THE SUPREME COURT OF PUERTO RICO

SPECIAL JUDICIAL COMMISSION
TO INVESTIGATE GENDER DISCRIMINATION
IN THE COURTS OF PUERTO RICO

Report on Gender Discrimination in the Courts of Puerto Rico

SJI

AUGUST 1995

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SJI State Justice Institute

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August 22, 1995

Hon. José A. Andréu García
Chief Justice
The Supreme Court
San Juan, Puerto Rico

Comisión Judicial Especial para
Investigar el Discrimen por Género
en los Tribunales de Puerto Rico

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Dear Mr. Chief Justice:

The Special Judicial Commission to Investigate Gender Discrimination in the Courts of Puerto Rico, in concluding its investigation, submits its Report, conclusions and recommendations to you and the full Supreme Court.

Our interpretation of information in this Report regarding the legal, doctrinal, and sociological aspects related to different manifestations and dimensions of gender discrimination, and the standpoints we have adopted represent the consensus of both male and female Commissioners. Although most of us coincide with the overall Report, we have included individual exceptions to some of the developed ideas and conclusions.

The Commission is grateful to you for the opportunity to explore a matter of such social importance for our country. The investigation became a true learning process for us; certainly, it broadened our perspectives. We were especially proud to have collaborated with the Judicial System on this matter because we believe that to undertake this kind of self-evaluation takes moral courage and shows genuine commitment to the values and principles that the Judicial System represents. We are confident that this pioneering attempt in Puerto Rico will lead other public institutions to undertake similar self-scrutiny.

Many persons, institutions and organizations collaborated with the Commission in the performance of its work and we are deeply grateful to them. We are especially grateful to you and the Hon. Miriam Naveira de Rodón who, as Ex-Officio Presidents of the Commission, knew

how to give us the necessary support and stimulus to accomplish our mandate.

We are aware that our commitment to the Judicial Branch does not conclude with the delivery of this Report to the Supreme Court. Presenting this Report to the Judicial Conference of Puerto Rico and the development of a plan of action to eradicate every manifestation of gender discrimination in the courts of the country are also important parts of our mandate. We are moving in that direction with determination and purpose. We are aware of the fact that sensitivity to the problem is a prerequisite to overcoming it. We hope that this Report serves as a foundation for that eventual victory.

Respectfully submitted,

Jeannette Ramos Buonomo
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Law School and Psychology Department

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TABLE OF CONTENTS

Introduction

This report is the result of a Judicial Branch decision to examine itself to identify possible manifestations of gender discrimination at its heart in order to eradicate them. The Chief Justice of the Supreme Court, the Hon. José A. Andréu García, entrusted the design and undertaking to the Special Judicial Commission to Investigate Gender Discrimination in the Courts of Puerto Rico—comprising members of the judiciary, lawyers, professors of law, and specialists in the diverse disciplines of the Social Sciences. The inquiry itself took two years. The fruit of our inquiry has been delivered to the Judicial Branch, which in turn, has made the report accessible to the community in order to help the Judicial Authority to fulfill its objective of fairness and justice, its commitment to this dimension of Puerto Rican social life.

Thus it is imperative that we explain the context in which the work was put together.

In recent decades, both in Puerto Rico and the rest of the world, social research has focused renewed efforts to examining diverse manifestations of discrimination in society, among them: discrimination because of race, socio-economic conditions and sex. The latter, now termed gender discrimination as a consequence of certain theoretical arguments,[1] has received special attention since the decade of the seventies. Studies by social scientists and by male and female feminist researchers as a sequel to the women's rights movement, turned up clear and persuasive evi-

[1] See the chapter General Theoretical Framework of this report.

dence of the existence of discriminatory practices and policies based on prejudices, myths and multiple stereotypes related to women.

The Judicial Branch of Puerto Rico, as an integral part of Puerto Rican society, responds to the same cultural and sociological patterns that govern it. Therefore, it is safe to infer as a matter of logic, that every prejudice that exists in our society must be reflected to a greater or lesser degree in the Judicial Branch. Since this is about an institution whose primary function is the administration of justice, a ministry that must be accomplished with the greatest possible degree of impartiality, the existence of any type of prejudice, however minimal or sporadic, is absolutely intolerable and must be eradicated. For this reason the Judicial Branch, motivated by the result of the multiple investigations undertaken with regard to gender discrimination, decided to examine itself and investigate both the manifestations and the magnitude of such discrimination in the judicial system of the Island and, at the same time, study available alternatives and options to prevent it.

Essentially this is an account of the first Puerto Rican institution to carry out this kind of self-examination, in order to confront the problem and contribute to a solution. The Judicial Branch and the Commission are confident that this Report, the result of serious and profound deliberation and thought, will serve to motivate other government institutions to carry out similar self-analysis to eradicate any discrimination based on gender or any other premise. Unquestionably a democratic regime such as that upheld by the Constitution of the Commonwealth of Puerto Rico, cannot be rooted in cultural and social patterns that, in any way, create discriminatory stereotypes and biases. With this purpose in mind, the Commission decided to devote its efforts to examining everything related to gender theory and to establishing a theoretical framework broad enough to serve as a starting point for future studies.

The problem of subordination and gender discrimination in Puerto Rican society has been amply documented, particularly concerning women, who historically have suffered the consequences of a culture implanted from a male point of view. In 1958 the Civil Rights Commission of

Puerto Rico issued its *Report on discriminations on the basis of race, color, sex, origin, and social condition*. Although the Investigation itself did not reveal problems of "sex" discrimination, that Commission recommended a study on the likelihood of amending the administration of movable community property. It also suggested considering the possibility of co-administration by both spouses.[2] Undoubtedly, this action marked the awakening of a new awareness, one which would lead to the definite acknowledgment of gender discrimination in Puerto Rican society, and to the eventual sanction of a series of reforms.

During the decades of the sixties and seventies the feminist movement, which was very productive in the suffragist struggles at the beginning of the century, was actively revived on the Island, as it was in other countries. Reverberations were not long in coming. For example, in 1969 the Legislative Assembly of Puerto Rico created a Special Commission to investigate "an alleged discrimination against the working woman in different sources of employment in the country: manufacturing, industry, professions, agriculture, and government entities".[3] After holding public hearings, the Commission recommended that the Civil Rights Commission undertake a more complete and exhaustive study. That is how the first report on *The equal rights and opportunities of the working woman in Puerto Rico*, under the presidency of attorney Baltasar Corrada del Río, came about.[4]

In that report, published in 1972, the Civil Rights Commission concluded that "discrimination against women who worked outside of the home and inside the home exists, and

[2] Civil Rights Commission, Report on discriminations on the basis of race, color, sex, origin, and social condition, 22 REV. COL. AB. P.R. 299 (1962).

[3] Concurrent resolution of the House of Representatives No. 5, approved in the House on April 1, 1969, and in the Senate on April 31st of the same year.

[4] The other members of the Commission were: lawyers Efraín González Tejera (Vice President), Fernando Pérez Colón (Secretary), Héctor Laffitte and Alfonso Miranda Cárdenas. Acting as special advisors were attorney María Genoveva Rodríguez de Carrera, and Dr. Belén M. Serra.

that discriminatory practices take on the most subtle and deceptive appearances".[5] It recommended that existing legislation be revised to correct disadvantages faced by women.

Among other concerns, the report pointed out:

> "The increased incorporation of women into the diverse economic, cultural, social and political activities of the country is undeniable. However, the absence of women is obvious at the higher levels of all work activities: industrial, commercial, professional, and technical. Even in those activities in which the participation of women has been traditionally sanctioned by our society because they are deemed related to the so-called "feminine qualities," women are denied the economic benefits and personal recognition top positions mean."[6]

In that respect, the report emphasized that this was analogous to the situation of women in the judiciary.

Particularly interesting is the recommendation to the Department of Public Instruction regarding the "total revision of the pre-school, elementary, and technical-vocational academic curriculum, with the aim of eliminating the institutionalization of feminine and masculine roles in activities and professions, emphasizing instead full professional development."[7]

Also the recommendations made to the Legislative Authority with the purpose of "revising the legislation regarding family relations with special attention to Book I of the Civil Code, and regarding the community property laws"; "revise the laws and rules of criminal procedure to eliminate areas of discrimination, in favor of and against women"; revise "all the laws with the intent of eliminating vestiges of the rationalized belief of the sexes as opposites and antagonistic in the view of society and with the objective of opening doors to the participation of women in the daily routine of our social and political life, and, in that way, incorporate the focus and contributions of the largest sector of the population"; and others.[8]

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[5] THE CIVIL RIGHTS COMMISSION, The equal rights and opportunities of the working woman in Puerto Rico, p 195 (1972)

[6] *Id.* p 196.

[7] *Id.* p. 208

[8] *Id.* pp. 209-210

In 1972, the Federal Equal Employment Opportunity Commission assigned a study on discrimination on the basis of race, sex and national origin in the private sector in Puerto Rico to a group of Puerto Rican professionals.[9] Their investigation revealed the existence of discrimination against women, blacks and foreigners. Their findings prompted, for the first time in Puerto Rico, an intense public debate over specific measures to eliminate gender and race discrimination. Their recommendations had a deep impact on anti-discriminatory policies that were later developed. That report, with some urgency, proposed amending existing laws and enacting new ones to address the problem.

That same year, the Commission for the Improvement of Women's Rights was created by law in Puerto Rico, to study, investigate and initiate legal proceedings against transgressors of anti-discrimination laws.[10]

Subsequently, and also responding to its own initiative, the Commission for the Improvement of Women's Rights and the Puerto Rico Department of Labor co-sponsored a study to identify labor legislation that discriminates against women.[11] As a consequence, in 1975 various bills were enacted into law by the Legislative Assembly.[12]

In 1976, Tufts University School of Law and Diplomacy (Boston, Massachusetts), enabled attorney Jeannette Ramos Buonomo to compile and analyze Puerto Rican law in the areas of public

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[9] Center for Social Investigations of the University of Puerto Rico, STUDY TO DETERMINE THE SCOPE AND RAMIFICATIONS OF DISCRIMINATION ON THE BASIS OF COLOR, SEX, AND NATIONAL ORIGIN IN THE PRIVATE SECTOR IN PUERTO RICO (1974) The study's working team was composed by Isabel Picó de Hernández, Marcia Rivera, Carmen Parrilla, Jeannette Ramos Buonomo, Isabelo Zenón, Roberto Busó Aboy and Roberto Aponte.

[10] Act No. 57 of May 30, 1973

[11] JEANNETTE RAMOS BUONOMO, STUDY ON THE EQUALITY OF THE SEXES IN LABOR LEGISLATION (1974)

[12] Among others, amended were Act No. 100 of June 30, 1959, 29 L.P.R.A. sect. 146 *et* seq , to prohibit that employers and labor unions discriminate on the basis of gender; Act No. 417 of May 14, 1947, 29 L.P.R.A. sect. 564 *et seq* , to prohibit that private business discriminate on the basis of gender; Act No. 49 of May 22, 1958, 29 L.P.R.A. sect 353 *et seq* ., to eliminate differences on the basis of gender regarding the maximum weight a person can lift, transport, or carry on his/her person; Act No. 73 of June 21, 1919, 29 L.P.R.A. sect. 457-460, also to eliminate differences on the basis of gender regarding work night shifts. For a review of this legislation, see Jeannette Ramos Buonomo, Women and Puerto Rican Law, 231-237 (March, 1976) (study done for The Fletcher School of Law and Diplomacy at Tufts University in Massachusetts.

administration, family law, penal law, health, education, and labor law to determine the full extent of equality between the sexes.[13] Her study also hoped to "awaken consciousness in framers of public policy, as well as in Puerto Ricans at every level of society, about the need to revise some of our laws and to change attitudes to conform to the reality of equality of the sexes".[14]

The investigation revealed the existence of gender-based discrimination against women in the separate areas that were examined. Among other things, and for the purpose of illustration, it confirmed once again the conclusion of the Civil Rights Commission in 1972, in that the participation of women in the judiciary is restricted, largely confined to inferior positions. The Report pointed out "It is significant that a woman judge has never been assigned to preside a Criminal Court, which illustrates the cultural pattern of protecting women; of her image as sensitive and pliant, incapable of dealing with the harshness of life".[15]

Conversely, regarding the composition of the jury, it stated: "Rule 108 stipulates, among other things, that the court should recuse from jury duty any woman who asks to be excused due to her obligations at home." Clearly, whenever occupations and professions are mentioned the masculine term is utilized, while only the woman is referred to when a petition for jury relief stems from obligations in the home. A situation could arise where a woman works outside the home and the man helps with the chores at home. This Rule should be amended to include the male."[16]

All of these studies and reports helped to awaken consciousness and create the necessary conditions in 1976 for the Legislative Assembly of Puerto Rico to embark on a broad reform of the

[13] Ramos Buonomo, *supra* note 12
[14] *Id.* p. 2
[15] *Id.* p. 27.
[16] *Id.* p. 29.

Civil Code and amend each legal statute, particularly in family law, that could entail gender discrimination against women.[17]

Many other reports have followed in the wake of those earlier reports. They were conducted by, among other organizations, the Women's Commission, the Women's Studies Project at the Cayey Campus of the University of Puerto Rico; the Center for Women's Studies, Resources and Services at the Río Piedras Campus of the University of Puerto Rico (C.E.R.E.S., its acronym in Spanish); and the Center for Social Research at the University of Puerto Rico. Prestigious scholars in Puerto Rico also carried out studies and investigations.

During the eighties the organized women's movement in Puerto Rico demonstrated new resolve and took on new issues and problems for their struggles and analyses. The women's movement hoped, in this way, to call attention to the extent gender discrimination had received little or hardly any consideration in the past. Most remarkable were the enormous efforts to approve legislation to prohibit sexual harassment in the work place, and the struggle against domestic violence. These phenomena became more clearly understood as unequivocal gender discrimination. Those processes, the debates on abortion and other proposals related to women's reproductive rights, incited intense public reaction, as shown by media emphasis on these issues in recent years. This public debate helped to generate new insight into the breadth and depth of the sometimes invisible mores of gender discrimination in Puerto Rico.

In 1988 the Sexual Harassment Law was passed.[18] In 1989, Law No. 54 on Domestic Violence was passed.[19] The Women's Commission of the Office of the Governor was instrumental

[17] For a study of the approved legislation, see: COMMISSION FOR THE IMPROVEMENT OF WOMEN'S RIGHTS, SPECIAL REPORT NO. 2: WOMEN AND THE NEW FAMILY LAW (March, 1977). This report was prepared by attorney Jeannette Ramos Buonomo

[18] Act No. 17 of April 22, 1988.

[19] Act No. 54 of August 15, 1989

in developing the law and defending it.[20] The Domestic Violence Law has gained international attention as a cutting edge law and a model for other jurisdictions. It has engaged both governmental and non-governmental agencies in the United States, Latin America and Europe, and in the United Nations.

The Domestic Violence Law, however, raised new dilemmas for Puerto Rico's courts which must take part in its implementation. Demands and efforts, both inside and outside the courts, were made for the Judicial Branch to critically examine its administration of this law. During the eighties, and also at the beginning of the nineties, more gender discrimination cases, notably regarding sexual harassment, than ever before were filed in the courts and in the corresponding administrative agencies.

The kind of self-evaluation that the Judicial Branch became interested in carrying out, based on the historic course of studies and investigations, has also been tried out in other jurisdictions. It is fitting to emphasize, with regard to the United States, the country that with Canada initiated important investigations on the subject, that by 1971 the studies of John Johnston and Charles Knapp, professors of law at New York University, had already called attention to the impact of those prejudices, myths and stereotypes about women on the decision-making process of every male and female judge:

> Sexism—that is, the development of unjustified presumptions (or at least those that are baseless) regarding the capacities, interests, goals and individual social 'roles' that are based only on the differences of the sexes—are as easily perceived in contemporary judicial decisions as was racism.[21]

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[20] The work team of the Commission that took the initiative in the development of this project was integrated by, among other persons, Doris Vázquez, Psychologist and Executive Director of the Commission in the beginning of the process, her successor, Yolanda Zayas, Social Worker, attorneys Margaret Wochinger, Esther Vicente and Mildred Braulio, the psychologist Mercedes Rodríguez andMarta Elsa Fernández, the Commission's Researcher. The project also received the active support of many women and men and of numerous organizations dedicated to the defense of women's rights.

[21] John D. Johnston, Jr. and Charles L. Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. REV. 675, 747 (1971)

Ensuing studies added new data regarding the influence of gender in terms of cultural and social values that go beyond biology to differentiate between the masculine and feminine—that is, attitudes, values and beliefs of the members of the Judiciary. Norma Wikler, an eminent sociologist from the United States, summarized the most important findings on this topic.[22] Among other matters, she noted a pattern of imposed expectations about sexual roles in both the criminal area and in the juvenile justice system. For example, women who commit crimes that are believed feminine are treated with greater leniency in the courts, especially if these women prove they are fulfilling traditional feminine roles, such as wife or mother. That is not the case, however, for women whose criminal acts are believed to be less than feminine (that is, violent). These women, apparently, are treated more harshly than males in similar situations, especially if they do not conform to conventional female sexual roles.

On the other hand, Wikler pointed out, victims are also discriminated against. Studies done during the seventies detected hidden prejudices and myths in the reactions of judges to victims of rape or domestic violence. For example, the notion that women are masochists, or that violence committed against a woman and rape are crimes prompted by the victims themselves. It was also found that the pernicious effects of gender-based myths, prejudices and stereotypes function with greater force in Family Law, the area in which most women come in contact with the courts. Among other indications, empirical studies on long-term consequences of divorce revealed an alarming fact: unknowingly, through a series of seemingly minor decisions, the courts were helping to create a new economically inferior class composed of divorced women and their dependent children. Insufficient child support pensions and inadequate measures to enforce their compliance, consign thousands of women and children to poverty.

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[22] Norma Wikler, *Identifying and Correcting Judicial Gender Bias*, in EQUALITY AND JUDICIAL NEUTRALITY 13-14 (Mahoney and Martin eds., 1987), (Notes omitted)

Completed studies and investigations point to the need to make male and female judges aware of multiple manifestations of gender discrimination in the courts, not only regarding women, but also men. In 1979, with the active participation of the American Association of Women Judges, promoting educational programs on this subject gained impetus The Association decided to co-sponsor with the National Organization of Women's Legal Defense and Education Foundation, a National Judicial Educational Program to specifically attack the problem in the courts. In coordination with national educational judicial institutions and state programs, many seminars and trainings cropped up across the United States. The judiciary's range of responses was broad: from those who rejected the idea because they saw no problem of discrimination in the courts, to those who saw the problem and became instrumental in developing seminars to address it.

As a result of these initial efforts, the Hon. Marilyn Loftus, Justice of The Supreme Court of New Jersey, asked her state's Judicial Branch to help support investigations on gender discrimination in the courts, to develop a state judicial education program. Responding in the affirmative, the Court named a broadly representative Committee to look into gender discrimination and find ways to abolish it.

In 1984, the Committee issued its first report. Its findings confirmed suspicions about the variety of gender discrimination, often unconscious, in the state's courts. Publicity generated by the report caused other states to create similar committees. That is how the committees from New York and Rhode Island got started (1984).

These committees found that greater discrimination towards women stemmed from the traditional subordination of women in a world historically dominated by men. The study Committee of New Jersey, comprising thirty-two persons, including male and female judges (of first instance and appellate), attorneys, professors of law, judicial educators, and community leaders, inquired into three specific areas: (1) Do gender-based myths, discriminations and stereotypes have any effect on substantive law or in the judicial process of decision making?; (2) Does gender affect

the way women and men are treated in the legal and judicial environment (in the courtrooms, in chambers, and in professional meetings)?; and (3) If so, how can male and female judges assure themselves that equal treatment is given women and men in the courts?[23]

In its 1984 Report, the New Jersey study Committee said in that regard:

> With few exceptions, the conclusions and findings from the Committee on Substantive Law, from the sampling of attorneys, and from the regional and state meetings of lawyers were mutually corroborative. Although, in terms of gender the written law is fundamentally neutral, it was found that on occasion the existence of stereotypes, myths, and discriminations affect the decision-making process in the areas of: torts, domestic violence, juvenile justice, matrimony and the adjudication of sentences. Also, persuasive evidence exists that women and men receive different treatment in the courtrooms, in chambers, and in professional meetings.[24]

New York's report coincided basically with New Jersey's:

> The work team has concluded that gender discrimination against women litigants, lawyers and employees of the courts is widely exhibited and has serious consequences. Women are frequently denied equal justice, equal treatment, and equal opportunities. The cultural stereotypes regarding the 'role' of women in marriage and in society distort the application of substantive law every day. In a unique and disproportionate way that is frequently unacceptable, women have to endure an environment of condescension, indifference, and hostility. Whether as attorneys or employees of the courts, women are all too frequently denied the opportunities to develop their potential to the maximum.
>
> The problems women face—rooted in a web of prejudices, privileges, traditions, misinformation and indifference—affect women of all ages, races, regions and economic situations. When women are poor or economically dependent, their problems are greater.
>
> On many occasions, women traverse the judicial system by themselves, coming up against indifference and scorn. The problems are prolonged due to the erroneous belief of some attorneys and judges that women's complaints are inventions of overly active imaginations and hypersensitivities.[25]

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[23] NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, THE FIRST YEAR REPORT (Trenton, New Jersey, Administrative Office of the Courts, 1984).

[24] *Id.* As cited by Lynn Hecht Schafran, in Documenting Gender Bias in the Courts: The Task Force Approach, 70 JUDICATURE 280-283 (1987), where the author summarizes the findings and conclusions of reports from New York and New Jersey.

[25] Report of the New York Task Force on Women in the Courts, 15 FORDHAM URB. L. J 17-18 (1986-87).

The authority the National Judicial Education Program attained as these investigations got underway, led the Conference of Chief Justices of the United States to include the topic of gender discrimination in its work agenda for the first time in 1986. In 1988, the Conference took another radically important step when it approved a formal resolution recommending that study committees be created in every state judicial system.[26] The Conference of State Court Administrators followed suit. Since that time, committees have been established in many states of the nation.

According to a survey done in 1992, and revised by the Information Service of the U.S. National Center of State Courts Information Service the following year, by 1993 thirty-four states and two Courts of Circuit Appeals had established study committees or special commissions primarily to look into gender discrimination in the courts.[27] Many of these study groups had already completed their respective inquiries and were proceeding to implement measures to address the problem's multiple manifestations; others were in different phases of their investigation. In four additional states, affirmative steps of another kind had taken place, as well as in 10th Circuit Court of Appeals.[28] More recently, The First Circuit Court of Appeals, to which the Federal District Court in Puerto Rico corresponds, also decided to research this subject and is currently doing so.[29]

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[26] Resolution XVIII of 1988 adopted by the Conference of Chief Justices of the United States, 26 CT. REV. 5 (1989)

[27] See: INFORMATION SERVICE OF THE NATIONAL CENTER FOR STATE COURTS, STATUS OF GENDER BIAS TASK FORCES AND COMMISSIONS IN THE STATE AND FEDERAL JUDICIALSYSTEMS 2-16 (2da ed., May, 1993). The following states named special committees to investigate gender discrimination in the courts in the year identified in parenthesis: Alaska (1992), Arizona (1991), Arkansas (1990), California (1987), Colorado (1988), Connecticut (1987), Delaware (1992),District of Columbia (1990) Florida (1987), Georgia (1989), Hawaii (1986), Idaho (1990), Illinois (1988), Indiana (1989), Kentucky (1989), Louisiana (1989), Maine (1993), Michigan (1987),Minnesota (1987), Missouri (1990), Montana (1991), Nebraska (1991), Nevada (1987), New Jersey (1982), New York (1984), Texas (1991), Utah (1990), Vermont (1988), Washington (1987), Court of Appeals of the D.C. Circuit (1990), Court of Appeals of the Ninth Circuit (1991) Some of these study committees were reorganized or amended in some form at dates later than indicate.

[28] *Id.* Although North Carolina and New Hampshire had not established study committees or special commissions, they had reviewed or adopted the conclusions of other state reports. In the States of New Mexico and Tennessee, the respective lawyers associations had assumed this initiative.

[29] The range of the investigation of working Commission of the Court of Appeals of the First Circuit includes discrimination on the basis of gender, by race and ethnicity. This Commission was subdivided in turn in two Committees, according to areas. The Committee investigating gender discrimination is presided by the Hon. Carmen Vargas de Cerezo, Presiding Judge of the Federal District Court in Puerto Rico. The Committee investigating discrimination on the basis of race and ethnicity had Atty. Antonio García Padilla, Dean of the Law Faculty at the University of Puerto Rico as one of its members

Investigations of the study committees have covered a wide range of areas related to gender discrimination and women's studies. Among them: women in the legal profession and in the judiciary, the treatment of women lawyers in the courts, their employment possibilities, gender discrimination in law schools, domestic violence, sex-related crimes, aspects related to the courts administration, jury selection process, civil compensations for torts, the courts environment, sexual harassment, employment practices in the courts, the naming of court-appointed counsel, access to justice, child support, paternal-maternal filial relations and custody, wage discrimination, selection and evaluation of judges, impartial language, judicial ethics, treatment of women witnesses and jurors, women victims of crime, credibility given to women, analysis by gender of sentences that are imposed, the relation between race discrimination and socio-economic position and gender-based discrimination.[30] Every report of the study committee that finalized its task, and the preliminary reports of the rest, confirmed the conclusions of the New Jersey and New York reports on the existence of multiple manifestations of gender discrimination in the courts that mostly affect women.

As a result of these inquiries, numerous measures have been taken by different states: many bills have been presented, including one prohibiting mutual protection orders (Florida), another that recognizes the legality of the battered-woman syndrome (Maryland), and still another permitting support personnel for victims in domestic violence cases in court (California). Another bill prohibits admission of female clothing as evidence of consent to sexual relations (Florida). Still another amends laws related to divorce and the payment of support awards (Rhode Island).[31] Special educational and sensitivity programs on gender discrimination, domestic violence, sexual harassment, aspects of family law have also been developed. Courses, workshops, seminars and con-

[30] INFORMATION SERVICE OF THE NATIONAL CENTER FOR STATE COURTS, *supra* note 27, pp. 36-43
[31] *Id.* pp. 60-61. The report of the National Center for State Courts presents a wide catalogue of proposed legislative measure.
[32] *Id.* pp. 62-69.

ferences are targeting male and female judges and lawyers in addition to other court personnel. Other programs address problems related to domestic violence, particularly violence against women, and design protective measures in both civil and criminal spheres. By 1993, sixteen states had initiated specific programs, not counting the national programs about the subject already in place.[33]

By the same year, fifteen states and two circuit courts of appeals had taken affirmative measures to establish procedures for complaints and lawsuits in cases of gender discrimination and sexual harassment in the workplace.[34] Another group of states (eighteen) and one circuit court of appeals proposed amendments to their respective Canons of Judicial Ethics to expressly prohibit any kind of discriminatory conduct based on gender.[35]

In Arizona, for example, amendments such as the following, were proposed to several canons: "Each male and female judge must discharge his or her judicial responsibilities free of bias and prejudice. No male or female judge shall show verbally or by behavior any kind of bias or prejudice in carrying out her or his judicial functions, including, but not restricted to, bias or prejudice on the basis of gender, nor permit bias or prejudice from any member of her or his staff, officers of the court or any other person under her or his supervision".[36] Similarly, amendments to professional codes of conduct for lawyers were proposed in various states.[37]

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[33] *Id.* pp. 70-73. The following states had taken measures on this matter: Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Maryland,Massachusetts, Michigan, New Jersey, New York, New Mexico, Rhode Island,Washington and Wisconsin

[34] *Id.* pp. 74-76. The listing provided by the National Center for State Courts includes: Alaska, Arkansas, California, North Carolina, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York, Texas, Washington and the Ninth and Tenth Circuit Courts of Appeal.

[35] *Id.* pp. 74-76. The listing includes: Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York, New Mexico, Rhode Island, Texas, Washington, Wisconsin and the Tenth Circuit Court of Appeal

[36] *Id.* p. 77

[37] *Id.* pp. 80-81. Thirteen states: Arizona, California, Colorado, Hawaii, Idaho, Massachusetts, Michigan, New Jersey, New York, New Mexico, Rhode Island, Texas, Washington.

By 1993 eighteen states and the Ninth Circuit Court of Appeals had already begun to develop specific policies in regard to sexual harassment.[38] Seven states actively promoted the appointment of women to the Judiciary[39] and ten others specifically asked that gender discrimination be evaluated by the way the Judiciary did its job.[40] Further, twenty-one states and the Tenth Circuit Court of Appeals inserted guidelines on gender-neutral language in their working agendas. Many states have published educational pamphlets on the subject; others have proposed the adoption of court rules; and still others have submitted forms, regulations, and official documents for revision.[41] The list of measures we've summarized in no way exhausts the measures the National Center for State Courts lists in detail.

With such a background of studies, investigations and developments, the Institute of Judicial Studies of the Office of Courts Administration of Puerto Rico prepared a proposal to investigate gender discrimination in the courts of Puerto Rico for then Chief Justice Víctor M. Pons Nuñez.[42] The Institute enlisted the aid of the Womens' Studies Project of the University College of Cayey.[43] The proposal was received with great interest by Chief Justice Pons. Despite his resignation from The Supreme Court, he included it in the work agenda of successor, Hon. José A. Andréu García. Shortly after, the new Chief Justice created the Special Judicial Commission to Investigate Gender Discrimination in the Courts of Puerto Rico to be presided by Associate Justice Miriam

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[38] *Id* pp 82-85: Alaska, California, North Carolina, Colorado, Connecticut, Hawaii, Idaho, Maryland, Massachusetts, Michigan, nebraska, New Jersey, New York, Rhode Island, Texas, East Virginia, Washington and Wisconsin

[39] *Id* p 89. The states were: California, Florida, Hawaii, Maryland, Massachusetts, New Jersey and Washington

[40] *Id*. pp. 90-91. The States were: Arizona, Connecticut, Hawaii, Maryland, Massachusetts, Michigan, New Jersey, Rhode Island, Washington and Wisconsin.

[41] *Id* pp. 92-94. The states' listing includes: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Rhode Island, Texas, Washington and Wisconsin.

[42] The person responsible for initiating this effort is Attorney Rafael J. Torres Torres, Director of the Institute of Judicial Education.

[43] The persons in charge of developing the Project's collaboration were its past Director, Dr Yamila Azize Vargas, and the past Rector of the University College of Cayey of the University of Puerto Rico, Dr. Margarita Benitez

Naveira de Rodón. Meanwhile, the Institute for Judicial Education of the Office of Courts Administration was ordered to serve as a support resource to the new Commission.

Assisted by the Women's Studies Project, a donation of $25,000 was obtained from the Notarial Bond Fund of the Puerto Rico Bar Association almost immediately. Shortly afterwards, and again with the support of the Women's Studies Project, a proposal to the State Justice Institute of the United States argued that it would be worth carrying out this kind of investigation in Spanish America, using Puerto Rico as a point of departure. The proposal was approved, and the Commission was granted an additional $40,000 to carry out this mandate.

The first phase of the project was concluded in October of 1993. It reviewed work done by the North American State Commissions and the proposal to the State Justice Institute. To fully proceed with the investigation, the Commission reorganized itself. Following recommendations made by male and female scholars on the subject, the Commission was broadened to include representatives of the judiciary and the legal profession, and specialists in psychology, sociology, statistics, and research. The Hon. Jeannette Ramos Buonomo, Judge of the Appellate Court, became president. Associate Justice Miriam Naveira de Rodón and Chief Justice José A. Andréu García became *ex officio* presidents.

The Commission did not limit itself, in its analysis, to identifying practices that could constitute legal discrimination. The framework of study was enlarged to include situations and customs that, although not typified by law as illegal conduct, sociologically do reflect gender bias and discriminatory attitudes. The Commission did not confine itself to incidences of intentional discrimination. The Commission also tried to identify practices and processes—many of which operate on an subconscious level—that could reflect structural discrimination within the Judicial Branch because of broader social, economic and cultural patterns in Puerto Rican society. The Commission had to examine every aspect of the judicial system, substantive as well as procedural, to determine which laws, regulations, norms, practices or attitudes related to gender could preju-

dice the court—which is why the scope of the Report is so broad and the areas it studies are so many: Judicial Administration, Interaction, Labor Law, Rights of the Individual and the Family, the Criminal and Juvenile Justice System, Domestic Violence, and the System of Juvenile Justice The sheer magnitude of the Report forestalled greater detail in certain areas, which, as we repeatedly indicate, remain subjects for future investigations. Each area also required distinct approaches involving special considerations that are reflected in the content and how each section of the report is organized.

Conversely, on many occasions because of the obvious network within the justice system, our study, findings and conclusions went beyond the borders of the judicial system itself.

Appropriately enough since this is a self-evaluation of the judicial system, the participation of its members throughout the investigation was indispensable. Female and male judges, and officers of the system were appointed to the Commission. The judiciary and other personnel worked together, contributing valuable information, points of view, and interesting perspectives in the diagnostic phase of the dilemma. They also provided important recommendations to solve it.

Chapter 1

General Theoretical Framework

Introduction

This chapter presents the general theoretical framework the Commission used to guide its investigation. It explains the conceptualizations, categories, terms, suppositions and key premises the Commission adopted to identify, explain, and evaluate the practices it studied. The theoretical framework was developed through a dynamic discussion process that took place from the start in the heart of the Commission. It was revised and modified throughout the investigation and took into consideration the contributions of participants in the hearings, group interviews and the participatory investigation sessions as well as the findings the whole process confirmed. Relevant literature on the subject was also reviewed.

Definitions of Concepts Used

The work of the Commission required the application of various basic concepts. The meaning of each concept is explained as follows.

A. DISCRIMINATION. In this report discrimination means any unwarranted devaluation of a person or group of persons, that results from any act or practice, including verbal behavior, by virtue of that person or group of persons belonging to a group or particular sector of society.

Considering its effects, an act or custom is judged discriminatory, independently of the intention of the person who incurs in it. Although the intention may be important at the moment of imputing responsibility of some sort, it must not be taken into account to determine if the practice is discriminatory. This is so especially when institutional practices are detrimental to a particular sector. A practice is discriminatory even when it is attributable to custom, habit, or any other kind of customary behavior that does not necessarily respond to intentional formulations on the part of the person incurring in the practice.

B. SEX AND GENDER. The Commission decided to make a distinction between the terms *sex* and *gender* because it understands each term has different meanings.

The term *sex* in the report refers only to the biological characteristics that differentiate men and women.[1]

In recent theoretical literature on this subject, however, the term *gender* has been generalized with a broader meaning. Not only does it mean the strict biological differences between women and men, but it also connotes the body of attributes that are socially and culturally assigned to one and the other. The term *gender* thus refers to a social and historical construction that has been made from characteristics of men and women that are considered defining, and from behaviors expected of them in our society. We are referring to the assignment that has been made throughout History of qualities, rights, responsibilities, and behaviors that have been required of women and men, as such. Gender, thus, according to this conception is not a "natural" reality, but the result of the beliefs and interpretations that have been socially and culturally generated in regard to what should be the behaviors and functions of men and women in all aspects of life, from

[1] The emphasis on the biological differences between men and women, as defining features of both groups, hides the fact that numerous biological similarities exist between one and the other, including aspects related to body reactions associated with sexuality. The political function that has historically underscored biological differences should not be overlooked, as justification in the differences in the distribution of social functions and power. Emphasizing biological similarities may contribute to dismantling myths and uncovering stereotype.

those related to sexuality to those having to do with performing specific activities and occupations in a given community.[2]

The Commission has adopted this definition of gender because it understands that it has a greater explicatory force than the term sex when referring to the circumstances and problems related to the differences in the treatment toward men and women in our area.[3]

C. GENDER PERSPECTIVE. This concept refers to the group of knowledge, intuitions, learning, and attitudes that women and men have accumulated through time as a consequence of their placement in a social setting and from their particular experiences that are the result of their sensory life experiences in a world divided culturally because of gender.

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[2] See, for example, ALDA FACIO, "CUANDO EL GÉNERO SUENA CAMBIOS TRAE: METODOLOGIA PARA EL ANALISIS DE GÉNERO DEL FENOMENO LEGAL." (San José, ILANUD, 1991); Marta Lamas, "Usos, dificultades y posibilidades de la categoría género" (photocopy of monography, undated); SYLVIA WALBY, THEORIZING PATRIARCHY (Basil Blackwell, 1990). For a critical opinion on the recent distinction between sex and gender, see, Stephanie Riger, Rethinking the Distinction Between Sex and Gender, in LESLIE BENDER AND DAN BRAVEMAN, POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER (1995) To summarize, Riger argues that there is a close relationship of mutual influences between biology and culture, making it a mistake to establish a marked difference between both. Notwithstanding the element of truth that this criticism may have, it continues to be useful to distinguish between sex and gender to highlight that the differences between men and women, far from being "natural", most of the time respond to cultural attributes that end up justifying the social consequences that are assigned to perceived biological differences. It should be noted that the majority of female and male judges that participated in the investigation sessions administered by the Commission, established a difference between the strictly biological characteristics and the cultural meanings ascribed to each of them. In these sessions, the male and female participants were asked to define the terms "sex" and "gender" Aside from the differences in the way the definitions were expressed, to sum up, the consensus was inclined toward the need to distinguish between the physical characteristics of men and women and the cultural attributes that are assigned to each of them regarding functions and expected behaviors

[3] The Commission is aware that in Spanish the term gender has several meanings For example, the DICCIONARIO DE USO DEL ESPAÑOL by María Moliner (Ed. Gredos, Madres, 1983) indicates that gender is understood to mean "class, species or kind". In that sense, one usually speaks of "the different kinds of ships " The concept also refers to the different kinds of literary works (one speaks of "literary genders"). One particular use, however, is tangible with the generalized use in the most recent sociological and philosophical literature. It is the use that designates the term gender to a specific grammatical accident by which means names, adjectives, articles and pronouns may be masculine, feminine or, in the case of articles and pronouns, neutral. According to MOLINER "such a division responds to the nature of things only when those words apply to animals, which may be masculine (masculine gender) and feminine (feminine gender). But, one can also assign masculine gender some times and feminine gender other times to the remaining names". (See pps. 1386-1387 of the cited work). There is a great affinity between this traditional grammatical use in the Spanish language and the use of the term as a category of analysis in sociology, philosophy, and contemporary literary theory to designate the group of attributes that are applied to men and women in social life. These multiple definitions may cause confusion whenever one speaks of sex discrimination. For this reason, it is clarified in this theoretical framework, that the term gender used in this report has the specialized meaning that we have described in the text.

We part from the premise that when people live performing specific activities assigned to them by reason of their sex, particular experiences are produced that somehow condition their way of seeing and evaluating the world. The differences in the functions and activities that men and women perform may produce different perspectives on their lives and the world in which they live. Men and women end up seeing and feeling the world and its circumstances in a different way. That is, because of their gender, they may develop different perspectives in many of the aspects of their lives. Ordinarily, this may lead them to evaluate certain practices, behaviors, situations and circumstances in a different manner. That is what is known as *gender perspective*.

The theoretical-methodological perspective that emerges from the particular placement of women in the social world is also usually called *gender perspective*. This is the perspective that has permeated many of the studies on the problems of gender that have been performed in the most diverse disciplines.[4]

D. EQUALITY, EQUITY AND DIFFERENCE. Traditionally, the problem of discrimination has been observed as related to inequality or the lack of equality. However, there are many diverse forms to comprehend equality. For example, one must distinguish between the concepts of *formal equality and real (or tangible) equality*.

1. Formal equality—Consists of the equality before the law. It responds to the proposition that all persons must be treated equally. This is the conception of equality that dominates the juridical world as we know it.[5] The criticism made of this conception is that it is insufficient. The mere formal equality may coexist with real inequality in society. Experience demon-

[4] For a more elaborate explanation of the proposed methodologies that part from the perspective of women, see, for example, CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); FACIO, *supra* note 2; Katherine E. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Ute Gerhard, Women's Experience of Injustice: Some Methodological Problems and Empirical Findings of Legal Research, 2 SOC. & LEGAL STUD. 303-321 (1993).

[5] According to this conception, it would suffice that all laws be redacted in a neutral manner, to include men and women, to apply to them equally. In that way, for example, it would suffice that the Domestic Violence Law protect men and women from aggressions on the part of couples, for it to be understood a fair law.

strates that the mere recognition of equality before the law does not eliminate, in itself, the problems of inequality that exist in society.[6]

2. Real or tangible inequality—The real condition of the people is what is important here, according to this conception. The aim is to place all persons in equal tangible situations, and not only at the level of formal recognition. In order to reach the same result, unequal treatment is often required to achieve real equality. That is, in order to eliminate the real inequalities in life's situations or in the access to society's resources, opportunities, assets or services, it will be necessary to treat persons who are unequally situated differently.[7] This is a route by which many situations of injustice can be transformed. One should keep in mind, however, that the road toward achieving real equality is not free of obstacles. Therefore, for example, in the case of inequality between genders, it is possible that the standard applied in determining how things should be—that is, what situation should be reached in order for all men and women to be the same—take as reference the situation of one of the poles, say, the masculine. Although real equality will be reached, it shall be by terms dictated by the masculine vision.[8]

3. Equity—It has been stated that neither formal, tangible or real equality are, by themselves, sufficient to achieve just treatment. Often, just treatment utilizes the term equity. The object is not to make anyone truly "equal", but to provide treatment the peculiar conditions of each person require to satisfy their singular needs or address their special claims

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[6] For example, to satisfy the criterion of formal equality, it would suffice that the body of laws recognize all persons right to be assisted by a male or female attorney in criminal cases. That in itself, however, would not be sufficient from the perspective of material equality. Persons who could not afford to pay the legal services of an attorney, even when they have that right formally, would be in a situation of real inequality. To satisfy the criterion of justice based on real equality, economic resources would have to be allocated to provide free legal services to whoever does not have the means to pay for them.

[7] An example of this kind of solution are the different programs of affirmative action to level off the historical inequalities in the hiring or promotion of women in specific kinds of occupations or positions in public or private employment.

[8] One such example would be to require that women behave the same as men in order to gain access to specific professions and occupations. In this case, facilitating access to women to a field traditionally reserved to men could be interpreted as a step in the direction of material equality. But, it would be unjust from the perspective of equity to require that, as a condition, women adjust to norms and standards established by, and developed for, men.

Equitable treatment—different from equal treatment—always requires the contextualization of decisions. That is, it is necessary to keep in mind the differences, the particular experiences, the social context of the relations and the conditions for existence of each person.[9]

4. Evaluation of the difference – The paradigm of equality—that is, the notion that justice is realized by treating all men and women equally—is being surpassed by a new proposal that raises the need to assign a value to differences. It involves accepting the fact that there are differences between persons and groups, and that those differences can be positive and should be respected. Justice, in this sense, requires that differences be recognized positively. These differences should be considered—not for the purposes of oppression and subordination—but to promote personal development and potential. This requires providing the necessary conditions for those differences to be respected and allowed to develop.[10]

The Commission understands that the treatment of justice requires a combination of these approaches to the problem of equality and differences. Formal equality is necessary, but not sufficient. Solutions that promote real equality, equity, and the positive evaluation of distinctions are also required. Some problems will have to be analyzed from one perspective, and others from another.[11]

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[9] The following are examples of equitable treatment: (1) taking special measures so that persons with physical handicaps can have access to places (e.g. buildings), services (e.g. education) and resources (e.g. jobs), that, without such special measures being taken, they would be impeded; (2) taking into consideration the particular circumstances.

[10] One such example of how to evaluate a difference positively is to appreciate and give importance, in the analysis of labor problems, to the particular perspective that a female worker may have by virtue of her experience as a woman and as a worker. Another example of this approach to the problem of justice, in countries with indigenous communities, is respecting the differences and incorporating them positively into the decision-making processes of the persons affected. Still another example is to recognize the positive contribution that persons of a homosexual orientation or lesbians can make to our understanding of the problems of gender.

[11] The literature on the diverse conceptions of equality and on the new normative paradigms that require the positive evaluation of differences is already abundant. In regard to applying these concepts to the question of gender, and to appreciate the different theoretical approaches that have been developed surrounding these problems, the reader may refer to, among others, the following: FACIO, *supra* note 2; MACKINNON, *supra* note 4; MARTHA MINOW, MAKING ALL THE DIFFERENCE; INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal* Treatment/*Squal Treatment/Special Tr*eatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-5); *Ann C. Scales, The Emergence of Feminist Jurisprud*ence; An Essay, 95 YALE

E. GENDER DISCRIMINATION. The Commission, in accordance with previous definitions of discrimination, gender, equality and equity, considers that the following general situations constitute sex discrimination:

1. Any unequal and unjustified treatment[12] against persons, on the basis of their gender, that has unfavorable or undermining effects.

2. Any equal treatment, however, that is disproportionately unfavorable, or undermines persons on the basis of their gender. This includes decisions or acts that do not take into account the particular needs that arise from a person's particular situation because his or her job or behavior requires functions attributable to their gender. This would be an example of inequity

3. Any act, decision or practice that, in effect, suppresses the women's perspective in matters that affect them. In other words, any action based solely on the masculine perspective, even when it affects women.

F. SEXISM. The Commission has used the term *sexism* ascribing to it the usual significance that it has come to acquire in the Spanish language[13] Thus, it refers to the group of attitudes and beliefs that convert the sex or gender of persons into the determining element, or that keep from recognizing in them value, capability or particular acknowledgments. These attitudes and beliefs tend to manifest themselves best in expressions used to refer to the persons, or to the

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L. J. 1373 (1986); *Robin West, Jurisprudence* and Gender, 55 U. CHI. L. REV. 1 (1988); *Patricia A. Cain, Feminism and the Limits* of Equality, 24 GA. L. REV. 803 (1900); *Anne Bottomley, Feminism: Paradoxes of* the Double Bind, in THE CRITICAL LAWYERS' HANDBOOK (Ian Grigg-Spall and Paddy Ireland, eds., 1992); *Liana Fiol Matta, On Teaching Feminist* Jurisprudence, 57 REV. JUR. U.P.R. 253 (1988). Please note that some authors, however, like Catherine Mackinnon, reject that the problem should be considered in terms of equality or difference. Mackinnon states that the central issue is that of domination, in this case, of women by men, and that the proper strategy to achieve justice should be directed toward dismantling the structures, norms and practices that make that domination possible. MACKINNON, supra note 4.

[12] By "treatment" we understand, practice, norm, disposition or other act that is directed toward, or applies to, a person or group of persons. This includes the way a person addresses another, such as a judge to a witness, or the acts that one person realizes in relation to another, such as a bailiff against a female prisoner, or the treatment of her by the establishment through the application of a rule or a particular group of rules, toward a legal person, such as the rights that are recognized or not, say, in the case of lesbian mothers.

[13] *El Diccionario General Ilustrado de la Lengua Española,* for example, deines sexism as the "tendency to evaluate persons according to their sex" and, in a second definition, as a "discriminatory attitude in sexual matters". VOX, DICCIONARIO GENERAL ILUSTRADO DE LA LENGUA ESPAÑOLA 1004 (ed. 1987)

behaviors toward them.[14] Sexism leads to discriminatory acts on the basis of gender and is reproduced through those same acts. Sexism manifests itself in daily life, and in the interactions that occur in the heart of institutions and in the production, itself, of wisdom and knowledge.[15]

G. SEXUAL HARASSMENT. Practices constituting sexual harassment have previously been the object of definition in various legal statutes and judicial decisions.[16] The determination of whether a practice constitutes an infringement on the legal right not to sexually harass others, must be made in accordance with the state of law. However, from a sociological point of view, specific practices can be identified, within multiple contexts that, although they have not yet been embraced by the courts, share similar characteristics with those that have been defined as harassment by the state of law. Although these practices have yet to be the object of legal sanction, they can have effects as detrimental as those sanctioned by law.

Therefore, the Commission has decided to examine all those practices that can be characterized as constituting sexual harassment or harassment on the basis of gender, independent of whether or not there exists a law that expressly prohibits it. In this more general treatment, we consider as a manifestation of sexual harassment any act or practice that consists of making unwanted sexual approaches, or requests of sexual favors, or any other verbal or physical behavior of

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[14] In this way, for example, phrases such as "women should stay in the home" or "the practice of labor law is more suited to men" are expressions that denote sexist attitudes, in as much as they only recognize the capacity to realize specific activities to men or underestimate the capacity of women to work in certain fields of social activity. Similarly, not employing a woman because of the mere fact of her being a woman to occupy the position of bailiff of a court, or to deny the opportunity to a man of custody of his children because of the mere fact that he is a man, would be considered behaviors or acts that reflect sexist attitudes

[15] ALDA FACIO Y ROSALIA CAMACHO offer the following classification of the forms assumed by sexism in the area of criminology: 1. familiarism: the identification of women with the family; 2. the douhle parameter: evaluate same behaviors with different parameters for each sex; 3. the sexual dichotomy: treat the sexes as diametrically opposed, without attributing similar characteristics; 4. the manner of each sex: the establishment of a specific manner for each sex; 5. the over generalization: present the results of studies that only analyze the behavior of the masculine sex as valid for both sexes; 6. the insensitivity to gender: ignore the gender as a variable that is socially important or valid; 7. androcentrism: the approach or analysis that is made from only the masculine perspective. VIGILADAS Y CASTIGADAS: SEMINARIO REGIONAL "NORMATIVIDAD PENAL Y MUJER EN AMERICA LATINA Y EL CARIBE" 33-40 (Lima CLADEM, Latinamerican Committee for the Defense of Women's Rights, 1993)

[16] Please consult the analysis made of the legislation and jurisprudence included in this Report's chapter on Labor Law.

a sexual nature that places a person in a particular situation of disadvantage, discomfort, or vexation, or that creates an intimidating, hostile or offensive environment for one or several persons. Sexual harassment is a modality of sex discrimination. This is so because though this kind of harassment a person is subjected to a specific treatment, that results in their underestimation, solely on the basis of their gender. A women that is required to submit to her male supervisor's sexual advances within the performance of her job, or that must suffer offensive comments related to sex or to the fact that she is a woman, is being submitted to unequal detrimental treatment in comparison to that of men. Even when the harassment is forthcoming from a person of the same sex, the woman that suffers the harassment has been chosen as its object by virtue of her sex. It is a foregone conclusion that what we have before us is a situation of sex discrimination.

Sexual Orientation Discrimination

The Commission concluded that sexual orientation discrimination is a form of sex discrimination [17] Discriminatory treatment is dispensed in these cases against a person on the basis of their having chosen behaviors, including those related to their sexuality, that are different from those that have been traditionally assigned to men and women by virtue of their sex. This assignment of expected behaviors includes standardized norms on sexuality, lifestyles, ways of a person relating to others of their own sex and to the opposite sex, dress codes, body demeanor and many other aspects of human conduct that are evaluated in reference to the sex of the person. In other words, in these cases the discriminatory treatment, based on stereotypes, falls on those persons that have questioned the social construct of the gender that characterizes societies in which only heterosexual relations are considered normal. In fact, the social attributes of gender that dictate guide-

[17] It should be noted that this same conclusion was arrived at by an overwhelming majority, almost unanimous, of the male and female judges participating in the investigation sessions administered by the Commission. Please see the Report on the Participatory Investigation Sessions for male and females judges of the judicial system that is an addendum of this Report. Also expressing themselves in this manner, were several of the persons that gave presentations during the hearings held in different parts of the Island.

lines and force persons to act in a certain manner and exclude others, and that conform expectations of how women and men should interact, establish more rigid and punitive parameters if transgressed by homosexuals and lesbians. Homosexuality and lesbianism contradict the accepted characteristics because of the prevailing visions of what it means to be a woman or a man, and on how the sexes complement one another. Homosexual and lesbian behaviors challenge the dominant order in many ways, among others, because of what those behaviors symbolize for the established order of subordination of women, and for the privileges and advantages this order confers on the majority of men.[18]

One should not lose sight of the fact, however, that in many ways sexual orientation discrimination exhibits its own characteristics. Persons submitted to this kind of discrimination suffer specific experiences of underestimation that are not identical to those of women and male heterosexuals who suffer discrimination on the basis of their gender. Particular stereotypes occur in relation to homosexual men and lesbian women. Even more so, the discrimination often assumes peculiar forms, and can manifest itself in contexts that are different to other forms of sex discrimination. Those sexual orientation discrimination particulars should be studied more carefully and specific measures should target their eradication.[19]

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[18] See, for example, Sylvia A. Law, *Homosexuality and the Social meaning of Gender*, 1988 WIS. L. REV. 187 (1988) for the relation between sexual orientation discrimination and the social construct of gender. See SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988) for an analysis of the forms in which homosexuality and lesbianism challenge the existing order and the consequences that this has on those persons who choose to construct their sexual identity in this manner.

[19] The study of sexual orientation discrimination in the Judicial Branch was not envisioned as part of the original task of this Commission. During the course of this investigation, however, the Commission became aware of the close relationship between sexual orientation discrimination and the social construct of gender. Given the progressive discovery of this aspect, it was not possible to design the investigation in a way that allowed a more thorough examination of the issue. Although, progress was made in the area of theoretical and juridical conceptualization of the matter, the investigation did not produce extensive or detailed findings or conclusions on existing discriminatory practices, in this regard, in the courts. The Commission decided to inform its conclusion that this kind of discrimination constitutes sexual discrimination, and to point out its scarce findings on this particular, with the recommendation that future, more comprehensive studies on the matter.

Gender Discrimination and Social Condition

Often, gender discrimination manifests itself by closely overlapping with other forms of discrimination, such as discrimination on the basis of social condition. That interrelation creates peculiar or specific experiences and has effects that cannot be reduced to a mere addition of one discrimination on top of another. Peculiar experiences of discrimination impress upon a life situation a character of its own. In that way, for example, it has been found that women who are poor suffer specific experiences of discrimination for the sole reason that they are women and poor at the same time. These situations present special problems that must be addressed specifically.[20]

Aspects of the Problem to be Studied

The basic problem that the Commission was charged with investigating was the following: To what degree, if any, does sex discrimination occur in the Judicial Branch? If it does exist, what are its manifestations? When these questions were first approached, a working hypothesis was proposed that, if it existed, discrimination would assume, as in the rest of society, multiple forms, and that these forms would manifest themselves in the diverse dimensions of the structure and work of the courts. It was agreed that the operations of the Judicial Branch are constituted by a group of practices that occur within a determined normative and structural context, and form part of a series of relationships that conform the social fabric of that part of government. Consequently, the Commission prepared itself to examine the possible manifestations of discrimination in each kind

[20] Please see, BENDER AND BRAVEMAN, *supra* note 2, especially Section C of Chapter 4, entitled *Intersections and Patterns of Power and Privilege* on the interrelation between experiences conditioned by race, gender, and social class in the United States. Also, please see Celina Romany, *Ain't I a Feminist?*, 4 YALE J.L. & FEMINISM 23 (1991). On the specific experience of women who are poor, see, Blanca Fernández, *Feminización de la pobreza and Rosa de la Asunción, Las mujeres y la pobreza*, in LA SOCIEDAD DE LA DESIGUALDAD (Tercera Prensa, Gipuzkoa, 1992). Numerous proponents at the Commission's hearings referred to the special problems encountered by women who are poor before the justice system. The Commission made some findings related to these problems, but suggests they be studied more thoroughly

of activity that is performed within the Judicial Branch, in its laws and fundamental structures and in the relationships that characterize it

More specifically, the Commission decided to examine to what degree can sex discrimination be produced and reproduced in the following instances:

a. In the process of drafting rules of jurisprudence and in the interpretation of the law;[21]

b. In the adjudication of real controversies;

c. In the occupational structure of the system;

d. In the distribution of functions;

e. In the organization of physical space, and setting up installations for the provision of services to all male and female users of the system;

f. In the daily interaction of the many persons that participate in the activities that are performed in the courts.

With regard to relationships and interactions, a decision was made to include those that occur between all persons that perform functions or that come into contact with the activities of the institution. Included in this group were female and male judges, male and female attorneys, male and female prosecutors, female and male bailiffs, female and male secretaries and other Judicial Branch personnel, defendants or persons who have had complaints filed against them, or victims of crimes or offenses, civil plaintiffs, witnesses, visitors and other persons who use the services of the courts.

Discrimination, Patriarchy and Power

Every social phenomenon is the result of multiple factors that converge to produce it. Most of the time one cannot point to just one factor to explain its existence. On the other hand, its repro-

[21] In view of the fact that courts are obliged to apply the existing law, which constitutes part of the normative framework within which the judicial function operates, it became necessary to analyze the applicable legislation to detect to what degree said legislation contained dispositions that were gender discriminatory.

duction occurs by the repetition, through the course of time, of diverse practices, in some cases over generations or centuries. Particular practices reproduce as a result of deliberate acts committed by some sectors so as to advance, protect or strengthen their interests. Others, are the consequence of recurrent acts that are committed unconsciously as a result of tradition, custom or habit. Gender discrimination also responds to this dynamic of social life. Instances of intended discrimination exist. But it is not necessary that discrimination be the result of deliberate acts to exist. It is explainable, many times, by profound cultural and political patterns, and by the effects of deeply-rooted historical processes. There are, thus, structural factors that cause discrimination which must be examined if one wants to truly understand the problem.

The Commission has been aware that the problem of gender discrimination revolves around the problem of power. Pulsating deep within are issues related to the meaning, structure, use and management of power. In this case, primarily, the relationships of power between men and women. When aspects of power that are intrinsic to the manner in which the relationships between men and women have been historically structured combine with other instances of circulation of power, such as economically large businesses, social organizations or government institutions, the situation can become especially complex. Within all institutions dimensions of power become manifest; even more so when their decision-making instances are hierarchically structured. In government institutions, in this case the Judicial Branch, the use and management of power are aspects that are central to its function. It is in this sense that the problem can acquire special contours that merit attention.

Men and women can be the object of gender discrimination. However, in our society, the form it most frequently assumes is against women. Discrimination against men and women homosexuals or lesbians is also frequent.[22] Gender discrimination is a manifestation and consequence of

[22] See, *supra* note 18, for studies that link sexual orientation discrimination with patriarchy, sexism and the social construct of gender.

a society in which men have dominated the areas of power—both in the public and private sectors—and have structured the world according to their particular vision. This reality, which has been abundantly studied in recent years, affects all the activities of our social life.

The studies on gender that have been made in the past two decades have developed a series of analysis categories to explain the systemic subordination of women phenomena in a world dominated by men. One of these key categories is *patriarchy*. According to this current use, the term patriarchy is used to refer to the system of structures and social practices whereby the subordination, oppression, and exploitation of women by men is maintained.[23] Walby points out that the reference to social structures is important, because not only does it discard biological determinism—in this case the idea that subordination is determined by biology—but also "the notion that each individual man is in a dominant position and each woman in a subordinate one".[24] We are speaking about a system of social relationships, corresponding to an aggregate of practices that operate to reproduce the system. This group of practices, the accumulation of which crystallizes into social structures, is produced and reproduced in the workforce, in the world of politics and of the family, in cultural institutions, in sexuality, and in the diverse modes of masculine violence against women.[25] The practices and ideology of a patriarchy can be reproduced by men as well as by women.

In the case of the Judicial Branch, one must keep in mind that like other political, economic, and social institutions, and also like the juridical profession itself, an instance of power historically controlled by men is involved. Only in recent years has women's input been felt as

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[23] WALBY, *supra* note 2, p. 20. See, also, GERDA LERNER, THE CREATION OF PATRIARCHY (1986).

[24] WALBY, *supra* note 2, p. 20.

[25] *Id*.; FACIO, supra note 2, at pp. 38-39. ALMA L. SPOTA, IGUALDAD JURIDICA Y SOCIAL DE LOS SEXOS (Mexico, Ed. Porrúa, 1967) explains, with an extensive bibliography, how the unequal treatment of men and women was developed in the heart of family and social relationships and its eventual impact on juridical institutions. Also see, 1 & 2 SIMONE DE BEAUVOIR, EL SEGUNDO SEXO (Pablo Palant trans. Buenos Aires, Ed. Siglo Veinte, 1984) and John Stuart Mill, The Subjugation of Women, in ON LIBERTY AND OTHER ESSAYS (1991), both classical works on this subject.

judges, attorneys, prosecutors, and in the exercise of other branch functions. It is not surprising that the operations, structures, practices and relationships of the Judicial Branch respond to the view, perspective, and the gender that has historically controlled it: the masculine gender.

Paradoxically, the recent arrival of women to diverse levels of the system, has probably let loose the deep androcentric currents—that is, the masculine view of the world—that once went unquestioned. This same circumstance has probably raised new forms and expressions of gender discrimination that must be challenged and eradicated.

Finally, it is important to understand that every phenomena of discrimination has an ideological dimension. That is to say, discrimination reflects and reproduces ideas, conceptions and values that are used to justify practices that are manifested. Many of these ideas, conceptions and values have deep historical roots that are acquired during the socialization process. Therefore, we are facing a phenomena that is manifested externally, in behavior, as well as subjectively, in internal dimensions within a person's consciousness. Generally, these ideas, conceptions and values adopt the form of stereotypes that are used to perceive and evaluate the objects of discrimination. These stereotypes lead us to compare each human being to a category—woman, man, etc.—assigned specific traits. How each person should be treated is derived from the alleged existence of those traits. When stereotypes conform an image that, somehow, is considered inferior, less capable, of less importance, the subsequent treatment tends to be discriminatory, in effect, detrimental and injurious to the person so characterized. This is exactly what takes place in the phenomenon of gender discrimination as it has historically been manifested in our society.

The Social Production of Stereotypes

Because of the radical importance of stereotypes in the discrimination process, a careful study of the concept and its implications is indispensable.

The development of conceptual schemes to categorize certain human attributes on the basis of sex, race, class and other traits is a phenomenon that has been manifested in the most diverse societies over time. Those classifying systems tend to project the idea that a person's way of being is immutable that some people often try too ground on biological criteria. These constructions of ways of being are rigid systems that categorize human and social attributes on the basis of a strict dichotomy that is either negative or positive (for example, passive-active, emotional-rational, strong-weak, industrious-indolent). They are also based on unfair decontextualized generalizations of the persons or social groups to which they refer. Stereotypes are precisely those conceptual schemes of gender, race, ethnic and social group that transmit the idea that human ways of being are unchangeable and are defined in reference to dichotomies, such as the ones previously described, abstracted from their actual social contexts.[26]

The injustice of treating a person or group on the basis of stereotypes lies, therefore, in that such treatment is realized on the basis of a generalization that ascribes a trait or determined role to a person or a group. If we consider that women, by nature, or an immutable cultural trait, are less rational than men—a classic example of a stereotype—then all women, and each woman in particular, will be treated as irrational beings. If we limit women's role to the domestic sphere, decisions related to work, politics, the family and other areas of social life will restrict, or at least try to curtail, each woman to the domestic sphere. Stereotypes, therefore, are not merely ideological phenomena or simple contents of consciousness. Their social force has real effects on men and women victims.

Gender stereotypes have varied according to historical period and place. Nonetheless, several recurrent themes can be identified under three large banners: (1) the alleged intellectual superiority of men; (2) the attribution of characteristics and behaviors deemed appropriate to a gender

[26] See JOSÉ MIGUEL SALAZAR ET AL., PSICOLOGIA SOCIAL 107, (Mexico, Ed. Trilla, 1979).

(for example, women are emotive, sweet, generous, altruistic, resigned", men are "aggressive, rational, strong"; women belong to the domestic, men to the public, arena; and (3) the sexual double standard that has various dimensions (such as establishing different parameters to evaluate similar conduct in both sexes; promoting sexual aggressiveness in men and submission in women; justifying male appropriation of female bodies).[27] For women to break with their assigned boundaries often causes them to feel guilty and cause men to blame them as a group.[28] The force of stereotypes on gender in societies such as ours stems from ways of organizing advantages and disadvantages, social privileges, and control and power at social and institutional levels—all derived from the distinction between masculine and feminine.[29]

Stereotypical contents impressed upon gender circulate in a society in different forms. They can be deliberately employed as an instrument of power, to expressly undermine the credibility and effectiveness of a woman or a man. They may also be disseminated by the belief that the traits attributed to women and to men are "natural" or are an adequate expression of an immutable culture (for example, a "national" culture). Used in this manner, stereotypes are not considered sexist. Finally, stereotypes can be expressed through ignorance or lack of information and want of empathy for the perspective or the situation of the victim.[30]

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[27] See Clara Corea, *El sexo oculto del dinero: Formas de dependencia feminina* , Buenos Aires: Colección Controversia, 186)

[28] From these stereotypes also rises the belief that in some way women provoke violence or sexual harassment of which they are victims. Actually, stereotypes that "explain" women's professional success by prioritizing their physical attributes over their professional and intellectual capacities have been getting more attention.

[29] Nancy Andes, *Social Class and Gender: An Empirical Evaluation of Occupational Stratification*, 6(2) GENDER & SOC'Y 231-251 (1992)

[30] Illustrating this last comment, is the interpretation made by judges and prosecutors of the withdrawal of charges made by a woman complainant in a domestic violence case. The judges« and prosecutors« lack of knowledge of the social, economic and ideological barriers that retard the definitive rupture between women and their abusers, makes these officials think that the withdrawal of charges at any given time is an "autonomous and free" act exercised by these women. Also, it is deemed an "irrational" act, as they do not see the factors that explain how a woman who has been physically abused can return to her abuser, if only temporarily. In the Task Forces´ reports that have studied sex discrimination in the courts of the United States, it is pointed out that a considerable number of the women interviewed indicated that they had been the object of discriminatory acts, and shared experiences of being treated differently from men. In the case of men, however, a large group of them claim not being aware of the existence of any discriminatory treatment against women, or think that the system operates in a neutral manner in regard to gender. The fact that many lawyers allege the non-existence of discrimination (for example, that instances of sex discrimina-

The diffusion of stereotypes can have negative consequences for the targeted group, for those that circulate them and for institutions.[31]

The Importance of Language

An important development in the social sciences during the 20th Century is the discovery of the importance of language in the constitution of social life. Many scholars of the social order, relying on works by linguists,[32] philosophers of language[33] and, more recently, on semioticians[34] have incorporated into their theoretical constructs and empirical works, the notion that language not only expresses realities, but also creates them.[35] To the extent that language creates meanings, it also molds, directs and structures social relationships and human identity. Hence, language is an important instrument of power. The categories that it creates constitute gender-based divisions in the real world. Therefore, language is an important medium to create the social divisions of our society on the basis of gender. Thus, feminine and masculine categories do not refer to a given, pre-existing, natural reality, but to the way language has created differences between behaviors, styles and ways of being of men and women. Language also suppresses the perspective of women and makes men's privileged.

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tion do not exist), give us an idea of the subtle, but deeply penetrating, character of discrimination in our actual period of history.

[31] More on this particular in the chapter on interaction in the courts.

[32] For example, Charles Sanders Pierce, the initiator of the field known as "semiotics." See CHARLES SANDERS PEIRCE, THE SCIENCE OF SEMIOTICS (Bueno Aires, Ed Nueva Visión, 1986).

[33] J. L. Austin and Ludwig Wittgenstein, among others. On AUSTIN, please see HOW TO DO THINGS WITH WORDS (1962); on WITTGENSTEIN, his *TRACTATUS LOGICO-PHILOSOPHICUS (*D F Pears & B F. McGuinnes, trans , Routledge, London, 1974)

[34] Semiotics is the study of the system of signs through which the meanings of words are created in a culture. Please see, among others, UMBERTO ECO, TRATADO DE SEMIOTICA GENERAL (Mexico, Ed Nueva Imagen, 1978).

[35] This includes besides theorists of discourse such as Michel Foucault, as well as thephilosopher Jurgen Habermas, the principal exponent of contemporary Theoretical Criticism. By FOUCAULT, please see, among others, LA VERDAD Y LASFORMAS JURIDICAS (Ed. Gedisa, Barcelona, 1988); THE ARCHEOLOGY OF KNOWLEDGEAND THE DISCOURSE ON LANGUAGE (1972); POWER/KNOWLEDGE (Colin Gordon, ed.,1972). By HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1991). See, also, PIERRE BORDIEU, OUTLINE OF A THEORY OF PRACTICE (1977); IN OTHER WORDS: ESSAYS TOWARD A REFLEXIVE SOCIOLOGY (1990).

The term language, in its broadest sense, includes gestures, oral and written expression and the graphic arts. All these forms contribute to the reproduction, circulation and reinforcement of stereotypes. This is one way forms of language reproduce the power that is socially conferred on men over women. Therefore, it crucial to any study on the impact of gender in an institution's operations, in this case the Judicial Branch, that a rigorous analysis be made of the forms and contents of the language employed by the institution.[36]

The Force of the Law

An idea has been spreading among theorists on the sociology of law, that the law is not merely a neutral observer in constituting gender-based categories in society. Like language, law is a constitutive force and is capable of creating social realities.[37] The categories established by law to classify social actors—known as legal persons—help produce a social order of legal persons with powers, competencies, rights, privileges, and different prerogatives and, consequently, with dissimilar access to power mechanisms power and society's resources. Standards influence the content of consciousness, that is, they affect how people perceive and evaluate reality.[38] Yet the law defines practices, including how a standard is obeyed, that condition how we see and evaluate

[36] A considerable body of literature already exists on the relationship betweenlanguage and the law, between language and juridical institutions. Please consult,among others, PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS (1987); OSCAR CORREAS, CRITICA DE LA IDEOLOGIAJURIDICA: ENSAYO SOCIOSEMIOLOGICO (México, UNAM, 1993); LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992); CATHERINE A MACKINNON, ONLY WORDS (1993); Elizabeth Mertz, Language, Law, and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law,26(2) LAW & SOC'Y REV. 413 (1992).

[37] See, among others, Pierre Bordieu, The Force of Law: Toward a Sociology of the Juridical Field, 38 HASTINGS L. J. 805 (1987); Robert W Gordon, Critical Legal Histories, 36 STAN L. REV. 57 (1984); Susan Silbey and Austin Sarat, Critical Traditions in Law and Society Research, 21 LAW & SOC'Y REV. 165 (1987-88); P NERHOT, LAW, INTERPRETATION AND REALITY (Dordrect, Klewer, 1989); Efrén Rivera Ramos, The Legal Construction of American Colonialism: An Inquiry into the Constitutive Force of Law (1993) (doctoral thesis, University of London); Efrén Rivera Ramos, The Legal Construction of American Colonialism: The Insular Cases, 1901-1922, (manuscript, s.f, soon to be published)

[38] Efrén Rivera Ramos, The Law and Subjectivity, paper presented in a seminar on the same theme given at the Instituto International de Sociología Jurídica de Oñati, Gipúzkoa, España, in the summer of 1994; Efrén Rivera Ramos, The Law and the formation of the contents of consciousness, Paper presented at the II Congreso Mundial de Sociología, given at the University of Bielefeld, Germany (July, 1994).

the world of those who incur in the practice.[39] Therefore, what the law says or does not say regarding the expected behaviors of men and women, is of cardinal importance in the reproduction of gender-based categories. Likewise, the practices generated in formulating, interpreting and applying standard behaviors—which are part of the substance and operation of the law—affect how humans construct their vision of the appropriate place and behavior for women and men in society. What judicial officials, men and women alike, do and say in that process, is part of the dynamics in producing and reproducing experiences of equity or inequity of the men and women in our society.

The Consequences of Discrimination

The work of the Commission starts from the premise that any manifestation of discrimination has important consequences in the administration of justice.

In the first place, discriminatory acts infringe on the principle of justice itself. Unjustified discrimination is an injustice.

Secondly, sexist and discriminatory attitudes and practices, based on gender, can seriously affect the outcome of cases.

Thirdly, the existence of discrimination affects the institutional respect that the court owes itself, and demands from others.

Fourth, because of the power and importance of the Judicial Branch in our society, any discriminatory practices in its arena will tend to reproduce sexism and gender discrimination in the rest of society. Likewise, to the degree that the Judicial Branch eradicates discrimination in all of its components and processes, it contributes to the rest of society doing the same.

Awareness of these effects more than justifies the Judicial Branch's self-examination, and presenting the fruit of its deliberations to Puerto Rican society.

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[39] *Id.*

Chapter 2

Methodology

Introduction[1]

Conceptual Framework

To carry out the study on gender-based discrimination in the courts, the Commission followed the most recent tendencies in Social Sciences research These are based on theoretical suppositions that are described below.

Each social phenomenon, which discrimination is, has multiple dimensions. Therefore, it can only be recognized and understood by a combination of investigative methods that permit observation and analysis of each dimension of social reality. To do that, a conceptual distinction between three complex entities must be maintained: (1) practices or social behaviors (regarding tangible traditional conduct);[2] (2) categories, meanings or interpretations that refer to those social practices (attitudes, preconceptions, theories, beliefs, discourses)[3] and (3)the enduring relationship between both domains.[4]

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[2] In the subject being analyzed, gender discriminatory acts are referred to, such as hiring a person for a job using sex as a criteria instead of the person's competence

[3] The stereotypes of women or men illustrate this dimension. For example, in our culture it is acceptable for a woman to be sentimental and emotive; however, a man who does the same is considered weak and less of a man

[4] IAN PARKER, DISCOURSE DYNAMICS: CRITICAL ANALYSIS FOR SOCIAL AND INDIVIDUAL PSYCHOLOGY 17-19 (1992)

This relationship refers to how the sphere of meanings produce and reproduce social customs as well as the importance these meanings have. We must understand which human categories of persons are affected by one or another interpretation of reality.[5]

The study of meanings, or interpretations conferred on social practices, is of great importance to research for several reasons: In the first place, to a large extent, social reality consists of enduring interpretations humans make. This refers to human thoughts, feelings, beliefs, theories, discourses, stereotypes, and prejudices about reality, including gender. Interpretation is a crucial aspect of social reality since humans are constantly using and creating preconceptions to interpret the world, and questioning how others think about the world.[6] It is important to clarify that interpretation can be observed, as are practices or social actions, because they too are tangible: in both written and spoken language (documents, laws, expressions).[7]

Secondly, what is expressed or spoken in social relationships has consequences for the persons about whom, or to whom, it is said. We must remember that expressions not only describe reality (events that have happened), but also construct it. Depending on their context, expressions greatly influence future practices where orders are given or anticipated, or behavior is prescribed. And, in selecting some elements to the exclusion of others, an expression can construct a reality.[8]

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[5] For example, believing that women in general are less intelligent than men undermines their credibility. Norma J. Wikler, Credibility in the Courtroom: Doe Gender Make a Difference? (unpublished document provided by the author). On the subject of the interrelation between these two dimensions, see the following works: PARKER, supra note 4, at pp. 3-22; VANDAN SHIVA, ABRAZAR LA VIDA: MUJER, ECOLOGIA Y CIENCIA 23-61 (Instituto de Tercer Mundo, 1988); STANLEY ARONOWITZ, SCIENCE AS POWER: DISCOURSE AND IDEOLOGY IN MODERN SOCIETY 3-34 (1988); Ruth Silva Bonilla, Debate de teoría y método en los trabajos de investigación en las Ciencias Sociales 1-13, Paper presented in The Encounter of Investigators, Decanate of Academics, University of Puerto Rico, Río Piedras Campus (1986)

[6] THOMAS KHUN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 197-215 (Fondo de Cultura Económica, 1962); PETER BERGER AND THOMAS LUCKMAN, THE SOCIAL CONSTRUCT OF REALITY (1984); SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM 197-215 (1986); RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983); ARONOWITZ, supra note 5, pp. 315-352; CHRIS WEEDON, FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY 12-42 (1987); FEMINIST RESEARCH METHODS (Joyce McCal Nielsen ed., 1990)

[7] Audio tapes are an example of how to capture expressions with investigative purposes.

[8] For example, the expression of a phrase in place of another can direct conversation toward another direction or lead the other person to respond in a certain manner. PARKER, supra note 4, at p. 12.

Thirdly, no empirical reference exists (data or evidence) without a theory influencing what is observed, how it is observed and measured, and how a social trait is interpreted. Preconceived interpretations always intervene because reality is not mechanically reflected in thought.[9] Not even male and female scientific or legal researchers escape value and theoretical judgments when speaking of evidence or information. What we may call information or evidence is shaped in the same way we choose our theories, since every interpretation of information is made within a theoretical context. Even though many male and female researchers say that the information "speaks for itself", facts always contain an element of interpretation.[10] This does not mean that the social reality under investigation cannot be known,[11] or that only different interpretations of that dimension exist, depending on the different theories employed. What it does imply is that to fully know that reality, it is necessary to study the theoretical dimension and schemas from which we analyze data and submit these theories to scientific thought as well.

