

Chapter 2

Citizenship

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The concept of citizenship, as constructed in modern times,¹ is characterized by an abundance of meanings because it is the center of important conflicting tensions on account of the transcendence of its scope.

The idea of citizenship refers, since ancient times, to the criteria of inclusion of an individual person in a political community. However, this concept has had two fundamental expansions: first, to incorporate the idea of equality in the distribution of rights, during political modernity, it will include defining who the citizen is, and ensuring that, when being one, the person will be treated in the same way as the rest of the citizenry. Since then, citizenship invokes both a legal-political status, which incorporates and excludes, and “a right to have rights”² that emancipates and includes subjects. Second, during the transition to the twentieth century, the concept of citizenship has expanded to incorporate the social and economic conditions that must exist in order for individuals to enjoy their rights. Since then, citizenship has been linked to equality of conditions.

The coexistence of these meanings – the legal belonging of a person to a given State, the ideal status in which the individuals attain entitlement to the rights and socio economic conditions for its exercise – turns the idea of citizenship into the

¹ The concept of modernity used in these interpretations is defined by Jürgen Habermas as the cultural, scientific, political, and economic model that surged in Europe at the start of the fifteenth century (though its existence was not self evident until the eighteenth century) and that in general terms, is defined as a rational process of secularization of the culture and of the development in societies characterized by capitalism and state bureaucracies. *See generally* Jürgen Habermas, *Le discours philosophique de la modernité*, Paris, Gaillimard, 1985, p. 2.

² These are the terms of Chief Justice Earl Warren of the US Supreme Court in *Perez v. Brownell*, 356 U.S 44 (1958).

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seat of important tensions of political thinking: the split between the human being as an individual and as a member of a political community; the universalism of fundamental rights and the peculiarity of communities; the abstract equality before the law and the concrete difference of the particular conditions of existence; membership and exclusion, among others.

The central quality of citizenship and the discussions that it summarizes allow us to affirm that a great part of the modern political experience can be synthesized in the fight for inclusion, within the idea of citizenship, of excluded subjects.³ A remarkable part of this fight has been fought by the feminist thinking and action.

In order to study the rulings in which the regional justice constructs doctrines that are coherent with these theoretical and practical struggles, this chapter is divided into two sections: (1) citizenship as an aspiration, which will address the problems of equality, reparation and emancipation, and (2) citizenship as belonging, which will analyze the problems of identity and culture.

2.1 Citizenship as an Aspiration: Equality, Reparation, and Emancipation

The history of the feminist movement can be traced along the history of citizenship. The limited scope of liberal citizenship, in terms of the few subjects it included, was the fundamental impulse of the first feminist movement, which obtained its greatest triumph with the achievement of women's political citizenship and the right to vote.⁴

Without attempting to defy the liberal theory of society, feminism of equality or liberal feminism considered that the fundamental cause of women's disadvantages was reduced to the differences in legal treatment. These differences, they believed, meant that there would be less material resources available to them, led to their being judged by inappropriate standards, denied them equal opportunities and impeded that specific feminine damages be recognized if doing so could affect men. Since discrimination lay in the differential legal treatment, the efforts of the first relevant feminist action focused on achieving the effective realization of the liberal premise that states that all human beings must receive equal treatment before the law. This included fighting for the inclusion of women in the idea of citizenship,—limited to male, white subjects who own property—for wage equality and the prohibition of sexual discrimination in employment and the trades, and for

³ Sandro Mezzadra, *Derecho de fuga*, Traficantes de Sueños, Madrid, 2005.

⁴ Ecuador, in 1929 was the first Latin American country to pass the female suffrage. Brazil and Uruguay did it in 1932, Cuba in 1934, El Salvador in 1939, Dominican Republic in 1942 and Jamaica in 1944. Guatemala, Panama and Trinidad and Tobago in 1945; Argentina and Venezuela in 1947, Chile in 1948 and Costa Rica in 1949. Haiti in 1950, Antigua, Barbados, Dominica, Saint Kitts-Nevis, Santa Lucia, Granada and San Vicente in 1951. Bolivia in 1953, Belize, Colombia and México in 1954 (the latter did not provide for the right under the same terms given to men until 1958), Nicaragua and Peru in 1955, Honduras in 1957 and Paraguay in 1958.

the right of married women to own property. This feminist action, lasting the whole of the twentieth century, did not introduce a challenge to the prevailing model of citizenship but rather simply advocated for women's inclusion as beneficiaries of certain rights. Feminism of difference,⁵ on the other hand, opposes this attempt at inclusion of women in the idea of citizenship comparable to that of males, and proposes that women's experiences, because they are women, be valued, and that maternity, care and the family provide orientation to the feminist political action. These proposals are based on the need for special legal treatment for aspects on which the differences are grounded.

The second period of the feminist thinking, termed the second wave, has its parallel narration in the history of social citizenship which expressed itself in overcoming the restrictive and exclusive civil and political citizenship and its limitation to formal equality and freedom with the incorporation of important social rights. From the feminist thinking point of view, this second movement is enriched with an important theoretical debate: the liberal social, socialist, and radical feminisms burst in as solid alternatives to the equality-difference dilemma. These ideas launch the first great challenge against the social liberal theory and its guiding idea of equality. Radical feminism understands that women's problems are not of inequality but of subordination. It considers that it is not about attacking isolated, easy to resolve deprivations of the law, but of fighting the patriarchal system conceived as a "system of structures and social practices in which men dominate, exploit and oppress women."⁶ The idea of supremacy-domination is now opposed to the traditional duet of equality-difference.

Since male dominance is exercised through the control of women's bodies and sexuality, it is necessary to consider all aspects of social life, especially the private aspect, instead of focusing solely on the verifiable rights in the public space. In this sense, sexuality acquires exceptional preponderance. The chapter "Violence" (Chap. 6) of this book deal with these aspects in depth. Suffice it for the moment to highlight radical feminisms' idea of subordination, which, in terms of citizenship, means incorporating the personal in the political.

Within this general theoretical framework, there is an analysis of the jurisprudential development of the idea of citizenship for women in Latin America. The first stage, which occurred three decades later than in the United States,⁷ brought about the expansion of civil and political citizenship. The second stage, which also happened three decades later, brought about the constitutional, penal, and labor reforms that promoted positive rights and were especially the expression of State censure to

⁵For the most in depth perspective on this subject, see Carol Gilligan, *In a Different Voice*, Harvard University Press, Cambridge, 1982.

⁶See Sylvia Walby, *Theorizing Patriarchy*, Blackwell, Cambridge, 1990.

⁷The United States approved women's right to vote 1920. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation." U.S Const. amend, XIX.

violence and sexual dominance. The third is settled by the contemporary fights for cultural recognition and the economic distribution of a globalized space, and finds its expression in situations and judgments directed toward the protection of transnational rights.

The first judicial decisions described below tell of the way in which the region gradually constructed a theory of sexual equality. It will show the passage from a formal conception to a substantial idea of equality until reaching the constitutionalization of affirmative actions. The judgments presented here illustrate, as a public matter, the adoption of discrimination and violence in private spaces and relationships, and with it the adoption of the radical feminism perspective on behalf of the regional law.

2.1.1 Equality Before the Law

Legality, understood as the requirement to the law of obtaining its justification based on its formal characteristics, that is, the assemblage of general and abstract rules issued according to predictable procedures, is the idea that seems to govern Latin American jurisprudence regarding the issue of equality during most of the twentieth century. The differences between formal and material equality, however, burst into judicial rationales hand in hand with social citizenship and the model of the Welfare State. From the legal point of view, these changes became evident in the overcoming of formalism and in the rescue of the social facts and the social reality for judicial interpretation. The move from the exclusive use of logical and syllogistic methods to the understanding of law as a social practice, whose validity and efficacy incorporates the knowledge of the space in which it operates, is evident. It also verifies that the myth of the legislator's will as the only aspect guiding interpretation falls apart.

The judgments presented show these transformations and illustrate three legal problems related to the scope of the judicial interpretation of women's equality: the first is a historic document that expresses the way in which Argentina's legal culture of 1929 permitted the resolution of a typical case of equality before the law: the legal habilitation of women to occupy positions and perform functions that were forbidden to them. The second tackles the legal capacity of married women, and the third imports to the region the equality standard constructed by the Supreme Court of the United States for gender discrimination.

Supreme Court of Justice of the Argentine Nation
Ángela Camperchioli
November of 1921

Main Legal Issue:

Can an incapacity to perform a trade not expressly prohibited by law be applied by analogy to women?

Facts:

Mrs. Angela Camperchioli requests that oath be taken to her to enter the registry of public notaries. In spite of the fact that law number 1893 does not contemplate any inability of women to perform this office, the civil and commercial codes did establish women's inability to perform certain functions. The Court of appeal ruled that if the woman cannot be a witness in the signing of public instruments, much less can she perform as a notary.

Court Ruling:

The Court revokes the challenged ruling and prohibits the extended interpretation of restrictions to women's rights.

Extracts:**Supreme Court of Justice**

[...] That the case of these proceedings considered thus, it is certainly appropriate to establish that, as recorded in the same judgment of the District Attorney through which the presented title is challenged [...] there is no law or specific legal text that establishes the incapacity referred to herein, nor derived from the spirit of a law and from general principles of legislation and the law, a concept on which the challenged author has also based his declaration, which states such incapacity in spite of the affirmation that "no legal provision establishes literally that women are disqualified for the performance of the position of Notary Public."

That the precedents presented show that the denial to the requested registration is equivalent to the invalidity of the title and to the legal incapacity— of those who invoke it, since compliance or the consecration of a specific provision of the law does not matter, but what matters is the application by analogy or implication of principles or general provisions regarding incapacities and legal concepts of a different order, which although they may be similar to the limitation whose creation is sought, do not establish such limitation or govern the matter by explicit legal provision.

That under such circumstances, the capacity to perform the profession as notary that the appellant justifies through the presentation of unobjectionable title, granted by the authority instituted by law to such effect, cannot be invalidated until declared null, based on an alleged incapacity derived by induction from others that the common laws specifically enumerate, because if it were allowed to infer the legal capacities, even related to titles which accredit a capacity of the same order, the former would not constitute the exception but rather the general rule, and they would not be interpreted with a restrictive criterion but with the corresponding breadth of mind.

That as for the rest, without entering into an analysis of the legal status of women in our legislation, because that would imply exceeding our authority in the present debate, it is however pertinent to insist on that whatever restrictions are being imposed on her, none of these would authorize to impose others upon her through the extended interpretation of such restrictions, thus placing unjustified objections to the primary guarantees of the Constitution, which are equality before the law, the right to learn, to work, the right not to be deprived of that which is not prohibited by the law, with which a judicial ruling that annuls *de facto*, without

explicit legal basis, a title of legitimately acquired professional qualifications, cannot be harmonized.

On these grounds [...] the challenged judgment is overturned [...]

Supreme Court of Justice of Panama
Action of unconstitutionality of article 26 of the Code of Commerce
February 8 of 1994

Main Legal Issue:

*Does the norm that provides that for the validity of commercial acts carried out by married women the husband's later ratification is required, conflict with article 19 of the National Constitution?*⁸

Facts:

A Panamanian woman files a complaint before the Supreme Court of Justice claiming the unconstitutionality of article 26 of the Code of Commerce which establishes that "... those who are legally of age may validly confirm obligations entered into through commercial transactions executed by them while they were underage. Likewise, the commercial acts executed by a woman with no explicit or tacit consent of the husband shall be valid, when they are later ratified by the latter."

Court Ruling:

The Court declares the challenged norm unconstitutional.

Extracts:

[...]

In the opinion of the Plenary the second paragraph of article 26 of the Commercial Code infringes upon article 20 of the Political Constitution which consecrates the principle of equality before the law. And this is so because the second paragraph of article 26 of the Commercial Code provides a distinct legal treatment for married women, by reason of their civil state, establishing that they cannot freely engage in commercial transactions since they need to be ratified by their husbands. This unequal treatment, this discrimination against married women, constitutes a violation of the constitutional principle of equality before the law enshrined in our Magna Carta in the following terms: Article 20: Panamanians and foreigners are equal before the Law [...]

Recently, the Supreme Court of Justice declared article 27 of the Commercial Code unconstitutional [...] In the part setting out the legal grounds of this judgment, the Plenary Chamber stated:

In the article which unconstitutionality is claimed it is accepted that a married woman requires an authorization from her husband to perform commercial transactions, which must be revalidated, even if they were not authorized by the husband, if the woman obtains a declaration of nullity of the corresponding marriage. Therefore, it is a detestable discrimination by reason of a person's 'civil status,' that is, of a woman, that conflicts with the content of article 20 of the Political Constitution in force, which consecrates the equality of all Panamanians before the law.

⁸ "There will be no laws or personal privilege nor discrimination on account of race, birth, social class, sex, religion or political ideas."

In the present case, the discrimination arising from article 27 of the Commercial Code is derived from the distinction between married women and unmarried women, since the former are required, in order for their commercial transactions be valid, to have authorization from their husbands.

In the constitutional system in force, women have full equality at all times, whether they are married or not, which is why the possibility that consecrating the validity of acts executed by married women after the marriage be declared invalid must be eliminated.

Although the challenged article was conceived to protect women who acted without the husbands' authorization, it undoubtedly consecrates a discrimination, for no woman in full enjoyment of her civil rights must need authorization from the husband to perform commercial transactions, nor must the privilege established in favor of women who have been married before be explicitly consecrated, as is the case in article 27 of the Commercial Code. The explicit violence of norms as the one under analysis decreases the quality of life of a society that legitimately aspires to the prevalence of justice and equality inherent in peaceful cohabitation.

Every woman who is legally of age has full legal capacity to carry out commercial transactions, without the need for authorization from her husband to third parties, so it is unnecessary to consecrate the principle foreseen in article 27 of the Commercial Code. [...]

Therefore, we hold that the appellant is right as regards the claim of unconstitutionality referred to in the second paragraph of article 26 of the Commercial Code, because it violates article 20 of the Political Constitution.

Since the challenged norm must be declared unconstitutional by reason of the infringement upon the Constitution, the Plenary considers that to confront this precept with other constitutional norms is deemed unnecessary.

