



How is adopting a gender approach enabling National Courts in Colombia and Mexico to drive forward important changes in legislation and practice to tackle root causes of sexual discrimination and inequality?

# LATIN AMERICAN ADVANCES IN INCORPORATING A GENDER APPROACH IN NATIONAL COURT RULINGS

## SUMMARY

The main objective of this Brief is to highlight the possibilities and potential for adopting a gender approach to justice and women's rights. It focuses on three resolutions made by national courts in Mexico and Colombia which have had significant impacts on the interpretation, recognition and protection of women's rights in both law and practice. By providing a new lens through which to evaluate the historical and social context of discrimination and inequality, the gender approach is helping to change traditional legal and societal structures that have historically maintained gender stereotypes and perpetuated asymmetrical power relations. This Brief identifies four common strategies used by Latin American courts to mainstream gender perspectives into judicial rulings, and provides specific examples of cases to illustrate how these strategies have been employed. These mechanisms will be of interest to judges, lawyers, human rights activists and civil society organisations using litigation as a tool for bringing about social change in favour of human rights. The Brief also identifies enabling factors from the region and summarises key lessons.



## TACKLING A COMMON PROBLEM WITH A NEW APPROACH

Worldwide, women are targets of violence and discrimination in a multitude of contexts and spheres, including within the family and community, at work and during armed conflict. Furthermore, violence and discrimination are constants in the lives of many women, sometimes even from before birth and up until old age. Violence in this sense has negative impacts on health, job performance and safety.<sup>1</sup> Manifestations of discrimination

## KEY

### LESSONS LEARNED

The Latin American experience shows that it is possible – though slowly and over time – for national supreme courts to incorporate gender paradigms and standards on human rights as a common practice when judging cases.

Rulings from the highest tribunals have a strong impact on lower courts' jurisprudence, which is why it has been so effective in Latin America when they have adopted a gender perspective to broaden the scope of protection of rights.

<sup>1</sup> Commission on Human Rights. 2003. [The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health](#). United Nations. E/CN.4/2003/58; Commission on Human Rights. 2006. [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](#). Mission to Mexico. E/CN.4/2006/61/Add.4.



and personal experiences depend on factors such as ethnicity, social class, age, sexual orientation, disability, nationality and religion. Some of these are referred to as structural factors because they are generally accepted as 'natural' or are permitted within prevailing social dynamics.

This includes specific activities that may have an impact on reducing inequality gaps between women and men, advancing towards harmonious relations between the sexes and eliminating the roles and stereotypes that translate into discrimination or limitations in exercising rights. In the context of the judicial system, it is vital that national courts understand the complexity of gender relations in order to make rulings which help to reduce inequality gaps and advance women's rights. In Latin America, courts are achieving this by adopting a gender approach to appreciate the context and impacts of cases within the complex reality of social relations (Text Box 1).

#### Text Box 1: What is a Gender Approach?

Gender approaches<sup>2</sup> provide a particular perspective on social relations. As Alda Facio,<sup>3</sup> a Latin American feminist suggests, gender approaches analyse social dynamics and institutions in terms of the impact of gender on people's opportunities, social roles and interactions. Gender affects every aspect of the economic, social, public and private lives of individuals and societies, as well as the different roles ascribed by society to men and women, and the gender approach aims to recognise and understand these impacts.

Differentiating between sex and gender is also included in a gender approach. While sex refers to the biological characteristics of individuals, gender defines traits that are "transformed over time and from one culture to the next, as societies change and evolve".<sup>4</sup>

In legal processes, adopting a gender approach enables cases to be understood in terms of the broader social context and often helps courts to make rulings which provide protection for specific human rights. The use

of a gender approach in judicial rulings therefore demonstrates a court's commitment to recognising and reducing inequalities between men and women. Adopting a gender approach also requires firm commitment from the judiciary to monitor the implementation and impacts of rulings, including on the future rulings of local courts.

## THE LATIN AMERICAN RESPONSE: ADOPTING A GENDER APPROACH TO ENSURE ACCESS TO JUSTICE

Across Latin America, national courts are implementing a range of strategies to integrate gender perspectives into judicial processes.<sup>5</sup> They include, among others:

1. Using definitions that are part of gender and human rights frameworks, such as concepts like patriarchy, subordination, power relations, gender roles and stereotypes.
2. Using legal arguments based on standards of international women's human rights law and international human rights jurisprudence and comparative law.
3. Considering contextual and historical factors of subordination and discrimination. This means not giving an immediate legal response to the case presented, but carrying out deeper analysis in order to consider the potential impact of the ruling on reducing inequality.