Traditionally, the Social Sciences preferred quantitative methods, because it was possible to know reality apart from the way people interpreted social practice. Today, however, we know that measure human acts is impossible unless we understand the dimensions of what they mean.[12]

We can exemplify this by asking ourselves how is the degree of discrimination measured when a good number of persons interpret the act of stereotyping or the act of discriminating as belonging to a category they deem "natural", i.e. , that it is "culturally acceptable" to flirtatiously

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[9] All scientific information parts from suppositions, rules and theories learned by the male or female scientist as a member of the scientific community. EZEQUIEL ANDER EGG, TECHNIQUES OF SOCIAL INVESTIGATION 17-30 (El Cid Editor, 1980); FRITJO CAPRA, THE TURNING POINT: SCIENCE, SOCIETY AND THE RISING OF CULTURE (1983): ARONOWITZ, supra note 5, at p. 332: Gloria Bowels, The Uses Hermeneutics for Feminist Scholarship, 7(3) WOMEN'S STUD. INT'L 185-188 (1984); SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM 197-215 (1986).

[10] This is proven when we observe that the rules of evidence have changed according to the cultural development of the Law.

[11] Parting, of course, from the suppositions that are employed to know it.

[12] The opposite is also true, interpretation can be quantified. The experiences, attitudes and interpretations that are repeated over and over again by interviewed persons are quantifiable.

compliment a woman.[13] That, of course, does not mean that dimensions of human behavior - discrimination or bias - cannot be measured; rather, it does alert us to their complexity and to considerations that a questionnaire or survey must take into account.

It follows, then, that to study meanings and interpretations - what is understood by gender discrimination, for example - requires that male and female researchers favor qualitative investigative methods. Qualitative methods include analysis of documents and responses during individual or group interviews to open-ended questions (that is, when the person is able to state all the information that he or she considers pertinent in response to a question by the female or male researcher), case study and participatory investigative sessions (SIP, in Spanish).[14]

Quantitative methods, in turn, emphasize surveys, questionnaires or closed-question interviews (when options to respond are integrated within the mechanism, and can be easily measured), observable behavior or demographic data with an observation guide, and laboratory-controlled experiments. Qualitative methods are geared toward identifying, describing, and explaining profound and subtle aspects of an event or experience,[15] the context within which they occur,[16] the history of the event, its subjective dimensions (motivations, feelings, beliefs and how these influence social practices), how an event is interpreted, who benefits from the interpretation, the logic or the discourses that reinforce certain social practices and how those practices are reinforced. Qualitative measures, much more adequately than their quantitative counterparts, can account for the com-

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[13] NORMA J. WIKLER, DATA COLLECTION: SURVEYS (National Center for State Courts (1990) In this work, the author expresses that the surveys do not capture that behavior which those who answer interpret as "natural" and not prejudiced. In her work she analyzes the advantages and disadvantages of the methodology.

[14] It supposes that we can get closer to knowing a reality with the active participation in the investigative process of those sectors that are included in a given social situation.

[15] For example, it is difficult to capture the subtleties of prejudiced attitudes, the common elements in the narratives of incidents of prejudice through the use of quantitative methods. WIKLER, supra note 13, pp. 17-18

[16] The context within which an event occurs is crucial in the attribution of a meaning; a comment made as a compliment means something different if it is expressed within the courtroom, or within an informal environment among friends.

plexities hidden in any aspect of social reality and the relationship between the parts of a whole.[17] However, a preference for qualitative techniques does not mean that the scope of the investigation has been sacrificed. In our case, the Commission has interviewed enough persons, and has performed the necessary observations, reaching conclusions only after ample consultation with the judicial population.

Participating were 75 male judges and 44 female judges for a total of 119 judges (including every level of The Court of First Instance and the Circuit Court of Appeals, and male and female presiding judges), which is an adequate representation of the system. Also participating were 56 female attorneys and 42 male attorneys, for a total of 98 (including prosecutors, male and female attorneys, and female and male attorneys in private practice); 68 female users of the system and 39 male users for a total of 107 persons (including victims, aggressors, policemen and other support professionals); and 2 male and 25 female employees of the Judicial Branch. This represents a total of 351 persons, many of whom offered written presentations that were amply documented. In addition, a critical analysis of laws, procedural rules and jurisprudence related to the topic of gender discrimination was made. Reality comprises aspects that can be better understood through qualitative measures; other aspects that can be better understood with quantitative measures; and still others, with a combination of both. Quantitative methods are extremely valuable in generalizing the result of a sample in order to apply it to a population or establish the numerical relationship between two variables. As we mentioned previously, the distinction between the qualitative and quantitative methods is not absolute—one method can buttress the other for a complete accounting of the total phenomenon under study.

[17] The reality, or the material order, is constituted by complex entities composed of various interacting structures. For example, a human being is a complex of biological structures who moves, talks, monitors her/his movements and his/her expressions and can analyze all this simultaneously. For this reason, the lineal perspective of cause and effect is considered very limited to explain the plurality and multicausality of any social event. PARKER, supra note 4, p. 26.

Based on the above, the Commission has preferred to ground its investigation on a combination of methods that, together, could better render an account of gender discrimination in the courts. Included are qualitative, quantitative and critical methods.[18] Regarding the latter, it is important to emphasize that it is not enough to analyze events and interpret them—it is fundamental to analyze their consequences as well.[19] It is also important to recognize that the consequences of information can be very dissimilar: detrimental for some social groups and favorable for others. That is why researchers must be certain of the scope and implications of the information that they generate. Thus, in studying gender discrimination, for example, not only are the practices that constitute it identified and their frequency noted, but the most affected persons and groups are also analyzed. It is also necessary to see how gender discrimination even affects privileged sectors.

The Social Sciences propose that a greater degree of comprehension is achieved in any study which incorporates the social perspective of every sector.[20] These sectors, of course, possess extremely valuable information, at both anecdotal and explicatory levels, about the topic under study. This information enriches, modifies and adds elements to the theoretical framework of the study. This form of investigation is based on the dialogue (and democratic) model[21] of science, which catalogues the communal character of knowledge, that is characterized by deliberation, interpretation, judicious weighing of evidence, criticism and communicating disagreements. Precisely because of the communal character of knowledge that members of the judiciary had to participate in doing this study, in conjunction with the members of the Commission. This investigation is a

[18] BERNSTEIN, supra note 6.

[19] For example, to discredit the credibility of women as a group can result in or explain the rejection and/or their reluctance to go before the courts to denounce criminal or civil situations

[20] In the case of the courts, there exists a broad range of involved persons: female and male judges, male and female attorneys, prosecutors, victims, male and female employees, bailiffs, support staff, among others.

[21] On "dialogue"; see BERNSTEIN, supra note 6, at p. 172.

self-evaluation.[22] Its most important purposes are to support those judicial practices that foster the most humane and equitable relationships that benefit us all, male and female.

Organization of Work and Methodological Design

To achieve the established objectives of this study, and as a point of departure, the Commission made an exhaustive analysis of the methodological designs and the results generated by diverse special state commissions that had studied gender discrimination in the courts.[23] After also examining, the content of those reports and other literature on the topic [24] , the Commission decided to divide itself into work committees, consonant with some substantive areas of law, that is: (1) penal law (particularly in the area of domestic violence), (2) family law and (3) labor law (particularly in the area of sexual harassment). A committee was also organized to work on the theme of court interactions, inside and outside the courtroom. Also organized was a committee on methodology and findings which, together with other committees, selected, designed and put into effect the different methods of investigation used, and coordinated as well all of the research efforts of the committees.

In October of 1994, the Commission relied upon the advice of sociologist Dr. Norma Wikler, an expert on the subject of this study and a consultant to similar commissions. Wikler's assistance was important to the investigative phase since we were able to share the methodological bases of the study and the structuring of the findings.

The combination of methods utilized were the following: hearings; focus group interviews; observance of proceedings in the courtroom or court watching; participatory investigation sessions

[22] In other words, the judicial branch understood that it was necessary to examine its own practices on gender discrimination and decided to design a methodological model that would permit it to study itself, thereby achieving the most participation of its members. This wasn't about female and male researchers outside of the branch approaching it to investigate it, but that the branch itself provided the mechanisms for its self-evaluation.

[23] Studied in detail were the reports of California, Florida, Massachusetts, Michigan, New York, New Jersey and the preliminary report of the Circuit Court of the District of Columbia, Washington (on gender, race and ethnicity).

[24] See the Introduction to this Report.

for male and female judges of the judicial system; analysis of pertinent legislation; analysis of jurisprudence in the areas of family relations, penal law and labor law; compilation and analysis of statistical data of the Office of Courts Administration and other diverse studies. This combination of methods permitted extensive corroboration of the information obtained.

Differences Between Social Investigation and Determination of Facts in the Judicial Process

The process of adjudicating controversies of facts is to determine what occurred in each particular case. To achieve this aim, evaluation and procedural criteria are used to receive information, such as the rules of evidence and of civil and criminal procedures.

However, when the purpose of investigating is not to determine beyond reasonable doubt or by the preponderance of the evidence, or for any other standard of adjudication what occurred in a given situation, other methods of investigation, administration and evaluation are required.

Investigation in the social sciences aims to examine, from a social, historical, and cultural point of view, what practices or behaviors are taking place, with what regularity, why they occur, and how they affect the parties or groups involved.

This is why social investigation requires different methods. Reliable information is sought in social investigation, but the criteria utilized to measure its dependability are different from the judicial. Social investigation is based on: (1) rigorous selection of the samples, (2) definition of concepts and methods according to valid and reliable criteria, (3) compilation of information so that it can be verified by an independent observer, and (4) balanced judgment of data by male and female researchers. As a rule, hearsay is not admissible in the field of judicial adjudication. However, that is a type of proof, subject to other forms of corroboration, that historians and sociologists handle. It deals with another kind of standard of reliability since the objective is different. Our

objective is to examine, with regard to social phenomena, practices and behavior related to gender discrimination in the courts, explore and explain their magnitude and manifestations.

Description of the Methods Used[25]

A. Hearings

According to the literature we consulted, hearings are one of the most appropriate methods for this kind of investigation, because it permits persons to relate their own experiences, or those they know about, on the subject of the study. The hearings held by the Commission allowed it to obtain testimonies on gender discrimination from persons related to the judicial system.

Participants[26]

The hearings were open to the general public to participate, but were held in private between the Commission and each presenter to guarantee the confidentiality of the testimonies and thus promote more effective participation.

To convene participants, notices were published in the press and letters sent to all the personnel of the judicial system. Nonetheless, a general lack of information on the subject of the study led the Commission to invite specific individuals, representing diverse sectors, without any criteria other than their particular interest. Each presenter was given a detailed explanation of the purpose of the investigation.

Taking the factor of geography into consideration, it was decided that the hearings would be held in the following judicial regions: Humacao, Utuado, Aibonito, Ponce, Mayagüez and San Juan. Responding were female and male judges, male and female attorneys, court personnel, prosecutors, representatives from private and public organizations, and the general public. A list of the

total number of hearings held and the number of participants by region is included below (see Table 1). We also include a break-down by profession or organization and by sex. (See Table 2).

Table I: Hearings held

Place	Date	Total participants
Humacao	May 13 and 14, 1994	17
Aibonito	May 20, 1994	7
Ponce	May 21 and 22, 1994	12
Utuado	May 27, 1994	9
Mayagüez	June 3 and 4, 1994	9
San Juan	June 10, 11, 17, 18 & 24, and July 1, 1994	49
		Total 103

Table 2: Breakdown of participants who appeared at hearings by sex, and profession or organization

Profession or organization	men	women	total
Presiding Judges	2	1	3
Appellate Unit Judges	1	-	1
Superior Court Judges	2	8	10
District Court Judges	1	3	4
Municipal Court Judges	1	4	5
Court Administrative Officer	—	1	1
Child Support Examiner	—	1	1
Law Clerks	—	3	3
Bailiffs	1	3	4
Court Secretaries	—	4	4
Court Librarian	—	1	1
Juvenile Solicitors	—	1	1
Family Division Office	—	1	1
Prosecutors	1	1	2
Police Agent	1	—	1
Lawyers (Juvenile Division)	—	1	1
Lawyers in private practice	8	13	21
Legal Services Agency Lawyers	4	2	6
Psychologist	—	2	2
Social Workers	1	2	3
University Professors	2	3	5

Profession or organization	men	women	total
Rape Victims	—	1	1
Women's Commission:			
• Office of the Governor	—	1	1
• House of Representatives	—	1	1
• Municipality of San Juan	—	1	1
Pro Bono	1	1	2
Families with Children Services Program	—	2	2
"Casa Pensamiento Mujer"	—	1	1
Grupo Colectivo Mujer	—	1	1
"Asociación Pro Derechos Igualdad Hombres"	—	1	1
Feministas en Marcha	—	1	1
"Coordinadora Paz para la Mujer"	—	2	2
Organización Mujer Trabajadora-	—	2	2
Puerto Rican Civil Rights Institute	—	1	1
Organization of Female Law Students, UPR	—	2	2
Center for the Study, Resources, and Services to Women	—	3	3
Reporter	1	—	1
TOTAL	27	76	103

Information Leaflet

The Commission produced an Informative leaflet for deponents in the hearings which contained a description of the origin and purpose of the investigation and a guide for the development of the hearings. This leaflet was distributed prior to each hearing

Procedure

After a brief introduction, each participant had about 20 minutes for his or her presentation, followed by a session of questions by members of the Commission. In most cases, the testimony included a thoughtful analysis of gender-based discrimination in the courts. Some participants presented corroborating data in addition to recommendations to address the problem. All of the testimony was taped. In addition, 24 written presentations were received: 12 from organizations and 12 from individuals

Analysis

A summary of issues considered in each presentation was prepared and grouped under the following subjects:

1. Administration of justice or judicial administration
2. Interaction in the courts
3. Issues concerning minors
4. Domestic violence
5. Family relations
6. Social workers
7. Law schools
8. Recommendations

The summaries were distributed to different study committees for their corresponding analysis.

B. Focus Group Interviews

The focus group interview is an investigation technique characterized by the participation of a group of persons with common interests who speak among themselves about a particular theme, in this case, gender-based discrimination in the courts of Puerto Rico. The dialogue constitutes the text that is later analyzed.

Group interaction distinguishes the focus group interview from other research methods. Meanings arise in group interaction that are not generally present when only two persons interact. The encounter between knowledgeable individuals on a particular theme helps to clear up arguments and elicit related incidents and situations. Experiences and points of view are revealed within a wide range of perspectives. The group interview is a magnificent method to analyze and compare the experiences of each participant in depth.

Selection of Participants

To obtain the broadest possible panorama about the problem of discrimination in the courts environment, the Commission organized 18 meetings, each lasting about two hours. Participants were selected either for their interest and knowledge about the problem or because they represented diverse groups related, in one way or another, to the subject of the investigation. These included male and female lawyers, judges, support professionals, prosecutors, victims of domestic violence, aggressors, prisoners and support networks. Table 3 provides a numerical distribution of participants by category.

Table 3: Focus Group Interviews

GROUP	MEN	WOMEN	TOTAL
1. Female and Male lawyers for employers	9	4	13
2. Female and Male lawyers for employees	1	8	9
3. Male family litigation lawyers	10	—	10
4. Female family litigation lawyers	—	10	10
5. Female trial lawyers and prosecutors	—	4 & 5	9
6. Male trial lawyers and prosecutors	5 & 5		10
7. In women's issues	—	9	9
8. Male judges	10	—	10
9. Female judges	—	4	4
10. Victims of domestic violence	—	9	9
11. Aggressors (domestic violence)	11	—	11
12. Counselors of women victims of rape	—	6	6
13. Specialists in women's issues	—	4	4
14. Socio-penal officers: psychologists and counselors	—	9	9
15 Female institutionalized minors (Industrial School, Ponce)	—	10	10
16. Male institutionalized minors (Industrial School, Ponce)	10	—	10
17. Jailed women (Jail of Vega Baja)	—	11	11
18. Jailed men (State Penitentiary)	12	—	12
TOTAL	73	93	166

Procedure

Each focus group interview relied on the assistance of at least two facilitators, who were either members of the Commission or knowledgeable on, or related to the subject of the study and the group management process. Female focus groups were facilitated by women and male groups by men. The facilitators were trained in the objectives of the investigation, its guidelines and applicable standards.

At the beginning of each group meeting, participants were told about the origin and purpose of the Commission and about its objectives. Also discussed were the rules and procedures for carrying out the investigation, emphasizing the fact that our intent was not to reach a consensus or make decisions but to exchange ideas, expressions and reflections about a subject with complete confidentiality. To do so, we told participants not to refer specifically to individuals and that the meetings would be taped and transcribed without identifying them.

Information Leaflet

The following three (3) questions served as guidelines for each group discussion:

1. Have you had any personal experience or situation in the courts that could be interpreted as discrimination because of gender? Give details.
2. How do you explain the occurrence?
3. What recommendations do you have to modify or eradicate that type of experience or situation?

Analysis

Once the tapes were transcribed, each work committee received the transcriptions of the meetings or focus groups corresponding to their area of study.[27] After all the transcriptions were

[27] The transcripts were distributed as follows:

Labor: Male and female lawyers for employers
Male and female lawyers for employees

Family: Male trial lawyers

examined, the Commission prepared a summary according to the categories of analysis devised by each committee as a point of departure for the theoretical framework of each theme' Observations, expressions and recommendations of the participants were grouped according to specific themes. This information was the basis for drawing up this report.

C. Court Watching

Court watching is a technique that consists in duly trained persons visiting previously selected courtrooms to identify and interpret, on the basis of direct observation, the practices they're interested in studying.

The technique permits an appraisal of behavior as it develops in true scenarios. Ordinarily, the individuals observed are not told about the purpose of the court watch so as not to influence their behavior. This technique is especially viable in observing public events, as judicial processes usually are, since they don't require the consent of participants to either be observed or informed of what was observed.

Selection of Participants

Court watching was carried out by a group of 17 students in a course on the Sociology of Law given by Prof. Efrén Rivera Ramos of the University of Puerto Rico Law School during the

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Female trial lawyers
Surviving victims of domestic violence
Penal: Surviving victims of domestic violence
Aggressors (domestic violence)
Female counselors of rape victims
Sociopenal: female psychologists and counselors
Minors, male and female, in institutions
Prisoners, male and female
Interaction: Female trial lawyers, specializing in women's issues
Female judges
Male judges
Female criminal lawyers and female district lawyers
Male criminal lawyers and male district attorneys
Specialists in women's issues

second semester of academic year 1993-94. These students, male and female, acted as court watchers.

Six courtrooms of the San Juan Judicial Center were selected. Two were criminal courts, two were civil courts and two were family relations courts. Included were courtrooms presided by both male and female judges. If a designated courtroom was not in session, court watchers were instructed to go to previously selected alternate courtrooms. If these alternate courtrooms were also not in session during their assigned shift, watchers were to go to any other courtroom that was in session. If any of these situations took place, the court watchers were to say so in their reports.

A calendar was prepared for the court watching sessions. An attempt was made to conduct court watching during consecutive days and, as far as possible, the entire day. The purpose was to observe each courtroom during a considerable amount of time so as to avoid reaching conclusions on the basis of isolated incidents. Further, each court would be observed by different teams to benefit from interpretations from different people.

A total of 30 hours of court watching was conducted. Procedures were observed in 11 court rooms because the original six were not always in session.

The Commission decided not to conduct court watching on the basis of prepared charts as is usually done in this type of exercise. We believed that the charts could limit the capacity of observation and that it was better to let the teams concentrate on observing and writing their notes freely while they registered the situations that merited their attention. Blank sheets of paper were provided for their notes.

Procedure

Before they began their court watching exercise, the students were trained as to what constitutes discrimination because of gender. For several weeks, they studied readings on the subject and discussed them in class. They also read various reports from commissions in the U.S. that

were similar to Puerto Rico's. Each meeting lasted two hours. During the discussions, they came to understand the theoretical framework that would guide the investigation. Its elements are the same that figure in the general theoretical framework adopted by the Commission. The technique of court watching was also discussed, pointing out its advantages and limitations.

A pair of students, male and female, designed a discussion exercise that consisted in drawing up a list of hypothetical discriminatory situations in the context of a court's procedure. The entire group amply discussed each one of the situations to determine if, in truth, it could be considered a manifestation of gender-based discrimination. The purpose was to sharpen the perception of both male and female court watchers and, as far as possible, resolve probable differences in interpretation beforehand.

The teams were paired in male and female couples. The composition of the couples was also alternated so that each observer would eventually pair up with more than one person. We expected that would contribute to a larger combination of similarities in our analysis of the situations.

Nearly halfway through the process, the class met and discussed the observations of each team to evaluate the exercise up to that moment and to incorporate suggestions that could make the observations more precise. After this evaluation, the students continued their visits to the courts.

Analysis

At the end of each observation session, court watchers compared notes. Each team gave a joint report. The reports were discussed in two sessions of two hours each. Several members of the Commission participated in the discussions.

The summary of the observations, as well as their justification and explanation, is found in Appendix D of this report.[28]

[28] Each working committee made use of this report according to the specific subjects under analysis

D. Participatory Investigative Sessions for Male and Female Judges of the Judicial System

This method consists in holding group discussion meetings, led by facilitators, to foster individual and collective reflection about a subject or issue under investigation. It serves to increase direct participation of a wide range of groups in an investigation. Since this was a case of self study by the Judicial Branch, the Commission decided to use this method to assure the widest possible participation of the judiciary.

Selection of Participants

Out of 284 judicial positions, a sample of 113 male and female judges was selected from an official list of judges by judicial region and courtroom, provided by the Office of Courts Administration. The following were eliminated:

- vacant positions,
- male and female judges whose terms had expired,
- male and female judges relieved of their duties,
- male and female judges who had participated in the investigation, either because they had given a paper on the subject or because they had participated in the Focus Group Interviews,
- and male and female judges who were members of the Commission.

To select the sample, the technique of random sampling was used.[29] A key code number to select the name of the first judge was determined by chance. The sampling was 50 per cent for male and female judges. These were selected, alternately, starting with the code number, until the determined number of judges was reached.

To guarantee the participation of the persons selected, Chief Justice, Hon. José A. Andréu García, sent individual administrative orders to each of them.

[29] The sampling at random is based on chance. It implies that all of the elements have the same possibilities of being selected, and that therefore, a statistically representative sample will be obtained. DICCIONARIO DE CIENCIAS SOCIALES (Instituto de Estudios Políticos, Madrid, 1976)

Of the 113 persons comprising the sample, 82, or 73 per cent, participated. The remainder excused themselves for valid reasons related to their judicial functions. Following, in Table 4, is the distribution of the sampling by court and sex of the participants.

Table 4: Distribution of the sample by court and sex

Court	Women	Men	Total
Municipal	8	8	16
District	6	21	27
Superior and Appellate	10	29	39
Total	24	58	82

Document

In designing the sessions the following documents were used:

1. Consultation sheet—to inquire into the opinion of the participants regarding the existence of gender-based discrimination in the courts. It was used at the start and at the conclusion of each session.

2. Evaluation sheet—to obtain the impression of participants regarding the activity, its content and the realization of its objectives. It was distributed at the conclusion of each session.

Procedure

At the start of each session, information was provided about the origin of the Commission and the purposes and objectives of the investigation were summarized. The difference between the determination of facts in a judicial process and in a sociological investigation was also explained.

After those present introduced themselves, the Commission asked their opinion regarding discriminatory practices on the basis of gender in the courts. To carry out these activities, participants were grouped by gender in small groups of between five and twelve persons. Each group was

assisted by a facilitator and a reporter[30], previously selected by the Commission according to pertinent criteria. For the general discussions, a spokesperson for each group was named.

Three activities were designed and developed by clinical psychologists, Dr. Edwin B. Fernández Bauzó and Dr. Marya Muñoz Vázquez and law professor Dr. Efrén Rivera Ramos, all members of the Commission. The aim of the first activity was to consider and discuss definitions of sex, gender and discrimination based on gender. The second aspired to evaluate whether hypothetical situations constituted gender-based discrimination. The third was designed to share experiences and situations that could constitute examples of gender-based discrimination in the courts and devise recommendations to overcome them.

Analysis

For the results of these activities, see Appendix C of the Report on the investigation sessions with both male and female judges. These include accounts of participants' experiences of gender-based discrimination in the courts, their perceptions about the problem and alternatives to combat the situation. The report also includes a tabulation of responses to both the consultation sheet and the activity evaluation sheet.

E. Analysis of Legislation

The Commission determined that it was indispensable to examine relevant legislation in each area of study for various reasons. In the first place, to examine the constitutional framework on gender-based discrimination starting from the basic principle that the dignity of the human being is inviolate. In addition, an analysis of the legislation in the areas under study was undertaken. In

[30] Facilitators and reporters had the following functions:
Facilitator — to explain in detail the purpose of each activity and to give instructions, to distribute the necessary material for each activity, lead the endeavors of each group, controlling the time and assuring the participation of everyone
Reporter— to observe and listen closely to the participants during group discussions, take notes about what was discussed, including the non-verbal communication of participants

the second place, the study of the problem of discrimination, especially in the area of court interaction, also required a study of the applicable judicial framework and regulations. Similarly, specific areas such as labor laws that prohibit discrimination and domestic violence, an area of development that is still new. The legislation was studied in compliance with the general theoretical framework of the investigation. In the third place, to analyze the development of legislation in each area, paying particular attention to the process of elimination and the inclusion of stipulations that may be discriminatory from the standpoint of gender and whose language, qualified by the use of gender terminology, could present problems.

F. Analysis of Jurisprudence

The analysis of jurisprudence, as a means of investigation, can have different purposes. In the study entrusted to the Commission, its purpose was to study the response of Puerto Rico's highest judicial forum to discrimination or to underlying issues related to gender-based discrimination in the country's courts, such as language, criteria of interpretation and the solutions and alternatives provided. Jurisprudence related to Personal Rights and Family Law, the Criminal and Juvenile Justice Systems and Labor Law, particularly in the area of sexual harassment. In the area of domestic violence, Appeals Court rulings were given special attention.

Procedure

Regarding the jurisprudence of the Supreme Court, every important case related to classifications on the basis of sex or those in which gender was somehow involved, were selected in each area of study.

The cases selected were analyzed within the judicial framework of each area of study and the general theoretical framework of the investigation.

G. Analysis of Data from the Courts Administration Office

An investigation on gender-based discrimination in the courts would be incomplete if the following areas were not subjected to scrutiny: available data on the distribution by sex in positions at different levels on the judicial ladder and of other posts in the General Court of Justice; the assignment of courtrooms, subject matter jurisdiction (civil suits, family relations, minors, criminal), and of administrative tasks between male and female judges; other information of possible significance for the study.

Procedure

We asked the Courts Administrator for all available information on a list of issues of an administrative nature. In some cases, given the difficulty of managing information accumulated over long periods of time, specific dates were selected that allowed comparisons to be established.

On the Method of Reporting the Results of the Investigation

The Commission's investigation produced two kinds of results: (1) those obtained through analysis of relevant legislation and jurisprudence of each subject of study; (2) findings that arose, basically, out of the hearings, focus group interviews, participative investigation sessions, court watching, analysis of inquiries and the compilation and analysis of statistical information.

Each chapter opened with the result of our analysis of legislation and jurisprudence. We then proceeded to analyze the findings obtained by other methods of investigation.

In presenting the findings of the investigation, the Commission took into account, among other factors, recurrent observations related to the subject and the measures taken to corroborate them. These were not the only criteria, however. We also took into account the seriousness of the incidents or practices reported to the Commission, even when they occurred infrequently. In a subject such as gender-based discrimination, which occasionally implies not only improper or undesir-

able behavior but also violations to the Constitution and the laws of the country, the occurrence of just one discriminatory act, even if isolated, is sufficient cause for worry and merits being brought to the attention of the Judicial Branch.

Ample testimonial examples explain our findings. This is consonant with our methodology, which relies heavily on qualitative methods of investigation. As explained previously, these methods seek to fully comprehend the way people interpret their reality. These narratives or stories are important in understanding how persons, affected by or involved in the situations described, imprint their experiences: how they describe, explain, interpret and value what has happened to them and what they have observed. Further, specific examples allow readers of this report, particularly members of the Judicial Branch—to which the report is primarily directed—to identify and associate with their daily routine and immediate context, those practices that the Commission has deemed discriminatory and whose elimination it recommends. Without these stories and narratives, the report would lack the vital forces that characterize these situations and that clearly transcend ciphers and concepts.

Chapter 3

Constitutional Framework

> The dignity of the human being is inviolable. All men are created equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or social condition, or political or religious beliefs. Both the laws and the system of public education shall embody these principles of essential human equality.[1]

The Bill of Rights of the Constitution of the Commonwealth of Puerto Rico consecrates the principle that the dignity of the human being is inviolable.[2] As a corollary to this, other principles and prohibitions embodied in the Bill of Rights, were elevated to constitutional rank to assure the protection of that dignity The Bill of Rights singularly emphasizes the following articles: Equal Protection of the Law, Due Process of Law [3] and the Right to Privacy.[4] These articles were influenced significantly by the American Declaration of Human Rights and Responsibilities and are closely related to the Universal Declaration of Human Rights.[5]

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[1] Const. Commonwealth, Art II, Sec. 1 Of note is the fact that the Constitution itself incorrectly utilizes masculine forms to refer to men and to women ("All men are created equal before the law") in a clause that applies to all human beings, which responds to and at the same reinforces, conceptions and cultural patterns that are at the foundation of gender discrimination

[2] *Id.*

[3] Art II, Sec 7

[4] Art. II, Sec. 8: "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life "

[5] Figueroa Ferrer v E L A , 107 P.R.R 250, 258 (1978); E.L.A v. Hermandad de Empleados, 104 P.R.R. 436, 440 (1975)

The scope of individual rights in the Constitution of Puerto Rico aspires to universality. Our Bill of Rights is "...of broader scope than the traditional one because it harvests the common sentiment of different cultures about new categories of rights."[6] As a result, our Supreme Court has established that the protection granted to the dignity of the human being in our code of laws is not "..... a wayward entity in search of an author or a juridical pigeonhole."[7] The principles that prohibit sex discrimination,[8] among others, and those that consecrate the rights to privacy and to the equal protection of the laws are mutually complementary and are aimed at the protection of the physical, psychological and emotional sanctity of every person.[9] The delegate to the Constitutional Assembly, attorney Jaime Benítez, in discussing the inviolability of human dignity, said:

> This is the basic cornerstone of democracy. Within it lies its profound strength and moral vitality. Because before anything else, democracy is a moral force, and its morality lies precisely in its acknowledgment of the dignity of the human being, in the high respect that dignity deserves, and the consequent responsibility that every constitutional order has to depend on it, protect it, and defend it. That is why in our first disposition, besides initially establishing the basis for the profound equality of the human being—equality that transcends any difference, whether biological, ideological, religious, political or cultural—above such differences, is the human being in his transcendent dignity....[10]

The Constitution of the United States neither contains an Equal Rights article that expressly prohibits gender discrimination nor an article that refers explicitly to a person's right to privacy. The protection of equality of human beings has been channeled, consequently, through the Equal Protection of the Laws article of the Fourteenth Amendment of the Constitution, and of the Due Process of the Law article of the Fifth and Fourteenth Amendments. In view of citizen pres-

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[6] Figueroa Ferrer.

[7] Id. at p 283.

[8] The concept that was adopted in the text of the Constitution and that has been later utilized in the laws and jurisprudence is "discrimination on the basis of sex" However, in this report the concept "sex discrimination" shall only be used when the Constitution is textually cited, any law or case in which it is specifically so noted. This Commission wishes to call attention to the fact that the discrimination that it investigates encompasses more than the biological sex of the person. Similarly, the Commission emphasizes that the principle underlying the prohibition of sex discrimination in our Constitution, and in our laws, that is, the inviolability of the dignity of the human being, would lack meaning if it only referred to the biological sex and were not extended to gender. See the chapter on +the general theoretical framework for a discussion on the meaning of the concept "gender".

[9] 4 Diary of Sessions of the Constitutional Convention 2566 (ed 1961)

[10] 2 Diary of Sessions of the Constitutional Convention 1103 (ed 1961)

sure to protect their dignity, the Supreme Court of the United States has found sources for the protection of privacy within the "emanations" and "penumbra" of various amendments to the Constitution.[11]

In the interpretive development of the United States Constitution, the U.S. Supreme Court has perfected a procedure to evaluate the constitutionality of statutes and of government practices that are impugned by those who feel aggrieved by them, to the extent that the classifications are established that affect them. The structure of this analysis is based on different scrutinies, depending on the classification and the rights involved.

In most cases that involve economic and social regulation, the U.S. Supreme Court utilizes the so-called "traditional" or "rational" scrutiny which is the least demanding of the three developed so far. This analysis presumes that the measure is constitutional, thus the person who questions it must prove that the government interest sought in the deposition is not legitimate, and, if it is, that the classification it establishes does not hold a reasonable relation with the declared objective. In other words, according to this assessment, a classification should not be declared invalid unless it is clearly arbitrary and no rational connection exists between it and a legitimate interest of the state.

However, when measures affect fundamental rights,[12] or create a classification that the Court considers "suspect",[13] the traditional standard of deference yields to the possibility that the state has violated the equal protection of the laws. In these cases, "strict" scrutiny is utilized, which requires that the state show that it pursues a compelling interest, and that the relation between the

[11] Griswold v. Connecticut, 381 U.S. 486-99 (1965) (Goldberg, J., concurring); Roe v. Wade, 410 U.S. 113, 153 (1973); Doe v. Bolton, 410 U.S. 179, 200 (1973). See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 893 and ss (1978)

[12] Among these are the right to vote, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); the right to travel between states, Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); and the right to marry, Zablocki v. Redhail, 434 U.S. 374 (1978).

[13] The Supreme Court of the United States has considered suspect those classifications that are based on race or national origin. Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 347 U.S. 483 (1954); Korematsu v. U.S., 323 U.S. 214 (1944)

established classification and its interest is essential. To achieve its objective, the state has to prove that a less onerous remedy does not exist. With this analysis, it is very difficult to defend the constitutionality of a law or a government practice.

The third scrutiny, known as "intermediate," is more exacting than "rational" but less than the "strict," and was later established as an analytical technique for measures that establish gender-based classifications. This followed failed attempts to place gender discrimination on a par with other discriminations based on "suspect classifications." During the seventies, the United States Congress sent the Equal Rights Amendment to the states for approval. The ERA expressly prohibited gender discrimination. In accordance with the constitutional amendment procedure of the United States, approval by three fourths of the state legislatures was needed to ratify it, a goal that was not achieved.

Nor was a judicial decision achieved to the effect that gender discrimination constituted a suspect classification. Not until 1971 did the Supreme Court of the United States first declare gender-based discrimination unconstitutional.[14] Two years later, in Frontiero,[15] four of the Justices were willing to uphold that gender-based classifications were inherently suspect, but the majority of the court refused. Finally, in 1976, the Supreme Court announced the application of a new standard, that of "intermediate" scrutiny, for those cases where gender discrimination arose.[16]

This evaluation technique stipulates that to support the constitutionality of a law establishing a gender-based classification, there should be an "important" government interest and a substantial relation must exist between the classification and the objective of the law.[17]

Puerto Rico's Supreme Court, however, established only two scrutinies, the strict and the rational, as evaluation techniques of classifications that have been constitutionally impugned. In-

[14] Reed v. Reed, 404 U.S. 71 (1971).
[15] Frontiero v. Richardson, 411 U.S. 677 (1973).
[16] Craig v. Boren, 429 U.S. 677 (1973).
[17] Id. p. 217.

termediate scrutiny, applicable in the United States to classifications that are based on gender, cannot be applied in Puerto Rico because the Constitution of the Commonwealth of Puerto Rico expressly prohibits sex discrimination in its Equal Rights Clause.[18] As a result, our highest court has qualified gender-based classifications as suspect and has applied strict scrutiny to claims of gender discrimination based on that clause.[19]

In Zachry International v. Superior Court,[20] it was pointed out:

> In Puerto Rico, our Constitution not only guarantees equal protection of the laws in Art. II, Sec. 7, but contrary to the federal Constitution it expressly prohibits discrimination based on sex in Art. II, Sec. 1. Consequently, upon facing the dichotomy that the critical determination as to which analytical formula should be applied to cases on the basis of sex represents, we are inclined in favor—due to the interaction of the values contained in our Fundamental Law against discrimination based on sex and the equal protection of the laws—of the formula of strict judicial supervision.[21]

In the following paragraph, the Court cited *Wackenhut v. Superior Court*,[22] and stated that:

> There are areas in which because of its tangency with human dignity and with the principle that every person is equal before the law, every classification is inherently suspect and is subject to the most meticulous judicial scrutiny. These areas include the classifications or discriminations on the basis of race, color, sex, birth, origin or social condition, political or religious ideas, and nationality.[23]

Consequently, in terms of the underlying principles that uphold them, and of their effects on reality, all legal dispositions that embody explicit classifications or subtle differentiations on the basis of gender can and should be analyzed strictly to determine if they pursue a compelling government interest and, should that be the case, if the means chosen to achieve it have been the least

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[18] Const. of the Commonwealth, Art. II, Sec. 1.

[19] Zachry International v. Superior Court, 104 D.P.R. 267 (1975); Women's Commission v. Secretary of Justice, 109 D.P.R. 715 (1980); Milán v. Muñoz, 110 D.P.R. 610 (1981); Amador Avila v. A.C.A.A., 117 D.P.R. 829 (1986); Pueblo v. Rivera Robles, 121 D.P.R. 858 (1988); Pueblo v. Rivera Morales, 93 J.T.S. 83.

[20] 104 D.P.R. 267 (1975).

[21] Id. p. 279.

[22] 100 D.P.R. 518 (1972).

[23] Id. p. 531.

onerous. This is the only way to save the objective of the statute without violating the rights of persons to be treated equally to protect their dignity.

Likewise, the measures or acts that discriminate on the basis of sexual orientation should be subject to the rigorous analysis of strict scrutiny. Although there is no jurisprudence on this matter in Puerto Rico,[24] the Commission has concluded that discrimination on the basis of sexual orientation is a form of gender discrimination—because it is a discrimination against a person on the basis of non-compliance with expected behaviors, including those related to sexuality, of men and of women, because of their sex.[25]

Since the Judicial Branch is part of the government of the Commonwealth of Puerto Rico, it should be kept in mind that any of its actions that imply discriminatory treatment toward persons[26] on the basis of their gender, could give rise to a claim under the Constitution.[27]

Our code of law recognizes the right to be compensated for damages caused when the State or a private citizen interferes with an individual's rights[28] This claim for damages does not prevent persons affected from safeguarding and protecting their rights through the use of an injunction[29]

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[24] The only case of the U.S. Supreme Court related to the rights of homosexuals is Bowers v. Harwick, 478 U.S. 186 (1986), in which it was determined that the law that prohibit voluntary sodomy between adults do not violate the fundamental rights of citizens under the concept of privacy in the United States« Constitution We understand that this case is not of direct application with respect to protection of the rights of homosexuals under the constitutional regime of Puerto Rico, because the concept of privacy in our Constitution is broader. Also, Bowers does not discuss the problem from the perspective of gender discrimination. Soon after the decision, Justice Powell, who had voted with the majority, expressed that the decision had been wrong. The case of Bowers should be revaluated as occurred with Dred Scott v. Sanford, 60 U.S. 393 (1857); Plessy v. Ferguson, 163 U.S.537 (1896); and Korematsu v. United States, 323 U.S. 214 (1944), decisions of the United States Supreme Court that accepted types of discrimination that have been since rejected.

[25] See the discussion of this in the General theoretical framework and the discussion of this matter in the chapters on Labor Law, Family and Interaction

[26] Persons in this context include, not only the personnel that works in the Judicial Branch, but also the clientele that it serves and the general public.

[27] This principle applies to any of the rights consecrated in the Bill of Rights of the Constitution of the Commonwealth of Puerto Rico. Obviously, those acts that are protected under the principle of Judicial Immunity, are no included.

[29] Arroyo v. Rattan Specialties, 117 D.P.R. 35, 64 (1986)

Ultimately, it is the Judicial Branch that is compelled to protect the rights of persons, the freedom and dignity of the individual, before the extraordinary presence and the power of the State and before the pressure of majority forces.

Chapter 4

Judicial Administration

Introduction

This section of the Report examines certain aspects of the General Court of Justice as employer of several thousand male and female personnel, and of the judicial administration in its broadest meaning. Within such latitude, external factors, such as the appointment of judges, are covered as are internal factors such as the assignment of courtrooms and subject matter jurisdiction, appointment of presiding judges, judicial evaluation and discipline, even court facilities. The Commission did not contemplate an exhaustive report in any way. Rather we sought to address certain areas of specific interest, such as occupational segregation by sex, and those topics that spontaneously arose during our investigation. However there are some aspects akin to judicial administration that, given their close relationship to other areas of investigation, are examined in other sections of the Report; i.e. the internal politics of sexual harassment in the work place, the dress code in the courts, and others.

The information that grounds some of our findings stemmed directly from the hearings, focus group interviews, and the participator investigative sessions held by the Commission. Although valuable information was collected regarding judicial appointments and employment in the Judicial Branch, at times not all of the necessary information was readily available. Nor was it possible to engage in profound analyses of the material to reach definite conclusions. That is why the Commission believes that an ongoing investigation of this matter is essential.

As a general rule in the study of gender discrimination, one aspect receives the most attention—occupational segregation by sex. This terminology refers to the way socially-identified jobs are distributed between men and women. There is men's work and women's work. This differentiation is based on the same cultural patterns and sexist stereotypes that govern gender discrimination.[1] The segregation of men and women into different work groups reinforces the idea that they should be treated differently because they "are" naturally and essentially different in intellectual and physical capacities, emotional attitudes and reactions.[2]

The result of this segregation is that, historically, it is exceedingly difficult for women to gain access to certain work categories with greater authority, power, and social and professional prestige traditionally identified as proper for men. The negative consequences of this process have been lower salaries, lesser status and fewer opportunities for advancement for women.

Various factors are at play in the process of integrating women into predominantly male occupations. These factors emerge, for example, when male-dominated occupations become fragmented and discredited. Fragmentation occurs when the tasks of one occupation are broken down and configured into a new job. At times, the new job is then devalued when compared to others. This was the case of "office administrators" who, at the end of the last century, were men and performed secretarial duties, among other tasks. As that occupation began to disintegrate, higher levels of the newer office tasks continued to be filled by men. Secretarial tasks that now became a new job, but with a lower pay scale, began to be occupied by women. Another recurrent scenario is common to professions or occupations that, without being dismantled, are devalued economically and professionally for economic and technological reasons, and other demands of the market. When that happens, the doors to that occupation are opened to women or to racial and ethnic minorities,

[1] Alice Colón, *O será cierto que hemos invadido el mercado de empleo?*, MUJERES EN MARCHA, No. 2, May, 1989, at pp. 2 and 5.

[2] See, as an example, Judge Bradley's comments, reproduced at note 6, *infra*, on the reasons why, in his opinion, it was justified to exclude women from the legal profession

who until then had been excluded from that occupational domain.[3] A similar phenomenon is noted when an industrial sector needs additional labor or a broader reserve of skilled workers to keep salary levels low. In these cases, access is extended to women and other groups excluded until then, but who were willing to work for lower salaries. The field is also opened to women when an industry grows substantially but lacks enough male workers to absorb that growth. In Puerto Rico this has happened in the service industry and with the keyboard operators in the electronics industry.[4]

Occupational segregation by sex should be analyzed within each work sector and the analysis should address such aspects as: 1) the position each gender occupies within the hierarchy of the organization, institution or business; 2) the position of each gender within a particular profession (in the case of women lawyers, for example, the kind of law firm or the company in which they are placed, their assigned areas and tasks); 3) the kind of position filled from the perspective of occupational categories (white collar, blue collar, professional, executive, etc.); 4) the kind of responsibility assigned, among others.

An important aspect examined in this matter is the role of judicial interpretation in occupational segregation. Vicki Schultz, who has gone into this angle in detail, points out that United States courts have developed an interpretive preconception that limits their potential for achieving changes favorable to women. According to her investigations, many judges do not believe that statistical evidence of occupational segregation by sex indicates discrimination. Instead, these judges say, discrimination is the outcome of job choices women themselves have made.[5]

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[3] See the Introduction to the chapter on Labor Law of this Report.

[4] In this respect, see Barbara F. Reskin & Patricia A. Roos, *Status Hierarchies and Sex Segregation*, in INGREDIENTS FOR WOMEN'S EMPLOYMENT POLICY 3-51 (Christine Bose & Glenna Spitze eds., 1987); Alice Colón, *La participación laboral de las mujeres en Puerto Rico: Empleo o sub-utilización*, 7 (44) PENSAMIENTO CRITICO 25-30 (1985).

[5] Vicki Schultz, *Women "Before" the Law: Judicial Stories about Women, Work, and Segregation on the Job*, in FEMINISTS THEORIZE THE POLITICAL 297-338 (Judith Butler & Joan Scott eds., 1992).

In validating this argument, the courts take for granted that women's job interests respond exclusively to personal factors, independently of economic and social forces that operate in the background including existent job opportunities. On the contrary, the evidence shows that women develop their occupational hopes within the workforce and in response to those structural dynamics previously discussed that are related to the process of occupational disqualification and devaluation and to the identification of some as "masculine" and others as "feminine." It is important to note that over time, neither the occupational interests of women nor those of men have remained static.

In exercising their interpretive faculties, the courts can validate or change those preconceptions that govern the workforce which to a large degree determine women's options, expectations and aspirations.[6] When the courts become conscious of the fact that occupational segregation by sex is a reality that is discriminatory and acts accordingly, they will become agents of change who can make possible access for women through equal opportunities in every occupational field.

Considering the above, various factors are of further interest. In the first place, at the moment of examining the way jobs were distributed in a given institution, it was impossible to either abstract an analysis from the broader social structures it was inserted into, or from the macrosocial factors that influence the structuring of the work. The lopsided representation of women and

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[6] A classic example of the contribution of the courts to maintaining occupational segregation in the professional field in the United States, related specifically with the exclusion of women from the practice of the legal profession, is the famous case of Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 21 L.Ed. 442 (1872). The U.S. Supreme Court denied the claim of a woman to be admitted to the legal profession, which had been denied by the State of Illinois, on the sole basis of her being a woman, even though she had passed the exam. Judge Bradley, in the concurring opinion, signed by two other judges, wrote the following:

> *The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. ... I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. ... [I]n view of the peculiar characteristics, destiny and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex Id* at pp. 141-142.

men in a certain social task, especially within the context of employment, can easily respond to intentional, discriminatory acts by decision-makers. But an intention to discriminate is not essential to judge the fairness of a particular case of inequality. This could be the result of cumulative historical processes that have long maintained a sector of society—in this case men or women—removed from access to specific chores or occupations. That disparity has socio-historic explanations. But this fact notwithstanding, it does not cancel the discriminatory make-up of the situation, nor the obligation to act in relation to it. All this must be kept in mind in making this kind of analysis.

As a framework of general reference for this chapter of the Report, some data about the labor force in Puerto Rico and in the Judicial Branch is appropriate. The participation of women in the island's labor force has been gradually increasing in recent years. According to available statistics, the rate of participation[7] increased from 24% in 1980 to 33.5% in 1993. Nonetheless, the work force is still predominantly masculine: by 1993 men constituted 60.9% of the labor force and women, 39.1%.[8]

The increase of women in the work force has occurred primarily in occupations traditionally considered as "feminine": service professionals, administrative assistance, and clerks. According to the Department of Labor and Human Resources, by 1993-94 women occupied 73.5% of those positions, but only 32.2% of positions of "administrators and officials," still believed to be more fitting for men.[9] A good part of the increase of women in administration occurred within the government sector, which offers special attributes that set it apart from the overall picture.

[7] The rate of participation states the proportional relation that exists between the labor group (constituted by employed and unemployed persons) and the population of 16 years or older

[8] Department of Labor and Human Resources, Employment and Unemployment in Puerto Rico: Average fiscal years 1993-94 and 1991-92, Special Report No. E 86, Table 1.

[9] *Id.* Table 7

The government of Puerto Rico employs 37% of working women and only 23% of male workers. Women (153,000) constitute 53% of the government workforce compared to the 47% constituted by men (135,000).[10] That is to say, more women than men hold government jobs in absolute and proportional terms. Steady hours, vacation benefits and the values that prevail in society are mentioned as drawing women into public service.[11] On the other hand, it is important to state the existence in the public sector of numerous jobs traditionally considered feminine, even at professional levels, including teaching, social work or nursing is probably influential. Likewise, the fact that government salaries are usually lower than those in the private sector, making the latter an occupational sector in which men compete harder for available positions, leaving more options open to women in government.[12]

Judicial Branch employees,[13] represent only 1.4% of the total labor force of the government sector. As of November 30, 1994, the General Court of Justice employed 3,666 persons, not counting the Judiciary. Of these, 2,465 or 67% were women, and 1,201 or 33% were men. Obviously, the general government pattern repeats itself here, although with greater female participation by a proportion of two to one.

Within the Judiciary, however, the proportion is the inverse. As we shall see in detail in the section on findings, there are two male judges for every female judge. Remember that judges have the greatest authority, hierarchy and prestige in the judicial system.

The Judiciary, on the other hand, presents very special circumstances. In the first place, the appointment of its members is a constitutional faculty of the Governor of Puerto Rico who

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[10] *Id* Table 5. Statistics are not available regarding the distribution of work by category and sex for the Executive and Legislative Branches

[11] See EL NUEVO DIA, January 29, 1995, at p 41, for statements made by the Director of The Office of Women's Affairs, and by the Executive Director of the Women's Commission.

[12] Colón, *supra* note 1.

[13] The data included below on the Judicial Branch is provided by the Office of Courts Administration

must exercise it with the advice and consent of the Senate.[14] Thus, it is about a factor that is beyond the control of the Judicial Authority. Now then, the fact that a judicial ladder exists with various rungs or categories, suggests possible discrimination regarding available options for men and women.

Secondly, considerations must be given to the constitutional powers of the Chief Justice , in a unified and consolidated system, to assign courtrooms and subject matter jurisdiction, to make administrative designations of judges to work at different levels of the ladder (the so-called *inter curia* movement) and to appoint presiding judges. In all these areas, where control is internal, cases of discrimination can occur because of gender.

It should be emphasized in the following analysis that, although the Judiciary is a part of the labor force of the Judicial Branch, it is examined as a separate group. The remaining personnel of the system is considered as supportive of the Judiciary, that is, personnel who do not exercise actual adjudicative powers since the Judicial Authority is the very body entitled and empowered to do so. Meanwhile, all the statistical data that follows, except when otherwise stated, are as of November 30, 1994.

Analysis of the Findings on Judicial Administration

1 The phenomenon of occupational segregation by sex is manifested in the work force of the Judicial Branch.

This finding refers to the composition of the so called support personnel of the Judicial Branch. That is, it includes all persons employed by the Branch, excepting the Judiciary, which will be analyzed separately.[15]

[14] Const. Commonwealth, Art. V, Sec. 8.

[15] The composition of the Judiciary is analyzed in finding number 4, *infra*

This general finding about occupational segregation presents very clear signs, such as the striking imparity in the number of female and male bailiffs and, as we shall see, in the number of female and male secretaries. Other aspects are not so evident and call for a deeper investigation than the Commission could do. Primarily, these aspects require deeper analysis, not only from a statistical point of view, but also from a sociological perspective that takes into consideration the great diversity of historical and social factors that have shaped this whole issue.

It is important to emphasize, as Table 1 shows, that of a total of 3,666 male and female employees of the Branch as of November 30, 1994, 67% were women and 33% were men.

Table 1

DISTRIBUTION OF SUPPORT PERSONNEL
OF THE JUDICIAL BRANCH BY OCCUPATIONAL CATEGORY AND SEX*

Category	Total	%	Fem.	%fem.	%cat.	Masc	%Masc	% cat
Secretarial	2,036	55.5	1,888	76.6	92.7	148	12.3	7.3
Bailiffs	550	15.5	47	1.9	8.5	503	42.0	91.5
M/C**	273	7.5	60	2.5	22	213	17.7	78.0
Professional	258	7.0	207	8.4	80.2	51	4.2	19.8
Adm've	253	6.9	131	5.3	51.8	122	10.1	48.2
Technical	89	2.5	59	2.4	66.3	30	2.5	33.7
D/M/G***	64	1.7	2	0.1	3.1	62	5.2	96.9
Executive	51	1.4	31	1.2	60.8	21	1.7	39.1
Others****	92	2.5	40	1.6	43.5	52	4.3	56.5
TOTAL	3,666	100	2,465	100	67.2	1,201	100	32.8

Source: Office of Courts Administration

*In order to comply with the Federal Law on Reasonable Work Standards, the Office of Courts Administration maintains a list of the types of positions included in the following occupational

categories: professional, administrative and executive. Additional categories that sustain the analysis are included in the table.
**Maintenance/Janitorial
***Drivers/Messengers/Guards
**** "Others" includes a varied range of jobs that don't fall under the larger categories.

Of the 3,666 male and female employees, 2,036 or 55.5% hold secretarial positions; of these, 1,888 or 92.7% were females, compared to 148 or 7.3% who were males. More than three fourths of the women employed in the Judicial Branch are secretarial personnel. If these facts are taken into consideration, together with the traditional notion that secretarial duties are proper to women and thus historically under valued, as we've pointed out previously, then the perspective changes drastically. It is possible to believe that more women are employed in the Judicial Branch because most of the available positions correspond to a group identified as "feminine," to such a degree that, in Spanish, we normally speak of "secretaries" as female, and not as male.

The other occupational category in which women seem to be over-represented in the Judicial Branch is that denominated as "professional," even though this category represents only 8.4% of the women employed. An employee is considered professional if his or her principal duty (more than 50% of an employee's working hours) entails performing any of the following duties:

a. Work that requires advanced knowledge in the field of science or general studies, normally acquired through prolonged courses of specialized education and study, or

b. Work of an original and creative nature in a recognized branch of art, or whose result depends principally on imagination or talent.[16]

Of the 258 male and female employees that as of November 30, 1994 held positions within the professional category (7.0% of the total non-judicial labor force), 207 or 80.2% were women and 51 or 19.8% were men. In analyzing these numbers in terms of the above definition, it would seem to indicate that the system acknowledges that women have been successful in entering the

[16] Circular No. 4 of the Administrative Director of the Courts, Year 1985-86 on Norms for the implementation of the Federal Law of Reasonable Work Standards. There are other requirements, among them, that the male or female employee consciously exercise discretion and judgment, and that he or she perform work that is predominantly intellectual and diverse work.

professional field, and that they are a good resource that should be put to use. However, when these professional positions are analyzed, that perspective may change. A good number of these positions correspond to social work, a field that traditionally has been considered "feminine," and to legal professionals. [17] Officials of the Office of Courts Administration who were consulted reported that female attorneys have been hired to fill many of these positions. These are primarily judicial investigative positions whose salaries cannot compete with those of law firms and the private sector. That is why these positions are not as highly valued as others in the judicial profession.[18] From this point of view, we could ask ourselves if the greater presence of women in these positions responds to the same factors related to the social structuring of work that we referred to in the introduction of this section.

There are other occupational categories of greater authority and value in the system that require greater technical or professional proficiency in which women appear to be, without a doubt, in a favorable situation. These categories include technical, executive and, on a lesser scale, administrative personnel. The classification of technician includes, for example, administrative technicians I, II, III, IV and V that are employed in such areas such as Statistics, Planning, Administrative Analysis, Budget, Finances, etc. These are professionals with special skills for performing duties that are neither manual, mechanical nor physical.

The category of executive personnel is defined on the basis of the requirements that each employee should have, among them:

a. That their principal duty (or more than 50% of their working hours) be the supervision of an office, center, institute, area, division, section or unit of work recognized by the General Court of Justice.

[17] Among them: Legal Advisors I, II, III, and IV; Legal Advisors to the Secretariate of the Judicial Conference I, II, III; Law Clerks Assistant Director of Legal Matters; Assistant Director of the Judicial Education Institute, Director of Judicial Evaluation. In this respect, see Circular No. 32 of the Administrative Director of the Courts, Year 1994-95.

[18] Except for the positions of law clerk of the Supreme Court and of the Appellate Court (today Circuit Court of Appeals), that tend to be very much in demand as an important step to acquire some professional experience before entering the private practice of the profession. Law clerksare not expected to stay very long in their positions.

b That they usually and regularly direct the work of two or more male or female employees in the same area.

c. That they have the authority to hire or fire or to recommend hiring or firing.

d. That they usually and regularly exercise discretionary faculties.19

The category of administrative personnel is also defined on the basis of the requirements employees ought to possess, among them:

a. That their principal function (more than 50% of their working hours) be office work that entails responsibility or work that is not of a manual nature directly related to administrative policy.

b. That they usually and regularly exercise discretion and independent judgment, and have the authority to make important decisions.

c. That they regularly assist an official or a bonafide executive or an administrative employee; that they perform, only under general supervision, work of a technical nature and special assignments.[20]

The statistical data relative to these categories reveal the following: Of a total of 89 technicians, 59 or 55.3% are female, compared to 30 or 33.7% male. Of a total of 51 executives, 31 or 60.8% are female compared to 20 or 39.1% male. Of a total of 253 employees in the administrative category, 131 or 51.8% are women and 122 or 48.2%, men. It is worth noting that the largest concentration of male and female employees of the above-mentioned categories is not in the courts. They are concentrated in the Office of Courts Administration and in the administrative units attached to the Supreme Court. According to statements of male and female officials of the Office of Courts Administration consulted on this matter, these administrative units represent a good option for females who see limited possibilities in equivalent positions in the private sector because of male competition for better salaries.

[19] Circular No. 4 of the Administrative Director of the Courts, Year 1985-86
[20] *Id*

Although the Judicial Branch has a certain appeal for employment—greater job stability as the only apolitical branch of government, for example—salaries tend to be lower than those that could be earned in similar work categories in the private sector. Evidently when an analysis of occupational categories takes into account the social structuring of work, the preponderance of women in the Judicial Branch can also be perceived as a product of gender discrimination that permeates employment in general.

It is also important to point out that, in terms of real authority, positions of greater administrative authority for non-judicial personnel—such as those classified as executive—fall way beneath the level of judges who perform administrative functions and who are mostly male.[21] That is, within the preconception of authority in the judicial system, the positions of administrative authority, held largely by women, are lower in rank.

We will now examine what occurs with the positions traditionally identified as "male." For example, in the category of bailiffs, out of a total of 550, nearly all, 503 or 91.5%, are male. Only 47 or 8.5% are female. A similar result occurs with maintenance and janitorial personnel: out of a total of 273, most, 213 or 78.0%, are male, and only 60 or 22.0% are female. The same occurs with respect to the category of drivers/messengers/guards: out of a total of 64, practically all, 62 or 96.9%, are male, and only 2, or 3.1%, are female. A marked inclination in favor of men is evident, one that is associated with sexist stereotypes. Women are believed to lack the necessary conditions to fill some of these positions and, if they are selected for the job, they are assigned duties that are not the same as those assigned to men in identical positions.[22]

2. *The judicial system responds to sexist stereotypes with regard to the hiring of personnel, the assignment of functions and responsibilities, and promotions.*

[21] Of thirteen (13) Regional Presiding Judges, fifteen (15), including the Director of the Juvenile Program and the Presiding Judge of the Circuit Court of Appeals. By November 30, 1994 only two were women (Source: Office of Courts Administration). The male and female judges of courts that had only one male or female judge, also perform administrative functions and are, in the majority, men

[22] See Conclusion number 2 of this chapter of the Report.

Testimonies about this subject were numerous. It was asserted, for example, that a veiled discrimination against women exists in the hiring of personnel.[23] Also, that the appointment of candidates to different available positions in the courts conforms to stereotypes and traditional roles that society assigns to men and women.[24] This predicament occurs chiefly with specific positions: bailiffs and maintenance personnel.

Regarding the position of bailiffs: a general idea prevails that women cannot do this job because they lack the prerequisite physical build for it, even when they fulfill the requirements of the position and show that they know how to use physical force.[25] One female judge, for example, did not want women assigned to her courtroom as bailiffs because she would not feel safe.[26]

It was also brought to light that women are not hired as bailiffs in some judicial regions. The reason given is that women are at fault because they do not want to perform certain duties, even though in reality it is the supervisors who determine their duties.[27] One judge noted that when women are appointed it is usually to alleviate a need; for example, checking women's purses at the entrances to the judicial centers.[28] Or, to attend female minors in the juvenile justice system where a special demand exists for women bailiffs. Even so, few female bailiffs are available.[29] When some judges request women bailiffs, they are not appointed.[30]

Although the same qualifications and training are the same for female and male bailiffs, women bailiffs as a rule are assigned less relevant tasks such as being put in charge of the entrance to the courts or providing information in the area of child support.[31] The prevailing notion is that

[23] Hearings, May 27, 1994, at p. 10
[24] Hearings, June 3 and 4, 1994, at p. 24.
[25] Hearings, June 24 and July 1, 1994, at p. 13
[26] Participator Investigation Session, District Judges
[27] Hearings, June 17 and 18, 1994, at p. 7
[28] Hearings, May 21 and 22, 1994, at p. 3.
[29] Hearings, June 3 and 4, 1994, at p. 36.
[30] Hearings, June 24 and July 1, 1994, at p. 13.
[31] Hearings, June 17 and 18, 1994, at p. 14

women are not suitable for dangerous work such as citations, arrests, serving summons and seizures. Nor are they believed capable of serving in the courtroom or transporting prisoners.[32] This state of affairs affects the advancement of women bailiffs.[33] In fact, there are no women bailiffs in supervisory positions.[34] The Commission learned that when personnel heard of administration plans to name a woman to a position supervising men, men argued against it because they didn't feel comfortable in such a situation.[35]

Yet, there are indications that disciplinary sanctions and the requirements for promotion are applied more rigorously for women bailiffs. A woman bailiff, for example, was reported to the administrative authorities because of alcoholism, but no male bailiff has been reported, despite the patently obvious alcohol consumption by some.[36] In another case, a woman bailiff was turned down for promotion because she was overweight but, that same yardstick was not applied to two overweight male bailiffs.[37]

A female executive director of a judicial center summarized what seems to be the general rule regarding male and female maintenance employees, a judge told the Commission. According to the judge, the official said that " janitors had to be men because they had to be strong to work the machines that clean the floors".[38] Another reason given for favoring male maintenance workers is that janitors have to cart many boxes.[39] The Commission was also told that when women are appointed janitors, they are assigned easy tasks. From this standpoint, men are discriminated against because they are assigned the heavier tasks.[40]

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[32] Hearings, June 3 and 4, 1994, at p. 36; Hearings, May 13 and 14, 1994, at p 4; Hearings, May 27, 1994, at p 10; Hearings, June 24 and July 1, 1994, at pp 7-8.
[33] Hearings, May 27, 1994, at p 10
[34] Hearings, May 21 and 22, 1994, at p. 2; Hearings, June 24 and July 1, 1994, at p. 7.
[35] Hearings, June 17 and 18, 1994 at p. 7
[36] Hearings, June 24 and July 1, 1994, at p 19.
[37] *Id.*
[38] Hearings, June 17 and 18, 1994, at p. 4
[39] Hearings, June 3 and 4, 1994, at p. 24.
[40] Hearings, May 27, 1994, at p. 9

Women are, without a doubt, overly represented in secretarial positions in the system. Until mid century the position was filled by men but as more women entered the field earning typically low salaries, its value decreased. This is a typical manifestation of discrimination against women in the workforce.[41]

Today, few men hold secretarial positions within the system and, when they do, they are usually classified according to sexist stereotypes: in areas considered apt for males, such as control of valuables and support monies.[42] Stereotypes sometimes operate against men. A male secretary, for example, was not promoted because the only available position was that of "secretary" of courtroom services, and it was not considered appropriate for a male to fill it.[43]

3. *There are male and female officials within the judicial system who, at the time of selecting personnel, use the possibility of pregnancy as a negative criterion.*

The Commission was told that within the judicial system women job seekers will often be asked if they plan to have children.[44] In one case a judge asked a candidate for the position of judicial officer if she was married, and if she planned to change the composition of her family in the near future.[45] In another case, a female employee was asked similar questions by the supervisor who interviewed her.[46] The reasoning in these cases is that pregnant women are frequently absent, and that, apparently, justified denying them employment. One former presiding judge recalled how he had to intervene with several officials of the court because they asked potential female employees if they had small children or whether they planned to have children.[47]

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[41] Hearings, June 10 and 11, 1994, at p. 16.
[42] Hearings, May 21 and 22, at p. 3.
[43] *Id*
[44] Hearings, June 3 and 4, 1994, at pp. 30 and 35.
[45] Hearings, May 27, 1994, at p. 25
[46] Hearings, June 17 and 18, 1994, at p. 4
[47] Hearings, June 17 and 18, 1994, at p. 8.

The Commission also heard about a woman bailiff who became pregnant during her probation period. As a consequence, apparently, she did not pass her probation, even though her performance up to the moment of her pregnancy had been rated excellent.[48]

These practices are prohibited by law, which is why this kind of question is usually asked with much care and in a veiled manner. The fact that the Commission received such unequivocal examples causes us to speculate that the situation is more prevalent than we would like to believe.

4. *During the last twenty-five years there has been an absolute and relative increase in the number of women named to the judiciary, but these still represent a minority portion of that body, especially in positions of higher hierarchy.*

Although the power to make judicial appointments, as previously mentioned, is not contained within Judicial Authority, in a study such as the kind assigned the Commission, the composition of the Judiciary in terms of occupational segregation by sex cannot be exempted from the investigation. In attempting to do so, however, the Commission was limited by the lack of basic information, and the difficulties in studying the area historically because of the multiple variables that had to be considered. In view of the broad scope of its project, the Commission could not devote the necessary time to this detail nor give it the indispensable sociological analysis to adequately interpret the statistics. Nonetheless, the available data is examined in what follows, and certain aspects to consider in a future analysis of this material are highlighted.

[48] Hearings, June 3 and 4, 1994, at p 24

Table 2

DISTRIBUTION OF MALE AND FEMALE JUDGES BY COURT AND SEX
by November 30, 1994

COURT	TOTAL	FEM	%	MASC	%
Supreme	7	1	14	6	86
Appellate	14	5	36	9	64
Superior	111	34	31	77	69
District	95	27	28	68	72
Municipal	58	33	57	25	43
Total	285	100	35	185	65

Source: Office of Courts Administration

As can be seen in Table 2, by November 30, 1994, out of a total of 285 members of the Judiciary, 100 or 35% were women, and 185 or 65% were men. The disproportion is obvious: there are approximately two male judges for every female judge in the system. If the different judicial levels are analyzed, one observes that women only surpass the men at the municipal level, which is the lowest echelon and, therefore, of less importance and lesser salary.

The most recent appointments made by the Governor pursuant to the new Law of the Judiciary of 1994 (January 25, 1995), has modified somewhat the distribution at some levels.[49]

[49] See Table 3

Table 3

JUDICIAL POSITIONS FILLED BY JUDICIAL LEVEL AND SEX
by May 18, 1995

COURT	TOTAL	FEM.	%	MASC.	%
Supreme	7	1	14	6	86
Appellate	33	7	21	26	79
Superior	127	38	30	89	70
District	81	22	27	59	73
Municipal	69	41	59	28	41
TOTAL	317	101	32	216	68

Source: Office of Courts Administration

Comparing the data previously analyzed with the most recent appointments, the participation of women in the judiciary has declined significantly—by 3 percentage points. This decrease occurs especially at higher levels , declining by one percent in the category of superior and district court judges: from 31% to 30% and from 28% to 27%, respectively, and by 15% in the new Appellate Circuit Court: from 36% to 21%. An increase was registered only in the category of municipal judges: from 57% to 59%.

This breaks a pattern of improvement in the appointment of women to the judiciary. As can be observed in the following table, in 1972 women constituted 8.8% of the judicial body, while in 1994 they composed 35%

Table 4

COMPOSITION OF THE JUDICIARY BY YEAR AND SEX DATES SELECTED

YEARS	TOTAL	FEM	%	MASC	%
1972	159	14	8.8	145	91.2
1974	174	24	13.8	150	86.2
1978	172	26	15.1	146	84.9
1980	234	47	20.0	187	80.0
1991	261	79	30.3	182	69.8
1992	286	92	32.2	194	67.4
1994	285	100	35.1	185	64.9
1995	317	101	31.9	216	68.1

Source: Office of Courts Administration

The increase in women in the judiciary until 1994 coincides with the process of their increased access to the legal profession over the last fifteen years, as can be seen when we compare Table 4 with Table 5.

Table 5

TOTAL MEMBERS OF BAR ASSOCIATION BY YEAR AND SEX 1980-1995

YEAR	TOTAL	FEM	%	MASC	%
1980	5,789	1,027	17.74	4,762	82.26
1981	6,045	1,126	18.63	4,919	81.37
1982	6,270	1,193	19.03	5,077	80.97
1983	6,423	1,261	19.63	5,162	80.37
1984	6,505	1,322	20.32	5,183	79.68
1985	6,710	1,403	20.91	5,307	79.09
1986	6,990	1,513	21.65	5,477	78.35
1987	7,221	1,626	22.52	5,595	77.48
1988	7,464	1,745	23.38	5,719	76.62
1989	7,710	1,871	24.27	5,839	75.73
1990	7,958	1,992	25.03	5,966	74.97
1991	8,137	2,122	26.08	6,015	73.92
1992	8,424	2,305	27.36	6,119	72.64
1993	8,631	2,428	28.13	6,203	71.87
1994	8,954	2,603	29.07	6,351	70.93
1995*	9,109	2,672	29.33	6,437	70.67

**Until April 4, 1995*
Source: Puerto Rico Bar Association

Available data on the number of male and female attorney members by year and sex show that the profession, until recently identified as only appropriate for men, admits more and more women each year. A percentage review of the number of new members of the Bar Association by year and sex, clearly verifies the dimensions of this process.

Table 6

NEW MEMBERS OF THE BAR ASSOCIATION BY YEAR AND SEX 1985-1994

YEARS	TOTAL	FEM	%	MASC	%
1985	241	80	33.20	161	66.80
1986	326	117	35.89	209	64.11
1987	292	121	41.44	171	58.56
1988	291	123	42.27	168	57.73
1989	303	131	43.23	172	56.77
1990	306	128	41 83	178	58.17
1991	267	142	53.18	125	46 82
1992	369	157	42.55	212	57.45
1993	314	143	45.54	171	54.46
1994	389	182	46.79	207	53 21
TOTAL	3,271	1,398	42.74	1,873	57.26

Source: Puerto Rico Bar Association

Considering the evident trend towards an increase of women in the legal profession, the recent decrease in their participation in the judicial profession becomes disturbing, especially when up to now, their appointments reflected a rise in the proportion of women in that profession.

We must point out that some studies on occupational segregation by sex in the judicial field, analyze the statistical data in relative terms based on the number of men and women in the legal profession.[50] Other studies use the number of female and male lawyers with the requisite

[50] The U. S Supreme Court uses a similar analysis to evaluate allegations of job discrimination under Title VII of the Federal Law of Civil Rights. See Hazelwood School Dist v. United States, 433 U S 299 (1977).

years experience in the practice of law to hold a position at the different levels of the judiciary.[51] If we apply these methods to the preceding data, it is possible to conclude that, in general terms, women are proportionally represented in the Judiciary. According to data provided by the Bar Association,[52] as of 1994, out of a total of 8,954 members of the Bar Association, 2,603 or 29.07% were women and 6,351 or 70.93% were men. Approximately the same proportion of two and a half to one in favor of men holds in the Judiciary. A similar proportion holds between the percentage of male and female lawyers with the requisite experience for each judicial position and those appointed judges by November 30, 1994, with the exception of the Supreme Court.[53]

Table 7

DISTRIBUTION OF PERSONS FILLING JUDICIAL POSITIONS, AND MALE AND FEMALE LAWYERS WITH REQUISITE YEARS OF EXPERIENCE TO BE CANDIDATES TO SUCH POSITIONS, BY COURT AND SEX
as of November 30, 1994

COURT	APPOINTED MALE/FEMALE JUDGES				MALE/FEMALE POTENTIAL CANDIDATES			
	F	%	M	%	F	%	M	%
Supreme	1	14	6	86	1,279	22	4,577	78
Appellate	5	36	9	64	1,476	23	4,947	77
Superior	34	31	77	69	1,851	25	5,458	75
District	27	28	68	72	2,121	27	5,761	73
Municipal	33	57	25	43	2,603	29	6,351	71

Sources: *Puerto Rico Bar Association*
Office of Courts Administration

[51] By 1994 these experience requirements were: Municipal (0 years), District (3 years), Superior (5 years), Appellate (8 years), Supreme (10 years). One should remember that the new Law of the Judiciary, Act dated July 28, 1994, modified these requirements. Today 3 years of experience are required for the municipal level, 7 years for the Superior, 10 years for the Appellate. In order to be named judge of the Supreme Court a minimum of 10 years of experience is required. Const. Commonwealth, Art. V, Sec. 9. The District level will slowly disappear as the terms of the appointments of the judges who occupy positions at that level are fulfilled within a period of eight years.

[52] See *supra* Table 5.

[53] See Table 7.

The Commission believes that these criteria are not sufficient by themselves to comprehend the problem in all its complexity.[54] For example, to make an analysis based only on the available persons with the requisite years of experience could be inadequate Remember that appointment to the judiciary is a process in which numerous factors intercede. Several of these factors have to do with the access that potential male or female candidates have to the sources of political power brokers. An analysis has to establish the extent women in our society enjoy or have enjoyed, to a lesser extent than men, that kind of access despite the traditional obstacles they encounter in the so-called public world. This can have a definite influence on the possibilities of appointing female lawyers to the Judiciary. This is an area that requires further exploration. Thus other data, such as the following, needs to be analyzed: What is the total percentage of applications to the Judiciary filed by female and male lawyers at each judicial level? What proportion exists between the number of male and female candidates selected and appointed and the number of applications by sex and by judicial level or category? How do the experiences and qualifications of female and male judges compare? Answers to these questions could help reach conclusions at a deeper level Unfortunately, this data was not available to the Commission.[55]

It is also necessary to address other questions related to developments in the juridical profession and in the rest of the economy. Are male lawyers conceivably moving into other areas of the legal profession? How are the economic patterns of society affecting all of this? What is the profile of the men and women who apply to the Judiciary? Why is women's access to judicial positions at the highest level of the Judiciary so limited? Why is it that the level that has most opened

[54] Notwithstanding the above, these criteria could have validity, above all, to judge whether or not there is intentional discrimination, even to determine legal responsibility in given contexts

[55] The Commission requested this information from the Office of Judicial Appointments of the Office of the Governor, but was unable to obtain it; not even for the years before the creation of such Office

its doors to women is precisely the municipal level, the lowest in the judicial hierarchy? All these questions and more remain for later studies that require an interdisciplinary approach.

Moreover, using only the criterion of the actual proportion of female lawyers in the profession to analyze the problem excludes important historical considerations from the investigation that serve to imbalance the Judiciary. We will address these considerations shortly in this Report.

Even without the kind of analysis that allows us to gain deeper insight into the patterns of segregation by sex in the Judiciary, some conclusions that emerge from the transcribed data must be placed in context.

It is obvious that, over the last two decades, the number of women entering the Judiciary has increased significantly. Just as obviously, however, a marked disproportion between men and women, in favor of men, remains within the composition of the judicial body. This disproportion is similar in the legal profession, a source for hiring members of the Judiciary. From that perspective, it reflects the reality of the profession. In view of that parallel, it is difficult to conclude that gender discrimination is not evident in judicial appointments. It is more factual to say that the Judiciary still suffers from the impact of historical discrimination which has excluded women from the juridical profession or kept them at a minimum.[56] The upshot of the social discrimination that turned the juridical profession into a prevailing male-dominated field is that women in our society remain under-represented in the practice of the principal function of the Judicial Branch, i.e. settling conflicts and adjudicating claims that affect women and men alike. Once they are appointed to the Judiciary, women suffer additional forms of discrimination that become apparent in other findings reported in this chapter.