Supreme Court of Justice of the Argentine Nation
Cristina González de Delgado et al. v. Universidad Nacional de Córdoba
September 19 of 2000

Main Legal Issue:

What is the standard of equality applicable to discrimination based on gender?

Facts:

The parents of some pupils at a school dependent on the National University of Córdoba sought, by way of a writ of amparo, to have the Superior Council of the University prohibit the admission of women to the institution.

Court Ruling:

The Court of Appeals, by majority vote, rejected the action, and the Supreme Court of Justice formally declared the extraordinary appeal was appropriate and confirmed the challenged judgment.

Extracts:

[...]

In "United States v. Virginia" (ruling of June 26, 1996, published in 518 U.S. 515) the federal government filed a lawsuit against the state of Virginia and the Virginia Military

Institute. This prestigious school – famous for its methods and achievements – was the sole institution of higher learning in Virginia that provided education for only one sex: males. That policy of admission and the consequent impossibility of women to access the qualified education provided by the said school, led to the allegation of violation of the 14th amendment. The presentation before the Supreme Court was successful, and the Court considered that harm had been produced.

[...]

The court claimed that Parties who seek to defend gender-based government action that imposes categories, classifications or exclusions must demonstrate an “exceedingly persuasive justification (of such action).” Neither federal nor state government acts are compatible with the “*Equal Protection Clause*” when a law or official policy denies to women, simply because they are women, full citizenship stature, that is to say the opportunity –equal to that accorded to men– to participate and contribute to social development based on their individual talents and capacities. To defend gender-based classification or exclusion has the burden to prove that such action serves an important governmental objective and that the discriminatory means employed are substantially related with the achievement of those objectives. The justification has to be “genuine” and not rely on overbroad generalizations about the different talents, capacities or preferences of males and females. Inherent differences between men and women remain cause for celebration – the Court appreciates – but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.

[...]

The heightened review standard applied to sex-based classifications does not make sex a proscribed classification, but it does mean that categorization based on sex must not be used to create or perpetuate the legal, social and economic inferiority of women. In any case, sex-based classifications may be used to compensate women for particular economic disabilities they have historically suffered [...]

[...]

In the US judgment a standard for scrutiny is proposed which, if not as strict as that used for classifications based on race or nationality, is extremely demanding (it is telling that the only judge who had a dissenting opinion found it undistinguishable from the “strict scrutiny” applied for these two last classifications: 518 U.S. 515, 596).

[...]

Even though the discussed US criteria (born in a normative framework as succinct as that of article 16 of our National Constitution) were applied as a hypothesis to the “*Montserrat*” case, the solution would be the same as that obtained in the light of the convention adopted by law 23179. Indeed, the plaintiffs have not shown (and much less, demonstrated), what would be the vital public interest that advises the exclusion of young girls from the benefits of the education provided by *Montserrat*, but rather that this vital public interest would consist in avoiding such exclusion, with involuntary speed, because it is based on a prejudice that, as such, does not deserve any justification [...]

The facts put forward are evidence that Córdoba National University, by disposing that the registrations in the Montserrat National School be made with no gender distinction, has not only acted as the competent organ within the sphere of the powers vested on it, but furthermore, has removed a discriminatory barrier –which today seems morally and legally abominable– that impeded full participation of young women from Córdoba in the educational and cultural life of their province. The National University of Córdoba has also expressed its will to comply with the obligations of international conventions that require the country to integrate women in all aspects of social life and to remove discriminatory obstacles that might stand in their way.

[...]

That I cannot come to a close of these reflections without referring to the unrelenting efforts of the appellants to demonstrate that their claim is not discriminatory: “a circumstance which” they say “at this stage of the centuries all the undersigned find repugnant” [...]. Such efforts seem vain to me. Their authors declaim their lack of discriminatory intention; but they remain petrified in that intention [...] for, at the same time, through their stance they place obstacles to sex equality in all its creative and fair aspects, and not only do they omit to take into account that men’s “being” is perhaps determined by women’s “being,” and vice versa (for which reason the exclusion of any of the two would be dangerous), but also (although the exclusion is not justified even then) that Argentina does not possess such a plethora of male talents at its disposal that it can afford to leave its female population without education, or half educated. The arguments utilized in the claim, both those relating to the incompetence of Córdoba University, and those of the conflicting constitutional values between the right of parents to choose their children’s education and that of equality (they opt for privileging the former), cover up the real motive, truly discriminatory [...] which could be expressed as follows: they say nothing against women; but they do not wish them to become integrated in a joint education with their male sons.

The plaintiffs’ claim thus constitutes an offense to excluded women and, for the same reason, does not deserve judicial protection because it is incompatible with the need to lay the foundations of a democratic and intelligent society.

2.1.1.1 Matters for Debate

The three judgments show how the region’s judges have gradually incorporated into the Latin American legal systems – chronologically and conceptually – women’s equality. The subject of the first case, addressed since the first decades of the twentieth century, makes reference to the dismantling of the incapacity inherent in women; the second to the inability derived from marriage; and the third, concludes the process with the constitutional prohibition of gender-based discrimination. These cases also illustrate the significant changes in the way in which the judges construct their arguments, from the pure syllogistic operation, under the pretended neutrality of the legal action which gave rise to the 1929 ruling, to the evident incorporation of political, sociological and ethical arguments in the decisions.

In the first judgment, the general principles of the law, which included the prohibition to interpret the penalties, exemptions and legal bans in an analogical or extensive way, constitute the winning argument. In Argentina of 1929, to collect substantive arguments such as the attributes of citizenship, the rights to equality before the law and other principles which are today the fundamental pillars of modern States, was viewed as an excess. The decision is not in favor of equality, but is about the limits of the interpretation of the law.

It is important to reflect on the Argentine Congress' utilization of the male gender in the legal grammar as a basis for women's exclusion from performing certain functions. This problem was addressed in the Colombian Constitutional Court's contemporary case law that rules on the claim of unconstitutionality of article 33 of the Civil Code. [...] In this respect, the Court states:

[...] by using generic expressions usually aimed at denoting only one sex – as is the case of the word “man” in its social use – but applied in a general sense, supposedly encompassing both sexes, in legally relevant definitions, we fall into what the doctrine has denominated “generic terms with a trap”, that is, expressions that seem to include both sexes but are frequently excluding as regards women.⁹

In the third ruling, the judgment addresses a fundamental aspect in the constitutional conception of equality. It is the so-called equality test, in which the constitutional courts define the conditions in which an unequal treatment among human beings based on sex, race, national origin or other similar considerations is justifiable. The Argentine Supreme Court imports into this judgment the so-called “intermediate scrutiny” termed by the Supreme Court of the United States. The latter court adopted the term after an examination of intermediate rigor, comparing it with the strict scrutiny applied to discrimination based on race, and established the requirement that if there is to be sexual discrimination, it had to be substantially related with important government interest.

In the region, the Colombian Constitutional Court has established the equality test in the following terms:

[...] the difference in treatment based on any of the connotations laid out in the first paragraph of article 13 of the Constitution related to equality –sex, race, national or family origin, language, religion, political or philosophical views– is in principle prohibited, and will only be admissible if it meets certain conditions. To evaluate such conditions this prohibited criterion is qualified as suspicious, which imposes on the legal operator the application of a strict equality test, in order to determine:

- (i) Whether the act that promotes a different treatment has an end that is admissible by the Constitution and if it is a vital one;
- (ii) Whether the act is useful and indispensable to achieve the proposed end; and,
- (iii) Whether the act ensures proportionality between the benefit obtained and the negative impacts or harm it may cause on other legal rights, an exercise that will be treated next in this document.¹⁰

⁹ Colombian Constitutional Court, ruling C-804 of 2006.

¹⁰ Colombian Constitutional Court, Ruling C-355 de 2006.

2.1.2 *Reparation*

The social concept of citizenship demands not only the legal integration of excluded groups, but also the actual one. The recognition of rights that are inherent in social citizenship in Latin America has its more relevant constitutional manifestation in the efforts made by the region's judges, especially during the 1990s, to define a substantial concept of equality and incorporate extra legal arguments in the law's application, and thus defend a space of state action aimed at ensuring not only the formal but also the material effectiveness of rights.

Overcoming the inequalities and the discrimination against women thus implied going beyond the conquest of formal equality before the law and defending the constitutionality of norms that generate a discriminatory treatment in favor of women when doing so compensates for the tradition of exclusion. These decisions have generated vast case law that shelters the so-called affirmative actions. Affirmative action, or remedy discrimination, emerged in the United States constitutional debate on occasion of the Supreme Court's support of the University of California's special admissions program based on race in the 1970s.¹¹

The extension of these actions to women implied accepting the constitutionality of regulations that discriminate in favor of them when with these they are compensated for their ancestral disadvantages. These decisions and policies have been, however, strongly criticized by feminist and non feminist authors. The former, consider that these types of programs can perpetuate women's inferiority, or demand that the precise meaning of compensation be defined, so as to not confuse it with the special treatment destined to pregnant women or the differences based on physical characteristics. The latter, consider that the damage implied in affirmative action in the modern concept of merit is unacceptable.

The cases put forth below illustrate the incorporation of this subject in the regional jurisprudence, and some of its inconveniences. The first ruling is a holding by the Constitutional Court of Colombia, which defines material equality and its difference with formal equality. The second lays out the doctrine of the Constitutional Court of Peru when it establishes the scope of affirmative actions, and the third accounts for the limits of these types of actions in the case of the quota laws when dealing with appointments by a selection process and merit.

Constitutional Court of Colombia Ruling C-410 of 1994

Main Legal Issue:

What is the nature and scope of substantial equality?

¹¹ Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Facts:

The plaintiff claims the unconstitutionality of some articles of the law that creates a social security system claiming that it violates article 13 of the Constitution¹² when it establishes that to access the senior citizen pension and the enjoyment of a pension the requirements of age are different for both genders, favoring women, for whom the requirement involves a lower age.

Court Ruling:

The court rules against the plaintiff: it decides that all the articles under study are enforceable –clarifying that they are enforceable as related to the formulated claim. Its considerations refer, in the first place, to the difference between formal equality and substantial equality. It states that substantial equality has a remedial nature, aimed at defending persons and groups in conditions of inferiority.

Extracts:

[...]

Formal and substantial equality

The simplest approximation to the concept of equality is sufficient to point out that it does not respond to a univocal sense but rather admits multiple meanings which are applicable according to the peculiarities of each case. Through a historical perspective demonstrates the successive occurrence of two significant achievements: formal equality and substantial equality. The first category constitutes, in its beginnings, one of the most valued triumphs of the classic liberal state that reacted against the privileges belonging to the ancient regime, proclaiming the similar position of all before the law, so that the recipients are given identical treatment in the norms and in their implementation. Within this notion, the result is that citizens are the receivers of the same norms, without opportunity for exceptions for any person; because the law is universal, general, abstract and impersonal, “the same for all whether it protects or punishes,” in the terms of article 6 of the French Declaration of 1789.

[...]

However, formal equality is not alien to the establishment of different treatments, it rests on relevant conditions that impose the need to distinguish situations that grant them different treatments, a hypothesis that expresses the known rule of justice which demands the treatment of equals with equality and of the unequal in an unequal way. It must be specified that initially, formal equality focused only on the effects of the law, regardless of the normative contents, a tendency that gradually

¹² Article 13 of the Colombian Constitution states “All persons are born free and equal before the law, they will receive the same protection and treatment from the authorities and will enjoy the same rights, freedoms and opportunities without any discrimination on account of sex, race, national origin or family, language, religion, political opinion or philosophy. The State will promote conditions so that equality is real and effective, and will adopt measures in favor of discriminated groups. The State will especially protect those persons who because of their economic, physical or mental condition find themselves in debilitated circumstances and will sanction abuse or harm against them.”

gave way to an interpretation that, according to the postulates of the social state of the law, advocates for equality in the content of the law, incidentally permitting control over constitutionality aimed at examining the correspondence between the legislative activity and the Constitution, a superior reference that makes the law the appropriate normative means for the realization of the State's goals.

[...]

Substantial equality alludes to the commitment of removing the obstacles that in the economic and social levels construct effective *de facto* inequalities that oppose the effective enjoyment of rights. The underlying causes of these situations have to do, among other aspects, with scarcity, with unsatisfied needs of human beings, with historical phenomena of segregation and marginalization or with past injustices and the attempt to rectify them. Substantial equality reveals, therefore, a remedial, compensatory, emancipative, correcting character, defensive of persons and of groups situated in conditions of inferiority, through the promotion of positive actions of the public powers.

[...]

This confirmation that certain individuals and groups, in spite of being equal before the law are not really equal, exercises a remarkable influence on the same norm which, on occasions, abandons the traditional characteristics of generality, abstraction, universality and permanence, becoming specific, that is, directed at concrete sectors of the population, or temporal, inasmuch as its effects become exhausted in a given lapse of time; all with the aim of enhancing the social or economic conditions of its particular recipients.

[...]

However, whereas equality before the law is part of the assemblage of prerogatives recognized by the majority of democratic constitutional regimes, to whose legal organization it integrates, substantial equality, enshrined in the Superior Statute of some States, is perceived scarcely as an objective or end of the political system, which links the public powers to the transformation of the existing type of society into an ideal one, more conducive to the fulfillment of human aspirations in its multiple facets.

[...]

Even when formal equality between the sexes has been growingly incorporated into the Colombian legal system, substantial equality still constitutes a goal; the subsistence of social unequal realities attests to this. It is not about ignoring the progress that equality before the law represents; apart from the fact that its absence would be an enormous obstacle to the improvement of women's conditions, it is necessary to take into account that it leads the way to higher courses, because it permits to resort to the State organs in search of eliminating discrimination and legitimizes, in this way, the claim for effective opportunities to exercise rights and develop capacities without setbacks. It should not be forgotten that, in the framework of the idea of substantial equality, the exclusion of discrimination by reason of sex contained in article 13 of the Chart, is not limited to the mere prohibition but covers the constitutional purpose of ending the historical situation of inferiority suffered by the female population; that decision authorizes, within the principle of

protection, to make positive decisions, aimed at correcting *de facto* inequalities, to compensate the relegation suffered and to promote real and effective equality at the economic and social levels. The protection measures, which imply special repeal of formal equality, demand the determination of those specially vulnerable ambits in which there is the need to operate; thus, together with the family and the State, the workplace is one of the spaces that offers most possibilities for discrimination on grounds of sex.

