientation?
- ❸ Is there an asymmetrical power relationship between any of the parties? How might this influence the evidence or testimony requested, and the weight given to it?
- ❹ Is any member of a traditionally-subordinated "suspect class" involved?
- ❺ Does any party belong to a historically disadvantaged group?
- ❻ Does any party have characteristics evincing possible double discrimination or intersectionality? For example, an indigenous woman in a divorce case, or a pregnant lesbian in an employment case.
- ❼ Does the behavior that we expect of the parties or of the victims conform to stereotypes or to one of the manifestations of sexism?
- ❽ Would our expectations of the victim's response be different if we imagined her being replaced with a man or, e.g., a heterosexual? What would change in our expectations of behavior if

- The following appeals court decision underscores the importance of taking into account certain sex-related factors that can generate discrimination.

"The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) [...] prohibits a woman from being fired because of pregnancy, as this is considered a form of discrimination against her. For their part, Articles 841 and 842 of the Federal Labor Code require Boards to issue their decisions in good conscience, in good faith, on the basis of truth, and contemplating the allegations of each party. As such, if, in deciding the plausibility of a female worker's resignation, the Board did not take into account the fact that the woman was pregnant, the Board may be said to have infringed upon the principles laid out in the aforementioned Article 841, as well as on the guarantee of non-discrimination as enshrined in Article 1 of the Federal Constitution. Additionally, the failure to consider the fact of the woman's pregnancy may constitute a violation of CEDAW."

Tesis Aislada; 9a. Época; Third Panel on employment matters, Fourth Circuit. Amparo directo 799/2008. María Guadalupe Sánchez Niño *et al.* Dec. 1, 2008. Unanimous decision. Author: José Luis Torres Lagunas. Secretary: Angélica Lucio Rosales.

we assigned a stereotypically “feminine” role to a party? For example, if it were a man who were seeking paternity leave.

Fact determinations have legal repercussions. The way we assess the evidence to establish the facts can dictate our choice of the applicable law, our decisions as to damages and victims, and the allocation of criminal, civil, or administrative responsibility. As such, fact determinations play a critical role in access to justice. They can help prevent certain acts from recurring, and can prevent impunity.

In order to more clearly demonstrate, from a gender perspective, the consequences that flow from fact determinations, we turn now to cases of rape, domestic violence, and pregnancy-related firing.

◎ RAPE

One case from the Criminal Appeals Chamber of the Supreme Court of Colombia (Sala de Casación Penal de la Corte Suprema de Justicia Colombiana) (Proceso 29308-13/05/2009) illustrates how stereotypes can inform judges’ evaluations of the facts in rape cases. The case presented the following facts: five men assaulted two young women in a park. Four of the men then ran away, except for one, who forced the women to perform sexual acts in the public park under threat that he would stab them.

The court held that the crime of rape had not been committed, based on the following reading of the facts:

- Before the parties entered the public park, the assault began in a busy street.
- The defendant was physically frail, was unarmed, and did not use physical violence.

● PRECONCEPTIONS OF RAPE ● VICTIMS’ BEHAVIOR

Isabel Cristina Jaramillo notes that “it has been shown that, even when the law protects women’s interests and credits women’s points of view, if the law is applied by institutions and individuals formed under patriarchal ideologies, women continue to be disadvantaged.

Susan Estrich’s work, *Real Rape* (Cambridge, Harvard University Press, 1987), marked a true milestone in demonstrating that even though rape is formally criminalized and that official data ostensibly shows low levels of impunity, judges’, prosecutors’, and lawyers’ notions about what rape means, how rape must be proved, and the way women “should” act, give rise to a situation in which acquaintance rape and date rape are *de facto* decriminalized.”

Isabel Cristina Jaramillo, “La crítica feminista al derecho, estudio preliminar,” in Robin West, *Género y teoría del derecho* (2000), p. 122. Available at <http://www.equidad.scjn.gob.mx>

- The victims' fear was not enough to override their ability to act freely.
- "[I]t is reasonable to assume that a victim will resist being assaulted," and here, the victims did not attempt self-defense by means of, e.g., "defensive struggling, running away, crying out for help, etc." Thus, "the crime, which is predicated upon the defendant's behavior, vanishes in the face of the common-sense rule that a person on the verge of being sexually assaulted will fight back, or, at the very least, will exhibit defensive or evasive behavior."

In order to decide whether this assessment makes sense from a gender perspective, we can contrast the above analysis with the dissenting judges' assessment of the same facts:⁵⁹

- "The assailant's short height and lack of a weapon" were insignificant, given that the nature of the violence he exercised was the act of threatening the women with death.
- Whether or not there was an "imbalance of strength" between the two adult women victims – who were 18 and 20 years old – and one physically weak man was irrelevant, because whether a sex offense has been committed "does not depend, either legally or factually, on the balance of the relative strengths of the victim and the attacker."
- The young women reasonably believed that "the men who had participated in the first attack were still lurking nearby."
- It is dangerous at the very least to do what the majority has done here and require a woman – or any victim – of sexual assault to show that she fiercely and tenaciously resisted

RAPE MYTHS GROUNDED IN STEREOTYPES

- Only certain kinds of women can be raped (for example, virgins, physically weak women, those who exhibit "morally proper" behavior, and not, e.g., European women).
- Women want to have sex, no matter what they say.
- Women want forced sex.
- Women can effectively resist rape if they want to.
- When women do not successfully or forcefully resist sexual assaults, they want to have sex.
- Rape by a stranger is worse than acquaintance rape or rape by an intimate partner.
- Women routinely make up false accusations of rape.

Source: Equality Now, amicus brief submitted to the Inter-American Commission on Human Rights in *M.Z. v. Bolivia*, June 2002. Available at <http://www.equidad.scjn.gob.mx>

⁵⁹ Justices Sigifredo Espinosa Pérez, María del Rosario González de Lemos and Jorge Luis Quintero Milanés wrote separate dissenting opinions. We have combined similar portions of the different dissenting opinions. Italicized portions in the originals are omitted.

the attack. Such a requirement effectively forces the victim to compromise other valid legal interests, including personal integrity and even the right to life. This requirement also overlooks the fact that, as a rule, different people will react differently to these types of assaults. As such, we should never hold that the passivity of some individuals is a sign of consent. In other words, it is simply wrong to hold, as the majority has apparently done, that nonconsent can only be proved by overt, external action on the victim's part – e.g. screaming, physical resistance, or cries for help.

- These kinds of requirements reflect obvious gender discrimination, apparently anchored to outmoded ideas. Chief among these myths is the notion that if a woman engages in sexual acts, she must have wanted to; or at the very least, she must not have done enough to fend off the advance. This attitude creates the kind of re-victimization that has already caused so much harm and, in most cases, prevents these crimes from being effectively prosecuted.
- To require that the victim “resist” the assault is to re-victimize “those who have already been victims of a crime.”

This case reveals that when judges' expectations of a victim's behavior are grounded in rape myths and stereotypes, the result is impunity for the perpetrators. If the majority opinion had applied a gender perspective when assessing the facts, as the dissenters did, the case could have successfully provided the victims with effective access to justice and to judicial recourse.

◎FAMILY VIOLENCE

Another instructive case regarding fact determinations is Case 66/2006-PS,⁶⁰ in which the First Chamber of the Mexican Supreme Court held:

“When a person seeks a divorce on the basis of domestic violence, the petition cannot simply set out a generic fact narrative which the petitioner believes merits a divorce. Instead, the petition must specifically plead the circumstances of time, place, and manner in which the facts took place. This is not just so that the opposing party can prepare his defense; but also so that evidence can be offered and weighed in light of the legal standards, and so that the judge can analyze the contextual background in which the petition originated. Moreover, if in an adversary proceeding the petitioner is required to first plead the alleged facts and then put on evidence for them during the trial phase, it is incontrovertible that the petitioner cannot try to alter or remedy any flaws in the petition during the evidentiary phase, because that phase is not an appropriate time to do so.”

Emphasis added. Jurisprudencia; 9a Época; First Chamber (Primera Sala); S.J.F. y su Gaceta; Tomo XXV, Jan. 2007, p. 173.

In 2012, the high court rejected that rule, and gave the following reasons for so doing:

“The First Chamber of the Supreme Court....held that when a divorce is sought for reasons of domestic violence, the petition cannot solely state a generic set of facts which give the petitioner reason to believe a divorce is warranted, but must also set out the circumstances of time, place, and manner of the abuse. Now, upon renewed reflection, we reject that rule. **We reject the prior holding because requiring the petitioner to detail the time, place and manner of each instance of abuse is an extremely difficult standard to meet; and it is thus practically impossible for a divorce petition on this basis to succeed.** Effectively, to comply with this court’s previous rule, the divorce petitioner would have to detail the circumstances

⁶⁰ Our analysis of this case is taken from *Diez criterios jurisprudenciales relevantes desde la perspectiva de género*, Suprema Corte de Justicia de la Nación, Novena Época. Gender Equity Office of the Supreme Court, and Centro de Investigación para el Desarrollo, A.C. (CIDAC) (2010). Available at: http://www.equidad.scjn.gob.mx/spip.php?page=ficha_biblioteca&id_articulo=1399.

around each instance of abuse – meaning she would have to document the day, month, and time of day at which each instance of abuse occurred (time), the exact method by which it happened (manner), and the exact location at which it occurred (place). It is practically impossible for a person to remember such specific information about each and every instance of violence she has suffered -- including physical abuse, psycho-emotional abuse, and sexual abuse. **This is especially so because when domestic violence is invoked as the grounds for a divorce, such a request is not usually based on one isolated instance, but on the cumulative effect of various abusive acts and situations. Therefore, when a divorce is sought on domestic violence grounds, the petition need not set out the fact circumstances in detail or relate every occasion on which abuse occurred.** So long as the petition sets out the facts in a concrete manner and describes some specific instances, the opposing party will have a clear idea of what is being alleged, and will understand why the divorce is sought, so as to permit him to adequately prepare his defense.”

Emphasis Added. Tesis Aislada; 10a Época; 1a. Sala; S.J.F. y su Gaceta; Libro IV, Jan. 2012, Tomo 3; p. 2681. Amparo directo 12/2010. Mar. 9, 2011. Five votes. Author: Olga Sánchez Cordero de García Villegas. Secretary: Rosalía Argumosa López.