[56] For a judicial opinion of the prejudices that supported that discrimination, see the concurrent opinion of Judge Bradley in the case Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1972), to which note 6 of the Introduction of this chapter makes reference.

In view of the important function of the Judiciary, whose decisions affect both women and men, and mindful of the historical exclusion of women from it, the nominating authorities can and should take positive steps to increase the number and ratio of women in the Judiciary, especially to positions of higher rank, despite the actual make-up of the legal profession. Not to do so would unnecessarily retard the process of imparting equal access to men and women in our society to the important function of dispensing justice.

Due to the complexity of this subject, the Commission recommends that it be studied more deeply and broadly and that suitable measures address and remedy the effects of this exclusion or historical discrepancy.

5. *Discrimination exists against female judges regarding work assignments particularly at the superior judicial level of the Court of First Instance.*

The Commission received numerous testimonies from both men and women, within and outside the judicial system, to the effect that established judicial work assignments reflect discriminatory treatment against female judges and respond to sexist stereotypes

A female trial lawyer told the Commission the following:

> I believe that there is also an element ..that I consider.... important and it is.. ..the fact that in a way certain areas of law have become feminized, and that we women attorneys have largely assumed specific kinds of cases[,] such as[,] for example, family law cases[.] It is seen as women's trial, and in a way that work is belittled[.] Also, Family Division is perceived as a less important court, judges of family law as less important, as if it were a punishment of judges....
>
> ....and I believe that this has a lot to do with gender[:] that's women's trial, that's an area for women.[57]

Testimony was also received about the case of a male judge who had repeatedly asked to be assigned to a juvenile or family relations courtroom. Each time, the reply was that assignment "would be a waste".[58]

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[57] Focus Group Interview, Female trial lawyers: in matters pertaining to women, at p. 71.

[58] Hearings, June 3 and 4, 1994, at p. 33

This suggests that as women have moved into the legal profession and the Judiciary, some specific areas of law previously handled by males, were left more and more to women. As a consequence, those areas began to lose value or worth within the profession. They began to be seen as more appropriate for the temperament and interests of women, such as were, for example, the areas of juvenile proceedings and family relations.

One lawyer explained it as follows:

> For example, in the world of criminal law, of criminal trial, it is not common to see women dedicated to the private practice of criminal law, and I am speaking from my perspective. Even, until recently, it was rare in the regions I am speaking about, it was uncommon to see a female lawyer in the Legal Aid Society. Now, at least, there is a group of female lawyers working, at least in Ponce, Aguadilla and Mayagüez. But still, the [larger] number of criminal lawyers in Legal Aid Society are male. But in private practice, I repeat, it is rare to find a female lawyer.
>
> But, there are other fields where one sees that daily trial is controlled by female lawyers, such as, for example, the field of family law, or the field of minors law. I have been in a mixed courtroom in Ponce, of minors and drugs—that was a project that lasted fourteen months—and at that time, the median of trial lawyers going to Minors, were women. Most of the Juvenile Solicitors who litigated were women. It's as if that area of law was being controlled by...women, no?[59]

Actually, instead of being controlled by women—which to a certain degree implies intention or an act of volition—it would be better to say that it is an area of law in which women lawyers have either been allowed to enter, or have agreed to enter because other areas are still basically occupied by men.

Another lawyer who participated in the Commission's Hearings pointed out that "female judges are assigned to the family division justifying this discrimination by saying that women know how to deal with that".[60] One lawyer remarked:

> Several years ago, it was rare to see a female judge hearing a case and presiding a criminal courtroom. It was more common to see them in civil courtrooms—in the courtroom that handled civil matters if there were no male judges- and then in family law division and in the juvenile division. They were assigned to that kind of work. For judges, it's possible that there were fewer challenges in those two areas...[61]

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[59] Focus Group Interview, Male trial lawyers and prosecutors, at pp. 24-25.

[60] Hearings, June 24 and July 1, 1994, at p. 12.

[61] Focus Group Interview, Male trial lawyers and prosecutors, at p. 18.

Precisely because of that, Department of Justice personnel generally use the feminine, in Spanish, to refer to Juvenile Solicitors and Family Solictors as if they were areas solely reserved for women. This further demonstrates what we have previously reported. One female judge said that women judges are normally assigned to family relations irrespective of their experience, and that women are kept in those assignments whether they like them or not.[62] Another female judge said: "I sent out the message that my area of expertise was civil, that I had litigated all my life in civil law, and that was what I was interested in. But they sent me first to family. Yes, woman..., family".[63]

Sexist stereotypes are also behind the assignment of judges to criminal courtrooms. One female judge noted: "Female judges are not assigned to criminal courtrooms. It is believed that, due to their temperament, women cannot tolerate shocking situations".[64] On the other hand, a lawyer pointed out: "That is, you used to think that ladies could not hear criminal cases by jury, and mix with all those defense lawyers. Because of all these things, the lady judge has to be protected, she must be protected" [65]

A female prosecutor narrated an interesting case about a sodomy committed on a boy by a group of fishermen At the preliminary hearing, the defense attorney asked the female judge to inhibit herself because she was a woman and, as part of the evidence for the defense of his clients, they had to show their genitals. Although the defense attorney explained that the clients would feel uncomfortable in exposing their private parts to a female judge, it is not hard to believe that, fun-

[62] Hearings, May 13 and 14, 1994, at p. 4.

[63] Focus Group Interview, Female Judges, at p. 16.

[64] Hearings, May 27, 1994, at p. 10.

[65] Focus Group Interview, Male trial lawyers and prosecutors, at pp.17-18 Note the use of the term "lady" to denote specific attributes and stereotypes associated with women, that, ultimately, end up imposing limitations on them. After all, it is believed that, there are areas that are "proper of the ladies", and others that are not.

damentally, the lawyer espoused the notion that this was not the sort of situation that a woman should be exposed to.[66]

A female judge testified about how difficult it is for women to reach and preside a criminal courtroom; it is considered a man's field. The female judge recalled how she had to "break the ice" as a prosecutor because a woman's capacity to carry a felony case was in doubt. As a judge, she had long been denied a chance to preside in criminal court despite her previous experience in that field. She declared that she had been displaced, even by less-experienced judges.[67]

Another female judge recalled the following experience:

> I remember that I wanted to go to a court and I was told that the presiding judge said that he didn't want any female judges in the criminal area. ... All I wanted was a criminal courtroom, and I said that ... I even offered to take the night shift if no one wanted it. They told me no because the presiding judge didn't want women in a criminal courtroom ... because all they were going to do was cause problems for him.[68]

What problems? Although the female judge was not more explicit, another female judge provided a partial explanation:

> My experience, as a judge, has been ... that the female lawyers are not resentful when a male judge is a disciplined person, a strict person giving them orders, but they do resent - I don't know if in the civil, but in the criminal area—they do resent a woman giving these orders, directing the criminal process, and demanding a specific kind of behavior in the courtroom ...[69]

This suggests that opportunities for advancement in the Judiciary are more limited for female judges. Likewise, their possibilities of performing in specific areas are limited.

Disproportionate assignment of subject matter jurisdiction shows up clearly in applicable statistics. Right now in the Judiciary, as we have shown, the proportion of male judges to female judges is two to one. Even in comparing that correlation, which we do not accept, the distribution of subject matter jurisdiction reflects a clear bias based on gender. In the criminal area, twenty-

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[66] Focus Group Interview, Female trial lawyers and prosecutors, at pp. 15-17.

[67] Hearings, May 13 and 14, 1994, at p. 4

[68] Focus Group Interview, Female Judges, at p. 122

[69] *Id.* at p. 31.

three (23) men and eight (8) women preside these courtrooms.[70] This constitutes a proportion of 2.9 to 1 in favor of men, greater than the proportion of 2 to 1 that the total composition of the Judiciary reflects.[71] There are thirty-eight (38) judges and fourteen (14) female judges in the civil area, which produces a proportion of 2 7 to 1, also higher than the total proportion of the group. In family relations, however, the relation is 1 to 1 (nine (9) women and nine (9) men).[72] This means that women are over represented, in proportional terms, in the area of family relations. Evidently, women are more represented in the area of family relations than in the areas of criminal or civil law.[73]

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[70] As of November 30, 1994, there were 111 positions filled in the Superior Court, of which 34 (31%) were women and 77 (69%), were men Data was submitted by the Office of Courts Administration. To this we must be added a male judge who presides over both civil and criminal matters. See Table 8, *infra*.

[71] The proportion is exactly 3 to 1 if we add the male judge who presides over hoth civil and criminal matters. See the previous note.

[72] There are three (3) male judges that preside over civil matters such as family relations, which would raise the number of male judges in this area to twelve (12). The exact proportion would be of 1 3 to 1.

[73] See Tahle 8, that follows.

Table 8

ASSIGNMENT OF SUPERIOR COURT JUDGES BY REGION, SEX AND CASES
by November 30, 1994

REGION	CIVIL		CRIMINAL		REL. FAMILY		MINORS		SUB TO-TAL		TOTAL	%	
	F	M	F	M	F	M	F	M	F	M		F	M
San Juan	3	15	3	4	3	1	—	3	9	23	32	28	72
Bayamón	3	3	2	4	1	3	1	—	7	10	17	41	59
Ponce	2	2(a)	1	3	1	—	1	—	5	5	10	50	50
Carolina	2	2	1	2	1	2	1	—	5	6	11	45	55
Caguas	1	2	1(a)	2	—	1	—	1	2	6	8	25	75
Arecibo	3	—	—	2	1	—	—	1	4	3	7	57	43
Humacao	—	3	—	2	—	1(b)	—	—	—	6	6	—	100
Mayagüez	—	4(c)	—	1	—	1	—	—	—	6	6	—	100
Aguadilla	—	2	—	1	1	—	—	1	1	4	5	20	80
Guayama	—	3(d)	—	—	1	—	—	—	1	3	4	25	75
Aibonito	—	1(a)	—	1	—	—	—	—	—	2	2	—	100
Utuado	—	1(a)	—	1	—	—	—	—	—	2	2	—	100
Subtotal	14	38	8	23	9	9	3	6	34	76	110	31	69
Temporary placement	—	—	—	—	—	—	—	—	—	1	1	—	100
Total		52		31		18		9	111		111	31	69
%	27	73	26	74	50	50	33	67	31	69			

(a) The judge, or one of the judges also presides over family relations matters.

(b) The judge also attends to minors' cases.

(c) One of the judges also attends to criminal matters.

(d) One of the judges also attends to minors' cases; another judge also attends to criminal matters.

Source. Office of Courts Administration

Contrary to the numbers and the statements reported above, some judges, always men, expressed opinions similar to the following: There is no discrimination against female judges in assignments to criminal courtrooms; what happens is that most female judges don't want the assignment [74] Or, the assignment of judges by subject matter jurisdiction is not made on the basis of gender; the selection is based on the interest of each candidate, the position that exists at the moment of his or her arrival, and waiting lists, or traditions that exist in the judicial center.[75] Or, it is not that women judges are not preferred; what happens is that presiding judges prefer judges whom they know, who won't have specific problems, who can work as a team and who already know the system.[76]

Sexist stereotypes are clearly evident here: as a general rule women don't have major knowledge, they have "certain" problems, they can't work as a team, and they do not know the system. However, the assignment of judges by subject matter jurisdiction follows the same pattern with newly appointed male and female judges who cannot be accused of negative work because they are totally new to the system. Requisite work experience for each judicial category is the same for men and women, which means that a female superior court judge like male judges in that category, albeit newly appointed, must have already accumulated the requisite experience and knowledge.

[74] Hearings, June 17 and 18, 1994, at p. 18

[75] Hearings, June 10 and 11, 1994, at p. 2.

[76] *Di* at p 16.

One judge argued that overt discrimination in the assignment of female judges to family relations courtrooms has to do with the susceptibility of male judges, that most males suffer stress in these courtrooms, and that others have personal problems that could influence their decisions.[77] Those explanations, of course, are equally applicable to female judges; they do not really establish a difference between men and women.

6. *Instances of unequal treatment that are based on gender and occur in the assignment of courtrooms from a territorial point of view and in judicial transfers within the system.*

Traditionally, the length of time in a position and the needs of the system are two criteria that are primarily advanced, to justify courtroom assignments and judicial transfers. Nevertheless the Commission repeatedly heard testimony on gender discrimination in the assignment of female judges since assignment sometimes responds to another kind of criteria including specific preferences of presiding judges, some of whom have openly expressed their preferences for male judges and do not want female judges in their regions.[78]

Beyond the preferences of presiding judges, views and beliefs that have nothing to do with the appropriate criteria for the assignment of courtrooms are also influential. For example, the Commission received several testimonies about a specific court that had plenty of female judges, and was even administered by a woman. This court was called "the court of the Amazons".[79] Many persons said that no more female judges should be sent to that court. One person even pointed out: It has never been said not to send more male judges to courts that have a majority of males, or all the judges are male, or to courts called by a special name.[80]

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[77] Hearings, June 17 and 18, 1994, at p. 18.
[78] Hearings, May 21 and 22, 1994, at p. 1.
[79] Hearings, June 17 and 18, 1994, at p. 14.
[80] *Id.* at p. 8.

The preceding is a good example of how sexist criteria can intervene, or is inserted, to determine courtroom assignments from a territorial point of view.

Concerning Superior Court judges, courtroom assignments and transfers are conditioned by subject matter jurisdiction of available courtrooms. In speaking of criminal courtrooms, for example, this fact is often used to make decisions based on gender, an aspect amply discussed in the section on discriminatory treatment in the assignment of courtrooms by subject matter jurisdiction. As we pointed out then, there are judges who refuse to consider women for criminal courtrooms.[81] In those cases, the alternatives for courtroom assignments from the territorial point of view are limited.

That also is the tendency, examined before in another part of this Report, in assigning female judges to certain areas of law, such as family relations and minors, before assigning them to others. That fact conditions the territorial assignment. The same sexist stereotypes that operate in other areas are, from that point of view, at the basis of these determinations.

One female judge recalled the following experience:

> Out on the Island (interior of the country) it was the customary to go and stay one year [in a specific place] and [after a while] another judge comes to replace you. [It's like a rotation... because... it's normal. Then we are placed where we are going to be... more or less permanently... in what this means in the Judicial Branch. I stayed because, for reasons that I have never understood, there never was space for me. There was space for everyone else except me.[82]

The testimony given by another female judge is also significant to see the stereotypes at work:

> When the judge of [such a place] resigned the position and the position was vacant, the presiding judge was told that he should try to fill it with a judge from the region. He first spoke with men, but no one wanted it... There were two female judges left... When he didn't have any other options and was told that he had to fill it [the vacancy], he first spoke to the other female judge who had less time in the system and he asked her... She told me that he asked her in this way: "Judge, the position of [such a place] is vacant. I was told to

[81] Focus Group Interview, Female Judges, at p. 122.

[82] *Id.* at pp. 13-14.

> fill it with someone from the region. I know that you are not going to want to go because [...the trip] it's very dangerous for women". That's how he told her. I told her: "But I'm interested". It looks like she told him. Then..... well...he asked me....he said....in the same way: "Judge, you know the judge [of such place] resigned...and the position is available [of such a place]. But I know that women do not like that [to make dangerous trips] and that trip is so long to [that place]". That's what he told me. I told him: "Well, look, judge, I'm not afraid [of the trip]."[83]

This case could be interpreted as an example of preferential treatment to women because they are being shown special considerations, i.e., that women should not be subjected to dangerous trips. But it is based on a stereotype, so ingrained that women are not even given a chance to say how they feel about it. They are simply dismissed.

Obviously, the fact that sexist stereotypes like this one exist, operating at every level of the system, is a source of discriminatory behavior towards women.

However, there are those who say that those same stereotypes operate in favor of women when they are assigned to courts near their homes and of easier access, taking into consideration their gender, that they are single or divorced with the custody of children, that they are married and their husbands not willing to move, or that they remain for long periods of time away from home, and many other circumstances. The Commission consulted with officials of the Office of Courts Administration on this matter and their response was that, overall, women receive the same treatment as men. The criterion of proximity to the home is applied to both males and females if the courtrooms are available. Otherwise, both male and female judges, particularly new appointees, must be sent wherever a vacancy exists. Under those circumstances, both genders have the same chance of being assigned to places far from their homes and less accessible, like Utuado, Jayuya, or Maricao for those judges who live in the metropolitan area.[84]

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[83] *Di.* at pp. 49-51

[84] The Judges Assignment Unit of the Office of Courts Administration was consulted.

Since women, as a general rule, take charge of child care and assume custody in separation or divorce cases, the Commission believes this aspect should be given importance in order to eliminate differences in opportunities for men and women. This entails equitable treatment that takes into account every circumstance that conditions the potential of men and women in our society.[85]

7. *The notion that unequal treatment exists against female judges is prevalent regarding the distribution and retention of administrative positions.*

Regional presiding judges of the judicial system are simultaneously administrators of the judicial centers located at the head of purported judicial districts. Traditionally, this post has been filled primarily by men. As a female judge told the Commission, no more than two women have ever administered the regions at the same time.[86] This is the case despite the fact that, until recently, there were twelve judicial regions plus the Director of the Juvenile Program, who also holds the rank of presiding judge.[87] The above datum was confirmed by the Office of Courts Administration. At other times there has been only one female judge regional presiding judge.

It should be noted, however, that the biggest concentration of female superior court judges occurs in the larger courts; there are small courts like Utuado and Aibonito where female superior court judges are not represented. This limits their options when appointments are made. See Table 9 below.

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[85] See the definition of "equity" in the chapter on General theoretical framework of this Report.

[86] Focus Group Interview, Female Judges, at p. 18. By November 30, 1994 there were only 2 female presiding judges (Source: Office of Courts Administration).

[87] At the date of this Report's publication, there were thirteen judicial regions with the creation of that of Fajardo. There is also a position of Presiding Judge of the Juvenile Program and the position of Presiding Judge of the Circuit Court of Appeals. Nevertheless, there continue to be only two female regional presiding judges. (Source: Office of Courts Administration).

Table 9

*ASSIGNMENT OF SUPERIOR COURT JUDGES BY REGION AND SEX**
by November 30, 1994

REGION	TOTAL	%	FEMENINO	% DEL TOTAL	% DE LA REGION	MASCULINO	% DEL TOTAL	% DE LA REGION
San Juan	32	29	9	26	28	23	30	72
Bayamón	17	15	7	21	41	10	13	59
Ponce	10	10	5	15	50	5	6	50
Carolina	11	10	5	15	45	6	8	55
Caguas	8	7	2	6	25	6	8	75
Arecibo	7	6	4	12	57	3	4	43
Humacao	6	5	—	—	—	6	8	100
Mayagüez	6	5	—	—	—	6	8	100
Aguadilla	5	5	1	3	20	4	5	80
Guayama	4	4	1	3	25	3	4	75
Aibonito	2	2	—	—	—	2	3	100
Utuado	2	2	—	—	—	2	3	100
Temporary placement	1	—	—	—	—	1	1	100
Total	111	—	34	—	31	77	—	69

Source: Office of Courts Administration

A female judge told the Commission that, based on her personal experience, a system of unequal treatment exists against female judges in designating presiding judges.[88] One man's testi-

[88] Hearings, June 10 and 11, 1994, at p. 14.

mony is significant in this respect; he recalled a female judge in a certain court who was slightly older than he and a person of great professional respect and very competent.

> To my surprise..., I arrive as presiding judge of that court. I mention it as an example of (possible discrimination)...perhaps...seeing it now. At that time I didn't see it in that way. I'm seeing it in that dimension...now, after twenty-two years in this activity.[89]

Yet, it was also pointed out that male presiding judges are "allowed" to stay administrating "forever"..."because they are friends, or for other considerations".[90] Terms for female judges tend to be shorter.[91] A case in point was that of a female presiding judge who was retired from the position under pressures from the region's lawyers. The system did not respond in the same manner, however, when similar pressures were exerted against male presiding judges.[92]

Attitudes assumed by the system against female presiding judges often reflect sexist stereotypes. A female judge told the Commission that when she was an administrator, everytime she spoke about the problems in her region, she'd receive reactions like the following : "These women really don't know how to manage, because they're always complaining. Girl, you sure ask for a lot".[93]

Several people also said that associate presiding judges receive unequal treatment too. A female judge recounted the following experience:

> This presiding judge named as second in command a friend of his who arrived about the same time I did. That didn't bother me too much. But when he left, I was the person with the most seniority.". Then, another younger judge arrived, with less professional and judicial experience and he was named. (The presiding judge) at one time confronted me and said: "I'm going on vacation. I'm going to name so and so Associate Presiding Judge.

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[89] Focus Group Interview, Male trial lawyers and prosecutors, at pp. 11-13.

[90] Focus Group Interview, Female judges, at p. 18.

[91] Hearings, June 10 and 11, 1994, at p. 14.

[92] *Di.* at p. 14; Focus Group Interview, Female Judges, at pp. 45-46.

[93] Hearings, June 17 and 18, at p. 6.

> You don't want the position, right?" I replied: "With all due respect, Judge, I understand that to be your decision , not mine." And obviously, he passed me over....and did so over andover again.[94]

Some persons said that stereotypes also are reflected in certain types of functions assigned to women in general, and to women who take on administrative duties. One judge pointed out that among her duties as deputy administrator was to organize parties.[95]

The administrative direction of the courts has always fallen to male judges, with only one exception who, although a lawyer, was not a judge.[96] There had never been a female judge in the administrative direction of the system. The first woman to hold the position was named recently,[97] an appointment that has been viewed with reservations solely because she is a woman. The Commission heard testimony about a judge who, regarding a memorandum from the female Courts Administration Director, said this: "I don't have to listen to that woman. Who is that woman to tell me what to do?"[98] The person offering that testimony, painted the following general picture:

> The tendency in the system is for women to occupy positions under the supervision of men. The system tends to suppress, or to gloss over, any discrepancies of opinion between men and women, encouraging the woman to yield, to back down. The system is operated and the problems addressed, by giving preference to solutions and suggestions offered by men. If a woman is named to a position of authority, she is watched constantly; any problem turns into a crisis. But if a man is involved, he is transferred without being censured.[99]

8. *Decisions and negative administrative reactions especially towards female judges occur in the judicial system which are either founded on sexist stereotypes and the application of different standards to women or respond to notions about how women act.*

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[94] Focus Group Interview, Judges, at pp. 10-11.
[95] Hearings, June 17 and 18, 1994, at p. 5
[96] A. Torres, Esq., Administrative Director of the Courts, under Chief Justice José Trías Monge, was not a judge.
[97] Mercies M , Esq.
[98] Hearings, May 21 and 22, 1994, at p 3 and paper
[99] *Di.* at p 2.
[100] Hearings, May 27, 1994, at pp. 10
[101] Hearings, May 21 and 22, 1994, pp
[102] *Di.* at p. 3.
[103] Hearings, May 13 and 14, 1994, pp -4.
[104] Hearings, June 17 and 18, 1994, at p. 6.
[105] *Di.* at p 6.

By this, we are not referring to the problems related to the assignment of subject matter jurisdiction or to court assignments from a territorial perspective, subjects which are discussed separately elsewhere in this Report. We are dealing here with considerations of a different nature, presented primarily by female judges. Taken together, these considerations led the Commission to conclude that incidents of discriminatory treatment of female judges by system administrators do occur in the courts.

Female judges, it was noted, tended to be more supervised than male judges. Female judges were expected to justify everything, even attending seminars and training. One deponent asserted that a female judge having lunch outside the court and taking more than the allotted time to return is questioned while male judges are not.[100]

One female judge contended that women are discriminated against regarding assignment of shifts, administrative appointments and authorization for seminars and trips.[101] The impression the Commission received is that, if female judges were available, they'd be considered favorably for night or weekend shifts for the determination of cause. Meanwhile, male judges are preferred for administrative designation to act in higher judicial ranks in, what is known as the "*inter curia* movement of judges." In the first case, it could be believed that women, unlike men, are less likely to object to taking orders, especially if the person doing the ordering is a man. In the second case, as the Commission was often told, the idea that male judges are perceived as more knowledgeable and experienced, may very well be at the bottom of it.

It was also noted that when male judges are not willing to handle difficult cases that take them outside their courtroom, they are assigned to female judges.[102]

Still, the statements of some deponents suggested that judicial evaluation by both male and female presiding judges can be affected by the application of different moral standards and by sexist stereotypes. One woman judge testified that some married judges have affairs with other women

that are public knowledge and are not called "to task", unlike the way women judges are treated for anything that could be viewed as a breach of court decorum.[103]

Another woman judge shared the following experience: Despite statistical evidence that she had resolved the largest number of cases in a certain court, the presiding judge always singled out two male judges as the most productive. When he was finally confronted with the statistics, he was surprised. "I thought that she (the judge) was only capable of organizing parties," he said, " but she resolved the most cases."[104] Beyond any doubt, general impressions rooted in stereotypes can influence judicial evaluations.

The same predicament can occur with conventional opinions about how male and female judges conduct themselves with each other. In that regard, it was asserted that discussions and problems among female judges are described as "gossip" by "foolish" women, unlike arguments among men which are seen as serious discussions from a professional perspective.[105]

Also raised was the question that on occasions administrative decisions favor male judges reflecting obvious bias against female judges. A female judge, for example, recalled the following experience: She was assigned to a civil courtroom in a certain court that was slow in expediting its cases and in a short time she brought them up to date. A male judge was subsequently assigned to her courtroom while she was moved to another civil courtroom with similar problems of speed. She brought this new court up to date and the previous situation repeated itself when another new male judge arrived. Then the presiding judge announced that he had reconsidered assigning a family courtroom to a male judge and would assign it to her. She refused to accept the assignment because she believed she was being discriminated against.[106]

9. *The judicial system does not adequately intervene with certain discriminatory conduct by judges that violate the Canons of Judicial Ethics.*

[106] *Id.* at p. 5. It is interesting to note that the female judge apparently endorsed the opinion of those who devalue the area of family relations, as pointed out in other chapters of this Report, as a result of viewing this field of law as "a woman's thing"

The Commission received ample testimony regarding judges who incur in certain kinds of prejudicial conduct without being dealt with adequately, or in some cases, not at all.[107] The general understanding is that since many cases deal with acts that, by themselves, are not sufficient to justify disciplinary action, this type of conduct has no repercussion for those who incur in it, meaning that they continue to behave in the same way. However, the recurrence of this sort of conduct could justify an initial administrative investigation to determine disciplinary action. Periodic evaluations of the judiciary should also be taken into account. Under many circumstances, nonetheless, prejudicial conduct is so serious or ominous that the system should act immediately.

Incidents denigrating to women who turn to the courts were recounted at Commission hearings. These incidents emphasized the insensitivity of the courts towards them. One deponent commented on the case of a male judge who asked female crime victims to accompany him to a private place so he could verify their injuries and contusions. This same judge asked a woman with a breast injury to let him see the other to compare the two. This situation was fully known to the corresponding presiding judge, but no measures were ever taken to correct his behavior.[108]

> One deponent pointed out: "The curious part of the judicial system is that the most barbaric and atrocious anecdotes about the things judges did, continue to be told, heard, applauded, and treated like a big joke."[109] The same deponent added: "The judges who exhibit this problem don't have major dissuasive measures to modify their behavior. The power that they have and the lack of corrective measures, assure them that they don't have to change their behavior."[110]

The response of the system—if there is one—is to transfer the judge to another court instead of pressing charges. Sometimes he is transferred to a court where there is minor supervision, increasing his chances to cause major damage.[111]

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[107] See findings 2 and 6 of the chapter entitled Interaction in the Courts.
[108] Hearings, May 13 and 14, 1994, at p. 3
[109] *Di*
[110] *Di.* at p. 11
[111] *Di* at p. 8.

Most of the time, the situation is about remarks, reactions and sexist expressions that tarnish judicial procedures. The Courts Administration Office tries to combat this situation through seminars and judicial ethics orientations and, when it learns about individual accusations, by personally speaking to both male and female judges who incur in such behavior or to their supervisors. Nonetheless, the lack of real and effective restraints, such as an inquiry into the dilemma and applying disciplinary sanctions if the evidence suggests a genuine problem, makes judges of both genders indifferent to their obligation to modify their behavior.

It is important to remember that, according to the Canons of Judicial Ethics, all judges, especially those in administrative positions, are obligated to ensure that the behavior of their colleagues is in keeping with the canons. Further, they must "promote disciplinary procedures that proceed against any Judge or lawyer who acts improperly or dishonestly, when they personally know it for a fact."[112] Only in that way, in the absence of complaints from outside the system, can the Office of Courts Administration get involved in the matter and initiate an investigation. Still, the Commission believes it is essential that existing complaint mechanisms be examined so that individuals offended by a judge's prejudicial actions can count on agile and accessible means to file their complaints.

10. *Court facilities have certain deficiencies that especially affect women employees, visitors and users.*

Court facilities were designed primarily for its male clientele. As a consequence, women who go to the courts as parties or witnesses or in search of a service or who appear as the accused or as the defendant confront multiple problems that are specific. Female employees of the court experience the same problems.

First, individuals who go to the court with their children, most of whom are women who are forced to do so due to special circumstances, confront problems in sessions when their children

[112] CANONS OF JUDICIAL ETHICS OF PUERTO RICO, Canon IV (1977), 4 L.P.R.A. AP. IV-A.

in some way , disturb court proceedings either by speaking, crying, standing up or moving around. This is made worse by the fact that preferential shifts for people in such situations are non-existent in the courts.[113]

The Commission heard testimony to the effect that male and female bailiffs and judges tend to be severe in these situations, loudly scolding mothers for the behavior of their children and ordering them to abandon the courtroom.[114] These scoldings affect women, making them nervous, even possibly having a negative impact on those who have to testify.[115] A trial lawyer pinpointed a similar situation in child support units located in the courts, where women have to stand in long lines with their children as they wait to be attended.[116]

The Commission received many recommendations on the need for waiting rooms and child care centers.[117] This recommendation was repeated with regard to employees of the courts. During school vacations and when the boys and girls are out of class, many female, and a few male, employees have to bring them to their offices.[118] This is a source of many problems.

Second, female inmates and minor defendants who must appear before the bench face the problem that, generally, there are no special or separate cells for women. The cells in the courts are not equipped in any way for women. Sanitary services are exposed, for example, and their cells adjoin those of men which is a source of many undesirable situations.: exhibitionism and sordid expressions of a sexual nature, among them. In the court rooms for minors, the situation is even worse: usually they have only one cell.[119]

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[113] Hearing, June 10 and 11, 1994, at p. 20

[114] Hearings, May 13 and 14, 1994, at p. 5; Hearings, June 10 and 11, 1994, at p. 20

[115] Hearings, June 3 and 4, 1994, at p. 37.

[116] Focus Group Interview, Male family trial lawyers, at pp. 82-83. This particular situation shall change by virtue of the Organic Law for the Administration for Child Support, Act No. 86 dated August 17, 1994, that transferred the responsibilities related to child support to the Department of Social Services of Puerto Rico

[117] Hearings, June 3 and 4, 1994, at p. 37; Hearings, June 17 and 18, 1994, at p. 18; Hearings, May 21 and 22, 1994, at p. 1; Hearings, May 13 and 14, 1994, at p. 5, among others.

[118] Hearings, June 17 and 18, 1994, at p. 9

[119] Hearings, June 3 and 4, 1994, at pp. 31 and 37; Hearings, May 13 and 14, 1994, at pp. 3 and 5; Hearings, June 24 ND July 1, 1994, at p. 5.

Recommendations

1. The Judicial Branch should foster the development of training aimed at supervisory personnel, male and female presiding judges. These trainings should include modules about occupational segregation by sex and discrimination in employment because of gender.

2. The Office of Courts Administration must take affirmative measures against occupational segregation by sex, especially in those areas of employment that affect services to court clientele such as the office of the bailiff.

3. The Office of Courts Administration should endeavor to prepare statistical reports on occupational segregation by sex in order to examine the patterns and existing tendencies in diverse work categories, so that pertinent administrative and educational measures can be taken.

4. The Office of Courts Administration should issue specific directives regarding the illegality of using pregnancy or possible pregnancy as a criterion in hiring personnel.

5. The Office of Courts Administration should emphatically circulate its public policy on gender discrimination in employment and the availability of a procedure for such complaints and legal action.

6. The Executive Branch, through its Office of Judicial Appointments, assigned to the Governor's Office, must engage in more profound studies about occupational segregation by sex, particularly judicial nominations, addressing the different categories on the judicial ladder.

7. The Office of Judicial Appointments, assigned to the Governor's Office, should develop an information system about applications for judicial positions and appointments that facilitates investigations about the subject.

8. The Chief Justice of the Supreme Court should be alert to the diverse manifestations of gender discrimination in employment when he exercises his constitutional powers to assign courtrooms and appoint male and female presiding judges.

9. The Office of Courts Administration, all presiding judges of the system must be alert to the possible manifestation of discriminatory treatment, particularly regarding female judges in assigning subject matter jurisdiction

10. The system of judicial evaluation of the Judicial Branch should evaluate the performance of all judges regarding diverse manifestations of gender discrimination, especially in what is related to judicial temperament.

11. The Office of Courts Administration should be more emphatic in investigating situations that reflect discriminatory attitudes on the part of members of the judiciary and the system's support personnel.

12. The Office of Courts Administration should study the possibility of establishing day care centers for all children, at least in the biggest and most crowded courts, that are open to all employees and to the general public.

13. The Office of Courts Administration should fulfill the need for adequate facilities in the courts for their female clientele, especially in the areas of criminal cases and the juvenile justice system.

Chapter 5

Interaction in the Courts

Introduction

In fulfilling its commitment to examine the Judicial Branch, the Commission learned how gender reveals itself in the daily interaction between men and women in the courts of Puerto Rico. In some respects, however, the results of our investigation went beyond the courts to cover the whole system of justice. Interaction is generally understood to mean "the reciprocal action that is exercised between two or more objects, agents, forces, functions, etc."[1] In social sciences, and within the framework of relationship theory, the term refers to interpersonal relations.[2] This study alludes to the way some persons usually relate to others within a specific social space, that is, the daily contact and the exchange of information between them, in its broadest sense, parting from the analysis of the social production of gender.

As the chapter on the General theoretical framework of the Report pointed out, it was decided to include relationships and interactions that occur between every person who performs duties in the Judicial Branch or who come into contact with its activities. Included, then, are the interactions between male and female judges, male and female lawyers, prosecutors, bailiffs, clerks, secretaries and other personnel of the judicial system, persons accused, or defendants, or victims of crimes or minor offenses, civil litigants, witnesses, visitors, and other persons who use the services

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[1] REAL ACADEMIA ESPAÑOLA, DICCIONARIO DE LA LENGUA ESPAÑOLA 832 (21st ed. 1992).
[2] DICCIONARIO DE CIENCIAS SOCIALES 1145 (Madrid, Institute of Political Studies, 1975).

that the Judicial Branch provides. That interaction takes place in the different spheres or physical spaces of the courts: in offices, hallways, reception areas, in different work units, in courtrooms, in cafeterias and on the premises of the court.

The Commission examined incidents that show or suggest the presence of stereotypes derived from attributes socially assigned to women and men.[3] On most occasions these attributes take the form of dichotomies, whose elements are characterized by their polarity: positive and negative. For example, the dichotomies "active - passive," "rational - emotional," "strong - weak." In the patriarchal system that characterizes our society, the positive attributes that we usually associate with the superiority of one human being over another in terms of intellect, temperament and physical or spiritual strength, are generally identified with men, in obvious detriment to the image of women. The force of these stereotypes is based on the fact that the distinction between the masculine and the feminine is one way of organizing advantages and disadvantages, social privileges, and power in society in general and at institutional levels.[4] The results of this distinction have traditionally been discriminatory against women.

Stereotypical conceptions related to gender can arise at any moment in routine interpersonal relations. Stereotypes can be explicit or surreptitious in expression, speech and social practice. Stereotypes can even be interwoven in discourses that contradict the stereotype itself, hence, exerting enormous power. That is why the forces that change stereotypes are necessary elements in projects of equity and justice in modern societies.[5]

Historically, obedience to established demands based on gender, even by persons prejudiced by them, was imposed after much struggle and by manifold sanctions applied to men as well

[3] *Id.* In this respect, see the part entitled *The social production of stereotypes* in the chapter of the General theoretical framework in this Report

[4] Nancy Andes, *Social Class and Gender, An Empirical Evaluation of Occupational Stratification*, 6(2) GENDER SOC'Y 231-251 (1992)

[5] IAN PARKER, DISCOURSE DYNAMICS: CRITICAL ANALYSIS FOR SOCIAL AND INDIVIDUAL PSYCHOLOGY 47 (1992).

as women who violated established norms. More recently, the blaming of victims is the most advanced control mechanism over behaviors that have to do with gender. "Blaming the victim" reasons that a victim of discriminatory practices, provokes or desires them and, therefore, deserves them. This kind of reasoning is employed especially when women are objects of rape or sexual harassment. In many cases, women feel guilty when their assigned space is violated. At the same time, men purportedly blame them, "because they are provocative bodies, disobedient bodies, or bodies that are where they should not be."[7]

Regarding the negative effects of such stereotypes in the work place: studies have been made, among others, on the different ways men and women routinely interact.[8] Stereotypes impose burdens on men and women. At the same time, stereotypes promote a double standard about their behavior. A body of evidence on the emotional development of men shows that our society does not allow young men to express their anger in positive ways that permit interaction and solidarity.[9] To the contrary, their anger stimulates an aggressive reaction consonant with perceptions of strength and power that supposedly characterize a man. The man who acts in this way does so within socially established parameters of masculinity. If a woman did the same thing, she would be contradicting what society expects of her. That is why different words are used to describe each case. A

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[7] Madeline Román, *Préndeme fuego si quieres que te olvide... : del delito pasional a lo pasional del delito*, in MAS ALLA DE LA BELLA (IN)DIFERENCIA: REVISION POST FEMINISTA Y OTRAS ESCRITURAS POSIBLES 153 (H. Figueroa-Sarriera et al, eds., 1994)

[8] Among other studies that demonstrate the presence of stereotypes, discrimination, or discussions regarding gender in work centers in Puerto Rico, see: MARYA MUÑOZ VAZQUEZ & RUTH SILVA BONILLA, EL HOSTIGAMIENTO SEXUAL: SUS MANIFESTACIONES Y CARACTERISTICAS EN LA SOCIEDAD, EN LOS CENTROS DE EMPLEOS Y LOS CENTROS DE ESTUDIOS (Río Piedras: CERES, Center for Social Investigations, U.P.R., 1985; LOURDES MARTINEZ & RUTH SILVA BONILLA, EL HOSTIGAMIENTO SEXUAL DE LAS TRABAJADORAS EN SUS CENTROS DE EMPLEOS (Río Piedras: CERES, Center for Social Investigations, U.P.R., 1988); Milagros Bravo et al, La Construcción social del género y la subjetividad: Educación y trabajo, in ALICE COLON, GENERO Y MUJERES PUERTORRIQUE„AS 56-83 (Interchange City University of New York and University of Puerto Rico, 1994). HELEN I. SAFA, THE MYTH OF THE MALE BREADWINNER: WOMEN AND INDUSTRIALIZATION IN THE CARIBBEAN (1995)

[9] Jean Baker Miller, The Construction of Anger in Women and Men, in WOMEN'S GROWTH IN CONNECTION 181-196 (Judith V. Jordan et al. eds., 1991); EDWIN CRUZ DIAZ ET AL., REFLEXIONES EN TORNO A LA IDEOLOGIA Y VIVENCIA MASCULINA (Center for Social Investigations, U.P.R., 1990); ANDREW TOLSON, THE LIMITS OF MASCULINITY: MALE IDENTITY AND WOMEN'S LIBERATION (1977); CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

man expressing anger, for example, is assertive. A woman expressing her anger is seen as aggressive and forceful, adjectives that carry a negative connotation.

Studies on gender also prove that the dissemination of stereotypes has negative effects on their targets, on the persons who circulate them and on institutions. A much debated and researched effect has to do with the credibility of women in the courts. A woman's credibility is impaired when what she says is filtered through the stereotypes subscribed to by her audience, or when her perspective is omitted from the process of analysis and judicial decision. A woman's credibility implies "that what she says be accepted as fact or that her motives be accepted as truth."[10]

In the context of the courts, the negative effect of stereotypes on credibility has also been acknowledged by Norma Wikler based on commission reports on gender discrimination in Maryland and California.[11] Judges tend to think that, under similar circumstances, women merit less credibility than men referring to "aggressive" women attorneys, "emotional" women witnesses, or women expert witnesses in traditionally "masculine" professional fields. Interestingly, says, Wikler, credibility is affected differently by a correlation of gender between the speaker and the listener depending on the subject matter. For example, in testimony of victims of domestic violence in the California study it was shown that more male judges than female (53% compared to 25% for female judges) felt that many women exaggerated their corroborative declarations and testimonies. However, it is important to exercise greater caution in analyzing sexual controversies since these cases evoke such powerful cultural stereotypes that both men and women presume that women lie and "incite" the sexual aggressions involving them.[12] An important source of bias in evaluating women's credibility has to do with what is called the "language of women". For example, it has been proven that more women than men tend to qualify their statements with such expressions as

[10] Norma J. Wikler, Credibility in the Courtroom: Does Gender Make a Difference? (unpublished document)
[11] *Id.* at p. 13.
[12] *Id.*

"about", "perhaps", "probably." Women also tend to use such polite forms as "please" and "thank you"; and to employ adjectives steeped in emotion such as "fabulous". These forms of expressions tend to diminish women's credibility in men's eyes because men perceive such language as devoid of strength and power.[13]

Another aspect of recent investigations on gender that merits notice is the attention given language analysis in the transmission of stereotypes.[14] Language objectivizes shared experiences and makes them accessible to everyone in a linguistic community; in this sense, language symbolizes realities, but because of its semiotic function,[15] it constructs realities at the same time. That is, language creates new realities because it selects meanings, it denotes, interprets and establishes expectations. Language is not a passive element: it molds, directs and structures social relations and individual identities. Its semiotic character permits language to denote power and, at the same time, be an instrument of power.

In studies on language, definitive and distinct patterns have been found in ways men and women communicate. In general, men evidently talk more often and for longer periods than women. Men speak in a sharper tone of voice and interrupt others more often than women do. Men also tend to fill more space-territory than women.[16] Nevertheless, it is women who are stereotyped as talkers monopolizing conversations. Men also tend to vary their topics of conversation more than women do. These different language patterns between men and women have to do with power, because language confers certain advantages on men. Language "imposes" male ideas, male ways of thinking and of working, male work goals and male expectations regarding the behavior of other

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[13] *Id*

[14] See the part titled *The importance of language* in the chapter General Theoretical Framework of this Report.

[15] For a definition of "semiotic", see note 34 in the chapter on General Theoretical Framework of this Report

[16] Nancy Henley & Barrie Torne, *Womanspeak and Manspeak: Sex Differences and Sexism in Communication, Verbal and Nonverbal*, in BEYOND SEX ROLES 201-221 (Alice G Sargent ed , 1977); Candance West, *Rethinking "Sex Differences" in Conversational Topics*, in THE WOMEN AND LANGUAGE DEBATE 263-282 (Camile Roman et al, eds., 1994).

men and of women. As we mentioned earlier, modes of speaking are interpreted as manifestations of "authoritative language," appropriate for men but not for women.

Another aspect of language that current literature has addressed with special attention and interest is about the meaning of gender in appellatives. These words are divided into masculine and feminine, and designate male and female respectively. We identify them as such, primarily , on the basis of the masculine and feminine forms, of the articles "el" and "la" and of some pronouns that are directly grouped with the substantive or allude to it [17] However, "the masculine plurals of articles and pronouns, the, they, these, etc. [in Spanish "ellos," "ellas"], can also designate a plurality of females and males, whatever their number and combination, by virtue of the general or generic idea that is inherent to the masculine. The appellative nouns of a name, on the other hand, have these and other limitations. Not only can the masculine plural, such as *sons, brothers* [in Spanish], signify males, but also males and females together. The masculine singular *man* means male, but can also designate women and men when employed in its general or generic use".[18] That is, when we say: "I have seen them today," the pronoun "them" can either refer to men only, or to men and to women. And when we say: "Language distinguishes man from the animals," the generic masculine singular "man" in this case refers to both men and women.

Experts on women's issues have pointed out that such linguistic usages reinforce a vision of the world from a male point of view and patriarchal concepts that cause gender discrimination. Language can make women invisible and bolster the idea that she is subordinate to man. The mere fact of invariably putting male forms before female forms when using both, reaffirms this notion. This observation is not an exaggerated feminist ideology if we remember that, in effect, historically

[17] REAL ACADEMIA ESPAÑOLA, ESBOZO DE UNA NUEVA GRAMATICA DE LA LENGUA ESPAÑOLA 173 (1973).
[18] *Id.* at p 174.

women have been invisible, and that historically the relevant and protagonistic role has corresponded to the male.

On the other hand, the gender distinction regarding certain types of nouns has shown that language has lagged behind social developments, particularly in reference to women's achievements, recognition of their rights and their entry into the labor force, including fields traditionally considered proper to men and controlled by them. Consequently, language lacks many of the feminine forms that can be applied to jobs and professions. Feminine forms that have been incorporated into some circumstances, are neither socially nor officially accepted by the Spanish Royal Academy of Language. This dilemma also tends to make women invisible and to reaffirm the idea that certain professions and jobs are more appropriate for men and, at the same time, becomes an impediment in the struggle of women to overcome obstacles erected by the social constructs of gender.

Thus the proposal to use, as far as possible, gender neutral language; to insist in the use of both feminine and masculine plural forms thereby eliminating the latter's generic character. To say, for example: the fathers and the mothers, the male and female prosecutors (in view of the fact that *fiscala*, the feminine expression of prosecutor in Spanish, has not taken root), the male and female judges. Also, a movement to create and generalize feminine forms of nouns that refer to professions or occupations has been persistent.[19]

It is noteworthy that language is not immutable although conscious change may seem difficult to achieve. Language varies according to social and cultural change. That is why it is necessary to understand that language is not fixed, but in constant flux. Language is a product, a human construction, as is any other human conduct. Those changes, that historically have been primarily

[19] See: Isabel Picó and Idsa Alegría, *El texto libre de prejuicios sexuales y raciales*, EL SOL 14-15 (Official Review of the Puerto Rico Teachers' Association, XXVIII Year, No. 2, 1983)

unconscious, can be steered through processes of orientation and awareness. That, precisely, is what has been attempted in this case.

A third form of language usage that illustrates its quality as an instrument of power has to do with attributing meanings to words. Behind every word is a social construction. For example, the words "man" and "woman," "masculine" and "feminine" do not have inherent meanings of universal value; to the contrary, their meanings vary from culture to culture and from epoch to epoch.[20] The socially dominant meaning of a term in a given epoch and culture concerns ways in which their different meanings compete in an extended purview (for example, employment, family, man-woman relations) to make sense of reality and to organize social institutions and their processes. For many persons, for example, the feminine term is associated with such concepts as weak, feeble, soft, delicate, feminist. So much so, that even the *Diccionario Español de Sinónimos y Antónimos* correlates them.[21] However, for many women the feminine is not associated with "feeble"[22] or "weak," words that convey negative values in nearly every context.

For many women, the term "feminist" is, in fact, coupled with the history of struggles for social equity between men and women; for others, however, the term "feminist" means conflict with men. These definitions compete to predominate, and it is that competition—to define our being and our world—that makes language retain its prominent position as another weapon in the struggle that could lead to greater social equity in labor organizations and in society

Language responds in many ways to the cultural conceptions of each society. In a society such as Puerto Rico which places so much emphasis on the virginity of women, the word "Miss" (*señorita*) together with the word "Mrs. " (*señora*) also apply, respectively, to single women and spouses. This type of distinction does not exist for men. Conversely, the word "Miss," tacitly con-

[20] CHRIS WEEDON, FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY 12-42 (1987).
[21] DICCIONARIO ESPAÑOL DE SINONIMOS Y ANTONIMOS 507 (1981).
[22] "Feeble" is defined as lax, of little strength or resistance. MARIA MOLINER, DICCIONARIO DE USO DEL ESPAÑOL, (Madrid, Ed. Gredos, 1984).

veys in its diminutive the idea of smallness, of immaturity, of a woman who has attained puberty but is unfulfilled. All these connotations appear, in one form or another, in the interaction between women and men, marking differences that frequently have discriminatory aims or outcomes.

The use of the diminutive in general, applied consistently and more frequently to women, reflects similar conceptions and produces the same results. The "diminutive" deflates, lessens and shrinks. The diminutive transmits a strong emotional charge that in its negative aspect can be sharply pejorative or contemptuous. In its positive aspect, however, the diminutive can either suggest affection or allude to delicate, pliant, tender, sweet and gentle notions. It can also belittle the object of its affection. Sentiments of affection, especially when exercised outside of a strictly family or intimate setting, can be condescending and underestimate the person referred to. Yet, references to dainty and delicate notions can and do have negative effects on women in that they reinforce sexist stereotypes that buttress discriminatory treatment.

The diminutive is often linked to "terms of endearment," that is to say, words of affection, that are commonly used in family or in intimate relations, Depending on the occasion and the circumstance, however, "terms of endearment" take on different meanings. Expressions such as: lovey, *negrita*,[23] dearie, my child, girl are good examples. These words, applied primarily to women within certain groups, can even have sexual connotations, and emerge as an important element in creating what legal doctrine has defined as a hostile environment in the work place within the framework of sexual harassment. More than affection and special considerations underlie these expressions. Often, there is also a kind of manipulation that aims to gain favor for those who use them. In a professional environment, "terms of endearment" can discredit the intellectual and professional capacity of the persons so espied. These expressions also crystallize painful sexist stereotypes and, when said by superiors, bolster notions of inferiority, of diminished worth or im-

[23] An adequate translation to English of this term does not exist

portance in their subordinates. Many of these situations occur at conscious levels, oblivious to the harm they may cause. That is why consciousness-raising is so important in combating discrimination in all its variations.

The way people routinely treat each other constitutes another form in which discrimination reveals itself. The informality between friends and family has no place in official settings where relations are more formal, or where tradition and custom require formality. In those circles familiarity or informality, applied chiefly to women, responds to sexist stereotypes and rouse various forms of discrimination.

Non-verbal language, comprising gestures, poses and body movements, looks and facial expressions, greatly impact interactional dynamics. Body language tends to reproduce, consciously or not, the same prejudices and attitudes reflected in the spoken word. A mocking smile, a raised eyebrow, occasionally says as much or more than a word. If both resources are used, the result can be dramatic.

It is well-documented that stereotypes relative to women occur every day at their jobs. It is also clear that Puerto Rico is no exception to the rule. The specific signs of stereotypes are varied: pejorative jokes, out-of-context flattery, non-verbal sexist language, subtle sexist expressions, sexual harassment and more. Our investigation of the interaction between men and women in the courts revealed that they are not exempt from harboring stereotypes.

Juridical Framework Applicable to Court Interaction

The Constitutional clause that prohibits sex discrimination in Puerto Rico [24] and Sections 1 and 8 of the Bill of Rights, that protect the "dignity" of the human being and the "honor, [the] reputation and [the] private or family life of Puerto Ricans," provide the parameters for the appli-

[24] Constitution of the Commonwealth of Puerto Rico, Art, II, Sec. 1.

cation of the Canons of Judicial and Professional Ethics and the legal statutes that embody the interaction between female and male officials, employees, and the public that daily interrelate in the courts of the country. Surely, one cannot abstract constitutional precepts when interpreting the scope of legal or ethical requirements prohibiting conduct that is harmful to human dignity and demanding dignified, compassionate, respectful and honorable treatment toward persons who turn to the court out of need or for work-related reasons.

As the Constitutional framework of this Report points out, the clause that supports the inviolability of the dignity of the human being operates *ex proprio vigore*, that is, it does not require any specific statute to enforce it before the courts, and can be invoked in acts of the State and in certain cases related to private individuals.[25] In that regard, since the Judicial Branch is part of the government of the Commonwealth of Puerto Rico, any of its acts that imply discriminatory treatment toward any person because of gender could give rise to a cause of action guaranteed by the Constitution. Our Supreme Court has recognized the right to be compensated for prejudices that arise when the State interferes with any individual rights recognized by Constitution itself. This cause of injury, however, does not prevent the individuals affected from safeguarding and protecting their rights through some other available legal recourse, such as interdictory action.[26]

A. Canons of Judicial Ethics

The Canons of Judicial Ethics of Puerto Rico regulate the interaction of judges with every person they relate to in the performance of their judicial functions, as well as in their personal lives. These Canons, adopted by the Supreme Court in 1977, constitute "minimum rules of behavior that every judge must follow faithfully[27] ... [and] they do not exclude other forms of con-

[25] Constitution of the Commonwealth of Puerto Rico, Art. II, Sec. 1

[26] See *Arroyo v. Rattan Specialties Inc.*, 117 D.P.R. 35 (1986).

[27] CANONS OF JUDICIAL ETHICS OF PUERTO RICO, Canon XXVI (1977), 4 L.P.R.A. Ap. IV-A

duct...established by law or that are inherent to the traditional decorum of the Judiciary". According to Canon I, in addition to administering justice, the courts have the mission to maintain the faith of the people in them, "to the highest levels of public responsibility," "as an essential value of democracy." Because of this, the canons impose on judges the duty to "watch that their acts respond to norms of conduct that honor the integrity and independence of its ministry and stimulate the respect and the trust in the Judiciary."[28] Further, the canons require that judges' conduct also be correct in appearance. "Recognizing that the strength of the judicial system and, with it, the strength of democracy, depends on the trust that its people have in its integrity and the independence of judges," this first Canon requires judges to uphold their own image of integrity and independence and that of the whole judicial system.[29]

Canon XI also underscores the importance of impartiality and integrity of the Judiciary in concrete and extraneous terms: "A Judge should not only be impartial, but his conduct must exclude every possible appearance that he is susceptible of acting under the influence of persons, groups or parties, or that he may be influenced by public clamor, by considerations of popularity or notoriety, or by improper considerations." His only endeavor "shall be to administer justice...with absolute equanimity". This Canon compels, in turn, all judges, to ensure that all officials, employees of the court under their direction act in accordance with those principles.[30] That is, they must ensure that the deportment of those persons is just as scrupulous in form and content so that the image of integrity, impartiality and independence of the judicial system is not tarnished in any way.

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[28] *Id.* Canon I.

[29] Rafael J. Torres Torres, *Canons of Judicial Ethics of Puerto Rico*, FORUM 7 (9th year, Nos 1-4, October 1993). See: *In re Brignoni*, 84 D.P.R. 385 (1962); *In re* Rodríguez, 81 D.P.R. 643 (1960); *In re Mar'n Báez*, 81 D.P.R. 274 (1959)

[30] CANONS OF JUDICIAL ETHICS, *supra* note 27, Canon XI.

Canon II stipulates that judges be industrious, prudent, serene, impartial and careful. The impartiality, objectivity and prudence required of judges at all times implies that it would be absolutely improper for them to incur in, or give the impression of incurring into, any kind of discrimination in performing their judicial functions, whether it be on the basis of sex, race, religion, nationality or socioeconomic standing. By the same token, judges are required to take measures to prevent any person from making derogatory remarks in the court that suggest any kind of discrimination. To allow such remarks could give the impression that the judge shares the opinion of the person who expresses them and, consequently, the entire judicial system as well. It would contradict this Canon, and others, to treat lawyers, parties and witnesses discourteously; to treat court personnel in an abusive manner; to use improper language as to another person; and to not pay attention to the testimony of witnesses or give them the credibility they deserve because of personal prejudices.[31]

For its part, Canon IV states that judicial conduct "shall be characterized by mutual respect, cordiality, and professional collaboration" and that judges should avoid making "unfounded or unnecessary criticism that may tend to discredit his fellow judges".[32] This canon also requires judges to initiate appropriate disciplinary proceedings against any judge or lawyer whose improper or dishonorable conduct is personally known to them. Each judge must be vigilant of the system's image. That is why judges cannot be indifferent to improper conduct of their professional colleagues. Clearly, this reasoning includes any conduct based on discrimination because of gender.

The behavior of a judge in the courtroom is governed by Canon XVI, which stipulates that "[a] Judge should be considerate and respectful to lawyers...to witnesses, jurors, court officials, and to all those who appear before him". Likewise, judges are required to ensure "that lawyers and

[31] Torres Torres, *supra* note 29, at p. 8.
[32] CANONS OF JUDICIAL ETHICS, *supra* note 27, Canon IV.

other court personnel and employees under his direction observe the same conduct".[33] As the central figure in the judicial system and the court's maximum authority, the judge must enforce the rule of respect for the dignity of every human being. From the moment the courtroom opens, the judge must treat the public and the lawyers, officials, employees of the court with the consideration and courtesy that they deserve. Judges must also ensure that each one act according to uniform norms of behavior. To that effect, the judge "must not permit in his courtroom any attorney, party, official or employee of the court to utilize inappropriate language, words, or abject behavior concerning victims and witnesses, especially against vulnerable persons.[34]

With respect to this Report, Canon XVII, titled "General attitude; praise or censure of conduct of attorneys," is essential:

> A Judge should direct the work of the court with order and decorum and he shall be alert to avoid any conduct that might affect the dignity and respect due to the court. He shall intervene to prevent improper conduct of the parties, lawyers, or any other person, and shall take the action which, at his discretion, is in order pursuant to the law, the canons of professional ethics, and the best traditions of the judicial system.
>
> During the course of [a] court proceeding, a Judge should maintain his general attitude, his expressions and his tone of voice within due propriety and circumspection, without showing excessive impatience or severity. He shall not makecomments or gestures alien to the judicial process, including derisive or mocking comments, expressions or gestures; neither shall he ridicule lawyers, parties, witnesses, court officers, or other persons who appear before him.[35]

Judges are obliged to establish guidelines of appropriate conduct in courts. Since judges are central figures of authority, as we have said, their conduct will serve as a model for the rest. In line with this responsibility, judges should avoid "any expression that may reflect prejudice of any kind and that may cast doubt on their capacity to act impartially. These expressions include jokes

[33] *Id.* Canon XVI

[34] Torres Torres, *supra* note 29, at p. 21

[35] CANONS OF JUDICIAL ETHICS, *supra* note 27, Canon XVII

or derogatory comments based on race, sex, religion, nationality, origin, age, sexual orientation, a physical impediment, or socioeconomic standing"[36]

The Canons of Judicial Ethics do not expressly refer to incidents of gender discrimination in court interaction such as, for example, sexual harassment in its contour of a hostile environment, sexism in language or denigrating or stereotypical remarks. However, to the extent that they require judges to be impartial and objective in administering justice, and obligate judges to preserve an environment free of anything that contravenes human dignity, any remark or action based on gender discrimination is forbidden in the courts because such remarks and actions counteract the spirit of the Canons. The Canons also require judges guard against dishonorable and improper conduct - such as sexual harassment or calling into question personal or professional credibility on the basis of gender - occurring in their courtroom. The Canons also require judges to initiate disciplinary proceedings against any judge, lawyer, or employee incurring in this kind of conduct.

Although the prohibition of gender-based discrimination is implicit in the canons, the Commission considers that the Canons of Judicial Ethics should be amended to make the prohibition categorical and to make the corresponding reference to gender-based discrimination throughout the text. Aside from that, the language of the canons should be revised to eliminate the generic masculine and, as far as possible, to use gender neutral language.

B. Code of Professional Ethics

The Code of Professional Ethics governs the interaction of lawyers within the courts, and outside the courts regarding their clients and colleagues. As a general obligation, it imposes on them:

> the responsibility of seeing to it that the different legal procedures of society embody and consecrate effectively and adequately the principles of

[36] Torres Torres, *supra* note 29, at pp. 20-21.

> democratic living and of respect for the inviolable dignity of the human being.[37]

It also stipulates that "[i]t is always incumbent upon every lawyer to see that an atmosphere of decorum and formality shall always prevail in the courts and to strive to improve the quality of justice."[38]

Canon 9 requires lawyers to supervise the conduct of court officials:

> Appropriate respect toward the courts also includes the obligation to take legal measures against judicial officers who abuse their prerogatives or who do not properly perform their duties, and who do not observe a courteous and respectful attitude.[39]

Likewise, the Code of Professional Ethics obliges lawyers to treat adverse witnesses and litigants with respect and consideration; it deems improper using legal procedures unreasonably or to harass the opposing party; and requires lawyers to ensure that every person, including their own clients, complies with these standards of behavior toward witnesses and opposing parties.[40]

The last part of the Code of Professional Ethics, pertaining to the duties that members of the legal profession have toward each other, points out that "to uphold the honor and dignity of the profession and good relations between colleagues is the unavoidable responsibility of every member of the legal profession....".[41] Lawyers should behave in a respectful and honorable manner toward their professional colleagues.[42]

Like the Canons of Judicial Ethics, the Code of Professional Ethics does not contain any specific reference to discriminatory conduct based on gender. Nonetheless, this kind of conduct is contrary to these canons in that it goes against "the principles of democratic life and the inviolable dignity of the human being," the bedrock of conduct required of every lawyer. The Commission

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[37] CANONS OF PROFESSIONAL ETHICS, Part I, General Purpose (1970) (amended 1980), 4 L.P.R.A., App. IX

[38] *Id.* Part II, General Purpose

[39] *Id.* Canon 9.

[40] *Id.* Canon 15

[41] *Id.* Part IV, General Purpose.

[42] See the case of *In re Calderón Marrero*, 122 D.P.R. 557 (1988).

recommends that the Code of Professional Ethics also be revised in the same manner as the Canons of Judicial Ethics.

C. The Judicial Branch as Employer; the Policy of the Office of Courts Administration on Sexual Harassment in the Work Place

According to the explanation given in the legislative analysis that forms part of the section on labor in this Report, sexual harassment in employment has been explicitly prohibited in Puerto Rico for decades. The General Court of Justice, as is every employer, is subject to the laws that regulate the workaday aspect of life. Among other laws, Act No. 69 of July 6, 1985 specifically prohibits discrimination in employment for reasons of sex.[43] It's worth noting, however, that neither affirmative measures have been taken to make the system's employees aware of that prohibition, nor have procedures been developed to channel and facilitate the presentation of claims about it.

By the same token, the General Court of Justice is subject to the stipulations of Act No. 17 of April 22, 1988,[44] which prohibits sexual harassment in employment and holds civilly responsible both private and public employers, as well as individuals who participate in discriminatory conduct.[45] In compliance with the law, on February 27, 1989 the General Court of Justice adopted its *Policy on Sexual Harassment in Employment* and applied it to every employee of the Judicial

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[43] 29 L.P.R.A. secs. 1321-1341 (Supp. 1994).

[44] 29 L.P.R.A. sec. 155 et seq. For a broader explanation of this law's text and the interpretive jurisprudence, see the pertinent discussion in the chapter of this Report on Labor Law.

[45] See Arts. 11 and 12, 29 L.P.R.A. secs. 155j and 155k, respectively.

Art. 11 states, in part, that:

Any person responsible for sexual harassment in employment as defined by sections 155-155l or this title shall incur civil liability:

(1) for a sum equal to double the amount of the damages that the action has caused the employee or job applicant; or

(2) for a sum of not less that three thousand (3,000) dollars at the discretion of the court, in those cases in which pecuniary damages cannot be determined.

Art. 12, in turn, states:

The party that is found guilty of the behavior prohibited pursuant to the provisions of sections 155-155l of this title shall pay the attorney fees and costs of the proceedings as established by a competent court.

Branch, irrespective of rank or position. According to Memorandum No. 117 of March 2, 1989, the document was circulated to all Presiding Judges and Judges of the Courts of First Instance, Municipal and of Peace, all Coordinators of Administrative Affairs, Executive Directors, Secretaries, Bailiffs, and to the Supervisory Personnel of the Office of Courts Administration, with specific instructions from the Administrative Director that they give the document ample publicity "so that every job applicant and every employee know the rights and protection conferred upon them by the law".[46] Part IV of the document establishes and declares as public policy that sexual harassment on the job or job-related is illegal and discriminatory because of sex and would not be tolerated from any employee, regardless of rank or position. Part V of the document also establishes the procedure to be followed by every Judicial Branch employee or job applicant who conclude they are victims of sexual harassment, either from supervisors, co-workers or clients.

Despite the foregoing, the truth is that the policy on sexual harassment has not been adequately circulated since 1989, which is why it is practically unknown. Still, the established procedure, as will be seen later in this Report, sins by being incomplete and inadequate. The Commission recommends that the Judicial Branch act more affirmatively than it has by starting to redefine more clearly its policy on sexual harassment, and to establish an effective claims procedure easily accessible to those who wish to use it.

In keeping with Judicial Ethics Canon V, members of the Judiciary are obligated to carry out said policy "carefully and diligently" and to ensure that it is faithfully performed.[47] The judicial system is also a work center. The ample discretion conferred on judges by the various procedural laws and regulations that control judicial proceedings—to impose sanctions, adjudicate controversies, recommend contracting employees of trust and recommend promotions and increases in sala-

[46] See the discussion of this matter in the chapter of the Report on Judicial Administration

[47] "A Judge shall carefully and diligently discharge the administrative responsibilities imposed upon him by the laws and regulations applicable to the judiciary and he shall follow the instructions of the Office of Courts Administration."

ries—places them in the position of control that corresponds to the position the Law of Sexual Harassment categorizes as "supervisor".[48] That statute assigns absolute responsibility to the employer, understood here as The General Court of Justice, for acts of sexual harassment between employees in the work place if the employer, its agents or supervisory personnel knew or should have known of such conduct and did not act in an "immediate and appropriate" way to correct the situation.[49]

In addition, Article 7 of the law holds responsible The General Court of Justice for acts of sexual harassment committed in the work place by non-employees as well as employees, as long as the organization, its agents or supervisory personnel knew or should have known of such conduct and did not take "immediate and appropriate action" to correct the situation.[50] In exacting such responsibility from the General Court of Justice, according to Article 7, "the extent of the employer's control and any other legal liability that the employer can have with respect to the behavior of persons not employed by him" must be taken into account. This legal responsibility, as we have seen, originates in the Canons of Judicial Ethics, which compels Judges to vouch for the conduct of all persons who come before their courtrooms, whether or not they are court officials under their supervision.[51] Specifically, Canon XVII requires that judges intervene to prevent any improper conduct by parties, lawyers, or any other person, and obliges them to react, at their discretion, according to "the law, the Canons of Professional Ethics and the best tradition of the judicial system".[52]

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[48] See Art. 2(4), 29 L.P.R.A. sec. 155a(4):
"Supervisor" means any person that exercises some kind of control or whose recommendation is taken into consideration for the contracting, classifying, discharging, promoting, transfer, fixing compensation or working hours, places or conditions or the tasks or duties that an employee or group of employees perform or may perform, or on any other terms or conditions of employment, or any person that performs day to day supervisory tasks."

[49] See Art. 6, 29 L.P.R.A. sec. 155e.

[50] 29 L.P.R.A. sec. 155f.

[51] Canon XVI

[52] See also Canon IV

D. The Bill of Rights of Victims and Witnesses of Crime

On April 22, 1988, the Legislature of Puerto Rico enacted Act No. 22 to incorporate into a single body of law, which it called "The Bill of Rights of Victims and Witnesses of Crime," the responsibility of government agencies and persons and private entities in certain cases to provide victims and witnesses with the necessary protection and assistance.[53] The Bill gathers all the rights that until then had been recognized in diverse legislation. These were complemented by other guarantees recognized in other jurisdictions, and adapted to the reality of our system.[54]

Act No. 77 of July 9, 1986 was one of the laws that was so incorporated. This law had already declared the public policy of the Commonwealth of Puerto Rico: to "provide protection and assistance to the victims and witnesses during court proceedings and also during investigations carried out to promote full cooperation and participation free from intimidation in those proceedings." This public policy responded to the need to correct the imbalance that existed between the protection of the accused and the protection of the victims, recognizing that "the efforts of the Government and of the community should be directed toward satisfying three basic needs of the victims: that their dignity respected, that they be protected and that they be consulted".

For its part, the Bill of Rights established by Act No. 22 recognizes that every person in our country who is a victim of a crime or a witness to it has the following rights, among others: To "receive compassionate and dignified treatment from the public officials and employees that represent the agencies that comprise the criminal justice system" during every stage—from the initial investigation to post sentencing—of any criminal case filed against the accused. To "receive orientation about all medical, psychological, social and economic assistance programs that are available in the Commonwealth of Puerto Rico, to receive correct information from officials and employees

[53] 25 L.P.R.A. secs. 973-973c.

[54] Statement of Motives, Laws of Puerto Rico, 1988, at p. 93.

of public and private agencies that administer those programs, and to be oriented about the procedures to apply for such services". To "receive at all times they are testifying in court or before a quasi-judicial body, respectful and dignified treatment from lawyers, prosecutors, judges, and pertinent officials and employees, and the protection of the judge or official in cases of harassment, insults, attacks and abuses to the dignity and honor of the witness or of his family and relatives." This includes the right of rape victims to not be questioned on their sexual history, pursuant to the provisions of Rule 21 of the Rules of Evidence.[55]

Implicit in the right of every crime victim and witness to dignified and compassionate treatment from all agency officials in the criminal justice system, is the right to not be discriminated against on the basis of gender. It is also implicit in their right to receive respectful and honorable treatment from lawyers, prosecutors, judges, and other persons in the judicial process. In acknowledging the right of victims and witnesses, as well as their family and relatives, to demand that the judge or official of the judicial or administrative hearing in which they are providing testimony, protect them against harassment, insults and attacks against their honor and dignity, the Bill also entitles them to protection against discriminatory attacks based on gender.

Analysis of Findings

1. *We did not find that any effort had been made in thejudicial system to use feminine forms of language or gender neutral language in daily speech, in proceedings, documents and the formulation of internal regulations.*

The Commission received innumerable testimonies to the effect that, as a general norm, personnel of the entire justice system—judges, prosecutors, lawyers, officials—are not conscious in any way of the fact that the mere use of language helps to register differences between women and men and to strengthen patterns of discriminatory treatment.[56]

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[55] 32 L.P.R.A. App. IV, R. 21.

[56] See the Introduction to this chapter of the Report; see, also, Hearings, May 13 and 14, 1994, at p. 6.

Indeed, the fact that the use of the feminine form of judge "*jueza*" [in Spanish] has not been widely accepted in the legal profession and is not even accepted by women, is an example of the above. The same rebuff occurs with the word "notary" [in Spanish *notaria*], to the degree that it is customary for women lawyers to use the phrase "*abogada notario*" in their advertisements. A female lawyer told the Commission that when she ordered her notary seal with the words "*abogada notaria,*" even the owner of the company where she had ordered the seal thought the use of feminine form was inappropriate.[57]

Even though women have been able to become, to an extent, bailiffs and prosecutrices, the words for female bailiff (*alguacila*) and female prosecutor (*fiscala*) have not been granted a certificate of citizenship in the language. To the contrary, there is a general resistance to those terms. It should be noted, however, that the feminine form prevails in certain positions such as *secretaria* (secretary) and *secretaria de sala* (court secretary). This occurs, of course, in those areas of work that today are primarily occupied by women.[58] This also occurs with "family solicitors" (*procuradoras de familia*) and "juvenile solicitors " (*procuradoras de menores*), titles for which the feminine form is preferred even though men are dedicated to these areas of work.[59] Obviously, that responds to the relationship established between the areas of family and juvenile law and female aptitudes.[60]

The generic use of masculine words, on the other hand, is an established norm of the system: the legislator (*el legislador*), the lawyer (*el abogado*), the judge (*el juez*), the prosecutor (*el fiscal*), the bailiff (*el alguacil*), applicable only to men, as well as to both men and women. A glance at the Canons of Professional Ethics and the Canons of Judicial Ethics suffices to know that

[57] Hearings, June 3 and 4, 1994, at p. 20.

[58] See the discussion of this matter in the chapter of this Report dedicated to Judicial Administration.

[59] Hearings, June 10 and 11, 1994, at p. 17

[60] See the discussion on the assignment of work to judges in the chapters of this Report dedicated to Judicial Administration and the Rights of Persons and Family.

the use of the generic masculine dominates the complete text. Likewise, the generic masculine plurals that make women invisible. For example, "[t]he judge (*el juez*) should be considerate and respectful with the lawyers, especially with those who are starting in the profession".[61] Noteworthy linguistic aspects in this guideline can be observed. The generic "*Juez*" in this case means both male and female judges. The phrase "*los abogados*" (the lawyers) refers to both male and female lawyers as does the masculine pronoun "*aquellos*" (those). All of this makes women judges and lawyers virtually invisible, and reinforces a conception of the world and reality from the male point of view.

One detail brought to the attention of the Commission on several occasions is that every form used by the system is aimed at men, making women totally abstract, except in matters that can only affect women. The use of the generic masculine also dominates the regulations of the system, among them: Rules for the Administration of the Court of First Instance, Regulation of the Circuit Court of Appeals, Regulation for Personnel; and in the Manual of Instructions to the Jury, a situation that, under certain circumstances, could even confuse that body.

A study conducted in the United States about giving a jury instructions on self defense and drawn up on the basis of the generic masculine, offers a good example. A mock trial was prepared using an actual situation. Two jury panels were selected. One panel was given instructions on self defense that were formulated on the basis of the generic masculine. Instructions given to the other panel, however, were formulated using both the masculine and feminine genders. The results were different; the persons on the first panel tended significantly to believe that the woman had not acted in self defense, contrary to the second panel.[62]

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[61] CANONS OF JUDICIAL ETHICS OF PUERTO RICO Canon XVI (1977), 4 L.P.R.A. App. IV-A.

[62] Mykol C. Hamilton et al, *Jury Instructions Worded in the Masculine Generic: Can Women Claim Self-defense When "He" is Threatened?*, in THE WOMEN AND LANGUAGE DEBATE, A SOURCEBOOK 340-347 (Camille Roman et al. eds., 1994).

The court watching study carried out for this Commission demonstrated that in every procedural aspect the use of the masculine forms of language was predominant. Feminine forms were rare. It was observed, for example, that members of the jury were referred to in the masculine: "Gentlemen of the jury" or "Gentlemen of the panel."[63] According to the observation group, the language situation was not simply about the dominance of traditional grammatical standards: there was also the prevalent conviction that the central figures in the judicial process are male.[64]

It is essential to make the system aware about these aspects of language and their relation to gender discrimination and to revise the forms, regulations and other documents of the system to include the feminine forms of language, or to draft them in gender neutral language.

2. *Daily interaction in the courts is marked by sexist attitudes that go undetected or are not questioned and generally work against women. These attitudes assume many forms: using the familiar form of speech when addressing a person (tuteo) and informality, the use of terms of endearment, the particular use of certain linguistic forms, non-verbal language, sexist jokes and expressions, and coquetry (piropos), among others.*

The Commission heard multiple testimonies to the effect that women are usually subject to coquetry and informality in the courts, whereas men are not.[65] In the formal environment of a courtroom, where the judge is referred to as "your honor" or by such expressions as "the honorable court," male attorneys, male parties, witnesses or expert witnesses are also treated formally. Similarly, male judges and lawyers are also treated formally outside the courtroom. The situation differs, apparently, for female lawyers and for women in general, even from bailiffs and other low-ranking court officials. Female lawyers are even addressed by their first names, especially by certain persons, while male lawyers are generally addressed by their surnames—usually preceded by their professional title. To the degree that this takes place, the fixed impression that men should be

[63] Report on the Observation of Proceedings in the Courts (Appendix D of this Report)
[64] *Id.*
[65] For example, Hearings from May 13 and 14, 1994, at pp. 6-7.

treated with greater deference and with personal and professional respect is reaffirmed—subsequently underestimating women

Closely linked to the above are the so called terms of endearment and certain linguistic forms, such as the diminutive[67] Particularly numerous were testimonies received by the Commission about dissimilar treatment women receive in the courts in the way they are referred to, with especially inappropriate expressions in that context. These include expressions such as: "lovey", "dear", "*negrita,*" "mommy," "girl," "love," " beauty," "my life," "my love "[68] These phrases, charged with affection, are not used as frequently with men, much less in the courts. They often conceal condescending attitudes and negative perceptions regarding the intellectual competence of women, or reinforce sexist stereotypes that work against them [69]

This situation, of course, primarily occurs outside the court, but occasionally it is even heard within the court itself especially words like "girl" and the much generalized "my child" (*mijeo*).[70]

Female judicial officials, among others, testified that they are frequently called "girls" by male judges, lawyers and other court personnel, a word that encloses multiple negative connotations, even though they may not be intentional. However, when applied to women, the word "girl," reinforces notions of lesser value and importance, of diminished intellectual and professional abilities when compared to men. This kind of treatment is not afforded male judicial officials, who are usually addressed by their professional title of attorney.