[...]

However, the matter that now occupies the attention of the Court, although it entails different treatments in effectively distinct situations, implies, on an additional level, the granting of legal relevance to the social differences of women to enhance their condition through the adoption of a compensatory measure of the difficulties they must face by virtue of their link to the labor market; this last aspect is situated within the perspective of substantial equality which, according to the postulates of the Social State based on the Rule of Law, is not limited to the mere function of guaranteeing or protecting, but advances toward a promotional function that is normally carried out through positive measures in favor of the discriminated or marginalized social groups. To proceed in a neutral way in the face of the social reality would entail ignoring the values, principles and ends consecrated by the Constitution, abandon the search for a fair society, respectful of human dignity, and empty the constitutional norms that prohibit discrimination against women and provide for their special protection of all content (arts. 43 and 53).

Supreme Court of Justice of Peru Unconstitutionality of Law 28449

Main Legal Issue:

Is discrimination in favor of women if the aim is the search for material equality, constitutional?

Facts:

The appellant claims the unconstitutionality of law 28449 which applies new rules on pensions, changes the calculation basis of the new pensions discriminating between men and women and demands, for the pension for widowhood, that the men accredit incapacity for subsistence on their own means and demonstrate that they are not within a security system. This requirement is not extended to women.

Court Ruling:

The Court rejects the claim and confirms the constitutionality of the challenged norms for considering them examples of a legitimate affirmative action in favor of women.

Extracts:

[...]

The application of the right to equality does not exclude a differential treatment and such principle is not infringed upon if the difference is based on objective reasons.

[...]

To focus on the interpretation of the right to equality from a strictly liberal point of view would imply reducing the constitutional protection of the equality principle to a merely formal content, for which reason it is the duty of this Collegiate Court, of the public powers and the community in general, to endow the principle of equality enshrined in the Constitution with substance. In this sense, a positive link with the legislator to the fundamental rights must also be recognized, in such a way that the law should become the means of reversing the conditions of inequality or, which is the same, of reviving the conditions of equality of which the social reality could be dissociating itself, to the detriment of the constitutional aspirations.

[...]

The State has the obligation to adopt measures – usually legislative – with the aim of legally compensating economically, socially or culturally excluded groups; in this way, through such measures of “positive action” or of “inverse discrimination.”

[...]

These measures are strictly aimed, through weighted provisions, at favoring the feminine collective, in the correct understanding that social reality still imposes the concession of greater support with the aim of ensuring them a life consistent with the principle of dignity.

[...]

The difference in treatment that the social security regimes have usually awarded to men and women should not be focused, *prima facie*, from the formal perspective of the right to equality before the law, that is, as the constitutional ban preventing that legislators introduce differences of treatment among persons who are in substantially similar situations without a reasonable or proportional basis, to the legal system.

On the contrary, the alluded differentiation must be approached under the material or substantial guideline that informs the right to equality, according to which there is an obligation of the State to adopt measures – normally legislative – with the aim of legally compensating economically, socially or culturally excluded groups; [...]

[...]

The reasonability analysis of the implementation of rules for positive action is hindered when these are taken in favor of groups and not of individuals. However, a criterion of vital importance which facilitates the analysis is the presumption of social exclusion against certain groups, derived from the specific clauses of non discrimination provided for in paragraph 2 of article 2 of the Constitution. Thus, expressly, such mechanism, bans discrimination “[...] by reason of race, sex, language, opinion, economic condition,” leaving an open clause in the hands of the legislator and the jurisdictional interpreter by adding “[...] or of any other kind.”

Therefore,

“[...] the specific clauses of non discrimination mainly fulfill the function of protecting, by toughening the equality criteria, certain groups which, on account of their history of subjugation and the social underestimation to which they are subjected, do not belong to the dominating group which participates, debates and creates the legal norms.” But another consequence derived from such clauses “[...] is materialized in the constitutional validation of the measures which are

based on this feature to favor the socially damaged groups, that is to say, the affirmative actions, always within the limits of proportionality.”

In this sense, there is a wide margin of presumption of constitutionality in the measures that favor the minority [...] or socially neglected groups, which could be considered to fall within these specific criteria. For example, women, certain religious, ethnic, foreign groups, and others of diverse natures.

[...]

Even though in recent years there has been an important degree of incorporation of women in social tasks in which they should never have been relegated (political participation, access to work positions, education opportunities, among many others), this task cannot be considered to have been consolidated in the Peruvian reality. A good part of our society still nurtures from patriarchal cultural patterns which relegate the female group to a secondary role, in spite of the fact that women’s identical capacities with regard to the male group in all the ambits of life, whether it be in the political, the social or the economic sphere, is beyond discussion. The prejudices and idiosyncrasy [...] of a significant number of citizens (made up of both men and women) still maintain the gender problem in the country alive.

So, the Constitutional Court cannot consider measures that require some years less of age or of contributions to women, to access a pension of the social security regime, or those that establish a system of calculation relatively more favorable to women receiving pensions at the time of determining the total sum of their pension, unconstitutional. It is clear that such measures are strictly aimed, through weighted provisions, to favor the women’s group, in the correct understanding that the social reality still imposes granting a greater support with the aim of ensuring them a life that is consistent with the principle of dignity.

And for this same reason, neither does the Constitutional Court consider unconstitutional that the legislator has not requested that the widow provide proof of the economic dependence in which she finds herself with regard to the deceased’s pension. It is clear that the legislator has used this presumption as a point of departure based on the element from reality described above. Consequently, it is an authentic “affirmative action” in favor of women.

Inter-American Commission of Human Rights

Maria Merciadri de Morini

Argentina¹³

Facts:

[...]

The radical, petitioner alleged that by mutual agreement among its leaders, the Unión Civica radical political party of the Province of Córdoba had put together the list of six candidates that were running for the national deputy seats up for election on October 3, 1993. The list placed the names of two women in third and sixth place without taking into account that the party had five national deputy seats

¹³ Report No. 103/01 case 11.307.

up for election. This was a violation of Law 24.012, called the Quota Act, enacted on November 6, 1991, which guarantees that at least thirty percent (30%) of the candidates on the political parties' slates for elective office are to be women, in numbers "proportional to the chances of being elected." Article 2 of Decree 378/93, which is the law's governing decree, stipulates that "the thirty percent quota that Law 24.012 sets for women, shall be regarded as a minimum. If application of the 30% formula results in fractions that are less than whole numbers, the minimum number shall be the number shown in the table attached as Appendix A, which is an integral part of this decree." The appendix in question states: "seats to be filled, five; minimum number: two." This provision is binding upon political parties when putting together their lists of candidates, and the consequence of failure to comply shall be denial of certification. The law also establishes the corollary right of citizens entitled to vote under the constitutional right of suffrage, to be able to vote for slates of candidates on which women are represented in accordance with the formula that the law stipulates.

The petitioner alleged that, as a citizen affiliated with that political party, she filed a complaint with the Board of Elections challenging the slate, which was rejected on the grounds that the "list of candidates was the product of a consensus built among all factions of the party, which agreed upon a single list." When she filed an appeal, the federal court denied her request and declared that she did not have legal standing to bring such action. The petitioner appealed that decision, but the Federal Elections Court also denied that she had legal standing to bring an action, on the grounds that she had no personal stake in the matter. The petitioner contends that the list drawn up by the Unión Cívica Radical party violates the right of the voter to equal opportunity, for men and women alike, to stand for elective office. She further argues that any citizen has the right to challenge the list, and need not be the party injured by his/her place on the list of candidates. The classic requisite that the plaintiff must have had a subjective right violated or his/her concrete interests disregarded is not the applicable paradigm, especially since the Argentine Supreme Court's ruling in *Ekmekdjian v/Sofovich*. She also cites Article 57 of the Political Parties Statute N° 23.298, which gives members of political parties standing before the court "when the rights they are given in the Statute are denied and when the recourses within the party have been exhausted."

The petitioner filed an extraordinary appeal seeking reversal of the decision on grounds that it was unconstitutional, but the court refused to allow her appeal to go forward on the grounds that the election had been held on October 3, 1993, and that the matter had therefore become moot. Finally, she filed a complaint with the Supreme Court because of the lower court's refusal to allow her appeal to go forward. The Supreme Court, however, denied her appeal arguing that "the votes that the Unión Cívica Radical carried in the October 3, 1993 election entitled it to four seats in the Chamber of Deputies; this case was about who ended up in fifth place." The petitioner considers that the question was not "moot" because there is a very concrete "right of expectation" that has to be upheld were a vacancy to occur among those elected. As matters stand, if such a vacancy were to occur, it would be filled by a man—the one who is in fifth place—and not by a woman. It is for that reason that a

woman should have been listed in fifth place and the man in sixth. Even had there been only four seats to be filled, two women should have been elected because one woman alone is equivalent to just 25% of the total, which is below the legally mandated quota.

Friendly Settlement Agreement:

[...]

3. The Argentine State recognizes that this decree serves to ensure women's concrete and effective participation in the lists of candidates for national elective office, thus reinforcing the rights upheld in law 24.012, as well as Article 37 of the Constitution, and in the counterpart provisions of the international human rights treaties to which Argentina is party.

4. Petitioner Dr. Maria Teresa Merciadri de Morini hereby undertakes to desist from the petition she filed with the Inter-American Commission on Human Rights, registered as case N° 11.307, as she recognizes that Decree N° 1246/00 adequately provides for the fundamental issues she raised in the complaint she filed with the Commission.

5. Both parties are grateful to the Inter-American Commission on Human Rights for its important contribution and ask that it give its approval to this friendly settlement and close case 11.307.

Constitutional Court of Colombia Ruling C-371 of 2000

Main Legal Issue:

Is the quota system at the decision-making levels of the public administration constitutional? Are quotas compatible with the merit system in force in the public administration? Are they applicable to the lists elaborated by political parties?

Facts:

The Secretary General of the Senate submits to the Constitutional Court a bill by which women's effective participation in decision-making levels of the public power is regulated, establishing a quota of 30% for these positions.

Court Ruling:

The Court defended most of the articles of the Law of Quotas, including the one that requests that women occupy a minimum of 30% of the directive positions in the executive branch, but excluded the positions of the administrative career and the judiciary, which are provided by the system of shortlists of three members or other lists, and elected offices. Finally, it also declared the article that establishes a quota in the candidatures of political parties unenforceable, since this would constitute a case of the State's interference in the internal organization of political parties, explicitly prohibited by the Political Chart.

Extracts:

[...]

It is frequently argued, by those who are contrary to affirmative actions like those consecrated in the regulatory bill under analysis, that an egalitarian system should guarantee that the conditions at the point of departure be equitable. In other words,

if the State is to adopt affirmative measures in favor of certain groups to guarantee a real and effective equality of opportunity, these can only be aimed at removing obstacles in the conditions of departure but not in those of arrival.

It could then be stated, with regard to the matter under debate, that if the legislator wishes that women occupy positions in the highest decision-making levels, the important, and in principle the only permitted action, is to design and implement policies intended to stimulate access of women to superior education and remove the obstacles that interfere with this purpose. Once substantial equality is reached at the point of departure, each person's specific merits shall determine the quantitative composition at the point of arrival. Something similar to the Darwinian thesis of the survival of the fittest or the free play of the laws of the market in the economic field, that cannot and should not – from these perspectives – be corrected via artificial measures in order to avoid serious distortions in the field of nature or the sphere of society.

Such argument, irrespective of what may be thought about the ethical and political consequences of Darwinism and of economic liberalism, overlooks an inescapable fact, verifiable through empirical observation and corroborated by the statistics, namely: that the population qualified to perform offices of high political responsibilities is (and has been for a time now) equitably distributed between men and women, and that the scale is even more inclined in favor of the latter.

If in spite of the fact that today there is equality at the point of departure the situation at the point of arrival is still unequal, this is because it is not the merits, or not only the merits, that determine that the highest responsibilities of the State be in their majority in the hands of the men.

Aware of this situation, the members of the Constituent Assembly of 1991 established in the last paragraph of article 40: "The authorities shall guarantee the adequate and effective participation of women at the decision-making levels of the Public Administration," in evident harmony with paragraph 2 of article 13, that by providing that "The State shall promote the conditions for equality to be real and effective and shall adopt measures in favor of discriminated or marginalized groups," does not prejudge on the phase in which such discrimination takes place and consequently, legitimizes and, moreover, makes the action by the public authorities directed at correcting any inequity derived from discriminatory factors expressly prohibited in the same provision, mandatory.

Thus, if what is being sought is to guarantee real and effective equality of opportunity, it is necessary to remove obstacles both at the point of departure and at the point of arrival.

[...]

As already explained, the offices that are intended to be filled through the quota system are offices of free appointment and dismissal. Such jobs are "created in a specific way, according to the catalog of functions of the corresponding organism, to fulfill a directive, managerial, or leading or institutional guidance role, during the exercise of which fundamental policies or guidelines are adopted, or positions which imply the necessary confidence of who is in charge of such kinds of responsibilities."

When providing these positions, unlike those career positions, the nominator has freedom or discretion to designate the person he/she considers most fit. With regard to the President of the Republic, this faculty is expressly recognized in numerals 1 and 13 of article 189 of the Constitution.

Nevertheless, even though discretion of the nominator is implicit in the nature of such offices, it is clear that such discretion is not absolute, since it must necessarily be exercised in conformity with the constitutional and legal provisions. [...]

The same occurs, then, with quotas; although it is true that the provision constitutes a restriction to the sphere of the authority of free appointment and dismissal, this limitation is reasonable and is not of such nature that it may affect its essential nucleus. [...]

The career positions:

[...]

It is clear that to join, remain and be promoted in career positions, the essential criterion of selection is merit [...]

Since merit or the capacity of the applicants is the decisive factor in the selection process, criteria such as race, sex or political affiliation cannot have any incidence.

