

# GENDER AND LAW: MEXICAN LEGISLATION ON DOMESTIC VIOLENCE

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## I. INTRODUCTION

The law is an instrument of the State used to organize and regulate the functioning of society. As societies become more complex, the law tends to follow a parallel course, usually at a reduced, and sometimes conspicuously slow pace relative to social events. The law's failure to keep pace with events has been frequently criticized and has been characterized as an obstacle to social change.<sup>2</sup>

In effect, the regulation of social relationships often carries with it the validation or legitimization of classist, racist, or patriarchal structures. It likewise signifies an acknowledgment of the public domain as a superior construct, one that is in fact, superimposed over the private domain. The latter point is particularly significant to an analysis of women's status, not only from the strictly legal standpoint, but also in broader social terms. The public-private dichotomy is one of feminism's longstanding concerns, precisely because beyond merely categorizing spheres of movement and activities, it assigns hierarchies of functions and tasks, and relegates women to the private

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2. EDUARDO NOVOA, *EL DERECHO COMO OBSTÁCULO AL CAMBIO SOCIAL* (1983).

domain.

The law has been used to perpetuate the subordination of women or to impose on them important identifying characteristics. Examples abound of laws that penalize female adultery more severely and that restrict women's access to the workplace, to productive resources, and to the justice system itself, not to mention laws restricting access to procedures for reporting rape and sexual abuse. We have recently observed the other side of the coin in the enactment of legislation that condemns this structure of discrimination and establishes guidelines for arriving at appropriate solutions. The presence of feminism has been central to this process. Working from a variety of perspectives, militancy, academia, and the media, feminism has consolidated itself to a degree that has enabled it to petition the State with concrete demands and to design international strategies that have begun to bear important fruit in Latin America.

This article analyzes the regulation of domestic violence in the Mexican legal system beginning with recent legislative reforms. The first section offers a general overview of the legal system and the diverse array of existing norms and principles. A second section addresses the Law for the Assistance and Prevention of Intra-family Violence for Mexico City [*Ley de Asistencia y Prevención de la Violencia Intrafamiliar para el D.F.*]. This law was the first on the subject to be enacted in Mexico. The law is administrative in nature and has certain limitations, particularly in relation to the procedures it sets forth. The third section discusses reforms to the criminal code and criminal procedures that were recently approved by the House of Representatives. Finally, some conclusions are presented.

## II. THE MEXICAN LEGAL SYSTEM

The structure and substance of any legal system is inherently complex and difficult to understand. Margaret Schuller<sup>3</sup> proposes a model that facilitates understanding of the complexity of legal relationships based on the integration of three closely related components.

The first of these is the legislative component, which includes all law, that is the totality of norms (political constitution, federal laws, local laws, codes, regulations, decrees, agreements, etc.) that sanction conduct, including both substantive and procedural areas. This

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3. MARGARET SCHULLER, *PODER Y DERECHO. ESTRATEGIAS DE LAS MUJERES DEL TERCER MUNDO* (1987).

component thus includes the content of the law as well as the manner in which it should be applied. In relation to this point, it is important to clarify that not all laws are similar in scope; there is a precise hierarchy that places the political constitution above federal laws, which in turn are superior to the laws of each federal entity, regulations, and so forth. This hierarchy of norms is based on two criteria: the subject being regulated and the territorial reach of each law.

The second component is what the author refers to as structure and includes the agencies responsible for the administration of justice. This includes the court system [*juzgados, salas, tribunales, cortes*] and, in general, all public offices whose function it is to apply the law. There exists a clear defined relationship between these first two components. In fact, the second depends on the first. The structure depends on the legislation. In order for these agencies to apply the law, the law must first exist.