The use of the diminutive, already present in these terms of endearment, produces greater impact, since it's taking place in the courtroom itself. According to the testimony of several depo-

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[67] *Id*

[68] This resulted from the Focus Group Interviews carried out by the Commission with litigating lawyers, female judges, domestic violence victims, and also with lawyers and judges. Also, from the hearings held and from the study of direct observation of the proceedings in the courtroom

[69] See the Introduction to this chapter.

[70] Hearings, May 13 and 14, 1994, at p. 6

nents, male as well as female, expressions like "young lady"; "little lawyer (female)," " little prosecutor (female)" are not unheard of in court proceedings. Seldom heard are their masculine counterparts. These phrases take away credibility and importance from women and underestimate their intellectual and professional competence. On the other hand, these words are also used as a tactic or strategy in the adversarial process that characterizes our legal system; the irony, ridicule and underestimation implicit in these linguistic forms can cause women to "lose their cool" emotionally or divert their attention, distracting them from their line of argument.

The non-verbal language of some men in the court produces similar results, especially when it is accompanied by expressions that try for a derogatory effect. Derision, an occasional chortle, facial and corporeal gestures, and other forms of non-verbal expressions, are considered part of the game of strategy in these adversarial proceedings and, generally, do not move the court to prevent or reprimand such conduct even when the presence of sexist attitudes are clearly behind them. The lack of consciousness that has traditionally prevailed in these areas causes much of this conduct to go undetected, or be incurred in without considering the implications and the effects on the targeted persons.

This is the dilemma of many expressions and sexist jokes that are spoken and permitted in the courts, and in which some judges take part, without considering the effect they have on women. A female prosecutor brought this example to the attention of the Commission: In a criminal case she gave her name and told the court that she represented the public interest. The judge asked her roguishly if she was a Miss or a Mrs. The prosecutor looked at the courtroom filled with men, and replied: "Honorable Judge, I am a prosecutor."[71] Apparently, the prosecutor recounted this case because she was either annoyed or somewhat surprised by the question, since her status as a mar-

[71] Focus Group Interview, Female litigation lawyers and prosecutors, at p. 11

ried or single woman had no relation whatsoever to the professional duty for which she had appeared in court.

A similar case was observed in a courtroom during a direct investigation carried out by the Commission: In a courtroom procedure, a male defense lawyer referred to the two representatives of the public interest, both women, as "the little ladies of the Prosecutor's Office." Both women protested vehemently, but the judge did not address the matter. Later, one of the women complained to the court watcher about the judge's passivity regarding behavior she considered inappropriate.[72]

Many female and male participants in the hearings and in the focus group interviews spoke about gender discrimination made manifest in expressions, comments, insinuations and jokes told by male court employees and officials, even judges, about women lawyers, clients, witnesses or visitors. For example, in family or criminal cases in which the affected persons are women, some bailiffs will call them "crybabies" and "hysterics," which responds to stereotypical visions that hide a lack of sensitivity toward problems that women face in these areas.[73] Also brought before the Commission were examples of judges who, in hushed tones, make remarks like the following to male prosecutors and lawyers: " And the victim? Is she pretty? because if she is ugly, I'll absolve him;" or "I'll have to see if its worth it to hear the case, or if that guy had good taste."[74]

One female judge told the Commission of having listened to a male judge say: "Women should be washing dishes in the house and having children". Although the male judge said it was a joke, the female judge felt that he had verbalized his true feelings.[75] No matter, he did not take into consideration the effect of his "joke" on his female colleagues, nor that this kind of comment exacerbates the difficulties encountered by women who work outside the home.

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[72] See Report on the Observation of the Proceedings of the Courts

[73] Focus Group Interview, Male litigation lawyers, and female prosecutors, at p. 84

[74] Focus Group Interview, Female Judges, at p. 23.

[75] Id. at p. 45

One female judge said that when she was a prosecutor she had to resist jokes by male prosecutors about women witnesses who came to the prosecutor's office. For example, whenever there was a woman in the waiting room who alleged to have been raped, word got around and everyone showed up to look at her. Subsequently remarks such as the following were made: "Who would think of raping such an ugly woman?" Or, if the woman was pretty: "Anyone would rape that woman".[76] A judge, on the other hand, told the following story: Another judge presiding a divorce hearing, looked at the woman, and told the spouse in open session: "Don't tell me you want to divorce yourself from this monumental icon."[77]

Sexist expressions run the gamut. For example, it was remarked that male attorneys and prosecutors in the courtroom who say they have no objections to allegations made by a female lawyer yet allude to the fact that the lawyer is a female and pretty. It was said that judges allow this kind of comment instead of reprimanding those who make it.[78]

The Commission heard many stories about judges and lawyers who, even in the courtroom, alluded to the physical attributes or the elegance of some female lawyers. The situations were inappropriate because of the locale and because the female lawyers were performing professional duties and expected to be treated professionally.[79] In addition, the impact of these comments and that coquetry on women is not taken into consideration. Some female lawyers tolerate or ignore them, however, so as to not affect their cases.[80]

It was also pointed out that secretaries and the rest of the female court personnel are silent victims of chauvinist attitudes of men. They must bear the "wit" of chauvinist male judges and

[76] Hearings, June 10 and 11, 1994, at p. 12.
[77] Hearings, June 17 and 18, 1994, at p. 8.
[78] Hearings, June 3 and 4, 1994, at p. 8.
[79] Hearings, June 24 and July 1, 1994, at p. 16.
[80] Hearings, June 10 and 11, 1994, at p. 40.

lawyers, their insipid jokes and their constant and guarded allusions to their [women's] physical attributes and sex life.[81]

The flirtatious remark was singled out for serious discussion during the participatory investigative sessions with female and male judges from the different judicial categories. There were those who alleged that these come-ons were not about gender discrimination; rather they were of a cultural nature. Others argued, that coquetry was indeed discriminatory. The consensus, however, was that the flirtatious remark is inappropriate in the courts, especially when the court is in session. This Commission believes inappropriate flirtation to be a discriminatory practice based on sexist stereotypes. It does not consider the discomfort and displeasure of women. Rather it considers the satisfaction of the man who voices the flirtatious remark and thus, reduces the credibility and effectiveness of the woman who appears before the court as a professional or in other matters.

On the other hand, there were those who argued that pretty lawyers could be the object of discriminatory treatment by judges in their favor, which can be seen in the flattering way judges address them. Clearly, we are talking about the bad impression that flirting with a female lawyer can have on a third party who hears it. Surely purging coquetry from the courts would help prevent these bad impressions and the discomfort that they cause.

3 *The absence of clear and uniform dress codes in the courts has gender-based discriminatory effects that are even reflected in the treatment of women in the courtroom.*

A uniform code on dressing appropriately to appear in court does not exist in the General Court of Justice of Puerto Rico.[82] This matter has traditionally been left to the discretion of the presiding judges. Consequently, a diversity of administrative norms on dress codes exist whose interpretation and enforcement vary from courtroom to courtroom and from person to person. Eve-

[81] Hearings, May 27, 1994, at p 8

[82] Information was supplied by the Office of Courts Administration

rything appears to indicate, however, that existing standards are not circulated adequately, a situation that causes multiple incidents between the public in the courtroom and the security bailiffs. This situation affects women primarily. They are often taken to task by the bailiffs in an inappropriate tone and manner, thereby affecting court interaction .

A female lawyer said the following:

> There is a lack of orientation on what constitutes adequate dress before the courts, and the enforcement of standards in that respect is not consistent. This affects a woman more, particularly because of the way in which they call her attention in public. More subtlety and respect on the part of the court officials are required. They [court officers] make persons feel uncomfortable; they address individuals inappropriately, and this occurs more often in the case of women. The public should receive orientation on the proper dress code through the use of fliers, advertisements placed in the courts, etc.[83]

A male lawyer remarked:

> There are administrative norms on dressing, but there isn't a directive on the decolletage and the length of the skirt. This depends on the bailiffs' discretion. They intervene with women when they appear in court.[84]

A female lawyer added:

> There is a lack of consistency with regard to the dress that is permissible in court. Women are admonished strongly in regard to the length of their skirts, although the norm is enforced differently if the woman is a professional; she is allowed to enter [the court room], but she is subject to embarrassing remarks. A certain lack of sensitivity occurs whenever a woman is chastised, especially when her financial situation is ignored. A poor woman is required to dress according to the social strata of the judge.[85]

The above comment was repeated on many occasions. It was pointed out that often the norms are rigorously enforced, without taking into account the socio-economic origin of the persons who appear in court, or their level of education. However, when a woman is pretty, or is an employee of the court, the norms are enforced with greater discretion. This last circumstance leads

[83] Hearings, May 13 and 14, 1994, at p 8.
[84] *Id.* at p 9.
[85] *Id*

some persons to believe that the system is more rigorous with men. In that respect, the following testimony was received :

> The regulation on the proper dress in the courts is enforced more rigorously with men than with women: men in short pants or T shirts are not allowed to enter, women in shorts enter.[86]
>
> Bailiffs demonstrate sexist behavior when performing their assigned duty of enforcing the regulation on proper dress that all persons who visit or work in the court must abide by. Bailiffs allow women to enter who are in violation of the regulation, for example, with short skirts, but enforce the norm in the case of men. It's as if they let women enter so that they can look at them, or to make them more obligated to them because of the favor they did them.[87]

It is important to mention that outside of situations dealing with shorts and T shirts, men's dress is not regularly subject to as many variations and fashions as that of women. Also, social demands of dress for women are greater in comparison; norms include such aspects as the length of the skirt, the fit of the clothing, the kind of neckline, the transparency of cloth, the style of clothing (tailored dresses, dresses with sleeves, pant suits), the fact that clothing leaves certain areas of the skin visible. Many of these aspects do not apply, or apply differently, to men. Thus, the absence of clear standards, especially regarding women, grants bailiffs a high degree of discretion. The problem stems from how this discretion is used and the way the bailiffs address persons to indicate whether they are complying with regulations; and this appears to affect mainly women.

These attitudes and patterns of conduct are also manifested by some judges. The Commission was told that occasionally judges in particular are insensitive in their comments on how women dress in their courtroom. For example:

> Women are criticized publicly because of their dress; they suffer the comments of witty judges. The greatest problem that happens is the way women are approached when they appear in court dressed inappropriately.[88]

> Frequent inappropriate comments said publicly suchas: "Colleague, your skirt is distracting my attention". The woman feels attacked and intimidated. It is considered a fact that the intention of her dress is to provoke[89]

[86] Hearings, June 24 and July 1, 1994, at p. 19

[87] Hearings, June 3 and 4, 1994, at pp. 9 and 22

[88] Hearings, May 27, 1994, at p. 9. See also, Hearings, May 20, 1994, at pp 5 and 6

The personal experience of a female lawyer deponent is illustrative. A judge told her: "Colleague, you either lack fabric or you've gained weight".[90] What has been said about the attitudes of male and female bailiffs applies equally to public comments and reprimands by judges.

4. *The court frequently applies standards to women that are different from those applied to men, based on stereotyped ideas about one or the other that clearly discriminate against women.*

A large number of accounts and testimonies presented to the Commission shows that different standards of behavior for men and women exist in the courts. That is, a particular conduct is evaluated in a different way depending on whether it is undertaken by a man or a woman. The consequences of this value judgment are in many cases discriminatory, especially against women.

A specialist in women's issues summarized the problem, from the point of view of society in general, in the following way:

> A woman is often questioned on her personal habits: if she drinks, if she has had a companion... Men are not [...] In this country, how many men can you ask if they have had an extramarital affair? That gives them status. What are you going to ask them for? That gives them status. The woman is the one who is hurt by the question.[91]

In the courts, this same line of questioning occurs regarding female judges, lawyers, employees and women who appear as witnesses or parties. A female judge offered the following example: At a Christmas party, she wandered around with a glass in her hand as did her colleagues. She drank Perrier while the male judges drank hard liquor. After the party, it was rumored that she always had a glass in her hand, and that she was "plastered".[92]

Conversely, a female lawyer pointed out:

> I have seen women judges transferred because they have become sentimentally involved with another judge or a lawyer, while this does not apply

[89] Hearings, May 13 and 14, 1994, at p. 9.

[90] *Id*

[91] Focus Group Interview, Women specialists in women's issues, at pp 43-44.

[92] Report on Participatory Investigative Sessions for Male and Female Judges of the Judicial System (Appendix C of that Report)

> when the judge is a male. Single female judges suffer greater pressure regarding their conduct.[93]

Similarly, a female judge pointed out that the "administration" is more indulgent with a male judge who goes out with a married woman than with a female judge who goes out with a married man. She even asserted that the woman is asked to resign.[94]

Regarding the female employees of the system, a male judge described the "adjustment that one makes towards the behavior in each instance, since no one doubts that if the female employee is married, the rumors, the comments, even the efforts to get rid of that employee are greater than when a man is in the same situation..."[95] Another judge also disclosed that in cases of sexual harassment of a secretary by a judge, the secretary is always transferred, never the judge.[96]

That is, the system tends to apply more rigorous standards toward women regarding their sexual behavior and they are the ones who are affected most adversely. It was also revealed that applying different standards also affects the evaluation process. One deponent recounted the case of a male presiding judge who gave a negative recommendation to a female judge because she was a friend of a female "friend" of a married male prosecutor, a fact the judge considered immoral. However, that same day the same judge gave a positive recommendation to a married male judge who had a female "friend," a fact that was public knowledge. That same deponent also recounted the case of a single female judge called to the office of the presiding judge who questioned why her boyfriend had spent three nights at her home. Meanwhile, married male judges whose relationships with other women are known, are not questioned.[97]

The double standard that gives way to gender discrimination comes about when women have to explain and justify their actions, while men are not only exempt, but receive the solidarity

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[93] Focus Group Interview, Female Litigation lawyers and prosecutors, at pp. 76-77

[94] Report on Participatory Investigative Sessions for Male and Female Judges of the Judicial System.

[95] Focus Group Interview, Judges, at p. 37

[96] Hearings, June 10 and 11, 1994, at p. 4.

[97] Hearings, May 13 and 14, 1994, at pp. 3-4.

of other men. Generally in our society the sexual behavior of men is not judged; rather it is reinforced as a symbol of their manhood.

It is important to emphasize that women also internalize all these concepts of gender and that many of them, including female judges, conform to what is expected of them. For example, a female judge pointed out:

> Also, women are in a very difficult position. And a single woman... , that is, I have to be very careful also. I am very careful; I err on the side of even being anti-social, not sharing, so that they can't say later that you ..... are having relations with lawyers.[98]

Other women, reacting to the same stereotypes and value judgments about women's behavior, take on even more severe and demanding postures than men. This was repeated to the Commission over and over, especially with reference to female judges in the daily performance of their judicial duties.

More demanding standards regarding the sexual behavior of women are strongly manifested in cases of sexual assault and family relations, where the custody of children is in dispute. Although this matter will be discussed in later chapters on the criminal and juvenile justice system, and the rights of persons and family, it is opportune to offer an example now. A female judge recalled her experience as a prosecutor in a rape case of a young woman, a case that she has seen repeated in the courts. She recalled how painful and disheartening it was for her to notice the attitudes that accompanied the comments of men and women toward the victim: "What was she doing around there at that hour. If she had been living with her parents, it probably wouldn't have happened to her".[99] In other words, the rape was the woman's fault because women, unlike men, should not be walking or living alone, and she's looking for trouble if she does that, hence, she had it coming.

[98] Report on Participatory Investigative Sessions for Male and Female Judges of the Judicial System.
[99] Focus Group Interview, Judges, at pp. 27-28.

Obviously, this kind of logic which reflects the application of different standards based on stereotypes could affect a judicial decision to the degree that a judge responds to them The implicit message in the foregoing case is that a single woman, in not belonging to anyone, is subject to violations of her body and emotions The attention of the protagonists in the judicial process is drawn, to the behavior of the woman, obviating that of the man who is really responsible for the aggression. Occasionally, this may even extend to justifying the aggression, since, if the woman "looks for it," the male aggressor is not as much at fault.

This possible effect of a double standard in judicial decisions also arises in examples like the following: A female judge recalled a case of liquidation of community property in which the petitioner, a female lawyer, was forced to appear before several judges without resolving the controversy. The petitioner was pregnant by a man other than the man she had just divorced. The deponent perceived the male judges as punishing her for her pregnancy, an issue that had absolutely nothing to do with her petition. The female judge also declared that gender-based discrimination takes place in attitudes related to torts in the death of the spouse. In these cases judges have asked if the widow has remarried or lives with a man, even when she may have done so long after, implying that if that were the case, she didn't really suffer the death of her spouse too much.[100] The female judge understood that this kind of questioning does not occur with men. That is, the social norm is that women should sexually relate with only one man and he should be her husband. The implicit message is that the woman "belongs" to the man.

The bonds of solidarity that exist between men come into play in these cases and can influence judicial proceedings:

> The male judge finds it more difficult not to identify with the male figure, in other words ...if I am capable of doing it, then I can understand it in him. But, I cannot understand it in a woman ... Returning to the practice of how we socialize ...through drinking, infidelity ...the male judge can accept the

[100] Hearings, June 17 and 18, 1994, at p 14

> infidelity of the man, but not that of the woman because he identifies more with the man and accepts that practice more in the man than in the woman.[101]

Conversely, the application of different standards operates strongly regarding female lawyers, particularly in relation to styles of litigation. It must be kept in mind that by the very nature of our adversarial system the style of litigation to a great degree is aggressive, which tends to be identified with masculine patterns. It is expected that men be strong and aggressive in litigation. But if a woman is aggressive, she faces criticism; by assuming that kind of behavior she is perceived as masculine. As a female lawyer explained, comments such as this are frequent: "you're so sweet in your manner, while in your letters, documents and the motions that you [file] you insult us".[102] Aside from the content or style of the documents, what's important about this example is that it shows female lawyers are expected to act according to the stereotype of a sweet, soft, feminine woman. A female prosecutor pointed out that female lawyers should be "gentle" in the court, but careful to not send a message that could be misinterpreted as being coquettish toward the judge.[103]

Of interest, nonetheless, one female deponent said, is that "for a woman to be admitted and be recognized in certain special circles of the profession, she has to work more and be more aggressive than men." In the words of another female deponent: "When a woman obtains the recognition of some men because of her performance, one of the compliments is: "since you litigate like a man (*macho*), I don't see you as a woman".[104] This appears to imply that to litigate like a woman is, for some male lawyers, synonymous with being weak and letting the other lawyer get away with things. But, if women "litigate like machos," they are then often criticized for being extremely aggressive, problematic, foolish, that is, for not complying with a woman's role. According to some

[101] Hearings, May 13 and 14, 1994, at pp 3-4.
[102] Focus Group Interview, Female family litigation lawyers, at p. 76
[103] Hearings, May 27, 1994, at p. 6.
[104] Hearings, June 3 and 4, 1994, at pp. 15-16

male and female judges, that double standard affects the vision others have regarding judges' job performance and the way they interact in the courts. One judge commented, for example, that a male judge can look serious or annoyed and those facial expressions will still be seen as normal, to be expected. When that happens, it is said that "The judge is in a bad mood;" or "The judge has character".

> If a woman does it, they say: She's ovulating, a hysteric, it's her period, must be menstruating. And that is heard in the hallways of the court. It's true. A man.....he's expected to punch, strike the gavel hard, he's expected to scream and insult, and that is acceptable Not in women. And that I understand to be highly discriminatory.[105]

The Commission also received many testimonies about how female and male judges of similar temperament or personality were depicted differently. While forceful male judges were portrayed as persons with character or as assertive, female judges, in turn, were said to be aggressive, problematic.

5. *An attitude based on gender to downgrade the credibility of women is evident in the justice system*

Credibility is a basic element in the adjudicative process insofar as the search for truth is also an essential factor in the process of achieving justice. Credible persons, indubitably, have greater power to make their positions prevail.

Norma Wikler holds a doctorate in sociology and is an expert on issues of gender. In an article, she summarizes several studies that prove that women as a group are presumed as having less credibility than men as a group.[106] The Commission's own investigation has verified that a similar predisposition to minimize the credibility of women also occurs in the courts of Puerto Rico. According to the testimony of a female judge, many men, and some women, presume that

[105] Focus Group Interview, Judges, at p. 33.

[106] Norma J. Wikler, Credibility in the Courtroom: Does Gender make a Difference? (Unpublished document received from the author) In the same manner, the task forces of the States of New Jersey, New York, Michigan, Florida and Minnesota have confirmed that statement.

women lie.[107] Women are frequently depicted as persons who are essentially sentimental, emotional and hysterical, incapable of sustaining valid, rational or objective postures.[108] As a female lawyer said, the veracity of women's expositions are frequently disputed: do they have merit or are they a "simple attack of hysteria?" To this lawyer, that view has caused some male lawyers to avoid legally representing women. Better for women to be represented by female lawyers, these lawyers say, "because women understand each other better." [109]

The devaluation of women's credibility occurs chiefly in cases and situations where gender-related concepts mediate more strongly, for example, in acts of domestic violence or sexual assault or in certain kinds of family relations cases. In other contexts, however, the potential for detracting from women's credibility could be allayed, as when a female specialist serves as an expert witness, or when a woman is a witness in other kinds of civil and criminal cases.

Discrediting credibility because of gender is evident when justice system officials minimize and trivialize women's accounts of domestic violence.[110] In general, seemingly trifle matters are trivialized, diminishing the credibility of women.

The testimony of battered women is often belittled by both male and female judges, prosecutors, lawyers who see those cases as "foolishness" or "women's gossip."[111] For example, a female judge informed the Commission about a male prosecutor who told her: "I don't believe in domestic violence cases and I am not going to file it [sic]". The judge added: "The perception is that those cases are about women's nonsense. That's what they say. It's women's nonsense, fights between husband and wife [in which one] should not get involved."[112] Such statements respond to the

[107] Hearings, June 10 and 11, 1994, at p. 14.
[108] Focus Group Interview, Female litigation lawyers and prosecutors, at p. 84.
[109] Hearings, June 10 and 11, 1994, at p. 8.
[110] Focus Group Interview, Female specialists in women's issues, at p. 23. See also the chapter on Domestic Violence in this Report.
[111] Hearings, June 17 and 18, 1994, at p. 21.
[112] Focus Group Interview, Judges, at p. 64.

fact that aggression is socially perceived and justified as part of a couple's daily and private life. In addition, this example arises from the sexist stereotype that women are gossips and tend to exaggerate, therefore, their testimony should be taken with a grain of salt.

Conversely, there are those who suggest that women, in the spirit of revenge against their mates, make up stories, "like in a novel." [113] One female judge pointed out: "since most of the victims are women, then, the perception is of a kind—that women will always lie or that they will concoct a story for some reason."[114] One male lawyer said that the credibility of a battered woman is diminished even when the physical attack is evident:

> [T]he fact that the woman has a swollen eye, is missing a tooth as a result of an aggression, is not sufficient evidence to convince a judge that it is imperative that he issue a restraining order.[115]

Loss of credibility is closely related to the general attitude of holding women responsible for domestic violence, a condition that is also discussed in this Report.[116] Inherent in this condition is the tendency to see a woman's own behavior as provoking violence against her, ignoring the aggressor's actions as if he were not responsible for them. Obviously, if we start from the premise that the woman is responsible, doubt will be cast on the veracity of her version of the facts and on her reliability. Her testimony will be seen as predisposed in her favor, and hardly trustworthy. The fact that her own body bears the signs of violence only serves to proclaim "she must have done something to have been beaten."

Regarding sex crimes, the testimony of a female judge illustrates how this prejudiced view transpires in court:

> I remember...a specific case. This girl worked in a Chinese restaurant in San Juan. When she left [the restaurant], a neighbor was waiting for her with other men and they took her away. They sodomized, raped and beat her. [It turned out] that he had done it because she had been a witness in an incident that affected him.

[113] Focus Group Interview, Male litigation lawyers and prosecutors, at p. 14.

[114] Focus Group Interview, Judges, at p. 64

[115] Focus Group Interview, Male litigation lawyers and prosecutors, at p. 35

[116] See the chapter on Domestic Violence

> He planned it all...to take her and get even and attack her in that manner, to rape and sodomize her.
>
> When I took her case before a male judge to determine probable cause to arrest, he told me that this was a Corín Tellado soap opera and that he did not believe her story
>
> of rape. He would determine cause in sodomy, because he had no other alternative, because sodomy, even if she had consented, is still a crime. But not the rape because what probably happened was that she had gone with those guys and that later, for some reason...[117]

Conversely, the Commission received testimonies about frequent attempts in sex crime cases to present information about the sexual history of the victims. Even though this information is inadmissible in court, the aim is to disparage the woman's credibility. A female judge and a social worker were among many who pointed out that in cases of rape and incest the victim is questioned about her virginity at the moment of the crime, whether she had engaged in sexual relations with several men, whether she lived a "carefree life"—questions that have absolutely no bearing on the possibility of rape.[118] With that information in hand, the questioners then propose to convince the judge that a woman who has had sexual relations prior to the rape is less credible in having refused a subsequent sexual relationship.

A female psychologist testified that many persons even believe that women enjoy sex crimes.[119] That belief leads them to suspect statements by women who allege rape. This is definitely a strategy to undermine women's credibility, but it is based on negative concepts about them. Mandatory corroboration of a victim's testimony in sex crimes originates in these negative concepts.[120]

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[117] Focus Group Interview, Judges, at pp. 24-25.

[118] *Id.* at p. 214; Hearings, June 10 and 11, 1994, at p. 14; Hearings, June 24 and July 1, 1994, at p. 25

[119] Hearings, June 10 and 11, 1994, at p. 20.

[120] See the chapter in this Report on the Criminal and Juvenile Justice System

Besides sexuality, a woman's consumption of liquor is also used against her, unlike in the case of a man.[121] Obviously, a double standard is at play here, an issue discussed in detail further on in this chapter.

These strategies to undermine credibility are tailored for women witnesses. A female lawyer described the strategy as follows: "if a woman is shown to be dishonest, she will be less credible." The term "dishonest" in this case relates to a woman's sex life, especially a married woman. This lawyer recalled how that strategy was utilized in an incest case to invalidate the mother's testimony: the mother was construed as an adulteress.[122] Apparently, this strategy assumes that anything can be expected from a woman whose sexual behavior does not conform to society, even false testimony. For a man, however, the perspective is different. Traditionally, his word is credible, not hers. Neither his sex life nor other excesses affect his credibility.,

In sexual harassment cases, however, a woman's credibility is apparently linked to her physical features. For example, the Commission was informed about a male judge who asked: "Is your client pretty or ugly?"[123] suggesting that an ugly woman could hardly be the object of harassment. A similar expression reported was: " It is impossible to harass that woman."[124]

The credibility and competence of a woman witness are also in doubt when she is associated with feminist organizations or viewpoints, especially in cases of domestic violence and sex crimes. Antagonistic preconceptions await feminists in favor of women's rights. One deponent explained that when a woman lawyer in the courtroom identifies herself as a feminist, some judges, both male and female, assume she's a troublemaker, there to cause problems instead of resolving

[121] Focus Group Interview, Women specialists in women's issues, at p. 44

[122] Hearings, May 13 and 14, 1994, at p. 26; see, also, Hearings June 3 and 4, 1994, at pp. 7 and 28. The lawyer was not referring to dishonesty in the sense of lying, but to its other meaning of shamelessness, or lack of modesty.

[123] Focus Group Interview, Female litigation lawyers and prosecutors, at p 59.

[124] Hearings, June 17 and 18, 1994, at pp. 13-14.

them.[125] Feminist lawyers are stigmatized as lesbians, as demented, castrating women who hate men.[126]

The Commission also heard testimony suggesting a relationship between impugning a woman's credibility and her socio-economic background. A deponent stated:

> With regard to who has more credibility between a man with economic power and a woman of a lower economic level, the tendency would be to believe the man has more. It is assumed that a man with economic power and the appearance of seriousness does not lie and that he keeps his word. A woman's credibility as a witness is associated with her sexual conduct and her economic station.[127]

It remains to be asked what happens when a case requires testimonies of men and women from similar socio-economic levels. Although the Commission does not have an answer, it is worthwhile to remember that the result would also depend, as previously discussed, on the kind of case or situation presented.

To conclude, the following words of an expert in women's issues summarizes the opinion of many of the deponents:

> [T]he experiences of the victims and survivors of sexual violence (incest, rape, sexual harassment, domestic violence, among other crimes), and women who appear before the court in family relations cases (in matters of divorce, support and custody), and those who request civil remedies (restraining orders), or those who file civil lawsuits (sex discrimination cases in employment because of reasons associated with pregnancies or sexual harassment [are those who] suffer the impact of a system that appears to have agreed to not see what they see, to question their credibility, to dishearten them in their efforts to seek justice in that system, to silence them, to place words in their mouths to say whatever the system wants to hear, to not allow them to express themselves in their own words, to confuse them in their intentions, and, above all, to not protect them in the exercise of their rights.[128]

6. *As in other work places, the courts of Puerto Rico reflect the prevalence of sexual harassment which affects daily* interaction and work performance.

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[125] Hearings, June 24 and July 1, 1994, at p. 14.

[126] Focus Group Interview, Women specialists in women's issues, at p. 58; Focus Group Interview, Male litigation lawyers and prosecutors, at p. 33. The reference to lesbianism as a stigma and as proof of lacking credibility reflects the double weigbt of discrimination that women carry who do not adjust to the stereotype of the adequate social behavior for a woman in this society.

[127] Hearings, June 3 and 4, 1994, at p. 28.

[128] Hearings, June 10 and 11, 1994, at p. 17.

The courts are a complex environment to analyze the problem of sexual harassment. This is so, first, because it is a context of myriad people, all with specific duties, tasks, and obligations which do not correspond to the typical hierarchical and administrative structure of the employee-employer relationship. For example, both lawyers and prosecutors are officials of the court, but are not employees of the General Court of Justice. Conversely, every day many persons turn to the court for services or as parties or witnesses in judicial proceedings and face typical patterns of power and authority that are not subject to the employee-employer relationship.

That is, in judicial proceedings and in the context of the courts, judges, officials, and employees of the judicial system have a reciprocal relationship with each other, with other professionals who work in the courts but are not employees and with the court clientele.

The foregoing suggests that the problem of sexual harassment, as was studied by the Commission, overstepped the conventional work environment that is safeguarded by the labor laws, to include instances of sexual harassment that could be understood as violations of specific provisions of the Penal Code, of the canons of judicial conduct and of the legal profession as well as the Bill of Rights of Victims and Witnesses and the basic mores of social coexistence.

Article 3 of Act No. 17 dated April 22, 1988[129] assembles three manifestations of sexual harassment in the work place:

> [A]Any type of undesired sexual approach, demand for sexual favors and any other verbal or physical behavior of a sexual nature when one or more of the following circumstances occur:
>
> a) when submission to said conduct becomes, implicitly or explicitly, a term or condition of the person's employment.
>
> b) when submission to or rejection of such conduct by the person becomes grounds for decision-making on the job, or about the job, that affect that person.

[129] 29 L.P.R.A. sec. 155.

c) when that conduct has the effect or purpose of unreasonably interfering with that person's job performance work or when it creates an intimidating, hostile or offensive working environment.

The provision does not exhaust, however, the manifestations of the problem from the social point of view. Studies on the subject indicate that sexual harassment is manifested in numerous ways. Its simplest manifestations include flirtations, winks, and unsolicited sexual innuendoes. These more subtle forms of assault tend to be replaced by more direct and aggressive expressions, such as repugnant verbal displays, body rubbing, pinches, and other undesired and unsolicited physical approaches. At its most extreme, the victim of harassment encounters the worst kind of physical and psychic violence as do rape or attempted rape victims.[130]

The problem with the more simple and subtle kinds of harassment is that they have not been traditionally seen as manifestations of sexual harassment, but as behavior that is often acceptable and accepted in the interaction between men and women. In that interaction, men generally assume the active role. They do not think that their unsolicited actions could be unwelcome to women recipients and can cause them to feel discomfort, shame or anger. Nor do men take into account the effect of their conduct on other observers.

Judges, lawyers and secretaries told the Commission that the work environment in the court is one of "flirtation," of unwelcome and unsolicited "coquetry" of many males - judges, lawyers, prosecutors, bailiffs, policemen- toward women, be they judges, lawyers, prosecutors, bailiffs and secretaries, even the system's clientele.[131] For example, there were known incidents of male bailiffs preying on women employees and visitors,[132] including women minors in the juvenile jus-

[130] MARYA MUÑOZ VAZQUEZ & RUTH SILVA BONILLA, EL HOSTIGAMIENTO SEXUAL: SUS MANIFESTACIONES Y CARACTERISTICAS EN LA SOCIEDAD, EN LOS CENTROS DE EMPLEO Y LOS CENTROS DE ESTUDIO 3 (Center for Social Research, U P R., 1985).

[131] Focus Group Interview, Female litigation lawyers and prosecutors, at pp. 24 and 61-66; Hearings, May 12 and 14, 1994, at p. 27; Hearings, May 27, 1994, at p. 12; Hearings, June 17 and 18, 1994, at p. 21.

[132] Hearings, June 3 and 4, 1994, at p. 8; Report on Participatory Investigative Sessions of Male and Female Judges of the Judicial System.

tice system.[133] The impression received by the Commission in this regard was that salient sexual behavior is unusually frequent in the courts with the system failing to take measures to prevent it.

One male lawyer told the Commission that some male lawyers habitually seek special treatment from the secretaries working in the court in exchange for gifts and invitations.[134] And one female lawyer pointed out: "Some female employees of the court still believe that they have to allow their boss to hug them at parties in order to be in good standing. Likewise, you hear carping that there are lawyers who date the secretary of Judge so-and-so and that this then gives them an advantage".[135] Similar comments suggested that the easy-going relationship between men and women in the courts produces a fertile environment for inappropriate comments and flattery, for sexual innuendoes that are neither solicited or provoked and for uttering terms of endearment, as we discussed in other parts of this Report.

Of note, however, is that very few employees, female or male, appeared before the Commission. Going beyond subtle allusions, they spoke candidly about different kinds of sexual harassment in the courts.

The Commission, however, perceived a high degree of fear and dread in these employees, although several recounted incidents that were clearly examples of sexual harassment in the work place, particularly as a hostile environment. One example is the judge who told a secretary, in unusually vulgar terms—and in her understanding, with ulterior motives—that he enjoyed having oral intercourse with women.[136]

The fear and apprehension we have referred to is perfectly explainable if we remember that court interaction develops within the framework of an hierarchical organization based on respect of authority. This turns the courts into a scenario in which women, especially those in an employee-

[133] Hearings, May 13 and 14, 1994, at p. 27; Hearings, June 24 and July 1, 1994, at p. 25.
[134] Hearings, May 21 and 22, 1994, at p. 6
[135] Hearings, June 3 and 4, 1994, at p. 14
[136] Hearings, May 27, 1994, at p. 5.

employer relationship, can be more vulnerable and feel more helpless in a sexual attack in its multiple dimensions. The court can hide and, in fact, does hide behind the mantle of respect due authority figures and to the chains of command. As we shall see further on, women lawyers and prosecutors themselves are fearful of confronting in a positive way the innuendoes or sexual advances of some judges—even though they are not employees of the system, even though their profession makes them better able to defend themselves. It's logical then to presume that the female employees of the system are even more apprehensive.

> According to a female judge, when sexual harassment comes from a judge..... No female employee, no secretary of the court, nobody is going to complain, because nobody trusts what the administration will do with their complaint. Everybody thinks that it will be hushed up because a judge is involved, "they'll cover it up," as they say.[137]

For a child support examiner, the problem is one of hierarchy;[138] according to a female judge, the incentive is to protect the system's Image.[139] To this is added the fact that the internal policy on sexual harassment in the work place has not been adequately divulged, nor is there an accessible and effective procedure to file and process this type of claim.[140]

According to Charney and Russell the victim in a sexual harassment situation can "choose" between submission or ignoring the harassing behavior. She can either avoid or confront; she can change her job, inform her superior or the corresponding complaint committee; she can seek legal assistance [141] However, as Muñoz Vázquez and Silva Bonilla point out, most women understand that they have to accept this kind of pressure, because they often have no other option

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[137] Focus Group Interview, Female Judges, at p 93.

[138] Hearings, June 24 and July 1, 1994, at p. 13

[139] Hearings, May 21 and 22, 1994, at p 8

[140] In this respect, see the chapter of this Report on Labor Law.

[141] Dara A. Charney & Ruth C Russell, *An Overview of Sexual Harassment*, 151 AM. J. PSYCHIATRY 10 (1994).

than to yield since effective measures to avoid humiliation are nonexistent: "her submission, more than indicating consent, is considered a precondition to her survival."[142]

Contrary to what transpired with female employees, the Commission received abundant testimonies from female judges, lawyers and prosecutors, and from some men as well. These testimonies described how the behavior of male judges at decisive moments, including the present, evinced harassment and how the deponents simultaneously felt rejected and discouraged because they often felt nothing could be done.

> Following are some examples: A female judge recalled the following experience as a trial lawyer: I remember that a judge called me [to] approach the bench with the lawyer [from the opposition] and then told me that he had dreamed about me, but that he could not say publicly what the dream was about. I was outraged. I told him so and I also told him that I was leaving the courtroom at once and was going to inform the district prosecutor that I would not return to that courtroom. He had been rude to me.[143]

A male prosecutor told of having endured the adverse consequences of sexual harassment a female colleague received from a "gallant" judge before whom she had several cases. According to the prosecutor, the judge suspended her cases so that she had to appear in his courtroom more frequently, and thus have an excuse to have coffee or dinner with her. On one occasion the prosecutor was sorely inconvenienced: he had to substitute for his female colleague, because she could not tolerate the distress and had asked to be replaced and he had to tolerate an angry judge whose lunch plans—as he told the court bailiff—had been ruined.[144]

To many, this kind of situation may seem to be more a case of a flirting judge than of harassment—which, in truth, is a limited interpretation of what constitutes harassment. It is important to emphasize that this kind of behavior occurs within a relationship of authority and, in this case as in others, with persons who neither want, nor initiate this type of approach. Judges persisting in

[142] Muñoz Váquez and Silva Bonilla, *supra* note 130, at pp. 23-24

[143] Focus Group Interview, Judges, at p. 22.

[144] Focus Group Interview, Female litigators and male prosecutors, at pp. 22-23

this kind of behavior obviously create hostile environments for targeted female lawyers and prosecutors. The fact that the prosecutor in this case, as happens in similar cases, opted to be replaced rather than file a complaint, shows that even a ranking official of the court, finds it difficult to act against a judge. Consequently, judges continue to act in that way because they are never sanctioned. [145]

One male lawyer said the following:

> If an attractive woman is representing the opposition, although I can't say that they'll definitely adjudicate in that person's favor, you can be sure that the conference in chambers that usually takes five minutes, lasts at least an hour. And that's one hour that I have to be there, hearing him [the judge] compliment and flirt with her. You're, like, painted on the wall ... and there is that constant flirtation and attack. Sometimes I'm saddened, because they're young girls just starting out. They don't even know what to say. [146]

This testimony, generously revealing, clearly suggests a fairly frequent kind of behavior that takes place, even in the presence of other lawyers, without any qualms. The fact that the situation of the victims often produces feelings of pity for them suggests that the harassment is indeed fierce, that their environment has become intimidating, hostile and offensive. On the other hand, the testimony also suggests, that the harassment is aimed primarily at young woman lawyers. If that is so, these young women lawyers are likely to be more fearful of the authority and power that the judge represents.

One male lawyer told the Commission about a male judge who used the power of his position to insist that a female colleague assist him in legal research. Terrified by the judge's authority, she dared not refuse. [147] A female lawyer recalled how two male judges on separate occasions sent her messages letting her know they were at her "complete disposition." She interpreted this behavior as highly improper, especially since she had cases before those judges at the time. [148]

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[145] An ex-judge administrator made clear comments to that effect. Hearings, June 17 and 18, 1994, at pp. 9-11.

[146] Focus Group Interview, Male litigation lawyers and prosecutors, at pp. 43-44

[147] Hearings, May 21 and 22, 1994, at p. 5.

[148] Hearings, June 17 and 18, 1994, at p. 32.

Similarly, a female lawyer recalled the case of a male judge who told another female lawyer in his office, how he would like her to dress. The lawyer, although annoyed, remained silent because she did not want to affect the result of the case that she soon would argue before that judge.[149] This example is illustrative of situations whereby undue attempts are made to create a climate of intimacy through allusions or comments about personal matters. These are clearly strategies of enticement, that is, dropping subtle hints that are intimidating when proposed by persons of authority who have the power to make decisions that could affect the persons involved.

The Commission heard testimony on the prospect of court litigations being influenced by these attitudes and behaviors, thus compromising impartiality—the highest ambition of a justice system. For example, a female lawyer told the following story:

> During an incident in chambers, the judge flattered her several times. She felt uncomfortable. The prosecutor of the case told the judge that he didn't stand a chance in the case. If she was the lawyer of the accused, then he was licked. Instead of discussing the pending motion, the judge and prosecutor engaged in discussing the elegance of the attorney. She was upset and felt uncomfortable and said so. As a result, the judge was offended and the prosecutor got upset. Consequently, the motion was resolved against the accused that she represented, and she could never be sure if the case was resolved on the merits of the arguments of each party, or because the judge was angry at her attitude [150]

Interestingly, many stories about this subject were told by third parties and not directly, apparently, by the persons who experienced them. The Commission was not surprised. This suggests that this is the kind of subject victims have difficulty in presenting and discussing before strangers, especially if they represent the system in some way, as happened in this case. In fact, the Commission often perceived a certain reluctance on the part of the deponents to expound upon these incidents which allows us to presuppose that the problem of sexual harassment is greater than perceived.

[149] Hearings, May 13 and 14, 1944, at p. 27
[150] Hearings, June 3 and 4, 1994, at pp. 10-11

Occasionally, harassing behavior is also directed at female judges. A female judge, for example, recalled how she was the object of a smear campaign and how she became the victim of an hostile work environment for refusing to date a peer who was married. Another judge told her: "She had left him high and dry in his best suit and best cologne." That same deponent recalled another incident with another married judge, who was her supervisor. He insisted that they go out together, alone. After she refused several times—rather elegantly, she noted—the judge invited her on four consecutive days by way of his courtroom bailiff. To avoid a fifth invitation, the female judge went to the office of a law clerk just before noon. The judge stationed himself in the hallway until 2:30 p.m. Later, he found her lunching with women friends and, without an invitation, sat at the table. That same day the female judge notified the presiding judge about the incident and the situation was corrected.[151]

Notwithstanding administrative intervention in the foregoing example, many female judges feel that the system fails to emphatically respond in these cases. The following comment by a female judge was echoed by several associates and colleagues:

> [W]hat happened in the federal court -where a sexual harassment case against a judge was investigated- would never happen here. Here if someone should complain about sexual harassment, they would look for a way to cover it up, that nothing would happen, that it would end there. In other words, I am completely certain that what happened [in the federal] court, would not happen here....And that is the general opinion, because I have discussed it with other judges, and they say the same thing. Why complain if they're not going to listen to us? In other words, what happened there, the quick attention it received ...Afterwards, they will isolate you, they'll send you to Jayuya [the boondocks]. They tell you, "Don't complain, they'll send you to Jayuya or to Las Marías" So, you keep quiet. I don't want to go to Las Marías ...In other words, [if] that's what happens from judge to judge, imagine a secretary....if she dared complain about a judge.[152]

[151] Hearings, June 17 and 18, 1994, at p. 21.

[152] focus Group Interview, Judges, at p. 92

Recommendations

1. The Office of Courts Administration should revise the forms, internal regulations, and other documents of the system in order to eliminate gender tainted language. Also, to determine to what extent, these documents respond to stereotypical notions of gender, and in what way their implementation presents problems of gender discrimination.

2. With the same purpose, the language of the Codes of Judicial and Professional Ethics should be revised and amended to explicitly prohibit all manifestations of discrimination by the Judiciary and members of the legal profession.

3. With the same purpose, the Supreme Court should order the revision of language in the Manual of Instructions to the Jury.

4. To raise the consciousness among members of the system, the Office of Courts Administration should develop educational pamphlets on the problems presented by the use of the masculine generic and on the use of neutral language from the standpoint of gender. It is important to sensitize male and female judges about this matter, because their position and authority in the system have a great multiplier effect on other components of the system.

5. Particular attention should be given in seminars and orientations on judicial ethics offered by the Office of Courts Administration to sexist manifestations reflected in daily court interaction: using the familiar form of address and informality, using terms of endearment, the particular use of certain linguistic forms, non-verbal sexist language, sexist jokes and expressions, and flirtations, among others. The example judges set in that regard should be underscored as well as the corrective duty they must exercise from the bench.

6. The employee orientation and continuing education programs of the Training Division of the Office of Courts Administration, should be revised to include modules, aimed at employees and supervisors of the system, on the sexist attitudes that are manifested in daily court interaction, with particular attention given sensitizing and changing attitudes.

7. In complying with its duty to promote the education of members of the legal profession, the Bar Association should develop workshops and seminars for male and female lawyers to sensitize them regarding discriminatory behaviors and patterns that occur in daily court interaction, law firms and other work centers. The Bar should also develop manuals and protocols of acceptable behaviors that address such aspects as language usage that recognizes the presence of women in the courts and that is neither sexist nor offensive and problems of behavior.

8. The system of evaluating judges and support personnel should take into account different manifestations of sexist attitudes that transpire in the courts and in the rest of the judicial system. Specific questions on the subject should be included in evaluation questionnaires.

9. The Judicial Branch should develop procedures that permit the gathering of information and complaints about sexist behavior and attitudes in the system in order to guide their strategies in eradicating the problem.

10. The Office of Courts Administration should review the Manual of Bailiffs' Procedures to incorporate norms and protocols on the appropriate treatment bailiffs should provide to persons who turn to the courts, especially women.

11. The Judicial Branch should develop seminars and orientation for all the system's personnel, especially judges and social workers, on stereotypical ideas that determine different standards of behavior and credibility for men and women. The Department of Justice should do the same for prosecutors, including those practicing in family and juvenile divisions.

12. Judges should develop a greater awareness of different manifestations of gender discrimination and their cultural foundations, and should be more alert to ensure the correct and appropriate development of the doctrine in this regard. The judicial system should stimulate awareness that stereotypical and prejudicial ideas, particularly in cases of domestic violence, sexual harassment, sex crimes and family relations, can cause miscarriages of justice

13. Law schools should carry out their formative duty aware of the historic alienation and subjugation of women and of the need to change attitudes and values to allow the full incorporation of women into the legal profession. To do this, law schools should review the curriculum and, wherever possible, incorporate courses that address these needs. Further, study and discussion of such issues that so directly concern justice as a fundamental value should be a part of every course. This should be done by university divisions in charge of the revision and approval of curriculum. Interaction of the different components of the university community should also be taken into account.

14. The Judicial Branch should amend its policy on sexual harassment to make it clearer and more forceful, and to clarify concepts and procedures. The opportunity should be seized to address the requirements of the Constitution and the laws prohibiting different manifestations of discrimination, so that the public policy of the Judicial Branch can be broadened to include them.

15. The Office of Courts Administration should give adequate publicity to its public policy on sexual harassment and on the different manifestations of discrimination, including the proper orientation for job applicants to the Judicial Branch.

Chapter 6

Personal Rights and Family Law

Introduction

Gender discrimination is produced within the family setting when stereotypical behavior is based on sex and roles are socially and legally assigned.[1] Many of these roles and behaviors are the result of configurations of domination and power of some human beings over others, especially of men over women, in every relationship of human coexistence,[2] a subject developed in the chapter on the General theoretical framework. These relationships have been especially clear and powerful within the framework of the family in nearly every known culture.[3]

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p 1 The work IGUALDAD JURIDICA Y SOCIAL DE LOS SEXOS by ALMA L. SPOTA (Mexico, Ed. Porrúa, 1967) explains with an extensive bibliography how the unequal relationship of men and women was developed in the midst of familiar and social relations, and its eventual impact on legal institutions. Other works of special importance on this subject are: SIMONE DE BEAUVOIR, THE SECOND SEX, Vol. I (The facts and the myths) and Vol. II (The lived experience), (Pablo Palant trans., Buenos Aires, Ed. Siglo Veinte, 1984); and John Stuart Mill, *The Subjection of Women*, in ON LIBERTY AND OTHER ESSAYS (1991) are classics in this matter. From the legal perspective of the civil law tradition, prevail the works of SPOTA, mentioned before, JOSE CASTAN TOBEÑAS, LA CONDICION JURIDICA DE LA MUJER (Madrid, Instituto Reus, 1955) and PLUTARCO MARSA VANCELLS, LA MUJER EN EL DERECHO CIVIL (Pamplona, Editions University of Navarra, S.A., 1970)

[2] SPOTA, *supra* note 1, at p. 6: "There is no doubt that from the biological and psychic point of view there are differences between men and women, but these differences cannot constitute the basis for legal differences...", specifically at p. 30 and ss; CASTAN TOBEÑAS; and MARSA VANCELLS, *supra* note 1. See, also, Nadine Taud & Elizabeth Schneider, *Women's Subordination and the Role of Law*, in THE POLITICS OF LAW 150 (rev. ed., 1992); Efrén Rivera Ramos, *Derecho y Cambio Social: Algunas reflexiones críticas*, 56 REV. JUR. U P R. 251 (1987).

[3] FREDERICK ENGELS, THE ORIGIN OF THE FAMILY, PROPERTY AND STATE 41-105 (Madrid, Ed. Fundamentos, 1971); WILLIAM GOODE, THE FAMILY 1 (Mexico, Eteha, 1966) points out:

> In all known societies, almost everyone lives his life involved in an amalgam of rights and obligations called functional relations. From infancy, a person learns of these kind of relations through a long period of socialization, a process in which is learned how the other members of the family expect one to behave, and in which a person comes to feel that this is the way that a person should, as well as wants, to act.

See, also, SYLVIA WALBY, THEORIZING PATRIARCHY (Basil Blackwell Ltd., 1990).

For centuries, women have been deprived of the possibility of developing their maximum potential as human beings. Often, women's work and capacities have been restricted to duties of the home, raising children, and attending to the needs of their husbands.[4] Although women perform other roles, the domestic role, paradoxically, is seen as exclusively theirs. Like many other cultures, Puerto Rican society also adopted ideas, conventions and legal institutions that have long maintained discriminatory treatment towards women. Laws, judicial decisions and the daily practice of petitioning authorized organizations for personal rights reflect that reality, because the Law responds to dominant values, premises, and expectations in the society in which it prevails.[5]

The Law is generally conceived as a mechanism to perpetuate and impose ideas and behaviors. However, it can be an important tool to accomplish changes in social attitudes, behaviors and beliefs.[6] Puerto Rico's experience is a good example of the benefits of this "educational" effort. Family Law is an area of Puerto Rican Law that has received utmost attention from the Legislature and in jurisprudence. Enormous efforts have been undertaken and significant inroads attained in

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[4] GOODE, *supra* note 3, at p. 21. Goode states that:

> [T]he darkest area of the biological effects on the human family is that of the sexual differences. This debate has held the attention of man for thousands of years, the modern accumulation of scientific evidence explains that many of the apparent differences may be due to social conditioning. ...Biological differences need not completely determine a familiar pattern as complex as the division of labor. *Id.* at p. 31

[5] See *El Derecho como producto del Patriarcado*, in SOBRE PATRIARCAS, JERARCAS, PATRONES Y OTROS VARONES 5-20, specifically at p. 24 (Rosalía Camacho & Alda Facio eds., San José, Costa Rica, 1993); WALBY, *supra* note 3; CHARLOTTE BUNCH, HACIA UNA REVISION DE LOS DERECHOS HUMANOS 11-26 (Ediciones de las Mujeres No. 15, Isis Internacional, 1991); Alda Facio, *Sexismo en el Derecho de los derechos humanos*, in MUJER Y DERECHOS HUMANOS EN AMERICA LATINA (CLADEM, Lima, Peru, 1991); Riane Eisler, *Human Rights: Towards an Integrated Theory for Action* 9 Hum. RTS. Q. 287 (1987).

[6] SPOTA, *supra* note 1, at p. 33. This author states:

> Discrimination manifests itself in acts that are prejudiced against persons who belong to a certain collective category, because of the mere reason of belonging to it. This is the case of the legal discriminations suffered during so many centuries by women that were imposed by men with impunity
>
> It has been said that the external discriminatory behaviors have an internal origin in the prejudice that is consistent in an unfavorable mental and hostile attitude against those discriminated against.
>
> *It is clear that the law cannot suppress thoughts, emotions or intimate attitudes, but legislators, philosofers of law, sociologists, and also educators must analyze the causes that produce these intimate attitudes to seek the most effective means to fight them.* (Emphasis added).

See, also, *supra* note 5.

Family Law to reduce the social disadvantages of women with regards to men. Although many areas remain in drastic need of reform, the truth is that substantial reforms of basic juridical institutions that regulate the family have helped accelerate social and behavioral change, which, in turn, have improved the juridical conditions of the Puerto Rican wife and mother. The new state of law altered the traditional rules that governed the male-female relationship, so that both genders could mutually demand fair and equitable treatment before the law in many of the areas regulated by the Law on personal and family rights.

To fully and responsibly investigate gender bias in the courts, specifically in the area of Family Law, the Commission used various investigative methods, which are explained in the Chapter on Methodology. Throughout our study and investigation, we were able to corroborate manifestations of gender discrimination in our system of justice and other institutions and processes of our society, in both procedures and behaviors as well as in the basic law that justifies them. The purpose of this analysis, then, is to identify areas that still need legislative or judicial reform and to propose appropriate statutes to stamp out gender bias, in any way it manifests itself within the institutions that establish Family Law in Puerto Rico.

In the development and evolution of specific Puerto Rican law, the Civil Code has undergone amendments, exclusions and inclusions, alterations, adaptations and interpretations that have rectified some of the bias and differences in the rules which were justified by the gender of the person on whom the full force of the law or judicial sentence fell—whether he or she was an actor, creditor or debtor in the particular action, suit or debt. From the colonization era to today, the process of adopting, revising, and re-evaluating the regulations of Puerto Rican Family Law, then, has been accidental, as we explain below.

The Roman-Germanic juridical tradition that inspired the law that we inherited from Spain conceived the rules governing the family institution as centered on the *pater familias*. As head of

an autonomous family unit, with wife and children, the man held sole authority over the patrimony and persons, including the right to decide whether they lived or died. The husband's authority, then, "was included in an assortment of powers of the *pater familias*, titled *manus maritalis* or *potestas maritalis* that gradually diminished during the imperial era."[7] "The special and perpetual *tutela mulierum* applied to women" also existed in Roman law to protect their patrimony.[8] That is, among the institutions that subjected the wife to the husband, the tutelage that deems her incapable because of her gender, and marital authority that bases her incapacity on her position in the family, are prominent.[9]

In contrast, the influence of Canonical Law in shaping institutions and rules that govern individual behavior in social environments, reproduced schemas of submission, obedience and ecclesiastic domination at the core of the family. Marriage became the basic and fundamental institution of human social development and, within that relationship, the male became the protector of Christian virtues that prescribed the stability of that merger and of the family that emerged from it. The precepts of conjugal fidelity, of obedience to marital authority, of procreation as the ultimate purpose of marriage, and protecting the integrity of the family unit by the permanence of the marriage bond—all inspired by religion—were also adopted by Civil Law as juridical rules to govern the institution of the family.[10]

The Napoleonic Code of 1804 crystallized marital authority in modern western codification.[11] From thence comes the civil codification that reaches Puerto Rico by way of Spain. For Castán Tobeñas, the Napoleonic Code consecrated in written law the "authority of the husband over the family, with attributes of strict legal authority over the wife and the children"; the

[7] CASTAN TOBEÑAS, *supra* note 1, at p. 117 et seq.; and SPOTA, *supra* note 1, at p. 57 et seq.
[8] *Id.*
[9] *Id.*
[10] See, in this regard, CASTAN TOBEÑAS, *supra* note 1, at pp. 67-76
[11] CASTAN TOBEÑAS, *supra* note 1.

"extension of that marital authority to the family's patrimony, on the basis of presumed mental frailty and subsequent need for protection" of the woman, placed between "the incompetent, next to the insane and to minors, making her a kind of "perpetual child"; and "the projection of the preceding two principles on regulating property within the marriage". According to Castán, in the new system that is usually attributed to the personal influence of Napoleon, "the husband concentrated the entire property of the marriage under his control" and with that, he controlled the woman, as wife and subordinate.[12]

The influence of the Napoleonic Code on subsequent Codes in Europe and America, particularly on the Spanish Civil Code, is part of the judicial history of those nations. This is the origin of Puerto Rico's actual state of law in the area of family relationships and in other aspects of civil relationships.

The Spanish Civil Code was extended to Puerto Rico through the Royal Decree of July 31, 1889. It went into effect January 1, 1890, and was in force for eight years preceding the North American invasion.[13] In 1901, the first revision of the Civil Code was made to adapt existing rules of private rights to the new juridical reality of the country.[14] The first textual changes to the Code, whose outcome we know as the Civil Code, 1902 edition, affected primarily the institutions of marriage, filiation and birthright.[15] In 1930, legislation enacted between 1902 and 1930 was in-

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[12] *Id* at pp. 121-122.

[13] See Rodríguez v. San Miguel, 4 D.P.R. 208 (1903); and Torres v. Rubianes, 20 D.P.R. 337 (1914); Luis Muñoz Morales, *El Código Civil de Puerto Rico: Breve reseña histórica*, 1 REV. JUR. U.P.R. 75-78 (1932). The Spanish Code continued in force, with the consent of the new political power, with regard "to the determination of the private rights of individuals and properties [while] they were not incompatible with the change of conditions carried out in Puerto Rico, in which case [it's enforcement could be suspended] by the chief of the Department". See General Order No. 1 dated October 18, 1898, signed by Mayor John R. Brooke, Chief of The Department of Puerto Rico. Cited and translated by Muñoz Morales, *supra*. Several basic institutions of the Civil Code were altered through military orders. For example, divorce for civil marriages was introduced; the terms for adverse possession were reduced; legal age was reduced, and wills regulated.

[14] See report of D. Juan Hernández López, only Puerto Rican of the three members of the Commission, in *Comentario al Código Civil Revisado presentado a la Asamblea Legislativa de Puerto Rico* in December, 1901, 14 REV. JUR. U.P.R. 276 (1945).

[15] The revised Civil Code was effective July 1, 1902. After this first initiative, some additional efforts to reform other civilist institutions were made on the part of the Legislature of the new colony, for which several special laws were enacted, many of which reestablished the old statutes of the Spanish Civil Code which had been substituted by statutes copied from Louisiana and

serted into the Code, and all the articles re-enumerated into one integrated whole[16] This is the edition of the Civil Code that is the basis for this study.

Marriage, as defined in the Family Law that we inherited from Spain, was indissoluble, celebrated with supreme solemnity between a man and a woman who, by legal fiat, contributed their talents, productive capacity and the fruits of their labor to a common enterprise. Protected by the mantle of the law, the husband became the sole administrator of every economic and legal activity that the enterprise generated. This concession expanded the central role of the ever-dominant male into domestic, social, political and religious spheres.[17] A woman owed absolute obedience to her husband, she had to take his surname, and follow him wherever he established residence, submit to sexual intercourse, even though forced, and cede exclusive authority over their children.

Termination of marriage left women even more dependent and vulnerable, aside from the social stigma that accompanied divorce. Ending her legal subservience to the male returned the legal capacity that her marriage had diminished—or worse, had canceled—to manage her financial affairs.[18] But systematic prejudice, or discrimination in other areas, did not allow women to par-

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other United States jurisdictions and that, in practice, did not adjust themselves to the juridical framework of the country. See detail of amended legislation that is described in 1 LUIS MUÑOZ MORALES, RESEÑA HISTORICA Y ANOTACIONES AL CODIGO CIVIL DE PUERTO RICO 92-96 (Río Piedras, Junta Editora U.P.R., 1947). The edition is based on the *COMPILACION DE ESTATUTOS REVISADOS Y CODIGOS DE PUERTO RICO* of 1911. The author points out that provisions related to inheritance, filiation, the private property of spouses, among others, were amended. Also, see Castán Tobeñas, *En torno al Derecho Civil de Puerto Rico*, 26 REV. JUR. U.P.R. 7, 9-11 (1956).

[16] Luis Muñoz Morales, *Anotaciones al Código Civil de Puerto Rico*, appear published in 14 articles of the *REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO*, between the years 1938 and 1945, Vols. 8 to 14. In 1930 all the laws correlative to the areas of the Civil Code were added, and the necessary adjustments were made for the renumbering of all articles. For a complete analysis, by the same author, of the amended legislation of the Civil Code from 1930 to 1948, see *Enmiendas al Código Civil de Puerto Rico posteriores al 1930*, 13 REV. COL. AB. P.R. 4 (1950) and *RESEÑA HISTORICA Y ANOTACIONES AL CODIGO CIVIL DE PUERTO RICO*, *supra* note 15, at pp. 25-121.

[17] Migdalia Fraticelli Torres, *Un nuevo acercamiento a los regímenes económicos del matrimonio: La sociedad legal de gananciales en el Derecho puertorriqueño*, 29 REV. JUR. U.I. 413 (1995). Also, see, Guaroa Velázquez, *Alcance de los poderes del marido como administrador de la sociedad de gananciales*, 22 REV. COL. AB. P.R. 281, 282 (1962); Augusto Malaret, *Condición jurídica de la mujer puertorriqueña*, 7 REV. JUR. U>P>R. 7 (1937); Muñoz Morales, *El Código ...*, *supra* note 13, at p. 86 et seq; Isabel Picó Vidal, *Derecho de Familia y cambio social. Una interpretación histórico-social de la reforma de la administración de los bienes gananciales*, 54 REV. JUR. U.P>R. 537, 541-545 (1985); and the opinions of Pérez v. Hawayek, 69 D.P.R. 50 (1948); and National City Bank v. De la Torre, 54 D.P.R. 233 (1939), for an extensive discussion on the state of the law during those first decades.

[18] *Id.*

ticipate equally with men, except for some business activity, always subject, however, to the husband's judgment.[19] Change in a woman's legal status was imposed from within and outside the marriage.

In 1976, substantial reform was achieved in the articles of the Civil Code whose North Star aimed to "match" or offer women equal treatment and consideration with regard to the administration of community property, parental authority and tutelage and the basic obligations of marriage.[20] Fraticelli Torres identifies four key factors that brought about this reform:

1. The intrinsic injustice of a system that recognized only one of the partners or members of the conjugal enterprise as administrator and head of the family unit, thus diminishing the intellectual and juridical capacity, personal status and dignity of the woman within the institution of marriage.[22]

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[19] Velázquez, *supra* note 17, at p. 282 et seq. On her capacity to act in her own interest: Armando Martínez, *La esfera de poder del comerciante casado: Necesidad de delimitar el ámbito de la gestión mercantil*, 18 REV. JUR. U.I. 289, 291 (1984); P.F. Entenza Escobar, *La capacidad contractual de la mujer casada*, 4 REV. D.P. 61, 63 (1962). Art. 6 OF THE COMMERCE CODE OF 1932 stipulated:

A married woman may freely engage in commerce and industry without other formalities than those required for men. In the business or industry in which a woman may engage, her liability shall be confined to her private property, with its fruits, the income therefrom and interest thereon, the immediate and direct profits obtained from such industry or trade, and the property acquired with such profits; and she may dispose of all such property without her husband's consent. Community property shall be liable for the results of the trade or industry undertaken by the woman provided there is express or tacit consent of the husband. If the husband wishes to express his will that such community property shall not be liable, he shall by means of a writing duly certified, notify his wife and the
Mercantile Registry, where an entry thereof shall be made in the margin of the registration of the merchant. 10 L.P.R.A. App. I, sec. 1006.
On the jurispudential interpretation see Giménez v. Registrador, 21 D.P.R. 329 (1914); Peraza v. Registrador, 30 D.P.R. 537 (1922); Sojo v. Registrador, 35 D.P.R. 855 (1926); Fuster v. Paonesa, 43 D.P.R. 760 (1932); Silva v. Corte, 57 D.P.R. 725 (1940); Quiñones v. Corte, 59 D.P.R. 438 (1941); Segarra v. Vivaldi, 59 D.P.R. 803 (1942); Ramírez v. Registrador, 61 D.P.R. 311 (1943); Lanausse v. Silva, 84 D.P.R. 546 (1962), among others.

[20] Excellent summaries of all the approved legislation may be seen in Eduardo Vázquez Bote, *Reforma del Derecho de Familia: Avance de un juicio crítico*, REV. D.P. 13, 61-62 (1976-77); and Emilio Menéndez, *Direcciones contemporáneas del Derecho de Familia*, 38 REV. COL. AB. P.R. 207, 218 et seq. (1977). On Act No. 51 dated May 21, 1976 that creates coadministration, see Olga Cruz Jiménez, *Cómo discriminan las leyes contra la mujer puertorriqueña*, 37 REV. COL. AB. P.R. 469 (1976); JEANNETTE RAMOS DE SANCHEZ, *LA MUJER Y LA NUEVA LEGISLACION SOBRE DERECHO DE FAMILIA* (San Juan, Commission for the Improvement of Women's Rights, 1977); JEANNETTE RAMOS DE SANCHEZ, *LA MUJER Y EL DERECHO PUERTORRIQUEÑO* (San Juan, 1976); and many other articles on the subject that were published during the seventies; Olga Resumil de Sanfilippo, *La condición jurídica de la mujer puertorriqueña en el siglo XX: Continuamos interpretando la parte de la leona?*, 54 REV. COL. AB. P.R. 5 (1993).
In addition to the articles cited, from the constitutional perspective see Pedro Ramos López-Oliver & Teresa Saladise, *La discriminación sexual y la sociedad legal de gananciales en el Derecho puertorriqueño*, 8 REV. JUR. U.I. 198 (1974).

[22] Fraticelli Torres, *supra* note 17

2. The increased incorporation of the Puerto Rican woman into the labor force, in many cases constituting the family's only consistent support.[23]

3. The adoption of universal principles that recognize full equality of every human being, regardless of origin, race, sex or social condition, in the Constitution of the Commonwealth of Puerto Rico of 1952.[24]

4. The influence of the Puerto Rican and international feminist movements aimed at attaining full recognition of women's rights in every category: social, political and economic.[25]

The impact or effect that these factors had on Puerto Rico Family Law Reform from 1976 is indisputable. The changes adopted constitute indispensable and significant breakthroughs for full juridical, social and interpersonal equality for women.[26]

Despite efforts to eliminate unequal treatment of men and women in amended legislation since 1976, the social premises that sustain or permit existing inequality have not been completely eradicated from the written law, from recurrent juridical relationships, or from lasting litigation or judicial practices in Puerto Rico.

This reality motivated the Commission to evaluate the juridical text of the current Family Law from the perspective of gender. This study does not exhaust the topic. It is only an attempt to illustrate with concrete examples how written regulations and the judicial processes that enforce them are not always crystal clear in treating women as fairly as men. Rather, they often help perpetuate unfair treatment on the basis of gender.

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[23] *Id.* Also see, Shahen Yamhure, *supra* note 21, at p. 77 et seq.; Picó Vidal, *supra* note 17, at pp. 550-554; Trías Monge, *supra* note 21, at pp. 44-46; and Resumil de Sanfilippo, *supra* note 21, at p. 7.

[24] *Id.* See the deliberations in 4 *DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE DE P.R.* 2561-2562 (ed. 1961). See criticism by Shahen Yamhure, *supra* note 21, at p. 75-78 and of Ramos López-Oliver & Saladise, *supra* note 21, at p. 230 et seq. Also, see Picó Vidal, *supra* note 17, at pp. 554-560; Trías Monge, *supra* note 21, at p. 46; Cruz Jiménez, *supra* note 21, at p. 472; Resumil de Sanfilippo, *supra* note 21, at p. 12 et seq.

[25] *Id.* Also, see Shahen Yamhure, *supra* note 21; Trías Monge, *supra* note 21; ISABEL PICO VIDAL ET AL..., *ESTUDIO PARA DETERMINAR EL ALCANCE Y RAMIFICACIONES DE LA DISCRIMINACION POR RAZON DE COLOR, SEXO, Y ORIGEN NACIONAL EN LA EMPRESA PRIVADA EN PUERTO RICO* (San Juan, P.R., Center for Social Research, 1972)

[26] Fraticelli Torres, *supra* note 17.

Despite its flaws, advances in Puerto Rican Family Law establish a good starting point to direct legislative efforts towards full equality of spouses in the different processes of marriage, and no less urgently, towards equality and equal treatment in designating and distributing other social and political responsibilities that women and men in this country commonly share.

Analysis of Legislation and Jurisprudence

Usage, style and interpretation of the body of law are crucial in analyzing and evaluating gender discrimination in the Puerto Rican juridical code, especially in the area of Family Law. Even at the dawn of the 21st Century, the Civil Code of Puerto Rico and the special legislation that complements it, still proclaim and recognize rights, acts, powers and duties for which gender is, or could have been, an essential or constitutive element, particularly in statutes that went into effect at the end of the last century.

The Puerto Rican Legislative Assembly has made conscientious efforts to recognize and explicitly reflect the juridical equality of men and women in the area of Family Law by amending the language and content of its regulations.[27]

For its part, the Supreme Court of Puerto Rico has either prompted many of these changes or has recognized equitable treatment for both genders even when the *literal* text of the law repudiates the premise of equality.[28] Even so, much remains to be done to completely eradicate manifestations of unequal treatment that our laws have tolerated for years.

To analyze the rules of Family Law in order to evaluate gender-based content and discriminatory practices, the Commission set off from the constitutional framework that prohibits all discrimination on the basis "of sex." We have dedicated an important part of this Report to this

[27] We shall see various examples of Legislative initiative in this work.

[28] The recent amendment to the Civil Code [C. CIV.] Art. 109 by Act No. 25 of February 16, 1995, is a clear example of this "judicial provocation", generated through the case of *Milán Rodríguez v. Muñoz*, 110 D.P.R. 610 (1981) 31 L.P.R.A. sec. 385

subject. Yet to place it within the system of more significant regulations, it is important to remember that the Constitution of the Commonwealth of Puerto Rico categorically stipulates that "*[a]ll men are created equal before the law. No discrimination shall be made on account of... sex.... Both the laws and the system of public education shall embody these principles of essential human equality.*"[29] Every analysis of the language and content of the laws and jurisprudence of Family Law should originate, then, with "*the profound equality of the human being*",[30] that in the performance of their activities as woman or man, wife or husband, mother or father, daughter or son, contributes equally to the development of the family and to the society to which they belong, always protected by that constitutional guarantee whose universal value is inescapable.

The Supreme Court of Puerto Rico has evaluated legislation in the area of Family Law from the perspective of gender and the right to privacy.[31] Consistent with previous jurisprudence on equal protection of the laws and discrimination in the areas of labor and criminal law, the Court confirmed the doctrine of Puerto Rican law that any classification based on gender is suspect and requires evaluation under strictest judicial scrutiny.[32]

In the case of *Milán v. Rodríguez v. Muñoz*[33] the Court confronted a challenge to the constitutionality of Article 109 of the Civil Code, because it countenanced a discriminatory classification on the basis of sex and deprived men of the equal protection of the laws. It should be remembered that until this case was resolved, Article 109 conceded only to women the right to claim

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[29] When explaining the Constitutional framework, it was previously emphasized in this Report that the linguistic formula used by the constituents, "All men ...", already reflects an androcentric conceptualization or cultural pattern, that is, centralized around the masculine figure

[30] Cited in the chapter on Constitutional framework. Words of attorney Jaime Benítez, 2 *DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE* 1103.

[31] See Figueroa Ferrer v. E.L.A., 107 D.P.R. 250 (1978).

[32] See other references on the subject identified in the Chapter on The Constitutional framework of this Report. Although the scrutiny in North American Law is less rigorous, the Supreme Court of the United States has said that any discrimination based on gender "*establishes a classification subject to scrutiny under the Equal Protection Clause*". Reed v. Reed, 404 U.S. 71, 75 (1971); to qualify as subject to scrutiny under the Equal Protection Clause, "*classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives*", Califano v. Webster, 430 U.S. 313, 316-317 (1977); Orr v. Orr, 440 U.S. 268, 278, 282 (1978).

[33] 110 D.P.R. 610 (1981)

support after divorcing her male ex-spouse.[34] Before evaluating the constitutional argument, the Court clearly established the parameters of analysis by pointing out:

> In *Zachry International v. Superior Court*, 104, D.P.R. 267 (1975, and the *Commission on Women's Rights v. Secretary of Justice*, 109 D.P.R. 715 (1980),—under Art. II, Secs. 1 and 7 that are prohibitive of discrimination on the basis of sex and the equal protection of the laws—we resolved to apply the formula of *strict judicial scrutiny* to cases of this kind. In both decisions we made note of the irreversible tendency of women incorporating in a substantial way into the diverse phases of economic, professional and social activity. *There, we seriously questioned the validity of subjective, erroneous, traditional and stereotyped premises that derive from the masculine point of view that consciously or unconsciously gets its raison d'être from the characterization of women as the weaker sex'*.[35]

In resolving the controversy over Article 109, the Court states:

> You do not need to make a great mental effort, or a profound analysis to conclude that the legislative scheme of the article in question represented in its text, without a doubt, a different, unjustified and discriminatory treatment against men by reason of their sex, that at this time...cannot prevail. *Its background demonstrates that its text... responds rather to an archaic and stereotyped idea of the traditionally limited function that was erroneously attributed in the past to the woman: home and mother. The precept reflects a view that was discarded with the modernization and reform of the juridical condition of women that the Legislative Assembly, in its desire to achieve a balance and give effectiveness to the deal of the Constituent Assembly to acknowledge the arrival* of women to their full rights, and to equal opportunity with men, methodically brought about during the past years.[36]

In *Amador v. A.C.A.A.*,[37] in evaluating the definition of the concept "housewife," defined as "*a woman*, independently of her civil status, *whose principal occupation is to administer, maintain and control a home* and who...is not engaged in a regular remunerated occupation or...does not attend regularly *to an employment outside of her residence* ", the Supreme Court held that:

> Regarding the Constitutional mandate that guarantees equal protection of the laws, or the constitutional clause that prohibits discrimination on the basis of sex, and being before a suspect classification based on sex, inherently

[34] Not until February 16, 1995 was the text of the law amended to adapt it to the constitutional precept and to the cited jurisprudence.

[35] *Milán Rodríguez*, 110 D.P.R. at p. 615 (emphasis added)

[37] 9 L.P.R.A. sec. 2052(8); *Amador v. A.C.A.A.*, 117 D.P.R. 820 (1986).

> suspect and subject to strict judicial scrutiny[,] in accordance with correct adjudicative technique, we decide that part of the statute that defines that housewife "means a woman" should be read in such a way as to include persons of either sex. Therefore, we recognize [petitioner] his rights under the law and our Constitution.[38]

According to the Supreme Court, in an opinion by Justice Negrón García, "When you have a Constitution that prohibits sex discrimination...[the emphasis and interpretation of the laws must be different".[39]

More recently, in the case of *Toppel v. Toppel*[40] the Supreme Court held that:

> Puerto Rico has a strong policy to protect women and to equalize the wife with the husband. Art. II, Sec. 1 of the Constitution of Puerto Rico provides in part that "all men [read 'human beings'][41] are equal before the law. No discrimination shall be made on account of ...sex..." Many laws have been passed under this legislation.

A fundamental principle of this case, which establishes the rules to govern legislation on the liquidation of community property in a marriage where the original conjugal domicile has been changed, is "the need to achieve equality between the spouses and to protect the wife, who has been excluded for so many centuries, against a possible manipulation of rules, and other injustices"—a bedrock that, as indicated ahead, justifies other opinions of the Court regarding the economic matters of marriage.

The doctrine of the Supreme Court, then, is not alien to the premises and juridical foundations on which this Report is based. Corroborated by examples of recent decisions, the Supreme Court has acknowledged the presence and effects of the premises that support the conclusions of this Report: the condition of social, political and juridical inferiority of women, perpetuated by laws and judicial practices, does not have a place in our juridical framework. No other unjustified discriminatory manifestation against gender shall be tolerated within our system of law. The

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[38] *Amador*, 117 D.P.R. 825 (citations omitted)

[39] *Milán Rodríguez*, 110 D.P.R. at p. 617.