[...]

The exception contemplated in article 5 of the bill is, therefore, reasonable. The legislator could scarcely request that a percentage of the career positions be reserved to women, since irrespective of the candidates' sex, the one obtaining the best score should be selected.

The offices that are provided through the system of shortlists of three candidates or other lists:

[...]

the Court does not share the criterion of some of the participants, in the sense that women's inclusion in the three-member shortlists and other lists is a "simple salute to the flag." Even though this mechanism is not as efficacious as the quota system, since there is no guarantee that women will be elected, the international experience has shown that a measure such as the one under analysis, if it is accompanied by the serious support and commitment of the authorities, contributes to enhance women's participation in positions of power. In the case of Argentina and Paraguay, even though it should be warned that the legal obligation in those countries refers to the inclusion of women in the lists of candidates to occupy seats in the Senate and the Chamber of Deputies. [...]

[...]

the obligation of the nominator to choose women, until reaching a minimum percentage of representation of 30% [...] unlike the positions of "maximum decision-making level" and of "other decision-making levels," in the more reduced sphere of implementation. While the selection rule of article 4 is applied to a wide universe of offices, and to fulfill it the nominator can choose among multiple women those he considers most qualified, the jobs provided by the system of lists are only a few and necessarily one of the persons conforming the corresponding list must be chosen. Secondly, and here resides the fundamental difference, with the quota established in

article 4 of the bill, the promotion of women as a group is sought, without sacrificing specific individual interests. Conversely, according to what is provided in the analyzed separate paragraph of article 6, it is to be expected that certain men, that is, those included in the list, despite being equally qualified to access the respective positions, will be automatically excluded, until such time as women are selected up to a minimum proportion of 30%. [...] it is clear to the Court that even though the analyzed measure pursues a constitutional objective and is adequate, unlike the one consecrated in article 4, it is neither necessary nor proportional *strictu sensu*, since it implies an excessive burden on some of the candidates, individually considered, who for the simple fact of belonging to the male gender are eliminated from the selection process. Such circumstance is undoubtedly discriminatory and therefore, contrary to the principle of equality. But in addition, what would be the sense of requesting that men and women be included in the lists, if the former cannot be taken into account? [...]

[...] Article 14 of the regulatory bill under study contains the following provision: “The Government must establish and promote mechanisms that motivate political parties to increase women’s participation in the structure and development of their activities; among others, it shall see that those under its direction stimulate greater affiliation of women, their inclusion in a percentage of at least thirty per cent (30%) in the committees and directive organs of parties and movements. The presence of women in a percentage of no less than thirty percent (30%) in positions in which they have the chance of being elected in the lists of candidates to the different corporations and positions to be filled by popular election.”

As correctly pointed out by the Court in ruling C-089 of 1994, “political parties arise as organizations whose mediation between the citizens and the political power contributes to consolidate democracy. They reflect political pluralism and through them, citizens’ participation in the formation and expression of the popular will, with the aim of gaining access to power, to positions to be filled by popular elections and of influencing political decisions, is promoted and channeled.” Women’s participation in parties and especially as members of their directive organs or as candidates to positions to be filled by popular election, aim of article 14 of the bill, is a highly desirable objective in a democratic system in which the participation of all in making decisions which will affect them is sought to be guaranteed.

Nevertheless, such provision must necessarily be declared unenforceable, since ultimately, it constitutes a case of interference by the State in the internal organization of parties, which is prohibited by the Constitution. [...]

2.1.2.1 Matters for Debate

Progress

The holdings of the Colombian and the Peruvian courts evidence the constitutional adoption of the liberal egalitarian ideology that since the 1970s has gradually updated liberal thinking to take into account most of the critiques formulated by

Socialism. The constitutional adoption of material or substantive equality, as developed by the Colombian Court, not only expresses a major theoretical political leap, but also a theoretical-legal progress for the region. The judge, until a few decades ago confined to technicalities, acquires the unprecedented power of evaluating the facts and social reality. He must then resort to meta-legal concepts, since the logical and syllogistic methods are already ineffective. Indeed, to reveal the meaning of the principle of material equality requires evaluation and not simple application. This position is defended by the Colombian court when it affirms that substantial equality has a remedial, compensatory, corrective, and defensive character of persons and groups situated in conditions of inferiority. It is further reinforced by the Peruvian Court when it states that women remain relegated and subjected to a patriarchal cultural philosophy.

Quota Laws

One of the subjects of greater impact from affirmative action is that of quota laws.¹⁴ In effect, toward the second half of the 1990s, the debate on these types of laws placed on the political agenda the political underrepresentation of women. Most of the legislations of the region have incorporated affirmative action¹⁵ with varied results. In Argentina, for example, for the period 2005–2007, the Chamber of Deputies was composed of 35.8% women, a historical record since the enactment of the law. During the same time period, the Senate's percentage was 42.3%.¹⁶ Unlike this successful case, women elected to the Chamber of Deputies in Brazil, for the period 2003–2007, reached only 8.19%.¹⁷

Quota laws face various types of inconveniences. In addition to the legal and constitutional obstacles shown in the Colombian Court's judgment, there are the practical obstacles derived from the disobedience of the adopted norms as evidenced in the Argentinean case. In the same way, the manner in which the lists are formed, or the election regime in force for the election of congress – be it in small or large districts, in a system of proportional representation of a majority regime, whether votes are for individuals or parties, etc. – deeply affects the results of political quotas. In general, women obtain better results in large proportional electoral systems.¹⁸

The two cases described above show an important problem: the defense of the degree of freedom granted to political parties in the elaboration of their lists. This

¹⁴ For an in depth study on quota laws in the Andean regions, see Magdalena León, ed., *Nadando contra la corriente. Mujeres y cuotas políticas en los países andinos*, UNIFEM, Bogotá, 2005.

¹⁵ Argentina (1991), Bolivia (1997), Brazil (1997), Mexico (1996), Panama (1997), Peru (1997) and Venezuela (1998).

¹⁶ Jutta Marx, Jutta Borner and Mariana Caminotti, *Las legisladoras. Cupos de género y política en Argentina y Brasil*, Siglo XXI, Buenos Aires, 2007, pp. 85–87.

¹⁷ *Id.*, p. 102.

¹⁸ Mala Htun, “Democracia e inclusión política: la región andina en perspectiva comparada”, en Magdalena León, *Nadando contra la corriente. Mujeres y cuotas políticas en los países andinos*, op.cit., p. 55.

defense, which finds explicit support in the Colombian Constitutional Court when it declares that part of the law is unenforceable based on the defense of the autonomy of private associations, has also found an expression, implicitly, in the concrete practices of political parties of the region which, in spite of having quota laws that harbor the formation of egalitarian lists, have sought mechanisms to render them ineffective.

From a sociological perspective, this situation can be examined in the same way the scarce presence of women in political parties of Europe is explained. The deficient relationships between parties and women's movements, besides the characteristics of professionalization of politics and its autonomy in the face of other fields of social life, can help understand the impervious character of politics in the face of significant changes in women's role in the region.¹⁹

On the other hand, the success of quotas for women can be examined from various points of view. First, from the numerical perspective, starting from the number of women who were elected under the new norm. Second, from the concern for substantive representation of women's interests in the spheres of power. Many women activists, in fact, defended quotas because they considered that a greater female presence would improve the representation of gender matters and would increase the possibilities of carrying out policies directly related to women's interests. However, inclusion does not necessarily imply representation.²⁰ According to the experience of Latin American countries, there is a consensus that there will be success when the following conditions are met: first, quotas must be mandatory; second, they must specify rules regarding the position in the lists, for example, that women not be in last place; and third, that they be enforceable: political parties must be subject to the possibility of losing their seats in Congress in case of non compliance.²¹

2.1.3 *Emancipation*

As explained above, radical feminists do not believe in the idea that equality – formal or substantive – professed by liberalism, is suitable to resolve the problem of subordination. More than a fight for equality, it is about fighting against hierarchies. Radical feminism focuses on sexual and labor oppression, on economic dependence, deficient

¹⁹ Catherine Achin y Sandrine Lévêque, *Femmes en politique*, La Découverte, Paris, 2006, p. 77.

²⁰ This distinction beings with a more complex conceptualization. According to Mala Htun, "This distinction corresponds to the two dimensions of the concept of representation described by Hanna Pitkin in her classical study *The Concept of Representation* (1967). On the one hand, representation can be understood as 'standing for', where presence is most important from a descriptive or symbolic sense. Legislators represent descriptively their constituents when they have similar physical features, share the same experiences, and serve as a symbol that evokes certain attitudes and emotions. On the other hand, representation is to act in favor of, or in Pitkins's terms, 'action for', that supposes that legislators must exercise their function of 'representation that actively promote the interests of the citizens that elected them'." Mala Htun, "Democracia e inclusión política: la región andina en perspectiva comparada," *op.cit.*, p. 33.

²¹ Peter Smith, *Democracy in Latin America. Political Change in Comparative Perspective*, Oxford University Press, Oxford, 2005, p. 252.

access to education and all other aspects in which patriarchy is expressed. The major exponent of this perspective is Catharine MacKinnon, for whom:

Sexuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away. Marxist theory argues that society is fundamentally constructed of the relations people form as they do and make things needed to survive humanly. Work is the social process of shaping and transforming the material and social worlds, creating people as social beings as they create value. It is that activity by which people become who they are. Class is its structure, production its consequence, capital its congealed form, and control its issue.

Implicit in feminist theory is a parallel argument: the molding, direction, and expression of sexuality organizes society into two sexes—women and men—which division underlies the totality of social relations. Sexuality is that social process which creates, organizes, expresses, and directs desire, creating the social beings we know as women and men, as their relations create society. As work is to Marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind. As the organized expropriation of the work of some for the benefit of others defines a class—workers—the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.²²

From the domination theory point of view, advances in the region in terms of overcoming patriarchal features have been expressed mostly in the field of criminal and labor law. Their manifestation in the regional legislation and jurisprudence are dealt with in the chapter “Violence” (Chap. 6). This section points out the advances of the constitutional doctrine in regards to the deregulation of private relationships of domination, an aspect on which female subordination has been based.

Indeed, the separation of the private and public spheres, and the remitting of women to the latter, has been a central issue in the feminist critique of liberalism. The consequences in terms of the lack of protection of the private sphere – the family – have been widely documented in the feminist theory.²³

An essential problem of liberalism, according to feminism, is the defense of the principle of neutrality that led the State to abstain from intervening in spaces in which domination and violence are habitual. Especially in its radical aspect, feminism emphasizes that the concentration of power in private hands and the violence exercised in the intimate sphere are responsible for the impossibility to achieve a socially more egalitarian world.

State intervention to protect private relationships and the definition of the scope of autonomy in this space are, for this reason, a significant contribution to regional case law. The penal, labor, and civil norms eliminated acts and omissions which expressed gross patriarchal models; the integrity of the female body is today widely protected by law, and the home is no longer viewed as a sacred space, it is now

²² Catharine A. MacKinnon, “Feminism, Marxism, Method, and the State: An Agenda for Theory”, *Signs*, Vol. 7, No. 3, Spring, 1982, pp. 515–544.

²³ Martha Alberston Fineman and Roxanne Mykitiuk, eds., *The Public Nature of Private Violence*, Routledge, New York, 1994.

registered as a place in which, with fearful insistence, violence and coercion reign.²⁴ This aspect in particular is treated in the chapters “Violence” (Chap. 6) and “Family” (Chap. 3), and will not deal with it in detail at this point.

The following presents a judgment of a wider scope that focuses on the subordination of private contractual relationships and makes a pronouncement on the capacity of the liberal state to interfere in order to protect fundamental rights in these types of cases. The plaintiff meets the characteristics of individuals who suffer what has been termed “multiple forms of discrimination,”²⁵ that is, the characteristics that make her critically vulnerable: gender, race, and poverty.

Constitutional Court of Colombia Ruling T-1042 of 2001

Main Legal Issue:

Is it an act of discrimination, contrary to the Constitution, to exclude someone from access to a good or service based exclusively on his/her social status? What is the difference between subordination and defenselessness? Is there constitutional protection of rights in private relations?

Facts:

Mrs. Calderón filed a writ of amparo against the general manager of the building in which she worked for infringing upon the fundamental rights to life, equality and free development of the personality. In the building, there was an elevator for the use of employees; these had to abstain from using the elevators exclusively for residents, visitors and tourists. When the employees’ elevator malfunctioned, Mrs. Calderón was forced to take the stairs to reach the twenty-second floor apartment of Mr. Garcia Martinez, where she worked as a domestic service employee. The Second Penal Tribunal of the Municipality of Cartagena ordered that the defendant, within 48 hours after the notification of the decision, take the necessary measure so that in the future there is no discriminatory treatment to the plaintiff and she can use the elevator for residents and visitors when the employee elevator is out of service.

Court Ruling:

The Court holds that differentiation based exclusively on the condition of being employees or domestic services workers to prohibit the use of certain elevators of a co-ownership constitutes a discriminatory act based on the social status of a person; the fundamental rights to human dignity and to equality of these employees is infringed on.

²⁴ Nancy Fraser considers the nuclear family as “the site of egocentric, strategic, and instrumental calculation, as well as the site of usually exploitative exchanges of service, labor, cash and sex, not to mention, that is the frequent site of violence and coercion.” Quoted in, Seyla Benhabib and Drucilla Cornell, ed. *“Introduction” to Feminism as Critic on the Politics of Gender*, Minneapolis, Minnesota University Press, 1987.

²⁵ Deborah King, “Multiple Jeopardy, Multiple Consciousness” en *Signs* 14 No. 1, 1998.

Extracts:

[...]

Regarding the difference between subordination and defenselessness, the Court has determined the scope of both institutions. While the relationship of subordinations is viewed as a normative situation, the relationship of defenselessness has factual nature. The Court has held:

This Court understands that subordination refers to the existence of legal dependence, as occurs, for example, with workers in relation to their bosses, or with students before their teachers or before the directives of the institution to which they belong, whereas defenselessness, even though it refers to a relationship that also implies dependence of a person with respect to another, does not originate in the compulsory nature derived from a determined legal or social system but in situations of a factual nature by virtue of which the person affected in her/his right is defenseless, understood as the lack of the possibility of effective response in the face of a given violation or threat [...]