Given the asymmetry that can exist within relationships between men and women in the family sphere, the right to appeal for the state’s protection from violence within that space – and the right to an intervention that does not increase the victim’s suffering or exposure to risk – is quite important. Moreover, in such cases the state must account for the vulnerability of a victim of violence who is also dependent – economically or emotionally – on the abuser. Family violence also leads to a variety of medical, emotional, and psychological consequences for the victim and the children (if children are in the picture).⁶¹

⁶²The impact of intimate partner violence on the woman has been called “battered women’s syndrome,” a phrase believed to have been first coined by Lenore Walker. It includes, in addition to the physical element, a process by which the victim undergoes systematic de-personalization. Descriptions of this syndrome are regularly admitted into evidence in legal proceedings in the United States. Separate Opinion of Justice José Ramón Cossío Díaz in Contradicción de Tesis 66/2006-PS, *supra*, pp. 11 - 12.

In order to take those complexities into account, we suggest that courts avoid requiring a petitioner to recite every fact in detail as a condition to accepting that violence occurred. We base this recommendation on the following principles:

- *Anti-revictimization.* Requiring the victim to recount a precise, detailed narrative of every fact is to adopt a posture of skepticism vis-à-vis the victim's story. This stance on the part of the justice system can be psychologically damaging to the victim, and can trigger in the victim a sense of guilt and of being responsible for the abuse she suffered.
- *Awareness of the personnel involved.* The person who took the victim's testimony or statement might not have had adequate skills to manage and fully understand the situation.
- *Characteristics of family violence.* Family violence frequently involves both cyclical and daily occurrences. This can make it difficult for the victim to be able to offer specific information regarding the exact time, place, and manner of each incident.
- *Privacy.* Omitting the details of injuries suffered by the victim is not about preventing personal "scandal." But even though privacy is valuable and merits our protection, this fact should not limit a victim's ability to seek protection from the state if she is not safe within the private sphere.
- *Access to justice.* Requiring a great degree of precision in the victim's statement places an enormous burden of proof on the victim. When this burden is combined with the psychological effects of violence on the victim, it is practically impossible for such a petition to succeed.

For all of the above reasons, the victim's account should be evaluated using standards that make sense from a gender perspective. Such standards need not compromise the alleged abuser's legal rights. Thus, requiring sufficient clarity and precision – without going to the extreme of requiring an precise recitation of every detail of each event – is an appropriate standard under which the adverse party is still afforded the

ability to dispute the allegations.⁶² Judges can also utilize expert witnesses, such as psychologists, to assess the victim, and can consider those professional opinions when deciding whether or not the alleged violence actually took place.

In accordance with Mexico's international obligations, judicial actors must, with due diligence, implement mechanisms to eliminate violence against women by making sure that judicial recourse is available and accessible for victims of such violence.

The standard of proof that the Supreme Court had upheld until 2012 had made it hard for women – especially poor women – to obtain a divorce on the basis of the human rights violation that is domestic violence. For a victim of domestic violence, divorce is not just a dissolution of the legal relationship that binds her to the abuser. It is also a way to obtain temporary or permanent benefits and protections. Those benefits can be concrete, such as title to property, ownership of marital assets, alimony, and custody of the children. Moreover, the prior standard created a disincentive for women to exercise their right to access to justice, for fear of the excessive amount of detail that they would be required to give, and for fear that judges would not believe their testimony.

⁶² Dissenting Opinion of Justice José Ramón Cossío Díaz. Tesis 66/2006-PS, *id.*, pp. 16-20.

◎PREGNANCY-RELATED FIRING

Fact analysis is especially important in cases involving pregnancy- or maternity-related firing. In these cases, it is crucial to ask the kind of questions listed at the beginning of this section. Courts in Mexico and Spain (from whom we quote in that order) have utilized the following instructive standards:

- “When an employee alleges that she was fired unjustifiably, and the employer argues that she actually quit, the burden falls on the employer to prove that the claimant did in fact resign from her position. If, in proffering such evidence, the employer offers supposed written proof of the worker’s resignation, the Board cannot solely consider the opinion of a handwriting expert that the signature on the document is that of the employee. Instead, if the employee presents evidence that she had been granted maternal disability, such evidence must also be weighed. In accordance with the principle of conscience that governs the Board’s actions in such cases (Article 841 of the Federal Labor Law), the Board must determine whether or not it is credible that a worker who had been granted maternal disability would quit her job, as resigning would impact her rights to certain benefits and job-related protections, which she may likely need during the postpartum period. For example, Article 123, Part 3, section V of the Constitution establishes that pregnant women are entitled to take six weeks of paid leave prior to and after the due date, and are entitled to retain their position as well as any work-related rights they may have accrued. The law also provides that, during the breastfeeding period, women have a right to two extra breaks per day, of a half an hour each, so as to feed the child.”

Tesis Aislada, Third Panel on Employment Law, Fourth Circuit
(*Tercer Tribunal Colegiado en Materia de Trabajo del Cuarto Circuito*).

- “The legislature created an especially strong enforcement mechanism in the *tutela* complaint process for pregnant workers – a mechanism that also reflects obvious constitutional concerns. We advance the most important interest, the right to freedom from discrimination on the basis of sex ...when we do not impose upon the employee-claimant an onerous burden of proof. Such burdens can be difficult to meet and they thus limit the employee’s ability to exercise her fundamental right. [...] Removing such a burden means refusing to require the claimant to prove that a third party was aware of the intimate fact of her pregnancy, which fact she may legitimately have wanted to keep private – especially from the employer. The employee may want to keep her pregnancy a secret from the employer for many valid reasons, including her desire to keep her job, and a fear that her job may be in jeopardy if the employer found out she was pregnant. This complaint process thus operates as a powerful means by which to challenge pregnancy-related firing, because the claimant need only to point to an objective physical fact – such as the fact of the pregnancy itself – and need not prove that she had given advance notice of her pregnancy. This process thus simultaneously honors the claimant’s right to privacy, both personal and familial.”

Amparo 92/2008, First Chamber, Constitutional Court of Spain.

The way we interpret facts and evaluate evidence can dictate our choice of the applicable law. For this reason, judges must take special care to discern structural forms of discrimination.

C.3. Determining the Applicable Law

When deciding which legal framework applies to the facts, a gender perspective recommends starting with the following questions:

- ❶ What domestic and international legal framework applies to the case?
- ❷ Are there any cases or opinions from international bodies which address the question at issue?
- ❸ Are there any international cases decided against Mexico that must be followed?
- ❹ Do any General Observations from U.N. treaty-monitoring bodies, or analyses from the Inter-American Commission on Human Rights, contain relevant legal analysis to the issue(s) in the case?
- ❺ What conception of the person underlies the applicable legal framework?
- ❻ Does that norm reflect a stereotyped or sexist view of the person?
- ❼ Does the norm impose a different impact on the person or the context at issue?
- ❽ What law best guarantees the right to equality for the victims or parties in the case?
- ❾ What legal strategies can counteract a norm that is discriminatory on purpose or in effect?
- ❿ Does the case require us to deconstruct a paradigm, concept, or legal institution? How could our analysis do that?
- ⓫ What tools does the applicable legal framework provide to resolve power asymmetries and structural inequalities in the case? Does the case merit differentiated treatment?

LAWS THAT REFLECT STEREOTYPES OR SEXISM

The law on social security and services for state workers that had been in effect until March 31, 2007 (Article 75, section III, Ley del Instituto de Seguridad y Servicios Sociales de Seguridad y Servicios Sociales de los Trabajadores del Estado), is an example of how sex role stereotypes can be built into the law. Effectively assuming that men will inevitably serve in a role of primary breadwinner, the law provided the surviving male spouse of a female state employee could not receive a widower's pension unless he demonstrated an extenuating circumstance of old age, disability, or economic dependency. In other words, men were presumed to occupy the exact opposite position that women were presumed to occupy. By the same token, women were always entitled to a widow's pension, on the assumption that they did not work outside the home.

The Supreme Court held as follows with regard to that law:

"...In spite of the fact that the Constitution enshrines equality before the law as a fundamental right, the legislature nevertheless treated surviving spouses differently when codifying their

When determining the law that applies in a given case, recall that under Article 9 of the constitutional human rights reform decree of June 10, 2011, every law or decision that predated that reform and cannot be reconciled with the principles therein should be considered overruled.

To determine the applicable law, we must identify the concept of the subject that underlies the available legal provisions. This analysis is important, because the language of a given provision, and the way it may be interpreted, can leave certain persons excluded or defenseless. One example of this phenomenon is case CC-2002-35, decided by the Supreme Court of Puerto Rico.

A gay man who had been assaulted by his partner filed a complaint for “aggravated abuse” under the law for Prevention and Intervention of Domestic Violence. The abuse occurred while the abuser was subject to a protection order that had been issued after three prior assaults on his partner.

The Supreme Court, nonetheless, held that “the challenged conduct... does not fall within the parameters of Law No. 54, because that provision applies only to domestic violence that occurs within relationships between a man and woman.”

The Supreme Court determined who counted as the “subject” of the law after reviewing the legislative history. That legislative history revealed that the legislature had enacted the law in order to protect battered women from their abusive partners. This conception of who the law protected, based on stereotypes about the paradigmatic intimate relationship, left the victim of violence without legal recourse.⁶³

⁶³ In footnote 20 of the majority opinion, the Court claimed that “the inapplicability of Law 54 does not leave the victim without a remedy. The conduct at issue here would not only be a crime under the Penal Code; it is also actionable under Articles 4 and 5 of Law 284 of August 21, 1999, 33 L.P.R.A. 4014 and 4015, which allow protection orders against any person who intentionally engages in a persistent pattern of threatening conduct.”

entitlements to state employees’ pensions. **Article 75, section III of the law on pensions for surviving spouses of state workers requires a surviving husband, before he can receive a pension, to show that he is over age 55, or that he is unable to work and will be economically dependent on the pension. But the surviving wife, to obtain the same benefits, need not proffer any other fact other than the fact that she is the surviving spouse. This scheme violates the principle of equality enshrined in Article 4 of the constitution**, in that it discriminates against men on the basis of gender, age, ability, and economic condition.”

Emphasis added. Tesis Aislada; 10a. Época; 1a. Sala; S.J.F. y su Gaceta; Libro VI. Mar. 2010. Tomo 1; p. 294. Amparo en revisión 328/2011. Alberto Flores Pavón. May 25, 2011. Five votes. Author: José Ramón Cossío Díaz. Secretary: Carmen Vergara López. Amparo en revisión 824/2011. Salvador Gutiérrez Eudave. Feb. 15, 2012. Five votes. Author: Arturo Zaldívar Lelo de Larrea. Secretary: Ana María Ibarra Olguín.