[40] 114 D.P.R. 775 (1983)

[41] Clarification made in the text of opinion, *Id.* at p. 793

Commission evaluated the legislation and jurisprudence included in this part of the study under this jurisprudential prism.[42]

To analyze the legal grounds that govern Puerto Rican Family Law from the perspective of gender, existing regulations were grouped according to the basic relations and institutions that they regulate, that is: 1) the juridical capacity of persons and the social and juridical values that are reflected in the law on gender differences; 2) the personal relationship between the couple, be it a marriage, a homosexual and lesbian relationship, or concubinage, and the dissolution of that relationship; 3) the juridical relations generated by paternity and maternity, specifically (a) filiation, (b) legal authority over children *(patria potestas)* and custody, (c) maternal and paternal filial relations and (d) adoption. Also examined are 4) Civil Code Articles on support obligations between parents and ex-spouses; 5) special legislation on child support; and 6) the economic lifestyles of marriage.

The analysis is developed in the following way: the language or writing of the legal stipulations is evaluated first, then the effects of their application on both genders and, finally, the jurisprudential interpretation of those stipulations

A. On the Language of Law

In analyzing the legal language regulating relationships, rights and responsibilities that apply equally to men and women, the Commission would like to call attention to the impact on our

[42] Other methods of analyzing the language and androcentric content of the law have been recommended. Among them, those of sociologist Alda Facio, previously cited in this work, stand out. The reader is referred to those works for a broader vision of the phenomena, since, for lack of space, the discussion of all the schemes suggested cannot be included in this Report.
Alda Facio develops a very particular methodology for the analysis of legal texts that discriminate against persons on the basis of gender, based on six specific steps. The author considers a law is discriminatory [against women] if its result is discrimination, even though that same law has not been promulgated with the intent of 'protecting' women or of 'raising her' to the same condition as men. In that manner, a law that treats men and women exactly alike, but whose results diminish or nullify the enjoyment or exercise by women of their human rights, shall be a discriminatory law. But, "a law that benefits a historically-alienated group can never be considered discriminatory, because its effects on society would not be discriminatory". ALDA FACIO, CUANDO EL GENERO SUENA, CAMBIOS TRAE 17-18 and 80-81 (1992).

institutions of careless use of concepts that do not apply equally to women and men who are active and passive subjects of the law.

On the other hand, if the Legislative Assembly did not take into full account the presence of men as well as women in the spectrum of juridical equality that, by superior decree, must pervade all our legislation, the Commission sought to examine the jurisprudence of the Puerto Rico Supreme Court to see how this forum, as interpreter of the law,—in determining the sense, impact and scope of the laws—has reacted to the presence of sexism and discrimination that endures in the legislated statute: whether the Supreme Court rejects or accepts sexism and discrimination as a part of our juridical, social and cultural heritage. It is important to point out that this process of interpretation allows ethical-moral, social, economic and ideological values to surface and be perpetuated as binding rules that are supposed to shape the relationship of persons who co-exist in a society in a given space and time—in our case, in Puerto Rico on the eve of the next century.

None of the rules of interpretation in our Civil Code establishes that the male gender also comprises the female in the drafting of stipulations. The all-inclusive male gender is accepted as a given, as a common rule of language. The entire text of the Code, then, is worded in the male gender, which justifies the constant reference to such terms as "administrator" and not "person who administers," "possessor" and not "person who possesses," "diligent father of the family" and not "diligent person," to mention a few obvious examples.

The masculine wording of written regulations has been frequently justified, on the basis of the aforementioned rule of hermeneutics that includes the female gender in the male substantive whenever it arises from the context of an expression. In reality, the rule of hermeneutics was not, or is not, always the direct cause of regulations drawn up from the masculine substantive or perspective.

The social, economic, political or religious values prevailing in the era in which a specific regulation is approved determine its conception, phrasing, content and scope.[43] When the Spanish Civil Code was approved, the supremacy of the male over the female at every level—social, economic, political and religious—was evident, as we have already pointed out. That alleged male superiority, historically sanctioned and accepted in western civilization, is the underlying reason for the presence of male values and concepts in the creation and classification of juridical figures.[44] Therefore, it was proper to refer to the "diligent father of the family" as a criterion to exclude women from responsibility in the area of obligations or for thinking of "impugning paternity," because only the husband was authorized to challenge the legitimacy of the offspring of the marriage.

For years, this formal male representation of the law was accepted as natural and appropriate.[45] Today, that kind of wording is no longer admissible, much less if the effect is to perpetuate dissimilar and unjustified treatment of one gender and maintain the invisibility of that gender in the face of history and everyday life. The following paragraphs examine how the Supreme Court has confronted the grammatical construction of the law, and has restructured the value of language to certify it as an effective resource for achieving justice.

B. The Capacity of Persons to Act According to their Gender

The first reference to gender in the Civil Code of Puerto Rico is found in Article 22, which establishes that "Civil laws are equally applied to all without distinction of person or sex, except in

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[43] The phenomenon of the invisibility of women in history and in law occurs because it is the male who always appears as the protagonist in both fields. This explains the so-called androcentrism in the theoretical field, which degenerates into male chauvinism (*machismo*) in the real world. See FACIO, CUANDO EL GENERO SUENA, *supra* note 42, at pp. 35 et seq.

[44] See SPOTA, *supra* note 1, at pp. 45 et seq; CASTAN TOBEÑAS, *supra* note 1, at pp. 95 et seq.

[45] In the case *Ex parte* J. A. A., 104 D.P.R. 551 (1976), the Supreme Court evaluated the Petition for Adoption of a mother who was single and pointed out: Even though the Article does not refer to the female adopter, *no one would believe* that women are excluded. Because, as an elementary rule of hermeneutics, except when indicated otherwise in the text of a statute, the singular includes the plural, and *vice versa*,, and the masculine the feminine."

the cases otherwise specifically provided in the law.[46] This phrase anticipates that some laws may not be equal "for all, [with] distinction of persons [and] of sex".

Article 25 of the Code enumerates the causes and factors that can limit a person's capability to act individually. Among them "minority, insanity, prodigality, habitual drunkenness..."[47] Gender is not mentioned as a limitation to the juridical capacity of the person, however, until 1976. In the first case, the Puerto Rican "married woman" or "mother" did not have the same active legitimacy or juridical authority to give her consent in a contract, and in the second, to exercise jointly with the father the *patria potestas* over their children. That is, many articles of the Civil Code made distinctions based on gender or on position in the family, such as those related to the administration and disposition of conjugal property, the exercise of rights and power over the children or the guardianship of minors and incompetents, to mention only a few.

Not until 1976, as explained below, was every allusion to marital authority eliminated and the full prerogatives of the Puerto Rican woman regarding her actions and authority as mother, wife, and proprietor were acknowledged.

C. The Value of Women's Work in the Family and in Puerto Rican Society

In analyzing the statutes of the Civil Code and the special legislation that complements its text, we became aware that these legal bodies have adopted the historical, cultural and juridical view that places women in a state of submission or subjugation to men, or, at best, places them in an hierarchically inferior state to men in family, social, economic and political relationships. The man is conceived as head of household, administrator of family property, as representative of its interests and the chief provider of the family nucleus. It is taken for granted that it is the man who

[46] 31 L.P.R.A. sec. 22. This Article does not come from the Spanish Civil Code. It was originally adopted by the Revisory Commission of 1902 since it "does not have an equivalent in the Spanish [Civil Code] nor in that of Louisiana". MUÑOZ MORALES, *supra* note 15, at p. 135

[47] 31 L.P.R.A. sec. 25. Act No. 140 dated December 14, 1994 amended Article 25 to exclude deafness in cases in which "the deaf cannot separate reading from writing and cannot understand and communicate effectively by other means".

leaves the home to earn the support for his family. Consequently, it is he who is usually protected by labor laws and social legislation. Positions of leadership and of social and political prestige are, generally, conceived as proper to the man, with the woman relegated to less important positions such as the service professions that conform to the motherly image and of solidary support still associated with her. Three examples serve to illustrate our appraisal:

First, in Puerto Rico it was essential to alter specifically the state of law to give women the "status" deserved in Puerto Rican society, because for decades, society did not validate the changes that were necessary to eliminate the existing discrimination.

Second, the existing laws still typify a woman's work within the family as having less social and economic value than that of a man, as shall be discussed later in this chapter.

Third, some of our laws still linguistically reflect some conducts and behaviors as appropriate for men and some as appropriate for women in our society, thereby fostering gender-based stereotypes and attitudes. Let us look at each example separately.

1. The Educational and Reformer Effect of the Legislation of 1976

The reform of 1976 was necessary to initiate radical social change in Puerto Rican society that would permit the juridical equality of men and women in the heart of the family and in other areas: domestic, as well as social and economic. The legislation did not merely constitute an acknowledgment of an order of things "alive and real", which was contrary to the actual state of law. It was essential to change the very content of the law *because the actual laws and judicial decisions kept women in a state of juridical inferiority.* That is, during three quarters of this century, and a few more in the past century, *our laws imposed marital authority or supremacy over the woman in her role as wife and mother,* until the state of law changed. It is with that legislative initiative, that the juridical condition of women truly began to change in Puerto Rico.

Although Articles 89 to 94 of the Civil Code were amended substantially in 1976, giving way to "the new juridical order of things", in reality the conceptions that shaped the "old order" still survive in the minds and the daily practices of many sectors of our society.

In order to place the subject in its proper perspective, the articles just mentioned used to stipulate that [t]he husband [must] protect his wife and satisfy her needs according to his condition and financial means (Art. 89); [t]he woman [was] obliged to obey and follow her husband wherever he establish[ed] his residence (Art. 90); [t]he husband [was] the administrator of the community property, except when otherwise stipulated. Purchases that the wife [would make] with such property [were] valid, whenever they [were related] to things that were destined for the use of the family according to its social status.. But the real property of the conjugal society [could] not be alienated or encumbered—subject to nullification—except with the express consent of both spouses (Art. 91); and [t]he husband [was] the legal representative of the conjugal society (Art. 93 and 1313).

As for the duties of the woman as mother in the exercise of her juridical prerogatives with respect to her children, the pertinent references will be made in the section on maternal-filial relations.

From 1976, the law imposed as basic postulates of the personal relationship within the marriage that [t]he spouses were obliged to mutually protect and satisfy their needs in proportion to their conditions and fortune (Art. 89); [t]he spouses would decide by mutual agreement where to establish their domicile and residence for the attainment of the best interest of the family (Art. 90); [b]oth spouses shall administer the community property, except when otherwise stipulated, in which case one of the spouses shall grant a mandate to the other to act as administrator of the community property.. Purchases made by either of the spouses out of said property shall be valid when they comprise things or articles for personal or family use according to the social and economic standing of the family.. The law also provided that either spouse can make said purchases in

cash or credit. The real property of the conjugal community may not be alienated or encumbered under penalty of nullity, except with the written consent of both spouses. Nothing above shall be construed as to limit the liberty of the future spouses to execute articles of marriage (Art. 91); [e]xcept as provided in Article 91 of this code, either of the spouses may legally represent the conjugal community. Any unilateral act of administration by one of the spouses shall bind the community property and shall be presumed valid for all legal effects (Art. 93).

That is, the law already perceives the marriage as a joint social and economic process, in which control is dual and equal, with its benefits equally distributed between the two. For the real and practical impact of the new legislation on the basic institutions of family law that we consider in these pages, it will be necessary to reintroduce the issue when analyzing the text and rules that regulate each one of them.

2. *The Devaluation of Women's Work within the Home*

In evaluating the social legislation that protects the person who joins the workforce outside the home, we realize that women, as either housewives or successful operators of lucrative businesses in their homes, are excluded from that legal protection or it is inadequate, almost nominal. In that way, some recent social legislation, such as the Automobile Accident Social Protection Act,[48] constitutes an interesting means to corroborate the above and to confirm that there are still situations in the law that adversely affect women, due to the traditional roles that society assigns them, when compared to the treatment that men generally receive. This law provides for compensation for the loss of income, due to automobile accidents, and provides that "[i]f within the twenty days following the date of the accident the injuries received disable a victim *other than a housewife, the Administration shall pay to him a benefit for loss of income by disability*. ..Section (a) of

[48] Act No. 138 dated June 26, 1968, as amended, 9 L.P.R. sec. 2051.

Article 4(3) of the law.[49] Section (g) of the same article states that "*When the disabled victim is a housewife the Administration shall pay her a benefit of $25 weekly subject to a maximum of 12 weeks.*"[50]

The law provides in its Article 2(8) that:

> Housewife — means *a woman*, independently of her civil status, whose principal occupation is to administer, maintain *and control a home* and who: (1) is not engaged in a regular remunerated occupation or (2) does not attend regularly to an employment outside her residence.[51]

The Workmen's Compensation Act was drafted in similar terms.[52] This law excludes "those persons who work in their homes".[53] It is common knowledge that the majority of persons who work in their homes are women who, by these means, attend to their different responsibilities as homemakers, custodians of their children, and providers of their family's support.

If our society were to evaluate the work of women within the home as they do the work outside it, it could offer adequate protection in situations of disability, accident or other cases of a decrease in work capacity. To not do it has the effect of perpetuating prejudices and is prejudicial by not historically evaluating the work performed by women in their homes, and by depreciating the real value that this activity represents from the economic and social perspective[54]

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[49] 9 L.P.R.A. sec. 2054(3)(a).

[50] 9 L.P.R.A. sec. 2054(3)(g)

[51] 9 L.P.R.A. sec. 2052(8) Amador v. A.C.A.A., 117 D.P.R. 820 (1986). In this case the Supreme Court, when interpreting the provision of law that defines "housewife" as "a woman", also concluded that according to the purpose and reach of the legislation, it was inclusive of both genders.

[52] Act No. 45 dated April 18, 1935, as amended, 11 L.P.R.A. sec. 1 *et seq*

[53] *Id.* Art. 2, 11 L.P.R.A. sec. 2

[54] MARLENE DIXON, THE FUTURE OF WOMEN 8-9 (San Francisco, synthesis Publications, 1980) Dixon says: A 1980 estimate made by a California attorney of a married woman's average working week, based largely on an earlier study by Chase Manhattan Bank, showed the following:

Job	Hours	Rate $	Per Wk
Food Buyer	7.0	5.75	$ 40.25
Nurse	2.0	7.14	14.28
Tutor	2.0	6.43	12.86
Waitress	2.5	3.41	8.53
Seamstress	1.0	3.75	3.75
Laundress	5.9	3.10	18.29
Chauffeur	3.5	5.50	19.25
Gardener	2.3	5.00	11.50

Although in recent years the jurisprudence of the Supreme Court of Puerto Rico has protected and raised the social and juridical condition of women, to the degree that the present legal structure allows it, it is important to make the following distinction:

In the case of *Milán Rodríguez v. Muñoz*, the Court quotes jurist José Luis Lacruz Berdejo[55] to illustrate his idea on the conditions that actually propitiate equal treatment for women. The Court starts the *Milán* opinion with the following words:

> As a conceptual background for the solution of this case and with reference to the juridical evolution of the condition of women the following words are useful: "[t]he amended articles assume the recognition, by the legislator, of several social realities that until now had not transcended the field of law (the law, almost always, comes after the social need): the new identity of the wife who is no longer defined exclusively as mother and domestic animal or for labor within the house, but as a being with dignity and liberty equal to that of man and as a result with the right, as a general rule, to the same juridical possibilities and opportunities.

Unfortunately those words reflect a certain disdain toward the position that women should occupy today in society. The Commission respectfully considers that the reference that woman "*is no longer defined exclusively as mother and domestic animal*",—(Is the categorization of domestic animal valid?) (What value does the adverb "*exclusively* " have in this analysis?)—, who is a "*being with dignity and liberty equal to that of men*"—(Should she not have a right to her own

Family Cousel	7.0	25.00	175.00	
Maintenance	1.7	4.90	8 33	
Childcare	168.0	1 00	168 00	
Cleaning Woman	7.5	3.21	24.08	
Housekeeper		10.0	4.75	47.50
Cook 13.1	4 75	62.23		
Errand Runner	3.5	3.79	13.27	
Budget manager	4.0	6.43	25 72	
Decorator	1.0	32 00	32.00	
Caterer 1.5	7.71	11.57		
Dishwasher	6 2	3.10	19.22	
Dietician 1.2	6.80	8.16		
Secretary 2.0	5.00	10.00		
Maid/Hostess	3.0	20.00	60.00	
Total Weekly Value		255 9	$793.79	
Total Yearly Value $41,227 08				

[55] EL NUEVO DERECHO CIVIL DE LA MUJER CASADA 23 (Madrid, Ed. Civitas, S.A., 1975), as quoted in the opinion, 110 D.P.R. at p. 611

dignity and liberty without having to depend on the masculine framework?)—and who "*as a general rule, [deserves] the same juridical possibilities and opportunities [as men]*"—(What and how could the exceptions to that general rule be justified?)—all are highly pejorative toward women and to the law that helps them. In fact, the quotation diminishes the valuable arguments that support the opinion that should have been upheld without "this conceptual background" that reflects the same attitudes and prejudices that the opinion so effectively rejects for both genders.

Another instance in which the Supreme Court analyzed the position that women ordinarily occupy in society is *Sánchez Cruz v. Torres Figueroa*,[56] in which a Superior Court sentence that decreed the dissolution of a marriage on the grounds of cruel treatment by the woman toward the man is questioned. The majority opinion, written by Associate Justice Naveira de Rodón, assesses the evidence presented during the divorce hearing based on the premises of equality of the spouses within the institution of marriage. The most significant manifestations are the statements of the plaintiff spouse on the conduct of the defendant that give rise to the cause for divorce. Upon evaluating this testimony Justice Naveira concluded:

> The position of subordination and servitude that the plaintiff kept his wife in is clear from his own testimony. Even though it was he who paid the bills in the home, he did not allow his wife to participate in the administration of the family property, to the extreme that [w]hen she went to buy something, they went together". E.N.P., p. 2. He apparently conceived the relationship with his wife as one in which he, as the dominant part of the conjugal community, had absolute control of the decisions that affected the couple; while she, was subordinated to a servile role, to be performed according to the demands and criteria of her husband....
>
> ...[T]his conduct... of underestimation ...constitutes an affront to her dignity.[57]

[56] 123 D.P.R. 418 (1989).

[57] *Id.* at p. 430.

In the dispositive part of the opinion, the Court "grants" the divorce to the defendant because it considers that the plaintiff's treatment towards his wife shaped the cause of cruel treatment.

It should be said that the text of the opinion mentions that the action by the court of instance was not appropriate because, "although the emphasis discussed should prevail in the decisions before our courts, in the present case the sentence from the forum of instance favors the subordination of Puerto Rican women...." when it concluded that a woman who does not have a meal on the table when her husband comes home, does not iron, and visits with her girlfriends exhibits cruel treatment toward her husband.

The Commission considers that this is a good example of the real practices that "resist the law"[58] and perpetuate discrimination. On the one hand, women's work is not valued equitably and, on the other, it is seen as an obligation toward the husband and other members of the family nucleus that cannot be delegated.

3. *The Law Reflects Stereotypes in the Performance of some Duties and Professions*

One of the most interesting findings of this investigation was to evaluate the legislative language to describe persons and processes, above all in the professions and public service

The legislation that refers to the benefits of the descendants or dependents of teachers,[59] female and male police officers[60] and other public servants, or those that refer to the position of

[58] José Trías Monge, *Los derechos de la mujer*, 44 REV. COL. AB. P.R. 43, 44 (1981); *Sánchez Cruz v. Torres Figueroa*, 123 D.P.R. at p. 424.

[59] Act No. 218 dated May 16, 1951, as amended, 18 L.P.R.A. secs. 362 and 263

[60] Act No. 169 dated June 30, 1968, 25 L.P.R.A. sec. 391 *et seq.* See especially secs. 397 and 401.

Governor,[61] Comptroller[62] or to the Speaker or President of the House of Representatives or of the Senate,[63] respectively, present some very interesting and particular linguistic variations.

The laws referring to teachers and police, exceptionally so, although not carefully or systematically, use language that includes both genders. The teachers' law refers to "*when the retired teacher is survived by a widow or a female teacher by a widower...while they remain in widowhood*". The police officers' law provides that the "*right to the widow's or widower's pension shall cease if either should marry*", in this way including, although not linguistically perfect, both genders in the law's provision.

The law of retirement of Ex-Governors, however, uses the term "the widow of every ex-Governor...", as if it is expected that it will always be a man who occupies that position.[64] A similar situation occurs with the law that created the pension "*to the widow of any legislator [who] would have occupied in property the Presidency of the Senate or of the House of Representatives of Puerto Rico...*" This provision of law was amended in 1991 to substitute the term "widow" for "surviving spouse",[65] a neutral concept that applies to men and women equally. The legislation that creates the position of comptroller refers to the comptroller in all its provisions in the masculine substantive [66]

Other social or labor laws also contain references to the widow or concubine in the feminine, taking for granted that the man, as worker or employee, is generally the provider in the home.

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[61] Act No. 2 dated March 26, 1965, on the Retirement of Ex-Governors, 3 L.P.R.A. secs. 21-24

[62] Act No. 9 dated July 24, 1952 eff. July 25, 1992, 2 L.P.R.A. sec. 71 *et seq.*

[63] Act No. 82 dated May 2, 1941 referred to "the widow of any legislator...while she remains in the state of widowhood". The law was amended in 1991 to change the language. 2 L.P.R.A. sec. 24

[64] In Art. 24 the term ex-Governor is defined as "any person who has held the office of Governor under the provisions of the Constitution of the Commonwealth of Puerto Rico, by popular election, who has not been removed [sic],..." As we can see, the clarification is still unclear in that the substantive "person" [in Spanish noun appears in feminine form] does not coincide with the term "removed" [in Spanish verb appears in masculine form]

[65] See Act No. 106 dated December 20, 1991, 2 L.P.R.A. sec. 24.

[66] No person may be Comptroller unless they are thirty years of age and are a citizen of the United States of America and a bona fide resident of Puerto Rico.
2 L.P.R.A. sec. 72

With the integration of women into the workforce, the Supreme Court has had to interpret similar provisions on some occasions and conclude that the feminine noun in social legislation necessarily includes, when applicable, the corresponding reference to man, whenever he has requested protection under similar provisions, drafted *originally in the feminine*, such as "widow" and the previously mentioned "housewife".

In the case of *Fraticelli v. Industrial Commission*,[67] where the word "widow" is interpreted, the petitioner, as stated in the opinion, questions the constitutional validity [of Article 3, subsection 5(3)(c) of the Workmen's Compensation Act],[68] on the basis that it constitutes discrimination against women in violation of Article II, Section 1 of the Constitution, which prohibits all sex discrimination. She bases her challenge in that "the text of the provision transcribed refers only to the widow and does not mention the widower, which constitutes a discrimination based on the sex of the beneficiary. She alleges that the grammatical rule is to the effect that "the masculine gender includes the feminine but not the reverse, so that one cannot interpret that widow includes the widower." To this argument, the Supreme Court replied that "[t]he Workmen's Compensation Act applies to all workers or employees—men or women—who may suffer injuries, are disabled or who lose their life in work-related accidents." After transcribing the legal provision, the Court points out:

> We wish to warn here that the transcribed text refers exclusively to the widow only because of the order of the wording in the sentence. The subject of the sentence is the masculine "worker or employee" [in Spanish] and the logical relation of the words makes it necessary to refer only to the feminine gender, that is, the widow.... It would be absurd and contrary to the purpose of the law to interpret that since the text only refers to the widow, the dependent

[67] 105 D.P.R. 363 (1976).

[68] The Article stipulates:

> The right to compensation of the widow or concubine as a dependent of the deceased workman or employee shall cease if she marries or lives in concubinage with someone else. In such case or in the case of the death of the widow or concubine the monthly payments to the dependent minors shall be increased and monthly payment which the widow or concubine received shall be distributed among the dependent minors. 11 L.P.R.A. sec. 3, subsec. 5(3)(c)

> widower does not have a right to compensation when a female worker dies. ... *The dependency is the* indispensable condition, not the sex.[69]

The correction in the final drafting of the written rule can avoid this kind of attack on the text of legal provisions, which we have exemplified by the cases of *Milán*, *Amador* and *Fraticelli*. The reality and casuistry demonstrate that, as said by Justice Torres Rigual in the *Fraticelli* opinion, "[t]he problem is not so simple that it could be resolved with the application of a mere grammatical rule." It transcends the field of legal hermeneutics to invade the field of stereotyped perceptions that a society has of its members and that the law must help to correct.

On the basis of the above regarding the language of the law and jurisprudence, the Commission concludes that:

1. Although one cannot always conclude that the text and application of the aforementioned laws, and others similar to them, expressly represent prejudice against a gender, it is important to point out that subliminal discriminatory values that retard the total eradication of prejudice and discrimination in the field of law underlay language, which perpetuates them.[70]

2. Although legislative history and the rules of hermeneutics can lessen the impact of drafting laws using the "masculine subject", this can and must be avoided. Because of this, the revision of the contents, language and stereotyped premises of all our laws is imperative, as part of a conscious, intense and coordinated effort aimed at cleaning up old social and juridical concepts that for centuries have obstructed the total ban of gender-based discrimination in our society.[71]

3. The work of women as housewives is devalued by written laws and administrative and judicial practices, which become prejudicial in personal, social and economic terms, and deny women the protection of important social legislation.

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[69] *Fraticelli*, 105 D.P.R. at pp. 365-366. (Emphasis added).

[70] A similar effect results by calling Secretary's [female form in Spanish] Week to the period that acknowledges the labor of persons of both genders who perform that work in the public and private administration field, or to call College of [female] Nurses, or the College of [male] Lawyers or of [male] Engineers and Surveyors, when persons of both genders constitute the membership of the professional group

[71] In Spain Act No. 11/1990 dated October 15, 1990 (B.O.E. October 18, 1990 No. 250) modifies various articles of the Civil Code to apply the principle of no discrimination on the basis of gender, by changing the language or establishing criteria other than of gender to grant or acknowledge rights and responsibilities

D. Relations Between the Couple: Marriage, Concubinage and the Homosexual Relationship

1. Marriage: Difference of the Sexes

To marry in Puerto Rico, it is necessary that 1) the parties be "man and woman";[72] 2) have the juridical capacity to marry;[73] 3) freely consent to be spouses;[74] 4) comply with prior administrative steps that the law provides[75] and, 5) solemnize their matrimonial vows before an authorized official[76].

Article 68 of the Civil Code stipulates:

> Marriage is a civil institution, originating in a civil contract whereby a man and a woman mutually agree to become husband and wife and to discharge toward each other the duties imposed by law. It is valid only when contracted and solemnized in accordance with the provisions of law; and it may be dissolved before the death of either party only in the cases expressly provided for in this title.[77]

Although only Article 68 of the Civil Code of Puerto Rico makes direct reference to the difference in sex, it is important to note that all of Book I of the Civil Code has as its premise the celebration of marriage *between a man and a woman*. The reference continues with a husband and wife, father or mother, parting from the legal concept that it is only possible to speak of marriage when it occurs between persons of opposite sexes.

As we shall see in this Report, Puerto Rican law does not protect concubinage between homosexual persons, although it sanctions and protects some of its consequences. The marriage or the consensual union of persons of a same sex or of transsexuals is not provided for by the legisla-

[72] 31 L.P.R.A. sec. 221
[73] 31 L.P.R.A. sec. 222
[74] 31 L.P.R.A. sec. 223.
[75] *Id.*
[76] *Id.*
[77] 31 L.P.R.A. sec. 221

tion of Puerto Rico.[78] We can conclude that any legal analysis of this area must necessarily be made taking into account fundamental dispositions of Constitutional Law: the right to privacy, equal protection of the law, due process of law, reasonableness of the prohibition of marriage on the basis of considerations of public order, are all aspects that should be considered in a matter of this kind.[79]

In the United States no state court has recognized the right of marriage between persons of the same sex, although the union of transsexuals has been permitted.[80] Some courts have based their decisions on public policy in denying a request of this kind.[81] In some jurisdictions within and outside the United States, for example, Denmark and Holland, marriages or similar unions between persons of the same sex have been admitted.[82]

In the chapters of this Report related to the General theoretical framework, the Constitutional framework, and the Analysis of legislation and jurisprudence in the field of Labor law, the Commission has expressed its belief that discrimination on the basis of sexual orientation is a manifestation of gender discrimination. Regarding the subject in the area of the family, it has been said that homosexuality, lesbianism, heterosexuality and bisexuality are all concepts constructed to

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[78] A distinction is made in that the juridical conditions that determine the treatment of homosexuals and lesbians and of transexuales are different. Each classification is determined by different physical, intellectual and psychic circumstances. The law must address these differences to do justice to the persons who find themselves immersed in a juridical situation that merits a different treatment.

[79] Already in the case of Zablocki v. Redhail, 434 U.S. 374 (1978), the Supreme Court of the United States held that the right to marry is a fundamental right, implicit in the right to liberty and protected by the clauses of due process of law and the right to privacy. Any law that imposes a requirement on a group that unjustly restricts that right violates the guarantee to the equal protection of the laws and would be subject to strict judicial scrutiny.

[80] The Supreme Court of Hawaii in the case of Baeher v. Lewin, 852 P. 2d 44 (Haw. 1993), resolved that the marriage law of Hawaii is presumed unconstitutional because it creates a classification based on sex, and therefore would be subject to a strict judicial scrutiny. The Supreme Court returned the case to the court of instance for it to apply such scrutiny when analyzing the constitutional allegation.

In the case of M.T. v. J.T., 355 A.2d. 204 (1976) a marriage of a transexual was validated. The court stated: "It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did no so here. In so ruling we do no more than give legal effect to a fait accompli, based upon medical judgment and action which are irreversible."

[81] Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980), aff'd, 673 F 2d 1036 (9th Cir.) cert. denied, 458 U.S. 1111 (1982); Singer v. Hara, 11 Wash. App. 247, 259, 522 P.2d 1187 (Wash. Ct. App. 1974); Baker v. Nelson, 291 Minn. 310, 191 N.W. 2d. 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972).

[82] Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1991 (1992). See article of Sheila Rule, *Right for Gay Couples in Denmark*, N.Y. TIMES, Oct. 2, 1989, at p. A8.

account for the human forms of sexual expression and affection that acquire very particular important events in the relationships between persons. These expressions and behaviors have always existed through human history. These important events will be influenced by the socio-historical constructions that occur to genders in each society and a particular moment in history. For example, heterosexuality has a dominant place because of its role in perpetuating the human race through procreation, acquiring cultural values that propose to devalue all that which does not approximate it.[83] It is precisely this basis that is presented when rejecting the legal matrimonial union between persons of the same sex or in not recognizing the juridical, physical and sexual identity, with all the attributes of the gender, of the transsexual.

In Puerto Rico it has not been acknowledged that the relationship *more uxorio* can occur between persons of the same sex. Yet, according to actual state law, the same community relationship that is now recognized regarding property accumulated by heterosexual couples must also be recognized regarding property that homosexual or lesbian couples have jointly accumulated. The law must re-evaluate schemas that do not comply with the new social realities, especially if the effect of the inaction is to perpetuate discrimination, intolerance, and the prejudice of some persons against others.

However, as we explain extensively in the chapter on Domestic Violence, Article 1.3 (i) of Act 54 defines the relationship of a couple as a relationship between spouses, ex-spouses, *persons who live or have lived together, those who maintain or have maintained an intimate consensual relationship* and those who have procreated children between themselves. This definition allows the provisions that protect victims of domestic violence to be applied to same-sex couples. This interpretation is a forward step in the equal treatment of persons who are voluntarily situated in diverse

[83] Edwin Fernández Bauzó & Francis Pérez Cuadrado, *El discrimen por orientación sexual como una forma de discrimen por género. Homosexualidad y la custodia de niños/as ante el sistema de justicia* (1995) (unpublished work).

minority sectors and social tendencies. The extension of this view to other manifestations of human socialization is obligatory.

2. *Marriage: Minority of the Spouses*

The Code contemplates other premises in which gender is of special importance to the institution of marriage. They concern those laws that regulate the marriage of minors. The validity of these marriages depends to a great degree on the gender of the minor. We know that minors who have not obtained their parents authorization cannot contract a valid marriage. This impediment stems from subsection (4) of Article 70 that refers to all minors under 21, without distinction in the circumstances of the marriage, and Article 74 which emphatically states that in order to marry, minors under 21 need the permission of persons with parental authority or tutelage, unless they have already reached 18 years of age or if the woman has been raped, seduced or is pregnant.[84]

Article 70 stipulates in subsection (3), which is pertinent to our analysis:

(1).....

(2).....

(3) *Males* under eighteen years of age, and *females* under sixteen years of age. Marriage contracted by persons under the said age of puberty shall, nevertheless, be valid ipso facto and without an express declaration, if one day after having arrived at the legal age of puberty the parties shall have lived together without the representatives of either of them having brought suit against its validity, or if the *woman* shall have conceived before the legal age of puberty or before having established such suit; and provided, that every *woman* over fourteen and under sixteen years of age who has been seduced may contract marriage with the prior consent of her parents or tutor and if these refuse it, with the consent of the part of the Superior Court of the place where the seduced *woman* resides; and every *man* over sixteen and under eighteen years of age who is under an accusation of having seduced a *woman* over fourteen and under sixteen years of age, may also contract marriage with the prior consent of his parents or tutor; and if these refuse it, with the consent of the part of the Superior Court of the place where the seduced woman resides; and such marriage shall be considered sufficient to bar all

[84] 31 L.P.R.A. sec. 242

> prosecution, in the same form as in the other cases referred to in Art. [101] of the Penal Code, sec. [4063] of Title 33.[85]

As we can see, neither *men under 18 years* nor women *under 16 years* can marry. This impediment stems from the fact that legal puberty—which determines the physical aptitude of the married parties to procreate children and assume the responsibilities of the family—ranges from 18 years in the case of men and 16 in the case of women. It springs to mind that the law accepts as valid that in a relationship , the man should be older than the woman.

Several justifications purportedly support the differences in the ages of men and women minors who are to contract marriage. The following stand out: *psycho-biological,* because women develop physically and emotionally earlier than men, therefore the male should be older than the female;[86] *cultural and social,* because from fourteen years of age women can procreate and take care of a home—those are the "duties proper of her sex"—but the male would be too young to take over the responsibilities of provider and protector of the family outside the home environment;[87] *political,* because the young male's first political or patriotic obligation is to fulfill his military service while celibate, and marriage and offspring are dissuasive factors for that essentially masculine activity,[88] in which case, by delaying the age that makes him eligible for marriage, he can comply with military service celibately and without the emotional or economic ties that may distract him from his patriotic duty; *economic,* the male should have completed his high school studies before taking on the responsibilities of a family, which would allow him, in turn, to be better prepared and more stable economically to carry them out.

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[85] 31 L.P.R.A. sec. 232

[86] GOODE, *supra* note 3, at pp. 32-33

[87] *Id.*

[88] *Id.* Goode says, "*the definition of "maturity" is not based on the physical differences of maturing between the sexes, but on the different social roles that must be performed*"

For the woman, the requirement that she be younger than he to contract marriage starts with the premise that her main social and personal goal is marriage and procreation. For her, there are no special considerations over the possibility that she may not have completed her studies or that, while still in full adolescence, she may not have the emotional maturity to assume such a demanding social responsibility that other experiences, such as military service, could supply. Whatever the reasons that originally justified these differences, especially if they were founded on gender, the Legislative Assembly should revaluate such premises and equalize the circumstances required of the contracting parties, women and men. Not to do so perpetuates a discrimination that could not withstand the scrutiny of strict judicial supervision.[89]

On the other hand, it would be useful to reactivate the debate regarding the establishment of legal age at 18 years. That age has already been established as the legal age in all the states of the United States and in Spain. The adoption of that rule would make uniform those areas of law where age is an important factor in determining rights and obligations.

3. Marriage: Sanction for the Seduction of a Woman

Article 70 of the Civil code also requires salvaging the honor of a woman who has been seduced by obligating the man to assume social responsibility for his acts. The fact that the penal sanction that the law imposes on the man who has seduced a woman younger than 18 years is easily lifted, if he marries her, illustrates two things: first, that the crime has a basic moral justification; the second starts from the premise that the woman does not have sufficient capacity to consent to the sexual act and that, should she consent, she does so anticipating marriage. Once again the woman is perceived as a being who, because of her emotional and intellectual limitations, needs special protection to care for her body and her honor. Further, these provisions foster a cult to vir-

[89] See the Puerto Rico Supreme Court jurisprudence cited in this part. Already the Supreme Court of the United States, in the case of Stanton v. Stanton, 421 U.S. 7 (1975), determined that no distinctions would be allowed between men and women based on age with regard to the right to support.

ginity,[90] applying the concept and experience of virginity only to the woman, which turns her into a special entity if she keeps that attribute or into a socially devalued being if she "loses it". From thence comes the social conception that the man must "save the honor of the woman", through marriage. Thus the determination whether to give or deny a woman the status of "dignified," remains in the power of the man, parents, tutors, and even the Superior Court.

A case that exemplifies this social conception is *Díaz Freytes v. M.M.M.*[91] In this case, a young couple had sexual relations before marrying and the father of the minor forced them to marry, although they did not live together after the marriage. The Supreme Court based its opinion on precedents from the beginning of the century, judging the conduct in question through the prism of seven decades of prior history. In the relevant part of the opinion, the Court sustained: "From the beginning of the century we decided in López v. Valdespino, 6 D.P.R. 354 (1st ed.), 172 (2nd ed.)(1904), that to have warned a person of the criminal sanctions that he would be subject to should he not contract marriage with *that person whose honor he had offended, does not constitute sufficient intimidation to nullify consent.*"[92]

The Court concluded that the man, "because of his legal age and university academic background", was not intimidated by the young woman's father when he told him that if he did not marry her, "he would have problems". The fact that the youths did not live together shows that the act of matrimony only served to "save the honor" of the woman, which the law sanctions by giving the appearance of legality to an essentially fictitious marriage.

This problem is very complex because of its religious, moral, emotional and social connotations. However, it is necessary to confront it head-on because of its pertinence to this study, since

[90] See on this subject J.L. Simmons, The Virginity Cult in the Civil and Criminal Law of Puerto Rico, 40 REV. U.P.R. 103 (1971)

[91] 110 D.P.R. 187 (1980).

[92] *Id.* at p. 189. (Emphasis added)

gender—what is expected of a woman in this society, especially of a virtuous woman—allows unacceptable juridical irregularities to occur, such as forced marriage.

On the other hand, the third paragraph of Article 74, as amended in 1975, effectively equips minors older than 18 years, with the necessary capacity to consent to marriage, without the consent of their parents, "in those cases in which it is proven that the contracting woman has been raped, seduced or is pregnant". Although the provision represents a forward step toward the equal treatment of young men and women, it still starts from the premise that the woman who has had sexual relations or is pregnant has marriage as a first social option, the only condition that appears to grant her a socially acceptable status.

4. Marriage: Consent of the Abducted Woman

One of the most striking provisions of the Code regarding the subject of marriage, and which reflects the romantic vision of the man who wins the love of a woman by force, is found in Article 73 of the Civil Code.[93] This article states:

> Consent is not valid [to marry]:
>
> (1) When it is given to an abductor by the abducted before the latter has fully recovered her liberty.
>
> (2) When obtained by violence or intimidation.
>
> (3) When there is a mistake with respect to the person with whom marriage is to be contracted.

We know of no case in which that argument has been used to challenge the validity of marital consent.[94] Its presence is an anachronism that reminds us of old and stereotyped notions regarding the relations between men and women in our society and about their intellectual and psy-

[93] 31 L.P.R.A. sec. 241

[94] See Díaz Freytes v. M.M.M., 110 D.P.R. 187 (1980), for an analysis of what constitutes intimidation regarding the consent for contracting marriage

chological attributes, among them, the idea that the woman can be possessed by a man who wants her, or that the woman enjoys being hurt, subjugated and dominated by a male.[95]

The Commission considers that subsection (1) should be abolished. Subsection (2) of this provision is sufficient to cover any case in which a woman is induced into marriage within a defenseless state as described in subsection (1). Other penal provisions punish any conduct that impedes the freedom of movement, activity and consent of a person [96]

From an analysis of the provisions of the Civil Code regarding the institution of marriage and the personal relations between the spouses, we can conclude the following:

1. The law imposes as an indispensable juridical condition for contracting marriage that the contracting persons be of different sexes. In light of the arguments presented throughout this Report and particularly in this section, this requirement could present substantial constitutional problems that should be examined carefully, by the Legislative Assembly as well as by the courts.

2. The law requires different ages to determine the legal aptitude of a person to contract marriage, although such differences disappear when the person reaches legal age. The discriminatory conditions that arise from subsections (3) and (4) of Article 70 of the Civil Code are:

   a) That the minors referred to in subsection (4) are minors of both sexes who have not reached 21 years, but are at least older than 16 if they are women, or at least 18 if they are men, the minimum ages—legal puberty—to contract marriage. The traditional justifications to support the differences would not withstand a strict judicial analysis.

   b) That every minor needs the consent of their parents to contract marriage, but the Code recognizes some exceptional cases in which the minors can have special circumstances that make that authorization unnecessary, and in these gender has a significant importance.

   c) That the minors who have not reached the minimum age that is required to contract matrimony, can validate the marriage already celebrated or marry in the

[95] In the chapter on the General theoretical framework other similar conceptions are explained that are not necessary to repeat here.

[96] Article 137 of the PENAL CODE [PEN. C.] prohibits the person who "by force, violence, intimidation, fraud or deceit [a person extracts from] another to deny them their liberty". 33 L.P.R.A. sec. 4178. Art. 130 of the PEN. C describes the crime of restraint of liberty and who commits it as "[a]ny person who in any way unlawfully restrains the liberty of another, the victim knowing of the restraint ..". 33 L.P.R.A. sec. 4171 Art. 131 of the Pen. C. describes the commission of the crime of aggravated restraint of liberty. 33 L.P.R.A. sec. 4172.

cases specified by law, qualified by social and cultural values, and influenced by the behaviors expected of each sex.

3. The law does not define the obligations of a husband or wife, a matter that society itself determines according to the traditional roles that it assigns to each person within the social or familial milieu. Behaviors that do not adjust to the social stereotype become a reason for the denial of rights or the imposition of sanctions, often of great consequence, because of their severity, to the person affected.

4. There still remain traditional premises within the text of several laws that support the view of the dependency of women on men and society. The Legislative Assembly and the courts should revise the current laws to eradicate all vestiges of dependency based on gender and to reconstruct juridical concepts and figures that are founded on the essential equality of all human beings before the law.

5. A re-evaluation should be initiated of the premises and sanctions that support the notion of seduction in Puerto Rico in keeping with the findings previously mentioned.

6. The debate should be reactivated on the establishment of the legal age at 18 years, a disposition that could bring uniformity to all areas of law in which age is an important factor to determine rights and obligations.

E. Concubinage

The Civil Code of Puerto Rico does not recognize the validity, effectiveness or protection of common law relationships.[97] The Supreme Court has established some rules to regulate and resolve conflicts between the cohabitants regarding property that they accumulate together during

[97] For an historical analysis of this institution in Puerto Rican law, see MUÑOZ MORALES, *supra* note 15, at pp. 316-337.

The law dated March 12, 1903, p. 119, on natural marriages, defined the natural marriage and established the procedure for legitimizing and registering such union. Section 1 provided: "That when a man and a woman lived publicly together under one roof as husband and wife, and a child was born as a consequence of that union, if the parties comply with the legal requirements and are capable to contract matrimony, and there exists no legal impediment, it shall be considered in all and by all as a legal marriage, having the same civil effects of any other legal marriage." This law was abolished by the one dated March 7, 1906, p. 103, which authorized the free legalization of rights of the marriages of persons who cohabitate as husband and wife before March 7, 1906, by request dated before July 1, 1907. In this way, legal marriage remains as the only union of a couple that is protected by all effects of the law.

Several articles that discuss the outstanding aspects of this institution of Puerto Rican law are: Ariel Curet Cuevas, *La división de los bienes concubinarios en el Derecho puertorriqueño*, 34 REV. JUR. U.P.R. 61 (1965); Lillian de la Cruz, *Análisis para una legislación del concubinato "more uxorio" en comunas y el derecho de familia*, 42 REV. JUR. U>P.R. 345 (1973). Two excellent works analyze the institution from the comparative perspective: EDUARDO A. ZANNONI, *EL CONCUBINATO*, (Buenos Aires, Ediciones Depalma, 1970); ENRIQUE AREZO PIRIZ, *CONCUBINATO*, (Montevideo, (2 tomes) 1983).

their common law relationship.[98] However, this forum has refused to acknowledge other obligations that ordinarily, socially and juridically are attributed to legally married couples, such as the reciprocal obligation to support each other,[99] the presumption of paternity of the children born in a stable and public relationship,[100] or the inheritance rights of the surviving male or female concubine,[101] because there is no legislation that recognizes it as such.[102]

> In *Ortiz v. Vázquez Cotto* the Supreme Court affirmed that: Never have we recognized, however, that the concubinage relationship, by itself, can generate a "factual matrimonial regime" with every juridical aspect that it entails, including, the obligation to support. The series of articles of our Civil Code that regulate the institution of support, in particular those that have to do with the spouse or ex-spouse in financial need, start from the premise of a legally constituted marriage. The court of instance, therefore, erred when it imposed on the appellant plaintiff in the present case the payment of a sum of money to the appellee defendant for the concept of support.[103]

There is, however, social or special legislation that grants some economic rights to the concubine, as long as the concubine is dependent on the worker or the insured employee, or protected by its provisions, as we have previously seen. Such is the case of the Workmen's Compensation Act,[104] that in Article 5, section (2) and (3) provides:

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[98] Several relevant cases on this subject are: Correa v. Quiñones, 29 D.P.R. 52 (1921), Morales v. Cruz Vélez, 34 D.P.R. 834 (1926), Torres v. Roldán, 67 D.P.R. 367 (1947), Pérez v. Cruz, 70 D.P.R. 933 (1950), Pereles v. Martinó, 73 D.P.R. 848 (1952), Dans v. Suau, 82 D.P.R. 609 (1961), Reyes v. Merlo, 91 D.P.R. 136 (1964), Cruz v. Sucn. Landrau, 97 D.P.R. 578 (1969) and Caraballo v. Acosta, 104 D.P.R. 474 (1975).

[99] Ortiz v. Vázquez Cotto, 119 D.P.R. 547 (1987).

[100] Id. In P.R., as we saw, at the begining of the century and for a short period of time the natural marriage received validity. Later, some vestige of the human relationship remained that could produce legal effects in Art. 125 of the Civ. C. that allowed evidence of the fact of concubinage in filiatory actions, or of forced recognition as a factor to prove paternity. This article was left inoperable by the Supreme Court in the case of Ocasio v. Díaz, 88 D.P.R. 676 (1963), because of reasons that were important and of juridical consideration.

The Civil Codes of Mexico, Venezuela, Guatemala, Bolivia, Honduras, paraguay and France, among many other jurisdictions acknowledge validity and determine the rights and obligations of this human relationship. For example, the Civil Code of the State of Mexico recognizes the concubinary relationship, the hereditary rights among concubines, Art. 1635, and its Arts. 283 and 383 also recognize the presumption of paternity of the children born or conceived during the concubinage relationship.

[101] Art. 1635 of the CIVIL CODE of Mexico provides that: "The woman with whom the author of the inheritance lived as if he were her husband during the five years that preceded his death or with whom he had children, whenever both have remained free from marriage during concubinage, have a right to inherit. ."

[102] Several bills have been filed in the Legislative Assembly of Puerto Rico that have attempted to protect stable concubinary relationships. None have received legislative approval.

[103] *Ortiz v. Vázquez Cotto*, 119 D.P.R. at p. 549 (emphasis suppressed and quotation marks omitted).

[104] Act No. 45 dated April 18, 1935, as amended, 11 L.P.R.A. sec. 1 *et seq.*

(2). Should the deceased worker or employee leave a *widow*; parents; children, including posthumous, adoptive and foster children; grandparents; foster father or foster mother; grandchildren; brothers or sisters, including foster brothers or sisters; *concubine*, and relatives within the fourth degree of consanguinity or second degree of affinity they shall receive, upon qualifying under the regulations established herein, a compensation equal to sixty-six and two-thirds (66-2/3) percent of the wages the worker or employee received or, but for the accident.... except as hereinafter provided for cases in which the beneficiaries of the deceased worker are the widow, parents or children.

(3)....

(a)....

(b) For the purposes of the compensation, *to the woman who at* the time of the death of the workman or employee, and during the last three years prior thereto has lived with the workman or employee honorably as husband and wife in a status of public concubinage, shall be considered entitled to the corresponding share of the compensation.

(c) The right to compensation of *the widow or concubine* as a dependent of the deceased workman or employee shall cease if she marries or lives in concubinage with someone else. In such case or in the case of the death of *the widow or concubine* the monthly payments to the dependent minors shall be increased.....[105]

No matter how the institution of concubinage is treated in the legislation of Puerto Rico—*more uxorio*[106] or *queridato*[107]—both classifications represent inferior and disadvantaged treatment for the woman, due to the generalized idea that the principal provider in the relationship is the man, who, in most cases, is presumed to be the owner of the property.[108] In order to receive the assistance or compensation that the special legislation grants her, the woman must prove that she

[105] 11 L.P.R.A. sec. 3. (emphasis supplied). The rules established for the concubine are described in Sections (b), (c), and (f) of Article 3. Sections (i) has to do with preference to the widow, and does not mention the concubine.

[106] The concubinage *more uxorio* refers to two persons who, having no legal impediment to marry, cohabitate as husband and wife, without contracting marriage.

[107] In "*queridato*" there exists an impediment to contract marriage. It occurs when one of the persons is married but maintains a factual marital relationship with another without having previously dissolved his/her marital bond.

[108] Culturally, "paramour" (*chilla*) or "mistress" (*querida*) are terms that refer in a stereotyped or pejorative way to a woman dependent on a man, to whom she remains united because of relationship that is essentially sexual, which makes her diminish in social esteem and appreciation. The man is not prejudiced to the same degree, because it is socially expected that men sustain sexual relationships outside of marriage without his social or professional esteem being affected.

participated in the accumulation of the fortune, which will determine her rightful proprietary participation in the assets and, that she depended on the man.[109]

Economically, the common-law wife is adversely affected in the division of accumulated property, if the evidentiary and procedural demands are applied without considering the behavioral patterns of the couple. In most cases, men exclude women and keep them ignorant of their financial condition. On other occasions, the common-law wife contributes effort, talent and work to the accumulation of wealth, whether large or small. This specific situation has come before the Supreme Court on many occasions. The case of *Caraballo v. Acosta*,[110] is, however, the best example of how the law, through rules or by their absence, can be unjust if the judiciary is not alert and receptive to existing inequalities between persons because of gender and social status.

In *Caraballo v. Acosta* the plaintiff, a concubine, claimed, after the death of her companion, proprietary rights to property that they had accumulated, alleging "that when their relationship started neither had any property; and that during the relationship the woman contributed her effort and work as much as or more than he to produce capital....". The claim was filed against the estate and the widow of the deceased, from whom the latter had not divorced, although he always lived with the concubine.

The Court resolved the controversy by applying the doctrine, established in various precedents, that an atypical community of property, above the property that both had accumulated together, existed between the cohabitants. The criteria established to reach this determination are that an express or implicit agreement between them toward that end could be proven, and in its absence, the theory of unjust enrichment would apply, forcing a distribution of property so as not to deny

[109] Opinion No. 69 of 1958 of the Secretary of Justice denied the concubine of a teacher the benefits provided in the law for the widow of a retired teacher. The laws on benefits upon death, be they by titled inheritance, o on the basis of dependency criteria must propitiate an equal treatment to all human beings. A situation as the one indicated can reflect prejudice and signify a real and serious prejudice to the affected party if she/he depended on the deceased or maintained with him a stable personal relationship.

[110] 104 d.P.R. 474 (1975)

one of the parties his or her proprietary right in proportion to the funds or work that she or he contributed to the acquisition or accumulation of the property in controversy. In this case the presumption that the property corresponded equally to the concubine and to the community property that the deceased had with the defendant applied, in accordance with the precepts of Articles 326 and 327 of the Civil Code.[111] The majority opinion, with great sensitivity, weighed the contributions of the concubine in its value and in its human, economic, social and juridical dimension. In the only dissenting opinion in the case, this analysis is described as "the sentimental and romantic flight of the majority opinion".

However, the language and tone of the dissenting opinion of Justice Jorge Díaz Cruz grabs our attention. In it he refers to:

> [t]he insignificant contribution of the concubine *which does not* exceed the works incidental to married life, is set against the *effort and work of the man* who was described by the trial judge as an industrious and skilled mechanic,...employee in the Psychiatric Hospital...[a]cquired two buses devoted to public transportation...[did] ironwork....
>
> > Vis-à-vis the husband's contribution, that of the concubine is described as preparation of lunches and dinner for the workers who built the pavilions of the insane asylum; animal raising, cows and hens (without specifying how many) and two or three pigs which she sold; and preparation of alcapurrias and other fritters, and coconut candy that she sold to the employees of the Psychiatric Hospital. It should be also credited to the "contribution" [emphasis added by the dissenting judge] of the concubine that the husband brought up her four nephews, three of them orphans.[112]

Justice Díaz Cruz concludes his opinion with this question: Has the concubine been extended the benefit of a presumption that does not appear in any legal precept, or has she been consecrated as a plaintiff who does not have to prove her case?

The Commission considers it prudent to reproduce these paragraphs, although, fortunately, they are not legally binding, because they are the most eloquent expression of discrimination,

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[111] 31 L.P.R.A. secs. 1271 and 1272.

[112] *Caraballo*, 104 D.P.R. at pp. 487-488 (Emphasis added).

prejudice and bias against persons because of gender and social status. Why is a woman's work looked down upon when compared to that of a man? Why is her effort as a cook less dignified in economic worth than that of a male mechanic, chauffeur, or mantainence worker? Why are some of the tasks performed by women always appropriate to their "sex" and, as such, socially and economically insignificant? Why is the work of a businesswoman less important that the work of a businessman? Why does the mere fact of marriage give the wife (legal, not affective) full rights over the property of "a man," her husband before the law, that he accumulated with another woman? Why would the common-law wife have fewer proprietary rights than another person?

These questions should make us ask if judges are above prejudice, or, human after all, if they are alert to their own moral, ethical, religious, ideological or social prejudices interfering with their work of doing justice.

The preceding analysis permits us to conclude regarding concubinage or consensual relationships that:

1. The Civil Code of Puerto Rico establishes that marriage is the only legal union that is protected between a man and a woman and that it is the only one permitting birth and the reciprocal demands of personal, economic, and inheritance rights of the spouses, simply by its observance and ritual.

2. Heterosexual concubinage is not adequately protected by the law, which causes the woman, generally, to suffer prejudice compared to the man in the relationship because of social stigmas and limited legal protection.

3. The common law relationship is the only available option for persons of the same sex who wish to live together and share affection, property and prospects of a life together, although not all these prospects are protected by law.

4. Protection recognized by law of persons who are not legally married, be they heterosexual or of the same sex, falls only on the title to the property that they have accumulated together.

5. In re-evaluating legislated norms regarding the relationships of couples who are not married, be they heterosexual or of the same sex, constitutional guarantees of the right to privacy, prohibition against gender discrimination, liberty of association, the equal protection of the laws, and due process of law must be taken into consideration

F. Filial Relationships

1. Filiation: the Presumption of Paternity and Filial Action

The first motion that the subject requires us to make is that certitude of maternity is a basic premise of our filiation law. Although filiation establishes a paternal as well as a maternal-filial bond, our system of law has given greater thought to regulating the bond between the children and the father. The mother-child relationship is taken for granted. It is clear, free from ambiguity or challenge.[113]

From the biological point of view, it has been justified that it is more difficult and questionable to effectively establish paternity than to determine maternity. There is no need to presume maternity because the natural act of delivery takes care of establishing the maternal-filial bond.[114]

From the moment marriage became the basic institution of human cohabitation under civil law, with a structure comparable to religious sacrament, behavioral rules were adopted to guarantee its integrity and indissolubility, and procreation as its primary purpose. The need to establish with certainty and celerity the civil status of persons and the rights and obligations that arise from this condition, generated presumptions and rules that attribute the paternity of a child to the legal spouse of the progenitor.

Our legal order adopted the maxim "*pater is est*", by which the husband of the mother is identified as the father of the children begotten by her.[115] Over time, this presumption has been

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[113] In Almodóvar v. Méndez, 90 J.T.S. 11, at pp. 7354, 7361, the Court said: "The procreation is of easy determination with regards to the mother, the fact of the delivery and the identity of the child proven. 31 L.P.R.A. sec. 504. The identity of the father, however, is not as easily solved. Two situations coexist: that of the child protected by a presumption of legitimacy, for having been born within an "actual" marriage, and that of the non-marital child."

[114] In *Ramos v. Marrero*, 116 D.P.R. 357 (1975), the Supreme court said: "Maternity, on the contrary, has always been an easily verifiable fact since pregnancy and childbirth are externally physical realities, proven with relative ease." See FRANCISCO RIVERA HERNANDEZ, *LA PRESUNCION DE PATERNIDAD LEGITIMA* 63-64 (Madrid, Ed. Tecnos, 1971)

[115] ALVARO CALDERON, *LA FILIACION EN PUERTO RICO* (San Juan, Ed. Colegio de Abogados, 2nd ed., 1978). See, also, FRANCISCO RIVERA HERNANDEZ, *LOS CONFLICTOS DE PATERNIDAD EN DERECHO COMPARADO Y DERECHO ESPAÑOL* 25-26 (Madrid, Ed. Tecnos, 1971); RIVERA HERNANDEZ, *LA PRESUNCION DE PATERNIDAD LEGITIMA*, *supra* note 114, at pp. 327 et al., 354.

variously justified Biological, religious and social justifications are predominant.[116] This maxim is conceived as a necessary postulate to protect family unity and assure the civil status and filiation of the children born within a duly constituted marriage. That is, legally and socially it is accepted as a basic premise that the finality of a marriage is to constitute a family through procreation and that family union is protected by presuming the woman's fidelity towards the man and attributing the paternity of the children she procreates to him.

The presumption does not operate in cases of births outside of marriage, because the filiation action was conceived only against the man who is not covered by it, that is against the man who fathers children outside the marriage.[117] Thus, two burdens are imposed on single mothers. The first is to give primary and solitary attention to the children, independently of any inclination of the biological father to recognize them or not. The second is to "pursue" the father, not only to recognize his child, but to share the expenses of the child's upkeep, which turns into a second martyrdom. Although it may be argued that the single mother knows the disadvantages of her situation and could very well have prevented it, the reality is that "single parents", even many married couples, don't receive the same legal or court pressure, sanction or onus to take care of the children.

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[116] RIVEO HERNANDEZ, LA PRESUNCION DE PATERNIDAD LEGITIMA, supra note 114, at pp. 206 et al. The author identifies various theories, from which the dominion of man over woman always stands out as a basic premise:
1) Dominical theory or by right of accessory - this theory is the first to appear in history. "This is based on the theory of presumption of paternity, or the attibution of a child to the husband of the mother, based on the right that the husband has over her, from which the child is a "frute" or something accessory. The child is of the husband, or belongs to the husband by right of accessory:. ...not on the basis of "genitor" but as "dominus". At p. 207.
2) Theory based on the fidelity or innocence of the wife - is based on the "primary and fundamental matrimonial obligation, and on a certain presumption of innocence of the crime of adultery that could destroy this presumption of paternity, innocence that the woman should, in principle, enjoy." At p. 211.
3) Theory founded on the marital cohabitation and fidelity - is seen "as a consequence of the sexual relations between the spouses, that should be, on the other hand, exclusive and excluding. The living community that the marriage represents and the moral and juridical obligations that it carries, allow to presume that the spouses consummated the marriage and continue cohabitating and fulfilling said duties, and that the wife has faithfully guarded her oath. . ". At p. 214.
4) Theory based on the authority and vigilance of the husband - "There are several authors that at the moment of justifying the rule "pater is est", in addition to talking of the obligations of cohabitation and of fidelity, refer to the authority of the husband over the wife. , or to the vigilance that the husband exercises over his house, whose order and policing he is charged with " At p. 223.

[117] CALDERON, *supra* note 115; JOAQUIN VALDES, *LA PROCREACION IRREGULAR Y EL DERECHO* 64 et al. (Madrid, Ed. nacional, 1972)

A woman not legally united with the father of her children, in their name, or they representing themselves, will have to prove paternity of the defendant, even if the plaintiff and defendant had lived together in a stable and public relationship at conception or birth, a discrimination that results in inconveniences, humiliations and hostile procedures against the mother and children plaintiffs.

Although the scope of Article 125 of the Civil Code[118], as we shall see, was revoked for all legal effects by the Supreme Court in 1963,[119] in that the norms or requirements of proof of said article were no longer required in a filiation action or proceeding, its text identified public concubinage as potential evidence of paternity in a filiation action. Today, the female concubine plaintiff can prove her case with any available and admissible evidence, although medical proof is still the best available evidence.[120]

Gender in the area of filiation gains importance through two procedural mechanisms. First, since the presumption of paternity is a presumption *juris tantum*, legal action to impugn paternity is admitted by presenting any proof that shows the impossibility of the husband's paternity,[121] not just the "physical impossibility of the husband to have use of his wife", according to Article 113 of the Civil Code[122]. In an action to contest paternity, the law only concedes active legitimacy to the alleged father or to the mother's husband, excepting legal provisions regarding his premature death before the action is begun.[123] Jurisprudence has had to broaden the list of persons who, for all

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[118] This article required indubitable written proof, continuous possession as the child, public concubinage or authentic proof of paternity.

[119] Ocasio v. Díaz, 88 D.P.R. 676 (1963).

[120] Ortiz v. Peña, 108 D.P.R. 458 (1979), Moreno Alamo v. Moreno Jiménez, 112 D.P.R. 376 (1982).

[121] Moreno Alamo v. Moreno Jiménez, 112 D.P.R. 376 (1982)

[122] 31 L.P.R.A. sec. 461. Art. 113 provides:

Children born one hundred eighty days following the celebration of marriage and before three hundred days following its dissolution are legitimate.
No other proof shall be admitted against this legitimacy other than the physical impossibility of the husband to have access to his wife during the first one hundred eighty days of the three hundred that would have preceeded the birth of the child.

[123] Art. 116 of the CIV. CODE, 31 L.P.R.A. sec. 464.

Legitimacy can only be disputed by the husband or his legitimate heirs. The latter can only contest the legitimacy of a child in the following cases:

practical purposes, can legally challenge the presumption established by Article 116, in that way recognizing the right of the offspring as well as to the mother and the biological father.

Second, without marriage, the woman has to initiate the filiation action in the name of her child if the father refuses to recognize it, with all the difficulties mentioned above, although her personal relationship with the alleged father allows one to surmise that he is, clearly, the father.

On the other hand, the short expiration periods of the Civil Code and the provisions of the Special Act on Child Support on the effects of the alleged father's refusal to take a paternity test[124] should be mentioned as possible mechanisms to relieve women from the rigors of proving paternity before she requests child support, and to protect her offspring from a paternity suit that provides for children born within a marriage.

Regarding the first issue, one case law must be singled out. In *Agosto v. Javierre*[125] it was said that on their own, children can contest their legitimate paternity secondarily in investigating and learning their true filiation.[126] Although not the majority opinion, because the court was divided, it is the opinion that has been favorably cited in subsequent cases to justify the search for filiation by other interested parties, besides the husband or his heirs.

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(1) If the husband has died before the termination of the period fixed for instituting his action in court.
(2) If he shall have died after presenting his action without having desisted from it
(3) If the child was born after the death of the husband

[124] See the Child Support Act, as amended, Art. 11 (B)(3)(c), section 2: "Paternity shall be presumed incontrovertible in cases where the alleged father refuses to submit to the genetic testing ordered by the Administrator or the Administrative Judge." Art 20 of Act No. 86 dated August 17, 1994 amended Art. 11(B)(3)(c) of Act No. 5 dated December 30, 1986.

[125] 77 D.P.R. 471 (1954)

[126] In the case of Ortiz Rivera v. Sucn. González martínez, 93 D.R.R. 562 (1966), our Supreme Court described very graphically the decision to look for own's filiation: "This principle of the complete sovereignty of the child to determine his/her familial state causes, as a consequence, that no one can recognize someone as a child without counting on the recognized person's consent, since it is known that children have obligations with respect to their parents that may become mortifying to their dignity and burdensome to their interests, such as are the interdiction tutelege and support according to the financial circumstances of the provider. Also, there are children who prefer to maintain their natural filiatory state before throwing their mother's history of intimacy to slander" At p. 598.

In *Pérez v. Superior Court*[127] it was said that *Agosto v. Javierre* had only one latitude, to permit the children themselves to look for their true natural filiation and, in passing, contest the legitimate paternity that protects them, but that authority was not granted the mother or the natural father.

This doctrine was recently revoked in the case of *Ramos v. Marrero*,[128] where it was resolved that the natural or biological father can challenge the presumed paternity of his children, despite the language of Art. 116 of the Civil Code that apparently limits the legitimacy action to the husband and his heirs, as long as they do it in time.

No jurisprudence authorizes a natural mother to file a filiation challenge, although in *Agosto v. Javierre* and, more recently, in *Robles López v. Guevárez Santos*[129] it was said that the mother could file the action in her child's name. But if her interest conflicts with that of the child's, a judicial defender must be appointed for the latter. The determination of non-paternity will deprive the child of the protection the presumption grants her/him.

The importance of the decision of *Ramos v. Marrero* is that it recognizes the right of the biological father to investigate the filiation of his children, born of married mothers and protected by the presumption of paternity of another man, a right that for decades was not explicitly recognized. The Court holds that the old notion that gave only the husband the power to impugn the paternity presumption of children born to his wife, responded to:

> [A]n old idea of the family where the husband, as chief or patriarch, possessed an absolute legal authority to decide all matters that affected the family relationship. It has also been understood that the impugnment implied a question of honor of which the husband is the only judge, in which case it should only be him who resolves whether to reveal or not his wife's adultery....It has been said, also, that since the husband, after considering the unfaithful conduct of this wife, can decide to forgive her and assume the paternity of the child born by her, third parties should not be allowed to interfere with his decision....

[127] 81 D.P.R. 832 (1960).
[128] 116 d P.R. 357 (1975)
[129] 109 D.P.R. 563 (1980).

> One author points out that a system of this kind loses whatever value it could have by making situations possible where the husband, even though he is aware of his non-paternity, keeps it as a means of pressure, of revenge, or of blackmail against his wife, impeding in this way, that the child acquire his/her true filiation...[130]

By resolving that the biological father could reclaim paternity over his children, and in passing, impugn the presumption of paternity of the husband of the mother of his child, the Court "ensures once again the triumph of the humane meaning of the law".

With respect to the second issue, mentioned, on the difficulties that the woman encounters when putting into motion legal mechanisms to seek the filiation of her children, two opinions of the Supreme Court stand out: *Almodóvar v. Méndez*[131] and Calo v. Cartagena.[132]

In *Almodóvar v. Méndez*, the Court faces the claim of a man who, after having voluntarily and expressly recognized a minor as his child, later alleges that he had made "multiple inquiries", that he had "doubts" and that he finally "proved that he is not the father of the child". Four years had passed since the inscription of the minor's birth in the Demographic Registry and the filing of the action to impugn the recognition. After an extensive analysis, the Court concluded that "that recognition could only be impugned on the basis that there was a defect in the consent given because by reason of error, violence or intimidation; that is, that it was given involuntarily or, if voluntarily, that it was uninformed" and that the plaintiff can only file an action within three months after the inscription of birth if the father who recognized the child lives in Puerto Rico, or six months since learning of the birth, if he lives off the island.[133]

In *Calo v. Cartagena* , the Court faced a similar situation. This time the petitioner was the husband. He challenged the paternity of a child born to his wife while they were separated and

[130] *Ramos v Marrero*, 116 D.P.R. at pp. 361-363.
[131] 90 J.T.S. 11, at p. 7354.
[132] Art. 117 of the CIV. CODE, 31 L.P.R.A. sec. 465
[133] Art. 117 of the CIV. CODE, 31 L.P.R.A. sec. 465.

while she was living openly with another man. He filed the action two and a half years after the inscription of the birth in the Registry. He argued that the presumption of paternity violates the constitutional precepts that guarantee the dignity of the human being, due process of law and equal protection of the laws.

When resolving this constitutional controversy, the Court concluded that the short period to impugn the presumed paternity is justified because:

> Today, it is still a pressing matter of State to establish with celerity and certainty the filiation status of its citizens....[w]hat the constitutional and legal provisions and also the judicial interpretations have done is to strengthen the rights of children—of marriages or out of wedlock—to have a quick, certain, sure and stable filiation status. In this way, the judicial power has once again intervened to protect children from the historical phenomenon of their rejection and absolute and arbitrary abandonment by their father.[134]

Both decisions are important for the protection of children's rights and to facilitate the processes that the mother must initiate to declare their true paternity.

In the case of men who recognize as theirs children born from extramarital relations, the law has already offered several reasons to impugn successfully the recognition made invalidly, that is, if there is a defect in the consent which annuls the will of the declarant. The periods of expiration for these cases, although identical to those of Article 116 granting the husband and other authorized parties to file the action of impugnment of paternity, start to count from the moment the declarant knows of the defect that annuls his consent to recognize a child he thought his own.[135] In the case of impugnment of presumed paternity that Article 113 establishes, several juridical difficulties are presented. The Commission's concern that, in regard to the defendant husbands or defendant biological fathers, the periods and conditions established by law can cause injustices to those cases in which the men could have a valid reason to be late in presenting the action of direct impugnment,—in the case of a husband—or the action of subsidiary impugnment when the bio-

[134] *Calo v. Cartagena*, 91 J.T.S. at p. 8958. (emphasis provided)
[135] *Almodóvar v. Méndez*, *supra*.

logical paternity of a child born in a marriage is claimed—as is the case of the biological father. The Commission considers that, if the moment in which the legal period starts is determined by conditions or circumstances as objective as the mere registration of the birth in the Demographic Registry, its computation would not adjust to the general principle that time periods start from the moment the affected party was able to file the action or knew of the facts that justified his cause of action. In the case of a congenital sterility unknown by the man, he would be deprived of filing an action for impugnment if he learned of the impossibility to procreate after the legal period had expired, which would expire three months after the minor was registered in the Demographic Registry.

The protection of an interest so pressing as the determination of a "quick, certain, sure and stable filiation status" must be based on good faith and the aspiration of justice to all the protagonist parties in a conflict. A reasonable balance of legal alternatives regarding the time periods and necessary conditions to initiate actions to impugn paternity in all circumstances guarantees to all affected parties a more just and equitable treatment before the law and judicial forums.

2. *Filiation: the Particular Case of the Divorced Woman*

A particular case that also represents discriminatory treatment against the woman is the text of Article 301 of the Civil Code. Although the divorced woman or widow no longer has to wait 301 days to contract marriage as the old text of that statute provided, today that right is still subject to the prior accreditation that she is not pregnant at the moment of the new marriage, and that in the case that she is, the presumption is that the child was fathered by the previous husband.[136]

[136] After the enactment of Act No. 108 dated June 2, 1976, Art. 70-A provides that:
After dissolution of the marriage for whatever cause, man and woman are apt to remarry at any time.
Notwithstanding, to the end of facilitating the determination of the paternity, the woman whose marriage has been dissolved and who is prepared to remarry before the lapse of 301 days from said dissolution shall present to the person authorized to perform the marriage a medical certificate showing whether or not she is pregnant.
This certificate, if positive, shall constitute presumption of paternity of the spouse of the dissolved marriage.
If the woman has given birth before the said 301 days, it shall not be necessary for her to present such certificate to remarry.

This imposition, when so many evidentiary mechanisms that adequately prove the true paternity of a child exist, appears to be unconstitutional because it limits the liberty of persons to marry and violates their right to privacy.[137]

3. *Filiation: the Particular Case of Adoption by a Single Person, and the Use of the Paternal Surname*

One fact that should not be forgotten, although it does not seem to present specific objections, is the use of paternal surnames as the patronymic that identifies a family. A practice that has been raised to juridical rank, it is also the most obvious manifestation of masculine domination within the heart of the family. The law does not require that the surname of the father be placed before that of the mother, but no one has questioned that placement, because socially and culturally it has always been accepted that it be done that way.[138]

One of the few times in which the Supreme Court has had to evaluate a matter that refers to the paternal surname of a person happened within the context of a case of adoption by an unmarried woman. In *Ex parte J.A.A.*, already mentioned, the Court concluded that an unmarried woman who has maintained bonds of affection and the custody of a minor can adopt her without the latter having to break juridical ties with her biological father and his family. The Court organizes the attribution of surnames in a way that creates "a situation that to the degree possible approaches the natural condition of the human being". The adopted person shall always carry the surname of the father while she or he keeps the previous paternal relationship or acquires it through adoption. The same shall occur with the mother's surname, carrying both her surnames if the

[137] Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978)

[138] Art. 32 of Act No. 24 dated April 22, 1931, as amended by Act No. 22 dated April 19, 1983 says that the Secretary of Health "shall prepare and keep up to date an alphabetical index [of births] by the surnames *of the parents*, or of the mother, in the case of natural children ..." This disposition provides that both surnames, maternal and paternal, identify every person inscribed in the Demographic Registry. Through the Commission's investigation, no provision of law was identified that expressly required that the father's surname be placed first and the mother's later, in the birth certificate or in any other official document. 24 L.P.R.A. sec. 1232.

adopted person has not been recognized by the progenitor. The registrar should place each surname in the corresponding place in the certificate.

It is interesting to note that, while in the case of *Ortiz v. Vázquez Cotto* protection is denied the human relationship that constitutes concubinage, in not extending to the concubine the obligation to support his/her ex-partner, in the case of *Ex Parte J.A.A.* the maternal and paternal filial relationship is protected as if it were a family constituted under the cloak of a legal marriage. In fact, this treatment justifies the dissident opinion of Judge Díaz Cruz because the majority opinion extends to unmarried couples the authority that is granted to married couples who adopt children. Judge Díaz Cruz opined that to allow single persons to adopt would give way "to concubinage and unmarried persons living together", when "[a]doption should not be available like a tailored dress for those who are not in the framework of juridical alignment."[140] Had the theory of Judge Díaz Cruz prevailed, many persons, primarily women, would not have been able to claim the right to adopt children, as was recognized in the case of *Ex Parte J.A.A.*

Acts No. 8 and 9 dated January 19, 1955 currently regulate adoption in its substantive and procedural aspects. These laws are not clear on whether unmarried persons can adopt, although an interpretation of the new text of Articles 130 and 131 of the Civil Code, as amended by Act No. 8, leads us to conclude that they can.[141] A major difficulty presented by Article 133, as amended, re-

[140] *Ex parte J.A.A.*, 104 D.P.R. at p. 564 (Díaz Cruz, J., dissenting).

[141] The text of Art. 138, as amended, provides that:

> Notwithstanding the previous article, the juridical ties of the adoptee with his previous paternal or maternal family shall subsist when the adoptee is a child of the spouse of the adopter, although the father or mother should have died by the date of the filing of the petition for adoption, or when the adoptee has only one filiation and is adopted by a person of the opposite sex of the father or the mother who has recognized him/her as their child

This provision partially covers the situation decided in the case Ex Parte J.A.A.. It is, however, confusing because there the girl had the filiation of the father and of the biological mother, but was only renouncing the filiation of the maternal biological filiation to adopt another, always keeping the paternal biological filiation. The new provision appears to allow the adoption without affecting the previous family ties when the adoptee has been recognized by only one of the biological progenitors and goes in search of another through adoption

quires that two persons who want to jointly adopt another person must be married to each other.[142] This provision can present constitutional problems in denying a person the authority to adopt another because he/she is not married to the adoptee's adoptive mother or the father. We consider that this legal provision holds back the advanced position initiated in the opinion of *Ex Parte J.A.A.*

It is interesting to note that the new legislation does not allow the adoption of persons of legal age or those emancipated by marriage, although they could be adopted had they lived in the home of the adopters before they reached the age of 18 years and that situation had continued to exist at the date of the filing of the petition for adoption, according to the new text of Article 132 of the Civil Code. Since the legislation is recent, we do not anticipate, in substantive terms, any difficulties in its interpretation, although it should be pointed out that both drafts are confusing and, occasionally, inarticulate.