Fundamental rights between private individuals: the so-called horizontal effects of fundamental rights

[...]

The criterion *par excellence* that has prevailed in the constitutional doctrine and case law at the time of admitting the constitutional analysis of particular actions regarding their respect for the fundamental rights is the existence of a clear asymmetrical relation of power between private persons, a relation that from the start rules out, limits or eliminates a person's autonomy and justifies state intervention to avoid the debasement, the absolute instrumentalization, or the degradation of human beings. Thus, in the face of contractual, commercial relationships or relationship of an individual's full exercise of autonomy, the Court has held that, in principle, it is not pertinent to grant the constitutional protection of fundamental rights. Instead, in the case of private relationships, in which there are relationships of subordination or defenselessness – as is the case in labor, pension or medical matters, in matters of exercise of computer power, of co-ownership, of trade union sports or transport associations or religious associations, of family violence, or social supremacy – constitutional case law, following the parameters set by the Constitution itself, has intervened, in such situations, to safeguard the effectiveness of fundamental rights.

Inasmuch as, derived from his/her greater power, a private person has for example the capacity of imposing on another a set of rules, of making unilateral decisions which generate some consequences that have a deep impact on the passive recipient of the same, or of qualifying or defining another private individual's situation with the damaging or beneficial implications derived from it, it is not strictly possible to speak of horizontality in relations between private persons. Under these conditions of marked asymmetry of power, such a relationship resembles more those of a vertical type between the citizens and the State than those of the horizontal type that exist, for example, between two tradesmen.

[...]

Equality and non discrimination

[...]

In private relationships, the enforceability of the principle of equality has its limits in autonomy, pluralism and cultural diversity. Thus, the State could not impose respect of the right to equality to an association of persons who explicitly decides to exclude persons of another origin as potential members – society of nationals – or with certain characteristics – political, moral or religious beliefs. Schools exclusively for women, organizations only for members of a religious faith, or residential assemblages only for the elderly, would have as a constitutional basis the right to autonomy and the guarantee of pluralism. Now, what is valid for the relations of private self-determination par excellence, like the exercise of free association, is not valid for situations of subordination or defenselessness. In these situations, what was viewed as a legitimate differentiation within the individual or group preferences is now a potential discrimination or discriminatory act susceptible of constitutional control.

The Court, based on its case law, departs from the following concepts of discrimination and acts of discrimination:

Discrimination, in its double meaning of act or result, implies a violation of the right to equality. Its constitutional prohibition is directed at impeding that the exercise of rights and freedoms of one or several persons be coerced, restricted or excluded, deny awarding access to a benefit, or a privilege to some, without an objective and reasonable justification.

Discrimination is an arbitrary act aimed at damaging a person or group of persons based mainly on stereotypes and social prejudice, generally alien to the individual's will, such as sex, race, national or family origin, or for irrelevant reasons, such as language, religion or political or philosophical opinion, at making a person the receiver of a detriment or a benefit.

[...]

The unequal and unjustified treatment that is usually present in the language of norms or in institutional or social practices, in a generalized way, to the point of being confused with institutionalism itself, or with the way of life of the community, being contrary to the constitutional values of human dignity and equality, constitute a discriminatory act, since it imposes a non legally or morally enforceable burden on a person.

We then have that for a discriminatory act to exist, in addition to an unequal treatment, it is also required that such treatment be unjustified, that is, lacking reasonability and causing a damage, be it because it generates harm, creates a burden, excludes someone from access to a good or service of common or public use, retains or withdraws a benefit. [...]

2.1.3.1 Matters for Debate

The debate on the horizontal effects on human rights that the Colombian judgment provokes expresses one of the most relevant aspects of the contemporary State's and law's transformation. What is private? When must the State intervene in this space to make fundamental rights prevail? The Court's answer is twofold: labor relationships are private relationships where subordination reigns, which in turn is a normative matter. Defenselessness, however, has a factual nature. This differentiation, especially

the affirmation on the factual nature of defenselessness, promises to endow judges with the tools to assess those situations in which women and sexual and racial minorities are defenseless due to the principle of State neutrality in private relationships still in force.

On the other hand, the case presented evokes one aspect that generates ample controversy in feminism and will be dealt with in Sect. 2.2: the multiple identities of women and the weight that forms of domination, not particularly of a sexual nature, have on their lives. Mrs. Calderon is not only a woman, she is also an indigenous person and a worker. Which is the most problematic dimension of her life circumstances? Her condition as a woman, as a domestic employee or as a member of a racial minority?

2.2 Citizenship as Belonging: Identity and Culture

The feminist movement, in the early twenty-first century, concentrates on the task of elaborating a theory capable of encompassing all women. The differences, no longer between women and men, but among women themselves, are the point of departure for a new group of ideas that react and reject the former feminism, liberal or radical, because they consider it essentialist, that is, because it projects on women and on men certain capacities or attributes that are historically and culturally acquired, and by doing so privileges the viewpoint of white, heterosexual and middle class women. This feminism is reproached for it having assumed the existence of the female experience irrespective of class, race or sexual orientation.²⁶ Women of traditional feminism, they state, are far from real women. By silencing the differences among women, the feminist movement has also allegedly hidden domination for reasons other than gender and the forms of subordination exerted upon, for example, poor, colored, foreign and lesbian women. Against generalization of experiences – for example, that of sexual subordination, – black feminism²⁷ states that rape is a much more complex experience for black women than for white women and that its occurrence depends more on color than on gender.

For postmodern feminism,²⁸ which raises a great part of these critiques, gender is socially constructed through social and political practices. Like the actor performing a role in a play whose script precedes and survives him, the subjects develop a gender role that is independent of their biological sex. The same happens with the rest of identities. Feminism assumes that collective identities are fictions and

²⁶ Peter Digeser, “Performativity Trouble: Postmodern Feminism and Essential Subjects”, *Political Research Quarterly*, Vol. 47, No. 3, September, 1994.

²⁷ See, e.g., Angela P. Harris, “Race and Essentialism in Feminist Legal Theory”, *Stanford Law Review*, Vol. 42, 1990.

²⁸ Judith Butler, *Gender Trouble*, Routledge, New York, 1990.

believes that politicized terms of identity, such as “the women,” are necessarily excluding and can only be constructed based on repression of difference.

For these reasons, it is now not about discovering what is the essence of the feminine and its difference with the masculine, but to reveal the way in which the different discourses construct an idea of the feminine and how they turn these differences based on sex into relevant differences and subordination mechanisms.²⁹ In this sense, the analysis of the law as a discourse that fixes identities, and in this case the feminine identity, is the subject of interest here.

On the other hand, this moment of feminist thinking coincides with the theories on citizenship described above, especially in their multicultural aspect. Multicultural citizenship pretends that the bond between the citizens and their communities not be neutral and that it account for the differences disregarded by the universal concept of citizenship. For its part, the branch of feminism that is akin to it, advocates for an idea of identity which, without falling again into the much criticized essentialism, permits women to identify themselves and constitute the differentiated citizenship.³⁰

This section will focus on two subjects. It will approach the law as a discourse which fixes identities and the conflict derived from the confrontation between a universal conception of rights, and the constitutional adoption of cultural recognition.

2.2.1 Identity

From the point of view of identity, law, politics and its key categories, such as citizenship, have been denounced for their inability to conceive a subject not determined by gender. For this reason it has been considered crucial to analyze them as processes of production of fixed identities and not as the implementation of norms to already sexed subjects.³¹

In alluding to a characteristic field, from the point of view of penal law, feminism states that the law's action is multiple on identity and on women's role. According to Alessandro Baratta, it operates through the primary criminalization³² when the acts women perform have a special relevance and cannot be controlled by the private patriarchy. The typical examples are abortion, infanticide and failure to provide child support. It also operates through negative selectivity, creating systems of immunity for men. Immunity operates in two ways: women are victims of a non-penalized violence or a penalized violence with reservations, – the cases of sexual

²⁹ Chantal Mouffe, “Feminism, Citizenship and Radical Feminist Politics” in, Judith Butler y Joan W. Scout, eds., *Feminist Theorize the Political*, Routledge, New York, 1992.

³⁰ Iris Marion Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship”, *Ethics*, Vol. 99, January, 1980.

³¹ Carol Smart, “The Woman of Legal Discourse”, *Social Legal Studies*, Vol. 1, No. 1, pp. 29–44, March, 1992.

³² Alessandro Baratta, “El paradigma del género, de la cuestión criminal a la cuestión humana”, en Haydée Birgin, *El derecho en el género y el género* Biblos, Buenos Aires, 2000.

and physical violence, in particular between spouses – or the penalized forms of violence offend objective and abstract values but not concrete legal goods, such as the characterization still in force of crimes against sexual freedom, honor, or family order. Likewise, the law defines women in abstract terms when they are assimilated to minors or elderly persons, or imposes a model of behavior when only “honest women” are beneficiaries of certain prerogatives.

These subjects are dealt with mostly in the chapters on “Violence” (Chap. 6), “Health” (Chap. 4), and “Family” (Chap. 3) of this book. Below are two judgments that manifest the classifying capacity of the law in the definition of identities and roles.

**Supreme Court of Justice of El Salvador
Unconstitutionality of article 196 of the Penal Code
September 10 of 1990**

Main Legal Issue:

Does sanctioning, with lighter penalties, the rape of a woman prostitute infringe upon the constitutional principle of equality?

Facts:

A woman claimed the unconstitutionality of article 196 of the Penal Code that provides that within the “crimes against modesty and sexual freedom,” what has been typified as “prostitute rape” states: “The rape performed against a woman who devotes herself to prostitution, shall be punished with imprisonment of three months to two years.” She considers that the article infringes upon the principle of legal equality, the right to honor, personal intimacy and her own image, since the rape committed against a woman who practices prostitution receives a light punishment.

Court Ruling:

The Court rejects the claim and confirms the constitutionality of the challenged norm.

Extracts:

[...]

The fundamental right to honor has two basic aspects, which are: a subjective one, relating to the immanence or sameness that consists in the assessment that each person makes of him/herself or the moral quality that is committed to the fulfillment of duties; another, of an objective nature, which consists in the transcendence or formality composed of the recognition of our dignity made by others, which is reputation or fame that accompanies virtue.

[...]

When drafting the Code currently in force, the drafting commission based its work on article 271 of the bill of the 1967 Venezuelan Penal Code [...] Such provision states: “Art. 271. Rape of prostitute. Whoever, through violence or intimidation, has forced a prostitute to have carnal access with him, shall be sentenced to prison for two or thirty months.”

[...]

If it is not acceptable that article 196 of the Penal Code affects the principle of equality, much less can it be accepted, as claimed by the pleader, that prostitution constitutes a “profession” [...] Rather, the activity is considered a criminal offence in certain penal legislations, constituting the so called crimes related to prostitution.

[...]

In some legislations, according to the type of rape, a requirement for the passive subject has been added: that it be an honest woman, which adds a special connotation in order to consider that the crime has been committed [...] In effect, article 120 of the Argentinean Penal Code establishes: “A sentence of imprisonment of three to six years shall be imposed, when the victim is an honest woman over the age of twelve years and under the age of fifteen and not comprised in the circumstances of paragraphs 2 and 3 of the previous article.”

[...] Here, the term “honesty,” as expressed by Soler, is taken in a sense of sexual morality.

The criminal figure as described in Art. 196 of the Penal Code can, therefore, be considered a type of attenuated rape, taking into account the passive subject who does not fulfill the conditions of sexual morality required for the type of proper rape. Even though women who practice prostitution are not left without protection, their condition is taken into account to diminish the gravity of the criminal offense.

On the other hand, concerning the recipient of the prohibition contained in the noted provision, the active subject, no difference is made that could affect the principle of equality, since the noted valuation refers exclusively to the passive subject, on account of the activity dedicated to, which is a promiscuous sexual conduct and for a price.

[...]

Constitutional Court of Colombia Ruling C-989 of 2006

Main Legal Issue:

Is the right to equality of a handicapped person infringed upon by a norm that privileges the dependence of a working mother over that of a working father?

Facts:

A claim is filed against the constitutionality of the expression “mother” included in a norm which creates the integral social security system and contains provisions on special and exempted pension regimes. The norm says: “[...] the working mother whose son suffers a physical or mental handicap, so qualified duly accredited and until such time remains in that condition and continues to depend on the mother, shall have the right to receive the special seniority pension at any age, provided she has entered the general pension system at least for the number of weeks required by the regime of medium premiums to access the seniority pension.”

Court Ruling:

The Court holds the constitutionality of the article, with the understanding that the pension benefits provided for in the same article are extended to the father head of household of handicapped children who depend on him economically.

Extracts:

[...]

The measures that were [...] adopted [...] by the authorities based on the special constitutional support of which mothers heads of household are holders may also be extended to men who are in the situation, “but not because there is an alleged discrimination based on sex between both genders, but because the purpose sought by it is to make the principle of protection of children effective, in those cases in which these are under the ‘exclusive’ care of their father,” in such a way that, if this protection is not extended to the father, certain rights of the children could be certainly be affected.

[...]

In other words, the affirmative actions established by the legislator in favor of mothers has its rationale in the special protection consistent with the constitutional mandate provided for in articles 44 and 47 of the Political Constitution, that advocates for the child’s superior interest and the social rehabilitation and integration in the case of the physically, sensory or psychically handicapped, under any circumstance; it is for this reason that it cannot only protect the mother but this benefit should be extended to the father who demonstrates to be in the same factual situation.

[...]

In such a way that, by recognizing the pension benefit established in the challenged legal provision exclusively to mothers heads of household, there is a violation to the right to equality of the handicapped son who depends economically on his father head of household, for the simple fact of being the man and not the woman the one who responds economically for his maintenance, without taking into account the special condition of handicap he suffers, which is ultimately the cause for seeking his protection, so that not only he does not lack economic resources that would allow his adequate rehabilitation to social life, if this were possible, but also disregarding the fact that the father can take care of the handicapped son, providing him the necessary care and attention, without such circumstance being limited only to those cases in which the mother of the family has died.