Beyond this theoretical construct, the analytical separation of the law as an abstract entity from the specific structure established for its application, facilitates an understanding of the differences, ambiguities, and even contradictions between the theoretical conception of a particular conduct and the application of the corresponding legal principle to a concrete case. Jurisprudence, which is the interpretation of the law provided by certain judicial bodies, is included in the second (structural) sphere.<sup>4</sup>

Culture is the third component. Culture encompasses the attitudes and behaviors of society toward specific norms. These attitudes may include "the conscious acceptance of these oppressive laws and practices or *women's lack of understanding and awareness about legal objectives and procedures*".<sup>5</sup>

This last cultural element rarely appears in law school texts, which focus instead on the weight of the law and, to a lesser degree, the administration of justice. Margaret Schuller's contribution, however, is essential to understanding not only the disparities between the norms and their application, but also how the personal opinions of judges and other authorities permeate judicial decisions and

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4. In Mexico, the Supreme Court of Justice and the federal appellate courts (*Tribunales Colegiadas*) (both federal institutions) are the bodies that emit jurisprudence or precedents. Jurisprudence or precedent is created when five consecutive cases are resolved in the same manner. The authority of the federal appellate courts to emit jurisprudence has been widely criticized because, *inter alia*, it has generated a number of contradictory rules of law. Nonetheless, an analysis of jurisprudence is very useful for understanding the positions of the judges and the arguments of defense attorneys, particularly in criminal cases that are confidential.

5. SCHULLER, *supra* note 3, at 3 (emphasis in original).

sentences. This understanding in turn, allows for awareness of why women do not approach these institutions and why, when they do, they almost never achieve the expected result.

If this model is applied to the Mexican legal system, the first component will be found to be completely saturated. There exists an excess of norms that, far from organizing and systematizing the regulation of social life, has instead produced a genuine legislative jungle. There is a political constitution for the entire Republic, and each sub-unit of the Federation has its own constitution, although the latter cannot contradict or supersede the federal constitution. The same holds true for civil codes, civil procedure codes, criminal procedure codes, etc. This means that in all of the Republic, there are a total of 32 constitutions, 32 civil codes, 32 criminal codes and so forth. If regulations and other administrative provisions are also considered, the number of laws grows exorbitantly. For example, when Mexico City, the Federal District, enacted a law on the subject of domestic violence, several states followed suit shortly thereafter using the law adopted in the capital as a blueprint and virtually copying it. As soon as the law entered into force and bureaucratic institutions were established for its application, another initiative was introduced to legislate on domestic violence in the criminal sphere. Even in a new area such as this one, an excess of disperse norms lacking any systematic order has emerged.

This proliferation of legal norms has its counterpart in the judicial structure. The sheer number of courts of first instance, appeals courts, district courts, federal appellate courts, etc. makes an analytical overview of their functions and tasks virtually impossible. It should also be noted that there exists no formal judicial career in Mexico. This means that judges and other members of the leadership of these institutions frequently change, so a large number of people are always in the training process without actually becoming specialized.

With respect to the cultural component, it should be mentioned that there is a deep distrust of the authorities, judicial authorities in particular. Numerous incidents of corruption have played a significant role in public disenchantment with the administration of justice. This disenchantment is experienced perhaps more frequently by women than by men. In effect, access to the system itself, because of all its corruption and inefficiency, is more difficult for women. This difficulty of access should be attributed in part to cost, but also to the fact that few lawyers are willing to defend women's interests, which continue to be seen as peripheral and offering little chance of success.

The three components interact in such a way that the law is not carried out on a single plane. To the contrary, the almost perpetually conflictive relationship between the three components makes the law seem to be a human undertaking rather than an external imposition removed from social life.

The law is an expression of the dominant ideology and often, given its complexity, reflects a collection of competing ideologies. Traditionally the needs of women have been ignored by the law, relegating them to the realm of the un contemplated. This situation in and of itself, contains a measure of violence.

We could also include in the cultural component the analyses of legislation formulated from the feminist perspective, as well as, the initiatives that have emerged from these analyses. A clear example of this process is laws on the subject of domestic violence which have been enacted in different Latin American countries. In 1994, the Inter-American Convention to Prevent, Sanction, and Eradicate Violence Against Women was signed in Belem Do Pará. Several countries in the region subsequently enacted special laws on intra-family violence and reformed existing codes. In fact, Argentina, Bolivia, Costa Rica, Chile, El Salvador, and Peru, among others, have laws on domestic violence. The Puerto Rican law predates the Convention and was the first to be enacted in Latin America. Uruguay reformed its criminal code in order to classify intra-family violence as a crime.

