

WOMEN AND JURISPRUDENCE

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It is important to reflect on influence that cultural legacy and humanist influence on juridical analysis. These influences, combined with Greco-Roman thought, define the institutions that continue to describe, prescribe, and interpret the law based on a concrete methodology.

Western thought emerged when the Greek culture developed the rules of logic that allow for scientific discourse. The Logos of Parmenides laid the first foundations for knowledge. This foundation was based on the canons of identity of the human being and the absence of contradiction, combined with the objective of learning the truth regarding any given object. This process required setting aside one's beliefs and opinions as paths of reflection, in order to open the doors to reason. The laws of reason demand using a clear methodology to apply principles that lead to scientific knowledge.

These reflections provided a conceptual framework for Roman scholars, who first sought to delimit their identities in order to establish their being. This set up a body of rules identifying them as Roman in order to preserve the principle of unity. The logos of the Roman scholar was interpreted by religious magistrates who possessed a monopoly on juridical activity. Thus the legal profession, in its early stages, was inaccessible to most other community members because these magistrates retained power over the rules through which the norms of custom were to be applied; Roman thought gave rise to the terms *jus*¹ and *fas*.²

The early Roman period was managed by a federation of noblemen

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1. In Roman law, *jus* meant the science or department of learning. The term was also used to refer to rights; that is, powers, privileges, faculties, or demands inherent in one person and incident upon another.

2. *Fas* meant right; justice; the divine law.

and families regulated by a monarchical and priestly authority. They designed a system in which the interpreter established the parameters of behavior in the community, with the aim of preserving peace and order. Peace and order were defined in terms of respect for principles of organization based on noble status and the family. These principles are expressed, for example, in the law's emphasis on citizenry determined by bloodlines, which was used to protect the origin and dignity of Roman status.

This archaic system changed when groups lacking the appropriate lineage challenged the existing law. These groups came to constitute a new class known as the common people (*plebes*). This placed pressure on the monarch to issue a series of legislative dispositions with the goal of harmonizing and unifying the population. As a result, for the first time, the people attended the coronation of a new king.

This signaled the transition to a second phase of Roman Law where old and new noble groups constituted a new social class. This social class still excluded the common people from other juridical, political, economic and social benefits through the monopoly of the upper class (*patricians*) on the creation, interpretation and application of the law.

This system was based on a "voluntarist" theory that justified the theoretical juridical framework, in which a classist State advanced the interests of one group to the detriment of others. This framework led to a class struggle between the upper class and the commoners. The complaints of the commoners emphasized the need to satisfy the demands of their social class and to place limits on benefits that were exclusive to the upper class. This process climaxed in the creation of a body of magistrates, known as tribunes, who became the spokespersons of the common people and who were heard in the popular assembly.

At this juncture, the law acquired new meaning by including the lower class, thus broadening the cultural framework that determined the meaning of the law, and thereby regulating in a normative framework the rights and interests of the commoners. These new laws were woven into the basic Roman law set forth in the Laws of the Twelve Tables. The objective of these Tables was to firmly establish the law through a written system. This system provided advance notice to the population through public dissemination, in order to avoid misapplication of the law.

This new system sought to preclude discrimination by doing away with laws that favored certain sectors. This resulted in the creation of

the civil law, which had been confined to custom and whose interpretation corresponded to the religious tribunals. The new emphasis gave rise to the secularization of the law and the possibility of developing a legal state through civil functionaries elected by the people. The deliberations of these new functionaries had an important revolutionary impact, even when, from a constitutional point of view, these laws concealed the fallacy of having no actual validity.

Under the new system, women remained defenseless, as they were viewed as being *Capitis Diminutio*³ with regard to freely defending their rights to patrimony, inheritance, filiation, etc. This negative treatment had important implications for the future development of the law as is evidenced by the *roman jus civile* being used as a model for private matters and *jus gentium* for public and international matters.

The commoner's struggle for their rights did not extend to women, which symbolizes the ideology and exposes the true intentions of the written norms. Today it is necessary to reflect on these intentions in order to find a new path toward juridical responsiveness to women's interests.

Today, the terms *Lex* and *Jus* have diverse meanings. Depending on which Roman approach was adopted, different countries' legal systems developed in different ways. On our continent, for example, some countries have adopted the Anglo-Saxon tradition (first phase of Roman Law), and others adopted a Roman-Canonic tradition (second phase of Roman law).

For this reason, it is important to analyze the meaning of the premises accepted and utilized by the ministers and magistrates of the judiciaries in our countries. The criteria which form the basis for arguments to establish the law in any given case are established based on these basic premises. The Roman law's written traditions, as subsequently adopted in France, serve as a reference in circumscribing the arguments that give rise to jurisprudence.