On the other hand, regarding the family surname, by revoking Art. 94 of the Civil Code,[143] which ordered that the woman use the surname of the husband, the custom adopted by many women to carry her husband's surname with the [Spanish] preposition "*de*", was somewhat relaxed, or she substituted her own surname as in the United States. Each day more married woman are keeping their own two maiden names as is legal after revoking the previously cited Article 94.

As far as is relevant to the object of its study, the Commission concludes, in regard to the filiation aspects previously discussed, the following:

1 It is perceived in the legal provisions that there still exists in our society the patriarchal organization of the family: the presumption of paternity of the children born within the marriage, the paternal surname as patronymic of the family unit, and the almost exclusive delegation to women of the care and satisfaction of the needs of the members of the family group, husband and children.

2. Even when the judicial work has strengthened the equal treatment recognized by the Constitution of all children born in this jurisdiction, discrimination still is manifested in the structure of processes and institutions that penalize the maternity outside the marriage, the

[142] Art. 133 provides in its first parragraph:
No person may be adopted by more than one person, except where the adopters are married to one another, in which case the spouses shall adopt jointly.

[143] 31 L.P.R.A. sec. 287. Revoked by Act No. 93 dated July 9, 1985

concubinage relationship of the progenitors and the delegation by the mother of her responsibilities regarding the children.

3. In view of these circumstances, the mother, the unmarried one especially, must carry the emotional, social and economic burden of the children because the judicial and legislative processes do not bring about effectively the equitable distribution of responsibilities and obligations between the mother and father.

4. To correct these three situations, the courts must develop theories of analysis and of judicial evaluation that take into consideration the real differences that exist in our society regarding the treatment that men and women receive in their different social manifestations, in a way that can propitiate solutions that promote the equitable distribution of responsibilities between both genders and a more just treatment for one and all.

5. The time periods and necessary conditions to initiate the actions of impugnment of paternity must guarantee for all the affected parties a more just, humane and equitable treatment before the law and the judicial forums. The start of the legal periods for these actions should take into account extraordinary circumstances that can justify filing an action of impugnment after the period established for ordinary cases.

4. Parental Authority and Custody: a Joint Exercise by Both Progenitors

The subject of parental authority over the children who are minors has four areas of particular importance that are significant in studying gender discrimination.

First, *the joint exercise* of the rights and obligations that constitute the *patria potestas* or legal authority by both progenitors, after having revoked the legal provision that granted the prerogative exclusively to male parents. Before, mothers exercised legal authority and custody over her children only in the father's absence or disability.

Second, *the manifested preference for the mother* during the divorce case or after the dissolution of the marriage, when both progenitors are fit to exercise parental authority, and its exclusive exercise is disputed between them.

Third, the imposition on women of more rigorous criteria of appropriate sexual and social behavior to achieve or retain legal authority and the custody of her children.

Fourth, filial relationships are governed by different criteria when evaluating the conduct and behavior expected of each gender in their role as mother-woman or father-man. Let us discuss each area separately.

Parental authority or *patria potestas* constitutes the group of duties and powers legally granted the father and the mother over the person and over the property of the children who are unemancipated minors.[144] The custody is an inherent attribute of the *patria potestas* and refers to the "physical holding or care of the minor", the tending to their immediate daily interests.[145]

The rule that the *patria potestas* belongs to the father and, in his absence, to the mother originates in Roman law. The idea that it is the man who has the *patria potestas* comes from the Roman institution of the *pater familias*, accepted as an economic, religious and juridical postulate in the Spanish Civil Code.

The conception that the father or man holds the patria potestas over the children existed in Puerto Rico until 1976, when legislation was adopted to allow the exercise of the legal authority jointly by both progenitors. This norm formed part of the legislative agenda to eliminate the juridical differences between men and women in Puerto Rico. When the law established that the *patria potestas* corresponded to both parents jointly, the basic premise that sustained the exercise of *patria potestas* by the father was radically altered: the male would not be the principal or only authority of the family. These powers must be shared between the couple, on equal footing, at all levels: title of property, authority over the children, and personal relations between the spouses.[146]

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[144] MUÑOZ MORALES, in his RESEÑA HISTORICA, supra note 15, at pp. 479 et al, has an excellent exposition on the historical development of this institution.

[145] During the decade of 1920, in *Chabert v. Sánchez*, 29 D.P.R. 241 (1921), the doctrine that initiated questioning the identity or integrity of the concepts of custody and parental authority (*patria potestas*) was introduced: the custody is separate from the parental authority and it is possible that between the married or divorced progenitors one of them has the parental authority over the child or children, while the other keeps the guardianship or custody. The latter will always be founded on the best interests of the child. In 1987 this vision will be reconfirmed in the case of *Ex Parte Torres Ojeda*, 118 D.P.R. 469 (1987).

[146] Any of the progenitors shall exercise alone the authority that the patria potestas grants in cases of emergencies or as an exception, in the following cases:

1) Admission of the minor to medical treatment or hospitals.
2) Death, absence, legal impediment

Articles 152 and 153 of the Civil Code of Puerto Rico[147] form the content and scope of the concepts "*patria potestas*" and "custody" of the children who are minors.

Article 152 provides:

> The *patria potestas* over the children who are not emancipated corresponds to both parents jointly, each one being authorized to practice it alone in cases of emergency over the minor in custody.
>
> Any public or private hospital shall accept the consent of either parent with *patria potestas* over children who are not emancipated in cases when emergency medical treatment and an operation may be recommended by an authorized specialist. The Secretary of Health shall establish the administrative procedures necessary to comply with these provisions.
>
> The *patria potestas* shall belong to only one of the parents when:
>
> (1) the other has died, is absent, or is legally incapacitated.
>
> (2) only one parent has recognized or adopted the child.[148]

This legal provision has done justice to mothers by granting them the authority and decisional power over the persons of their children. It required, as a consequence, greater juridical responsibilities of them.

According to Article 153:

> The father and the mother have with respect to their unemancipated children:
>
> (1) The duty to support them, keep them in their company, educate and teach them according to their fortune, and represent them in the exercise of all the actions which may redound to the benefit of such children.
>
> (2) The power to correct and punish them moderately or in a reasonable way.[149]

3) When only one parent has recognized or adopted the child

[147] 31 L.P.R.A. secs. 591 and 601, respectively

[148] 31 L.P.R.A. sec. 591. (Emphasis added).

The Civil Code provides that "[t]he administration of the children's property that is under *patria potestas* belongs, in the absence of judicial decree to that effect, jointly to both parents or to the one who has the minor under his or her guardianship and potestas".[150] Similarly:

> The property that the unemancipated minor acquired or acquires with his work or industry, or by any lucrative title, belongs to the child in title, and in usufruct to the parents having the potestas and custody over the minor; but if the child, with the consent of his parents, should live independently from them, he shall be deemed, with respect to all effects as regards the said property, and he shall be the full owner and have the usufruct and administration.[151]

The above synthesizes the meanings of the juridical concepts of parental authority and custody and their consequences on family relations. The greatest change that occurred to this institution is permitting the mother to be on equal footing with the father in the exercise of their rights and prerogatives over the children. This normative harmony, however, disappears when two legally married persons with children who are minors decide to divorce, or when they are unmarried and one of them claims the exclusive authority over the children of the relationship.

Since parental authority is subordinate to the courts' exercise of the power of *parens patriae* of the State, the practice of that authority is determined by the well-being of the children. If that well-being is in jeopardy, the court may limit, suspend or deny a father or a mother the power granted by parental authority at any moment of the paternal or maternal-filial relationship.

5. *Parental Authority and Custody: the Preference for the Mother*

Whenever the mother and the father are in similar positions—any of them considered fit to attend to the best interests of the minors—the court shall grant custody to the mother. This doctrine

[149] 31 L.P.R.A. sec. 601 (Emphasis added).
[150] Art. 154 of the CIV. CODE, 31 L.P.R.A. sec. 611.
[151] Art. 155 of the CIV. CODE, 31 L.P.R.A. sec. 612. (Emphasis added).

was established in the case of *Nudelman v. Ferrer Bolívar*.[152] In this opinion, the Court confirmed the norm that custody determinations must always be guided by the criterion of the best interests and well-being of the minor, and declared that this criterion continues to be the guiding light of every judicial determination on the custody of minors in our jurisdiction.[153]

In *Marrero v. García*[154] the Supreme Court established the following factors to determine which progenitor is most appropriate to be the guardian: the preference of the minor; the sex of the minor, the age of the minor, the mental and physical health of the minor, the love that can be given to the minor by the parties in controversy; the capacity of the parties to adequately satisfy the emotional, moral and economic needs of the minor; the degree of adjustment of the minor to the home, school and community in which he/she lives; the interrelation of the minor to the parties, her/his siblings, and other members of the family; the psychological health of all the parties.

When applying these criteria, the following jurisprudential rules have been developed in our jurisdiction to guide judicial discretion:

First: Each criterion is not decisive alone; it is necessary to weigh all of them to achieve a just balance for a more just decision. (*Marrero*)

Second: If after analyzing all the factors, the mother is essentially in the same position as the father, *custody should be adjudicated to her* in absence of other exceptional circumstances that justify a different decision. (*Nudelman v. Ferrer*)

Third: Even when the mother is considered to be the person who takes care of the children with the most fervor and dedication, that does not underestimate the importance of the paternal fig-

[152] 107 D.P.R. 495 (1978).

[153] Studies carried out demonstrate that in Puerto Rico in the majority of cases custody is granted the mother. See Marcia Rivera Quintero, *Las adjudicaciones de custodia y patria potestad en los tribunales de familia de Puerto Rico*, 39 REV. COL. AB. P.R. 177 (1978).

[154] 105 D.P.R. 90 (1976).

ure. The father is on equal footing with the mother when evaluating his adequacy as a guardian. (*Nudelman v. Ferrer; Ortiz v. Vega*[155])

Fourth: Although the economic resources of one party may be limited when compared to those of the other, by itself it is not a determining factor since the imposition of a reasonable support amount on the non-custodial father or mother rectifies and remedies the existing monetary inequality. (*Nudelman v. Ferrer*)

Fifth: Judges are not obliged to personally interview the minors on their preferences with respect to the progenitors; they can learn of their choice through other ways. What is important is having certainty regarding the determination of the child and to weigh it along with the remaining elements of proof. (*Nudelman v. Ferrer*)

Sixth: The previous existence of extramarital relations does not carry the probability of a future environment of immorality or corruption such as to injure the moral character of the minor to the degree that the mother be denied the custody. (*Muñoz v. Torres;*[156] *Nudelman v. Ferrer*)

These norms justify several additional comments on appreciating maternal conduct in custody cases, a matter that we will analyze shortly.

In *Nudelman,* the Court organizes the main questions alleged against the maternal preference as follows:

> Among the principal reasons for this focus, are: (a) the fact that in contemporary society, the woman has assumed roles—voluntary or involuntarily—that have improved her financial position; (b) the lack of compelling scientific evidence that demonstrates that as a general rule the mother plays a greater role than the father in the development of the children; (c) the doubt over whether the preference for the mother is constitutional.[157]

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[155] 107 D.P.R. 831 (1978).

[156] 75 D.P.R. 507 (1953). See also *Fernández v. Martínez*, 59 D.P.R. 548 (1941).

[157] Nudelman v. Ferrer, 107 D.P.R. at p. 510 (Citations omitted).

When the Court resolved on this occasion that if "the mother is at essentially the same position as the rest, including the father—in the absence of other exceptional circumstances that justify the contrary—the custody must be adjudicated to her", it concluded, as basis, that:

> Our feeling in this matter is influenced by the fact that generally the mother, by unwritten natural law that springs from biological imperatives, and profoundly rooted in our conscience—with almost universal recognition—is the person who with the greatest fervor, dedication and love cares for her children. We cannot obviate the fact that in Puerto Rico our vision of a people founded in the reality of a culture of Hispanic origin, in its hierarchy of community values, still perceives the woman as the soul around which family life revolves. This does not underestimate the importance of the paternal figure. Fathers, although they may be ordinarily and in appearance less expressive, also share the hope and ideal toward the well-being of the children.[158]

In this case the Court confirmed the determination of instance that granted custody to the mother because it was in harmony with the fact "that the children were in very sensitive ages with respect to their development and growth, the stages of pre and adolescence, of which psychologists have expressed that the mother can be of significant help, especially to the girl."[159]

This vision, besides indicating an obvious discrimination against the father, reflects values, aspirations and a reality of people that grants the woman the best and the worst of two worlds: the authority to keep the children with her and the deprivations inherent to that authority, when the children ought to be the responsibility of the two persons who gave them life. To the extent that this stereotype signifies a different treatment for women regarding opportunities and personal development, the same society, the law and legal doctrine create discriminatory conditions for the woman who is a mother.

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[158] *Id.* at p. 512 (Citations omitted).
[159] *Id.* at p. 516.

6. *Parental Authority and Custody: the Relations with the Children During the Divorce Proceeding*

The legal provisions that govern the normative status of custody and parental authority over the children, during a divorce case and after the sentence is decreed, are articles 98 and 107 of the civil code.[160]

a. Article 98 of the Civil Code

Article 98 clearly favors the mother as guardian of the children who are minors when the divorce case is initiated. In this regard, it provides:

> If there are children from the marriage whose provisional care is requested by both spouses, *they shall be placed in the care of the mother*, while the case is substantiated and decided, *unless* the Superior Court finds that there are compelling reasons to deny the mother the care of her children completely or partially.[161]

This provision has a dual purpose. On the one hand, to prevent the children from suffering personal traumas caused by the judicial conflict between their progenitors to gain and keep their custody; on the other, for the woman to keep the primary responsibility for the immediate care of the minor-aged children, because it is socially understood that the mother should assume that role. By limiting the custody issue by this summary judgment, the litigating parties will not be able to use the children as an object of dispute or haggling in the personal struggle brought on by the divorce. However, this purpose is not always achieved, and the battle for provisional custody can be ruthless, more often than not, becoming a humiliating and dehumanizing experience for the woman, since it involves proving "*compelling reasons to deny the mother the care of her children completely or partially.*" Her sexual history, her tastes, customs and behaviors are judged according to the traditional image of the devoted and selfless mother who sacrifices all for the constant care of her children. No one asks if the man has or had periodic sexual relations with a woman, if he is

[161] 31 L.P.R.A. sec. 341 (Emphasis added).

accustomed to having a drink with his friends, who will take care of the children while he works or attend to them in the evenings, who will take them to the doctor or help them with their school assignments. But the woman will be asked these questions, as judicial practice proves. Deponents gave extensive and varied statements on this matter during the hearings and focus group interviews. A woman always suffers the effect of the stigma if she does not adhere to what society expects of her, because of her gender.

Therefore, what at first glance appears to be discrimination in favor of the woman and against the father, becomes a double-edged sword when the male tries to gain temporary or permanent custody of the children of the marriage. Gender, or the perception of what constitutes the appropriate behavior of a person, according to their gender, is the determining factor in understanding the claim of a litigant for parental authority or custody over children who are minors. The same occurs if the custody case develops after the divorce is decreed.

b. Article 107 of the Civil Code

Article 107 is part of the provisions related to the consequences of divorce. As we have mentioned previously, the basic concept or premise maintained by the institutions that shape the Puerto Rican family, including those related to the offspring, is that it originate in the marriage between a man and a woman.

> The article provides: In all cases of divorce, minors shall be placed under the care and parental authority of *the spouse* whom the court, in the exercise of its reasonable discretion, considers best serves their interests and welfare; but, *the remaining spouse* shall have the right to continue family visits with his or her children in the manner and frequency that the court decrees, according to each case.
>
> *The spouse* who has been deprived of custody and parental authority shall have the right to regain them if he or she proves, in any competent Superior Court, the death of the *other ex-spouse* or demonstrates to the court's satisfaction that the best interests and welfare of the minors are better served by the recuperation of the parental authority requested.[162]

[162] 31 L.P.R.A. sec. 383 (Emphasis added)

In analyzing Article 107, what was established is that once the marriage is dissolved, *the provisions that determine the individual or independent practice of paternity and maternity of the children* must be resolved, since these persist even after the divorce. What "the fact of marriage" does is permit these powers to be exercised jointly by the progenitors. To corroborate this fact, note that Article 107 *refers to spouse and ex-spouse*, although the relationship that is regulated is that of father or mother with respect to their children, a relationship that the divorce of the parents, according to Article 108 of the same Code, *cannot affect*.[163]

In cases of divorce, before 1976, the innocent spouse was awarded parental authority. Act No. 100 of 1976 eliminated all reference to the concept of culpability to grant or deny parental authority and custody of the minors to the divorced parents. The criterion of culpability was substituted by the governing criterion of serving the best interests of the minor. That is, culpability in divorce cases has been separated from the determination of who is best suited to care for the children. Even the actual state of law in Puerto Rico permits shared custody and parental authority decrees of the minors after the divorce. To compensate for the loss of parental authority, the provision that grants the non-custodial father or mother the right to continue visitation rights with the children was kept.

Our jurisdiction has been emphatic in determining that parental authority and custody corresponds to the father or mother who can best serve the interests of the child.[164] That is, although the mother as well as the father may be considered fit to care for and tend to the children of the marriage, custody shall be granted to the person who can best "satisfy" the interest and best take charge of their general welfare. Only in extraordinary cases, with prior rigorous scrutiny of the deciding court, could shared parental authority and custody be granted.

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[163] 31 L.P.R.A. sec. 383. (Emphasis added).

[164] Llompart v. Mesorana, 49 D.P.R. 250 (1935); Rosell v. Meléndez, 101 D.P.R. 329 (1973); Marrero Reyes v. García, 105 D.P.R. 90 (1976); Nudelman v. Ferrer, 107 D.P.R. 495 (1978); Santana v. Acevedo, 116 D.P.R. 298 (1985).

The current state of the law in Puerto Rico permits decrees of shared custody and parental authority of children after the divorce of the progenitors. In the case of *Ex Parte Torres Ojeda*[165] the Court outlines the proper rules of this kind of relationship, by pointing out that shared parental authority and custody is an additional alternative to attain the welfare of the minor, and that no legal impediment exists for that power to be shared by the progenitors who expressly agree and request it of the court. Several criteria should be met:

First, the courts must verify before accepting the agreement of shared parental authority and custody, in cases of divorce by mutual consent as well as by other traditional causes, that the agreement is not the result of rashness or coercion and that the parties who agree to share these duties possess the firm purpose, ability, and availability to assume such responsibility.

Second, the following factors should be considered before authorizing the agreement:

1) The degree of hostility and substantial tension that exists between the parents,

2) The real probability of future conflicts that make the agreement inoperable,

3) The children's feelings,

4) The true objectives and motives of the request for shared parental authority and custody,

5) How the profession, work or occupation will affect the effective administration of the agreement,

6) If the parties can assume the additional costs generated by the relationship, and

7) If the place and distance between the homes affect the education of the children.

Third, absent an agreement between the progenitors to share parental authority and custody, the court must adjudicate it to only one, under the criteria previously outlined regarding the best interests and welfare of the child.

[165] 118 D.P.R. 469 (1987).

In the dissident opinion in *Ex Parte Torres Ojeda*, Justice Rebollo says that "the award of shared parental authority to the divorced father and mother with all certainty has caused more problems than it can resolve, with consequent prejudice to the minors".[166] Justice Rebollo held that the Court based its opinion on "an ideal situation that is far from reality. It starts from the utopian premise that two persons, who could not resolve their matrimonial problems or continue to live together with their children who are minors can, in complete harmony, without prejudice to the minors, deal with the serious responsibilities that parental authority and custody entail after the divorce".[167]

The Commission believes that each case deserves special and particular consideration on it own merits. Judges must look upon shared parental authority and custody as one more alternative, but must ascertain beforehand that every agreement to share responsibilities is evaluated considering all the criteria and warnings outlined in *Ex Parte Ojeda*. If the judicial conviction is that all the criteria in favor of the minors have not been met, the parental authority and custody of the children should not be shared. Each case must be evaluated with the sensitivity and attention that the parties deserve, but with the welfare of the minors as the North Star.

In considering this controversy from the perspective of gender, it is perceived that, as an outcome in the courts, women generally acquire parental authority and custody exclusively, together with the primary responsibility of rearing and supporting the offspring. Gauging the possibility that both progenitors could share these tasks, even after the divorce, could lead to a greater commitment to their responsibilities as fathers and mothers. It can also mean, on the one hand, relief from the exclusive responsibility that a greater number of woman have today, and on the other, the acknowledgment that fathers should continue to have a constant, active and important presence in the daily lives of their children.

[166] *Id.* at p. 493.
[167] *Id.* at p. 489.

7. The New Law Regarding the Denial of Patria Potestas and Custody

Conscious of the fact that *patria potestas* is a great responsibility in the development of children, the law provides a mechanism to deny or suspend that authority from the progenitor who does not adequately comply with it.

The prevailing legal doctrine in Puerto Rico is that "for a vital change to occur in the custodial relationship there must have occurred a sufficient change in the quality of care that was received, or the existence of another analogous risk to the minor".[168] The approval of new legislation could affect this jurisprudence.

The recently amended Civil Code of Puerto Rico, provided in Article 166 and in the others that have been added—166A, 166B and 166C—the following:[169]

> Art. 166. Parental authority entails the obligation to be *a good family parent* in accordance with Article 153 of this Code and the applicable special laws, and to watch for the welfare and best interests of the minor.
>
> The courts may deprive, suspend or restrict the parental authority *of the parents* in the manner and under the conditions provided by law.
>
> Whenever parental authority is denied, suspended or restricted; the court shall also deprive *the parent in question, or both*, from administering or using the property *of the child*; shall appoint a tutor whenever necessary; and shall adopt any measure that it considers in the interest of protecting the *minor*.
>
> Art. 166A. The causes or omissions that could deprive, restrict or suspend *a person's* patria potestas over a child are the following:
>
> 1. To cause harm or risk substantially *the minor's* physical, mental or emotional health.
>
> 2.....
>
> 3. To neglect their responsibilities or not exercise the powers as provided in paragraph (1) of Article 153 of this Code. These responsibilities include, but are not limited to, keeping *the minor* in their company according to law, supervising their education and development, or providing adequate food, clothing, education or health care, according to his or her means, or with the means that the State or any other natural or juridical person provides. Health care includes required treat-

[168] *Marrero v. García, Colón v. Meléndez*, 87 D P R 442 (1963)

[169] Act No. 8 dated January 19, 1995, amending the Civil Code articles concerning adoption, some sections of Act No. 75 dated May 28, 1980, known as Minors Protection Act, and the referred articles of the Civil Code about *patria potestas*

> ments to attend any physical, mental or emotional condition, or to prevent the same. *A person* shall not be deprived of the *patria potestas* because of his or her religious beliefs.....
>
> [T]he article enumerates 6 other causes that are not necessary to mention here for the effects this Report.]
>
> Art. 166B. The court should deprive *a father or mother of patria potestas*, upon request by one party, or motu proprio, if *the father or the mother*, , have an illness, or defect, or emotional or mental condition, or a condition of alcoholism or addiction to controlled substances, or manifest behavior that disables or impedes them from giving the *minor* the supervision and physical, mental and emotional care; unless it can be shown that the previously described conditions can be addressed within a reasonably short period of time. To determine what constitutes a reasonable time, the court shall take into account the kind of condition in question, the age of the minor and of the father or mother, and the total set of circumstances of the home to which the minor would return should *the father or mother* not be deprived of patria potestas.
>
> Art. 166C. The court may deprive *any person* of the custody *de jure* or *de facto* for any of the causes or circumstances included in Articles 166A and 166B of this Code. (Emphasis added.)

The new provisions have not yet been evaluated by the Supreme Court. The Commission, after having evaluated them, anticipates the following difficulties:

a. Regarding its Drafting

A quick analysis of the three transcribed articles demonstrates the absence of a uniform writing style, conceptually and in the choice of words. Article 166 discusses the *good father* and *father or fathers*, in their generic sense. Article 166B refers to both progenitors and makes continuous use of *father or mother* in all its sentences. Articles 166A and 166C refer *to the person*, a neutral concept, who can be deprived of custody or parental authority. The law does not contain definitions, which would have complicated even more the proper identification of protagonists in the intense child custody dramas that take place every day in the courts.

The careless drafting of this law, not to mention multiple stylistic defects in Laws 8 and 9 of January 19, 1995, is just one example of ignorance of the importance of drafting rules that are applicable to both genders who coexist in society.

b. Regarding its Application

Just as temporary custody is determined during a divorce case, it is interesting to note that, regarding the forfeiture of *patria potestas* , most of the time that male behaviors will be judged with greater rigor or harshness when exhibited by a female. This unfair treatment is often justified for cultural reasons, for the same reasons that perpetuate prejudices and encourage or fuel discrimination. For example: Imagine a man who drinks socially and occasionally becomes intoxicated, who leaves his children everyday with their paternal grandmother while he works, or does "male" things, who is absent from his home for prolonged periods of time because of his work, - - which suggests that "he doesn't supervise their education or development", according to the new law—who gambles, is "strong willed" and uses improper language, lives with a woman with whom his children relate to periodically. For the courts, neither under the new law or the old, this man does not necessarily present a portrait of abuse or neglect for which he could be deprived of parental authority or the custody of a child.

In fact, so far—and we hope that the new legislation changes this view—NEVER has a judge in our jurisdiction concluded, either as a matter of fact or of law, that not to visit a child, pay support or be in arrears in support payments, is child abuse which, incidentally, also constitutes abuse of the custodial mother or father. It should be remembered that the right to receive support is sustained by the constitutional right to life.[170] Diligent and affirmative attention by every component of the judicial system and the new Administration of Child Support is essential to do justice to our country's children who depend on compliance with a judicial decree for their subsistence.

Evaluating and corroborating the experiences many deponents shared, the Commission is convinced that in many cases, if the mother exhibited behaviors analogous to those described—imbibing alcohol, going out with friends, leaving the children to the care of another person—

[170] Milán Rodríguez v Muñoz, 110 D P.R. 610 (1981); Martínez v. Rivera, 116 D.P.R 164 (1985); Negrón Rivera and Bonilla, *Ex Parte*, 120 D P R 61 (1987).

probably society and the court would conclude that she is not a good example for her children, thus justifying the temporary suspension of custody and the deprivation of her parental authority. Should that be the case, it would clearly reflect gender discrimination.

Of interest is how, in the *Per Curiam* opinion dictated in *Ortiz v. Vega*, the Supreme Court underscores the fact that the custodial father "is married, works from 3:00 p.m. to 11:30 p.m. ...and his mother helps him care for the children, especially the girl because she is sickly"; but that she [his mother] "is single, employed in a company where she does work on diplomas and laminating, and also collects debts. She lives alone in a condominium", although her parents "would also be willing to take care of their grandchildren." True to stereotype, this case shows that even in the country's highest forum of appeal, this conduct determines which progenitor will have the custody of the children. Pitting the stability of a married father who has a wife and a mother baby sitter, against the supposed instability of a single mother working outside her home, is a recurrent picture in our courts, whose epilogue is similar to that of this case.[171]

If we add the cultural differences between the social strata of Puerto Rican society to this appreciation—that is, behaviors accepted in some groups are not accepted in others—the greater impulse of scrutiny to suspend or deprive parental authority will occur in the most socially and economically depressed stratum, signifying double prejudice and discrimination.

Even when they never constitute a final decision, decrees that award *patria potestas* and custody to only one parent create a STATE OF LAW that should not, except in extraordinary cases, be summarily altered. The father and the mother should be heard before any changes are

[171] It is curious to note how it's explained in one of the findings that follow in this chapter of the Report, that in this case the husband alleged as part of the reasons to avoid the award of custody to the mother, that she had been unfaithful to him and had abandoned the children, criteria that the court of instance did not take into account, resolving that the mother should recover the custody of the minors

made to the original decision, according to the rule that modifications should be based on a substantial change in the existing custodial relationship.[172]

In the case of women, some decisions imply that this extraordinary status can be constituted by simply initiating a stable intimate relationship, or remarrying, which are considered a threat to children, especially girls. A man's stable intimate relationship and his eventual marriage, generally qualify him to be an adequate custodial parent; for a woman, however, these experiences can compromise her morality before society, and endanger the custody decree that permits her to keep her children.

In view of this reality, judges could be more sensitive and just in evaluating those qualities that make men and women adequate resources to tend to their children, when they exclude from their evaluation old and recurring prejudices that originate in stereotypical behaviors and conducts that society expects from each gender.

8 Maternal and Paternal Filial Relations

Article 107 of the Code explicitly establishes that the "non-custodial parent shall have visitation rights with the children, in the manner and extent that the court decrees in the divorce judgment".

Relating and communicating with those children whose custody and parental authority have been assigned by judicial resolution to only one parent, is a natural right that corresponds to the non-custodial father or mother.[173] These visitation rights, protected constitutionally, cannot be prohibited, except for extraordinary reasons, and can only be regulated to benefit the minor. Visi-

[172] *Santana Medrano v. Acevedo Osorio*, 116 D.P.R. 298 (1985); *Nudelman v. Ferrer*, 107 D.P.R. 495 (1978).
[173] *Sterzinger v. Ramírez*, 116 D.P.R. 762 (1985).

tation rights of the non-custodial father or mother appears to be almost absolute, although it can be modified according to the circumstances of each case.[174]

Visitation rights, custody and parental authority of the homosexual father and lesbian mother is an area in which the Supreme Court is beginning to define applicable rules.

In *Figueroa v. Colón*,[175] decided in a published non-precedent-setting judgment, the Supreme Court of Puerto Rico, for the first time, faced the claim of a lesbian mother to keep custody of her daughter, a minor. The court of instance, following the recommendation of the social worker, determined that the mother could retain provisional custody, with the condition that the minors would not be exposed to the presence of the partners of their respective parents, and that these would abstain from giving the children negative information about the other. It ordered a new social report for a final decision. The father of the minor appealed to the Supreme Court. He alleged that the court of judgment erred in awarding provisional custody based on the social worker's Report on Provisional Recommendations without holding an evidentiary hearing and for revoking a previous determination that awarded him custody of his child. The Supreme Court, emphasizing that the right to custody is governed by the cardinal principle of the welfare and best interests of the child, confirmed that the mother keep provisional custody, and ordered an evidentiary hearing be held as soon as possible to determine to whom permanent custody should be adjudicated.[176]

After hearing the case on it merits,[177] the court of first instance dictated an extensive and solid resolution in which it declared the father's motion requesting custody of his daughter without basis and resolved that the sexual orientation of the mother did not demonstrate any prejudice or

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[174] *Id.*

[175] 94 J.T.S. 85, at p. 12022

[176] Justice Rebollo López dissented because he understood that the girl should be separated immediately from what he considered was a situation that could cause great confusion and irreparable harm to a little girl of five years of age, while waiting for the expert's report on the situation's impact on the mental health of the minor.

[177] Testifying in the hearing were the parties and their witnesses, a doctor in psychology and a social worker, both of the Family Relations Program of the Judicial Center, and a psychiatrist as a witness for the mother. The initiator-father did not present any expert evidence even when the court of instance suggested he do so.

harm to the minor, having shown that, on the contrary, the girl was better cared for and had a better relationship with her mother than with her father. It ruled, among other things, that Mrs. Colón must abstain from having sexual relations with her partner under the same roof she shared with her children.[178]

In its resolution, the forum of instance stressed the singularity of the case, since it dealt with the custody awarded an admitted lesbian, and emphasized the tangency that it could have "regarding the recognition of fundamental constitutional rights like those that oppose sex discrimination and the right to privacy of groups as well as individuals who come before the Court...".[179]

The court resolution summarizes a case resolved by a court in the United States sustaining that the mother's lesbianism "could bring certain inconveniences to the minors, but not because of the fact of living...with the mother[,] but by her lesbian condition, something that will not change by the simple fact of changing the custody in favor of the father".[180] It pointed out that "[t]he mother would not stop being a lesbian and, however, the removal of [the minor] could[] provoke in the latter a sense of shame for the mother".[181]

The Court continued by saying that "[a]ll expert testimony coincided and unanimously recommended that the custody remain with the mother, since the identification with, closeness and preference that the child has for the mother strengthen and cause her best development, and any change in custody would affect it" [182] The experts also "indicated that homosexuality was not an illness, is not learned and does not make it more probable that a child would become a homosexual by living with a homosexual parent, which, therefore, should not, in itself, be disqualifying.[183]

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[178] See Resolution dictated by the Superior Court, Bayamón Court (Hon. Luis Rosario Villanueva, J.) July 6, 1994 in Civil Case No. DD193-1308, at p. 24.
[179] *Id.* at p. 18.
[180] *Id.* at p. 20 (citing M.P. v. S.P., 404 A.2d 1256 (1979).
[181] *Id.*
[182] *Id.* at pp. 21-22.
[183] *Id.* at p. 22.

Similarly, they suggested that "closeness with the homosexual father or mother facilitates communication should the child, at any time, present any doubts that require explanation" [184]

Not satisfied with the decision, the father again appealed to the Supreme Court alleging that the forum of instance erred in awarding the custody of the minor to the mother, by not taking into consideration that in our society homosexuality is condemned and socially reproachable, implying that the girl would suffer harm by suffering social rejection.

The Supreme Court, through a resolution[185], denied the father the issuance of the requested writ of *certiorari* and resolved that it would not intervene with the evaluation that the court of instance made of the criteria to award the custody of the minor, according to those stated in the opinion of *Nudelman v. Ferrer*.[186] The Court understood that said evaluation justified the concession of the custody of the child to her mother, independently of her sexual preference.

The Supreme Court also said:

> Any determination regarding the custody of the minor must be based on his or her welfare; for that reason, a mother should not be deprived of the custody of a minor because of the mere fact of the former's homosexuality if such objective is best met that way, as the court decided in this case, allowing that the mother continue to exercise the custody of said minor. See: *SNE v. R.L.B.*, 699 P.2d 875, 879 (1985) and *Stroman v. Williams*, 353 S.E. 2d 764 (1987) where the previously mentioned rule was expressly used and the following was said:
>
> []We therefore find no abuse of discretion on the part of the trial court in refusing to change custody from the mother to the father, Bezio v. Pastenaude, 381 Mass. 563, 410 N.E. 2d 1207 (1980); see Guinan v. Guinan, 102 App. Div. 2d 963, 477 N.Y.S. 2d 830 (1984) (the mere fact a parent is a homosexual does not alone render the parent unfit and a parent's sexual indiscretions are a consideration in a custody dispute only if they are shown to adversely affect the child's welfare); In the Matter of the Marriage of Cabalquinto, 100 Wash. 2d 325, 669 P.2d 886 (1983) (holding that homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation); D.H. v. J.H., supra (homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child), Nadler v. Superior Court of Sacramento County, 255 Cal. App. 2d 523, 63

[184] *Id.*

[185] Justice Rebollo López, consonant with this previous position, did not join the rest of the Court in the resolution. On the contrary, be made known that he would issue the writ of *certiorari*

[186] 107 D.P.R. 495 (1976).

Cal. Rptr. 352 (1967) (a mother who is homosexual is not an unfit mother as a matter of law).[]187

The Supreme Court held that the case of *Roe v. Roe*,[188] cited by the appellant to base his position, did not vary the rule previously mentioned and that it is distinguishable from the circumstances of this case since here the mother is not relating to her partner in her home , or in front of her children.[189]

A cardinal principle in the United States and Puerto Rico regarding custody decisions is the general welfare and best interests of the child. However, the truth is that, under the guise of the child's welfare, judges occasionally tend to interject their own prejudices regarding the rules and morality of society.[190] Consequently, various arguments have been used to justify restrictions regarding custody or visitation rights of a lesbian mother or homosexual father. One is the social intolerance that the relationship can cause and its impact on the socialization of the child. The effects of raising a child in a home where a lesbian mother and her lover live have also been studied. Those studies have revealed that the children of lesbian mothers who live with their partners are emotionally healthier than children who live in homes with only one of the parents, irrespective of their gender or sexual orientation.[191]

The decisions issued in the case of *Figueroa v. Colón* by the Superior Court of Bayamón, and by our Supreme Court are, basically, advanced decisions. However, both decisions expressly restrict, although in different ways, the sexual conduct of the mother with her partner under the

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187 See Resolution issued by the Supreme Court on October 21, 1994 in Case No. CE-94-554, at p. 2.

188 324 S.E.2d. 691 (Va. 1985). In this case the Supreme Court from the state of Virginia deprived a homosexual father of his visitation rights with his daughter, a minor, in his home or in the presence of his companion, while the father continued living with said companion because the homosexual relationship was considered illegal and immoral

189 In *Bottoms v. Bottoms*, 444 S.E. 2d 276 (Va. App. 1994), a case decided by the Court of Appeals of the State of Virginia, the case of *Roe v. Roe* was interpreted. By unanimous decision, a panel of three judges resolved that it cannot be presumed that the homosexuality of a father or a mother shall adversely affect a child

190 David M. Rosenblum, Comment, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665, 1666 (1991). In this article, Rosenblum quotes a theorist who indicates "[t]he more subtle issue in these cases is to what extent the court has given tacit approval to social and moral proscriptions against homosexual expression." Id. n.8.

191 Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 563-564 (1990).

same roof that she shares with her daughter. The Superior Court decided that the mother "*shall abstain from having sexual relations with her partner under the same roof under which her children live*"; the Supreme Court based its determination on the fact that "the mother does not relate with her partner in the home in front of the children". If indeed explicit sexual relations, be they heterosexual, homosexual or lesbian, in front of the children are improper and unacceptable,[192] that should not impede the demonstration of human love and affection between couples in the presence of children. Various cases resolved in the United States on this particular point out that the sexual conduct of the father or the mother can only be taken into consideration if it is proven that it adversely affects the welfare of the children.[193] Demonstrations of affection generally create a secure environment for the children. In this way, it encourages that the children be informed at an early age of their father's homosexuality or their mother's lesbianism. Several studies have show that the more sincere the father or mother, the better adjusted the child will be; thus the child will be better equipped to handle social intolerance more wisely and with greater understanding.[194]

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[192] Gottlieb v. Gottlieb, 488 N.Y.S. 2d 180, 182 (A.D. 1 Dept. 1985). See, also, Gloria M. Custodio, *The Discourse of Discrimination: How Lesbian Mothers Are Judged in Child Custody Disputes*, 63 REV. JUR. U.P.R. 531, 535 (1994).

[193] In Gottlieb v. Gottlieb, 488 N.Y.S. 2d 180 (A.D. 1 Dept. 1985), the appellate division of the Supreme Court of the State of New York, first department, sustained that the decisive criterion to be applied in a custody case where the father of the minor was a homosexual is not a criticism to the morality of the lifestyle of the father, but the welfare of the child. It pointed out that in the protection of this welfare, the father should be discreet and not expose his daughter or involve her in his sexual conduct. In that case, the court of instance had awarded the custody of the minor to the mother and had imposed restrictive conditions on the father or on any other homosexuales in the home of father during the visit or that even outside the home, these persons should not any contact with the girl and that the girl should not be taken any place where there were homosexuals, and that they should not include her in homosexual activity. In appeal, all the restrictions were eliminated, except that the girl could not be involved in homosexual activity. In one of the concurring opinions, it was pointed out that the father and the mother of the minor lived in the same building and that, therefore, the girl would necessarily learn that her father had a lover living with him and that to exclude said lover as a condition of visitation did not have any other purpose than to punish the father. Gottlieb, at p. 182. In another concurrent opinion, it was made clear that the girl should not be exposed *to any sexual heterosexual or homosexual conduct* that could affect her emotionally. *Id.*

Regarding the effect that the homosexual relationship of the mother could have on her child, a minor, in *Guinan v. Guinan*, 477 N.Y.S. 2d 830 (A.D. 3 Dept. 1984), the appellate division of the Supreme Court of the State of New York, third department, decided that the fact that the mother bas had sexual relations with other women was not a determining fact in a custody case. It provided that the sexual indiscretions of a father or a mother should be taken into consideration only if they can be proven to adversely affect the welfare of the child. Similarly, in *Stroman v. Williams*, 353 S.E. 2d 704 (S.C. App. 1987), the Court of Appeals of the State of South Carolina confirmed the decision of instance to keep the child under the lesbian mother's custody, since there was no evidence that the lesbian relationship that the mother had with another woman in the home of the child was exposing the latter to deviant sexual acts, nor that her welfare was adversely affected.

[194] Polikoff, *supra* note 191, at p. 565. It is important to note that the problem of social prejudices and their impact in custody cases also tend to occur for other reasons. For example, in Palmore v. Sidoti, 466 U.S. 429 (1984), the Supreme Court of the United States revoked a dicision of the State of Florida where, under the guise of the welfare of the child, custody was awarded to

The separation of the parents because of sexual orientation is damaging to the development of the child and does not diminish the effects of the social stigma. Instead, it increases the levels of social intolerance, misunderstanding of homosexuality and of lesbianism as social phenomena, the violence against these groups and antagonism within the family context.[195]

According to the decision in the case of *Figueroa v. Colón*, the Commission is confident that these circumstances can be evaluated on merit, and not on prejudices or judgments based on what is considered morally or personally correct or incorrect from the perspective of heterosexuality, the dominant view in our society. The guiding light should be the best welfare of the child, which can be well served by either the father or the mother, notwithstanding the differences or inclinations that distinguish them from others.

Regarding paternal and maternal-filial relations, in every aspect we have discussed, the Commission concluded that:

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the father for no other reason than that the mother of the child had married a man belonging to the black race. According to the opinion, the court of instance deemed that:

[]The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's welfare. This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.[]

Palmore, at p. 431.

The federal Supreme Court pointed out that the matter to be decided was if the private prejudices and possible harm that might be inferred, are considerations that are permissible to remove a child from her mother's custody. The court decided no. It provided that although the Constitution cannot control said prejudices, it cannot tolerate them either. Private prejudices are perhaps outside the reach of the law, but the law cannot, neither directly nor indirectly, give them effect. *Id.* at p. 433. To these effects, see González v. Superior Court, 97 D.P.R. 804 (1969).

195 As an example, see M.P. v. S.P., 404 A.2d 1256 (1979), where a superior court in the State of New Jersey decided that the lesbianism of the mother or any intolerance or joke that her sexual orientation could signify for the children was not a reason to change custody. On the contrary, the change of custody would not reduce the prejudices that the community would have regarding the lesbianism of the mother. It also pointed out that nothing indicated that the lesbianism of the mother in itself presented a threat to her daughters, or than in the ordinary course of their development they would be unable to deal with any problem that the community could cause them. See, also, Fernández Bauzó & Pérez Cuadrado, *supra* note 83.

1. *The current legislation does justice to fathers and mothers by recognizing that they have equal rights, powers and obligations over their children.*
2. *It is necessary that judges accept as a question of fact and of law that for a father or mother not to visit a child, not pay child support or be in arrears in the payment of support constitutes child abuse and non-compliance with an obligation shared with the custodial mother or father. It should be recognized that the right to receive support has been sustained by the constitutional guarantee of the right to life. The new legislation is a statutory source of this conclusion.*
3. *Conscious of the different treatment that men and women receive from society regarding socially acceptable behavior and behaviors related to their sexuality, judges could be more sensitive and just in the evaluation of the attributes that make men and women be adequate resources to take care of their children, if they exclude from the evaluation old and recurrent prejudices that originate in stereotypical behaviors and conducts that society expects from each gender.*
4. *In those cases where the progenitors are of homosexual or lesbian orientation, extreme care should be taken so that the criterion of the welfare of the child be that which truly prevails and not the stereotypes or prejudices related to the sexual orientation of the father or mother.*

G. The Obligation to Support

The obligation to provide support arises in our law from the notion that blood relations and those of affinity create mutual rights and obligations between the persons so related.

Article 143 of the Civil Code establishes those who are obliged to provide each other support[196]: 1) the spouses; 2) the ascendants and descendants, 3) the adopter and adoptee and their descendants and 4) the siblings when due to a physical or emotional defect, or to any other cause that is not the fault of the support provider, he or she is unable to secure his or her own subsistence.

Article 144 establishes the order of the persons from whom support can be claimed.[197] When two or more persons are obliged to give support, the order shall be the following: 1) the spouse; 2) the descendants to the closest degree; 3) the ascendants also to the closest degree; 4) the

[196] 31 L.P.R.A. sec. 562.
[197] 31 L.P.R.A. sec. 563.

siblings. There is no distinction regarding maternal or paternal lines, those who are in the same order should share the obligation jointly.

The obligation to support the ex-spouse emerges from Article 109, as an economic result of divorce, and is not justified on the basis of the previous provision.[198]

The outstanding aspects on the subject of gender discrimination in support legislation are the following: first, the *legal requirements of paying alimony to the ex-spouse* because of the divorce; second, the stipulations that regulate *alimony* of the spouses *pendente lite* during divorce proceedings, and third, the *procedures established to claim child support* which are extremely burdensome for mothers who, generally initiate them to get fathers to support their children.

1. The Support of the Ex-Spouse (Alimony)

The provision that establishes post-divorce support for an ex-spouse does not derive from the Spanish Civil Code, but from Article 160 of the Louisiana Civil Code. It was inserted into our Code as part of the rules that would govern the divorce, an Anglo Saxon import, in our jurisdiction.

Article 109 of the Civil Code, as amended by Act 25 of February 16, 1995,[199] provides:

> Once the divorce is decreed for any of the reasons established in Article 96 of this Code, and any of the ex-spouses do not have sufficient means of support, the Superior Court may assign the spouse discretionary support from the income, rents, salaries or property of the other spouse.

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[198] 31 L.P.R.A. sec. 385. Regarding the legislative precedent of this provision, see CIVIL CODE of Louisiana, Art. 160 and the cases of Rubio Sacarello v. Roig, 84 D.P.R. 344, 358 (1962); Suria v. Fernández, 101 D.P.R. 316 (1973); Milán Rodríguez v. Muñoz, 110 D.P.R. 610 (1981); and Toppel v. Toppel, 114 D.P.R. 16 (1983).

[199] Provided before:

If *the wife* who has been granted divorce does not have sufficient means to subsist, the Superior Court shall assign her discretionary support from the income, rents, salaries or property of *the husband,* without said amount exceeding the support amount of one fourth part of the income, rents or salaries generated. If the divorce was decreed because of the cause of separation, *the wife* may request the support mentioned in the previous parragraph, if she does not have sufficient means to subsist. The support amount shall be revoked if it is no longer needed, or when *the divorced* woman marries for a second time, or when she lives in public concubinage or incurs in a licentious life.

31 L.P.R.A. sec. 385. (Emphasis added).

The Court shall award the support referred to in the previous paragraph, taking into account, among others, the following circumstances:

(a) The agreements reached by the ex-spouses.

(b) The age and state of health.

(c) The professional background and the probabilities of gainful employment.

(d) The past and future dedication to the family.

(e) The collaboration in the mercantile, industrial or professional activities of the other spouse.

(f) The duration of the marriage and of conjugal coexistence.

(g) The wealth and financial means and the needs of one and the other.

(h) Any other factor that is considered appropriate within the circumstances of the case.

Once support is established, the judge can modify it whenever substantial changes occur in the situation, income and fortune of one or the other ex-spouse. The support amount shall be revoked through judicial resolution if it should become necessary, or when the divorced spouse, who benefits from support, marries again, or lives in public concubinage.

The cases and files examined by the Commission to meet its mandate, were resolved under the previous rule, therefore, it is necessary to refer to that juridical framework in this area, before examining the scope of the new regulation.

The notion of dependence of women on men justifies the drafting and application of Article 109, before it was amended. It remained so until the Supreme Court decided the case of *Milán Rodríguez v. Muñoz*,[200] in which it extended the right to receive post-divorce support to any man who

[200] 110 D.P.R. 610 (1981).

was in the same situation as that described in the precepts of the old rule. We have previously discussed in this Report the impact of this case on the subject of gender.

Before *Milán Rodríguez v. Muñoz*, the doctrine that justified the drafting and the legislative purposes of Article 109, had been expressed in *Suria v. Fernández Negrón*,[201] where the Court adopted the historical view of dependence of the woman on the man:

> [T]he purpose of human solidarity that indubitably inspired the drafting of Article 109, that is none other than the projection beyond the happy days, of the obligation of the man to aid and help his wife; a canon of nobility and gratitude inserted in the Civil Code for the benefit of that person who in a past fantasy gave of herself sweetly, in love and even in personal sacrifice to the man who made her his wife. Those are the personalized values that serve as moral and ethical armature to the interpreted precept and that convey a vital and essential character to the man's obligation to this woman who having kept herself pure and honest, languishes as victim of illness, poverty, and the other vicissitudes of existence.
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> ... The Law is to a great extent the most visible external sign of the intricate morals of a people, and the interpreted precept honors the Law of our land.[202]

The theory of the romantic and traditional image of the submissive and selfless wife totally dependent on the man was, in 1973, a juridical basis to support the validity of that regulation. In *Milán Rodríguez v. Muñoz*, the Court reconsiders that view and recognizes, that with the passing of time, it is not the dependence of the woman that supports its validity, but the pressing interest of the State to share with the citizens the obligation to give support to those who need it. It starts from the premise that the need for support is not exclusive to the woman and states the reason for changing the rule of law as follows:

> [T]he central hypothesis is that the woman is in a situation of economic inferiority. This premise, valid possibly several decades ago, formed part of the juridical armature and design that placed the woman in a position of strict submission and absolute frailty before the man, which, at the same time, required a superior and legal defense and greater economic protection.....
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> .....

[201] 101 D P R. 316 (1973)

[202] *Suria v. Fernández*, 101 D.P.R. at p. 320.

> ...in a world of changing realities, clearly a person's need to receive "food and shelter" to subsist with a minimum of dignity, is not a private condition of the female sex. More so, it is an inherent and neutral circumstance that originates in nature itself and that crudely projects itself at any age over all of humanity, male or female.[203]
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> The Court adopted the reasoning of the court of instance: Today, the two [a woman and a man] have the same opportunities, which also implies obligations. A woman can, because of special circumstances, have the need, according to the requisites of law, [of] using the protection that Article 109 provides her, and in the same way, the men of today, with whom women have been put on the same level economically, intellectually and socially, have the necessity for very particular reasons, and according to the requisites of law, to use the protection that Article 109 offers him.[204]

In the opinion of the Commission, a great difficulty hovers between the original view and the new perspective of the Supreme Court: although, on its face, the conclusion of law regarding the discriminatory character of Article 109 and extending the provision to men is applauded, the Court sets out from the mistaken premise that women enjoy equal opportunities and find themselves in the same economic and social condition as men. Still, they have a long road to travel. Doors have been opened, and many women today enjoy better opportunities and conditions, but many others continue at a political, social and economic disadvantage. This jurisprudence could be, on the other hand, a good start for the genders to move closer to the law and their shared society.

Even the abolishment of discriminatory treatment favoring women and excluding men did not, under the old article, end the discriminatory treatment towards women, which the new regulation does not correct. From a cultural and social perspective, the third paragraph perpetuated a difference in the treatment of women in our society and, as a result of stereotypes, how they are treated in our courts. The new article repeats the above provisions: The support amount shall be revoked through judicial resolution if it should become necessary, or when the divorced spouse, who benefits from support, marries again, or lives in public concubinage.

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[203] *Milán Rodríguez*, 110 D.P.R. at pp. 613-615.
[204] *Id.* at p. 617.

Since 1981, apparently the previous draft could be applied to both genders, but it must be remembered that the draft *was originally conceived for its exclusive application to "a wife"*, the original reason why it was adopted and integrated into the Civil Code. A woman's sexual life became reason to deprive her of several rights—support, custody, parental authority, visitation—solely by behaving in ways that were socially accepted and tolerated in the case of men. Hopefully, when courts interpret and apply this new article, they will not reproduce this practice.

On the other hand, as the study of files from the proceedings of the courts of first instance and from the jurisprudence of the Supreme Court demonstrate, the daily practices in our courts show that the immense majority of ex-spouses claiming support after divorce are women, many of whom need those resources, either because marriage kept them out of the workforce or because their income is less in comparison to that of the men. This reality is compounded by the fact that the immense majority of child custodians are mothers, forcing the conclusion that Article 109 is almost exclusively applied to women, and rarely to men.

The new drafting takes into account the criteria outlined by researchers on the problem—which is more social than juridical—of family support after the progenitors divorce. The criteria of the new law are:

(b) age and state of health; (c) professional background and probabilities of gainful employment; (d) past and future dedication to the family; (e) professional, industrial or mercantile collaboration with the other spouse; (f) duration of the marriage and conjugal coexistence; and (g) wealth and economic means and the needs of each spouse, are particularly important because they do justice to women who suffer the experience of divorce.

By excluding the criterion of the plaintiff's innocence , the new provision tends toward eliminating the criterion of culpability in the determination of such a special matter of human content as is support.

The criterion (a)—the agreements that the ex-spouses have reached—should be carefully evaluated, since the impact of this legislation will influence agreements or stipulations between couples on the future support of ex-spouses, and thus, avoid judicial intervention. Those stipulations must be carefully evaluated in the post-divorce economic relationship to avoid violating or prejudicing the party at a greater disadvantage, generally, women.

In the opinion of the Commission, the criteria of the new Article 109 permits the judge to evaluate the condition of the divorced ex-spouse from a more just and humane perspective.

2. *Support Pendente Lite*

The rule that regulates the award of alimony during a divorce case is Article 100 of the Civil Code which stipulates:

> If *one of the spouses* does not have sufficient resources of her or his own during the case, the Superior Court shall *order the other spouse* to provide support in proportion to his or her property.[205]

As occurs with Article 109, the immense majority of those who claim support under this provision are women. Usually during the marriage, the man administers de facto the property or is the principal provider of the income of the marriage. In financial matters, both circumstances place the male in a position of advantage over his spouse at the moment of litigation, since he is the one who knows and maintains control of the sources of income.[206]

The obligatory analysis of this provision requires that we remember that in marriages that are subject to the regime of community property, both spouses are titled owners of the total property accumulated by said community.[207] The wife claims her own property, not property from the

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[205] 31 L.P.R.A. sec. 343.

[206] This situation gained attention when the Supreme Court issued judgement in the case of Kantara v. Castro, 94 J.T.S. 4. A bill was filed before the Legislative Assembly, P. of the C. 1171, that proposes to amend Art. 100 to the effect of specifying the cases in which support *pendente lite* shall be established and to provide for the coadministration of the community property during the case.

[207] Arts. 1295 and 1296 of the CIV. CODE, 31 L.P.R.A. secs. 3621 and 3622, respectively.

husband, to which the law recognizes her access. We should also remember that Article 1308 declares that the "support of the family....." shall be charged to the community property. Therefore, neither the support *pendente lite* nor the *litis expensa* is taken from the husband's property, but from the community property, whose administration is joint as long as the conjugal community is not dissolved and the property liquidated.

In *Kantara v. Castro*[208] we see two different views in that respect, through the opinions of Associate Justice Naveira de Rodón and associate justice Negrón García. Each opinion can be tempered by the particular perspective of gender and experience. Although the amendments to the Civil Code turn both members of the legal community property into co-administrators, the facts of the case show that the letter of the law can consecrate juridical equality without automatically implementing a change in the condition of the woman before her husband.

In the opinion of Justice Negrón García:

> It is illusory to believe that, where both spouses are mutually disappointed, where profound differences, intolerance, stubbornness, and even hostility exist, they will be able *ex proprio vigore* to resolve their differences of opinion, particularly their needs and personal expenses. The coadministration and adoption of cordial reciprocal *decisions ceases*. Without agreements to this effect, the support *pendente lite*—based or not theoretically on the equality of use and access to the community property— by imperative, must be channeled through the courts.[209]

Justice Negrón García's affirmation regarding the cessation of co-administration during the divorce proceeding could present significant juridical difficulties, since it affects the property rights of a title owner, whose recognition was the explicit cause for broad and intense reform in 1976 to give both women and men equal rights and powers over the property that both accumulate, and over the actions that affect them while they have such title.

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[208] 94 J. T. S. 4, at p. 11437. (Judgement).
[209] *Id.* at p. 11439.

Perhaps, because of this difficulty, the judge expressly affirmed that "[t]his circumstance was not created by the Legislative Assembly or the courts. It doesn't have to do with sexism or a legal economic outline of subordination." He held that "it is an unquestioned datum that she [his wife] could not do, nor did equal professional work" and adds that the fact that she "should have had to come before the court—even though she was going through a situation that was painful, critical, with feelings of guilt, loss of affection and defeat—could hardly be characterized as "humiliating"....[T]he same would have happened in reverse." He considers the regulation of these difficulties by the courts necessary, because to allow the spouse free use of funds "is to invite chaos".[210]

Justice Naveira de Rodón, for her part, starts from the premise that:

> [W]omen still are in a situation of subordination caused by the same juridical order. For the purpose of awarding support before the divorce, the economic disadvantage that one of the spouses suffers vis a vis the spouse who has control of the community property is, generally, damaging to the woman.[211]

Further on, she continues that:

> [I]t is incompatible with the purpose of the referred Reform to interpret that the spouse who does not have control of the property must come before the court to justify that she or he be given support in cases where property exists that belongs to the community property, such as for example, salaries and rents, and on the other hand, not to demand from the spouse with control of the property that he or she also justify his own needs or the use that she or he gives to the community property to cover those personal needs. One must ask: why is it necessary that one of the spouses ask for permission to make use of the community property patrimony, while the other is granted the right to make use, with impunity, of the patrimony that belongs to both of them?"[212]

The judge concludes with an exhortation to sentencing judges:

> In summary, the courts are obliged to interpret the articles of the Civil Code that govern the support between the spouses in such a way that gives life to the intent that encouraged the Reform of the administration of community property approved in 1976. This demands an interpretation of the articles of

[210] Justice Negrón García's position contrasts with those assumed by him, generally, in other cases that allege gender discrimination against women, as evidenced by this Report

[211] *Kantara*, 94 J.T.S. at p. 11440.

[212] *Id.* at p. 11444.

> the Civil Code that promotes and allows the equal access and use of the community property.[213]

For Justice Negrón García, the burden of proving the need for support and the plausibility of the claimed amount falls on the spouse who is not the principally the producer of those funds, who in our society, is usually the woman. The more productive person, usually the man, should retain or take control of the funds to avoid their squandering by the woman, what Justice Negrón García calls "the chaos", because that appears to be fair. The difficulty that this position presents is that joint ownership regarding the total property is seen as a power that is merely formal; true ownership is exercised by the person who produces or promotes the income. Although the law determines equal ownership of community property, this position holds that the person with talent and industry should keep direct control, and starts from the premise that the woman receives all the benefits of her husband's work and gives back very little. This position is rooted in the stereotypical idea that the woman depends on the husband the breadwinner and the provider of the community property fortune.

Justice Naveira held that the ability of women to administer what she owns be recognized, and that controls, if they are necessary, be imposed on both. The power, authority and ownership of the administration are not temporarily limited by the law. Any existing contradiction stems from the co-existence of old and new laws that start out from different historical premises. It is the duty of the judge to interpret them harmoniously, according to contemporary values, respecting the equality of both spouses.

The Commission considers that the judge should not presume that women seek to squander the community property fortune when they ask for support *pendente lite,* or rightful claim access to the co-administration; nor can it be said that men are more suited to protect said property. Both affirmations respond to stereotypes in our society. Reality shows that the concealment of property

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[213] *Id.*

or its fraudulent disposition, actions that the Supreme Court has heard, are produced by the person who controls them , usually the man.[214]

The Commission adopts as its own the exhortation of Associate Justice Naveira de Rodón that judges be alert to situations in which spouses in divorce proceedings, principally women, claim the use of the community property, whose ownership and coadministration they share, in order to act in accordance with the premises on which the Reform of 1976 is based.

3. *Child Support*

In the case of *Martínez v. Rivera Hernández*[215] the Supreme Court voiced its concern over the "slowness of the proceedings in child support cases." It describes the situation in the following way:

> It is alarming. Recent studies confirm it. The notable effort of judges and other officials to remedy the problem have been unsuccessful. Part of the complex problem derives from the attitudes of the protagonists, lawyers and judges. But also the nature of the matter. A substantial number of divorce decrees include imperative orders regarding support. Their consequent execution generate in the short and long term innumerable incidents related, among them, to their non-compliance, and an increase or decrease in the support amount. The classic method to require a demonstration of cause of the support provider who is in arrears, along with the usual hiring of a lawyer by the plaintiff, filing of documents, notice and citation, is costly, complex and complicated. Also, it goes against the interest of the children—true tutored subjects of the law— by promoting undue tardiness.[216]

The Court immediately required the "urgent intervention of the Legislative Power". Act No. 5 of December 30, 1986, as amended, known as the Special Act on Child Support,[217] was the Legislative Assembly's response. But the procedures did not speed up. In 1994, Act 86 of August

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[214] The cases of Banco de Ahorro v. Santos, 112 D.P.R. 70 (1982); Quintana v. Longoria, 112 D.P.R. 276; and Quetglas v. Carazo, 93 J.T.S. 146, at p. 11265, are examples of these outlines. The Commission did not find cases where a woman was alleged to squander the community property or of fraudulent plans to dilapidate the property during the divorce proceedings or the liquidation of community property regime. Should they exist, they would represent a smaller percentage in comparison to those who present situations similar to men.

[215] 116 D.P.R. 164 (1985)

[216] *Id.* at p. 171. (citations omitted.) Recently, in the case of *Rodríguez v. Soler*, 94 J.T.S. 59, at p. 11819, this concern was reiterated.

[217] 8 L.P.R.A. sec. 501 *et seq.*

17, 1994, known as the Organic Law for the Administration of Child Support (ASUME, [its acronym in Spanish]), was approved,[218] which amends Act No. 5, with the intent of removing support cases from the ordinary judicial process and creating an administrative body and appropriate corresponding procedures to deal with the serious problem of non-compliance with support orders in Puerto Rico.[219] Fundamentally, the law intends to establish truly speedy processes, effective and aggressive mechanisms to collect child support and tracking systems for absent parents who do not comply with their support obligation.[220] It promises to resolve the serious problem of delays in the receipt of periodic payments that persons, mostly women with custody of minors, suffer.

The procedures established by Articles 11(B)(3)(a),(b) and (c) are important in establishing o the paternity of out-of-wedlock minors. Presumptions of paternity where the alleged father refuses to cooperate, assuming costs, and sanctions established during the processes, should foster a better and quicker assignment of paternal and maternal filial responsibilities to provide relief from the burden that ordinarily falls to women.

Since the legislation and inauguration of ASUME are too recent, the Commission was unable to judge the efficiency of the new mechanisms and how they affect the processes and treatment of the persons who request, or will request, support for minors under their custody. We encourage any effort that promotes or initiates an effective public policy to resolve this problem, which is more social than legal. Only with a true and committed effort from the officials of ASUME and the

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[218] The name by which the Administration shall be known

[219] This law was drafted in the same androcentric language (the father, the parents (padres), the minors (los menores), the provider (el alimentante), although, occasionally, it refers to a person (la persona), support recipient (alimentista), etc., concepts that have a neutral connotation. By experience, the vast majority of persons in this country who are child support providers are men, which doesn't make the references too difficult. The Commission's position, however, is that non-sexist rules should be established when drafting new legislation, irrespective of the fact that numerically speaking the subjects affected or represented by their provisions helong to one gender or the other.

[220] Although, this is not the appropriate place to bring this up, due to the limitation on the scope of this work, some of the measures are so aggresive that they may present problems of a constitutional nature, in that they violate the right to privacy and the due process of law of the persons. The need to speed up and make for effective some processes cannot be a justification for violating other fundamental guarantees that protect all citizens, irrespective of their personal or social results. The deprivation of professional licenses, the publication of photographs in the newspapers, just to mention two examples, as measures should be used with much discretion and caution.

Judicial Branch, working together will this be achieved. Several considerations regarding Supreme Court jurisprudence on the subject of support are in order because they demonstrate the judicial system's commitment to more sensitive and effective processes and attitudes in resolving the problem of delays in support payments. To the extent that these processes become more adequate and agile, the system will treat woman and their children more fairly.

In *Guadalupe Viera v. Morell*,[221] the Supreme Court clearly established that the obligation of the parents to support their children stems from two statutory sources—Article 143 of the Civil Code on support between relatives, and Article 153 that establishes that the support obligation depends on the responsibilities originating in parental authority (*patria potestas*).[222] The essential difference of both stipulations is that the obligation that rises from Article 153 is not subject to the dual scrutiny of the needs of the person with a right to receive support and the resources of the support provider, which is what occurs with the obligation that Article 143 generates.

This jurisprudence lost practical effect since the Mandatory Guidelines to Establish Child Support[223] was predominant in determining the applicable criteria to establish child support in Puerto Rico: under the new law, the monthly income of both progenitors and the number and ages

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[221] 115 D P R. 4 (1983)

[222] Art. 143 provides:
All persons, to the extent described in the preceding section, are reciprocally obliged to provide support:
(1) The spouses.
(2) The ascendents and descendents
(3) The adopter and adoptee and their descendents.
(4) The siblings
The siblings are reciprocally obliged to provide support when, because of a emotional or physical defect, or because of any other cause that is not imputable to the sibling who requests support, the latter cannot provide his or her own subsistence. Amongs these needs are comprised the costs indispensable for acquiring elementary instruction and the learning of a profession, art or vocation.
31 L.P.R.A. sec. 562
On the other hand, Art. 153 provides:
The father and mother have, with respect to their unemancipated children:
(1) The responsibility to feed them, keep them in their company, educate and prepare them in accordance to their fortune, and to represent them in the exercise of any action that may be to their advantage
(2) The authority to discipline them and to punish them moderately or in a reasonable manner.
31 P.P.R.A. sec. 601

[223] Act No. 47 dated August 5, 1989, which amended Art. 19 of Act No. 5 dated December 30, 1986. 8 L.P.R.A. sec. 518.

of the dependent children became the principal criteria to determine the basic support amount that the support provider had to pay.

In *López Martínez v. Ramón Yordán*[224] the Supreme Court established that the support obligation falls on both parents and should be distributed according to their resources. When the community property is liquidated, the father shall be accredited the proportion he paid that corresponds to the mother for the support of the children. That proportion is established by the court of instance, after the share of each ex-spouse in the community property is determined. Under the new legislation, after the conjugal society is liquidated, the independent income of each progenitor determines the amount of support that each should pay each child, although a proportional distribution according to each one's income will be made to address the extraordinary costs that the law itself acknowledges. The basic support payment is based on the monthly income of the non-custodial father or mother and on other factors that we have mentioned.

Although these cases followed a trajectory parallel to the special law, other jurisprudence decisively introduced efficient measures into the special legislation on child support.

As a general rule, *Rodríguez v. Vázquez Flores*[225] established that modifying child support not be retroactive. Situations can occur in which retroactively reducing support is appropriate. A factual question arises in these circumstances. It can be made retroactive, the Court concludes, if the appellant's incapacity to satisfy the support payment was clear before the request.

A similar issue was cleared up in *Ex Parte Valencia and Riollano*.[226] Here, the Supreme Court clarified that nothing can impede a sentencing court from hearing a matter of support reduction with consequences, even though the plaintiff's support payments are not on time. Despite its

[224] 104 D P R. 594 (1976)
[225] 113 D P R. 377 (1982)
[226] 116 D P R 90 (1986).

decision on support arrears, and in light of new evidence, there is no reason for the court of instance not to resolve whether light child support should be reduced.

The Supreme Court warned that courts of instance should abstain from intervening in the total support owed before the presentation of the request for reduction, unless the support provider could show—besides the legitimacy of the actual reduction—that due to illness or an incapacitating accident, he or she could truly not present the corresponding request to reduce the time. The new legislation gathered this legal doctrine.

The Child Support Act emphatically establishes in Article 19 that fixed support "is not subject to a retroactive reduction in Puerto Rico nor in any state, except that in extraordinary circumstances the Court or the Administrator may make the reduction retroactive to the notification date of the petition for the reduction to the person with a right to receive support or creditor or the notice of intention to modify, whichever the case may be. No retroactive reduction of the total unpaid support obligation" shall be permitted. This is why the petition for reduction can not be retroactive to a date prior to the request, guaranteeing the diligence of the support provider when making this kind of request.

This provision of law has generated much opposition on the part of support providers, usually men, especially when they accumulate a considerable debt and want to reduce the current support amount to compensate for the arrears, or to reduce the accumulated and expired debt. When we discuss the findings in the third part of this Chapter of the Report, we shall see that reductions are usually permitted and arrears canceled to the detriment of minors and of the custodial party. Evidently, the Supreme Court doctrine forged a more rigid rule in favor of the minor. This premise should guide the courts of instance in decisions on adjusting support.

In *Mundo v. Cervoni*,[227] a new view of the value of the mother's contribution in the care and daily attention to her children is introduced. The prevailing rule was: when the obligation to give support falls on two or more persons, in this case the father and the mother, the support payment shall be divided between them proportionate to their respective capital. Therefore, when the community property is liquidated, a support provider could reclaim a credit against the other party obliged by the payments in excess of the fair pension agreed to or established by a court. This case evaluates the work of women from another perspective. The personal labor of a spouse or ex-spouse (usually the mother) who converts the support and applies it to everything that is indispensable to her children's sustenance, room and board, clothes and medical assistance as meeting her own support obligation, is an appreciable element when the judge decides the claim for credit between the joint support providers.

This decision is of particular importance for doing justice to custodial women, since for the first time, the Court determines that:

> The father contributes to providing periodic amounts of money toward the support of the children, as much as the mother who with her work and energy achieves the purpose and destiny of support by preparing and serving the food of her children, keeping the home clean and neat, taking them to school for their education and to the doctor when they become ill. There is no juridical or moral basis to conclude that a mother who behaves in this manner does not contribute to her duty to support her unemancipated children that Article 153 imposes on her, nor should her physical and emotional support to her children be underestimated to the point of zero, when the moment of the liquidation of the community property arrives, and granting a credit against her to the husband because she did not contribute proportionately with money.[228]

The Court makes the exception that:

> Of course the mother, who has at her disposal such a large amount that allows her to hire employees delegated to perform such important functions of head of household and coadministrator of the society, may not offer her work

[227] 115 D P R. 422 (1984).

[228] *Id.* at p. 426. (Emphasis omitted).

> [to claim] a credit from the husband *but, as a general rule,* this situation does not occur.[229]

This jurisprudential determination was included in the new law, which in the appropriate paragraph points out that "non-monetary contributions of each parent to the care and welfare of the minor shall be taken into account". In these cases the non-monetary contributions of a father may liberate the mother from certain duties that society ordinarily expects of her, such as providing after-school care, transportation to and from school, academic tutoring, visits to doctors and going with the children to sports practices or artistic activities. On the other hand, it values the work mothers have traditionally performed without recognition, by acknowledging its true economic value.

The case of *Martínez v. Rivera Hernández*, previously cited, is of special importance. This case resolves two pivotal matters on the subject of child support. First, that the judgments and resolutions in cases of support generate legal interest due to default. This is a natural consequence of a money obligation. These are computed from the moment in which the judgment is issued or, if it is monthly, from the moment it expired or became due. This determination has not been persuasive for the great majority of support providers in arrears, but, it is really the laxity in the judiciary that has permitted that this resource not be the coercive instrument the Supreme Court wanted to implement.

Second, the Court makes "an appeal to the courts of justice of the country to creatively and imaginatively try to solve these disputes more quickly and with a greater sense of priority".

In *Quiñones v. Jiménez*,[230] the Supreme Court also encouraged the courts of instance to implement "those procedures or systems that make viable giving automatic follow-up to the cases [of child support]; that is, mechanisms that do not allow situations as that occurring in the present

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[229] *Id.* (Emphasis added).

[230] 117 d.P.R. 1 (1986)

case" to prevent the accumulation of money to the extent that these sums can not be easily recovered. In this case, the judge required the father to make an initial payment and guarantee the remaining amount, which the Supreme Court called "a creative and efficient mechanism". In fact, Act No. 5 adopted this mechanism as an alternative form and guarantee of payment. In *Key Nieves v. Oyola Nieves,* [231] justice was done to the children who, upon entering legal age, still depend on the economic aid of the father to finish a professional career; the support obligation is extended to the children after they have reached legal age. The legal duty of every father and mother to provide the necessary economic means for the education cannot cease "ipso facto" by the fact that a child has reached twenty-one years of age. When a child has started studying a trade or profession while a minor, he or she has the right to request from the support provider the means to finish, even after reaching legal age.

The child who requests support or economic assistance for postgraduate studies must affirmatively show that he or she is worthy of such economic assistance by their efforts, an attitude reflected by the studies that she or he wishes to pursue based on academic achievement, and whether the desired objective is reasonable. Only when the prior circumstances or criteria have been proven to the satisfaction of the court, can that forum establish the amount that it considers apt and reasonable for support. If necessary, the court can use its coercive power to force the support provider to comply with the established obligation. When the children have reached legal age, the courts have determined that it is they who should file the legal action and authorize the requisites described.

The Child Support Act is written with the needs of minor-aged children in mind, but its definition covers suppositions that jurisprudence had foreseen for the direct descendants who have reached legal age. A person with the right to support is defined as "any person who according to

[231] 116 D.P.R. 261 (1985).

the applicable provisions of law has a right to receive support....". The legal doctrine established by the Supreme Court is a rule of law established for the effects of that definition.

It is necessary to underline the importance of this decision because of the impact it has on the families of custodial mothers who usually become the only source of economic support and guarantors of student loans incurred by their children who pursue university studies. Many men liberate themselves from their support obligation when their children reach legal age. The law requires that they sue the father for continued support, but if they decide against the action for moral considerations, or because they feel humiliated by these proceedings, or to not further affect the already deteriorated paternal-filial relationship, it is usually the mother who will feel obliged to help them get ahead.

The Commission believes that the courts should provide fairer procedural mechanisms to resolve these situations. Remember that generally mothers act on the behalf of the minors, with respect to child support claims, within the same proceeding or case file of divorce. Why not consider the mother the representative of the children, as if it were an agency contract, an express or tacit mandate, or a voluntary representation, without the need for the minors who reach legal age to replace the mother as indispensable plaintiff party in order to continue with the claim of support? This resource would avoid the delay and complication of these processes, the unjustified liberation of some fathers who do not assume their paternal responsibility, and further deterioration in family relations. The claim for support would go forward as what it is, a family matter, regarding which there are two progenitors who are juridically, socially and morally obliged, and where one of the solidary debtors claims that the other continue with the payment of his part of the debt—thus avoiding a juridical imperative, such as reaching legal age, that would pit the children against their father in a court of law, and the betrayal of a moral and legal obligation.

In *Rodríguez v. Rodríguez*,[232] the Court makes clear that the expiration of Article 1866 of the Civil Code to claim child support arrears does not apply against minors.

The Court reaffirms that, whenever the claim to child support refers to debts that are old and remote and the defendant is currently paying the support obligation, and the minor does not have an immediate need that needs to be addressed with the claimed debt, a plan should be approved for its payment, without forcing the support provider to go into economic ruin. If and when the support provider obstinately and voluntarily refuses to comply with the payment plan, he shall be declared in contempt.

The Court reminds lawyers that in child support litigation, they must advise custodial progenitors to make any support claim quickly and to inform the support provider of his or her responsibility, the consequences of non-compliance and the obligation to go before the Court to request a timely reduction, if the economic conditions change. The judges, in their duty of *parens patriae*, should instruct the parties on their rights and obligations.

This case deals with a situation that was brought up by several deponents during the hearings held by the Commission, the tardiness of women in claiming child support and the effect that it has on the judicial procedures and the personal situation of the support provider. One reason given to explain these situations is the helplessness that women often feel before the judicial system. A prompt claim does not guarantee adequate and diligent attention to her request nor to the support provider's compliance with the court order. Whenever the need compels the woman to judicially claim the payment of the debt, the mother is blamed for the defendant's non-compliance and he is given new and recurring opportunities to delay the payment. The "automatic follow-up system", if implemented through the new administrative body, may be the solution to this dilemma.

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[232] 117 D.P.R. 616 (1986)

One opinion that greatly influenced the drafting of Law 5 is *López v. Rodríguez*.[233] This case confirmed two old rules: first, that the community property regime is responsible for the support of the children of prior marriages of any of its parties and, second, that for a petition for reduction of support to proceed, the plaintiff must demonstrate that a substantial change has occurred in the circumstances that were present at the moment the support order was established, which has affected his or her capacity for providing support.