However, other justices dissented.⁶⁴ The dissenting justices argued that “interpreting Law 54 to protect only heterosexual couples is to read the statute in a such a way as to seriously call its constitutionality into question. Such a reading deprives some victims of violence of equal protection solely because of the gender of the person who attacked them. The effect of this interpretation is to treat victims with discrimination, and to give impunity to an attacker on the sole basis of his sexual orientation. This conclusion is not only unjust for the victim; it is also legally unsustainable under our system of laws.”

In conjunction with the Secretary of Foreign Relations, the Mexican Office of the United Nations High Commissioner on Human Rights, and UN-Women, the Gender Equity Office of the Supreme Court of Mexico has published the second edition (up to date as of April 2010) of *“Derechos Humanos de las Mujeres: Normativa, Interpretación, y Jurisprudencia Internacional.”* (“The Human Rights of Women: Doctrine, Interpretation, and International Jurisprudence.”)

- This first-of-its-kind volume focuses exclusively on women’s human rights under the law, and surveys:
- International treaties and declarations from the UN and Inter-American systems;
- International Labor Organization treaties;
- UN Special Rapporteur reports;
- Cases decided by UN treaty-monitoring bodies;
- Recommendations and concluding observations on Mexico from various rapporteurs and treaty-monitoring bodies in the UN system
- Reports and complaints at the Inter-American Commission on Human Rights;

USING THE *PRO-PERSONAE* PRINCIPLE TO SELECT THE APPLICABLE LAW

“Under the current version of Article 1 of the Constitution, as amended by the human rights reform decree, published in the Official Federal Daily of June 10, 2011, the legal system in Mexico is now governed by two supreme sources of law: (a) the fundamental rights recognized in the Constitution, and (b) the human rights enshrined in the international treaties to which Mexico is party. Consequently, **the laws and norms that arise out of those two primary sources are the supreme law of the land. This means that the values, principles, and rights that these sources of law entail must permeate throughout our legal system. All state officials now have the obligation to apply them and, where appropriate, to interpret them.** When the same fundamental right is recognized in both of the supreme sources of law – that is, the Constitution and the international treaties, courts must select and apply whichever human rights norm includes standards that most favor the individual – applying what has been called the *pro personae*

⁶⁴ Dissents were filed by Justice Jaime Benito Fuster Berlingeri and Justice Federico Hernández Denton, who was joined by Justice María Naveira de Rodón.

- Decisions and advisory opinions from the Inter-American Court of Human Rights;
- Relevant cases from the European Court of Human Rights, the International Tribunal for Rwanda, and the International Tribunal for the Former Yugoslavia.

Available at: <http://www.equidad.scjn.gob.mx/spip.php?article1602>

● A FACIALLY NEUTRAL LAW WITH A DISPARATE IMPACT

Article 293 of the Civil Code of Peru provides as follows:

“Spouses’ right to work. Each spouse may engage in any profession or industry permitted by law, and thus work outside of the home, with the express or tacit consent of the other spouse. If spousal consent is denied, a judge may authorize such employment if it is in the interest of the family.”

Notwithstanding this provision’s facial neutrality – declaring its subject to be “each spouse,” instead of “the wife,” as was and is still used in other civil codes – it nevertheless causes discrimination in effect. This is because the only people for whom “work[ing] outside the home” is ever an issue are women, and as such, it is only women who must rely on the “consent” of their spouse. The law thus reinforces the notion of husband-as-master, reifies an unequal normative baseline, and thus distributes duties and obligations unequally within marriage, providing less freedom and independence to women.

Mexican law is undergirded by an important legal and jurisprudential infrastructure: the constitutional and international concept of the right to equality, the duty and power of domestic courts to directly apply international human rights law (*control de convencionalidad*); the *pro personae* principle, etc. That infrastructure gives jurists the power to remedy the effects of facially neutral laws – otherwise known as *de facto* discrimination.

principle – in accordance with the second paragraph of Article 1 of the Constitution. Under this interpretive canon, whenever norms from two different sources differ in terms of the scope of their protections, judges must choose and apply whichever source of law provides greater protection to persons, or imposes fewer restrictions on persons.

Thus, the catalog of fundamental rights is not limited to those explicitly itemized in the text of the constitution. It also includes all of the rights included in the international treaties ratified by Mexico.

Emphasis added. Jurisprudencia 107/2012; 10a. Época; 1a. Sala; S.J.F. y su Gaceta; Libro XIII, Oct. 2012. Tomo 2, p. 799.

● AN INTERSECTIONAL APPROACH

The Constitutional Court of Colombia has approached the situation of women and girls displaced by Colombia's armed conflict through an intersectional and contextual lens. The Court has stated:

“The State's duty to apply a differentiated approach to preventing forced displacement means that Colombian officials must act resolutely to address the grave human rights violations of internally displaced women as victims of the armed conflict. This duty, in conjunction with the State's international obligations to remedy violence against women, means that Colombian officials are immediately required, by both constitutional and international law, to identify and evaluate the specific risks that the armed conflict poses for displaced women, as those risks are among the primary causes of the disparate impacts that displacement has on women. By doing this, the government will be able to act as forcefully as possible to prevent forced displacement and to protect its victims. ”

Constitutional Court of Colombia (Second Chamber), Action 092/08.

More specifically, the Court's decision identified ten gender-related risks posed by the internal armed conflict. These included: (a) the risk of sexual abuse, rape, or being forced into sex slavery by various military actors; (b) the risk being forced into slavery; (c) the danger of having one's economic provider killed; (d) the risk of having one's children forcibly “recruited” into an armed faction; (e) the risk of being stalked and murdered by illegal militias; (f) the risks that relate to the general discrimination against, and heightened vulnerability of, displaced women; (g) the risks that flow from having voluntary, accidental, or perceived contact or relationships with any member of a militia or military group; (h) the risks that attend participation in social groups or human rights organizations; (i) the risk of being more easily ousted from one's land or property.

Internal footnotes omitted. Source: *El Principio de Igualdad de Género en la Jurisprudencia Comparada. Una muestra analítica de criterios internacionales y nacionales*. Women's Link Worldwide & Gender Equity Office, Supreme Court of Mexico. In print.

● DECONSTRUCTING A LEGAL INSTITUTION

One example of the deconstruction and inclusive evolution of a legal institution is the Supreme Court of Mexico's recent decision on marriage.

"The Mexican Constitution does not set out a civil definition of marriage, but leaves that definition to the ordinary legislature. The Constitution thus allows for the traditional concept to change in accordance with social realities. In this way, the definition of marriage can reflect the transformation of human relations that has gradually given rise to various types of relationships formed by emotional and sexual bonds and by mutual solidarity. The definition of marriage can also reflect the changing legal nature of the institution of marriage, as each era redefines the traditional concept of marriage; and can reflect the fact that procreation is no longer thought of as marriage's ultimate goal. As such, **while traditionally, marriage has been considered to be a union between a man and woman, with procreation one of its primary purposes, the Constitution does not bar the legislature from modifying this definition. Moreover, the meaning of marriage has been effectively decoupled from procreation, and is now principally understood to be the achievement and sustainment of emotional and sexual bonds, bonds of identity and solidarity, and the recognition of the mutual commitment between those who wish to share a life as one.**"

Emphasis added. Tesis Aislada; 9a. Época; Pleno; S.J.F. y su Gaceta; Tomo XXXIV, Aug. 2011. p. 88. *Acción de inconstitucionalidad 2/2010*. Attorney General of the Republic. Aug. 16, 2010.

Majority of six votes in favor of the content of the fifth section of the decision. Dissents: José Ramón Cossío Díaz, Margarita Beatriz Luna Ramos, and José de Jesús Gudiño Pelayo. Justices Sergio Salvador Aguirre Anguiano, and President Guillermo I. Ortiz Mayagoitia did not participate in the deliberation or the vote. Author: Sergio A. Valls Hernández. Secretary: Laura García Velasco. The full court, on July 4, 2011, approved the foregoing Tesis Aislada, in number XXVI/2011.

See also Gender Equity Office, Supreme Court of Mexico: "La definición de matrimonio," Boletín "Género y Justicia," No. 43, January 2013; "La (re)construcción del matrimonio," Boletín "Género y Justicia," No. 42, Dec. 2012. Available at www.equidad.scjn.gob.mx.

SOFT LAW: APPLICATION AND UTILITY

A wide variety of norms can be considered “soft law.” Examples include the General Comments of UN treaty-monitoring bodies, as well as the Advisory Opinions issued by the Inter-American Court of Human Rights. These documents authoritatively explain how the text of a given treaty provision should be interpreted, and describe how states parties are to comply with their international obligations.

While “soft law” is not formally binding, in a legal system that seeks, above all, to guarantee the broadest possible human rights protections to all persons, it would be nonsensical to ignore this body of persuasive authority. Soft law arises out of this legal system and provides authoritative insight into the intent behind its binding provisions. Interpreting the law while ignoring these sources of persuasive authority would work to negate or diminish the effective enjoyment and exercise of human rights.

The *pro-personae* principle invites jurists to use all available resources to interpret and apply the law so as to protect and enforce human rights to the fullest possible extent. “Soft law” is an extremely useful source of reasoning that can help courts do exactly that.

See: Gender Equity Office, Supreme Court of Mexico: “El *soft law* en el quehacer jurisdiccional,” Boletín, Género y Justicia,” No. 34, April 2012.
Available at: www.equidad.scjn.gob.mx.

C.4. Legal Reasoning and Analysis

Legal reasoning from a gender perspective requires more than simply applying the law to a case. It is an exercise in which we must question the facial neutrality of laws and norms; determine the legal framework that will best effectuate the right to equality; decide whether differentiated treatment is legitimate; and articulate why we are applying the chosen framework to the facts. At the same time, using a gender perspective demonstrates a judicial commitment to the evolution of law, to the battle against impunity, and to the pursuit of effective redress for rights violations.

“In the law of democratic societies, it is not only the holdings of cases that matter, but also the reasoning – or certain types of reasoning – that courts use in deciding those cases.”

Manuel Atienza. *El Derecho como argumentación*

Available at: <http://isegoria.revistas.csic.es/index.php/isegoria/article/view/76/76>

“There is never just one correct answer.” The validity of a legal decision rests on its moral content; the soundness of its reasoning; and its application of principles and rules.

Robert Alexy, *Derecho y razón práctica* (1993), pp. 7-24.

During the analysis and reasoning phase, we must resolve the issues we spotted during the phases in which we weighed the evidence, determined the facts, and identified the applicable law. We must also respond to the arguments proffered by the parties.