Understanding how some of the highest tribunals in Latin America have incorporated human rights and gender paradigms into judicial processes serves different purposes. Firstly, it can facilitate replication in lower courts since this can represent a new approach for providing equal access to justice at the local level. It also serves to demonstrate that a gender approach to law can be used as a means of creating change and can therefore be adopted by other relevant actors such as lawyers and civil society organisations using litigation as a tool for bringing about social change in favour of human rights.

This Brief focuses on three rulings, one made by the Mexican Supreme Court and two by the Colombian Constitutional Court, which include some or all of the strategies set out above. These resolutions are examples of progressive interpretations of women's human rights and demonstrate how a gender approach to justice can help to transform unequal gender relations.

<sup>2</sup> For a broader definition, see: ECLAC. 2010. [User Manual for The Gender Equality Observatory for Latin America and the Caribbean](#). Santiago, Chile.

<sup>3</sup> Alda, F. M. 1992. *Cuando el Género Suena Cambios Trae. Una Metodología para el Análisis de Género del Fenómeno Legal (When Gender Dreams, Changes Come. A Methodology for Gender Analysis as a Legal Phenomenon)*. ILANUD, San José.; See also: Cook, R., Cusack, S. 2010. *Gender Stereotyping: Transitional Legal Perspectives*. University of Pennsylvania Press, Philadelphia.

<sup>4</sup> Food and Agriculture Organization (FAO). 2001. [Agricultural Censuses and Gender Considerations](#). FAO, Rome.

<sup>5</sup> For a broader regional overview, focused in particular on gender violence, see: Inter-American Commission on Human Rights. 2007. [Access to Justice for Women Victims of Violence in the Americas](#). Inter-American Commission on Human Rights, Washington, DC.



## ELIMINATING GENDER STEREOTYPES IN COLOMBIA

### **Case 1: Supporting Female Heads of Household and Reducing Inequality**

Act 82 of the Colombian constitution states that the government is responsible for providing support to female heads of household, understood as women who are single or married, who are socially and economically responsible for either their own or others' young children, and who are incapable or unable to work due to lack of physical, sensory, mental or moral support from the spouse or life partner or due to substantial disability of other household members. The Act recognises the difficulties that women face in gaining access to equal payment for work and access to health services. It also points out the burdensome situation faced by female-headed households, particularly expressed in violence, which has left countless widows, the abandonment of men and indifference regarding birth and care responsibilities. Women are thus forced to take on the responsibility of being the economic support, without discarding cultural patterns confined to the domestic space and to childcare. The Act is also based on the fact that an increasing number of households are headed by young women with dependent children. The Act therefore promotes specific support for female heads of households and benefits for their children.

With these provisions, the Act is intended to support women to access opportunities in all spheres of life, to seek personal development and to guarantee access to certain scarce resources, all the while seeking to preserve decent living conditions for children and people who are cared for by female heads of household. In terms of the special protection that should be provided, the Act gives preference to access to education programmes to dependent children, and also establishes that female heads of household should receive preferential access to different credit benefits for creating employment, as well as housing credits.

The use of the term 'female head of household' is relevant for a gender approach for two reasons. Firstly, it breaks the social stereotype of men as the sole maintainers of the household, and second it demonstrates official recognition of the reality that the number of female-headed households in Colombia is increasing. The use of the term also demonstrates official understanding

of the existence of traditional gender patterns marked by the difference between productive male work and female reproductive work.<sup>6</sup> It is also relevant that in the ruling, the court used concepts such as 'stereotypes', 'prejudices' and 'social inferiority', which are examples of gender language and categories that reveal existing inequalities.

On 21 October 2003, the Colombian Constitutional Court sent down an interesting ruling on the Act, demonstrating a gender approach. It ruled<sup>7</sup> that Articles 2 to 21 of Act 82 from 1993 were unconstitutional since they issue regulations to provide special protection to female heads of family only. The court found that the Act discriminated against the rights of men because the use of the expression *woman* or *women* violated constitutional provisions related to equality. The court therefore declared that the Act should also be applicable to men who are in the same situation as a female head of family.

