

CONCEPTUALIZING THE LAW FROM A GENDER PERSPECTIVE: CONCEPTIONS REGARDING VICTIM AND ACCUSED

GLADYS ACOSTA VARGAS*

I. INTRODUCTION.....	319
II. CRITERIA FOR SELECTION IN CRIMINAL LAW.....	322
III. THE INTERMEDIATION BETWEEN ACCUSED AND VICTIM IS IN THE HANDS OF THE STATE	324
IV. WOMEN AS VICTIMS: CRIMES AGAINST SEXUAL LIBERTY	327
V. PROPOSALS FOR DEVELOPING A CRITICAL PERSPECTIVE OF THE CRIMINAL LAW AS TO THE RELATIONSHIP BETWEEN ACCUSED AND VICTIM IN CRIMES AGAINST THE SEXUAL LIBERTY OF WOMEN.....	329

I. INTRODUCTION

Although operating in different legal systems, feminist legal critics in Latin America and the United States share a common concern regarding criminal law which should be brought into the classroom, as criminal law expresses much of the symbolic and coercive force of the law. The following ideas are inspired by the legal methodology for gender analysis developed by Alda Facio¹ and by the efforts of women attorneys and activists who have sought for decades to democratize the law from the starting point of a profound respect for human rights.

To speak of victims and the accused places us at the center of criminal law. Classic doctrine does not distinguish between men and women with respect to their place in criminal procedure. The assumption of non-distinction derives from the centrality of the principle of equality before the law as the basis of justice. However, in practice, criminal law is laden with important gender-based

* Instituto Latinoamericano de Servicios Legales Alternativos (ILSA)

1. ALDA FACIO MONTEJO, CUANDO EL GÉNERO SUENA CAMBIOS TRAE (UNA METODOLOGÍA PARA EL ANÁLISIS DE GÉNERO DEL FENÓMENO LEGAL) (2nd ed. 1996).

connotations, many of which stem from its most basic conceptions of criminal law, while the most important ones are imported from the social order.

The ideas presented in this essay are inspired by experiences and analyses of a specific type of relationship—that established between the accused and the victim in the context of proceedings in which the sexual liberty or integrity of women is treated. In such crimes, women are for the most part positioned as victims and men are in the role of the accused; the opposite situation is an exception to which we will allude below. We will move from this specific field to more general hypotheses regarding criminal law.

To understand the substantial, as well as subtle, nature of the distinctions made by criminal law between women and men in their status as victim and accused, one must take a few steps outside the logic of criminal law. Legal sociology is very helpful in addressing the polemic. The concepts used in this debate are derived from the intellectual issues regarding the law posed by feminist theory, which has often been incorporated into legal sociology. Much of the research on criminal practice has had recourse to the methodology of legal sociology, inspired by feminist theory. This “contact with reality” has made clear the limitations of the law when it comes to responding to social issues that stem from the systematic discrimination that affects the lives of women.

In the opinion of Carol Smart,² the encounter between feminist theory and the law has faced numerous problems. I will summarize some of the problems she raises. The first is the explicit or implicit rejection of theoretical analysis as a method of studying the law. This point focuses on the greater or lesser importance attributed in the law school classrooms to conceptual discussion, especially when there is a predominant belief that the students need to know, first and foremost, the “black letter law.” The second problem is the direct resistance to feminist theory in law school classrooms. In the eyes of many, the law is inherently just, and therefore the problem of discrimination has already been resolved. Smart identifies this as a “liberal” position. The third problem is that certain positions within feminism see theoretical work as a masculine activity, and steer away from such discussion, focusing their concerns on the practical and the concrete. These problems will continue to arise in the relationship between law and feminist theory. It should be noted that the rejection of theoretical analysis, due either to devotion to the letter of the law or to a pragmatic radicalism, leads to

2. Carol Smart, *La Mujer del Discurso Jurídico*, in MUJERES, DERECHO PENAL Y CRIMINOLOGÍA (Elena Larrauri ed., 1994).

an impasse in the process of learning that should be avoided in the academic training of law students.