This paper will attempt to demonstrate the role that doctrine plays in resolving certain conflicts where women have been marginalized under the law. This paper assumes that the lawyer is bound by the law. The law prevents a lawyer from engaging in free administration of justice, as he is limited by the norms established by the lawmaker.

In countries with an Anglo-Saxon tradition, the judicial function

3. In Roman law, a diminution, or abridgement of personality; a loss or curtailment of a man's status or aggregate or legal attributes and qualifications.

has obtained greater breadth through the interpretive tools of *jus* and mores. These are understood to be interpretative rules that establish a flexible tradition in which lawyers argue with greater freedom, invoking precedents established by past experience.

It is necessary to reflect on these different legal traditions to determine the rationale behind certain problem-solving techniques. The metalanguage of these techniques has given rise to a special terminology in Mexico, through the *Nomina juris*. The law is also characterized, as a result of these techniques, by an emphasis on the deductive methodological approach over the experiential.

As an illustration, I will cite some examples based on the opinions and jurisprudence developed by judicial institutions.

With reference to joint property, for example, in the state of Jalisco the rules for ownership of joint property provide that the right of legal representation resides in the husband, and only in exceptional cases in the wife. Therefore, the husband is the full and exclusive legal representative of the legal unit for the purpose of protesting acts that affect marital property. The wife can only fill this role in exceptional cases: 1) with the consent of her husband, or 2) if he is absent or impeded, she may act as set forth in articles 207 and 234 of the Civil Code of the State of Jalisco.

This law, enacted on January 24, 1969 by unanimous vote in the Second Chamber, reflects the Roman tradition in Mexican legislation and the force of the French Civil Code from which these criteria are based. The written legal order had greater weight than experience in writing this law, preventing a woman in this century from handling the administration of her own property even after she obtained the right to vote.

Similarly, in September 1978, as the result of an action for the protection of a constitutionally guaranteed right (*amparo*), it was resolved that disputed assets that constitute joint property belong to the husband, as does the defense of those interests. The rationale for this decision was that, at the time of contracting marriage, the husband is granted the role of administrator. This role cannot be repudiated without applying the law retroactively. The woman complainant thus lacks standing to exercise a constitutional action when it affects assets belonging to joint property.

Almost ten years after the first decision, and even after the constitutional reforms of 1974 which recognized the equality of women, the law continued to leave women unprotected. Even when women's assets are affected directly, if the marriage predated the constitutional reforms, she is not protected, because this would

require applying the law retroactively.

This interpretation was approved by unanimous vote in the seventh session. It contravenes article fourteen of the constitution which stipulates that no law will be applied retroactively so as to cause harm to someone, which means in "*contrario sensu*" that it is possible to apply a new law retroactively to someone's benefit.

With respect to criminal law, the First Chamber of the Supreme Court of Justice established that the difference in the legal definition of abduction for sexual purposes—(*raptio*) and kidnapping (*secuestro*) lies in the fact that the second is understood as the external limitation of a person's right to maneuver or move. The criminal intent or psychological element thus consists of the awareness and will of the offender to illegally deprive another of personal liberty with the purpose of asking for ransom or causing injury. If there is no aim of depriving the person of liberty, even when sexual acts are performed, the crime is considered to be that of the lesser crime of abduction (*raptio*) rather than kidnapping (*secuestro*).

Meanwhile, in 1961 the same reporting judge, Manuel Rivera Silva, wrote an opinion, adopted by unanimous vote, which held that an abduction (*raptio*) did not occur where the accused, through physical violence, seized a woman but did not remove her from the manner in which she ordinarily conducts her life. This holding establishes that there is no abduction, even where the aggressor takes the woman to a specific place, as long as this occurs in a short time frame and on a public route, on the grounds that it cannot be argued, under these circumstances, that his actions have isolated her from her environment.

The above doctrinal criteria contain contradictory arguments in that they establish that kidnapping (*secuestro*) is reduced to a deprivation of liberty with the aim of demanding ransom or causing injury, while the aim of abduction (*raptio*) is not deprivation of liberty, even when sexual acts are performed. This doctrine is contradictory, because the concept that sexual acts can be considered to cause injury and deprivation of liberty is necessary in order to perform sexual acts against a person's will.

Taken together with the other opinion that establishes that there is no abduction of a woman when she is removed from her ordinary routine and taken by a public route for a short time, the vagueness in defining the levels of dangerousness can be observed, as well as how the facts can lead to a determination that a lesser crime was committed, leading to a less severe sanction.