[...] the Court shall declare the conditioned enforceability of the challenged term “mother,” in the understanding that the pension benefit provided for in such article will be extended to the father head of household of handicapped children who depend on him economically, and it will be so noted in the operative part of this decision.

F. A. D. Protective Custody Moderation of its Own Authority
Court of Penal Rights N° 8
Judicial Department of Lomas de Zamora, Argentina
2010

Main Legal Issue:

Does the norm that establishes house arrest only for mothers and not for fathers of children under the age of 5 infringe upon children’s rights?

Facts:

A man accused of the crime of illegal possession of drugs for sale, requests the benefit of house arrest to take care of two minor sons under the age of 5 after the death of his concubine. However, the Code of Criminal Procedure reserves this benefit specifically for women with children under the age of 5, excluding any other type of family bonds and relationships.

Court Ruling:

The judge recognizes that the measure is reserved for mothers of children under the age of five. However, he states that the exercise of the shared paternal authority is attributed both to the father and to the mother, for which reason, given the family situation of the defendant after the death of his children's mother, and taking into account the fact that the defendant is the only one who is entitled to exercise paternal authority, he decides to grant the benefit to the father.

Extracts:

[...] Several works and reports of international organisms of human rights have published on the impact the incarceration of a mother has on her children and alert on the importance of considering such effects in legal processes: “when the children of incarcerated mothers and fathers are neither taken into account nor are children mentioned in the different stages of the criminal law process – from the arrest, going through the trial, and imprisonment [...] the rights, needs and the boys or girls’ best interest are being at best ignored, if not actively damaged...”

In the same sense, it has been also said that “States must seriously meditate on the cost implied in increasing the use of penalties of deprivation of freedom of women for non violent crimes, taking into account the very serious consequences that imprisonment of women have on the family and the importance of a good family relationship as a key factor in prevention of crime.” For this reason, they must consider alternative sentences, with no deprivation of freedom, for offenders of non violent crimes. [...] on the other hand, and before this time, the Civil Code established that: “The paternal authority is the assemblage of duties and rights which correspond to the parents regarding the persons and goods of their children, for their protection and integral formation” and “The minor children are under the authority and care of their parents. These have the obligation and the right to raise their children, feed them and educate them in a way consistent with their condition and wealth...” (article 265 C.C.).

Along these lines, it is clear that one of the most transcendent gender conquests of the 20th century has been the full exercise of shared paternal authority, since its exercise is attributed both to the father and to the mother in a joint way. [...] However [...] making special reference to the circumstances under which the defendant's family is found, as recorded in the present file, the characteristics of the death of the children's mother and concubine of the defendant and since the minors on account of their age have no independence regarding housing, labor and/or family, the limit specifically set to award an alternative and/or moderating measure “to the woman with children under the age of five” is directly opposed to the exercise of paternal

authority [...] to the Convention on the Rights of the Child and to the National Constitution itself, since the defendant [...] is the only one entitled to exercise this right and duty regarding his two minor children.

2.2.1.1 Matters for Debate

Not only does the law establish identities, it also allocates roles. It seals the differences between sexes through language; the exceptions it contemplates for one of the two sexes or the different standards for the assessment of conducts are frequent examples of this. The first case reminds us that conceptualization of aggressions that affect the integrity and the autonomous exercise of sexuality of persons, such as crimes against honesty, were a constant theme in the region until the 1990s. The relationship between these acts and “sexual honesty” showed the protection of the penal system for those who were the owners, tutors of, or persons responsible for the women, consistent with a system enlarged by legal incapacities that excluded women’s sexual autonomy and promoted their sexual modesty. Along these same lines, these norms incorporated the allocation of traditional roles and the separation between those who deserved State protection and those who did not. Privileges for “honest women,” and aggravating circumstances for kidnapping of married women, among others, are eloquent examples of the law’s capacity to define identities and generalize subjectivities.

The second and third cases, question the allocation of roles made by the legislators. For the legislators, the idea of care was exclusive of women, thus defining and reproducing identities. The suggestion is to break this classification and then incorporate men, but it does so taking into account the *de facto* situation: only those who perform the same role of care shall benefit. With this, it fulfills a prioritized conceptual function: the socially acquired separation of identity roles.

2.2.2 Culture

In November 2006, Pakistan adopted a law whereby women who were raped and who had the possibility of accompanying their claim with the testimony of five men could be acquitted from the crime of adultery after having suffered a rape. In Mexico, a claim lodged before the State Commission of Human Rights in 2004 narrates a brutal punishment on an indigenous woman of the *Otomí* community accused by members of her community of adultery. In Colombia, the Emberá-indigenous community imposed a sanction on a 14 year-old girl, consisting of keeping her left foot in a stock – an instrument made of two pieces of wood to restrain prisoners – for having maintained a romantic relationship with a policeman who did not belong to the community, and a series of claims opened the public debate on clitoris mutilation practiced on women of the same community.

These and many other similar narrations reveal the constitutional conflict of principles that the courts have had to deal with for the last two decades. A large part of multicultural societies, those in which multiple cultures cohabit and interact,³³ have recognized multicultural rights, especially the rights of self-government. However, this recognition has been questioned by those who, from the universal perspective of citizenship, and women's equality and dignity, consider certain cultural practices unacceptable.³⁴ In its strong version, multiculturalism³⁵ establishes that cultural groups must be guaranteed a series of rights that allow them to govern themselves in a broad manner according to their customs and beliefs. In its weak version, this broader view finds precise limits in the rights of the members considered individually. This is the argument that guides the critiques of some feminists.³⁶

The judgments presented here describe the way in which the courts of Salta, Argentina and Pueblo Rico, Colombia dealt with the universal idea of rights and respect for cultural diversity.

Trial Court 2 Tartagal, Salta Argentina December 15, 2006

Main Legal Issue:

What are the limits to legal autonomy of indigenous communities when their practices, constitutionally protected, violate fundamental rights?

Facts:

José Fabián Ruiz, a member of a Wichi community of Tartagal in the northern part of Salta, Argentina, is accused of having sexually abused a nine year old girl, the daughter of his concubine, belonging to the same ethnic group. As a result of that relationship the girl was impregnated and, at the moment of the girl's delivery, her mother reported the rape. The accused justified his action as being an ancestral custom in his community according to which a man living with a woman of the same ethnicity may have relations with her daughter, as well, if she is not his own offspring.

The case first came to the attention of the Judge of Targal Trial Court No. 2 who ordered the arrest of Ruiz for "aggravated sexual assault." Days after the accusation, the accuser and various members of the Wichi community requested that Ruiz be released, alleging that his conduct conformed to the norms of his cultural customs. The defense appealed the court's decision before Division III of Arraignment Court, who denied the petition and confirmed the decision to proceed against the accused.

³³ Amy Gutman, "The Challenge of Multiculturalism in Political Ethics", *Philosophy and Public Affairs*, Vol. 22, No. 3, Summer, 1993.

³⁴ Susan Moller Okin, "Is Multiculturalism Bad for Women?" in, Joshua Cohen y Howard Matthew, *Is Multiculturalism Bad for Women?*, Princeton University Press, Princeton, 1999.

³⁵ See Ayelet Shachar, "On Citizenship and Multicultural Vulnerability", *Political Theory*, Vol. 28, No. 1, February, 2000.

³⁶ To explore an opposition to these arguments see, Letti Volpp, "Feminism versus Multiculturalism", *Columbia Law Review*, Vol. 101, No. 5, June, 2001.

The defense appealed this later decision before the Salta Court of Justice and this tribunal, by a three to one majority, decided to declare the legal actions taken as nullified and ordered that the accused be released.

Arguments by the Court are based on the fact that cultural autonomy of indigenous peoples is protected by the Constitution of the Argentine Nation. After this last decision described above, the Judge of Tartagal Formal Trial Court No. 2, in the decision that is transcribed here, resolved to proceed once more against Ruiz for the same crime. The defense appealed this decision twice more but on both occasions the proceedings in the superior court confirmed the judgment that is transcribed here.

Court Ruling:

Although the right to cultural identity is a form of human rights, it is indisputable that no practice, even if it should be based on ancestral customs or religious beliefs of a determined culture, can be acceptable if it places a person's dignity at risk. There exists no contradiction between recognizing the rights of minority groups to their cultural identity and criminalizing the conduct of a person, who is a member of that culture, against the physical, mental, and moral integrity of another person, most particularly if that person is under special protection, such as in the case of young girls and boys.

The judge based his decision on three principal arguments: First, he established that the consent and lack of physical violence do not prove the argument that the accused should be exonerated, because when dealing with a minor it is impossible to speak of consent freely given. In regard to the absence of physical aggression, the judge affirms that violence can be present in different forms and, in this case, it is evident that the minor reacted with reverential fear to the intimidating power of the authority who is charged with her custody, safekeeping, and education.

Second, the judge resolved the conflict between the indigenous community's autonomy and the right of the minor's physical, mental, and moral integrity, giving more weight to the greater interest of the child as was consecrated by the International Convention on the Rights of the Child, and negating the character of the right to community practices that place at risk the physical, psychological, emotional, and sexual integrity of any of its members.

Third, the judge affirms that Argentine indigenous communities are integrated into the majority culture, and for that reason cannot cite as proof of their argument that they are ignorant of the illicitness of their behavior.

Extracts:

[...]

And from all of this it becomes evident that when the action committed by the accused is analyzed, it falls within the category of a criminal offense, as long as the sexual abuse with carnal knowledge committed upon the minor is duly proven. [...]

It is for this reason that we declare that the accused, Fabian Ruiz, is the perpetrator who is materially responsible for the illicit action, and with the classification that is given, that he had knowledge that the minor was the daughter of his concubine,

Teodora Teherina, allows us to infer that there existed a disregard of consequences. That is to say, the primordial element to which the subjective legal entity is resigned, in other words the wanting dominated by the will of the objective legal entity, or in simpler terms, the will to act in reference to the result produced by the intentional action of imposing carnal knowledge on the victim, and being authorized to perform this action showed disregard. In dealing with the subjective aspects, the result is clear: that they cannot be seized or immediately grasped by the Judge, but instead, that they can and should be derived by means of conduct carried out by the active subject that forms part of the attribution.

The absence of vestiges of the physical violence turns out to be irrelevant, as well, because the rape also consists of moral violence, and, important to say, is performed with a degree of intimidation that is sufficient, and in this regard, in the matter of rape, the question that relates to force used and the victim's resistance is purely circumstantial. And in fact, depends on the assessment by the judicial system in light of the causes of the circumstances under which the menace might present itself: by means of words, power to intimidate, seduction, or, as in the case of the subject in question, that reverential fear and the authority that the accused had or has over the victim upon finding himself living with the mother of that minor in the same home and who had in his charge the custody, safety, and education of that same minor. For this reason, we declare that the absence of genital lesions do not rule out rape, nor does it rule out absence of violence, which is irrelevant, because of the fact that violence as we might express it may have been consummated using moral violence or sufficient intimidation.

We should also explain that the existence of consent on the victim's part can be associated with different consequences according to the different hypotheses contemplated in the criminal statutes. In this way, in cases where the victim should be younger than thirteen years old, as we are analyzing in these actions, sexual abuse always occurs whether or not the victim has given her consent. In effect, carnal knowledge of minors, whose age, even though it might be imprecise but was somewhere between nine and eleven years, in a manner that was repeated until pregnancy resulted, a method that supposedly was consented to by virtue of matrimonial relations that are accepted in certain indigenous communities, results in absolute violation of a person's physical, mental, and moral integrity and the dignity of the human being as described in article 5.11 of the Pact of San Jose, Costa Rica.

And these standards (in the pact) should not fail to be applied to the minor, Tejerina, because of the fact that both the victim and the victimizer belong to the Wichi ethnic group, because the Guarantees of Human Rights should be applied in all of the National and Provincial States in an egalitarian way to those who live there. This is stated not only in the National and Provincial Magna Carta in its Article 16, but also as it is based on the Law that considers that said consent in cases where it exists (as it has tried to be demonstrated here) is ineffective due to the lack of maturity that the victim would need in order to discern the significance and scope of the action. By virtue of the Law, whether or not the victim has given her consent, the conduct shall be contrary to the statute because what is being protected in this case is the victim's naivety, innocence, and her ineptitude, because she lacks the

mental maturity required to understand the nature of the action; and therefore the subscriber duly accuses the perpetrator Jose Ruiz of the crime of Sexual Abuse with Carnal Knowledge with prejudice to the minor, Estela Tejerina.

Additionally, if it is shown by means of the medical reports concerning the victim that there had been no aggression or that there is no evidence of aggression against the minor, simply because this matter deals with a cultural concept belonging to that community, it does not imply that we should set aside the concept of Personal (physical, mental, and moral) Integrity of which Sexual Integrity is only one of the components.

Personal (physical, mental, and moral) Integrity also includes the right not to have to consent to agreements that are considered to be degrading, satisfying those standards, and includes the right to reject medical and biological objectives as a minimum concept of the most basic Human Rights. [...]

We should not forget that the greater interest of the child is recognized in the International Convention on the Rights of the Child which refers to the problem about the relation of the child to culture and human rights, and that the interest of the child goes beyond any cultural standard that infringes on the minimum and elemental Rights of a minor, as it is established in its Preamble, in Article 8, point 1; Article 12, point 1; Article 15, point 2; Article 16, point 1; and cc. of the aforementioned Convention, which has constitutional roots in our Country in its Article 75 paragraph 22 with the Constitutional Reform of 1994. [...]

As a separate matter it is sufficient to analyze the permanent or ongoing objections that are mentioned in this type of action by members of aboriginal communities, in which the objective is to include as acceptable certain illicit conduct for reasons that the aborigines have their own, diverse culture. The members reason that constitutional norms are rendered vulnerable by not respecting the prevailing norms and customs of the Wichi people, of which the accused is a member, insisting that the issue deals with a matrimonial union carried out with agreement of the parties and within the approved customs of his community and immersed in the usual social system of the Wichi people.