From the standpoint of feminist theory of legal sociology, other challenges are presented. One of these challenges relates to the various conceptions of the law. It is important to bear in mind developments regarding the "alternative use of the law," or the production of what has been called "alternative law." In my years at the Latin American Institute for Alternative Legal Services (ILSA), I have had the opportunity to meet many critical legal studies theoreticians and activists who moved between both of those fields.³ In some way, as we approach the end of the 20th century, we feminist attorneys are also facing the challenge of "using" and/or "transforming" the law by introducing new theoretical perspectives that originate in the historical, social, and personal experience of women, who had hitherto been confined to the domestic corner of society, with voices muddled by male authority in the public and private spheres.

Following Smart's interesting logic, it would appear that the arrival of feminism to the law in a more or less organized fashion (many women became attorneys and discovered that they could play a role in advancing the status of women in their work as attorneys), has turned the law into a "field of struggle" and not just an "instrument of struggle." I believe that one could read in these expressions the difference between those who seek "to make alternative use of the law" and those who set out to produce an "alternative law." In practice, neither of these positions is to be found in pure form, and many feminists who find themselves in the field of law are fostering initiatives in all possible settings. Some are jurists, others litigate, still others have entered the judiciary or state office, while others teach law or work with the law in interdisciplinary fields.

3. Both movements are of interest for constructing the notion of gender justice. In Latin America, a major movement is under way that calls into question the operation of the legal system. This movement postulates that the state is not the only law-maker. The notions of "legal pluralism," "alternative law," and "alternative use of the law" have won followers in the region, because they respond to the aspirations of broad popular sectors that find little understanding of their needs in state policies. These concepts are part of a "critical theory of the law" that seeks to elaborate a legal discourse with the objective of social transformation (Wolkmer 1994). In addition, one finds the arguments of a different origin, taken up by diverse women's groups inspired by feminist theory. The articulation of these arguments has brought pressure to bear on the state for the purpose of gaining access to certain legal products to solve immediate problems that cannot await the transformation of the justice system as a whole. Many of the tasks taken on by legal services have been aimed at serving the urgent demand for justice put forth by women. The tension between the two points of view is inevitable, for the critical legal studies theorists have focused more on the overall economic aspects of exploitation, from an all-encompassing perspective. They have paid less attention to critiques that call into question the oppression and subordination pointed out by women, which do not always directly correspond to economic exploitation. Gladys Acosta Vargas, *Una Luz al Final Tunel: La Justicia de Genero*, in *DERECHOS HUMANOS DE LA MUJER: PERSPECTIVAS NACIONALES E INTERNACIONALES* (Rebecca J. Cook ed., 1997).

We have undertaken to study the law as such, discovering its inconsistencies and internal weaknesses, but also gauging the power of legal reasoning. The goal is to determine whether the law can be pushed forward within its own potential, or whether a transformation is required on such a scale that the law would cease to be what it is today.

Evidently, our view is from a perspective external to the law. In our opinion, the law as a closed system does not have the capacity to resolve the social problems that arise in women's experiences. The law has been constructed by "others." In other words, the law has been constructed by men from Western culture interested in maintaining the order they themselves have created.⁴ However, it is inadequate to say that it is male per se. In the process of its development, the law has become a complex historical product and does not always act in favor of men and against women. It is more accurate to recognize that the law has a gender, and that it has the capacity to create gender categories.

The detailed analysis of laws, legal doctrine, legal culture, and legal practice have led us to discover the existence of contradictions between diverse interests within the law. It is, then, a question of finding the most adequate way to have an impact on all the components of the law so that we women, as well as other subjects of the law who have suffered discrimination, may find solutions to specific controversies⁵ that limit our lives. This struggle explains the presence of a significant feminist movement that seeks legal reform, despite the not very encouraging results of the socio-legal analyses that have been conducted regarding the contribution of the law in improving women's quality of life.

The central debate regarding our interaction with the law is characterized by an open, unfinished perspective. The approach is also one of dialogue with reality and reaffirmation of experiences and social practices that transform. This should be transmitted to those who are beginning their legal education. There is nothing worse for the law itself than absolutism as to its content.

II. CRITERIA FOR SELECTION IN CRIMINAL LAW

The starting point for a critical assessment of criminal law lies in the relationship between society and the law. The criminal system continuously selects those it will place on trial and those it will protect.

4. Latin American law has followed the steps of European Law with slight adaptations. It is essential to develop the historical perspective on the law to understand the normative transformations.

5. It is important to recognize that the law is only relevant in relation to the protection of specific legal interests, and that its breadth and scope should be the result of a democratic debate within each society.