The situation in Mexico has varied somewhat from that in other Latin American countries. Several months before the ratification of the Belem Do Pará Convention, the House of Representatives for Mexico City approved the Law for the Assistance and Prevention of Intra-family Violence, which only has effect in the capital. Similar laws were subsequently enacted in the states of Querétaro and Coahuila and draft legislation is pending in the states of Morelos, Colima and Nuevo León, among others. Most recently, the criminal code and code of criminal procedure were reformed to classify domestic violence as a crime.

### III. LAW FOR THE ASSISTANCE AND PREVENTION OF INTRA-FAMILY VIOLENCE

The Law for the Assistance and Prevention of Intra-Family Violence is a law that was approved by the House of Representatives for Mexico City on April 26, 1996, and entered into force on August 8, 1996. The House of Representatives is a local legislative body, meaning that it can only enact laws on certain subjects and only for Mexico City.

For example, it does not have the authority to reform the civil or criminal codes, since they include a federal component.

The Assembly only had the authority to legislate on administrative matters and to regulate special procedures. These restrictions, clearly manifest in the law, were inevitable. The euphemisms and ambiguities, however, were not inevitable.

Article 1 states that the purpose of the law is to "create rules and procedures for assistance for the prevention of intra-family violence in Mexico City." Although the emphasis is on prevention, the law itself establishes procedures, sanctions, and mechanisms for appeal which go beyond the exclusively preventive character of the law and are more inclined toward case resolution.

There is no reference to aggressors and victims, but rather to "generators" and "receivers" of intra-family violence, which seems to be a euphemism that introduces ambiguity into the violent relationship, as if generation and reception were distinct, unrelated acts.

For the effects of the law, the family is defined as persons united by a blood relationship, without restriction in terms of degree, by a civil relationship, marriage or by a relationship of concubinage. Common law unions are included, but they are only mentioned, not defined. This omission is unfortunate, since *de facto* unions do not appear at all in any other law. The law on intra-family violence is the only one that refers to these unions. By not defining them, however, their mention becomes virtually meaningless.

Violence (that abstraction that someone generates and someone else receives) is defined as "a recurrent, intentional, and cyclical act aimed at dominating, subjugating, controlling, or assaulting, physically, verbally, psycho-emotionally or sexually." Herein lies the problem, which also surfaces in other Latin American laws. What should be understood by "recurrent" and "cyclical"? These terms appear as concurrent elements and not as synonyms. Can there be a recurrent act that is not cyclical or vice versa? Moreover, is it necessary to allude to *intent* when sanctioning violence? Can one conceive of something being generated without previous intent? Can there be an act "aimed at dominating, subjugating, controlling or assaulting" that is not intentional but rather accidental?

Even though on the surface these questions may be unnecessary and even pointless, it is very important that the law be sufficiently clear so that it may be applied appropriately and with precision. In fact, aggressors in cases of domestic violence often allege as a defense, that the injuries in question were produced as the result of

an accident. For this reason, it would be worthwhile to preclude the possibility of this defense in the text of the law. The language must be clear and free of ambiguity. It would be more appropriate for the law to state that the intention of the generator, is irrelevant in cases of physical injury.

The problem with broad definitions, which might provide quite illustrative language, arises in transferring the principle to the concrete case, where the conduct must conform precisely to the definition. How can intent be evaluated when it is something so personal and subjective? Proving the intent of an act is virtually impossible, except in cases where there is an explicit confession. Including this element in the definition is somewhat dangerous, and unnecessary.

By dissecting abuse into physical, psycho-emotional, and sexual elements, the law emphasizes the fact that the acts or omissions must be "repetitive," "reiterative," and "aimed at subjugation and control" to be covered.

In the case of sexual abuse, if the conduct in question can be classified as criminal, the law refers the case to the criminal code. Otherwise, abuse is defined as denying "sexual-affective needs, inducing undesired practices, and using jealousy to control, manipulate or dominate the partner." This last definition introduces an innovative element that alludes to a combination of sexual and psychological abuse not usually registered in legal proceedings.

