

INTEGRATING GENDER PERSPECTIVE INTO BRAZILIAN LEGAL DOCTRINE AND EDUCATION: CHALLENGES AND POSSIBILITIES

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"Equality is not a given but a build-up."²

Hannah Arendt

I. INTRODUCTION

This study focuses on the challenges and possibilities for integrating gender perspective into Brazilian legal doctrine and education. Like other Latin American countries, Brazil has enforced the civil law system, where statutes and normative rules serve as the major source of law. As a result, the study of the legal doctrine also becomes the focus of special attention. Unlike countries which follow the common law system, where legal precedents constitute the most relevant source of law, the Latin American system is based on a tradition of legal codes and doctrines which guide judicial interpretation.

This study will address three questions: 1) how to integrate the gender perspective into Brazilian legal doctrine and education; 2) what are the main obstacles to such a process; and 3) what are the possibilities and perspectives of such a process?

This paper outlines the challenges and obstacles that prevent the inclusion of a gender perspective into Brazilian legal doctrine and education. This paper also focuses on the possibilities and perspectives that may encourage and allow the process of including the gender standpoint into Brazilian law schools.

II. INTEGRATING GENDER PERSPECTIVE IN BRAZILIAN LEGAL DOCTRINE AND EDUCATION: OBSTACLES AND CHALLENGES

A. Anachronisms of the Brazilian Legal System and the Need for Transformation

The Brazilian legal system consists of a complex normative system that combines contemporary and innovative legal instruments, such as the Brazilian Constitution of 1988, with legal provisions dating back to the beginning of the century, such as the Civil Code of 1916 and the Penal Code of 1940.

In view of such a complex regulatory system, where historical legal provisions are combined with contemporary legal provisions, conflicts and tensions inevitably emerge. Such conflicts and tensions are faced

2. Free version of translation.

by the interpreters of the law, who may have their own legal and political biases.

These tensions reach their highest degree with regard to women's legal status. On one hand, laws such as the Brazilian Constitution and international treaties for the protection of women's rights advocate equality between men and women, the duty to promote such equality, and the responsibility to ban discrimination. On the other hand, the traditional legal provisions develop an androcentric perspective which discriminates against women. This approach adopts the masculine perspective and upholds the male as humankind's paradigm. Such discrimination is evident in the Civil Code of 1916³ and the Penal Code of 1940.⁴ These codes establish a clear hierarchical relationship between males and females by denying women fundamental rights, assigning women a predefined social role, and controlling women's social behavior with a double standard results in the conditioning of their rights.⁵

There is an urgent need to change the Brazilian legal system by effectively eliminating those discriminating rules that go beyond the scope of advanced regulatory tools. The prevalence of the Brazilian Constitution and international instruments for the protection of women's rights demand the revocation of the whole body of ordinary rules as incompatible with women's rights. This would remove the obstacles which result from a discriminating, gender-oriented hierarchy, and socially defined roles for men and women. Based on the advances of the Brazilian Constitution of 1988 with regard to women's legal status and on international declarations and treaties on the protection of women's rights⁶ necessitate a new paradigm integrating gender perspective into Brazilian legal doctrine and education.

3. See rules established by the Brazilian Civil Code on paternal power, head of the household, the man's right to annul a marriage when the woman is not a virgin, and the man's privilege to determine the family domicile, among other issues.

4. See the rules established by the Brazilian Penal Code that consider rape a crime against customs and not against the person, and deem the honest woman the passive agent in certain crimes.

5. See Beatriz Di Giorgi, Flávia Piovesan & Sílvia Pimentel, *A Figura/Personagem Mulher, em PROCESSOS DE FAMÍLIA* (Sérgio Antonio Fabris ed., 1993); see also Danielle Ardaillon & Guíta Debert, *QUANDO A VÍTIMA É A MULHER: ANÁLISE DE JULGAMENTOS DE CRIMES DE ESTUPRO, ESPANCAMENTO E HOMICÍDIO* (1987).

6. See Convention on the Elimination of All Forms of Discrimination Against Women, 1979; Vienna Declaration and Program of Action, 1993; Declaration on the Elimination of Violence against Women, 1993; Inter-American Convention on the Elimination of Violence against Women, 1994; and Beijing Declaration and Program of Action, 1995.