In addition, the Colombian Constitutional Court confirmed the constitutionality of most of the provisions of the Act, and declared that the benefits of the Act should be extended to minors and disabled children who are dependent on men in the same situation as female heads of family. In this way, the court aimed to move away from gender stereotypes which assume men are the economic providers of a family. In fact, the significance of the court's ruling lies in the fact that it recognises that a man could be in the same situation of vulnerability as a woman, thus calling into question gender stereotypes about men and their ability to provide for their families through productive work outside the home.

The court analysed the use of the concept of female head of family, used in the Act, and considered the contextual and historical experiences of these women. The court defended the overall objectives of the Act, by recognising the existence of a tradition of sexual discrimination that the constituent has sought to abolish through the Act, which is orientated to implementing measures for the transition from formal equality on paper, to real equality in practice.

### **Case 2: Labour Rights and the Right to Non-discrimination**

A second resolution issued by the Colombian Constitutional Court<sup>8</sup> ruled on the application for protection filed by Mrs Diana Maria Ortiz who had been hired by the Engineers Club of Bogota, and whose employment was transferred to the

<sup>6</sup> It is noteworthy that the Colombian Constitutional Court has used similar arguments in rulings on other cases of sexual discrimination (see Resolution T-098/94), declaring that the historical view of males as providers of goods and women as biological reproducers is not a permissible basis for differential labour law. The Colombian Constitutional Court has also declared that the cultural conception of the roles of men and woman should not deprive women of accessing social security benefits. The court has demonstrated a broad understanding of human relationships and gender perspectives by acknowledging the subordinated social position of women and how this drives inequality.

<sup>7</sup> Colombian Constitutional Court Resolution C-964/03.

<sup>8</sup> Colombian Constitutional Court Resolution T-291/05.



cooperative *Idearfuturo*. When Mrs Ortiz became pregnant, her employer stopped providing her monthly pay and revoked her health insurance, leaving her and her unborn child without health coverage. The Engineers Club and the cooperative tried to justify the working suspension for disciplinary reasons, stating that Mrs Ortiz had been reprimanded on several occasions for misconduct towards clients of the club and work colleagues. In the first instance, the judge turned down the application because she considered that the factual conditions did not satisfy legal requirements to grant a *writ of tutela* (writ of protections of fundamental rights). The judge found that the plaintiff had not been fired from her office but had been temporarily suspended from the cooperative, as a sanction for certain irregularities and failures in her performance; in essence, the judge ruled that pregnancy was not the reason for the suspension. Moreover, the judge found that the *vital minimum* (minimum subsistence needs) of the mother and the unborn child had not been violated because Mrs Ortiz's partner's income was included in the calculation.

After an unsuccessful appeal, the application was presented before the Colombian Constitutional Court, which confirmed the existence of an employment relationship between the Engineers Club and Mrs Ortiz. The court declared that the Engineers Club had violated the rights of the plaintiff and her son to a living wage, to effective access to health care and to employment stability by unilaterally terminating the contract without due authorisation from the labour inspector.

Importantly, the ruling demonstrates the use of a gender perspective in that the court did not consider the plaintiff to be dependent on her partner. This was crucial since it enabled the court to argue that the right of *vital minimum* of Mrs Ortiz and her unborn child had in fact been violated. Finally the court ordered the reinstatement of the plaintiff in her previous position or in a higher one; it also stated the employer's obligation to pay Mrs Ortiz a salary during the legal process.

The court justified its ruling by arguing that pregnant women deserve special protection by the state, including specific considerations in the workplace for pregnant women and nursing mothers, and the right to employment stability.<sup>9</sup> The court declared this protection as a fundamental right based on international women's human rights law which states that ensuring non-discrimination for pregnant women requires effective guarantees of protection for female workers who are pregnant or breastfeeding. It is relevant that the court considered the existence of an employment relationship

between the plaintiff and the defendant and established the real reasons that caused the dismissal and the procedures that in fact were based on Mrs Ortiz's pregnancy. This is an interpretation that maximises the guarantee of the fundamental rights of pregnant women.

## PROTECTING SEXUAL SELF-DETERMINATION IN MEXICO

In 2005, the First Chamber of the Mexican Supreme Court of Justice issued an important ruling related to the crime of rape, in which it stated that the prevailing criteria that lower tribunals should follow was that there are no provisions establishing special conditions referring to the rape between spouses, and that in fact rape between spouses could occur and should be legally prosecuted.<sup>10</sup> The Mexican Supreme Court needed to make this clarification because there were lower tribunals issuing different approaches to the crime of rape between spouses, with a tendency to suggest that such a crime could not exist between spouses because it was a lawful exercise of a right.