Legal analysis and reasoning with a gender perspective can mean doing the following as we strive to resolve the issue:

- ❶ Apply the constitutional principles of equality, universality, interdependence, indivisibility, and progressivity.
- ❷ Apply, and explain our reasons for applying, the law or rule that provides the best protection to persons who face power asymmetry or structural inequality. This means not just citing to, e.g., international treaties, but explaining the reasons for applying those principles the case and explaining why they control the outcome.
- ❸ Interpret the law and the case in accordance with the more recent constitutional paradigms, which have replaced older hermeneutic approaches such as literalism, hierarchy, and specialization.
- ❹ Understand the problems that can arise from the use of interpretive legal approaches such as analogy, when formal, material and structural equality are not taken into account.

LEGAL REASONING AND SEX DISCRIMINATION

In *Amparo* 92/2008, the First Chamber of the Constitutional Court of Spain explained that the right to a legal decision that sets out the grounds on which it is based, whether or not the outcome is favorable, is an “especially important right because it implicates the fundamental right to be free from discrimination on the basis of sex.”

The court made clear that “the requirements of an effective *tutela* process are distinct and are enhanced, that is, they are ‘reinforced,’... when, even where a judicial decision may not deal directly with the parameters or preservation of a fundamental right, such a right – other than the right to prosecute a *tutela* itself – is nonetheless implicated, related to, or possibly affected by the decision.” As such, “deciding whether a *tutela* has been handled sufficiently means more than ensuring that the decision explains the legal grounds on which it is based. The resolution must also be consistent with the fundamental right at issue, and its reasoning must align with the values inherent in that right.”

- 5 Incorporate persuasive gender-related analyses from comparative law and from legal scholarship.
- 6 Explain why applying a given norm in the case would cause a different or discriminatory impact.
- 7 Elucidate the stereotypes and sexism detected in the facts, in the way the evidence was interpreted, in the allegations and claims of the parties, or in the norms that could have been applied.
- 8 If we must undertake any balancing test, be sure to adequately account for power asymmetries.
- 9 Explain why an unequal power relationship, or structural inequality, underlies the case.
- 10 Determine the appropriate legal strategy to minimize the impact of the structural inequality in the case.
- 11 Recognize and describe any gender biases encountered at any stage in the process.
- 12 Make sure that neither the reasoning nor the ultimate outcome of the opinion revictimizes or stereotypes the victim in any way.

Several useful compilations of domestic and foreign judicial opinions exist online, including:

- The Gender Equity Office of the Supreme Court of Mexico's micro-site: www.equidad.scjn.gob.mx
- Women's Link Worldwide: www.womenslinkworldwide.org
- The Judicial Opinions Observatory (*el Observatorio de Sentencias Judiciales*) of the *Articulación Regional Feminista*: <http://www.articulacionfeminista.org>

"The Court emphasizes that these gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them. The Court is not validating these stereotypes and only recognizes them and defines them in order to describe the disproportionate impact of the interference caused by the Constitutional Chamber's judgment."

Artavia Murillo et al. v. Costa Rica (in vitro fertilization), para. 302 (I.A.Ct.H.R. Nov. 28, 2012).

- In their article entitled “The Principles of Universality, Interdependence, Indivisibility, and Progressivity: Pointers for Practical Application,” (*“Los principios de universalidad, interdependencia, indivisibilidad y progresividad. Apuntes para su aplicación práctica”*) Luis Daniel Vazquez and Sandra Serrano offer the following conceptual framework:

UNIVERSALITY

To the extent that human rights law reflects moral values of paramount importance, it is appropriate to assume that such rights apply to all people, regardless of sexual preference, age, nationality, race, etc. This assumption translates into the principle of universality in a number of ways. First, to speak of the universality of human rights means to begin by acknowledging the primacy of those rights: “all human beings are entitled to human rights.” (*Peces-Barba*). This level of initial abstraction goes hand-in-hand with the practical consequence that “all people in any political, legal, social, cultural, spatial, or temporal context can demand that these rights be enforced.” (*Blanc Altemir*).

INTERDEPENDENCE

“...human rights are interdependent, in that they are interconnected by reciprocal relationships. That they are indivisible means that human rights cannot not be taken to be isolated or separate, but must be understood as a compound cohort. *Interdependence* means that the extent to which one right or set of rights can be enjoyed depends entirely on whether one has access to another right or set of rights.”

INDIVISIBILITY

“...implies a holistic vision of human rights, in which all rights are unified, and not for reasons of dependence, but because, in one way or another, they form a complete whole. As such, if one right is realized or violated, this will have an impact on all the other rights, whether or not those rights are closely dependent. The central idea is that human rights can only be truly enjoyed when all rights are realized in conjunction with one another.”

PROGRESSIVITY

Following Abramovich and Courtis, the authors state that “progressivity means gradualism as much as progress. Gradualism accommodates the reality that human rights cannot be made universally real overnight; but will come into existence by means of a process in which states set short-term, medium-term, and long-term goals. This process promises that the scope of available rights will always increase, and will not regress.”

Article available at: <http://biblio.juridicas.unam.mx/libros/7/3033/7.pdf>

“MAGIC FORMALISM”

Magic formalism is the notion that simply invoking the principle of equality, or simply citing to a case from CEDAW (CEDAW being a “prestigious” source of law on gender equality) both guarantees and proves that a court or adjudicatory body has applied the law with a gender perspective.

The risk here is that citing to “politically correct” sources could disincentivize the court from actually providing the reasoning for its decision, and could also discourage the legal community from rigorously scrutinizing a decision. Such decisions would therefore be better justified if the citations were not included at all. Magic formalism is thus one of the greatest errors that jurists can commit.

The danger is that judges might think that the invocation of these lovely “umbrella norms” is enough to transform their opinions, as if by magic, into decisions informed by a gender perspective.

Source: Francisca Pou Gimenez. “Argumentación judicial y perspectiva de género”, from *Interpretación y argumentación jurídica en México*. (Juan A. Cruz Parceró, Ramiro Contreras y Fernando Leal Carretero, eds.). In print, in the *Doctrina Jurídica Contemporánea* series, published by Fontamara.

TIME OFF FOR DOMESTIC WORKERS

Article 10.2. Weekly rest shall be at least 24 consecutive hours.

International Labor Organization, Domestic Workers Convention (No. 189)⁶⁵

Art. 336. Domestic workers have the right to one and a half days of uninterrupted rest time weekly; preferably Saturday and Sunday.

Federal Labor Code. (Ley Federal del Trabajo)

In order to reflect a gender perspective, directly apply international human rights law (per *control de convencionalidad*), and comply with the *pro-personae* principle, the Federal Labor Code provision must prevail over the ILO provision, because it provides greater protection to those who do domestic work.

⁶⁵ This provision is only used as a hypothetical; as this ILO Convention has not been ratified by Mexico and is thus not strictly binding on Mexican courts.

● INTERPRETING THE LAW TO MAXIMIZE HUMAN RIGHTS PROTECTIONS

“Even though the Federal District’s Civil Code – before Articles 35, 98, and 135 bis were amended in 2008 to allow new birth certificates to be issued to reflect sex/gender reassignments – and the D.F. Code of Civil Procedure, which governs the procedural steps for such requests, did provide, in Article 138, for marginal annotations to birth certificates in order to correct errors, this mechanism is insufficient for a transgender person, where the order authorizing the name and sex change allowed only for a marginal annotation and not a new birth certificate. This is so because **an adjudicator must interpret the law so as to fill any legal lacuna with a general principle of law that can resolve the petitioner’s claim constitutionally, under Article 14 of the Mexican Constitution and Article 19 of the Civil Code of the Federal District.** Thus, if the complainant has been diagnosed as intersex (feminine pseudo-hermaphroditism), is transgender, and has undergone sex reassignment procedures including surgery, hormone treatment, and psychological treatment, and, for these reasons, petitions a family court for a new birth certificate with the corrected name and sex so that her legal documents can reflect her lived reality, **it is unconstitutional for the judge to refuse to seek and employ a solution that would vindicate the claimant’s fundamental rights, so as to ensure full respect for her human dignity.”**

Emphasis added. Tesis Aislada; 9a. Época; Pleno; S.J.F. y su Gaceta; Tomo XXX, Dec. 2009; p. 18 Amparo directo 6/2008. January 6, 2009. Eleven votes. Author: Sergio A. Valls Hernández. Secretary: Laura García Velasco. The decision was approved by the full court on Oct. 19, 2009 (No. LXXI/2009).

THE *PRO-PERSONAE* INTERPRETIVE CANON

The *pro-personae* principle essentially facilitates an interpretive dialogue between the Constitution and international treaties, in which we search not for preemption by hierarchy, but for preemption by whichever law or interpretation most favors human rights. Accordingly, the fact that a law or principle is located in the Constitution or in an international treaty is irrelevant when it comes to deciding which principle should prevail.

An interpretation of the law that most favors the rights of persons is one that accepts and reflects the underlying metaphysical claims of human rights concepts, and recognizes that within the process of applying the law itself, structural issues can create an unequal power dynamic between the parties. Thus, the *pro-personae* principle is a tool with which judges can prevent and combat exactly those kinds of inequalities.

See: Gender Equality Office, Supreme Court of Mexico, “El principio pro persona”, Boletín “Género y Justicia”, No. 32, Feb. 2012. Available at: www.equidad.scjn.gob.mx

JUDICIAL DECISIONS THAT CONFRONT SEX STEREOTYPES

“The argument that men have historically served as economic providers for the family and that women have historically been assigned to reproductive roles is no longer a defensible basis for a labor law that treats men and women differently. Women do not just suffer a greater burden in effecting the biological reproduction of our species; they are now also entering the labor market, contributing to our national economy, and supporting their families....Traditional notions of women’s roles must not be allowed to have any impact on the pension benefits to which women’s work entitles them, nor on their family members’ entitlements to the medical and other benefits that accompany those pensions.”

Case T-098/94. Third Appeals Chamber, Constitutional Court of Colombia.

“The social assignment of women to the role of wife and mother of (legitimate) children has precipitated a strict social code of marital and social conduct, which infringes on women’s sexual freedom but not on

men's. Moreover, different social values attach to virginity and sexuality depending on gender. Thus, men's and women's behavior are judged according to different social and moral standards—to the detriment of women's free self-determination.”

Case T-23023/94, Constitutional Court of Colombia.

● RECOGNIZING AND REVEALING GENDER BIAS IN LEGAL INTERPRETATION

Establishing interpretive methods with respect to gender bias is critical if the law is to evolve so as to expand human rights protections. This kind of interpretive effort will both vindicate human rights in immediate cases while also establishing legal precedents that will impact future cases. The following analysis illustrates this:

“Our legal system has arrived at a point at which all arguments that place wives in positions subordinate to husbands must be rejected. Neither ‘protecting the family’ nor managing the ‘moral conduct’ of one of the spouses can authorize one party to violate the fundamental rights of the other. The decision of two individuals to join in marriage in no way implies that either party has renounced any fundamental rights or dignity to any degree.”