To that argument we should reply that any judicial analysis should take into consideration that the conduct carried out by the subject which is classified as a criminal offense does not hold up to the defense that maintains that it is a cultural practice of the Wichi community, of which the inchoate is a member. But the facts in this case before you very clearly reveal a tremendous cultural density and they create a particular line of thought, given that they entail the necessity of analyzing the tension that exists between the two viewpoints regarding indigenous communities or their members.

To think along this line requires a certain perspective: that without disregarding their fundamental rights, we should first consider the manner in which the terms have been established in various National Supreme Court decisions. In these decisions the Supreme Court expresses that the terms that are established in International treaties and particularly those dealing with Human Rights never involve the annulment of the principles, rights, and guarantees recognized in the dogmatic portions of the Magna Carta. And the guarantees in those should blend and reconcile with the

doctrine of the Superior Tribunal according to which the interpretation of Constitutional norms should be carried out in a manner that is compatible with the requirements of a coherent union.

From this point of view, one cannot claim that there is inapplicability of National Criminal Law in regard to the indiscriminate exercise of rights derived from the condition of being indigenous and the fact of cultural identity, unless a status of absolute Constitutional Law were to confer upon those rights, a status which they do not possess.

And one can claim inapplicability even less when, as a consequence, a decision of this sort would entail the denial of other individual rights whose essence arises from the comprehensive interpretation of the norms that make up the constitutional framework that is applicable to this case.

It is worth mentioning [...] that the anthropology expert (that carried out) an analysis of the “privignatico” marriage, that is, a marriage in which a man marries the daughter of his wife’s prior matrimony (in which the husband has relations with his wife and her daughter by a prior marriage), starts off from the possibility of a multiple or polygamous marriage in these societies. In fact, this kind of union is relatively common and, in every case, corresponds to rules of social organization that may be considered normal in this zone and in many parts of the world. [...]

[...]

Analyzing, here, the previously referred to anthropological studies that also are included in this case before you, it is emphasized, during the hearing of same, that the purpose of respecting the cultural identity of a group of human beings when it is expressed in behavior that is supported by their moral and social values, with their own procedures and, primarily when there is consensus with their own communities, is laudable; nevertheless, the sexual relation between an adult and a nine or eleven year old girl consummated in a Wichi community cannot be registered as a legal exemption that must be respected as belonging to another culture. [...]

We must ask ourselves, then, which is our real conviction in regards to the universality of those human rights that are established by international conventions, incorporated in our Constitution, and which should or should not be protected, because it is indisputable that the right to cultural identity is included as a component of human rights, and it is also indisputable that any practice founded on ancestral customs or religious beliefs that threatens a person’s dignity cannot be considered to be a right. This was expressly affirmed by the 179 nations, among them Argentina, who signed the Beijing Declaration and Platform for Action in 1995 that was later ratified in New York in 2005.

The right of a community to a bilingual education forms a part of the right to a different cultural identity. It is not part of that right to violate the physical, psychological, emotional, and sexual integrity of one of its members, much less that of one of its minors. Thus, there is no contradiction between acknowledging the right to a different cultural identity and applying due punishment to one who, while being a member of that different culture, threatens the integrity and fundamental human right of another person. And this is particularly so if that person is in need of special protection, such as in the case of children, both girls and boys. Strangely, while the

argument about cultural diversity has never been a valid argument when it comes to guaranteeing the other rights, the necessity of respecting “ancestral practices” or the “right to the habitual” is put forward when dealing with actions that harm the sexual integrity of girls.

To support the idea that a people’s cultural identity should be respected does not imply a justification of the practices that are at odds with human rights, “equal and inalienable rights of all members of the human family,” as is affirmed in the Universal Declaration of Human Rights of 1948. Within the notion of human dignity over centuries the culture of man’s human rights has survived. Within the notion of human dignity over centuries there has survived the culture of man’s human rights that teaches that aberrant practices (such as sexual abuse is) should be eradicated, regardless of how rooted they are in a particular culture. To protect human dignity the State is obligated to guarantee the rights of all people. It is truly inconceivable that “abuse with violence” “when there is no consent” of the victim should be distinguished from “abuse with violence” when, as is cited as a means of proof in this case, there was “consent” on the part of the child.

It must be added that there are two clarifications: by definition all abuse is violent; a sexual relationship between an adult and a child is – as stated in the Criminal Code – abuse, and when the perpetrator is related by family. It is “aggravated abuse by a related party.” It involves an exercise of power by the stronger against the weaker, which is not always expressed as explicit violence. This is the case of the Wichi girl, of which it was said that there was no physical violence because it was a matter of “ancestral customs,” in other words, these were habits that were accepted by the community. And in this manner, in those cases in which the victims are younger than 13, there is always sexual abuse involved, whether or not the victim may have give her consent. The reason for this, as we have stated on several opportunities in cases that are equal to this one, that the law consider that said consent in cases where it exists (as it has tried to be demonstrated here) is ineffective due to the fact that the victim lacked the maturity she would need in order to discern the significance and scope of the action.

By virtue of whether of not consent on the part of the victim exists, the behavior shall always be as described by law. Consent presupposes conscience, freedom, and understanding of the consequences of an action. It turns out to be attractive to some to allege that there was “lack of understanding” or “ignorance” on the part of the accused or say that he “is not conscious that his action is prohibited or illicit.” We all know that in spite of the social and economic exclusion to which the aboriginal communities have historically been submitted, there has been effective integration in the majority of the directions of everyday life. In no other way could one explain that the aboriginal communities denounce any violation of their own human rights (an idea developed by western society in the 20th century), that they demand their rights of citizenship (a matter of contemporary debate), their right to ownership of the land, of running water, of decent living conditions, etc.

Colombia
Juzgado Promiscuo Municipal
Pueblo Rico, Risaralda
July 24, 2008

Main Legal Issue:

What are the limits to the autonomy of indigenous peoples? How can a change to their customs be promoted?

Facts:

The Emberá-Chamí community practices female genital mutilation. This consists of cutting and cauterizing the clitorises of newborn girls. This practice is customary for this community and appears to have two rationales: first, to prevent infidelity among adolescent girls and women, and to prevent, its practitioners believe, the clitoris from developing into a male organ for copulation if it is not removed promptly.

On January 10, 2008 the Civil and Criminal Judge of Pueblo Rico, Risaralda received a complaint of abuse of 16-day-old infants who had undergone genital ablation and were experiencing fever and vomiting from an acute infection. The petition sought the application of family violence laws to the case. Physicians and anthropologists became involved in the case and provided information about the origin and meaning of the custom and the health risks it presents.

Colombia is a multicultural society. The 1991 Constitution recognizes the autonomy of the nation's indigenous communities. Nevertheless, there is a broad consensus in the nation that any cultural practice that violates any of the four minimum fundamental rights (the right to life, right to physical integrity, right not to be enslaved and right to due process) must be changed, while respecting the indigenous communities' autonomy and providing support from the state institutions that are involved in these affairs.

Court Ruling:

The judge approaches the legal problem from three standpoints. First, he considers the conflict of rights in Colombia while acknowledging the autonomy of the indigenous peoples; second, he considers the problem of the absence of responsibility as an impediment to criminalizing a practice that is part of a culturally accepted custom; and third, he evaluates the results of the measures the State has taken to change this type of practice. Regarding the first point, the judge referred to the Colombian Constitutional Court's broad jurisprudence, which has clearly established the limits of the indigenous communities' autonomy but has indicated that changes to their customs must be brought about by consensus and with respect for their autonomy. With regard to the second point, the judge studies the way in which the practice would coordinate with the penal system of laws and concludes that, given the absence of individual responsibility, it is not possible to approach the practice within the frameworks of the penal procedure code or family violence laws. Detailed analysis of these aspects and a review of the extensive and varied body of reports provided by anthropologists and physicians lead the judge to conclude: first, that the custom of female genital mutilation clearly oversteps the limits of indigenous

communities' autonomy and, therefore, it cannot be practiced.; second, that the practice cannot be criminalized because those who perform it do so without malicious intent; third, that although indigenous authorities have committed to eliminating the practice, they are not honoring these commitments and the measures to change the practice that the State has attempted to implement have not been effective thus far. Finally, he concludes that it is vital for the Colombian State to take clear and definitive measures to prohibit this practice.

Although Colombian criminal and family violence laws cannot be applied to cases of female genital mutilation that occur within indigenous communities, this does not mean that the only possible alternative is to rely on intercultural educational measures aimed at changing the custom. These are slow and inadequate. The State must adopt urgent measures to prohibit this practice, which violates the lives and personal integrity of girls and constitutes a violation of the national constitution and international humanitarian law.

Extracts:

[...]

3.1. The Autonomy of Indigenous Races Enshrined in the National Constitution.

In approaching the subject and arriving at the conclusion of the present verdict, we shall review article 246 of the Political Constitution and the Constitutional Court's pronouncements regarding said legislation. One of the legal problems that arises is what action the Colombian authorities should take with regard to a practice that is traditional within the EMBERÁ-CHAMÍ indigenous community in the Risaralda department, an action that was presented to this judicial office and initially considered an act of intra-family violence, and whether intervening in this practice for the purpose of eliminating it is a viable option given the ethnic autonomy recognized in the constitution.

Article 246 of the Political constitution states:

"The authorities of the indigenous peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures, provided these are not contrary to the Constitution and the laws of the Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial system." [...]

"The constitutional jurisprudence has established that there are four elements of indigenous jurisdiction: i) the possibility that the indigenous communities have their own legal authorities; ii) the power of these authorities to establish their own rules and procedures; iii) respect for the Constitution and the Law alongside the principle of maximum autonomy; and iv) the legislator's authority to specify the method by which indigenous jurisdiction is coordinated with the national legal system."

[...] 3.2. The Principle of Maximum Indigenous Autonomy and the Reiteration of this Principle in Different Contexts.

The body of past judicial arbitrations has also established that the principle that governs the exercise of indigenous jurisdiction is the principle of maximizing indigenous autonomy and minimizing restrictions on such autonomy, based on

the principle of respect for ethno-cultural diversity. In spite of this view, the jurisprudence has established certain limits on this jurisdiction [...]

[...] 3.3. Fundamental Constitutional Rights Constitute the Minimum Obligatory Principles of Coexistence for All Individuals.

Despite the fact that all citizens, including members of indigenous communities, are bound by the laws and the Constitution (Articles 4, 6, and 95 of the Political Constitution), it should be noted that the axiological system contained in the bill of right and responsibilities, particularly as it pertains to fundamental rights, constitutes an important limit on the principle of ethnic and cultural diversity and on the values held by the different indigenous communities inhabiting the nation, communities that, I mention as an aside, were represented at the National Constitutional Convention.

3.4. The Imperative Legal Norms (Pertaining To Public Order) of the Colombian Republic Take Precedence Over the Usages and Customs of Indigenous Communities Whenever These Norms Directly Protect a Constitutional Value that is Superior to the Principle of Ethnic and Cultural Diversity.

The interpretation of the law as a limit placed on the recognition of usages and customs is not that the legal norms simply cancel out these usages and customs. The regulatory nature of the Constitution makes it necessary to weigh the relative importance of various values protected by the constitution – diversity, pluralism – against those protected by the mandatory provisions of the law. There are intangible conditions of pluralism and ethnic and cultural diversity of indigenous communities that cannot be subject to legislation, as this would endanger their preservation and undermine their cultural wealth, which relies precisely on maintaining their cultural uniqueness. The special jurisdiction (Article 246 Political Constitution) and functions of self-government entrusted to the indigenous councils (Article 330 of the Constitution) must be exercised, therefore, in accordance with their usages and customs, but while respecting the pertinent mandatory laws that protect superior constitutional values.

3.5. An Indigenous Community's Usages And Customs Take Precedence Over Dispositive Provisions of the Law.

This rule is consistent with the principles of pluralism and diversity and does not imply to acceptance of customs *contra legem*, because it refers to dispositive provisions. The nature of civil laws, for example, grants a wide margin of autonomy regarding individual will, which, *mutatis mutandis*, serves as a basis for the precedence of certain usages and customs over norms that should only be applied in the absence of self-regulation by the indigenous communities.

The earlier position has been altered by Court jurisprudence. Indeed, verdict T-349 of 1996 established that, in the interest of maximizing indigenous autonomy, the limits on indigenous jurisdictional faculties are limited to an intangible core of rights, i.e., the right to life, the prohibition of slavery, the prohibition of torture, a minimum amount of respect for due process of law according to the respective indigenous community's world view, in penal matters, the legality of crimes and

punishments. To prevent a situation from arising wherein any mandatory law could be invoked as a restriction on indigenous jurisdictional faculties, it was stated:

The principle of maximization of autonomy becomes paramount in this regard, because it pertains to purely internal relationships, regulation of which is vital for the preservation of cultural identity and group cohesion. Limits on the ways in which internal control is exercised should, therefore, be the minimum acceptable ones, and should apply only to what is truly intolerable and constitutes a violation of the most sacred human rights.

[...]

Limits to indigenous jurisdictional faculties are confined to the core of intangible rights identified by the constitutional jurisprudence; these are: the right to life, the prohibition of slavery and torture, a minimum level of respect for the proceedings themselves in the context of the respective indigenous community's world view and, with regard to criminal matters, legality of the crimes and punishments. These limits, which are minimal as seen in evolution of the jurisprudence, are justified because they are "necessary to protect superior hierarchical interests and they are the least restrictive limits imaginable under the constitution."

[...]

4. Observed Legal Problems.

There are several legal problems related to this topic that must be resolved.

- 4.1. Does the FGM/A practiced by the Emberá-Chamí indigenous community in the department of Risaralda represent a danger to the lives and personal integrity of that community's women and girls, and can the practice therefore be considered intra-family violence?
- 4.2. Does FGM/A violate one or more of the four minimum fundamental rights established by the constitutional jurisprudence by limiting the indigenous autonomy recognized by article 246 of the Constitution?
- 4.3. If in fact this practice is found to violate the rights of indigenous women and girls, to constitute intra-family violence, and to violate the above-mentioned minimum fundamental rights, how should Colombian authorities address the problem?

[...]