The most important aspect of the opinion is that to determine the economic capacity of the provider, the court may consider aspects such as his or her lifestyle, their capacity to generate income, the nature and quantity of properties that she or he has, the nature of his or her employment or profession, and his or her other sources of income. Based on the circumstantial evidence presented to the Court, it may infer that the support provider has sufficient means to comply with the support obligation imposed. This criterion was incorporated into the law to establish the fair and adequate amount of support for the provider.

Regarding the subject of gender, it is important to point out that generally, it is women who have difficulty identifying the support provider's sources of income. This criterion allows them to demonstrate, by inference, that the obliged person has sufficient property to pay the support amount, which means an advance in the establishment of a fair support amount. This criterion was confirmed in *Rodríguez v. Zayas*,[234] where the Supreme Court authorized courts to take into account other criteria than those required by the Personal and Economic Information Form,[235] even that of the underground economy.

On the subject of support, the Commission considers that:

1. Any judicial, administrative and legislative effort that helps to resolve the juridical and social problem of arrears in the payment of child support in Puerto Rico contributes

[233] 121 D.P.R. 23 (1988).
[234] 93 J.T.S. 75, at p. 10719
[235] Known as PIPE. [in Spanish].

toward a more equitable and just treatment between the men, women and children who coexist in our society.

2. Diligent and assertive attention to all the components of the judicial system and the new Administration for Child Support is necessary to establish expeditious and efficient processes and resources for the collection of child support arrears.

3 The courts should consider, at the time of establishment of support of the non-custodial parents (absent parents), the non-monetary contributions that these make to give the children the daily attention they need, in a way that the non-custodial parent contributes fairly and sufficiently toward the true, recurrent, and special costs of his or her children. Not to do this imposes on custodial parents, usually women, a true burden, often more onerous than that imposed on support providers, usually men.

4. The system of justice or the new Administration for Child Support should carry out studies that help to identify the ways in which persons obliged to support minors can more equitably share this obligation, keeping in mind the economic resources, the special actions, the particular attributes, and the personal and professional deprivations of those obliged of the daily care of the minors.

H. The Exercise and Enjoyment of Patrimonial Rights in Marriage[236]

Laws 109 and 111 of June 2, 1976 amended Articles 89 and 90 of Book I, respectively, regarding the mutual obligations between spouses and the establishment of the conjugal domicile.[237] The actual reading of these provisions is the following:

> *Art. 89.* The spouses must protect and satisfy their needs mutually in proportion to their respective conditions and means of fortune.
>
> *Art. 90.* The spouses shall decide by mutual agreement where to establish their domicile and residence according to the best interests of the family.

Here, the concept that the husband must protect and support the woman, and that she must follow him wherever he takes her is eliminated. By making the personal and juridical status of both spouses equal, a new concept of what constitutes the personal and economic contribution of each spouse in marriage began. Now then, the most significant contribution to Puerto Rican law by Act

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236 The analysis of the changes in economic aspects comes from the article published by Commissioner Migdalia Fraticelli Torres in 29 REV. JUR. U.I. 413 (1995), *supra* note 17.

237 31 L.P.R.A. sec. 282 and 283.

No. 51 of May 21, 1976, hence Law 51, was "the juridical institution of coadministration of the community property".[238]

1. The Administration of the Community Property[239]

To protect the woman and her patrimony from the abuse or negligence of the husband who was the only legitimate manager and administrator partner, without diminishing the marital powers bestowed on him by his patriarchal position, the legal doctrine recognized the community property regime's own, distinct and separate-from-its members, juridical personality. However, this differentiation of three distinct juridical personalities constituted the only legitimate barrier that would allow the husband to control the financial management, conforming to the common expectations of the spouses and family. The presumption of diligence of the marriage management was always present, and it was difficult for women to accumulate and present to the competent authority evidence of negligence or intent to defraud, for the restitution of her proprietary rights when these had been damaged, always at the time of the liquidation of the society.[240]

Law 51 amended the language and text of Articles 91 and 93 of Book I of the Civil Code, to read as follows:

> *Art. 91. Both spouses* shall administer the community property, except when otherwise stipulated, in which case one of the spouses shall grant a mandate to the other to act as the administrator of the community property.
>
> Purchases made by *either of the spouses* out of said property shall be considered valid when they are things or articles for personal or family use in accordance with the social and economic standing of the family. Except that *either of the spouses* may make such purchases in cash or in credit.
>
> The real property of the conjugal community may not be alienated or encumbered, under possibility of nullification, without the *written consent of*

[238] Law 51 revokes Articles 1312 and 1333 of Book IV regarding the powers of the exclusive administration of the society by the husband. Several commentators of the new legislation identify the following basic purposes and objectives of the law: making the wife and husband equal in the administration of the community property, protection of the conjugal patrimony, and to a lesser degree, the protection of the third parties who contract with the society. Isabel Picó Vidal, Sentido y alcance de la reforma de la aministración de los bienes gananciales. 18 REV. JUR. U.I. 241, 244 (1984).

[240] Fraticelli Torres, *supra* note 17.

both spouses. Nothing above shall be construed as to limit the liberty of the future spouses to execute articles of marriage.

Art. 93. Except as provided in Article 91 of this Code, *either of the spouses* may legally represent the conjugal community. *Any unilateral act of administration by one of the spouses* shall bind the community property and shall be presumed valid to all legal effects.[241]

Law 51 also amended Articles 1308 and 1313 of Title III of Book IV of the Civil Code, which currently provide:

Art. 1308 The following shall be charged to the society of community property:

(1) All the debts and obligations contracted during the marriage by any of the spouses.

(2) The arrears or credits drawn during the marriage, of the obligations to which they are obliged of the private and community property *of the* spouses.

(3) The repairs, of minor or simple conservation, made during the marriage on the private property of *any of the spouses*. Major repairs shall not be charged to the society of community property.

(4) The major or minor repairs of community property.

(5) The support of the family and the education of the children from the marriage and of *any of the spouses* from previous marriages.

(6) The personal loans incurred by *any of the spouses*.

Art. 1313. Notwithstanding Article 91 of this Code, none of the two spouses shall donate, charge or oblige by onerous title, the personal or real property of the society of community property, without the written consent of the other spouse, except those things destined for the use of the family or personal in accordance with the social or economic position of both spouses.

Any act of disposition or administration made regarding such property by any of the spouses contrary to this section, and the other provisions of this title, shall not affect the other spouse or his or her heirs.

The spouse who dedicates him or herself to business, industry or a profession shall acquire or dispose of the personal property dedicated to those ends, for just cause, without the consent of the other spouse. Notwithstanding, he or she shall be responsible for the damage that these acts cause the com-

[241] 31 L.P.R.A. secs. 284 and 286, respectively. (Emphasis added).

> munity property. This action shall be exercised exclusively at the time of the dissolution of the community property.[242]

For the woman President of the Juridical Commission of the House of Representatives, the legislative body where the new legislation originated, Law 51 "establishes within our legal juridical order a new regime that regulates the society of community property, permitting, as a general principle, the joint administration by both spouses of all of the property of that society and, consequently, making the woman equal to the man in the socio-economic relations within the marriage".[243] "The legislation ... constitutes a healthy advance ... although ... the reform [could] have had a broader scope",[244] some say; for others, it was far-fetched and a greater source of problems than solutions.[245]

Clearly, the contribution with the greatest impact of Law 51 was recognition of equal access of the spouses to the common patrimony. By virtue of the amendments to the current legislation, both spouses can, jointly or separately, administer, dispose and oblige the common or community property, a power previously recognized only for the male. As administrators of the society, with equal prerogatives except when both agree that only one shall administer, an exception and temporary decision, the woman and man have equal rights and responsibilities as parts of the legal society of community property regarding their personal needs and the administration and disposal of the property both have accumulated.

Joint management protects the patrimony from dilapidation or bad administration that could be prompted by only one acting individually. The law also provides mechanisms to protect the juridical traffic and third parties who contract with the conjugal society, especially when the spouses act separately: dual consent; the regulation of the use and disposal of the property in the

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[242] 31 L.P.R.A. secs. 3661 and 3672, respectively. (Emphasis added).

[243] Cruz de Nigaglioni & Hosta de Guzmán, *supra* note 20, at pp. 701-702.

[244] Menéndez, *supra* note 20, at p. 218.

[245] Vazquez Bote, *supra* note 20; Rafael Torres Torres, *La coadministración de la sociedad legal de gananciales en el Derecho Puertorriqueño*, 64 REV. D.P. 413, 420 (1976).

practice of the profession, industry or commerce by one or both of the spouses; and the limitation of the purpose or destiny of transactions that any one of them carry out regarding the common property. These are mechanisms that harmonize the interests of the domestic enterprise, and of the third parties who contract with it.

Extensive jurisprudence recognizes this new state of law, but the hues exhibited by many of the opinions present many questions. The case of *Kantara v. Castro*, previously cited, is one of them. The cases of *Trabal Morales v. Ruiz Rodríguez*[246] and *Pérez Mercado v. Martínez*,[247] resolve that contracts where originally only one spouse consented to the transaction when both should have jointly are merely nullible, may reinstitute in some cases the defenseless position that previously placed women under the authority and control of her husband in economic affairs.

In general terms, the 1976 reform retains the liberty to select the economic regime before the constitution of the marital bond, but maintains the society of community property as a legal or substitute regime. The immutability of the regime after the celebration of the marriage and the absolute prohibition of contracting between the spouses under the regime of the legal society of community property or of one of the spouses with the society, remain in force.[248]

The equality of both spouses in the exercise of the powers and responsibilities required by the economic management of the marriage celebrated under the society of community property, is certainly an advance in our legislation. Within the known juridical framework, the changes promote new alternatives to the couple's relationship, promote the implementation of equitable treatment for women and men acting together and projects a fairer image of our fundamental juridical institutions.[249] The judges, however, should be alert to the social reality that still exists in our country, to

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[246] 90 J.T.S. 15, at p. 7405.
[247] 92 J.T.S. 32, at p. 9330.
[248] *Int'l Charter Mortgage v Registrador*, 110 D.P.R. 862 (1981); *Umpierre v. Torres Díaz*, 114 D.P.R. 449 (1983).
[249] Fraticelli Torres, *supra* note 17

respond to the letter and spirit of the law, primarily through affirmative actions, thereby, opening the door to equality.

Let us look at other questions and circumstances that affect the purpose and application of the 1976 Reform and its interpretation by the Supreme Court.

2. *Regarding Individual Action*

Several questions still remain latent among trial lawyers regarding some aspects of the law. Article 91 appears to proclaim co-administration or joint administration of both spouses, if indeed that was what was desired, but leaves an escape valve that allows the stronger spouse, usually the man, to demand a mandate or authorization from the other to exclusively administer the property of the society, which existed before the "reform" [250]

The problem of statutory interpretation is complicated by the absence of criteria to determine the way and moment in which the mandate could or shall be given. A simple agreement of the wife could convert it into a valid tacit mandate that could validate the individual act of the husband,[251] especially since it refers to the disposal of personal property.

It should be noted, as Vázquez Bote points out, that said clause or exception, as written, was contrary to the reform because it promoted the act that permitted retaining the *status quo* of many marriages where the husband continued to administer and dispose of the property of the

[250] Cruz de Nigaglioni and Hosta de Guzmán point out that "by virtue of the new law, all the provisions of the mandate apply whenever a spouse signs a mandate to the other, and therefore Law 51 is no longer applicable One must examine the signed mandate to identify the powers granted for those purposes." Further on they say: "we are inclined to believe that by following the wording of these articles of law, the mandate for administration must be express, by public or private instrument, since for acts of disposal of personal or real property, the actual Law 51, *supra*, requires written consent " They point out in a footnote that the alternative of the mandate was an amendment introduced by the Senate. See *supra* note 20, at p. 705 See, also, Vázquez Bote, *supra* note 20, at p 56 et all.; Picó Vidal, Sentido ..., *supra* note 238, at p. 246; Torres Torres, *supra* note 245, at p 429 *et al.*

[251] Arts 91 and 1313 of the CIV. CODE, according to their previous drafting, required the "express" consent of the wife The jurisprudence held that said consent did not signify written, but clear, indubitable, which could derive from the conduct or acts of the woman indicating her ratificatin of the husband's action. To understand the implications of the case of Madera v. Metropolitan Const., 95 D P.R. 637 (1967, see José A. Fusté Pérez & Roberto Boneta Carrión, doctrina de la ratificación tácita y los artículos 91 y 1313 del Código Civil, 37 REV. JUR. U P.R. 807 (1968)

marriage.[252] The revocable character of the mandate would not be, therefore, a reason to uphold that the woman or the husband were protected from the unilateral acts of the other. The revocation could not undo a consummated act of administration or disposal that was unfavorable to the other spouse.[253]

Because of the unclear drafting of the law concerning the requisites of the mandate required in Article 91, and in harmony with the spirit of the reform, the Supreme Court has said that acts of administration must have an express mandate that oblige the patrimony of the society and an express and written mandate for the disposal of real property situated within the jurisdiction of Puerto Rico.[254]

In the opinion of *W.R.C. Properties, Inc. v. Santana*[255] our Supreme Court explains that "the capacity of exclusive administration by one of the spouses can only be conferred by virtue of an express mandate by one spouse to the other". In this case, one spouse issued a bond in favor of the plaintiff to solidarily guarantee the obligations contracted by a third, but the wife did not sign the contract to assume the obligation. In the absence of an express mandate to exclusively administer and represent in the person of the defendant spouse, the written consent of the other was necessary to validate the transaction and oblige the society

In two later cases, *Zarelli v. Registrator*[256] and *Gorbea Valles v. Registrator*,[257] the Court established legal doctrine concerning the mandate required by Article 91 that, in cases where obligations arise from Article 1313, the mandate must be express and written because Article 1604 of

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[252] Vázquez Bote, *supra* note 20, at pp. 38 38 et al, see p. 42 specifically

[253] In the case of *Quintana Tirado v Longoria*, 112 D.P.R. 276 (1982), the Supreme Court admitted the validity of a contract because of the existence of an express mandate of the wife, although a credit is given to the society in the internal liquidation. Although the contract is subscribed under the previous legislation, under which the mandate was not necessary, the interpretation by the Court should be applicable to the new situation.

[254] See Arts. 1600-1617 of the CIV. CODE, 31 L.P.R.A. secs. 4421-4449, that govern the institution of mandate

[255] 116 D.P.R. 127, 136 (1985).

[256] 124 D.P.R. 543 (1989).

[257] 92 J.T.S. 112, at p. 9884.

the Civil Code of Puerto Rico requires an express mandate to carry out any act of rigorous dominion. In *Gorbea*, the Court stresses that the requisite for the mandate to be express and written shall have future character, effective from June 30, 1989, date of the *Zarelli* opinion, because, although the conclusion was correct in law, in terms of the interpretation of the precepts of the Code, a body of integrated rules, its retroactive imposition "would imply an injustice, provoke multiple rejections in the Property Registry and could signify the nullity of several business transactions".[258] It should proceed from the document whether the real property is situated in Puerto Rico, although its registry description is not required.

By adding this requisite to that of written consent for the alienation of real property, which was imposed by the legislation of 1976, the purpose of the law is met because it assures or guarantees that the wife know of the transaction and has agreed to it. In this case, the mandate was not sufficient to sell a community real property because it was "prepared" in general terms, thereby only delegating power to administer and not to dispose, alienate or place a lien on the property of the society. However, the impact of *Trabal Morales v. Ruiz Rodríguez* and *Pérez Mercado v. Martínez* concerning the woman's position before her husband when disposing of property, should be kept in mind.

3. *Regarding Charges to the Regime*

Article 1308 says that: (1) All the debts and obligations contracted by any of the spouses... and (6) The personal loans incurred by any of the spouses [s]hall be charged to the regime of community property." Although section (6) transcribed should be understood as comprised within section (1), the Legislative Assembly wanted to "clarify",[259] especially for banking institu-

[258] *Id.* at p. 9887.

[259] Vázquez Bote, *supra* note 20, at pp. 50 et al. The following dialogue occurred in the Legislative Assembly:
Mr. Jarabo: The question, colleague, once amended section 1 in which are all debts and obligations contracted during the marriage by the husband or the wife, [sic] once that is amended, (?), what is the purpose of section 6 that provides (?)...

tions, that the husband as well as the wife can take out a loan, to avoid, or better, eliminate, existing discrimination against the married woman in the financial field, where she could only obtain credit with her husband's express consent.[260] That explains the wording of the second sentence of the second paragraph of Article 91 which says that "*any of the spouses may make such purchases in cash or on credit*".

Article 1308 does not have any clauses of exception and strictly limits the situations in which the society of community property will be obliged by individual or joint actions of both its members. Article 93 and Article 1308 could lead us to conclude that the Legislative Assembly wanted to establish the equal authority of the man and woman to represent, administer, and oblige separately and not jointly, the property of the community society, excepting the acquisition and sale of real property. Thus, the woman would be made equal to the husband and third parties protected by the presumptions of validity that Articles 91, 93 and 1308 recognize. The person who represents acts in the name of and for the person represented. When one spouse represents the society in acts or legal acts, whether administrative or of alienation, it is the society who is acting. The Commission understands that this is the true meaning of the reform and the language used legitimizes the realm of possibilities that the law confers on both spouses to act to the benefit of the society.

4. Regarding the Active Assets of the Community Property of the Marriage

The Civil Code of Puerto Rico begins this identification or characterization of the property that is contributed to the marriage or acquired during its existence in Article 1295, by stipulating that "[t]he husband and the wife, upon the dissolution of the marriage and by means of the community property, shall make theirs by half the profits or benefits obtained indistinctly by any of the

Mrs. Cruz de Nigaglioni: It's purpose is for clarifying. So that it is clear that the woman can take out a loan, that is, that it remain clear the capacity of the woman to adquire credit.

[260] See Isabel Picó Vidal, *La equiparación de la mujer en el crédito financiero: Análisis de Banco de Ahorro del Oeste v. Santos Cintrón*, 17 REV. JUR. U.I. 313, 316 and 318 (1983).

spouses during the marriage". In Articles 1301 to 1306 the property reputed by express legal provision to be community property is identified. To evaluate the assets of the conjugal society and to determine which conform to the community property mass which is subject to the division by half between the spouses at the moment of the dissolution, the Civil Code provides the criteria that permits characterizing the accumulated property in private, belonging to each spouse, or community, belonging to both.

For Fraticelli Torres "the assets that the Civil Code reputes as community property respond to an agrarian society, where salaries, land, cattle, uses, wages, and government or military pensions appeared to support the marital economy sufficiently." Today, however, "modern Puerto Rican society imposes the recognition of other tangible assets, that can signify vital economic elements for a marriage and, in the case of its dissolution, constitute for only one of the spouses a contribution of incalculable value." If the law does not provide adequate protection, the dissolution can represent "for the other [spouse] the considerable loss of economic resources and the denial of opportunities, almost always accompanied by many frustrations in the human social, emotional and economic expectations that the marriage represents".[261] The laws of Puerto Rico lack adequate criteria for the characterization and distribution of the intangible community wealth.[262]

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[261] Fraticelli Torres, *supra* note 17. In Spain the ecclectic theory, that delineates the moral from the patrimonial or wealth, is followed. On the subject of the tangible assets see JOSE CASTAN TOBEÑAS, DERECHO CIVIL ESPAÑOL, COMUN Y FORAL, To. I, Vol. 2, 401-403 (14th ed., Madrid, Ed. Reus, 1987); DIEGO ESPIN CANOVAS, MANUAL DE DERECHO CIVIL ESPA„OL, Vol. 2, 301-316 (5th ed., Madrid, Ed. Rev. Der. Privado, 1975); JOSE PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, To. III, Vol. 2, 221-235 (3rd. ed., Madrid, Ed. Rev. Der. Privado, 1979); COMENTARIOS AL CODIGO CIVIL Y COMPILACIONES FORALES, To. 5, Vol. 2, Comentarios a los artículos 428 y 429 Código Civil Español (Manuel Albaladejo ed., Madrid, Ed. Rev Der Privado, 1985).

[262] Regarding the regulation of this matter in other jurisdictions, see EDUARDO VAZ FERREIRA, LA SOCIEDAD CONYUGAL (Buenos Aires). See pp. 380 (rights of the person), 381 (literary and artistic property), 390 (industrial property), 391 (civil clientele), 399 (life insurance), 406 (pensions), 408 (diplomas and titles) EDUARDO A ZANNONI, LIQUIDACION Y CLASIFICACION DE BIENES DE LA SOCIEDAD CONYUGAL, 97 et al. (Buenos Aires, Ed Astrea, 1976); VIDAL TAQUINI, DERECHO DE FAMILIA: REGIMEN DE BIENES EN EL MATRIMONIO 338 et al. (2nd ed., Buenos Aires, Ed. Astrea, 1978); AQUILES H. GUAGLIONONE, DISOLUCION Y LIQUIDACION DE LA SOCIEDAD CONYUGAL, 203 et al., especially 221-227 (Buenos Aires, EDIAR, 1965); Claro C Ducci, *Las cosas incorporales en nuestro Derecho* (Chile), 83 REV D. & JURISPRUDENCIA 29-35 (1986).

In *Carrero v. Santiago*,[263] the Supreme Court of Puerto Rico was receptive to "the concern that certain economic schemes may represent a subterfuge for defrauding one spouse of that which belongs to her or him". The Court has repeatedly held that the "woman, who has been alienated for so many centuries, must be protected against a possible manipulation of the norms...".[264]

Many intangible properties can remain outside the protection and equitable distribution between the man and woman who temporarily shared their lives and now wish to liquidate the property, by much or by little, that they accumulated together. The list is extensive, but the following stand out, according to Fraticelli Torres: "the profession or commercial practice, [...] the ownership shared by both spouses over works, inventions, patents, and other intellectual creations made by one of them during the marriage; regarding the contributions and sacrifices of one spouse to permit the other to finish a professional career, the attainment of a license, the development of business and commercial and vocational practices; regarding the additional worth, the clientele and the potential of development that these activities generate; regarding the investments in insurance plans of life, health and professional disability that benefit only one spouse, although the periodic contributions to get these benefits drain the finances of both."[265]

> The personal nature of professional licenses, the practice of a career, of moral rights of authorship and enjoyment of the intellectual creation are unquestionable, but the act of support, the solitary assumption of responsibilities that ordinarily should have been shared, the deprivations of development and the depreciation of the value of the individual capacities to enter the workplace, are factors that should be taken into consideration when determin- ing to whom, how, and to what extent the economic value of those personal rights benefit. Whenever the marriage enterprise becomes a fertile ground for the flourishing of the potential of only one spouse and the dissolution represents the deprivation of sources of support and loss of prestige and social status for the other, an inequality exists that the law should rectify. [I]n the majority of cases the weakest party, the woman, is the person who receives the smallest

[263] 93 J.T.S. 103, at p. 10868.

[264] See *Toppel v. Toppel*, 114 D.P.R. 775 (1983).

[265] Fraticelli Torres, *supra* note 17.

share. It is necessary to legislate in these matters, because the absence of law sometimes promotes discrimination.[266]

On the basis of the above, the Commission concludes that:

1. The Civil Code and the special legislation that complements it still contain and recognize rights, actions, powers and obligations with discriminatory effects on the basis of gender.

2. Juridical language has incorporated the values of the patriarchal system and as a result sexist references are to be found in the wording of juridical laws within Family Law that perpetuate discriminatory treatment against persons on the basis of gender.

3. Although the situation of women has much improved since the Reform of 1976, there are still concepts, figures, rights and actions that should be changed to guarantee equitable treatment in the administration and enjoyment of the community property that men and women accumulate jointly during the marriage.

4. Gender discrimination in the courts and other legal institutions that affect the rights of the person and the family occur in greater degree against women. Affirmative action for some and sensitive and informed professional practice for others may start the complete eradication of unequal treatment, discrimination, and prejudice that keeps one part of humanity in a disadvantaged position vis à vis the other.

Analysis of Findings on Family Law

In the area of Family Law, interesting and important findings were identified, through several instruments we explain extensively in the Chapter on Methodology, that confirm many of the appreciations and concerns that the Commission voiced in the above section. Some of the findings have been discussed in more than one part of the Report, but this has been necessary to analyze them from different perspectives or approaches, according to the special subject or matter developed in each chapter.

1. *Confirming a similar finding discussed in the Chapter on Judicial Administration, a tendency exists to place women judges in the courtrooms of Family Relations, to appoint women as Solicitors for Domestic Relations and Child Support Examiners and to associate women lawyers with the practice of family affairs. This tendency is in harmony with the habit of perceiving the practice of Family Law as a "feminine"*

[266] *Id.* (Footnote omitted)

option and criminal and civil patrimony litigation as "masculine" options, which, occasionally create situations of gender discrimination.[267]

Since its origins, the legal profession was considered a profession of men because the qualities assigned to the jurist or legal professional were traditionally associated with the masculine figure: public exposure, aggressiveness, credibility, arts of persuasion and oratory, strength before danger and contact with crime, among others.[268]

Indeed, historically in all known societies male lawyers have always outnumbered women who enter this profession.

Over the last decades, more women in Puerto Rico have been integrated into the study of law and the active practice of the profession, although the total number of women admitted to the practice of the profession is still less than males. This observation of a female lawyer who participated in the group interviews,[269] is easy to confirm and is supported by different studies regarding the education and practice of the legal profession.[270] The increase in the number of women who enter law schools each year can be confirmed through the admissions reports of the faculties of law that operate in Puerto Rico and the United States.[271] Recent statistics are provided in the Chapter

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[267] This finding was developed from another perpective in the chapter on Judicial Administration. We consider it apt to present it on this occasion from the perpective of the practice of this area of the law.

[268] L. Teitelbaum et al., *Gender, Legal Education and Legal Careers*, 41 J. LEGAL EDUC. 443 (1991).

[269] Focus Group Interview, Female trial lawyers: in women's affairs, at p. 9

[270] The statistics of the Puerto Rico Bar that are presented in Block V of the chapter on Judicial Administration reflect that year after year the number of women who enter the profession increases, although there is still not an equitable distribution by sex. There are more male lawyers (70%) than women (30%).

[271] See Teitelbaum et al., supra note 268, for an analysis on this phenomenom. In 1980 the Commission for the Study of the Bar and Legal Education in Puerto Rico presented in its report the statistics regarding the distribution by sex in the three schools of law of the country at that time: U.P.R. 59.2% males and 40.8% female; U.C.P.R., 79.3% males and 20.7% females; U.I.P.R., 69.18% males and 30.83% females. Actually those numbers have varied considerably, although there are no specific studies in this regard.

In the year 1994-95 the distribution of males and females between the students who entered that year to the different schools were the following: U.P.R., 42% male and 58% female; U.C.P.R., 54% male and 46% females; U.I.P.R., 49% males and 51% females. At the time of writing this report, the statistics for the year 1995-96 were not available. It is evident that the number of women who decide to continue the legal career is increasing.

The statistics of the American Bar Association reflect that in the schools acredited by this organization studied 72,670 males and 55,122 women for 1993 and 73,180 males and 55,808 females for 1994. (Taken from the take-off that the A.B.A. provides the schools).

on Judicial Administration on the number of male and female lawyers admitted to the legal profession.

The quantitative impact, however, is not as significant for this finding. What is really important is the finding made by a female trial lawyer concerning the special tendencies that became manifest at the start of increased incorporation of women into legal careers.

> The adversarial system that the legal practice promotes is made by man. This puts women in a doubly disadvantageous situation. On one hand, in this profession women must assume a behavior that is identified as masculine by society; on the other, the "masculinization" is criticized.
>
> That has to inhibit and affect the practice of law by women, especially in trial work. Even those who are willing to play the game are wrong, according to society.
>
> This situation must be considered and covered in the law schools to change the manner in which the male conceives the role of the women, at least in the courts.[272]

As the number of women lawyers increases, so do their professional options, but the truth is that, *as lawyers, they are expected to exhibit* the traditional roles expected of them *as women*. In effect, women lawyers were in the majority in some areas of Law because they adjusted to a feminine perspective society accepted as adequate for their gender. By assuming, " a specific type of case en masse", for example, family affairs, these areas began to be perceived as a field of litigation for women.[273] This phenomenon not only occurred in the area of litigation, one male judge said, but also in the area of the judiciary:

> It is very rare to find a female judge hearing and presiding in a Criminal courtroom. They are seen more often in Civil courtrooms—if there are no male lawyers—in Family Relations' courtrooms and in Juvenile courtrooms. They were placed in those areas of work with the purpose of *protecting them* in a courtroom with fewer challenges.[274]

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[272] Hearings, June 3 and 4, 1994, at pp. 20 and 21

[273] Focus Group Interview, Female trial lawyers,: in women's affairs, at p 71

[274] Focus Group Interview, Judges, at p. 18.

This association of women lawyers with particular work in the field of law has been perpetuated through time because, according to a female judge, "the system itself permits this to happen."[275] The generalized perception is that, through the years, female judges have been assigned in greater numbers to the Family Relations courtrooms in comparison with the Civil (contentious) and Criminal areas. One female judge said that in Superior Court almost all women judges are assigned to that area; and that "it is rare to find ourselves in a criminal courtroom."[276] Whenever this happens, explained another participating female judge of the focus group, male lawyers expect the female judge to sit in her court, not know the area of Criminal Law, not know the laws, not be prepared and that she be so weak that they can present their allegations and later boast of how they manipulated her.

In her own words, she said:

> What they expect is a female judge who sits there, who probably is not too studious, doesn't know much of criminal law, because they understand that the area of criminal law is exclusive to men and that has always been so.[277]

In the opinion of the deponent, this behavior reflects how male lawyers have internalized Criminal Law as a field for men exclusively[278] while Family Law belongs to women, whether it is because of their sensitivity or because they can better identify with the women, who are the persons who mainly go before the Family Relations courtrooms. In her words, "as if only women are prepared to handle this kind of case and the legal profession in general understands that the penal area is for men".[279]

One female lawyer in private practice in the area of family relations explained that the assignment of a judge to a Family Relations courtroom is perceived as a lower category, that is, it is

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[275] Focus Group Interview, Female judges, at p. 68.
[276] *Id.* at p. 122.
[277] *Id.* at pp. 55-56.
[278] *Id.*
[279] *Id.*

not an assignment that helps distinguish a judge, since, if he or she were any good, they would be assigned to a Criminal Courtroom.[280] To aggravate the gender discrimination in this area, several deponents pointed to the fact that it is openly commented that Family Relations courtrooms are the easiest and least important.[281] During the hearings held on June 3 and 4, 1994, one lawyer in private practice said that "the area of family relations as such is discriminated against within the system of justice".[282] She added that:

> In the family courtrooms, which are seen as courtrooms of a lesser category, there are many more female judges assigned than male judges. There is a perception that those courtrooms are easier and less important and because of that "can be left to the girls".[283]

Any other area of the law within the system is considered more important than Family Law.[284] That which is less important, then, is identified with the feminine gender.

A trial lawyer in the area of family said that the rejection of those courtrooms becomes so extreme that judges believe that they are sent there as "punishment",[285] because the assignment does not represent prestige. On the other hand, several psychologists commented that they have heard several judges say that the judges who are assigned to the Family Relations Courtrooms are the "weakest", incompetent, without skills or knowledge. According to one male psychologist, that same image prevails regarding lawyers dedicated to the area of family law.[286] Also, as part of the repudiation of these courtrooms, these same judges speculate that, if offered the opportunity to choose, most would dislike being assigned to a Family Relations courtroom.

When joking among themselves, judges often use the perceptions that we have described regarding these courtrooms. One of the most telling examples is the following: Whenever a judge of

[280] Hearings, June 3 and 4, 1994, at p. 40.
[281] focus Group Interview, Female litigation lawyers: in women's affairs, at p. 71.
[282] *Id.* at p. 40
[283] Hearings, June 3 and 4, 1994, at p. 44.
[284] *Id.* at p. 40.
[285] Focus Group Interview, Male family trial lawyers, at p. 1
[286] Focus Group Interview, Socio-penal officials: psychologists and counsellors.

another courtroom complains about the workload, the Family Relations courtroom judge issues an invitation: "Let's change courtrooms". Then, the other judge answers: "No, no, no one wants that". Another way of joking about the courtroom is to call it "the courtroom of the orphans" or "Siberia" and to even remark that "it is not a controversy adjudication courtroom."[287]

On the other hand, according to another family trial lawyer, the judges of that area have no specialized training and no requirements exist to select them.[288] This promotes selection and assignment of persons on the basis of criteria that are extraneous to the duties to be performed. Another deponent declared that it is time to start demanding criteria of excellence instead of political partisanship in the selection and assignment of judges. He suggested that judges be selected on the basis of the quality ,[289] merit, recognition and their effort, through a confirmation process of high principles of justice.[290] Even more so—as one judge interviewed pointed out—it must be remembered that those officials are going to form part of the judicial system and all of the work of that system is equally important in terms of its social function.[291]

What correlation exists between that negative perception of family affairs, the association of women with that branch of law and gender discrimination?

The Commission believes that the devaluation and the negative perception of feminine attributes that have been assigned to those issues, legitimize and perpetuate prejudice and discrimination against female lawyers, judges and other officials of the system.

The Commission believes that the germ of discrimination is manifested whenever the social correlation is made between the commonplace, the facile, that which does not intimidate, the absence of challenge and the feminine. Discrimination becomes established in the judicial system

[287] Focus Group Interview, Judges, at pp. 90-91.
[288] Focus Group Interview, Family trial lawyers, at p. 1.
[289] Focus Group Interview, Male trial lawyers and prosecutors, at p. 92.
[290] Focus Group Interview, Specialists in women's affairs, at p. 87.
[291] Focus Group Interview, Judges, at pp. 90-91.

when the gender of the official determines, then, the selection and assignment of the personnel that will work in family matters, and in any other capacity.

The Commission was able to perceive through all the testimony received, that the prejudices and general negative image generated concerning Family Relations courtrooms have brought, as a result, disenchantment with the profession on the part of female lawyers[292] and, even worse, a devaluation of the work performed by women whenever they exercise their position as judge, prosecutor, or lawyer within the judicial system.[293]

Although in assigning courtrooms and resources the system responds to the same preconceptions of what men should or can do and to what women should or can do, it perpetuates unfair and unequal treatment of human beings with the same skills, talents and disposition to serve, because it denies to some the same opportunities of personal and professional development that it gives to others.

2. *Many women lack adequate access to the courts of the country because they cannot pay for the costs of litigation or cannot overcome the specific difficulties that they encounter in the judicial processes in the area of family law.*

During its investigation, the Commission received ample information on different factors that hinder access of women to the courts of the country and the specific difficulties that they encounter within the judicial system because of their gender or because of circumstances ordinarily associated with their gender.

A main factor identified by various deponents is that a great number of women have little or no income to cover the costs of litigation, especially with regard to family-related conflicts, such as divorce, paternity, support, custody or paternal visitation with their children. Different reasons give rise to this situation, among them, the high level of unemployment and the low salaries or sources of income, which are not enough to cover their basic needs, those of their children and,

[292] Focus Group Interview, Female trial lawyers, in women's affairs, at p. 14.
[293] *Id.* at p. 71.

also, to pay for litigation. Although there are various organizations that offer legal services to indigent persons, the truth is that litigating parties in civil matters do not always have them available, usually, because of lack of orientation or because of the absence of human resources within those organizations that can offer them.

Other times, the procedural stage of litigation does not require the indispensable assistance of a lawyer, leaving the woman at the mercy of the resources of the actual system, such as the Support Division, Accounts Division, the Bailiff's Office or Reciprocal Support.

It is important to remember that, because a constitutional right to claim free legal representation in civil cases does not exist, the appearance of a party in a civil suit without legal representation does not necessarily impede the continuation of the term periods and interlocutory processes. In a large number of actions, women assume their own defense or representation before the different offices of the system.

Within this context, various examples of situations in which women were evidently at a disadvantage were presented. A female social worker gave the example of filiation cases, in which men appear before the court accompanied and assisted by their lawyers, while the women appear alone because the prosecutors don't support or meet with them. She also pointed out that in support cases, bailiffs do not serve the orders for the claim of support, and it is the women who have to find someone who will.[294]

Members of the Commission know for a fact that numerous women appear before the court in their own defense and that they diligently represent their interests and that of their children. Others do not have the necessary skills and resources to adequately defend their interests and that of their children. It is also public knowledge that many judges permit women to assume their own

[294] Hearings, June 24 and July 1, 1994, at p 42.

representation in order to expedite matters, especially if minors are affected, in which case there will always be a Family Relations Solicitor available in court to watch out for their interests.

This fact was analyzed from another perspective by a female trial lawyer who explained that in family relations' cases the court occasionally requires the presence of a lawyer to represent the woman who tries to file petitions in her own defense or who requests a hearing. The hearing is suspended to give her time to obtain legal representation. This practice, explained the deponent, provokes a delay in the process, which constitutes one of the most frequent complaints of Legal Services clients.[295]

Another female trial lawyer considered the excessive delay in proceedings as an additional factor that makes women's access to the courts troublesome. She mentioned custody cases as an example of an lengthy judicial proceeding. She indicated that these cases, besides being prolonged, are very emotional and the woman suffers a lot throughout the process. As a consequence, she is deprived of legal representation, because she cannot incur in the high costs of a lawyer, or because the lawyer resigns from the case because he or she cannot handle the anxiety the client exhibits during the process.[296]

Another factor that imposes additional barriers on women in custody cases is the excessive cost of expert testimony, which is difficult for many women to assume. This example was given by a female lawyer in private practice in the area of Family Relations:

> In custody cases, judges generally follow the recommendations of social workers. In order to impugn those reports, the party must contract experts in human behavior who are expensive. In this sense, an economic discrimination occurs because only that person who can pay for experts can impugn the reports; except those who have managed to make the court use its own experts.[297]

[295] Hearings, June 10 and 11, 1994, at p. 23.
[296] Hearings, June 17 and 18, 1994, at p 35.
[297] Hearings, June 3 and 4, 1994, at p. 44.

Of all the examples mentioned, one that most attracted the Commission's attention is the lack of knowledge of the users of the system, especially women, of the rights, processes and options that the law offers them to resolve their legal problems. A female trial lawyer in the area of Family Relations, in one of the Focus Group Interviews, presented the problem in the following way:

> The lawyer and everyone, generally, in this judicial system, are like doctors, they prescribe something: Take it, you will be cured. They tell you everything will turn out fine but they don't explain what it's about, what they are going to say, how the process works, what the steps are so that she can be more comfortable and understand what is happening.[298]

In support of this lawyer's position, one of the participating female judges related one of her experiences:

> There once was a judge who practiced divorce by mutual consent en masse. The divorce was that way that morning. I was there with my client and went out to the hallway. Among the persons who left the courtroom was a woman who, after having gone through the whole process and being divorced, was asking, But what happened, what happened in there? Am I divorced, or not? I didn't understand what happened. What happens now? And I tell her: Madam, where is your lawyer? I don't know, he left. That woman, had been in there, had been divorced and she didn't know what had happened, or anything, anything. I was crushed: Yes Madam, a divorce process occurred in there and you were there. You said yes and everyone said yes and I don't know how much.....But, often we, the lawyers, fail to give advice.[299]

It was pointed out that, occasionally some judges, who are either more sensitive or are ashamed of the deficient job their professional colleagues are doing , call the matter to their attention. But the truth is that most of the time, mediocrity [of the lawyers] passes unnoticed.[300]

A male lawyer who represents indigent persons, said:

> The Support Unit is one of the most sensitive units of the court and where discrimination can most occur. The users who come to this unit are unemployed women who hardly have money or resources to move from their homes to the court.

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[298] Focus Group Interview, Female trial lawyers: in women's affairs, at p 43.
[299] *Id.*
[300] *Id.* at p. 41.

> The employees' treatment of them sometimes borders on abuse. They throw them the form for a petition for their own defense: "Here, fill this out". The woman doesn't know what she is to fill out, nor what to write; sometimes she even doesn't know how to write. There is no one to advise her. You don't have to be a lawyer for that, an employee with the proper attitude and adequate training can do it.
>
> Often women take the petition and ask neighbors or go to Pro Bono for orientation. They no longer go to Legal Services because the appointments there take 3 or 4 months. Sometimes the judge doesn't understand what the woman wrote there, and only adds "Informed". There is no follow-up to her request.[301]

Other negative elements were added to the factors already described: lawyers with little preparation in support and custody cases, negligence in clarifying the details of the cases during the hearings, delays in the dates of hearings, innumerable opportunities given support provider debtors and inefficiency in the support payment procedure.[302]

All these difficulties and negative aspects makes the woman's "summary," or impression, of the entire judicial system terrible and horrid.[303]

The Commission believes that women are the principal users of the system in the area of family relations. Women usually initiate and follow-up on the affairs addressed by the Family Relations courtrooms. The conditions, resources and processes provided by the system to adequately perform their judicial function must account her specific needs into account, since indifference to her specific circumstances may be unfair and discriminatory treatment.

3. *Gender discrimination is manifested in the area of family relations, in an adverse way toward women with respect to the credibility she merits as a litigant and witness in the courts.*[304]

The Commission, through its investigation, received information that corroborates the finding that within the context of the Family Relations courtrooms there is a tendency to underes-

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[301] Hearings, May 21 and 22, 1994, at p. 48.

[302] Hearings, June 10 and 11, 1994, at p. 25.

[303] Focus Group Interview, Female trial lawyers: in women's affairs, at p. 41.

[304] We refer to reader to the chapter on Interaction in the Courts where this finding is discussed in greater depth.

timate women's credibility, be they parties or witnesses. According to several deponents during the hearings "the courts, through its setting, proceedings, rules and [the attitudes of several of] its employees [propitiate] the double victimization" of the users, usually women, who appear in the Family Relations courtrooms to resolve affairs of domestic violence, divorce, support pensions or custody.[305] Regarding the obstacles that women come up against in judicial processes, several deponents indicated the following:

> [Women] suffer the impact of a system that appears to have conspired not to see what they see, to question their credibility, to discourage them in efforts to seek justice in this system, to silence them, to put in their mouths what the system wishes to hear, to not allow them to express things in their own terms, to confuse them in their intentions and above all to not protect them in the exercise of their rights.[306]

As we indicated in the Chapter on Interaction in the Courts, questioning the credibility of women derives, in part, from the socially negative perception that feminine communication and expression produce.[307] As a result, the veracity of her testimony is placed in doubt, that is, whether her declarations are credible is based on her gender, before judgment is passed on the contents of her declarations.[308] A clear example of this situation, pointed out by various deponents, occurs in custody cases when "it is insinuated that the woman's claim is based on revenge and spite."[309]

Within that same context, when a man expresses himself in a court, his testimony is given more validity, that is, it is given greater weight and credibility compared to the expressions of a woman.[310] A female lawyer commented that there are even occasions when the credibility that a man enjoys is "absolute", irrespective of the fact that he is lying "shamefully".[311] This prejudice

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[305] Representatives of the organization *Coordinadora de Paz para la Mujer*. Hearings, June 10 and 11, 1994, at p. 17.

[306] *Id.*

[307] See the discussion of this subject in the chapter on Interaction in the Courts.

[308] See testimonies in the Focus Group Interview, Female trial lawyers: in women's affairs, at pp. 85-86; Hearings, June 10 and 11, 1994, at p. 8.

[309] Hearings, June 10 and 11, 1994, at p. 28.

[310] Focus Group Interview, Sociopenal officers: female psychologists and counsellors, at p. 59.

[311] Focus Group Interview, Female trial lawyers: in women's affairs, at p. 57.

against the credibility of the woman is a factor that encourages or causes discriminatory treatment in the judicial processes on family relations, especially if her appearance is not elegant.[312] As a consequence, she is treated as if she doesn't know what she is saying, or as if what she is saying doesn't merit credibility. On the other hand, if the woman arrives well dressed, comments are heard like this one: "That woman is a manipulator. She came to say that she doesn't have money and I saw that she had a dress made of linen. She is a manipulator."[313]

Another important factor that provokes the underestimation of women's credibility in family relations processes are prejudices regarding her sexuality or the manifestation of it, especially in cases where her capacity to perform certain social roles, such as wife or mother, is being aired. While men are not usually questioned much about their sex lives during e judicial procedures, a woman's reputation is commonly attacked whenever information on her sexual experiences is permitted to be aired in the courts. This behavior is considered a good strategy of the lawyer of the other part to diminish her strengths as a person, mother, spouse, etc. The result of this practice is to prove that the woman is dishonest[314], an adulteress[315] or sexually promiscuous, therefore, her credibility is lost, or diminished.[316]

According to the foregoing, it is evident that whatever is associated with her sexuality and, also, the consumption of alcohol, constitutes an element of shame or detriment for the woman, while for the man it represents a social "status."[317] We shall cover this point more fully when we discuss the impact of sexuality on custody decisions.

As a result of the prejudices that we have referred to, a female lawyer said that "women really lose faith in the system and in addition to that [or as a consequence of it], don't wish to re-

[312] Focus Group Interview, Sociopenal officials: female psychologists and counsellors, at p. 59.
[313] Hearings, June 17 and 18, 1994, at p. 34.
[314] Hearings, May 13 and 14, 1994, at p. 26.
[315] Hearings, June 3 and 4, 2994, at pp. 7 and 28.
[316] Hearings, May 21 and 22, 1994, at p. 16.
[317] Focus Group Interview, Specialists in women's affairs, at p. 44.

peat humiliating and degrading experiences, [because] what they say is not taken seriously."[318] The Commission believes that the direct result of the strategies described by the deponents, should they occur and be permitted by the courts, is that a woman will concentrate her energies on defending herself from prejudice and not in defending her claims or rights as a woman, mother, spouse or support recipient, whichever the case may be. It is up to the judges, and lawyers who participate in the processes to evaluate the relevance, pertinence or need to bring out or describe conduct that only contributes prejudice to the process, as long as this does not constitute grave risk, prejudice or real injury to the outcome of the interested parties. The examination of the evidence and, as a result, the appreciation of the truth of what is said or demonstrated by a witness must be devoid of any prejudice, bias or social, cultural or moral preconceptions on the part of the judge. If judges are conscious of these human limitations, they will be able to judge every person, man or woman who appears before their courtrooms seeking justice with more equilibrium.

The following finding justifies and supports the same appreciation.

4 *In cases of paternal and maternal filial relations (visitation rights) and custody the courts do not have sufficient specialists in human behavior to address the needs for service of the parties, and some of these professionals have not received adequate training to address these kinds of cases from the gender perspective. This especially affects the women and children who appear before the judicial system as interested parties in their processes.*

Custody and paternal or maternal filial relations (visitation rights) cases are complex. The relationship of the children with the fathers and mothers and the effects of these relations on the general welfare and best interests of the children is evaluated there. This responsibility converts Family Relations courtrooms' cases into delicate proceedings, full of emotions, tension, resentments and human reactions of all kinds. Therefore, much specialized knowledge and sensitivity is needed by the personnel working there.

[318] Focus Group Interview, Female trial lawyers: in women's affairs, at p. 46

Many of the persons who participated in the investigation processes of the Commission expressed a serious concern with regard to the professional preparation of the personnel working in these courtrooms and cast some light on the general perception that exists regarding what occurs there. Several persons were concerned about the scarcity of adequately trained personnel to work with issues of support, custody and paternal or maternal-filial relations.

A male lawyer from Legal Services, for example, said:

> The personnel from the support unit is not equipped to handle the misery seen there. There are few personnel and they appear to do their job with disgust. This affects mainly women with few resources. They lose the day in court.[319]

Still, another deponent complimented the work carried out by child support examiners, but added that personnel is scarce. In her words "there aren't enough child support examiners, although those that are there are efficient. The delay affects the women" [320]

Deponents said that the scarcity of personnel ultimately affects the women who go to this unit primarily to claim child support. A male ex-judge of the District Court indicated:

> The employees assigned to work in the support unit [should] have a good attitude to work there. The support unit is one of the most sensitive of the court and where discrimination can occur the most. The users who go to this unit are unemployed women who scarcely have the money or resources to move from their home to the court.[321]

Another concern that came to light during the investigation process was the lack of multidisciplinary personnel to handle different factors that influence family relations problems that reach the courts.

> Our law is of a pleading character—what you do not request, you cannot get. Not having a Family Code that adequately orders the judgments, and/or a Family Court, fails to provide an articulate system that can struggle with different points of view on family problems, of real families, often headed by women. A broader concept of the Family Court could integrate its best re-

[319] Hearings, May 21 and 22, 1994, at p. 9

[320] Hearings, June 24 and July 1, 1994, at p. 46

[321] Hearings, June 3 and 4, 1994, at p 47.

> sources. This would have to be on a par with an interdisciplinary approach when alternatives are sought.[322]

Another representative of the women's movement of the country expressed herself along this same line of thought, by remarking:

> In those cases where the controversy requires determinations of paternal-filial relations or visitation rights and custody, the courts don't have sufficient specialists in human behavior to attend to the need for services of the women and children. The investigations and reports of the social workers and psychologists are limited, and they are overburdened with the narrative summary of biographical data and the hearing dates with the investigated parties and collaterals. To a smaller degree figure the results of an objective investigation and field work by a specialist and the analysis that allows him or her to formulate conclusions.[323]

Similarly, a male trial lawyer recommended the need for multidisciplinary personnel in Family Relations courtrooms:

> A specific Family Code is needed, a Family Court, and several judges with a multidisciplinary staff—like the modern approach- to deal with the family....[324]

Previously mentioned manifestations appear to coincide in two important points that our justice system should consider: the need to duly train staff to work in the Family Relations courtrooms and the need to adopt a multidisciplinary approach that tends toward a comprehensive understanding of the diverse problems and conflicts that impact the family and that our courts must resolve, keeping in mind the best interests of the children.

5. *Gender, or the perception that one has of what constitutes the appropriate behavior of a person according to their gender, is a determining factor to appreciate and adjudicate a litigant's claim with respect to patria potestas or the custody over their children who are minors*

This finding manifests itself mainly in the following points of view:

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[322] Hearings, June 10 and 11, 1994, at p. 26

[323] *Id.* at p. 27. In their written presentation they used the ending letters os/as [in Spanish] to identify men and women. In order to facilitate this reading, we interjected the complete word that denotes gender

[324] Focus Group Interview, Male family trial lawyers, at p. 19

a. *In decisions regarding patria potestas and custody, women who request them are usually granted them on the basis of their gender; and the men who request them are, usually denied them on the basis of their gender.*

b *Demands are imposed on women that are related to their sexuality more rigorously than to men in order to retain custody and the patria potestas over their children, which provokes many judges, male and female, to permit judicial processes to deviate attention from the main purpose—the protection of the minors—and direct it toward the intimate life of the woman and other irrelevant behavior.*

c. *Therefore, one may conclude that in decisions regarding the custody and paternal or maternal-filial relations a double standard or unequal treatment prevails whenever the sexual conduct of the mother is evaluated vis à vis that of the father, although it is not relevant to adjudicate the petition.*

For the discussion of this finding and its points of view, it is necessary to point out from the start the possible contradictions that may arise from the different expressions in which they are manifested. A quick reading of the two preceding paragraphs appear to suggest some contradiction between them, but, if they are carefully examined, that contradiction does not exist. Both are products of a society culturally divided in terms of expectations based on gender whereby a woman ,usually and principally, fills the role associated with the home and the custody of the children. It is said that she is preferred in the awarding of custody, but only to the degree that she does not separate from the stereotypes related to her gender. If, indeed, she is "favored" with the custody under the so-called "equality of conditions" vis à vis the man, it also pressures her to live and behave according to the stereotypical expectations imposed on her gender, under the constant threat that, if she fails to do, she will lose the company and rights to her children. It should come as no surprise that the social pressure to fulfill the stereotype of the "good woman", culturally associated with the demands of being "a good mother", inhibit some women from conceding custody of the children to the fathers, fearing the social stigma of abandonment, a factor that could even prompt unnecessary complaints.

To avoid repeating ourselves, we shall analyze the finding in general terms and later examine each point of view separately, in light of expressions made during the hearings and focus group interviews and in other activities and methods of investigation carried out by the Commission

> *Gender, or the perception that one has of what constitutes the appropriate behavior of a person according to their gender, is a determining factor to appreciate and adjudicate a litigant's claim with respect to patria potestas or the custody over their children who are minors.*

Our society considers the nuclear family as the family model that is suited for the development of human beings. With regard to this concept of family, the State has developed social, cultural and economic policies that vary according to the historical moment and to new forms of human interrelation. In today's Puerto Rico, this concept of the nuclear family—father, mother and children—is not adequate enough to include innumerable non-traditional families[325] in which, as an example, the mother is the head of household, or the family is in charge of rearing family members who are under legal age. These families are more and more numerous in our society.[326]

The notion of the nuclear family attributes to each of its components a special appropriate behavior: the father is the provider who leaves the home to seek the support, and the mother attends to the home and the children, or should, and can attend to both after a full day of salaried work. If the couple separates, both keep the traditional roles of father and mother. The woman is expected to retain custody of the children, adjust her life routine to a social plan that is acceptable for a divorced mother: almost absolute dedication to the children and discrete in her sexuality, among other social impositions. The man is expected to be diligent in the payment of support and in abiding by pre-established visits with his children. The male has greater freedom to continue his sexual activ-

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[325] MARYA MUÑOZ VAZQUEZ & EDWIN FERNANDEZ BAUZO, EL DIVORCIO EN LA SOCIEDAD PUERTORRIQUEÑA (2d ed., Río Piedras, Ediciones Huracán, 1988).

[326] NILDA CURGOS & E. COLBERG, MADRES SOLTERAS CON JEFATURA DE FAMILIA CARACTERISTICAS EN EL HOGAR Y EN EL TRABAJO (Centro de Investigaciones Sociales, U.P.R., 1990)

ity and relations with persons of the opposite sex, without any presumption of promiscuity, immorality or ineptitude as a father.

The State, in carrying out its function of "*parens patriae*", is recognized as the power that intervenes with the nuclear family to protect the welfare of the minors and other members of the family, whenever critical situations require it to do so. In the past, the State's intervention was considered an undue interference into the privacy of families. Today, the protection of the best interests and welfare of the minor is the reigning law in the country and permits the State to intervene in disputes related to custody, parental authority and paternal or maternal-filial relations in order to regulate, modify and, even, terminate these relations.[327]

As for expectations of a woman's behavior after the divorce or break-up of a relationship of affection, especially when a custody claim comes into play, the Commission identified as a specific finding that the courts, social workers and ex-spouses demand that she exhibit specific behavior, and that those demands are no different from the expectations that society generally has regarding gender.[328] A female psychologist explained it in the following manner:

> I believe that this ... is all the continuation of this baggage[329] that we have from the Judeo-Christian philosophies. That is, we still continue with all these [so-called] characteristics that women are second-class citizens. We've picked that up from that philosophy that prevails in all our social order. The patriarchy prevails through all that philosophy, which although, has supposedly been eradicated and doesn't guide us, I believe it continues to guide us ... [330]

On their part, several deponents at the hearings and focus group interviews—among them two judges—said that the perceptions of what a woman should be and how she should behave, re-

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[327] Efraín González Tejera, *Bienestar del Menor. Señalamientos en torno a la patria potestad, custodia y adopción*, 54 REV. JUR. U.P.R., 411 (1985). Extensive jurisprudence mentioned in this Report support this doctrine.

[328] Hearings, June 17 and 18, 1994, at pp. 35 and 40; Hearings, May 13 and 14, 1994, at p. 25

[329] Figurative use of adornment or clothing of body

[330] Focus Group Interview, Sociopenal officials: female psychologists and counsellors, at p. 58

spond to cultural bonds and start from a very old view of the concept of family, which is perpetuated and unconsciously reflected in our actions by our upbringing and education.[331]

Our country's perception of adequate behavior for a divorced woman with children is very conservative. It is not viewed favorably if a woman enjoys going out socially,[332] imbibes alcoholic beverages,[333] has many male and female friends,[334] or a particular male or female friend,[335] is sexually active,[336] hands over her children to the father because she cannot take care of them,[337] and requests an increase in the support amount.[338] If a woman voluntarily decides to engage in one of the activities or acts mentioned above, she may risk losing her maternal-filial relations or the custody of her children.

Whenever women struggle against the fathers for the custody of their children, they are usually accused of all these things.[339] A private social worker explained why:

> If they have a profession, it's why are they absent from the home; if they choose to stay in the home, it's why are they parasites or lazy; if they remarry, it's why are they trying to substitute the true father; if they live with another man in a consensual relationship or have relations now and then, it's why are they giving a bad example; if they live with another woman or alone, it's why don't they provide a masculine model for the children.[340]

Men are hardly questioned regarding their social life, [341] their drinking habits ,[342] their friends,[343] their sexual relations,[344] or if they have a partner or not, if they pay child support or

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331 Focus Group Interview, Female trial lawyers: in women's affairs, at p. 81; Focus Group Interview, Judges, at pp. 8 and 17.
332 Hearings, June 17 and 18, 1994, pp. 35 and 40; Summary of Focus Group Interview, Male family trial lawyers, at p. 4.
333 Hearings, June 17 and 18, 1994, at p. 36; Hearings, May 13 and 14, 1994, at p. 20.
334 Hearings, June 17 and 18, 1994, at p. 40.
335 *Id* at pp. 35 and 38.
336 *Id* at p. 38; Hearings, June 10 and 11, 1994, at p. 27.
337 Hearings, June 24 and July 1, 1994, at p. 45; Focus Group Interview, Male trial lawyers in family law, at p. 4.
338 Hearings, May 13 and 14, 1994, at p. 18.
339 Focus Group Interview, Female trial lawyers: in women's affairs, at p. 82; Hearings, May 13 and 14, 1994, at pp. 17-18.
340 Hearings, May 13 and 14, 1994, at pp. 17-18.
341 Hearings, June 17 and 18, 1994, at p. 40.
342 Hearings, May 13 and 14, 1994, at p. 20.
343 Hearings, June 17 and 18, 1994, at p. 40.
344 *Id*; Hearings, June 10 and 11, 1994, at p. 27.

not,[345] because those activities and behaviors are part of the concept of a man that prevails in society.[346]

The deponents in the hearings and focus group interviews shared some opinions based on their experiences to explain the discriminatory milieu against women that permeates the courts, especially when it has to do with the withdrawal of custody.

Whenever the father requests custody of the minor based on allegations that the woman is immoral (for example, she goes out too much, has a "friend", drinks liquor), it is granted provisionally, or the maternal-filial relations are denied, because the court considers that the mother "does not fulfill the traditional role that society imposes on the woman."[347] Also, social workers recommend the removal of custody because the mother is not fulfilling her traditional role.[348]

Prejudice is also evident when custody is withdrawn from the mother or when her maternal-filial relations are restricted because of alcoholism, but when the alcoholic is the father the same does not appear to occur.[349] To illustrate the magnitude of this discrimination, a female lawyer who participated in a hearing told the following anecdote that took place at the moment of adjudicating custody:

> In one case in which the [Women's] Commission was present, the history of violence of the man is totally neglected, and the focus is on [a] the woman who had been seen in the "kiosks" of Luquillo, drinking beer, categorizing her as "alcoholic". Despite the fact that the psychologist who evaluated the case determined that the woman was not an alcoholic and was fit to have the custody of her children, they were removed from her home while another investigation was conducted.[350]

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[345] Focus Group Interview, Specialists in women's affairs, at p. 84.

[346] Hearings, June 10 and 11, 1994, at p. 27

[347] Hearings, June 17 and 18, 1994, at p. 35

[348] Focus Group Interview, Sociopenal officials: female psychologists and counsellors, at pp. 36-37

[349] Hearings, May 13 and 14, 1994, at p. 20

[350] Hearings, June 17 and 18, 1994, at p. 36.

Other demands on the woman considered by the courts and social workers were: whether she is a good employee,[351] whether she does work; whether the children are well dressed and cared for; whether the house is furnished and clean and neat;[352] whether she dedicates all her free time to her children.[353] If the woman neglects one of these aspects, she will be seen as an abusive mother, "who is not a good resource".[354]

If the woman passes the prejudicial inspection on gender expectations, she is favored if the father of her children petitions their custody. This conclusion merits a separate analysis of the first part of the finding.

a. *In decisions regarding the patria potestas and custody, women who request them are usually granted them on the basis of their gender; and the men who request them are, usually denied them on the basis of their gender.*

In our Hispanic-rooted culture, we have assimilated the perception that the woman—the mother—is the most suitable person to raise and educate her children and that the man—the father—is not emotionally, nor psychically equipped to assume such a responsibility.[355] A female judge who participated in the investigation described this perception as sexist.[356]

This cultural presumption has been incorporated by our courts in the Family Relations courtrooms and is considered a determining factor in adjudicating custody and *patria potestas*, prompting in that way, from our perspective, discrimination in favor of the woman and, consequently, against the man.[357] One male lawyer summarized the situation in this way:

> Judges see women in the traditional stereotype of mother, and the capacity of the man to be a father and to raise his children is not trusted.[358]

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[351] Focus Group Interview, Sociopenal officials: female psychologists and counsellors, at p. 37.

[352] Hearings, May 13 and 14, 1994, at p. 35.

[353] Focus Group Interview, Male trial lawyers in family law, at p. 4; Focus Group Interview, Female trial lawyers: in women's affairs, at p. 82.

[354] Focus Group Interview, Sociopenal officials: female psychologists and counsellors, at p. 37.

[355] Focus Group Interview, Judges, at p. 51.

[356] Hearings, May 13 and 14, 1994, at p. 17.

[357] Hearings, June 17 and 18, 1994, at p. 41.

[358] Hearings, June 24 and July 1, 1994, at p. 44.

A female lawyer from a governmental agency made a similar statement:

> In the awarding of custody, the woman has the advantage because the cultural stereotype dictates that she should have the children.[359]

One female judge interviewed also spoke on this practice:

> In the Family courtrooms the judges, irrespective of the fact that it is a man or a woman, base their decisions, mainly, on the basis of sex. Even when the father is clearly the better parent, if the mother is not bad, she is awarded custody of the child although she is not the best one to have the child, by the simple fact of being a woman.[360]

Several deponents at the hearings, including judges, agreed that judges prefer to grant custody to women[361] because she is the person in the best position to care for the children.[362] In general terms, she is "automatically awarded"[363], the children, resulting in blatant discrimination against the man.[364]

As a male trial lawyer in the area of family law explained, "the discrimination in the area of custody begins with the Supreme Court decisions that establish that under equal conditions, the woman is preferred."[365] Several lawyers concurred with this explanation.[366] One added that the Supreme Court has even declared that adjudication of e custody under these circumstances is not discriminatory, but he believed it to be discrimination validated by the Supreme Court".[367] In the following example, a female judge illustrated how discrimination operates in the determination of custody:

> Recently, there was a case in Carolina in which a girl had been living with the father for a while and, in one fell swoop, they took her away from

[359] *Id.*

[360] Hearings, June 17 and 18, 1994, at p. 34.

[361] *Id.* at p. 41; Hearings, June 24 and July 1, 1994, at p 43; Hearings, June 10 and 11, 1994, at p. 23

[362] Hearings, June 17 and 18, at p. 35; Focus Group Interview, Judges, at p. 51.

[363] Hearings, June 3 and 4, 1994, at p. 47.

[364] Hearings, June 17 and 18, 1994, at p. 41; Hearings, June 24 and July 1, 1994, at p 43; Focus Group Interview, Male trial lawyers and prosecutors, at p 36; Hearings, May 21 and 22, 1994, at p. 11.

[365] Focus Group Interview, Male trial lawyers in family law, at p. 3.

[366] Hearings, June 17 and 18, 1994, at pp. 43-44; Focus Group Interview, Male litigation lawyers and prosecutors, at p. 36; Hearings, June 3 and 4, 1994, at p. 42

[367] Focus Group Interview, Male trial lawyers and prosecutors, at p 36

> him because the judge determined that under equal conditions the child belonged with the mother because she was a woman and that makes her more fit.[368]

Discrimination against men in the adjudication of custody is manifested in different ways. For example, the specifics of a case are not considered when it would be better to award custody to the father.[369] Although the father presents evidence to the effect that he can have custody and the children express their preference for him, the process of awarding the father custody can be uphill.[370] At other times, although the mother may appear to have problems[371] or is an aggressor, it is she who is awarded custody.[372] There are also cases where the mother shows that she is negligent[373] and does not respond to the needs of the children and, despite positive reports of the father, judges resist awarding him custody.[374]

Court officials in charge of evaluating the family also discriminate in favor of women in custody cases.[375] In illustration, a male judge said that in provisional custody cases, the father has to prove to Social Services beyond a reasonable doubt that he is reputable and is living with his parents, since the children are handed over to them. He added that Social Services does not prepare objective evaluations of men who request custody or visitation rights.[376]

Regarding social workers, a female judge said: "... For them, men and women are equal for the effects of granting custody, but they recognize that the input that they receive from collaterals during their investigation in the field discriminates in favor of the woman."[377] A male lawyer in private practice, however, said that because "social workers usually are women that deprives them

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[368] Hearings, June 17 and 18, 1994, at p. 34.
[369] Hearings, June 3 and 4, 1994, at p. 47
[370] Hearings, June 17 and 18, 1994, at p. 41; Focus Group Interview, judges, at p 51
[371] Hearings, June 17 and 18, 1994, at p 41.
[372] Hearings, June 24 and July 1, 1994, at p 43
[373] Hearings, June 17 and 18, 1994, at p. 39
[374] Hearings, may 13 and 14, 1994, at p 17.
[375] Hearings, June 17 and 18, 1994, at p. 41.
[376] Hearings, June 24, and July 1, 1994, at p 43.
[377] Hearings, June 3 and 4, 1994, at p. 46.

of the father's perspective regarding custody determinations."[378] A female judge believed that "social workers demand more of the father when recommending paternal-filial relations and authorizing them to keep the children for longer periods or to sleep over."[379]

Certain factors aggravate the father's position when he requests visitation rights or custody. A female lawyer in private practice explained that one factor is when children are under five years old, because the courts do not believe the father is capable of caring for small children.[380] A male trial lawyer in the area of Family Relations explained that: "men are not considered capable of changing a diaper, of giving a bottle to a baby, or taking care of it."[381]

Another factor is if the minors whose custody or paternal-filial relations he requests are girls. A female judge explained "it is too shocking to imagine a male father staying alone with a female daughter."[382] It is even worse, if that girl is younger than a certain age, because according to a lawyer in private practice: "the judges find it difficult to view men as fathers, especially in relation to a girl. They cannot understand that he can share with his daughter or that he can bathe her and clean her genitals without problems or morbidity."[383]

A male lawyer in the area of Family Relations, said that judges presume that if a father is between twenty and thirty years, is not married and lives alone with his mother, he will sexually abuse his two or three-year-old daughters.[384]

These obstacles have deterred many men from even daring to request custody[385] because they believe it will never be adjudicated in their favor.[386] Lawyers, on their part, have adopted the

[378] Hearings, May 13 and 14, 1994, at p. 17.
[379] Hearings, June 17 and 18, 1944, at p. 37.
[380] Hearings, May 21 and 22, 1994, at p. 11.
[381] Focus Group Interview, Male trial lawyers in family law, at pp. 4-5.
[382] Hearings, June 17 and 18, 1994, at p. 37.
[383] Hearings, June 24 and July 1, 1994, at p. 44.
[384] Focus Group Interview, Male trial lawyers and prosecutors, at p. 37.
[385] Focus Group Interview, Judges, at p. 51.
[386] Hearings, June 17 and 18, 1994, at p. 39

practice of notifying their clients—the fathers of minors—that it is the woman who has the capacity[387], that they should forget that".[388] Another said: "....I tell my male clients who want to request custody, that taking custody away from a mother is equivalent to climbing Everest, barefoot, in underwear and in the middle of winter".[389]

Despite the solid opinion of many of the participants regarding existing discrimination against men concerning adjudication of custody and paternal-filial relations, a contrary, albeit minority, opinion was expressed by two deponents, a male and a female lawyer. Although discrimination exists against men in custody cases, she said, today the courts are more reasonable in this regard[390], while he remarked that "each day there is a greater change in attitudes more favorable to the man, even among women judges. Custody is being granted [on more occasions]."[391]

b. Demands are imposed on women that are related to their sexuality more rigorously than to men in order to retain the custody and patria potestas over their children, which provokes many judges to permit judicial processes to divert attention away from the main purpose —the protection of the minors—and direct it toward the intimate life of the woman and other irrelevant behaviors.

While a case on custody or maternal or paternal-filial relations is being heard, occasionally attention is diverted away from guaranteeing the best interests and general welfare of the children and focused on the intimate behavior of the parties, especially of women because they don't comply with the traditional mold of the dedicated or self-sacrificing mother of the once-respected nuclear family. A male ex-judge of the District Court said:

They always try to bring in the sexual history of the mother in custody cases. Judges sometimes consider this behavior in their decision.[392]

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[387] *Id.* at p. 41

[388] Focus Group Interviews, Judges, at p. 51.

[389] Hearings, June 3 and 4, 1994, at p. 42.

[390] Hearings, May 21 and 22, 1994, at p. 11.

[391] *Id.* at p. 10.

[392] Hearings, June 3 and 4, 1994, at p. 48.

Several lawyers and a female judge also agreed that the system's lack of sensitivity[393] reaches such a point that those interrogations directly attack the woman's reputation[394] and place her in embarrassing [395] or humiliating [396] situations because they try to "dig up"[397] and "tear apart"[398] her intimate sexual life. These attacks are attributed to the fact that few judges intervene to ensure that interrogations are tailored exclusively to what is relevant and necessary.[399] As an example of attacks on a woman's morals, a female judge said that the woman is routinely asked if she associates socially with a man:

> In custody cases the sexual behavior of the mother is used as a relevant factor to determine custody of the children. The mere fact that the mother has a boyfriend or has social contact with some man [causes] her to be presumed incapable of being a "good mother" and be used [that fact] to request that custody be taken away.[400]

Another deponent told of an experience in the courtroom.

> Frequently, questions are asked the mother regarding intimate matters that don't have anything to do with custody. Her reputation is at stake, to such a point, that all that's left is to say that she is a prostitute.[401]

Nevertheless, the woman is also routinely asked how many partners she has had or if she was unfaithful to her husband during the marriage. One deponent, during the hearings on June 24 and July 1, 1994 made several statements illustrating the situation:

> If the woman is unfaithful in the marriage, the man immediately asks that she not be granted custody, even though she is a very good mother. The man's lawyer speaks ill of her and doesn't even want to let her see the children.[402]

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[393] Focus Group Interview, Female trial lawyers: in women's affairs, at p. 36.
[394] Hearings, May 21 and 22, 1994, at p. 10; Hearings, June 3 and 4, 1994, at p. 42.
[395] Hearings, June 10 and 11, 1994, at p. 27.
[396] Hearings, May 13 and 14, 1994, at p. 20
[397] Focus Group Interview, Male trial lawyers in family law, at pp. 3-4
[398] Hearings, May 21 and 22, 1994, at p. 11
[399] Hearings, June 10 and 11, 1994, at p. 27; Hearings, May 13 and 14, 1994, at p. 20
[400] Hearings, June 17 and 18, 1994, at p. 38.
[401] Hearings, May 21 and 22, 1994, at p. 10. The deponent is judge of the District Court (today, "District Subsection")
[402] Hearings, June 24 and July 1, at p. 43

During the focus group interviews, a male judge indicated that "during the court proceedings, they always try to bring out the personal aspect, that is, events in the personal life of the woman, for example, if she has had another boyfriend. "How many boyfriends has she had before the relationship?"[403]

This situation makes the judicial processes that women turn to for justice for themselves and their children, uncomfortable and unreliable. To the contrary: the courts turn into a threat to their emotional health and reputation. This, however, does not necessarily mean that custody of their children will always be denied, according to one female lawyer:

> During the questioning of the woman, her love life and sexual experiences are brought up. She is considered unstable in those cases, but the same criterion is not applied to a man. The process is humiliating for a woman, even when she is awarded custody. Some judges intervene to protect them, but this does not happen very often.[404]

The experience does not stop being humiliating and the dishonor of these circumstances is never justifiable. On many occasions, though, the result of the process is the unjust removal of minors from their mother's custody.[405]

Clearly, the testimony that we chose to illustrate this finding reflects a prejudice that fosters discrimination and unequal treatment towards women in conflicts on custody and maternal and paternal-filial relations. As several deponents said, the differences in expectations of each progenitor according to their gender in the family break-up, result in discriminatory treatment because the behavior demanded of the woman authorizes the man, his lawyer and the judges to delve into her intimate life and question her adequacy as the mother or guardian of her children.

Many other participants in the compilation of information for this study reiterated that in the judicial processes of custody, the attention of the court is diverted to aspects of the private lives

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[403] Focus Group Interviews, Specialists in women's affairs, at p. 44.
[404] Hearings, May 13 and 14, 1994, at pp. 19-20.
[405] Hearings, June 24, and July 1, 1994, at p. 40.

of the parties. The Commission was able to perceive that this situation appears to become more acute when dealing with the private sex life of the woman.

The courts are not isolated institutions that can remain at the margin of historical-social events. Experiences and perceptions narrated by the deponents show genuine concern that society's general attitudes and prejudices are influencing the decision processes within the justice system. Even when we believe that the persons in charge of administrating justice are impartial and follow the law in determining what is applicable to the case, a subjective element exists which at a given moment can surface and affect their decisions. It is important to prevent that subjective element from inducing unequal treatment of the parties who appear before the courts seeking equitable and just remedies, above all in custody and paternal or material-filial relations cases where what is truly important is the welfare of the minors, not the personal agendas of the progenitors or their legal counsels.

This finding justifies analyzing separately the existence of a double standard in the courts regarding the evaluation of evidence, treatment and consideration of issues in which the comparable conduct of men and women is judged.

c. *Therefore, one may conclude that in decisions regarding the custody and paternal or maternal-filial relations a double standard or unequal treatment prevails whenever the sexual conduct of the mother is evaluated vis à vis that of the father, although it is not relevant to adjudicate the petition.*

The process of socialization to which persons in Puerto Rico are exposed, encourages the establishment of double standards to evaluate human behavior in society. Women are educated in one way and men in another. There exists a social expectation that women, merely by being women, project themselves as weak, self-sacrificing, dedicated to serving others as if their own nature predisposed them to it. Men, on the other hand, are educated or conditioned to assume positions of leadership. They should, therefore, project control, aggressiveness and self confidence.

This characterization is reflected in the family, and establishes a rigid division of roles and duties within the home that also permeate the workplace and sexual conduct.[406] The judicial processes and the persons involved in them are not exempt from these influences.

A consensus exists regarding the double standard that prevails in Family Relations Courtrooms whenever the sexual behavior of a mother is considered vis ^ vis that of the father during the adjudication of custody and paternal or maternal-filial relations, even though in general terms such behavior should not be relevant. One deponent in the focus group interviews explained that, although persons appear before the court seeking justice, the prejudices found there are the same that exist in society because "the courts are not a bubble separate from the rest of society."[407]

According to manifestations made to the Commission throughout this study, double standards regarding sexual conduct are stricter or more repressive primarily when applied to women in their struggle to *keep or obtain custody* of their children. One female judge expressed her opinion on this finding as follows:

> A double standard is observed with respect to the woman. If she goes out or has a boyfriend, she is immediately subjected to questioning about whether she should have custody. The man is allowed to go out and to have personal relations without any problem. In those cases, psychological or psychiatric evaluations tend to be requested of the woman, and on many occasions the man stops paying support as a means of exerting pressure.[408]

In addition to reflecting a double standard regarding sexual conduct—which need not be relevant to determine who better serves the interests of the children—the aforementioned manifestations show clearly the use of the children as an instrument to exert pressure on the decisions that affect women. It is expected that she place the needs of the children before hers, and that she submit to the demands of third parties, such as ex-spouses, to be truly worthy of their company and custody.

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[406] MUÑOZ VAZQUEZ & FERNANDEZ BAUZO, supra note 325, at p. 30.

[407] Focus Group Interview, Specialists in women's affairs, at pp. 44-45.

[408] Hearings, May 21 and 22, 1994, at p. 10.