Tesis Aislada; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; Tomo XXXIV, Aug. 2011; p. 176.
Amparo directo en revisión 1621/2010. June 15, 2011. Five votes. Author: Arturo Zaldívar Lelo de Larrea. Secretary: Javier Mijangos y González.

• AVOIDING REVICTIMIZATION

In 2005, a transgender woman applied for a new birth certificate that would correctly indicate her name and sex. She had lived most of her life as a woman, and had undergone sex-reassignment surgery; though she had been male at birth and medically diagnosed as intersex. The court of first instance acknowledged the name change and sex change, but did not order a new birth certificate, instead ordering only a marginal annotation of the original. The decision was affirmed on appeal. The petitioner filed an *amparo*, arguing that allowing only an annotation instead of a new birth certificate violated her constitutional rights. (Amparo Directo Civil (6/2008)). The Supreme Court took the case. (3/2008-PS).

In its decision, the Supreme Court quoted the following from the Civil Registry's analysis to show how the use of stereotypical reasoning revictimized a person seeking justice:

"...the petitioner's claims cannot be reconciled with the fact that, as the birth certificate clearly states, the petitioner's parents registered having given birth to a boy named ***, not a girl named ***, and it is legally impossible to retroactively change the personhood status that one had at birth, that status here being MALE."

"Sex reassignment does not change one's underlying genetic information, which is fixed from the moment of conception. Here, the petitioner underwent a process of feminization, in which his body was altered to look more like a woman's. This process included a surgery that consisted of nothing more than changing his genitals from those of a man to those of a transsexual woman; so as to approximate the desired female genitals. We note again that this is only a change in appearance; the surgical technique consists basically of a penile inversion. That the petitioner, who is still genetically a man, made the decision to undergo this procedure, and now seeks to be fully recognized as a woman due to this aberration, does not give this claim legal merit. While he has had surgery in order to create the appearance of a vagina, he nevertheless retains male genitalia; he has

not lost his penis, it simply changed forms when he went under the knife; and although he has breasts, these are simply implants – never in his life will he be able to use these specifically female body parts for their natural hormonal functions.”

“...transsexuality is a psychological problem; not a genetic or hormonal one. As such, it would be improper to order a new birth certificate with a new sex indicated solely because of a psychological problem or feeling, as is the case here. This is because a male person can change his physical appearance, but his body will never stop producing male hormones, and genetically his body will continue to be male for the rest of his life.”

The Supreme Court squarely rejected the above analysis, and held that a new birth certificate should be issued to the complainant to include the revised data that she had requested.

Moreover, the Supreme Court established an analytic approach that both vindicated the rights of the claimant and will resonate in cases beyond this one. The Court reasoned as follows:

“In terms of the objective and subjective features that define a person, when it comes to sexual or gender identity, subjective factors (feelings, projections, ideals) play a much more important role than do physical or morphological characteristics (objective factors). The complexities of human nature give each individual the ability to formulate and develop his or her own sense of personhood based upon his or her individual self-concept. Psychosocial sexual identity must trump morphological sex if we are to fully respect transgender persons’ rights to sexual and gender identity. Those are aspects of personhood which, to a great extent, define a person’s sense of self, as well as how he or she is seen by society.”

Tesis Aislada. 9a. Época; Pleno; S.J.F. y su Gaceta; Tomo XXX, Dec. 2009, p. 20. Amparo directo 6/2008, Jan. 6, 2009. Eleven votes. Author: Sergio A. Valls Hernández. Secretary: Laura García Velasco. The full court approved the foregoing opinion on Oct. 19, 2009. (No. LXXI/2009).

▲
“When a transgender person undergoes a sex reassignment, revising the name and sex on her identification documents has wide-ranging effects for both her private and public life. Those data and the documents on which they appear may also implicate the legal rights of others, and the public order, as can occur when that information relates to marriage, inheritance, employment relations, military service, parental rights, contracts, criminal records, *etcetera*. However, third parties’ rights, like the public order, can be protected by legal means that do not infringe on or violate any person’s fundamental rights. The alternative would be to infringe quite severely on the transgender person’s right to freely develop her personality, the right to personal and sexual identity, and the right to health, in its holistic sense. To do otherwise would also infringe on the right to form one’s own self-concept, the right to privacy and to private life, and would thus implicate the rights to human dignity and to non-discrimination. This is because having one’s personhood fully recognized – which starts by having one’s name and sex properly recognized – is what enables one to be seen, in all aspects of life, as who one really is, and to have one’s very existence legally recognized.”

Id. at 17.

“If a transgender person has undergone medical, cosmetic, and surgical treatment so as to physically and psychologically change his or her sex, but his or her birth name and birth sex remain on his or her documents – including on the birth certificate – and all that is allowed is a marginal note authorizing the name- and sex-change, this constitutes a violation of the fundamental rights to human dignity, to equality and non-discrimination, to privacy, to private life, to self-concept, to personal and sexual identity, to the free formation of personality, and to health. This is so because a marginal annotation forces the person, in even the most basic of activities, to be reminded of and to reveal her pre-transition status, which, without any accompanying means to protect against it, will eventually lead to discrimination.”

Id. at 18.

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For more information about this case, please see the “Casos Paradigmáticos” section of www.equidad.scjn.gob.mx.

Next, we quote from selected judicial opinions in which a gender perspective was utilized in the reasoning and analysis phase:⁶⁶

THE USE OF STEREOTYPES IN CHILD CUSTODY DECISIONS

INTER-AMERICAN COURT OF HUMAN RIGHTS, FORNERON & DAUGHTER V. ARGENTINA

“93. Regarding the circumstances prior to the birth, the judge did not indicate what implications the supposed absence of love between the child’s parents in the past or the absence of “a formal relationship of more than 12 months” between them, would have on the relationship of a father and daughter, and did not justify how these elements would prejudice the well-being and development of M, or why this prevented a father from exercising his parental role. In addition, he did not analyze the reasons why the biological mother opposed the surrender of the child to her father, or why the latter could not take care of or collaborate with the pregnant mother, especially when the initial surrender of the newborn to the married couple B-Z occurred irregularly and has even resulted in the filing of criminal actions based on the possible surrender of the child in exchange for money. In addition, the said judges referred to Mr. Fornerón’s supposed indifference or passivity towards the pregnant woman, one of them praising the conduct of a mother

⁶⁶ Original footnotes from the quoted opinions are omitted.

who, ignoring the claims of the biological father, decided to surrender her newborn daughter to another family, presumably in exchange for money. In addition, he suggested that the mother's decision arose from the conduct of the biological father when, as has been indicated Mr. Fornerón advised the mother that he would take care of the child ... The Court considers that, in the instant case, the unilateral decision of a woman that she is not in conditions to assume her role of mother, cannot constitute grounds for the judicial authority in question to deny paternity."

"94. To the contrary, the Court observes that these assertions correspond to preconceived ideas about the roles of a man and a woman with regard to certain reproductive processes or functions in relation to a future maternity and paternity. These notions are based on stereotypes indicating the need for eventual ties of affection or a supposed mutual desire to form a family, the presumed importance of the "formality" of the relationship, and the role of the father during pregnancy, who should provide care and attention to the pregnant woman, because if these assumptions do not exist, a lack of capacity or aptness of the father will be presumed as regards his role in relation to the child, or even that the father was not interested in providing care and well-being to the child."

"96. The considerations of the first instance judge also reveal a preconceived idea of what it is to be a single parent, because Mr. Fornerón's capacity and possibility of fulfilling the role of father was questioned and conditioned [on] the existence of a wife. The single status of Mr. Fornerón, compared by one of the judges to "the absence of biological family," used as grounds for legally depriving him of performing his role as a father, constitutes the denial of a basic right based on stereotypes about the capacity, qualities or attributes required to exercise single parenthood, without considering the specific characteristics and circumstances of the father who wishes, alone, to fulfill his role as a father."

“100. The judicial decisions did not ensure the best interests of the child and the rights of the father, and were based on assertions that reveal a predetermined idea about the circumstances in which her paternity occurred, and that a single parent cannot assume responsibility for a child.”

STRUCTURAL INEQUALITY BETWEEN MEN AND WOMEN AND ITS MANIFESTATIONS IN THE LEGAL CONTEXT

CONSTITUTIONAL COURT OF COLOMBIA, CASE C-804/06

“For much of human history, it was seen as unremarkable that only men could participate in politics. Men and only men took part in the active life of society – they set goals, initiated projects, and laid the groundwork for these to be achieved. It is obvious, then, that men’s creations are made, par excellence, in a human image, and the legal realm is no exception. But the primary point of reference for these creations has long been male. Thus, the ‘male’ human is thought of as both the positive and the neutral human subject...”

RECOGNIZING WOMEN’S WORK AND THE “SECOND SHIFT”

CONSTITUTIONAL COURT OF COLOMBIA, CASE C-410/94

“Even today, women’s increasing participation in the labor force has not relieved women of having to do the domestic work that has traditionally been women’s exclusive burden. This unpaid, unrecognized labor is done without help. It predates the existence of the formal economy, and continues to exist today at the margins of that economy. It is the complex and diverse work of homemakers, related to their “reproductive and caregiving” function. It begins with gestating and caring for children, includes producing and preparing food, providing services, and extends to cleaning the house as well as caring for the sick or disabled. In addition to being unpaid, this work is also unacknowledged as actual work – including by the very women who do it – who tend to think of “work” as synonymous only with remunerative employment outside the home.

The burden of domestic labor, invisible, diffuse, or seen as trivial, usually corresponds to a woman's reproductive period.

Domestic work plays an instrumental role in the functioning of our economy; in the socialization, care, and reproduction of the labor force. But because this work has been traditionally devalued, policy planners continue to ignore this type of female labor, which, according to some calculations, accounts for somewhere between one-fifth and one-third of GDP. Further, although women are participating with increasing frequency in the labor force, they must often subordinate that work to their household responsibilities. As such, their domestic work continues to go uncalculated in the social security rolls, thus limiting the benefits and entitlements that women receive. Clearly, in a society in which women's roles are, to a large extent, viewed in contrast to those traditionally associated with success and earning power, what we consider productive work depends less on the activity being performed than on the individual performing it.

Adding the domestic work that women do to the remunerated work that women do gives us an idea of the complexity and heterogeneity of the various functions that women in the labor force are required to perform today. Moreover, acknowledging this work allows us to grasp the specificity and intensity of the various tasks that women do. Because women must operate in these multiple spheres, women are forced to work a "second shift," as they frequently dedicate a substantial amount of time to domestic tasks both before, and after, their shifts at their paying jobs."