B. The Conservative Profile of Legal Agents and the Need for Change in Legal Institutions

Scientific research shows the highly conservative perspective of legal professionals who in large part conceive law as an instrument for social conservation and not as an instrument for social change. Such a conservative perspective has maintained the traditional legal categories and structures created nearly one hundred years ago, making it difficult to recreate legal thought under the light of new paradigms. Such an approach implies a severe legal distortion because egalitarian tools likely to change women's legal status have been interpreted under the light of discriminating categories promoted by traditional legal provisions.

This phenomenon illustrates not only the conservative nature, but also the private component of the Brazilian traditional legal culture. In Brazilian legal culture, the private perspective has taken priority over the public standpoint. Legal codes have been studied more intensely than the federal constitution itself. International treaties on the protection of human rights, particularly on the protection of women's rights, are seldom studied in law schools.

Law school curricula should be revised so that such advanced instruments become a part of the curriculum. Within this setting lies the possibility of a renewed, contemporary, and advanced approach to gender issues and women's legal status.

In addition to its private influence, Brazilian legal culture is highly formalistic. It is fundamentally important to broaden the study of the factual dimension, considering the complexity and contradictions of the social reality. Based on research, studies, and statistics, it is important to expose the pattern of discrimination and violence against women. It is also important to show the need for changing such reality by means of distinct legal strategies. This debate should enforce a gender perspective, without which there is no possibility of justice and democracy because more than half of the population is unable to freely exercise fundamental rights.

If transformations take place in law schools, legal professionals could present a new perspective, and consequently, the legal institutions would reflect such changes.

C. Integrating Gender Perspective into Brazilian Legal Doctrine and Education: Possibilities

1. The Need to Create a Jurisprudence Under the Light of Gender Perspective

Considering the challenges and obstacles mentioned, an initial strategy to change women's legal status is to create and encourage visualization of women and expose the power relationships between the sexes through legal doctrine.⁷ The basis of such a doctrine should be the pattern of discrimination and experiences involving exclusion and violence against women.⁸ The task of transforming such a reality should be its core objective. Such a doctrine must rely on the international instruments for protection of women's rights and on the democratic constitutions promulgated as a result of political transition processes in Latin America.⁹

Despite the relevant advances resulting from such tools, they have not had a strong impact at the local level. The changes in the international arena following the development of recent international declarations and conventions on women's rights should be incorporated at the local level. Therefore, a change of paradigms seems to be fundamental, and it requires the creation of legal doctrine that incorporates new conceptions and is able to transplant the significant international achievements into the local level.¹⁰

7. See ALDA FACIO, CUANDO EL GENERA SUENA CAMBIOS TRAE 54 (1992) (stating that "Gender or sexual gender refers to a sexual dichotomy that is socially imposed by roles and stereotypes"); see also KATHARINE BARTLETT, GENDER AND LAW 633-36 (1993); Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in WOMEN'S HUMAN RIGHTS 11-17 (1995); Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, in FEMINIST JURISPRUDENCE 94-100 (Patricia Smith ed., 1993); Robin West, *Jurisprudence and Gender*, in FEMINIST JURISPRUDENCE 493-530 (Patricia Smith ed., 1993); Catharine Mackinnon, *Toward Feminist Jurisprudence*, in FEMINIST JURISPRUDENCE 610-19 (Patricia Smith ed., 1993).

8. See FACIO, *supra* note 7, at 13 (arguing that "if it is right to say that men have been subject to discrimination for belonging to one class, ethnic group and/or sexual preference, etc., NO men have ever been subject to discrimination for belonging to the masculine gender; while ALL women are subject to discrimination for belonging to the feminine gender (further to discrimination against class, ethnic group and/or sexual preference, etc.)"); see also KATHARINE T. BARTLETT & ROSEANNE KENNEDY, FEMINIST LEGAL THEORY: READING IN LAW AND GENDER 10 (1991) (explaining that "there is widespread agreement that although it is instructive for feminist theory to expose the implicit hierarchies and exclusions through which meanings are constituted, feminists also need to take the positive step of transforming institutional and social practices"); Deborah L. Rhode, *Feminist Critical Theories*, in FEMINIST LEGAL THEORY: READING IN LAW AND GENDER 333-50 (1991).

9. "Despite the difficulties and cost of seeking change through law, law represents opportunities for feminism. Law is power. . . . Legal reform may create as well as resolve problems for feminism, and it may not instantaneously improve women's lives, but it is a necessary precondition for meaningful social change." BARTLETT, *supra* note 8, at 4. See FACIO, *supra* note 7, at 22 (stating that "although law can be an obstacle to the development of the female personality, it can be an instrument of structural, cultural, or personal transformations that necessarily shall lead women to better life conditions").