It is important to understand that laws that do not view rape between spouses as a crime were established based on the belief that marriage is a space in which men can exercise 'rights' over women who have a correlative duty to preserve the nature of marriage. In this context, violence perpetrated in the home, including rape, is considered less severe and less deserving of sanctions compared with publicly inflicted violence. The resolution therefore is relevant on the basis of non-discrimination against women and the consideration of domestic violence as a public issue that requires states to take action to eliminate it.

The First Chamber of the court argued that while civil law considers one of the purposes of marriage as procreation, this cannot be interpreted as giving one spouse the right to force the other into unwanted sex. The court also argued that although in the past the law aimed to protect the 'honesty of women', in contrast, today stronger legal protection is required to protect sexual freedom and the individual right to sexual self-determination.

This ruling was based on the international principle of non-discrimination towards women and on the consideration that domestic violence is a public issue that should be addressed by government action that tackles the root social causes. As such, the court's resolution represents a significant shift away from traditional conceptions of male supremacy in the private family sphere, and has set an important precedent for greater recognition and protection of women's rights in Mexico.

<sup>9</sup> Article 239 of the Substantive Labour Code.

<sup>10</sup> Mexican Supreme Court of Justice Resolution 9/2005.

# CONTEXTUAL FACTORS

## ENABLING A STRONGER GENDER APPROACH IN THE JUSTICE SYSTEM



The recognition of discrimination against women has emerged out of historically persistent gender inequalities and, over time, has led to agreement on specific human rights for women. Gradually, women's human rights have been acknowledged in regional and international legal instruments such as the [Convention on the Elimination of All Forms of Discrimination Against Women](#) (CEDAW), and the [Inter-American Convention on the Prevention and Eradication of Violence Against Women](#), adopted at the regional level.

International frameworks have played a key role in establishing the obligations of states to protect women's rights and to carry out actions that improve gender equality and eradicate discrimination against women. In Latin America, governments and the judiciary have initiated processes to incorporate these new values into law and to set the mandate of public servants responsible for implementing them in practice.

Processes of gender institutionalisation and gender mainstreaming in particular have accelerated governments' progress in meeting these obligations. The Platform for Action of the Fourth International Conference for Women identified gender mainstreaming in government's plans, programmes and projects as a priority action.

Furthermore, various international meetings between judges and magistrates have acknowledged the importance of mainstreaming gender perspectives into the judiciary and

have provided spaces for members of the judiciary to exchange information and strategies. These include the Statute of Latin American Judges, adopted by the Presidents of Supreme Courts of Justice at the sixth Ibero-American Summit held in Spain in 2001, and annual meetings held between judges of the Meetings of Judges of the High Judicial Bodies in Latin America and the Caribbean for Gender Justice, which began in Costa Rica in 2001. In Latin America, women's and feminist movements have played a crucial role advocating for women's human rights from local to international levels.

Although Latin American countries have followed different pathways on the transition towards democracy, a common characteristic of new political structures in the region is establishing mechanisms to control human rights abuses perpetrated by government authorities and to advance institutional processes to safeguard human rights. Some countries have modified their constitutions in recognition of international human rights law, incorporated human rights in national legal frameworks, and established National Human Rights Institutions with a mandate for protecting, defending and enforcing human rights.<sup>11</sup> This has had important impacts on judicial resolutions that are moving away from traditional interpretations of the law towards arguments and resolutions that reflect human rights principles and gender perspectives. In fact, Latin American judiciaries have played a progressive role in interpreting and implementing rulings.

<sup>11</sup> To learn more, see the [ELLA Brief: Latin America's National Human Rights Institutions: Fostering Democratic Transitions and Guaranteeing Human Rights](#).

### LESSONS LEARNED

- 1 The Latin American experience shows that it is possible - though slowly and over time - for national supreme courts to incorporate gender paradigms and standards on human rights as a common practice when judging cases.
- 2 As part of the state, the judiciary is mandated to take action towards the advancement of women's human rights. This means that within the fulfilment of its mandate it must

consider the historical discrimination and subordination of women and, in fact, use the law to reduce and eliminate gender stereotypes. This legal responsibility has given judges in Latin America the space within which to implement innovative practices like a gender approach, thereby helping to reduce gender gaps in access to justice.

- 3 Rulings from the highest tribunals have a strong impact on lower courts' jurisprudence, which is why it has been so effective in Latin America when they have adopted a gender perspective to broaden the scope of protection of rights.

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