THE CONCEPT OF "FAMILY"

INTER-AMERICAN COURT OF HUMAN RIGHTS, FORNERON & DAUGHTER V. ARGENTINA

"98.The Court has stated previously that the American Convention does not establish a closed concept of family and, in particular, it does not

protect only a “traditional” model of the family. In addition, the Inter-American Court has established that the term “family members or next of kin” should be understood in its broadest sense, including all those persons connected by a close relationship. There is nothing to indicate that single-parent families cannot provide children with care, support and affection. Every day, the reality shows that not every family has a maternal or paternal figure, and this does not prevent the family from providing the necessary well-being for a child’s development.

99. In addition, this Court has established that a decision based on presumptions and stereotypes about parental capacity and aptness to be able to guarantee and promote the well-being and development of the child is not sufficient to ensure the best interests of the child. In addition, the Court considers that the best interests of the child cannot be used to deny the right of his or her father owing to his civil status, in favor of those who have a civil status adjusted to traditional concepts of the family.”

WHEN GENDER STEREOTYPES IMPEDE ACCESS TO JUSTICE INTER-AMERICAN COURT OF HUMAN RIGHTS, GONZÁLEZ *ET AL.* V. MEXICO (“COTTON FIELD” CASE)

“208. The Tribunal considers that, in the instant case, the comments made by officials that the victims had gone off with a boyfriend or that they led a disreputable life, and the use of questions about the sexual preference of the victims constitute stereotyping. In addition, both the attitude and statements of the officials reveal that, at the very least, they were indifferent towards the next of kin of the victims and their complaints.”

“400. In addition, it has been established that, when investigating this violence, some authorities mentioned that the victims were “flighty” or that “they had run away with their boyfriends,” which, added to the State’s inaction at the start of the investigation, allows the Tribunal to conclude that, as a result of its consequences as regards the impunity

in the case, this indifference reproduces the violence that it claims to be trying to counter, without prejudice to the fact that it alone constitutes discrimination regarding access to justice. The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice. In this regard, the Court underscores the words of the Inter-American Commission in its thematic report on “Access to Justice for Women Victims of Violence,” to the effect that: “[t]he influence exerted by discriminatory socio-cultural patterns may cause a victim’s credibility to be questioned in cases involving violence, or lead to a tacit assumption that she is somehow to blame for what happened, whether because of her manner of dress, her occupation, her sexual conduct, relationship or kinship to the assailant and so on. The result is that prosecutors, police and judges fail to take action on complaints of violence. These biased discriminatory patterns can also exert a negative influence on the investigation of such cases and the subsequent weighing of the evidence, where stereotypes about how women should conduct themselves in interpersonal relations can become a factor.”

ON RAPE

INTER-AMERICAN COURT OF HUMAN RIGHTS, ROSENDO CANTÚ *ET AL.* V. MEXICO

“109. The Court, following international jurisprudence and taking into account the provisions of said Convention, has considered previously that sexual violence is committed by means of acts of a sexual nature, committed on a person under circumstances against their will, and that in addition to involving physical invasion of the human body, they may include acts which do not involve penetration or even any physical contact. In particular, rape constitutes a paradigmatic form of violence against women, and its consequences go far beyond affecting the victim.”

“95 ... The Court considers that the fact that she did not indicate that she had been raped in the two initial medical consultations should be contextualized to the circumstances of the case and of the victim. First, sexual assault is a type of crime that the victim does not tend to report. This occurs specifically in indigenous communities, given the cultural as well as social particularities that the victim must face (supra para. 70), in some cases, as in the present, because of fear. Likewise, [Ms.] Rosendo Cantú, at the time the facts occurred, was a girl child who was forced to live an experience in which, in addition to being physically and sexually assaulted, she received death threats against her community by the soldiers who attacked her. Based on this, it is the [opinion and] criteria of the Court, that not having told the first doctor that she was raped and not having indicated that she was raped by soldiers at the second doctor’s visit, does not discredit her statements regarding the existence of said rape. Lastly, said omission may be due to the lack of sufficient safety or trust to relate what had happened.”

“89. ...First, the Court finds it evident that rape is a particular type of violence, which is generally characterized by taking place in the absence of persons other than the victim and the aggressor or aggressors. In view of the nature of this type of violence, one cannot await graphic or documentary evidence, thus the victim’s testimony becomes the fundamental proof of that which occurred.”

“91. ...Of the various statements made by Mrs. Rosendo Cantú, despite some imprecisions, it is noted that there is consistency among the narrations regarding the rape. The Court considers that it is not unusual that the retelling of acts of this nature contain some aspects that could be considered, a priori, lack of precision in the narration. In this regard, the Court takes into consideration that the facts narrated by [Ms.] Rosendo Cantú refer to a traumatic moment which she suffered, and the impact, when recalling it, can lead to determined imprecision; said statements were rendered at different moments between 2002 and 2010. The Court also highlights that, in addition, in the present case at the time of the facts [Ms.] Rosendo Cantú was a child.”

“118. On the other hand, the Court finds that rape may constitute torture even when it is based in a single fact alone and takes place outside State facilities. This is so because the objective and subjective elements that classify an act as torture do not refer either to the accumulation of facts or to the place where the act is committed, but to the intention, the severity of the suffering, and the purpose of the act, requisites that, in the present case, have been fulfilled. Based on the aforementioned, the Court concludes that the rape in the present case entailed a violation of the personal integrity of Mrs. Rosendo Cantú, constituting an act of torture pursuant to Article 5(2) of the American Convention and Article 2 of the Inter-American Convention to Prevent and Punish Torture.”

ON MATERNITY RIGHTS IN THE EMPLOYMENT CONTEXT

AMPARO 17/2003, FIRST CHAMBER, CONSTITUTIONAL COURT OF SPAIN.

“...the protections owed to women are limited neither to their physical health during and after pregnancy, nor to the mother-child relationship during the postpartum period. Instead, these protections extend to the developing and evolving employment relationship, and require that the employer refrain from using its organizational or disciplinary authority in a discriminatory manner so as to impose adverse physical or psychological health consequences on women. The scope of this protection extends to all of the employment and labor rights to which women are entitled as employees. This means that any discrimination with regard to those rights and prerogatives, for reasons of pregnancy or maternity, is prohibited.”

“...sex-based discrimination does not refer only to discriminatory treatment that is premised solely on the basis of sex per se. It also includes treatment that is discriminatory on the basis of characteristics or circumstances that are directly and unequivocally related to sex. For instance, it is an incontrovertible biological fact that pregnancy is something that only happens to women. Thus, different treatment on the basis of pregnancy is a form of sex discrimination.”

“...informing the employer [of the pregnancy] is not required, as pregnancy is the kind of fact that exists within the employee’s zone of privacy. The employee is not obligated to inform the employer of her pregnancy if it has no impact on her ability to discharge her job-related duties.”

AMPARO 92/2008. FIRST CHAMBER, CONSTITUTIONAL COURT OF SPAIN.

“...protecting the biological status and physical health of the female employee must never be at odds with her employment rights. As such, any professional devaluation or disadvantage caused by pregnancy or subsequent maternity should be presumptively considered to be a form of direct sex-based discrimination.”

“...the risk of pregnancy- and maternity-related job loss is probably the greatest affront – along with pay inequality – to gender equality in the employment sphere.”

ON THE RIGHTS TO FREE DEVELOPMENT OF PERSONALITY, PRIVACY, SELF-IMAGE, PERSONAL IDENTITY, SEXUAL IDENTITY, & HEALTH

TESIS AISLADAS (NON-BINDING OPINIONS) ARISING OUT OF AMPARO DIRECTO 6/2008. SUPREME COURT OF MEXICO.

“The right to the free development of personality necessarily entails the rights to personal, sexual and gender identity. This is because these forms of identity inform how an individual projects herself within both the personal and societal spheres. Thus, a transgender person’s decision to undergo sex reassignment in order to align her physical sex with her psychosocial gender, so as to live within the gender with which she fully identifies – and be recognized as such by all others – is part of the free development of personality. Such a decision is an expression of her individuality with respect to sexual and gender self-perception, which decisively influences her life’s project and every relationship he or she has within society.

“Article 1 of the Mexican Constitution provides that all people are equal before the law and shall not be discriminated against on the basis of ethnicity, nationality, race, sex, or religion, nor suffer any violation of their human dignity as a result of any other personal or social condition. This provision, along with those included in the international human rights documents ratified by Mexico, demonstrate the primacy of human dignity. Every human being is possessed of an inherent dignity that must be respected in all cases. The right to have this dignity respected is absolutely fundamental, and serves as the foundation and precondition for all other human rights. The rights to live in and with human dignity, and to have that dignity acknowledged, are indispensable prerequisites if individuals are to be able to fully and completely develop their personalities. Further, these are the rights from which all other rights flow, including, inter alia, the right to life, to physical and psychological integrity, to honor, to privacy, to a name, to self-image, to the free development of the personality, and to marital status. Even when these highly personal rights are not expressly laid out in the federal Constitution, they are implicit in the international treaties ratified by Mexico. In any event, these rights must be understood to emanate from the fundamental right to human dignity, because it is only by fully respecting all of these rights that we can truly see a human being in all of her dignity.”

“Necessarily included among these personal rights are the rights to privacy and to self-image, as well as to personal and sexual identity. The first of these should be understood as an individual’s right to keep certain aspects of her life private, and thus she has the right to decide whether or not certain information regarding her self, her family, her thoughts or feelings shall be made public. The right to self-image should be understood as the right of an individual to freely decide if, when, and how she might choose to reveal herself to others. Personal identity should be understood as the right of all persons to be themselves, both in their own eyes and in the opinions of others; that is, to control the way one sees herself and how one presents that self to others in terms of physical and internal characteristics, and in terms of actions that individualize and identify her within society. Sexual identity should be understood as the way each

individual is perceived by herself and by society, not only in terms of sexual preference but also, and crucially, in terms of how she sees herself, based on her deepest feelings of belonging, or not belonging, to the sex to which she was legally assigned at birth. Further, because individuals will project that highly personal and individualized sexual identity into all spheres, both private and public, sexuality becomes an essential element of an individual and her psyche. Sexual self-determination pertains to the private sphere, a part of life that one may wish to keep outside the bounds of third parties' awareness or public knowledge. Because they constitute inherent human rights that may not be infringed upon by others, these rights defend and affirm the human condition. They may be invoked to defend against incursions upon privacy, as well as to demand that the state prevent future intrusions. While their scope is not absolute, an infringement of these rights may only be justified where some supervening interest has been established by law."