The law stipulates two procedures: conciliation and amicable settlement. Although the terms appear to be synonymous, amicable settlement in the law refers to an arbitration process. Both procedures take place in special units established to give attention to intra-family violence. These units are administrative agencies that fall under the jurisdiction of the political delegations for Mexico City.<sup>6</sup>

The first option is conciliation. For this purpose, Article 20 stipulates that the "conciliator" (who is an undefined functionary of the delegation distinct from the arbitrator) will proceed to "seek compromise between the parties, exhorting them to conciliate, informing them of the consequences should the conflict persist, and offering them all possible alternatives." If there is conciliation, an agreement is signed. The agreement is obviously administrative in

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6. Each state of the Republic is territorially divided into municipalities, each of which have their own political authorities. In Mexico City, this territorial unit falls within the competence of the political delegations, which are dependencies under the executive branch (of the government of Mexico City). The leaders of the political delegations are not elected by the citizens.

nature and, consequently, cannot address issues such as the marital status of the individuals, the guardianship and custody of minor children, the separation of spouses, etc. Thus, conciliation can only mean reconciliation. Although, the parties could voluntarily agree to initiate legal divorce proceedings, which would only have legal effect upon ratification before a family court judge.

If there is no conciliation, the procedure for amicable settlement or arbitration may or may not follow. This arbitration process is an extremely weak link in the law, because the procedure is administrative rather than legal. This means that the procedure can only be applied to persons who voluntarily submit to it. Even more, the parties must expressly request the intervention of an arbiter to settle the intra-family conflict. The arbiter, in the law's best euphemistic style, is called a friendly adjuster (*amigable componedor*). In practice, this term should probably be considered more a proper noun than a precise description. It is possible that he or she will be neither all that amicable, nor much of an arbitrator. If one of the parties, presumably the aggressor, does not accept arbitration by the Delegation, it cannot be imposed. The injured woman in that case will have no other options except those available under ordinary civil or criminal law. The law under discussion will then be ineffective.

The arbitration procedure includes the presentation of evidence (except confessions, making the intent of the acts even more difficult to demonstrate), oral arguments and a decision.

The law establishes sanctions for those who fail to appear when summoned or fail to comply with the agreement or final decision. The sanctions consist of a fine of 30 to 180 days of minimum wage and up to thirty-six hours of administrative detention.

The promulgation of this law constitutes progress in the area of legal attention for abused women. Its principal attribute is that it assigns concrete responsibilities to diverse institutions of the Mexico City public administration to carry out large-scale prevention campaigns. It is an instrument of coordination and cooperation among government offices in the capital.

Large gaps still remain which should be bridged with appropriate measures, efficient procedures, and genuine protection mechanisms for the victims.

Paradoxically, instead of continuing forward on this road already begun, a new route was subsequently attempted in the criminal field. In December 1997, a series of reforms was approved to classify intra-family violence as a crime.

#### IV. CRIMINAL REFORMS IN THE AREA OF INTRA-FAMILY VIOLENCE

In November 1997, the President of Mexico endorsed a reform initiative in the area of intra-family violence the most important elements of which are the following:

a) Physical or psychological violence perpetrated within the family is considered a crime punishable by six months to six years of jail.

b) It is expressly stipulated that rape is a crime that can occur in the context of a marriage.

The inclusion of domestic violence in the criminal code has been strongly debated. The central issue of debate has to do with the viability and effectiveness of this measure. Are abused women going to report offenses that may send their husbands or partners to prison? Do they really want their husbands punished or do they only want an end to the violence? Moreover, is this the solution? Will temporary imprisonment be effective in stopping the violence?

Besides this, the time in detention will be very short because it is a crime that is bond-eligible. In other words, even supposing that a complaint lodged by a woman is processed, that her version of events is believed,<sup>7</sup> and that the aggressor is arrested, the most likely outcome is that within three days he will be released after having paid a bond with money that could have been used for family expenses. This fact alone is enough to question the viability of the criminal option. But there is more. Arrest and detention for such a short time may even provoke further violence.