In the State of Hidalgo it was decided, on the basis of a Supreme

Court opinion, that status as a virgin is a required element for the crime of statutory rape. The Supreme Court held that status as a proper young lady (*estatus de doncellez*) should be understood as the condition of virginity. Since the condition of *doncellez* is a requirement in Hidalgo's Criminal Code, it was held that the crime of statutory rape only exists if the element of virginity has been shown, even though the tribunal itself recognized that the term is not necessarily synonymous with virgin.

Another example of the negative impact on women is seen in the aggravating factor of "advantage" in homicide cases. The case law holds that an allegation regarding the aggravating factor of advantage in the context of the superiority of physical force between men and women may only be seen as an attempt to apply a provision applicable in specific cases to a general truth. The opinion thus holds that it would be a legal aberration to include the aggravating factors in every case perpetrated by the man against a woman victim.

The above examples make it clear that the Court and its members believe that, during that period considered in the first case, that even though *doncellez* was not the equivalent of virgin, it was more important to apply the Hidalgo Criminal Code than to take into account the affected party's appeal for justice.

Meanwhile, in the case of aggravating factors for homicide, the court unanimously held that the difference in physical strength did not apply to benefit women.

With reference to support arrangements, a 1989 opinion by the federal appellate court for the sixth circuit stated that the woman manages the conjugal household and educates the children. Despite the fact that the principal of equality between men and women before the law has been elevated to the constitutional level, it is understood that the woman does not have an obligation to contribute to paying household expenses, because most Mexican women dedicate themselves to household chores. This opinion was reached by unanimous vote in the eighth session of jurisprudence. The judges' opinion, although favorable to women, presumes that the woman is incompetent.

With respect to patrimony, the State of Guanajuato has established that contracts for the sale of goods between spouses are valid under only two conditions: a) that the couple is married under a separation of estates system; or, b) that the woman has been legally authorized to contract with her husband.

As to property acquired during marriage, a federal appellate court established legal doctrine holding, in relation to the law in the State

of Zacatecas, that property acquired by one of the parties through donation, inheritance, bequest, or any other unpaid transfer of title or good fortune, was excluded from joint property as it was not the result of conjugal effort.

In both cases, restrictions are placed on the enjoyment or on the negotiation of sales with respect to the patrimony acquired during marriage. In this manner, women continue to be regulated by cultural parameters handed down from Roman Law.

With the above examples, I want to demonstrate the importance of the interpreter's role in the development of jurisprudence, which serves as an interpretative tool in the administration and application of justice. The ideological and cultural perspectives of the participants in the system play a fundamental role, along with the written law, in the administration of justice. It is necessary, therefore, to reexamine the jurisdictional task through critical analysis, with the aim of establishing legal definitions, that are gender-neutral.

To do this, it is important to continue to collect legal materials through the use of the computer, in order to subsequently carry out the pertinent studies regarding the language used by the interpretive bodies, with the aim of understanding trends in doctrine. This will enable us to flag errors and seek new horizons for the equal treatment of women.

I think that the work of universities will play an important role in the future. It is essential that programs of study include practical fieldwork combined with research on the arguments used as the basis for resolutions. The objective should be to create a new awareness that makes organic and non-organic doctrine more operative. In this sense, measures should be taken to increase student awareness of the research being carried out by researchers and professors, as well as that conducted by lawyers responsible for deciding cases and creating law.

Because the Law School at the Universidad Nacional Autónoma de México is the largest academic center in Mexico, and it contains a female student population that surpasses the male population, I think that it is important to promote new frameworks for legal development at the University. The objective will be to produce better educated lawyers with a greater gender awareness. These new attorneys, upon assuming responsibilities in the institutions, will have the necessary tools to respond to their history.

In this respect, the federal justice system should open its doors to women professionals. The Supreme Court of Justice of the Nation currently has only one female justice to ten males. Moreover, women

account for no more than ten percent of judges in the federal appellate courts. At the same time, women are responsible for the greatest amount of work in mid-level positions.

In terms of other spheres of women's activity, it is worthwhile to point out that indigenous women do not figure in Supreme Court doctrine. These women constitute the most excluded segment in the legal structure. They are excluded at three levels: within their own culture, in society, and in economic life.

Mexico lives in the Roman stage of written law, whose rigidity does not allow it to stray from certain legal frameworks. Nonetheless, decisions on actions for protection of constitutionally guaranteed rights (*amparo*), provide a route toward greater flexibility which will open doors to new reflection. This reflection will show that written legal norms can coexist with other normative sources such as custom, practice, and general principles of law. Together, these various sources will make law a science and an art that responds to reality, bringing together experience and legal guiding principles to provide unity and coherence to the creation of jurisprudence in favor of women and justice.