"Human dignity is an elemental and fundamental right recognized by the Mexican legal order. This right precipitates other personal and individual rights, including the right of each person to choose, freely and independently, her life's project. Accordingly, and in line with the scholarship and with the holdings of courts from other countries, to recognize this right is to appreciate the natural faculty of all persons to be, individually, who they desire to be, without coercion or unjustified control, so as to facilitate a person's attaining the goals or objectives that she has chosen in accordance with her values, ideas, hopes, preferences, et cetera. Thus, the right to free development of the personality includes, inter alia, the freedom to marry or not to marry; to have children, to control one's family size, or not have children at all; to choose one's personal appearance; to choose one's profession or work activities; as well as free choice in the sexual context. All of those are facets of how a person might choose to present herself and live her life. Thus, those choices belong to the individual alone."

"We understand the right to health to mean the right to pursue overall well-being, in its physical, mental, emotional, and social respects. This

means that the surgical, psychological, and hormonal treatment that a transgender person undergoes in order to complete a sex reassignment and thus live life as herself are not enough to allow her to effectively pursue well-being, if she cannot also legally change the sex indicated on her legal documents so that she can be identified as who she truly is. Accordingly, new identity documents must be issued. To do otherwise, and to require such a person to show documents that revealed her status as transgender, would thwart her ability to be recognized as who she really is, and would wreak havoc in her everyday life, undoubtedly and blatantly affecting her emotional or mental state, and as such, violating her right to health.”

ON THE DEFINITION OF REPRODUCTIVE FREEDOM

INTER-AMERICAN COURT OF HUMAN RIGHTS,
ARTAVIA MURILLO *ET AL.* (IN VITRO FERTILIZATION) V. COSTA RICA.

“150. ...the right to private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right...The right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, de iure or de facto, to exercise the reproductive decisions that correspond to each individual.”

IS INCLUSIVE LANGUAGE NECESSARY IN JUDICIAL OPINIONS WITH A GENDER PERSPECTIVE?

In the law, words and their meanings are fundamental. Written judicial decisions serve as the primary means of communication between those who decide cases and those who have been party to a dispute or who have had their human rights violated. Judicial decisions are a manifestation of the transformative power of words.

The choice between one word and another in order to name a situation is determined by an evaluation or implicit judgment of that situation. For example, in the following opinion, the court refers to maternity leave as a “forced break.” This suggests that the court views the labor of maternity and motherhood as actually analogous to a “break,” and that this occurs in a “forced” manner, presumably meaning on the employer’s part.

“Article 123, part B, sub-section c, of the Mexican Constitution provides, among other protections and guarantees for female workers, the right to **forcibly enjoy a one-month break before, and two months after, the due date**, along with the right to be paid her full salary and to retain her job, in addition to any other rights and prerogatives pertaining to the employment relationship. This right...is meant to ensure social protections for motherhood which, in turn, are meant to protect the health of the woman and her offspring, ultimately establishing better conditions for the favorable development of the family.”

Emphasis added. Fifteenth panel on employment law, First Circuit. Amparo en revisión 114/2011. Ana Elena Torres Garibay *et al.* Feb. 3, 2012. Unanimous decision. Author: Rosa María Galván Zárate. Secretary: Susana Aurora González Caballero. .

The Constitutional Court of Colombia (cases C-037/96 and C-804/06) has held that legal language must be infused with the principles and values that animate the Constitution. As such, the Court explained that entities with the power to make law must “always utilize language that neither establishes unjustified gender discrimination nor ignores life choices founded on the principle of human dignity and on the right to the free development of personality.”

The Court added:

“It is not surprising, of course, that the state of invisibility, subordination, and discrimination to which women have been subjected for years upon years is also manifest in the ways in which concepts of inclusion and exclusion have been defined in legal language. This, in turn, has generated a patriarchal culture that was, and continues to be, reflected in legal language and legal culture...”

▲ It is obvious, then, that legal language can use its influence either to maintain women's subordination and unjust discrimination against them – thus keeping women from enjoying their fundamental constitutional rights – or can transform the prevailing state of affairs and facilitate real and effective equality between women and men." (Case C-804/06).

Certainly, changing the ways we use language will not automatically result in real-world equality. However, the transformative potential of language can be a tool with immense symbolic power for those who write judicial opinions that strive to vindicate the right to equality.

See: Gender Equity Office, Supreme Court of Mexico, "Lenguaje incluyente," Boletín "Género y Justicia," No. 25, July 2011. Gender Equity Office, Supreme Court of Mexico, "El poder del lenguaje en las sentencias," Boletín, "Género y Justicia," No. 26, Aug. 2011. Available at: www.equidad.scjb.gob.mx

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C.5. Remedies

The central point of reference when it comes to deciding remedies must be the victim. The victim's understanding of, and participation in, the process guarantees that the remedies will adequately meet her needs. Moreover, under Article 5 of the General Victims Law (Ley General de Víctimas), judges must make necessary efforts to ensure that remedies are comprehensive and transformative: that is, remedies should "contribute to the elimination of the patterns of discrimination and marginalization that may have been behind the facts in the particular case."

In this sense, the judge must make the following inquiries:

- ❶ Did any party suffer disproportionate harm on the basis of sex, gender, or sexual preference/orientation?
- ❷ What type of remedies could best provide redress for this kind of different impact?
- ❸ If we identified power asymmetries and structural inequality, what remedies would be most useful in undoing those asymmetries and inequalities?
- ❹ Does the remedy we selected reflect stereotyped or sexist notions?
- ❺ Given the sex, gender, and sexual preference/orientation of the victim -- and the type of harm suffered -- what remedy would be the most appropriate way to make the victim whole?
- ❻ When deciding on the form of redress, are we taking the victim's desires into account?
- ❼ How did the problem affect the familial, workplace, and community roles and responsibilities of the victim? How could the remedy selected address those impacts?
- ❽ Is there any kind of collective damage in the case? Is it possible to redress it?

- 9 Did anyone suffer a harm based on any kind of group membership?
- 10 Will the remedies we selected provide redress for all of the different types of harm that we identified?

Under Article 26 of the General Victims Law, victims “have the right to be made whole in a manner that is timely, comprehensive, differentiated, transformative, holistic, and effective, in light of the type of damage the victim has suffered as a consequence of the crime or the human rights violations, or in response to other harms the victim has incurred by virtue of the actionable facts. Remedies may include restitution, rehabilitation, compensatory damages, measures of satisfaction, and measures to ensure non-repetition.”

Next, in Article 27, the law explains what each of these remedial methods does:

I. Restitution aims to return the victim to the situation she was in prior to the commission of the crime or the human rights violations; *(see article 61)*

II. Rehabilitation aims to facilitate the victim’s recovery from the harmful impacts of the crime or the human rights violations; *(see articles 62 and 63)*

III. Compensatory damages are meant to appropriately and proportionally compensate the victim in light of the severity of the rights violations or criminal act, taking into account the circumstances of each case. Compensatory damages should account for all of the harm, suffering, and calculable economic loss that occurred as a result of the crime or rights violations. *(see articles 64 - 72).*

IV. Measures of satisfaction are an effort to recognize and reestablish the dignity of victims; *(see article 73).*

V. Measures to ensure non-repetition seek to make sure that the criminal conduct, or the human rights violations that occurred, do not occur again. *(see articles 74 - 78).*

VI. For the purposes of this law, **collective reparation** relates to the rights held by groups, communities, or social organizations whose group members’ have had their individual rights violated, or the right held by such groups when they have incurred collective damage. The restitution of collective rights shall be oriented toward rebuilding the social and cultural fabric, in recognition of the legal institution’s capacity to guarantee the enjoyment, protection and promotion of human rights to affected *pueblos*, communities and groups.

“The Court recalls that the concept of “integral reparation” (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, **bearing in mind the context of structural discrimination in which the facts of this case occurred**, which was acknowledged by the State (*supra* paras. 129 and 152), **the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification**. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable...”

In line with that analysis, the Inter-American Court required remedies that do the following:

“(i) refer directly to the violations declared by the Tribunal;
(ii) repair the pecuniary and non-pecuniary damage proportionately;
(iii) do not make the beneficiaries richer or poorer;
(iv) restore the victims to their situation prior to the violation insofar as possible, to the extent that this does not interfere with the obligation not to discriminate;
(v) are designed to identify and eliminate the factors that cause discrimination;
(vi) are adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women, and
(vii) take into account all the juridical acts and actions in the case file, which, according to the State, tend to repair the damage caused.”

Emphasis added. *Gonzalez et al. v. Mexico*, (“*Cotton Field*” / “*Campo Algodonero*” Case), I.A.Ct.H.R., paras 450 and 451.

A judicial decision is a type of remedy in and of itself, as the Inter-American Court of Human Rights has recognized. In the remedies sections of its cases against Mexico,⁶⁸ the Court has made statements such as: “[t]his opinion is a form of reparation.” This kind of statement recognizes the symbolic power for victims of the fact that, after a long quest for justice, an international tribunal has recognized that the state violated their human rights. The Court’s formal recognition of what happened to the victims, and the Court’s application of legal consequences to those facts, are acts of major social significance. Those judicial acts not only shine a light on the particular circumstances surrounding a human rights violation, but also send a clear message that these sorts of things matter and have consequences.

The following remedial measures called for by the Inter-American Court of Human Rights are examples of how remedies can utilize a gender perspective.⁶⁹

INTER-AMERICAN COURT OF HUMAN RIGHTS FERNANDEZ ORTEGA *ET AL* V. MEXICO.

“251. The Court finds, as it has in other cases, that a measure of reparation must be ordered that provides appropriate care for the physical and psychological effects suffered by the victims, which attend to their gender and ethnicity. Consequently, having verified the violations and the harm suffered by the victims in the present case, the Court decides that the State is obliged to provide them, free of charge and immediately, with the medical and psychological care they require. Prior, clear, and sufficient information should be offered to the victims so as to obtain their consent. The treatments should be provided for the time that is necessary, and should include the provision of medication, and where applicable, transportation, interpreters, and other costs that are directly related and strictly necessary.

⁶⁸ Castañeda Gutman v. Mexico (Aug. 6, 2008); González *et al* v. Mexico (“Cotton Field,”) *supra*; Radilla Pacheco v. Mexico, *supra*; Fernandez Ortega *et al* v. Mexico, *supra*; Rosendo Cantú *et al* v. Mexico.

⁶⁹ Original footnotes in the quoted cases omitted.