10. See Susana Chiarotti, in PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS DE LAS

Another strategy for creating a new legal doctrine is the use of contemporary language of women's human rights. Such language endorses the values of universality and indivisibility. It should be remembered that women's human rights are universal, international, and boundless.¹¹ They are also indivisible, so that their integrity demands the exercise of civil and political rights as well as of those of a social, economic, and cultural nature. It is important to emphasize the universal grammar of these rights to clarify that any State's policy that violates such a universal code of rights would be politically and legally isolated from the rest of the international arena and susceptible to criticisms and sanctions by the international community.

2. Study of the Impact of International Instruments for the Protection of Women's Rights on National Law

In addition to conducting necessary in-depth studies on the contemporary language of women's legal status, it is of utmost importance to accent the legal and binding force of the international treaties, which result in legal obligations to those nations that have ratified them.¹² It is necessary to state that nations themselves, in the free exercise of their sovereignty, assume international legal obligations with regard to the task of transforming women's legal status.¹³

MUJERES 18 (1997) (arguing that "we must face the Post-Beijing challenge, which means we have to work actively to implement, at a local level, advancements achieved internationally").

11. "In the past decade, women from all over the world have launched an unprecedented international movement for women's human rights. At the 1985 U.N. Conference on Women in Nairobi, Kenya, human rights began to emerge as a key issue for women, although it was hardly mentioned in the Conference's official declaration. By the 1995 World Conference on Women in Beijing, human rights had been taken up by thousands of women and became the framework for the entire government Plan of Action. At intervening world conferences in Vienna (human rights), Cairo (population), and Copenhagen (social development), women's rights activists challenged the neglect of women and their rights in all of these areas and argued that the improvement of women's status anywhere depends on advancing their rights everywhere." WOMEN, LAW & DEVELOPMENT INTERNATIONAL & HUMAN RIGHTS WATCH - WOMEN'S RIGHTS PROJECT, *WOMEN'S HUMAN RIGHTS STEP BY STEP VII* (1997) [hereinafter *HUMAN RIGHTS WATCH*]. See Juan E. Mendez, in *PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS DE LAS MUJERES 13* (1997) (explaining that "the Platform for Action of the Fourth World Conference on Women ratified the universality of all women's human rights and emphasized the utmost responsibility of governments for the promotion and protection of these rights, so that the omission of certain acts by the state can be object of complaint").

12. With regard to the impact of international treaties on protection of human rights on Brazilian Law, see FLÁVIA PIOVESAN, *DIREITOS HUMANOS E O DIREITO CONSTITUCIONAL INTERNACIONAL* 114-27 (Max Limonad ed., 2d ed.).

13. "International and regional human rights law can be used in national systems in different ways including: a) basing the human rights claim on international or regional law, where such law is part of national law or has otherwise been incorporated into national law; b) using the international and regional human rights law as an aid to the interpretation of national law provisions. Judges in many countries can and have been guided by international

In this sense, it is important to discern whether the national legal order has been consistent with the principles undertaken at the international level. Certainly, there will be conflicts between the national and the international body of rules, especially with regard to women's legal status. It is a matter of urgency that visibility be given to events of anachronism in the Brazilian legal system through advocacy at national and international levels. Such a process involves the revocation and elimination of rules discriminating against women that are in existence nationally.

In addition, when these instruments are integrated by the national system of laws, they strengthen and expand the scope of the protection of women's rights at the domestic level by reinforcing existing rights or adding new rights. The development of a doctrine clarifying the advancements from the legal impact of international treaties is of utmost importance. For example, emphasis should be given to the provisions of international instruments concerning: a) the legal definition of discrimination against women (Art. 1 of the Convention on the Elimination of Discrimination against Women); b) the possibility of enforcing affirmative action capable of expediting the actual equality between men and women (Art. 4 of the Convention on the Elimination of Discrimination against Women); and c) the definition of violence against women as gender-based physical, psychological, or sexual violence,¹⁴ occurring either at a public or private level (Inter-American Convention on the Elimination of Violence Against Women and Declaration on the Elimination of Violence Against Women).