The document provided by doctor Agustín Conde, a surgeon at the Universidad del Valle, specialist in gynecology-obstetrics and epidemiology and member of the International Federation of Obstetricians and Gynecologists – IFOG – clearly states that the practice of FGM/A carries risks of physical complications and intense pain, shock, hemorrhage, tetanus, septicemia, urine retention, ulceration of the genital region and lesions adjacent to the genital tissue. It also carries a high risk of future maternal morbidity, recurrent kidney and urinary tract infections, cysts, infertility and contributes to higher neonatal death rates in infants whose mothers have been subjected to the practice.

The extracts above allow us to state without a doubt that FGM/A is in fact a harmful practice that endangers, both in the present and in the future, the lives and personal integrity of women and girls in the Emberá-Chamí indigenous community

in the department of Risaralda. Therefore, the practice could be said to constitute intra-family violence, given that it has also been established that this practice is carried out within families (refer to the information contained in the epidemiological files showing that the girls were taken to the hospital by their mothers).

[...]

4.2. Inapplicability to FGM/A of The Rules Regarding Protection From Intrafamily Violence And of the Penal Procedure.

Given that the practice of FGM/A is an existing custom of the Emberá-Chamí indigenous community in the department of Risaralda, and that it originated during the conquest and colonization, it cannot be seen as just an act performed by individual mothers and midwives in this community. Therefore, its treatment must not be governed by the regulations contained in Law 294 of 1996, the basis for article 42 of the Political Constitution and rules created to prevent, remedy and sanction intra-family violence. Nor is Colombian Criminal Legislation applicable, because it pertains to malicious or blameworthy behaviors that occur within the individual's environment and which are not present in these cases.

Article 33 of the Penal procedure code, paragraph 1, states:

“Article 33. Unimputability. A person who, while performing the customary and illegal action, is not capable of understanding its illegality or cannot be determined to possess such understanding due to psychological immaturity, a mental disorder, socio-cultural diversity or similar conditions, is unimputable.”

This Article, among others that deal with security measures applicable to the individual who is declared unimputable for socio-cultural reasons, was contested before the Constitutional Court and court decision C-370-02 (...) declared it feasible under two conditions: i): that the unimputability does not derive from incapacity but rather from holding a different world view, and ii): that in cases of insurmountable errors whose prohibition stems from such cultural diversity, the person should be absolved and not declared unimputable, according to the stipulations of that court decision.

“The constitutionalization of a blameworthy criminal law gives rise to the following question: What should be done about behaviors that are as serious as crimes in that they affect essential legal rights and are traditional and are contrary to law, but are performed by persons who, due to certain conditions, could not act with guilt? This situation poses difficult questions for constitutional governments founded on the principle of human dignity, given that such persons cannot legitimately be criminally sanctioned for their conduct because they have not acted with guilt. But at the same time, society must take measures to prevent these behaviors that, although not performed with guilt, deeply affect essential legal rights, in that not only are they customary and are contrary to law but that, in addition, it is possible that the person could perform them again, in many cases, for the same reasons due to which he lacks the capacity to act with guilt.”

“...In these events, the Penal Procedure Code does not establish punishments since doing so would violate the basic principle of a penal code based on guilt, but rather it provides for safety measures, whose purpose is not to sanction but to protect,

heal, educate, and rehabilitate. And that is why the punitive statute does not demand that the responsible party's behavior be imputable, since this person lacks the capacity to act in a guilty manner."

"...And in a society based on law, founded on the principles of human dignity and on personal liberty and autonomy (P.P.C. Articles 1, 5, and 16) it is disproportionate for the legislator to choose the method that is most invasive of personal liberty, as would be criminal law, when other tools exist to protect the same legal rights and are less harmful to these principles. The criminal law system is a social legal system and so it is also limited by the principle of necessity, preferably being used as a last resort. Therefore, these unnecessary sanctions are found to be unconstitutional."

"...In such circumstances, to prevent persons whose world view differs from that of the majority from affecting fundamental rights considered important under national law, the state can, instead of imposing the majority's values through penalization, avail itself of other tools, such as intercultural dialogue, that allow for progressive respect and understanding between the different cultures that make up the Colombian nation (P.P.C. art. 70). In this case the criminal procedure itself, which eventually leads to declaration of innocence based on a culturally conditioned error or a declaration of unimputability, can lose its purely punitive connotation and become a privileged space for intercultural dialogue."

The same considerations can be applied to the law 294 of 1996, of which Articles 22, 23 and 24 describe conduct that is harmful to family harmony and unity and the respective sanctions to impose, whose applicability to Colombia's population is divided, given that paragraph 2, article 4 of law 294 states that in cases of intra-family violence in indigenous communities, the person with jurisdictional faculties to hear these cases is the respective indigenous authority, based on special jurisdiction provided by the Constitution in article 246.

Therefore it is not appropriate, as we have stated, to consider the practice of FGM/A as something that can be rectified or sanctioned under either of the two state legal systems, and so we must conclude that this practice constitutes neither criminal conduct nor intra-family violence. Rather, as we have explained, it is a practice that violates human rights and it must be handled in a different manner.

Now then, it is one thing for the penal code and law that protects against acts of intra-family violence not to be applicable to mothers and midwives because of the circumstance that have already been explained, and it is another thing to deduce, therefore, that the state authorities should confront FGM/A as described in the I.C.B.F. [Colombian Institute for Family Well-Being] information. The Interior, Justice, and Public Defense Ministries agree to "intercultural educational procedures to change the practice." As we shall discuss below, these are insufficient, ineffective, and slow in preventing risks to the lives and personal integrity of the girls of the Emberá-Chamí indigenous community as the practice continues. These agencies argue that ethnic autonomy must be respected; however, this constitutional value is inferior to the constitutional right to life and to other rights that outweigh the right to cultural diversity.

4.2.1. Limits on the Recognition of Indigenous Autonomy.

Having analyzed article 246 of the Political Constitution and the above-mentioned Constitutional Court verdicts that establish its scope and applicability, one can easily conclude, as in the previous point, that the practice of FGM/A exceeds the limits placed on indigenous jurisdictional function and on the autonomy of ethnic communities, since those limits include public security standards that protect more important constitutional values than that of ethnic and cultural diversity (Verdict 254 of 1994 M.P: Eduardo Cifuentes Muñoz).

The Court also indicated in that court decision that the greater the preservation of usages and customs, the more a community's autonomy should be recognized, which brings us to a subject related to the level of "contact" of the Emberá-Chamí indigenous community with the rest of Colombian society and specifically with the region's other inhabitants.

[...] We have before us a community that has shared with the descendants of Africans and those of Antioquians and Caucaans, the territory that makes up the Risaralda department for more than 400 years in an intense cultural exchange, which was practically eliminated by the nearly complete Catholic religious indoctrination of the past 50 years. Therefore, this is a society that has had profound "contact" with our own, and although it has preserved its cultural identity and many of its usages and customs, it is incomprehensible that it has preserved such a barbaric usage or custom as FGM/A, which might be "justifiable or faintly admissible" in a society with a lesser degree of intercultural "contact or reconciliation" with the modern world, as can be said of some of the world's African or Middle Eastern societies.

[...]

The indigenous leaders did not allege at any time that the practice of FGM/A was a respectable or justifiable usage or custom in their community; on the contrary, they acknowledged that it was inadvisable, which begs the question whether this is in fact a practice that should be tolerated or permitted, or allowed to undergo a long-range transformation and not immediate prohibition.

The indigenous leaders appeared more worried about intervention in their own affairs and demanded that they themselves and the indigenous community be the ones who would resolve the matter. [...]

Given the fact that the indigenous leaders themselves tend, based on their "world view," not to defend the practice de la FGM/A as part of their cultural identity, it should be concluded that the practice is not one of the usages and customs that should be allowed by the Court when it states that greater preservation of usages y customs permits greater autonomy.

Now then, if, as we were concluding, the practice constitutes a failure to recognize one or several of the four above-mentioned minimum rights, we have a situation in which neither indigenous authorities nor the Emberá-Chamí community itself can rule on the matter alone, because as inhabitants of the Colombian Republic they must adhere to the Constitution and allow public order provisions that protect constitutional values superior to the principle of autonomy (which FGM/A fails to recognize) to supersede their other constitutional right to ethnic and cultural diversity.

[...]

Because the practice of FGM/A, as we have said, endangers the lives and personal integrity of indigenous girls and therefore constitutes a failure to recognize fundamental constitutional rights that take precedence over the constitutional right to ethnic diversity, consideration of the indigenous community's autonomy is not appropriate with regard to the topic. The practice of ablation violates human beings' most sacred rights, which consist of the right to life and other constitutional rights in coordination with those rights that are recognized by international treaties. [...]

4.3. Colombian State Authorities' Attitude, Including that of the Indigenous Authorities, Toward FGM/A

[...] It is clear that for the indigenous authorities and for representatives of the agencies entrusted with the protection of children's rights in Colombia (as they have explained to the Court) this agreement satisfies the expectations regarding women's and children's rights contemplated in the National Constitution and in International Treaties. This may not be true, given that the procedures established therein were not followed in the case of Marina Bateza, age 17, who was seen on December 7, 2007 and Angelica and Sorany Niaza Mejia both age 16, who were seen on December 14, 2007 at San Rafael de Pueblo Rico Hospital, Risaralda, more than a month after the agreement was signed (see the epidemiological reports on pages 3, 4 and 5). This failed to set off the procedures stipulated in the agreement, since on April 1, 2008, the date on which judges met with indigenous authorities in Pereira, Risaralda, which has been referred to elsewhere in this declaration, neither the indigenous authorities, nor the I.C.B.F., nor even the Public Advocacy Department, were aware of the case; they became aware of it only when the court notified them of these proceedings.

Based on the above, we can assert that the agreement provides no guarantee that the lives and physical integrity of the girls of the Emberá-Chamí community, in Risaralda, will be protected. Therefore, it is vital that we conclude that the Colombian state agencies that are parties to the agreement, including the indigenous authorities, are not adequately meeting their constitutional obligations to defend the lives, honor, and rights of those inhabiting the nation's territory.

And it bears repeating that while the intercultural education procedures aimed at transforming the practice are being initiated, many girls continue to suffer horrifying consequences and risk losing their lives as a result of this barbaric practice, which constitutes a violation of human rights.

The undersigned judicial operator finds it inconceivable that with regard to a practice considered by the agencies and persons linked to these proceedings as contrary to human rights, and following our conclusion, in this case, that the constitutional right to indigenous autonomy is outweighed by the constitutional rights to life and personal integrity, these agencies can attempt only to transform the practice when they should be agreeing to its immediate and urgent elimination. This is the only acceptable course of action in light of the international agreements on human rights.

A related topic is that once the practice has been completely prohibited, the indigenous authorities or the Colombian state does not resort in applying criminal

sanctions against mothers or midwives within the community who fail to comply with the prohibition, due to what was explained earlier regarding the absence of individual criminal responsibility and because this matter involves a cultural usage or custom. At such a time when the practice is prohibited, only then it will be valid to address noncompliance with the prohibition by using educational procedures, intercultural dialogue and other procedures that, with great wisdom and competence, have been put forward by anthropologists, sociologists and social workers, whose studies are used to formulate policies aimed not at transforming the practice but at offering a socio-cultural perspective for working with those who fail to comply with the prohibition.

2.2.2.1 Matters for Debate

Feminism shares with multiculturalism certain essential features such as the critique of liberal individualism and the denouncement of the indifference of which women and the ethno-cultural minorities are the object on the part of a white and patriarchal hegemony. However, these cases illustrate the risks that multiculturalism may represent to women's rights, especially regarding the frequent conflicts between the commitments of gender equality and respect for the customs and practices of the ethno-cultural minority groups. The conflicts that arise from multiculturalism, from the constitutional and penal point of view, are very significant and are clearly laid out in the judgment and in the dissenting opinion of the Argentine case.

The Argentine ruling highlights the most relevant aspects of this discussion: the protection of the customs – sexual relationships with minors – based on the principle of autonomy of indigenous peoples, and the conflict generated by this protection in the face of international treaties signed and ratified by the Argentinean State. Likewise, as an argument to consider, it includes the immersion of the member of the minority culture in the majority society and, assessing the degree of this immersion, to be able to determine his responsibility for the violation or the ignorance of the norms that governs it. This subject makes reference to the possibility that this existence in two cultures offers him, to prioritize which shall govern his axiological referents.

The universal perspective of women's constitutional rights of their right to equality and dignity as expressed in the *United Nations Resolution on Harmful Traditional Practices Affecting the Health of Women and the Girl Child*,³⁷ the *Resolution on the Elimination of Crimes Against Women and Girls Committed in the Name of Honor*,³⁸ the *Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children of the Commission on Human Rights*,³⁹ or the

³⁷ Resolution 2005/28, <http://www.un.org/womenwatch/daw/vaw/v-hrc.htm>

³⁸ http://www.wunrn.com/reference/pdf/Crimes_of_Honor%20_resolution_english.pdf

³⁹ <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0811fcb0b9f6bd58025667300306dea/d93233b755c3f6678025672b0050b116>

Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, *Intersections Between Culture and Violence Against Women*⁴⁰ among others, demonstrates the existence of a consensus regarding the fact that harmful practices have become a recognized issue concerning the status and human rights of women and the girl child. The debate surrounding harmful practices has been intense since its inception in the framework of the United Nations in the 1950s.⁴¹ Aspects such as the sovereignty of or the respect for cultural rights prevented the issue from being fully enforced in the human rights agenda until the mid-1970s. The adoption by the UN General Assembly of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) is considered a pivotal moment in the generation of consensus regarding the necessary elimination of harmful practices.

In order to clearly illustrate the behaviors that are part of the harmful practices, General Recommendation No. 19 of the CEDAW enumerated traditional practices by which women are regarded as subordinate to men or as having stereotyped roles that perpetuate widespread practices involving violence or coercion: family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision.⁴²

⁴⁰ <http://www.unhcr.org/refworld/docid/461e2c602.html>

⁴¹ Harmful Traditional Practices Affecting the Health of Women and Children, UN Fact Sheet. <http://www.unhchr.ch/html/menu6/2/fs23.htm>

⁴² CEDAW, General Recommendation No. 19, see <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>

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