252. In particular, the psychological or psychiatric treatment must be provided by State personnel and institutions specialized in attending to victims of acts of violence such as those that occurred in this case... When providing this treatment, the specific circumstances and needs of each victim must be considered, so that they are offered individual and family treatment, as agreed upon by each of them, and following an individual evaluation. Lastly, this treatment must be provided, insofar as possible, in the institutions nearest to their place of residence.”

INTER-AMERICAN COURT OF HUMAN RIGHTS

ATALA RIFFO & DAUGHTERS V. CHILE

“271. ...the Court orders the State to continue implementing continuous educational programs and training courses in: i) human rights, sexual orientation, and non-discrimination; ii) protection of the rights of [the] LGBTI community; and iii) discrimination, overcoming gender stereotypes of LGBTI persons and homophobia. The courses must be directed at public officials at the regional and national levels, and particularly at judicial officials of all areas and levels of the judicial branch.

272. In these programs and training courses, special mention must be made of both the present Judgment and the various precedents of the corpus iuris of human rights related to the prohibition of discrimination based on sexual orientation and the obligation of all authorities and officials to guarantee that all persons, without discrimination based on sexual orientation, may enjoy each and every one of the rights established in the Convention. To this end, special attention should be paid to norms or practices in domestic law which, either intentionally or because of their results, may have discriminatory effects on the exercise of rights by persons belonging to sexual minorities.”

INTER-AMERICAN COURT OF HUMAN RIGHTS FORNERON & DAUGHTER V. ARGENTINA

“156. In this case, the Court determined that the domestic proceedings culminating in the decision to hand over M for guardianship and subsequent adoption violated the rights to judicial guarantees, judicial protection, protection of the family, and the rights of the child recognized by the American Convention...Consequently, in principle, this Court should annul the domestic decisions taken in the said proceedings. However, the Court cannot overlook the exceptional aspect of this case, which is the circumstance that a bond has been established between the child and her adoptive parents and the social environment in which she has been immersed for almost 12 years.

160. Based on the above, the Court finds it necessary that, as a measure of reparation, the State must establish immediately a procedure designed to establish a bond between Mr. Fornerón and his daughter. This involves a process of bringing them together gradually in order to start building a relationship between the father and daughter who, in almost 12 years, have only met once for about 45 minutes. This process should be a mechanism for M and her father to establish a bond by means of periodic meetings and should be designed so that, in the future, they can develop and exercise their family rights, such as the right to live together, without this implying a conflict with the adoptive family of M...”

Certainly, the scope of a judicial body’s powers and jurisdiction will delimit the nature and extent of the remedies it can provide. Independent of those limits, however, remedies that must be informed by a gender perspective. This means that remedies must include transformative measures meant to address the context and structures that permitted the violation(s) to take place. In this way, the responsibility of judicial actors goes beyond merely resolving concrete cases or disputes. Judicial actors must also use the decision-making process as an opportunity to, with due judicial independence and impartiality, contribute to the building of a more just society.

If a gender perspective is the conductive fiber of the deliberative process that leads to the resolution of a case, it is highly probably that the pursuit and implementation of that resolution will be adequately realized.

D. What is the Purpose of a Gender Perspective in Adjudication?

Throughout this Protocol we have used examples to show how introducing a gender perspective into legal reasoning can lead to resolutions that may have come out differently without the benefit of such a perspective. The result of judicial decision-making with a gender perspective is access to justice for those who, because of their biological, physical, sexual, gender, or contextual situation, are at risk of having their rights go unrecognized. As such, a gender perspective vindicates the rights of victims and avoids secondary victimization.

Judicial opinions and decisions with a gender perspective are part of a strategy to combat impunity, discrimination, and inequality – and they send a message that human rights violations can be prevented, recognized, and remedied. In this way, the jurist assumes an active role in effecting the transformations that are needed if we are to build a society that guarantees to all persons the conditions necessary to design and undertake a life's project with dignity.

Legal reasoning with a gender perspective leads to holdings and outcomes that will generate confidence in the judiciary and thus obviate the need for cases to be escalated to the national high court or to international tribunals. Moreover, deciding cases this way will establish precedents on gender equality issues. As we will see in the next section, precedent cases are of major importance.

- **Secondary victimization** “means
- victimization that occurs not as a direct result of a criminal act but through the response of institutions and individuals to the victim.”

Emphasis added. Justice in Matters Involving Child Victims and Witnesses to crime. Model Law and Related Commentary. United Nations Office on Drugs and Crime (UNODC); United Nations Children's Fund (UNICEF); International Bureau on Children's Rights. Available at http://www.unicef.org/albania/Justice_in_matters.pdf.

- All acts or omissions of public servants that discriminate or have the result of delaying, thwarting, or impeding women's enjoyment and exercise of their human rights, including women's ability to benefit from public policies designed to prevent, address, investigate, punish, and eradicate various forms of violence, must be considered acts of institutional violence, and their consequence is the secondary victimization of women who have attempted to seek justice.

See Articles 18, 19, and 20 of the Women's Access to a Life free from Violence Act (Ley de Acceso a las Mujeres a una Vida Libre de Violencia).

E. The Importance of Precedent

“As the nineteenth century was the age of the Legislature, and the twentieth century was the era of the Executive, the twenty-first century will be – according to neoconstitutionalist predictions – the age of the Judiciary.”

Alfonso Santiago, *Neoconstitucionalismo*. Available at: <http://ancmvp.org.ar/user/files/02neoconstitucionalismo.pdf>

As we have seen throughout this Protocol, the decisions handed down by international and national high courts illuminate an understanding of what the law means, and what it means to impart justice. A gender perspective enables this understanding to evolve progressively.

In addition to the fact that they are binding on lower courts, precedent decisions are the means by which legal norms come alive, are adapted to new realities and new social needs. Thus, through precedent decisions, jurists do more than simply resolve individual cases.

Jurists and other adjudicators hold in their hands an enormous responsibility, and possess a great power to effect change. Therefore, in cases where a gender perspective is relevant, jurists must pause and ask themselves questions such as “what role will this decision play in defining right-to-equality standards? Will this decision advance the struggle against sex-, gender-, or sexual orientation-based discrimination?”

Therein lies the importance of paying close attention to how a final decision is reached, of making the process of gender-mainstreamed legal analysis visible, of generating precedent opinions that will lay the groundwork for similar cases, and of encouraging other jurists to follow them.

Another important tactic can be the use of dissenting or concurring opinions, which can be another forum in which the jurist can present her arguments in favor of human rights.

“The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice.”

Gonzalez et al v. Mexico (“Cotton Field” case), I.A.Ct.H.R., para. 400, Nov. 16, 2009.

In their dissents, the Puerto Rican justices Jaime Benito Fuster Berlingeri, Federico Hernández Denton, and María Naveira de Rodón, as members of the Supreme Court of Puerto Rico, expressed their disagreement with the majority's holding, and articulated an alternative interpretation that vindicated the rights of the victim and advanced a gender perspective. The following are selected quotations from their dissenting opinions:⁷⁰

“Once again, this Court has lost a historic opportunity to hand down an opinion that would be at the social vanguard, and which would impart justice to a segment of society whose sexual orientation does not fit the prevailing template in our country.”

“It is utterly clear that the conduct of the accused meets all the elements of the crime. To accept Mr. ***'s argument that the crime did not occur because his acts were against a person with whom he was in a consensual homosexual relationship is to insult to the dignity of this Tribunal and of those who come before it in pursuit of justice.”

“History is on our side. There will come a day when this Tribunal will guarantee to sexual minorities the same rights that it grants to the rest of society, and will rectify the injustice and discrimination caused by today's decision.”

“... where the meaning of a written provision is indeterminate, the judge has the ability to generate law... it has been said that in this sense, the judicial function is a dynamic one, as applying abstract legal concepts to concrete cases inevitably requires a creative effort. This creativity becomes indispensable as we strive to adapt generic commands to the specifics of real-world cases, in all their infinite variety.”

Fernando Silva Garcia, *The Supreme Court as Constitutional Court: The Judicial Creation of Law and the Legal Efficacy of Constitutional Jurisprudence (La Suprema Corte de Justicia de la Nación como Tribunal Constitucional: Creación Jurdicial del Derecho y Efecacia Normativa de la Jurisprudencia Constitucional.)* Available at: <http://biblio.juridicas.unam.mx/libros/6/2559/38.pdf>

⁷⁰ Supreme Court of Puerto Rico, case CC-2002-35, *supra*.

The page features a teal background with several white decorative elements. A vertical line starts from the bottom left, goes up, and then turns right into a horizontal line. Another horizontal line is positioned below the 'VI Checklist' text. In the bottom left corner, there are three concentric white circles. On the right side, there are two large, overlapping, semi-transparent white circles.

VI Checklist

The following checklist covers the methodological content of this Protocol, and should be applicable to any stage of a proceeding and for cases in any substantive area.

A. On initial procedural questions

- ☒ Decide whether special protective orders are necessary.
 - ☒ Analyze whether a claim or issue should be admitted based on gender-sensitive criteria and international human rights standards.
-

B. On the parties involved

- ☒ Identify whether there is an unequal power relationship at play, and if any person involved is facing a situation of vulnerability or of formal, material, and/or structural inequality.
 - ☒ Apply strict scrutiny if suspect classes, such as sex, gender, and/or sexual preference or orientation, are implicated.
 - ☒ Pay particular attention to cases in which two suspect classes overlap – such as sex and race – and as in contexts such as poverty, homelessness, and migration.
-

C. When determining the facts

- ☒ Read and interpret the facts without discriminatory stereotypes, and taking into account any contextual inequality already identified.
-

D. When determining the applicable law

- ✓ Apply the human rights standards and constitutional principles of universality, indivisibility, interdependence, progressivity, and the pro personae canon.
 - ✓ Question the supposed neutrality of laws or norms, and evaluate disparate impacts that facially neutral laws may impose.
 - ✓ Determine whether stereotypes are reflected or relied upon in the law, norm, or in the behavior of authorities, and make sure to combat those stereotypes in the judicial decision.
 - ✓ Establish the proper legal framework by applying the Constitution and the terms of international human rights treaties. (*Control de constitucionalidad y convencionalidad*).
 - ✓ Explain that the decision will take into account the identified inequalities.
 - ✓ Use inclusive language.
 - ✓ To the extent possible, create precedent or persuasive authority on gender issues, in both the reasoning and the holding of the opinion.
-

E. At the end of the proceeding

- ✓ Award holistic and comprehensive remedies that increase the affected person's ability to achieve her life's project, and which demonstrate the symbolic power of judicial decisions. At the same time, establish transformative forms of remedies and reparations.
 - ✓ Ensure that a gender perspective continues to be utilized when the decision is being implemented and when compliance is being monitored, as it was during the previous phases.
-

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