3. Strategies for the Advocacy of New International Instruments in Protecting Women's Rights

As stated, the inclusion of a gender perspective in legal doctrine and education requires the creation of a doctrine with a gender

law in their interpretation of specific legal provisions; c) reminding the state that if it has, through ratification of a treaty, freely assumed an obligation (e.g. to eliminate discrimination against women), national enforcement mechanisms should be under a duty to interpret national law so as not to conflict with the state's international or regional obligations; d) using international human rights law as the minimum standard of protection which national law should attain. Advocacy for law reform and responsive judiciaries can endeavor, in the first instance, to bring national law in line with internationally accepted standards for the protection of women's human rights." HUMAN RIGHTS WATCH, *supra* note 11, at 110-11.

14. "When one act is performed against a woman because she is a woman, or when acts affect women disproportionately (for example, acts of violence or sexual abuses during wars), we are talking about gender violence. . . Gender violence comprises any act of force or coercion that threatens or affects the life, the physical or psychological integrity, or the freedom of women." Elizabeth Odio Benito in PROTECCIÓN DE LOS DERECHOS HUMANOS DE LAS MUJERES 26-27. See U. N. Declaration on the Elimination of Violence Against Women, 1993, art. 1.

perspective, the study of the impact of international instruments for the protection of women's rights on the national legal order, and strategies for the advocacy and enforcement of these new instruments. These international instruments present a double impact on the national and international levels. In order to be applied in their entirety, it is vital to launch training projects to publicize the relevance of making use of and advocating these instruments.¹⁵ The primary target of such training projects would be legal professionals. Legal professionals include judges, lawyers, non-governmental organizations active in the defense of human rights and women's human rights,¹⁶ law students and professors, and all those directly involved with the legal system. In Brazil, pioneer steps have been taken toward such gains.¹⁷

The planning of strategies for the international advocacy of women's human rights also raises a critical challenge. By submitting cases of violations of women's rights to international forums, greater visibility would be granted to acts of violence, thus demanding clarification and justification. In turn, this would result in advances in women's human rights. Two cases submitted by the Brazilian Women's Movement to the Inter-American Commission on Human Rights,¹⁸ based on the violation of rights enunciated by the Inter-American Convention on the Elimination of Violence against Women and ratified by Brazil, are examples of this advancement in woman's human rights.

15. "Prerequisites to reform included improved education and training in human rights law and processes, provision of legal services for women's empowerment, development of capacities to reach facts and publicize findings, and promotion of the feminist presence on human rights committees, courts and commissions." Rebecca Cook, *Women's International Human Rights Law: The Way Forward*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 29 (Rebecca Cook ed., 1994).

16. "Thus, while activism over the last decade has clearly made women's human rights more visible, the challenge now is to make them more accessible." HUMAN RIGHTS WATCH, *supra* note 11, at VII.

17. In this sense, some Brazilian women's human rights organizations have introduced the first courses in International Human Rights Laws from the gender perspective for police commissioners in charge of police stations specializing in women's affairs, judges, lawyers, and non-governmental organizations for the protection of human rights.

18. In November 1996, CLADEM and União de Mulheres de São Paulo (Women's Alliance in São Paulo) submitted to the Inter-American Commission on Human Rights two dramatic cases of violence against women that marked the Women's Movement in Brazil: the case of Delvita Silva Prates and the case of Márcia Cristina Leopoldi. Delvita and Márcia were brutally murdered, although at the Brazilian level, no parties have been held responsible for such acts of violence. In both cases, there was a total exhaustion of the domestic remedies, though no effective response has been given by the Brazilian State. The objective in submitting the cases is that the ineffective response by Brazil be declared a violation of fundamental rights ensured to women at Belém do Pará Convention, and that Brazil be condemned to effectively investigate and punish the responsible parties, as well as to pay restitution to the victims' families.

D. Integrating a Gender Perspective into Brazilian Legal Doctrine and Education: The Urgency in Changing Paradigms

Above all, the integration of a gender perspective into Brazilian legal doctrine and education demands changing paradigms. Such a challenge necessitates an incorporation of new values and a new vision of the law. It also reflects the need to include a greater share of the world population and its way of feeling and understanding reality.¹⁹

Changing paradigms is no easy task; it demands intense involvement, persistence, and commitment. It is, therefore, a fascinating challenge in view of its relevance and its powerful transforming potential. Hopefully, this study will contribute to creating and recreating women's history, legal status, and rights.

19. See Rhode, *supra* note 8, at 345 (arguing that "although we cannot know a priori what the good society will be, we know more than enough about what it will not be to provide a current agenda. It will not be a society with sex-based disparities in status, power, and security. Nor will it be a society that denies many of its members substantial control over the terms of daily existence.").