Another issue worth mentioning is the inclusion of psychological violence in the definition of the crime. The term is not defined. The law simply mentions acts that "attack the psychic integrity" of another family member. Psychological violence is always present in abusive relationships. Wherever there is physical or sexual violence there is also emotional harm. The latter can also occur independently. Nonetheless, the creation of this crime is bound to cause numerous complications. Psychological violence is hard to identify, as well as to define, not to mention the difficulty of proving it. Moreover, there is a generalized belief (or prejudice) that those who inflict psychological violence are mainly women. The application of this norm could entail a risk in this sense.

To summarize, domestic violence as a crime provides a clear example of the interaction between the three components in

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7. In the majority of cases of complaints of injuries perpetrated by a husband or partner, the authorities question the veracity of the woman's story and, in cases where the complaint successfully goes forward, they pressure the woman to forgive the aggressor and to avoid trial.

Margaret Schuller's model. On the one hand, there is a norm in the criminal code (legislative component) that is broad and vague. On the other, difficulties can already be foreseen in the interpretation and application of the norm (structural component). These difficulties derive mainly from the concept of psychological violence, which contains a mix of beliefs and prejudices that continue to blame the woman (cultural component). A very ambitious idea, that seeks to respond with maximum severity to violent behaviors, may turn out to be a white elephant due to its ineffectiveness.

The other important aspect of criminal law reform is the inclusion of rape, in the context of matrimony, as a crime. In the strictest sense, it was not necessary to modify the text of the law since it did not exclude marital rape. However, Supreme Court interpretations of the law had sparked indignation among different sectors of the population, particularly women's organizations. The decision was made to reform the code precisely to avoid misinterpretations.

In effect, some cases of marital rape were considered by the Supreme Court to be acts in "wrongful exercise of a right," a crime with a significantly lower penalty,<sup>8</sup> and one with bond eligibility. The problem is not so much the punishment as the way rape and the sexual relationship in marriage is conceptualized. Any sexual act should be a space in which two autonomous wills concur; to continue to talk of a husband's right and a woman's obligation is tantamount to denying her free will.

In this case, the law can serve to bind interpretations to a standard of equity between spouses. Although difficulties remain in relation to reporting and proving the crime, the inclusion of marital rape in the substantive text is undeniably correct.

To summarize, it could be said that criminal reforms in the area of intra-family violence show little promise due to their broad definitions and the scant effectiveness of criminal proceedings. With respect to marital rape, it is a shame that the code had to be modified in order to avoid erroneous interpretations, but in any event, that deficiency has now been corrected.

## V. CONCLUSION

As in other Latin American countries, the feminist movement in Mexico has achieved a degree of consolidation that has enabled it to formulate concrete demands of the government in terms of

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8. The punishment for rape is eight to fourteen years of prison, while the punishment for wrongful exercise of a right is approximately one year.

responding to women who suffer from violence. Recent legislative changes in the area of domestic violence serve as an example.

Despite the undeniable importance that the incorporation of this topic into the legal system represents, it is worthwhile to point out some difficulties and limitations.

First, although the introductions to both the Law for the Assistance and Prevention of Intra-Family Violence and the criminal reform initiatives clearly state that the main victims of domestic violence are women, this gender perspective is diluted in the legal text. The family unit is emphasized and the individual rights of each family member, particularly the woman, are subsumed by this abstraction which in practice becomes clearly oppressive.

The Law for the Assistance and Prevention of Intra-Family Violence, which is administrative in nature, is a useful instrument for conciliation processes but offers few options for resolving conflicts.

The criminal reforms are so forceful in terms of the severity of sanctions and procedural rigidity that their ineffectiveness can already be predicted. It would have been more useful to impose alternative penalties, such as community service or administrative detention.

An appropriate solution must begin with a series of comprehensive measures that offer legal certainty to the victims, holistic attention to the victims and the aggressors, and socially useful punishments. To accomplish this, family legislation must be thoroughly reviewed and protective measures that preserve people's physical and psychological integrity must be adopted, setting aside restrictive and oppressive abstractions derived from a romantic notion of family unity.