Several judges said that at the moment of determining who will be granted custody of the minors, the woman's sexual conduct is considered as a pertinent factor[409] by judges[410] and by social workers of the Department of Social Services.[411] Said conduct is also considered in investigation units.[412] One lawyer considered that type of treatment as admissible because it is "supposedly relevant to establish the moral character of the woman.[413]

This practice is discriminatory since it fosters unequal treatment when evaluating the sexual conduct of the mother vis à vis that of the father. A female participant said that as part of the prevailing idea of what a woman should be and what a man should be, perfect behavior is expected of the woman; but of the man, "it's not even brought up because he is a man and can do whatever he wants."[414] That is, while men are rarely questioned regarding their sexual conduct[415], as a general practice, it is permitted to interrogate women on totally irrelevant matters [416] that are related to her.[417]

This double standard, used to weigh the sexual conduct of ex-spouses to determine custody, brings in its wake a series of negative effects on women. One female judge said that these effects include presumptions that are created about women, and how these are later used against her by associating her love life with her capacity to be the custodial mother.[418] Contrary to men, the woman is recriminated against[419] and is considered unstable[420] or immoral if she renews any

[409] Hearings, June 17 and 18, 1994, at p. 38.
[410] Hearings, June 3 and 4, 1994, at pp. 42 and 48.
[411] Hearings, June 17 and 18, 1994, at p. 38.
[412] Hearings, June 24 and July 1, 1994, at p. 40.
[413] Hearings, June 3 and 4, 1994, at p. 42.
[414] Hearings, June 17 and 18, 1994, at p. 27; Hearings, May 21 and 22, 1994, at p. 10.
[415] Focus Group Interview, Specialists in women's affairs, at p. 44.
[416] Hearings, May 21 and 22, 1994, at p. 15; Hearings, June 3 and 4, 1994, at p. 42.
[417] Hearings, June 3 and 4, 1994, at pp. 42-43 and 48; hearings, May 13 and 14, 1994, at pp. 19-20; Hearings, May 21 and 22, 1994, at pp. 10-11
[418] Hearings, June 17 and 18, 1994, at p. 38.
[419] Hearings, May 21 and 22, 1994, at p. 14.
[420] Hearings, May 13 and 14, 1994, at p. 20.

kind of sexual activity. A tendency exists to remove the children from the maternal home facilely for these reasons.[421]

A deponent concluded:

> In our system, a father has almost absolute rights to associate with his children without the imposition of major conditions and without his conduct being an issue.[422]

In other cases of family relations, the same pattern appears to occur. With regard to the cause of adultery, one female lawyer said:

> Several female lawyers of the south region have commented that extremely unfair treatment exists in cases where there are allegations of adultery. If the man is presumed adulterous, that doesn't cause too much commotion, and it's seen as just another cause of divorce. But if the alleged adulterer is a woman, an adulteress, the lawyers and the judges and even the persons in the courtroom, magnify the matter. The attitude of denigration is easily palpable; the rude and rough behavior toward that woman is noticeable; the looks and attitudes change. The judge's decisions tend to be less flexible, more negative, and stricter toward that party and her lawyer.
>
> What's unacceptable is that this kind of prejudice exist in a court of law, even though the prejudice exists in society.[423]

Regarding this situation, it was also observed that a woman's infidelity overturns the presumption that exists in her favor in determining custody and that, occasionally, automatic custody occurs in the man's favor, since it is he who uses adultery to blackmail the woman into conceding custody.[424]

A judge also illustrated how the woman is affected by the fact that her infidelity is considered relevant, contrary to what occurs with men.

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[421] Hearings, June 24 and July 1, 1994, at p. 40.
[422] Hearings, May 13 and 14, 1994, at p. 16.
[423] Hearings, June 24 and July 1, 1994, at p. 17.
[424] Hearings, June 3 and 4, 1994, at pp. 43-44.

> When a man is the unfaithful party or falls in love with another, the woman is expected to accept that behavior. It's understood that he hasn't done anything wrong, for which he has a right to visitation rights.[425]

Comments were also heard to the effect that a man's infidelity does not harm him, rather it gives him "status",[426] especially if the judge is a man since he identifies with the man and can accept his infidelity, but not that of a woman.[427]

This double standard appears more significant when the sexual relations of each progenitor are compared to that of another person of the opposite sex. However, when the relations are homosexual or lesbian, it appears that society and the courts judge mothers and fathers with the same yardstick of sanction and rejection.

6 *There is a tendency to use the homosexuality or lesbianism of a party as a reason to deprive them of custody and for the extreme regulation of the paternal or maternal-filial relations, even if other criteria of adequacy in the exercise of the litigants' prerogatives as father or mother are proven.*

Sexuality has been defined as the set of biological, psychological and social characteristics contributing to the sexual identity of the person and to his or her behavior as a sexual being.[428] Different kinds of sexual orientations exist: heterosexual, homosexual, lesbian and bisexual.[429]

As we have discussed in other parts of this Report, our society, as all known societies, has established parameters on what is acceptable as an expression of human sexuality according to gender.

We have pointed out that our Civil Code establishes the heterosexual relation as the only relation that can constitute a legally valid marriage.[430] This relation is considered the model best suited for the development of the family, even when a diversity of family styles and human rela-

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[425] Hearings, June 24 and July 1, 1994, at p. 43.

[426] Hearings, June 3 and 4, 1994, at p. 42; Focus Group Interview, Specialists in women's issues, at p. 44.

[427] Focus Group Interview, Specialists in women's affairs, at p. 46.

[428] GLORIA MOCK & W. MARTINEZ, SEXUALIDAD: SUS CONCEPTOS BASICOS 22 (Río Piedras, Ed. Cultural, 1995).

[429] *Id.* at p. 27.

[430] Art. 68 of the CIV. CODE defines marriage as "a civil institution pursuant to a civil contract by virtue of which a man and a women agree to be husband and wife, and to mutually meet the obligations to each other that the law imposes on them ...".

tionships, as indicated, exists in our society. This definition excludes consensual relations between persons of the opposite sex and between persons of the same sex (lesbian and homosexual). This exclusion, however, is not purely juridical. It is also permeated with religious and moral values. The conceptions established in society on this issue are observed and have their impact on the justice system.

Through different forums of expression used by the Commission, several deponents said that the sexual orientation of the father or mother was an important factor in child custody cases. Although, occasionally, the incident becomes a bitter experience for the litigating mother or father, if the relations are heterosexual it would have a less negative effect on the decision than if they were homosexual or lesbian. That is, whenever the mother or the father have an intimate relationship with a person of their own sex, some judges start from the premise that this relationship is not healthy and represents a danger for the psycho-emotional development of the children. It is the general perception that judges favor the removal or deprivation of custody with respect to the progenitor who exhibits that orientation. In the words of a female deponent:

> The sexual preference of the woman, which is considered contrary to the order established by society, is used as a primary basis for depriving the mother of custody and awarding it to the father. On other occasions, if the Department of Social Services has intervened, the court accepts the determination of the Department and does not revaluate the facts, even when the court has the authority in law to do so. Whenever the court makes these decisions, the capacity of the woman to be an excellent mother, irrespective of her sexual preference, is not considered.[431]

She also said the following based on her experience:

> [Whenever] women [whose] sexual preference is toward their own sex appear before court, the court focuses more on the sexual preference of the mother than it does on the father's aggressiveness; which, frequently, comprises emotional, physical and sexual abuse. The court prefers to expose mi-

[431] Hearings, June 17 and 18, 1994, at p. 35. The deponent is a female lawyer dedicated to the practice in the public sector and to women's work.

> nors to the violent conduct [of the father] rather than accept the sexual preference of the mother.[432]

The results of the Commission's study on this issue differ slightly from this general perception. In evaluating the jurisprudence of the Supreme Court of Puerto Rico, we mentioned the judgment in *Figueroa v. Colón*.[433] In this judgment, the court considered the claim of a father to obtain the custody of his daughter because the mother was a lesbian. The original decree of the court of instance awarded the custody of the minor to the mother based on a previous agreement between both progenitors. When some time later the father questioned that determination, the Superior Court expressed its inclination to remove the child from the mother's custody and to give it to the father provisionally while the hearing to modify the original decree was held on its merits. It left the child, however, provisionally with the mother, a decision later confirmed by the Supreme Court. The final decision of the justice forum,[434] confirmed by the Supreme Court on a second occasion,[435] favored the mother. This case represents a first step of great importance in the right direction. Since this is the only known case decided by the Supreme Court where sexual orientation is presented as a negative factor against awarding custody of a minor, it represents an advanced vision and fair treatment for lesbian mothers and homosexual fathers.

There were no relevant testimonies or references in our juridical texts about the treatment that occurs regarding the sexual orientation of men in custody cases. This could be due to the fact that, in our society, feminine sexuality is more strictly controlled, or because, on the other hand, the sexual conduct of men is not given the same attention, unless it is directed toward minors by way of sexual abuse or corrupting examples.

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[432] *Id.* at p. 36.

[433] 94 J.T.S. 85, at p. 12022. (Judgement).

[434] See Resolution decreed by the Superior Court, Bayamón (Hon. Luis Rosario Villanueva, J.) July 6, 1994 in Civil Case No. DD193-1308, at p. 24.

[435] See Resolution decreed by the Supreme Court on October 21, 1994 in Case No. CE-94-554, at p. 2.

In many of these cases, the father or mother is granted supervised visitation rights or restricted from showing affection toward their lovers in front of the children.

It is important to underscore a female social worker's statement to the Commission:

> The reports of the social workers from the Judicial Center in San Juan show that they are advanced, in terms of the vision of equality between men and women and that the relevant criterion is the welfare of the child, irrespective of the sexual conduct and preference of the parents.
>
> The social workers of the Judicial Center of San Juan do not take into consideration, when preparing their reports, the sexual experience of the mother. It is not used because in San Juan it is a cultural pattern to have many companions. What is considered is how that conduct affects the child.
>
> The social services personnel of the Judicial Center of San Juan has received trainings on the subjects of sexual preference and promiscuity. Dr. Gloria Mock has been a resource in those trainings.[436]

The Commission recognizes these initiatives on the part of the system as a step forward in improving attitudes and processes in legal areas where human behavior plays a decisive role. Tolerance is cultivated through knowledge and understanding. To the extent that the officials of the system are more sensitive to the complexities of human behavior, they will be better professionals in the service of justice.

7. *In child custody cases the violence manifested by the aggressor against his companion or their children is minimized or declared irrelevant to determine the aggressor's capacity for custody and parental authority and to relate with the children.*

In Puerto Rico many people from every social class use violence to resolve differences of opinion. An example of this is the proliferation of news about homicides, murders and every kind of aggression published daily in the country's general circulation newspapers. But the violence that develops in the family nucleus, however, is much more alarming because its victims are more vulnerable, more subjected to patterns of violent behavior and suffer deeper and more lasting psychic and emotional wounds.

[436] Hearings, June 24 and July 1, 1994, at pp. 46-47.

To a large extent, our country's public policy revolves around the strengthening of basic institutions, the family among them. But, for a long time the State ignored the violence that women were subjected to in the family core because these incidents were considered private family matters or "marital spats." The subject of domestic violence has been extensively developed in this report. But what is the impact of violent situations on decisions about custody, parental authority and paternal-maternal filiations? Are judges mindful of this conduct and its character traits as an important factor in deciding with whom or where the children will live? Is this element of judgment essential in deciding which progenitor can guarantee the welfare of the children and their best interests? This finding answers those questions in part.

Some deponents dispensed experiences, statistics and recommendations about this issue. With respect to marital violence, more than 14,000 cases of assaults against women of all ages were reported in 1993.[437] This kind of violence, say scholars and experts on the issue, is cyclical, that is, the episodes tend to be successive and escalate in frequency and gravity.[438] In addition, domestic violence is seen as the male controlling women and other family members.[439] We will not repeat previous discussions on the subject, but it is essential that we reconsider it from the perspective of the child's well-being and best interests in court custody cases.

Several deponents spoke of the need in custody cases to look into the record of violence of the father or mother within the family. Others said that the courts and social workers in deciding about custody ignore,[440] or fail to take into account, the effect of male violence.[441] One female public defender had this to say:

> In child custody cases the violence that the aggressor has demonstrated towards his companion or children is minimized, denied or declared irrelevant

[437] Statistics prepared and presented by the Women's Affairs Commission with data from the Police Department.
[438] RUTH SILVA BONILLA, EL MARCO SOCIAL DE LA VIOLENCIA CONTRA LAS MUJERES EN LA VIDA CONYUGAL (Centro de Investigaciones Sociales, U.P.R. 1985)
[439] MUNOZ VAZQUEZ & FERNANDEZ BAUZO, *supra,* note 325, p. 137.
[440] Focalized Group Interview, experts in women's issues, p.84.
[441] Hearings, May 13 and 14, 1994, p. 16. See Introduction to the chapter on Domestic Violence

> in determining his capacity to relate with the children even when the children have witnessed their father's violence and have testified about it.[442]

A female legal advisor also said:

> In establishing paternal-filial relations, the father's motivation, his manipulation and aggressive conduct are not taken into account.[443]

Her statement was echoed by a psychologist:

> When custody is being determined, the courts do not properly consider the effects of domestic violence on the children. Nor do the social workers.[444]

A women's rights attorney, however, offered another version of the problem:

> ...when poor women are accused of abusing or neglecting their children, the yardstick of severity punishes them with impunity and taking away custody and adoption placement loom...[445]

In a society where problem solving is accomplished through violence, it's important that the judicial system remain vigilant in effectively protecting the best interests of minors. On many occasions, minors in violent relationships either suffer the consequences directly, through physical, sexual or emotional abuse, or indirectly, in witnessing the two most important people in their lives physically and emotionally abusing one another. Two immediate effects arise from these experiences: one, copying that conduct to relate to family and strangers and, two, an internal struggle between love and loyalty and subsequent instability and other emotional disorders.

For this reason, it is necessary to set aside stereotypes that lead to accepting some myths or popular notions as inevitable, including: nobody should get involved in marital affairs; violence is between the couple, the children have nothing to do with it; the aggression of parents is not that harmful for the children; the mother may be aggressive but she's the mother and the person best able to watch over them; sometimes harsh discipline is the only way to make children respect you

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[442] Hearings, June 17 and 18, 1994, p.36.
[443] *Id.*
[444] Hearings, May 13 and 14, 1994, p 16.
[445] Hearings, June 10 and 11, 1994, pp. 28-29.

and a few slaps in time correct bad habits. These myths can no longer be socially and juridically upheld.

The judicial function has to transcend frontiers of sentimentalism and social expediency. If the atmosphere of violence is not conducive to raising children then other alternatives should be sought that lead to their healthy development.

As one deponent said:

> We prefer not to keep children in abusive environments but the courts have to consider the possible rehabilitation of a woman who may also be a victim of abuse, of poverty, and lacking social and educational resources to learn to treat her children differently.[446]

Alternatives such as treatment, rehabilitation of the aggressor and behavior modification must be exhausted before the perpetuation of a dangerous and socially inadequate situation for children who are, as the Supreme Court has often said, wards of the Law.

> 8. *On occasion, when custody and paternal authority are awarded the father because the mother cannot adequately tend to the children, the decision is based on the care of the paternal grandparents, not the father.*
>
> *There is a tendency to unjustly compare the custodial capacity of a young mother, who is maturing and gaining experience, with that of older more experienced persons.*

A tendency in Family Relations courtrooms is to take the custody of her children away from the teenage mother and, instead, award it to the father, more so if he is an adult. In justification, she is said to be too young, has no experience in child care and, that possibly, has had no role models to teach her. These young mothers, it is also said, are too negligent and careless for the task of mothering.[447]

Other judicial justifications in granting custody to the father is that the teenager's ability is compared to that of the grandmother, who naturally responds to a totally different mentality and

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[446] *Id.*

[447] Hearings, May 13 and 14, 1994, pp. 18-19.

time. As part of this discrimination, the young mother's moral quality is also questioned—unlike her ex-spouse's mother or his new wife who will, in fact, assume the custody and formation of the children.[448]

A female lawyer had this story to tell about a 19-year-old mother who sought legal aid at her agency:

> The woman who requested the service is young, black and poorly educated. Her ex-husband filed for custody of their three-year- old son in the Bayamón Court. He alleged that the mother is too young (19), that she lives in a public housing project and said that environment was not good for his child. The woman was extremely anguished. She said that her husband could pay for legal representation while she could not. She believed that the judge was partial to her ex-husband. She worried that the judge would take away custody because she lived in public housing. The case is a good one for an in-depth hearing. The issue being aired in court is the capacity of the mother to educate and raise her son. The father's allegations are based on cultural prejudice. The woman senses that prejudice because she feels at a disadvantage in a setting that historically has held that the child is better off with the father for economic reasons.[449]

Age, race and social and economic condition add insult to injury for the teenage mother. Meanwhile, it is easier for her former husband or companion to gain custody of the children. The only requirement the court demands of the father is that he live with his parents—since they are the ones who are handed the children—[450] or that he have a supportive female figure to help him with that responsibility. She could be an aunt, his mother or a sister.[451] This practice allows the man to take advantage and ask for custody, then have another person actually take care of the children.[452]

When the man remarries no one questions the moral solvency of his new wife; she is expected to be nice to her husband's children. But if the mother remarries, the presence of another

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[448] *Id.*

[449] Hearings, June 17 and 18, 1994, pp. 36-37. It's important to remember that in Nudelman vs. Ferrer, 107 D.P.R. 495 (1978), the Supreme Court established that economic situation was not a criterion to determine child custody. If the custodian mother lacked sufficient income, adequate child support from the non-custodian father could cover their needs.

[450] Hearings, June 24 and July 1, 1994, p.43.

[451] Focalized Group Interview, Family male trial lawyers, p.4.

[452] Hearings, May 13 and 14, 1994, p.19.

man in the house puts the emotional and physical integrity of the children at risk, especially the daughter. This recurrent theme, which we have already broached, should be reviewed with care and sensibility. This is an example of larger suppositions of prejudice and unjust treatment between the genders in terms of custody and paternal or maternal-filial relations.

> 9. *The mother's contribution in the multiple facets of the lives of her children, attending to their medical, recreational and educational needs, among them, are not valued with due propriety and justice in custody determinations. This shows that more value is given to the father's check than to the contributions of the custodial mother.*

If it is true that in our society the male figure has been identified as the family provider, it is just as true that in the sexual division of tasks, women have been dedicated to raising their children.[453] This imposition places different burdens on the father and the mother. The father's contribution is more concrete because it comes at the end of the month in the form of a check, postal money order or in cash. Meanwhile, in not being monetary, women's contributions are often devalued or made invisible. Moreover, many times women's work in raising children is seen as natural, binding and expected. The father's absence from the children's educational and formative processes, from their care, health and recreation, represents an excess of work for custodial mothers.

One deponent, explaining this reality, said that "women are overwhelmed by the responsibilities imposed by home and child custody."[454] The responsibility for raising children that our society has decided is a priority for women calls for additional economic, physical, emotional efforts, even professional and vocational sacrifices.

Apropos the value of women's work in child care, it is important to remember that our Supreme Court stated in *Mundo vs. Cervoni* [455] that "as much as the father supports the children by regularly providing a certain amount of money, so does the mother with her work and energy real-

[453] This topic is discussed from another perspective in the category on the devaluation of women's work in the home in the section Analysis of legislation and jurisprudence in this chapter.
[454] Hearings, May 20,1994, p.8
[455] 115 D P R. 594 (1984).

ize the purpose and plan of the support by preparing and serving food to the children, by keeping the house clean and in order, by taking the child to school for education and to the doctor for a cure."

> On many occasions women's contributions in child care are not economic. If that work was taken into account in economic terms, as we pointed out in discussing devaluation of women's work within the home, it would represent a large outlay of money for the family fund.[456] Women who have custody of their children work 24 hours a day, seven days a week and judges, lawyers and other system employees involved in these processes should place that in proper perspective.

A female law professor agreed:

> There are still some legal considerations that are not included in the tables used to compute support. For example, there is no acknowledgment of the time and effort of the custodian father only his income is considered. Usually when a woman is employed, children connote obstacles to her professional development. If the woman manages to obtain care for the children without paying for it, that is not considered. Although this does not mean additional money for her, it could hinder a promotion and her professional development.[457]

Another deponent had this to say:

> Discrimination exists against the mother, especially the working mother, when support is determined or the father's arrears in support payments is considered. Her obligations as custodial mother are not considered as equity, nor is the time she spends in child care valued. Those elements are not considered when support is determined.[458]

The situation of women, however, is worsened by frequent arrears in child support payments.

In the hearings of June 24 and July 4 of 1994, a series of statistics was presented that indicate, to a large extent, how women are impoverished by the uncertainties of child support.

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[456] See the analysis of women's work in the home in DIXON, *supra* note 54.

[457] Hearings, June 24 and July 1, 1994, p.45

[458] Hearings, May 21 and 22, 1994, p. 10

> If you calculate that after the divorce, women retain custody in 90 per cent of the cases and that 60 per cent of the support is not paid to the satisfaction of the court, then logically women become impoverished.[459]

Moreover, this is aggravated by aspects of process serving to collect the debt.[460] A female University of Puerto Rico professor put it this way:

> In support cases, the bailiffs do not serve the orders for support claims. It is the woman who has to arrange for compliance with the order.[461]

This situation keeps women poor and prevents them from suitably incorporating into the economy.[462] But other factors also adversely influence the status of women and their children. Adjudicating responsibilities to conform with their expenses, for example, can affect their situation. The social and economic status of women, for example, can be a negative factor in many child custody cases—despite the fact that the Supreme Court of Puerto Rico has emphatically refused to accept this criterion in a judicial determination of that nature.[463]

> Social reports often evaluate negatively certain aspects such as house furniture, clothes, etc. without taking into account the woman's level of poverty. Privileged class standards are imposed on her even in details such as order and cleanliness.[464]

To the extent that custodial mothers do not receive essential support from judicial and administrative structures to attend to their children's needs and their own as well , any determination based on that criteria is inappropriate—unless it can be proven that the woman has squandered her resources at the expense of her children and their well-being.

> 10. *There is a mistaken impression that men are discriminated against as fathers because they are required to pay their contribution toward their children's expenses in cash. And when they are unable to fulfill their obligations ,the sanctions are severe, including imprisonment for contempt, intervention with their sources of income and*

[459] Hearings, June 24 and July 1, 1994, pp 45-46

[460] Hearings, May 13 and 14,1994, p 22

[461] Hearings, June 24 and July 1, 1994, p.42.

[462] *Id.*

[463] See *Nudelman vs. Ferrer*, 107 D.P.R. 495 (1978)

[464] Hearings, May 13 and 14, p.19

> *other alternatives that affect their economic and personal relations with third parties.*

There's another side to the coin, however. Although small in number, several deponents said that men are discriminated against in the process of establishing child support. A female attorney in private practice said:

> Discrimination exists against men in child support determinations. It is taken for granted that men lie about their income. As a general rule, child support examiners do not take into account the father's information sheet. But without specific proof, they determine that the expenses women present are reasonable. In general women are not required to back up their information sheet while men are—they are required to prove their case beyond reasonable doubt as if it were a criminal case.[465]

Another lawyer agreed:

> There is discrimination in favor of women in child support cases. Before, the woman had no remedies, the man failed to comply and nothing happened. Now, the man is at a disadvantage. Child support examiners do not take into account the man's actual expenses when they use the guides to decide the amount of child support he has to pay.[466]

A female trial lawyer added:

> The guidelines should not be applied mathematically. Each case should be considered individually to determine if the guidelines apply. Sometimes the guidelines are applied unjustly, because the father's true situation is not taken into account: the debts of the community property of a previous marriage that the male ex- spouse took over.[467]

Interestingly, discrimination against men is mentioned as an effect of the system's diligence in enforcing compliance with orders and judicial decrees on child support: contempt, imprisonment, attachment of property, withholding of income are seen as "unjust" penalties for the man. There are even those who affirm that imposing high child support affects the man's second or third marriage because the debts of the new relation are not taken into consideration to reduce or fix the

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[465] *Id.* p. 21.

[466] Hearings, May 21 and 22, 1994, p. 9.

[467] Hearings, May 13 and 14, 1994, p. 21.

support, if that were the case. These opinions apparently exclude the perspective of the woman and her children. Of course, there are isolated cases that require some flexibility in the process of carrying out the sentence or support decrees. One female lawyer in Legal Aid declared:

> In child support cases indigent men are adversely affected. Even when there's evidence that the man is under psychiatric treatment, there's no compassion, no remedies or opportunities. There's the case of an addict father who cannot pay because he's in a rehabilitation program. When he completes his treatment he is jailed for support. This happens frequently.[468]

Comparing these claims of discrimination with those of women, we have to lean towards defending the interests of the children. Their upkeep and right to life are at stake. A sense of justice, and the conviction that what is done corresponds to law and equity, should inspire judges to evaluate each case in its proper context.

11. *The child support program of the courts is not effective for lack of human, physical and economic resources to attend to the needs of its clientele, represented most of the time by the mother. Ignorance of the law and its procedures create the impression that only men pay* child support and that women do not have to.

Many participants in the hearings and the focal group interviews took issue with how child support is enforced. Their criticism reflected serious concern over the credibility of the parties, the sufficiency of the guidelines, the effectiveness of collection methods, among many other matters.

The first broad criticism of the system and the state of Law is that child support is almost always imposed upon men. It is believed that men "carry" all of their children's expenses. To a large extent, this appreciation can be justified from an historical perspective. Over many years, the man has been seen as the principal provider of the family. Due to the socialization process and the strict division of tasks in society, the woman stayed at home, entrusted with raising their children. And mothers do not get paid for that. When these women divorce, many remain at home raising the children just as they did in their marriage. Others have to resort to salaried work for which they

[468] Hearings, June 24 and July 1, 1994, p 46

lack competitive skills. Although the mother may be employed, as generally happens with custodial mothers, the law obligates the man to pay his contribution in cash so she can cover the children's expenses. Although the Mandatory Guidelines provide mechanisms on computing the amount the mother has to "pay," the reality is that the mother does not pay her portion to herself. Apparently, neither the provider nor the ordinary citizen have understood this point. An orientation campaign would be the best resource to end this mistaken impression. The statement of a participant at the hearings summarizes the general perception:

> The idea of the father as provider prevails and responsibility to provide support is not imposed upon the mother. When the father has custody of the children, support is not imposed on the mother even when she's shown no inability to work.[469]

This quotation has two aspects. We described the first in the preceding paragraph, the second is an additional aspect. It is thought that women are not required to pay child support. No statistics are known indicating how many women do pay child support in Puerto Rico. It is estimated that the percentage is very low. But every non- custodial mother is also required to pay a portion of the support, based on her income, to the custodial father or the person who cares for the children. There can be no discrimination based on gender of any kind. What happens in the great majority of the cases is that the non- custodial mother lacks adequate economic resources to pay support or her portion of the children's expenses, according to the Mandatory Guidelines, is very low because the father earns a much higher monthly income. Again, a good orientation program will help citizens to better understand these situations and to correct mistaken perceptions about them.

In the hearings held May 13 and 14, 1994, a male lawyer with the Legal Services Corporation had this to say:

> As for contempt for failure to comply... with the support, there is a tendency to give the provider a chance, to offer a payment plan.

[469] Hearings, May 13 and 14, 1994, p 21

> Arrest orders for default on support are not processed with due diligence despite the fact that the necessary information is available to do so. Sometimes months pass. Perhaps hovering in the background is the idea that if the man can't pay why arrest him?[470]

A female lawyer explained:

> Statistics show that despite the amendments to the Child Support Law in 1988, defaults in support cases keep increasing. Only ten per cent (10%) of the cases are resolved in three (3) months while the law has decreed that it be ninety per cent (90%) in three months.[471]

On the other hand non-compliance is made even more acute by the lack of personnel in the programs or divisions involved in the determination, payment and follow-up of child support.

> There are not enough Child Support Examiners although those that we do have are efficient. This affects women because of the delay.[472]

Various factors, evidently, affect the child support programs in a negative way. These obstacles must be diligently addressed because they impinge upon the best interests of children.

12. The father's child support defaults and paternal-filial visits are not perceived by the judicial system as presumable negligence, abandonment and abuse of minors.

Child support determinations and paternal or maternal-filial visiting hours are two of the more important statutes and judicial measures in Family Law because they aim to protect the best interests of the children. Nevertheless, the findings of a study conducted by the Commission show that the Family Court procedures are permeated by social prejudice and stereotypes about the male and female, the father and mother. Previously discussed, for example, was the marked emphasis given a woman's sexual conduct in custody cases, unlike that of a man.

Likewise, many deponents echoed the propensity of our courts to concede child custody to women. This is the outcome of the social belief that women are better than men at raising and educating the children. This perception, we pointed out, places a heavy burden on the shoulders of

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[470] *Id.* p. 22

[471] Hearings, June 24 and July 1, 1994, p. 46

[472] *Id.*

women who frequently have to care for the children and work outside the home to cover their expenses because of the father's default on child support. While the father fails to pay, the mother is expected to have enough disposable income to feed and dress the children, keep them in school and satisfy their whims. Lacking sufficient resources, she turns to public welfare and the customary humiliations, exertion, inaction, weariness and abuse that usually accompany those efforts.

The father, on the other hand, by complying with child support and visiting hours fulfills society's minimum expectations. A man who carries out his obligations is perceived as a responsible father, a good father. Women, on the other hand, are judged more harshly. They are responsible for looking out for the welfare of the children every day without fail without regard for their own needs and financial pressures.

A representative of a feminist group asserted:

> The father's non-compliance in child support, paternal-filial visits or any other duty, is not seen as constituting negligence, abandonment or as any other formal concept of child abuse. This abuse, legally invisible, represents that difference that Alda Facio talks about: it is the difference in the yardstick used to measure child abuse by women when they are the only figures of authority in the home.[473]

Diverse factors must be taken into account when awarding child custody as well as establishing paternal and maternal-filial relations. This leads to setting aside the presumption that children are better off with the mother. A female social worker affirmed:

> There are cases where the mother is negligent and does not truly respond to the needs of the children and, despite positive reports about the father, judges resist granting him custody. This happens most frequently with male judges.[474]

A female lawyer in private practice shared her experience:

> There is a double standard for fathers and mothers regarding negligence in child care. The mother is required to be more attentive to child care than the

[473] Hearings, June 10 and 11, 1994, p 26

[474] Hearings, May 13 and 14, 1994, p 17

> father. Yet his violence and aggression against her is not given the same importance.[475]

Her statement recalls earlier statements by two female lawyers dedicated to the defense of women's rights:

> "... when poor women are accused of abusing or neglecting their children, the yardstick of severity punishes them with impunity and taking away custody and adoption placement loom..[476]

This same requirement does not appear to exist for non-custodial fathers who abandon their children, do not visit them, do not take care of their daily needs or pay for their upkeep. Women resent these double standards. They have taken on greater responsibilities and are judged more harshly by the judicial system when they fail to fulfill them.

A female lawyer explained:

> The clients of Legal Services feel discriminated against because they are women and because they have to ask for the support, go to the hearing, set the child support, and yet, their difficulties continue. The payments do not arrive, either because the provider does not pay or because he pays what he wants to, at the wrong time, or because the payment is delayed. This contrasts with the provider's experience. Once the support is settled all he has to do is pay and is relieved from further responsibility.[477]

Law No. 8 of January 19, 1995 supplemented Article 166 A of the Civil Code. This article establishes the circumstances, either by commission or omission, under which a person's parental authority can be withdrawn, restricted or suspended. Among the circumstances is to "transgress duties or fail to exercise authority as stipulated in the first paragraph of Article 153 of the Civil Code." Among those duties is to provide adequate food, clothes, shelter and other essentials. Subsection 4 establishes "failing to supervise and care for the minor under the *de jure* or *de facto* custody of another person" as cause to deny the *patria potestas*. This article, in general, sanctions the

[475] *Id* p.19.
[476] Hearings, June 10 and 11, 1994, p.28.
[477] Id. p.24

failure of the father and mother to fulfill their duties and responsibilities to their children. Moreover, it incorporates the need for continuing communication between the father and his children.[478] We have already discussed our observations about this detail in the section on the new law that denies parental authority and custody. Of interest now is reviewing the legislation in light of the finding that warrants this discussion.

The law seems to authorize judges to suspend or deny parental authority and custody of the children if the father or mother fail to feed or visit them, in short, fail to attend to their basic needs. Most important, the law appears to characterize those actions as abusive. On the other hand, an irresponsible father can not be rewarded with complete freedom from his responsibilities—a consequence of denying him parental authority—if the minor does not have other alternatives that guarantee his welfare and future.

With the prudence that each case requires, judges have an additional tool to confront delinquent providers and those fathers and mothers who fail to attend or periodically relate to their children. If these new measures manage to balance the responsibilities of the father and mother regarding their children and prevent mistaken choices in raising them, the law could be effective. In applying the law to indigent persons, judges must act carefully and be sensitive to the distinction between abuse and asphyxiating social condition that does not allow adults and minors to relate within the family and socially, because they lack the necessary human, economic, and intellectual resources and the frame of mind to do so. The Supreme Court's exhortation that judges be creative in designing schemes to protect minors acquires validity with this challenge.

13. *Some judges are lenient or lax in sanctioning defaults on child support thereby encouraging irresponsible and delinquent behavior by providers and aggravating the vulnerability and need of minors and their custodians.*

Some judges place the responsibility of choosing the sanction for the delinquent father-provider on the mother's shoulders. She is forced to choose between two alter-

[478] Article 166A, clause 4 (c), stipulates that custody or parental authority can be suspended or denied " if he has not visited the minor or maintained contact or regular communication with the minor or the person that has de jure or de facto custody "

natives: a new and recurrent payment plan of the debt or sending the provider to jail.

A previous finding discussed problems related to the child support program. In this finding we will discuss the difficulties women and their children face in collecting child support. We believe that these difficulties are related to judicial treatment of delinquent providers.

A female lawyer with Legal Services said the following:

> Our clients frequently complain about how the Justice System discriminates against them compared to the numerous chances given the providers who clearly have records of default in support cases. Payment plans for new and old debts are both offered and accepted.[479]

This situation leads women to feel defenseless, without the institutional support they expected. In turn, she presents a contradiction. By claiming in court that the father-provider does not cover the basic needs of their children, the institution whose coercive power can enforce the obligation, prolongs the process.

The sharpest criticism of the process of implementing child support orders came from a female lawyer:

> Women are placed in a quandary when they are asked to choose between a ridiculous payment plan or sending the provider to jail. We've heard some judges place the responsibility for that decision on the woman's shoulders, and even try to persuade her, almost order her, to "dialogue" with the support provider to reach an agreement. Most of the time the payment plan is ridiculous and the provider makes fun of it."[480]

Attaining fair child support that covers the needs of the minor, is a difficult process. Even more difficult is getting the provider to comply. In this process women come up against the whole institutional structure that at times loses sight of the fact that the prevailing doctrine in this area of law is to protect the best interests of the children.

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[479] Hearings, June 10 and 11, 1994, p.24.
[480] *Id.* p.29.

A female lawyer in public service discussed how the lack of support affects the custodian mother:

> When we serve these clients we discover that they are human beings with many responsibilities and little support. They are women with custody of their children, who know their needs because they see them every day, and who can't count on economic support from the providers who default on their obligation, completely ignoring the consequences of their action. Few of them have a relationship with their children. Obviously, the client has to reflect the crushing burden of her situation.[481]

On the other hand, several deponents spoke about procedural obstacles women face in obtaining the necessary money to cover the necessities of their children:

> One of the most frequent complaints of Legal Services clients in Family Court cases is the difficulty in getting their own motions accepted or in assigning a hearing once the motion is filed. Sometimes the court will set a hearing but on the condition that a lawyer be present, or worse yet, that a lawyer appear on her behalf in writing, which prolongs the case even more. Yet many women have come before the court in their own right and have represented their interests and their children's better than any lawyer in our jurisdiction.[482]

Child support was heavily criticized for the way it is established, implemented and made effective. Following hearings to determine support, the delinquent provider may often be allowed to offer recurrent payment plans that at times are laughable—exposing the needs of the minors and their custodians.

A female trial lawyer said:

> They keep on giving a chance to fathers who default on their support obligations. There is a lax attitude in this respect. The support units take their time in dealing with pensions.[483]

The same criticism was made by a female Superior Court judge:

> There are judges who are very lenient in the fulfillment of child support payments. They either offer payment plans, encourage contempt or don't imprison the person who defaults.[484]

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[481] *Id.* p. 24.

[482] *Id.* p. 23.

[483] Hearings, May 13 and 14, 1994, p. 22.

This laxity of the court entails critical economic hardship for women and children who need fathers to carry out their responsibilities fully. We cannot forget that these practices encourage irresponsibility and keep children vulnerable if their basic needs are not covered for long periods of time. On the other hand, these practices cause affected parties to lose faith in the system that must protect their rights.

The Commission understands that the judge who requires that the mother decide whether to send the father of her children to jail or not or who allows the father to continue in unjustified arrears in child support, is abdicating judicial responsibility. This attitude worsens relationships, creates resentment towards the system and weakens court authority. The administrative process that an organism known as ASUME will implement, to give automatic follow-up to child support orders, should reduce the frequency of these situations. Judicial review, however, is of vital importance in implementing the new law. The renewal of faith and trust in the judicial system will depend on the diligence, certainty, integrity and justice of judicial and administrative decisions. Our children deserve no less.

14. Most stipulations in divorces by mutual consent do not meet the true needs of the woman and the children of the couple.

Many judges accept the stipulations of the parties in mutual consent divorces without checking to see that the stipulations adequately protect the party with fewer economic, social and domestic advantages.

The purpose of stipulations in divorces by mutual consent is that the parties willingly and conscientiously agree to different aspects of the divorce: patria potestas and custody of the children, support for the children and the parties, maternal-paternal-filial relations and the division of community property, as required by the jurisprudence that recognized this process as grounds for divorce. In this way, the welfare of the children, if there are any, and both parties are protected.

[484] Hearings, June 24 and July 1, 1994, p. 42.

Generally, women are the parties most wronged in divorce suits because the woman usually remains with the children,[485] she doesn't work outside of the home or generates less income and, in most cases, does not control the sources of income in the marriage.

The Commission's investigation discovered that all too often the purpose of the stipulations is not achieved and the courts do not fully comply with their obligation to assure that there was no duress, that the agreements were voluntary and satisfied the interests of both parties and that one party has not taken advantage of the other. The foregoing can be attributed to different reasons.[486]

According to a female lawyer, the judicial process of divorce by mutual consent affects the woman because it forces her to "negotiate or stipulate" with a man in a hostile environment, full of resentments and suspicion. Consequently each negotiating point adds to the controversy.[487]

Several participants in the hearings and focal group interviews concurred in that the man frequently manipulates or pressures the woman to accept his conditions or surrender her rights. A female judge had this to say about that point:

> The man will often refuse to sign the petition unless granted joint patria potestas.[488]

A female lawyer added:

> Even though the father doesn't want to keep the children, he requests custody in order to pressure the mother to accept the stipulation... The fact that the father is seeking joint *patria potestas* in a divorce by mutual consent, is a question of machismo... He requests it even though he is not going to see his children. He wants to exercise control over his ex-wife.[489]

A male judge agreed:

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[485] *Id.* p.41.

[486] Hearings, June 10 and 11, 1994, pp. 25, 27 and 28; Hearings, June 17 and 18, 1994, p.40; Hearings, June 25 and July 1,1994, p.41; Hearings, May 13 and 14, 1994, p.16 and 20.

[487] Hearings, June 10 and 11, 1994, p.25

[488] Hearings, June 17 and 18, 1994, p.38

[489] Hearings, June 24 and July 1, 1994, p.41

> Men use the request and granting of the custody to coerce the mothers.[490]

A female lawyer in private practice concluded:

> In divorce by mutual consent cases, the woman comes off badly because she tends to yield her rights.[491]

Men want to retain control over their ex-wives. The exercise of that control is manifested in different ways. One of the most common is utilizing children in divorce or separation cases. A female trial lawyer said that the use of the children by one spouse to manipulate the other happens all the time in divorce by mutual consent cases.

> In divorce by mutual consent cases the mother usually stays with the children. Even though the father doesn't want to stay with the children he asks for custody to pressure the mother to accept [the terms of] the stipulation.[492]

On many occasions, this situation inadvertently slips by the courts. Despite the provisions of the Guidelines to Process Mutual Consent Cases, joint *patria potestas* is conceded without looking into the factors that could make it function adequately to the children's benefit.[493] On the other hand, in establishing paternal-filial relations, the court also omits consideration of the backdrop of the divorce. Although the parties have chosen grounds that "do not create controversy"—such as mutual consent—other elements, such as cruelty, adultery[494] or abuse, may exist. This knowledge could be decisive in determinations about custody, parental authority and maternal, paternal relations which should benefit the children[495] not what the parties have agreed to.

Another circumstance that escapes the purview of the courts is that the woman is usually at a disadvantage in the division of property. As one female lawyer said: stipulations in most of the

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[490] *Id.* p.43
[491] Hearings, May 13 and 14,1994, p.20
[492] Hearings, June 24 and July 1, 1994, p.41.
[493] Hearings, June 17 and 18, 1994, p.38
[494] Hearings, May 13 and 14,1994, p.16.
[495] Hearings, June 10 and 11, 1994, p.28

cases do not meet the real necessities of the woman and children nor do they reflect his real income because the man tends to hide the money." The same lawyer said that many times the court starts from the premise that "dividing the community property into fifty percent for each spouse is the most equitable, but that's not necessarily so."[496]

The Commission found the prevailing environment of Family Court to be prejudicial to women and children. These deficiencies can be described as follows: The woman is treated impersonally. She is not oriented on the obligatory nature of the stipulations and their importance. Consequently she tends to accept them to get divorced on the grounds of mutual consent and to keep her privacy, without thoroughly understanding the scope of what she has signed.[497] The specific situation of women and children are not examined in detail.[498] The courts do not have sufficient human behavior specialists to meet the needs for service for women and children affected by divorce. An excess workload and a heavy calendar often prompt judges to accept a stipulation hastily.[499]

We must remember that the duty of the court is to ensure free and informed consent between the parties, especially the woman, before accepting stipulations in a divorce by mutual consent. This duty cannot be delegated or relinquished. Mutual consent was envisioned as a more human divorce process. It has ended up being a mechanism of oppression and convenience of some spouses over their consorts. Only judges can return dignity and justice to this process by participating more actively in the court.

The special sensibility and commitment of the entire system can guarantee that all of its users—men, women and children—receive just, equal and humane treatment, more so when the

[496] Hearings, June 24 and July 1, 1994, p.41.
[497] *Id.* p.41.
[498] Focus Group Interview, specialists in women's issues, p.90
[499] Hearings, June 10 and 11, 1994, at pp. 27-28

family and social structures have become disrupted and judicial determination the only order that is binding and mandatory.

Recommendations

1. The Office of Courts Administration should develop a special program of continuing training for judges, child support examiners and social workers assigned to Family Court to sensitize them about sexist stereotypes and cultural patterns that influence family relations and deal with specific problems in the adjudication of custody, parental authority, support, paternal- maternal filial relations, divorce and others.

2. The Puerto Rico Bar Association should include topics on Family Law from the perspective of gender in its continuing education programs for members of the judicial profession and encourage reflection and discussion of those topics in its law review.

3. The Justice Department should develop training programs from the perspective of gender for family solicitors, paying special attention to the problems of litigation in the area of Family Law.

4. Law schools should promote the inclusion of the perspective of gender in courses and seminars on Family Law and develop investigations, studies and analyses of jurisprudence to address different aspects of gender discrimination in Family Law that serve to sensitize and educate all those involved in one way or another in family law litigation.

5. Schools of social work should revise their curricula to include the perspective of gender in compulsory courses and broaden the range of seminars and workshops on the subject, so that social workers are truly and effectively qualified to deal with family relations and other cases and are conscious of sexist stereotypes and cultural patterns that tend to affect them.

6. In consonance with the analysis of legislation in the area of Family Law included in this report, the Judicial Branch and the legislature itself should encourage the study and evaluation of the valid laws in this area in order to propose pertinent amendments to eliminate every sexist element that is discriminatory in content because of gender from the letter of the law.

7. The Justice Department and the Judicial Branch should make efforts to circulate and orient the public about the Bill of Rights of Victims and Witnesses and existing mechanisms to file claims so that the justice system in general can take the necessary steps in particular case to validate the public policy of that document.

8. The Judicial Branch should weigh the creation of specialized family courts that are clearly integrated with special orientation programs for judges assigned to them. These courts should be effectively coordinated with every region and be adequately staffed with support professionals. The Commission received numerous recommendations on creating a Family Court, which should be evaluated from the perspective of a uniform system such as exists in Puerto Rico

9. The Judicial Branch should give special training to personnel in investigation units and to one-judge courts to properly and adequately serve and orient their clientele on their rights and on judicial procedures.

10. The Judicial Branch, Bar Association, law schools and the Legislature should encourage the complete revision of Volume One of the Civil Code on Individual and Family Law.

11. The Judicial Branch should contest the negative assessment that affects the area of family relations within the different spheres of judicial tasks: assign judges to that area on the basis of special qualifications and prior training; encourage their tenure and establish a continuing training program that is obligatory and serves not only the purely informative aspects but, especially the formative, in terms of attitudes and sensitivity development.

12. The justice system and the Puerto Rican Legislature should continue to explore alternatives to developing systems to collect support that guarantee greater efficiency and adequate compliance by the providers. Available human, physical and economic resources in the child support program should be increased. The Commission is aware that recent legislation has undergone structural changes whose effects and results should be examined in due time.

13. Appeal forums should be particularly alert to the perspective of gender to properly and adequately guide the courts of instance in the daily adjudication of family relations cases to develop a doctrine free of discriminatory traits. The judicial system should encourage judges to take advantage of available specialized courses and seminars about the subject. An organized internal discussion of the subject should also be fostered.

14. Appellate forums, particularly the Supreme Court, should avail themselves of every opportunity the appeals process provides to clarify doctrine in terms of gender perspective and establish clear guidelines about unresolved legal aspects in the area of family relations.

15. The justice system should take steps to facilitate access of women to the courts and to adequate legal representation, especially in the area of family relations where women constitute the great majority of users. In that respect, the Judicial Branch should expedite these cases and limit postponements since delays have negative emotional effects and make the process more costly.

16. The judicial system should expand its resources in the area of specialists in human behavior and tighten requirements regarding their qualifications and formal training to ensure a better work team.

17. The judicial system should consider the needs that arise in litigation of family relations cases. For example: personnel to serve child support subpoenas.

Chapter 7

Domestic Violence

Introduction

> Domestic violence, the physical, emotional and sexual abuse that takes place in a relationship, is one of the most serious and complex problems faced by contemporary society and the family in Puerto Rico, as well as in other countries in the world. An awakened consciousness about the problem over the last decades has led to the passage of specific legislation and to the introduction of public policies to combat the problem and its consequences. In Puerto Rico, on Aug. 15, 1989 our Legislature passed Act No. 54, known as the Law to Prevent and Intervene with Domestic Violence. The law's statement of motives affirms the following: "we must place emphasis on addressing the difficulties presented by situations of domestic violence, especially to women and minors, to preserve their physical and emotional integrity, procure their safety and save their lives."[1]

The violence exhibited by men against women, as the Legislature acknowledged in the statement of motives of the Domestic Violence Law, is a product of the social-historic construction of gender, that is to say, of the ways different societies in diverse places and historic epochs have structured the relations between men and women. Violence against women, especially, has been a product of the historic placement of woman in a position of subordination and submission to man, juridically imposed by him, endowed by religious tradition and perpetuated by an educational system that envisions women as the "weaker sex" in multiple dimensions. This vision of women remained solidly reflected in the language of many societies. In establishing particular categoriza-

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[1] 8 L.P.R.A. sec. 601 *et seq.*

tions of reality, that language reinforced the interpretation of that same reality from a male perspective.[2]

The foregoing assertions focus on two of the basic aspects of domestic violence on which this introduction is based: that the victims of this problem are essentially women[3] and children because of the social institutionalization of male dominance over them; and the dramatic reality that the physical and emotional integrity of their very lives is at risk in these situations. According to data from the Department of Social Services, 18,000 incidents of domestic violence were reported in fiscal year 1993-94. In 93% of these incidents, the victims were women. Available data, however, do not detail how many children were affected by these incidents, but if three children comprise the typical Puerto Rican family, the number is easily surmised.

These statistics provide only a partial view of reality. This type of behavior is largely seen as a private problem, one that should not go beyond the family nucleus—which is why a great number of these cases do not reach the stage of legal action. The actual number of domestic violence incidents is much greater than the number reported.

According to statistics from the Judicial Branch, the number of felonies presented in the island's courts during fiscal year 1993-94 amounted to 37,962. Of these, 3,329 or 8.8% corresponded to domestic violence cases.[4] Quantitatively, this ratio represents a high proportion if the legion and number of other crimes included in the total are taken into account. Even without considering the crimes of domestic violence that are not reported or do not reach the courts, the ratio clearly confirms the magnitude of the problem. Also worth mentioning is the documented practice

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[2] See the chapter in this Report titled General Theoretical Framework

[3] See, for example, Murray A. Straus, *Conceptualization and Measurement of Battering: Implications for Public Policy*, in WOMAN BATTERING: POLICY RESPONSES 19, 24-32 (Michael Steinman ed.,1991). The author estimates that the number of battered women annually in the United States fluctuates between three and six million); Murray A. Straus & Richard J. Gelles, *Societal Change in Family Violence from 1975 to 1985 as Revealed by Two National Surveys*, 48 J. MARRIAGE & FAM. 465, 470 (1986) (The study indicated that a minimum of two million women annually are severely abused by their male partners)

[4] Source: Office of Courts Administration, Statistics Division

of reducing crimes of domestic violence to simple aggression—which, indeed, sways the statistics of the system.

Paradoxically, 42 women were murdered in 1993 as a result of domestic violence according to Police Department statistics. In 1994, the number was 30.[5] These figures would probably have been higher if not for the efforts of many protective women's institutions and organizations to safeguard their physical security. Those figures could also be affected had the causes for the multiple murders been individually computed in the foregoing statistics. Nonetheless, and setting aside the above for lack of certainty, the number of murdered women cited above shows that domestic violence is not a minor problem that should be down played or considered as a private family matter. Rather, the reality is that a life-threatening seed of greater injury exists even in the most simple act of physical or psychological violence.

Although the Commission decided to use the term "domestic violence," it is aware that the adjective "domestic" effectively sets that kind of violence apart from other manifestations of violence in society, with the result that, generally, domestic violence is assigned a lesser degree of seriousness and importance. Inversely, a generically neutral term obviates the fact that, according to every statistic on the problem, in most cases the abuse is leveled by the man against the woman.[6]

This violence is expressed physically, sexually and emotionally. Physical violence is conveyed by blows, kicks, all types of severe physical aggression against the most vulnerable areas of the body. In many instances, the man will incur in sexual violence after he has physically and verbally assaulted the woman. Battered women generally reveal an image of faces swollen and de-

[5] Source: Women's Affairs Commission, according to data submitted by the Division of Statistics, Police of Puerto Rico. It should be pointed out that the Police Department bases its statistics on a natural year, not a fiscal year as does the Judicial Branch.

[6] ANN JONES, NEXT TIME SHE'LL BE DEAD 81-87 (1994). This book serves as a basic source of what we'll point out further on about domestic violence.

formed by blows, bodies cut and bruised, body burns, broken bones, head sores and bald spots as a result of trauma, missing or broken teeth, various types of lacerations and degrees of severity.

Studies show that physical violence against a woman increases considerably when she is pregnant. At that time, the man tends to aim his aggression at the woman's womb: punches, kicks and every kind of blow intended in many cases to that effect. On occasion, he attempts other means to provoke an abortion.[7] A United States study reports that more babies are born with defects due to violence against the woman during her pregnancy, than due to the multiple illnesses that threaten her at this particular time.[8]

Sexual violence, on the other hand, assumes the shape of rape and sodomy perpetrated by force and intimidation, unwelcome advances and other sexual acts such as caresses, kisses, masturbation and forced oral sex and introducing sharp objects into the vagina.

Emotional violence includes intimidation, offensive language, degradation, forced isolation, enslavement and coercion. All of these things gradually undermine the assault victim's self-esteem and her capacity to make decisions, largely destroying her will. Different studies point out the similarities between the abused woman and the prisoner of war: both are subject to indiscriminate and arbitrary violence, both are usually isolated from their families, friends and support resources.[9] The abused woman is constantly threatened with more violence if she takes measures against her abuser, with the threat of death hovering over their lives, abused women tend to be paralyzed by fear.

According to recent studies on the subject, violence against women is not generally about isolated acts. Rather it is a deliberate process of intimidation which tries to force the woman to do

[7] RUTH SILVA BONILLA ET AL., HAY AMORES QUE MATAN: LA VIOLENCIA CONTRA LAS MUJERES EN LA VIDA CONYUGAL. (San Juan, Ed. Huracán, 1990).

[8] SARAH M.BUEL, National College of District Attorneys, Presentation on Dynamics of Family Violence, NITA, *Rescuing the Victims of Family Violence*

[9] JONES, *supra note 6*, pages 89-92

the batterer's bidding, known as control tactics.[10] Even so, there is a tendency to justify the abuser's actions: he lost control in a moment of anger, he's under stress, he's under the influence of hard liquor, or he acted spontaneously provoked by something she did. The reason for this justification is that normally wife beaters display a different personality in public than they do at home. Socially, he may be hard-working, responsible, sociable, nice, courteous and pleasant, so much so that it is difficult to imagine that such a moderate person could incur in such violent and humiliating behavior at home.[11]

Add to the above the fact that few male batterers accept that label: to the contrary, they minimize situations of violence. David Adams, a recognized expert in counseling aggressors has this to say:

> A recent informal survey among the clients of EMERGE revealed that very few men, not even the most violent abusers, could see themselves in those terms. The tendency of batterers to minimize violence is similar to the patterns of denial of alcohol and drug abusers. The drinkers minimize their problem with alcohol by favorably comparing their own consumption with that of the worst cases of alcoholism that is those who drink liquor in the streets (the bums). Likewise, many wife beaters minimize their violence when they compare it to the violence of the "savages that fall all over their wives every day." Besides rejecting the label of "wife beater" most of the batterers under report the intensity of the violence.[12]

The social code that justifies the violence of men against women is known as patriarchy. In contemporary theory, the term refers to the manifestation and institutionalization of male dominance over women and children in the family and the extension of this dominance to society in general. This does not imply that women are completely bereft of power or that they lack total access

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[10] *Id.* pages 88-92.

[11] *Id.*

[12] D. Adams, *Identifying the Wife Beater Before the Court,* FORUM, Year 6, No.3, pages 6-8 (1990) Adams is president of EMERGE, Counseling Services on Domestic Violence for Men. See, also, James Browning & Donald Dulton, *Assessment of Wife Assault with the Conflict Tactics Scale: Using Couple Data to Quantify the Differential Reporting Effect,* 48 J. MARRIAGE & FAM. 375 (1986); E.N. Joariles & K.D. O'Leary, *Interpersonal Reliability of Reports of Marital Violence,* 53 J. CONSULT. & CLIN. PSYCHOL. 419 (1985)

to institutional power. It implies that men hold and retain power in every institution of society and that women's access to that power is riddled with difficulties.[13]

For hundreds of years the abuse of women has been, and still is, a manifestation of male dominance that has been expressed in terms of power and supremacy in his case, and in conditions of inferiority, weakness and subordination in hers. A basic premise of the patriarchal view of society is that men are especially qualified—physically, emotionally and intellectually—to oversee public affairs and maintain order within the family microcosm. Women's obedience and subordination are seen as a logical consequence of an innate weakness that calls for physical protection and material security on the part of the male. A patriarchal society, as is ours, presupposes that men have the duty and obligation to govern or guide and, if necessary, discipline women so that family and society can function adequately.[14]

These are precisely the cultural patterns that are to blame in the perception of the gravity and severity of crimes as being less serious and less severe in the family nucleus than in society at large.[15] When a woman speaks of rape, of abortions as results of blows, of all types of injuries, of broken bones, society tends to describe the situation in terms of marital problems or fits of passion. Society reasons that, in keeping with the basic values that the family represents, the woman must always be willing to sacrifice herself, to resign herself to possible marital problems and to submit to the "head" of the family.

Consequently, any act of marital aggression is conceived as a private problem that should be resolved internally, within the family. Clearly, criminal conduct as determined by law loses that trait when it occurs in a relationship, despite the fact that the violence in that instance is even more

[13] G. LERNER, THE CREATION OF PATRIARCHY (1986)

[14] See the chapter in this Report titled General Theoretical Framework

[15] David A. Ford, *Wife Battery and Criminal Justice: A Study of Victim Decision-Making*, 32 FAM. REL. 463,465-569, 472-474 (1983)

severe than between strangers.[16] Seen as a private problem, it's not surprising that the customary response to domestic violence is making a deal to maintain, at least for the sake of appearances, family unity. Counseling for both parties is also frequent—especially for the woman because in her will and readiness to sacrifice lay the basis for marital and family bliss. The family asks the woman to reconsider her decision to press charges against the man; the priest, pastor or minister intercede in favor of family unity; the police tend to not lend themselves to what they consider the woman's intemperate and contentious attitude; and, even judges attempt to save "family unity," often sending both parties to mediation programs or acting as mediators themselves. Mediation, however, is not considered an appropriate method of intervention in a relationship characterized by an unequal balance of power and authority that tends to exist between the two parties.

The fact that many women depend economically on their male partners and that for the most part, they care for their children—which often impedes them from working outside the home—present greater difficulties for them when they have to decide to abandon a relationship marked by violence. Reality presents them with a portrait of future economic distress and dependence on social welfare systems to survive.

In general terms, most research on the causes of domestic violence have wrongly emphasized the study of women's behavior, that is, the object of the aggression and not the aggressor.[17] Even today, many researchers continue that practice. Nonetheless, the consensus is that it is a logical consequence of the same cultural patterns that subordinate women to men. It is interpreted to mean that if he reacts violently, there must be a reason. His reaction is usually conceived as a response to an external stimulus, and, as regards the couple's relationship, presumes to originate

[16] Compared to victims of violence at the hands of strangers, victims of domestic violence are at greater risk of recurring victimization. See PATRICK A. LAGAN & CHRISTOPHER A. INNES, U.S. DEPT. OF JUSTICE, PREVENTING VIOLENCE AGAINST WOMEN 3 (1986). (Points out that even though most domestic violence incidents are considered misdemeanors, many assaults are genuinely serious.)

[17] JONES, *supra* note 6, pp. 129-138.

with her. For that reason, she is traditionally the primary object of research on the causes of domestic violence. As a logical corollary to that viewpoint, since she is the primary cause of that violence, his culpability is less and he must not be subject to greater sanctions.

At the moment of facing up to the problem that conception underlies, the typical question everyone tends to ask, even judges, is: Why doesn't the woman leave? If the situation is as she describes it, why does she stay in the relationship? Once again, the woman is held liable, not the male aggressor. Her attitudes and reactions are accentuated, not his actions. Since it's inconceivable that anyone can be repeatedly subjected to abuse without fleeing to avoid it, then the woman must be lying or exaggerating in order to avenge an unrelated incident or to victimize the man.

On one hand, the mere question implies that it's the woman who should give in, who should leave. By not doing so, she is responsible for what may happen. Her mere presence can set off or ignite his violence. On the other, this implies ignorance about the underlying problem and the cyclical nature of violence. Lenore Walker was the first scholar to propose that cyclical nature and to identify its three stages: the accumulation of tension, outbursts of violence and reconciliation.[18]

Today the so-called cycle of domestic violence is a reality accepted by every researcher on the subject.[19] The way this operates is similar to brain-washing—the victim is subjected to successive abuse and rewards in order to dominate her. The stages of the cycle have been described as follows:

The first stage is characterized by the build-up of tension insofar as the man reacts negatively to any minor frustration in his life. Consequently, certain episodes of violence occur in which the man hits walls, throws and breaks objects and mistreats animals. He could even reach the point of verbal and physical assault in response to what he considers her wrongful act, real or imagined,

[18] LENORE WALKER, THE BATTERED WOMAN (1980).

[19] Among the researchers in Puerto Rico on the cycle of domestic violence see Mercedes Rodríguez, *El problema de la violencia doméstica: Preguntas y respuestas*, FORUM, Year VI, No. 3, pp.14, 21 (1990).

despite maintaining control over his reactions. After those episodes, which are usually brief, he apologizes and acts complaisant. In the face of this situation, the woman tries to calm the man by assuming a passive attitude. She is deferential, quells her unease and terror and pretends to accept his abusive behavior as a legitimate reaction to something she did. She thinks that by acting this way she'll prevent further violence. She'll even deny her own anger against the abuse, blaming herself for what took place. Nonetheless, she tries to avoid contact with him. Tension builds up every time a small episode of violence occurs. As the woman becomes more distant, the man fears she'll abandon him which makes him more possessive, jealous and oppressive in his zeal to keep her bound to him. The violent episodes become harsher, more frequent and last longer. The psychological humiliation gains greater force verging on torture.

The second stage is characterized by outbursts of physical, verbal, emotional and sexual violence against the woman and, at times, their children. The aggressor viciously assaults the woman. He usually thinks he has to teach her a lesson for an act he believes wrongful. Any small detail can serve as an excuse to violate her: a hot or cold meal or not ready on time; not being at home when he arrives; wearing clothes he doesn't like; crying children. In those cases, the man desists only when he feels she's learned the lesson. Generally, the aggressors allege difficulty in remembering what took place in these situations. Most women, meanwhile, consider themselves fortunate that the incidents were not worse, even though their injuries are severe. Generally they deny the severity of their injuries and refuse to go for medical help. This is the most violent stage of the cycle and the shortest.

The third and last stage, that of reconciliation, is characterized by a show of love and remorse on the part of the aggressor. Generally, the man begs for forgiveness, promises never to hit the woman again and behaves seductively. He uses every available trick and strategy to convince her: he cries, implores, gives her all sorts of gifts, uses a third party to intercede, professes his love

and remorse, offers different justifications for his behavior, blaming, among other things, jealousy or alcohol, and asks her to help him change. Usually, the battered woman wants to genuinely believe that her partner will not assault her again and dreams that his current behavior is truly characteristic. With this illusion and hope in the aggressor's promises and prodded by family pressure to forgive him and give him another chance, the woman tries to forget what happened. Sometimes religious pressures intervene and the weight of the stereotypes that make the woman primarily responsible for the stability of the home and family unity. If the woman has lodged any criminal action against the man, she opts not to go ahead with the process and withdraws the charges. During this stage the victimization of women becomes total. From that moment, the cycle will repeat itself indefinitely, unless it is broken in some way or ends in the death, either murder or suicide, of the victim or her aggressor.

Current literature on the subject clearly explains the difficult situation in which women find themselves: usually they are enjoined to remain in the conjugal relationship for the good of "family unity," that they be self-sacrificing, that they serve as shock absorbers for male violence—but if the woman remains and suffers the severity of that violence then she loses credibility in the face of the question: why didn't she just leave?[20] Knowledge of this cycle is indispensable in understanding why women remain in a relationship marked by violence and to help them to get out of it offering real and effective support from the components of the judicial system, from the institutions that aim to protect women and from the professionals who intervene in these cases: medical doctors, psychologists, social workers, among others.

Judicial system employees are not in any way immune to the multiple stereotypes that predominate in our society regarding feminine gender identity and the male-female relationship. To the contrary. Even though many of them are sensitive to the problem they could react unconsciously,

[20] JONES, *supra* note 6, p. 149

conforming to entrenched patterns. The New Jersey Advisory Committee of the United States Civil Rights Commission in a 1982 report on domestic violence, for example, showed different ways in which sexist attitudes and practices of judges and prosecutors filter into judicial processes. The report pointed out some of the sexist notions subscribed to by judges and prosecutors:

> (1) the notion that victims of domestic violence deserve the assaults against them because in some way they provoked or caused them; (2) that the victims of domestic violence should not protest the violence against them because they receive, in turn, a good deal of benefits *sic* on the part of their aggressors; (3) that women victims of domestic violence do not deserve court assistance because a large percentage of women withdraw the charges after filing them; (4) that many of the victims don't permanently leave their abusive husbands and therefore don't deserve help from the courts. [21]

An additional aspect of domestic violence that must be emphasized is the effect on the children of the couple immersed in the problem. A clear correlation exists between domestic violence, child abuse and juvenile delinquency. The statistics that prove the connection are as depressing as they are revealing.[22] In 1988 Boston City Hospital determined that in 60 per cent of the cases of child abuse, the mother was also a victim of domestic violence. A 1985 study of the Massachusetts Department of Youth Services found that minors raised in homes where domestic violence is routine were more likely (74 percent more) to commit crimes against a person and 26 times more likely to commit a sex violation[23]

In Oregon, 68 percent of delinquent youth in treatment programs had witnessed the abuse of their respective mothers or were themselves abused. Sixty-three percent (63 %) of male youths between the ages of 11 and 22 imprisoned for homicide in the United States had killed the aggressor of their respective mothers.[24]

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[21] Quoted in CENTRO DE ESTUDIOS, RECURSOS Y SERVICIOS A LA MUJER (C.E.R.E.S.), Preliminary Report, Research Study on the Difficulties of the State in Implementing Law 54 of August, 1989 (Center for Social Research, U.P.R., 1993)

[22] BUEL, *supra* note 8, page 4

[23] *Id.*

[24] H. ACKERMAN, THE WAR AGAINST WOMEN; OVERCOMING FEMALE ABUSE 2 (1985).

Adams, quoting several important authors, points out that "children exposed to abuse are more insecure, more aggressive and more prone to depression."[25] Other studies indicate that these minors are six times more exposed to suicide attempts, alcohol and drug addiction, running away, prostitution and committing sex aggressions.[26] According to Adams, the studies suggest that early exposure to the abuse of their mothers could be a significant indication of future wife beaters.[27]

Custody and Domestic Violence

Act No. 100 of June 2, 1976 [28] amended Article 107 of the Civil Code to establish that custody and the parental authority of minors will be granted to the mother or the father who, according to the court "represents the best interests and welfare of the child." In *Marrero Reyes v. García,* [29] the Supreme Court stated: "the following factors, among others, must be examined: the child's preference, sex, age and mental and physical health; the love that each party in the controversy can provide the child; the ability of each party to adequately fulfill the child's real, moral and economic needs; the degree of adjustment of the child to the home; the child's school and community; the child's inter-relationship with the parties, siblings and other family members; and the mental health of each party."[30] In *Nudelman v. Ferrer* ,[31] the Court reaffirmed its opinion on the matter.

These factors are critical because of their direct impact on the children and their relationships with other members of the family. However, another factor directly related to custody is not

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[25] Adams, supra note 12, pages 7, 8. See also D. Kalmuss, *The Intergenerational Transmission of Marital Aggression*, 5 (4) J. MARRIAGE & FAM. 11 (1984); and G. Hotaling & D. Sugarman, *An Analysis of the Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 2 VIOLENCE AND VICTIMS 101 (1986).

[26] COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF YOUTH AND FAMILY VIOLENCE, A STUDY OF ABUSE AND NEGLECT IN THE HOMES OF SERIOUS JUVENILE OFFENDERS 17-18 (1985)

[28] 33 L.P.R.A. sec. 383

[29] 105 D.P.R. 90 (1976) Before the passage of Law 100 of 1976, the Supreme Court had declared that in determining child custody, the courts must always be governed by the well-being and the best interests of the child. *Rodríguez v. Gerena*, 75 D.P.R. 900 (1954); *Castro v. Meléndez*, 82 D.P.R. 573 (1961)

[30] *Marrero*, 105 D.P.R. p.105 (Emphasis added)

[31] 107 D.P.R. 495 (1978)

on the list of criteria: domestic violence. Although this is not about whether the list is conclusive or not—since the Court has pointed out that those factors would be investigated "among others"—the fact that domestic violence is not expressly mentioned had led judges of instance to think that only violence aimed directly at the children should be considered, concluding that past or present aggression between the couple is irrelevant. court social workers say that the effect on the children of this second type of violence (between the couple) does not need to be detected or studied in order for them to make their recommendations about custody and the parent-child relationship because the supreme court has not listed domestic violence as a factor to be considered.

Domestic violence affects children cognitively, emotionally and physically.[32] In other words, children are also its victims, even if violence is not directly aimed at them, because they suffer acutely the aggression between their parents. Besides, children also learn from their parents and imitate their behavior: they also can behave abusively toward their mothers or duplicate the pattern of violence in their own relationships. Routine violence reinforces the idea that violence is acceptable and an integral part of the process of becoming a man. Conversely, children who witness violence against their mothers risk suffering psychological and behavioral problems. 33

Before the passage of Law 100 of 1976 and the juris prudential creation of divorce by mutual consent,[34] violence between parents—even indirectly—was considered an element in determining custody. Grounds for divorce and child custody were based on the morality of the couples' behavior.[35] Thus, a plaintiff who obtained a divorce on grounds of "cruel treatment," automatically obtained the custody of her-his children.[36] In changing the focus of custody decisions from the rights of parents to the best interests of the child, the relationship between the couple

[32] LENORE WALKER, THE BATTERED WOMAN SYNDROME 149 (1984)

[34] *Figueroa Ferrer v. E.L.A.*, 107 D.P.R. 150 (1978)

[35] Excepting divorce for reasons of separation in which the concept of culpability does not apply.

[36] Civil Code Art. 107 provides: In every divorce case minors will be placed under the care and parental authority of the party in favor of whom a judgment has been decreed

seemed to lose relevance. This situation became much more severe in cases of divorce by mutual consent because, through the constitutional imperative of the right to privacy, nothing that transpired between the couple could be aired in the Court. In addition, in those cases child custody and parental authority, as well as the mother-father filiation and support are presented to the court by the stipulation of the couple.[37]

In other words, in their determinations about custody the judicial system has been ignoring the negative effect of domestic violence on the children and on the post-divorce behavior between the parents, and the relationship of each parent towards the children when violence has occurred between the two. Further, how domestic violence can affect the father-mother filiation is not investigated

This attitude and behavior can even lead to granting custody to the victimizer parent, rewarding their behavior in the eyes of the child and of the victim of domestic violence. Or joint custody could very well be granted which, inevitably, will result in greater contact between the aggressor and the victim. That could prolong post-divorce violence between the parties.

Nowhere is it established that the murder of a woman by her husband or ex-husband will be taken into account to determine whether he should retain or recover custody and parental authority of their children. We cannot exaggerate the grave harm produced when these children see that the murderer is paroled and granted custody and parental authority—that is, if he had lost it—over them. The attitude society, the judicial system and agencies of executive authority project when this occurs is that of total indifference towards domestic violence or the virtual approval of it. Nonetheless, we cannot conceive of a greater destructive act against children than to deprive them of their mother by killing her.

[37] Many women victims of domestic violence give in to their husbands' demands for control during divorce proceedings, either through fear of post-divorce violence or because they're emotionally exhausted or fearful of losing custody of their children.

Acknowledgment of this problem of custody and domestic violence moved the U S. Congress to propose Joint Resolution 172, approved by the House of Representatives Sept. 27, 1990 and by the Senate Oct. 25, 1990, which exhorts state courts to consider domestic violence in their custody decisions [38] They have begun to take it into account.[39]

The acknowledgment by the Puerto Rican Legislature that domestic violence has a detrimental effect on the children—to the extent of making them victims—became evident in the Domestic Violence Law establishing a greater penalty against the aggressor when the violence is committed in the presence of the children.[40] That fact, however, has not had any effect on determining custody.

What has been considered is that established statutes or guidelines concerning domestic violence as an important factor in determining custody are inadequate—if they only indicate that domestic violence is simply an added factor in determining the best interests of the child.[41] In being just one element among several and in not indicating the relative weight it should be assigned, the courts retain a high degree of discretionary power that can counter public policy on determinations about custody, parental authority and father-mother filiation.

Puerto Rico needs legislation or Supreme Court guidelines so that the traumatic reality of domestic violence can be incorporated into custody decisions in order to adequately protect the mother who has custody over her children. Accordingly, it should also be recognized that preventing additional violence—of every variety—against the mother will redound to the benefit of the children. This suggests that decisions be made to grant custody to the mother, excepting the father,

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[38] H R. Con. Res. 172, 101st Cong., 2d Sess; 136 CONG. REC. H8280 (1990)- approved by the House; 136 CONG. REC. S18,252 (1990) - approved by the Senate.

[39] See J. PENNINGTON & E. THOMAS, CUSTODY LITIGATION ON BEHALF OF BATTERED WOMEN (1987) (supp. 1988) which briefly summarizes how the states are handling the problem and the applicable psychological literature; Note, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407 (1985); Cahn, *supra* note 33.

[40] Law 54, art. 3.2 (d), 8 L.P.R.A. sec. 632 (d).

[41] *American Bar Association's Model Joint Custody Statute*, 15 FAM. L. REP. (BNA) 1494 (1989).

and that filial relations with the father be carefully regulated. Naturally, this requires a new and deeper understanding on the part of the Legislature and the Judiciary about the realities of domestic violence in order to dispel existing myths about it and the battered woman.

Analysis of Legislation and Jurisprudence

The Domestic Violence Act of Puerto Rico

A. Statement of Motives and Public Policy[42]

With the passage in 1989 of the Law to Prevent and Intervene in Domestic Violence (hereinafter, Domestic Violence Law or Law 54), Puerto Rico took an essential step toward addressing the serious problem that physical, emotional and sexual abuse within a relationship implied for society. In the law's statement of motives, our Legislature was clear in its assessment of the seriousness and intensity of the problem and showed a firm and assertive will to address it.

Supported by studies on the subject conducted over the last decades, the Legislature parts from the following conclusions in its statement of motives: "domestic violence is one of the most complex criminal acts that our society faces;" "[even] though most incidents of domestic violence are not reported to public security agencies, police statistics reflect alarming tendencies;" "it is a reality that incidents of domestic violence are manifested by a pattern of escalating aggression, in frequency as well as in intensity;" "children who have been targets of domestic violence or come from homes where incidents of domestic violence occur, carry with them lifelong marks and patterns of violence;" "tolerance of domestic violence today contributes to the erosion of the family, fosters criminality and undermines the values of human coexistence."

An extremely important aspect regarding the Legislature's intention is that, although the gender neutral language of the act implies that men as well as women can be victims of abuse, the

[42] See Statement of Motives of Law 54 of Aug 15, 1989, Laws of Puerto Rico, 1989, p 22.

Legislature acknowledges and clearly expresses in its statement of motives that it is usually women who are assaulted, emotionally abused and raped by their spouses. In this regard, the same statement of motives emphasizes that researchers estimate that in Puerto Rico at least 60% of married women are victims of spousal abuse. Faced with this quandary, the Legislature passed affirmative protective measures for victims of abuse making the law *comprehensive* whereby such a *civil* protective measure as restraining orders co-exist with articles that typify certain manifestations of abuse as *criminal* conduct and with measures aimed at *education, awareness and, consequently, the prevention* of domestic violence. In addition, the law gives clear directives to the components of the justice system about their functions in the prevention of and intervention with incidents of domestic violence. It makes plain the obligation of the State to develop educational programs and services designed to minimize the social causes and effects of domestic violence.

B. Definition of the Spousal Relationship

According to the law, the term couple includes a spouse, ex-spouse, mate or former mate, a consensual partner or the progenitor of a child.[43] The law thus recognizes different spousal relationships and protects these from incidents of domestic violence, further acknowledging that the separation of the couple, or divorce, does not necessarily end the violence. However, the law does not specify that the couple be heterosexual or whether individuals of the same sex can constitute a couple. Nonetheless, the Commission believes that the term "couple" should include same sex relationships, especially regarding the possibility of issuing restraining orders.[44] Regarding the penal environment, where other important factors are involved, the situation could be different

C. Restraining Orders or Civil Remedies [45]

[43] See Law 54, art. 1.3, 8 L.P.R.A. sec. 602

[44] Aleida Varona Méndez, *Las órdenes de protección*, FORUM, Year 6, No. 3, p. 22 (1990)

[45] Law 54, arts. 2.1-2.8, 8 L.P.R.A. secs. 621-628

In order to protect victims of aggression within a spousal relationship, Law 54 establishes a *civil* remedy, proficient in obtaining through the Court of First Instance orders directing the aggressor to abstain from certain actions regarding the abused person without requiring that criminal charges be filed. Once an application for a restraining order is petitioned, the court must issue the parties a summons, subject to contempt, to appear within a period not exceeding five days.[46]

Nonetheless, restraining orders can also be obtained *ex parte,* in certain circumstances: when diligent efforts to serve the petitioning party with a copy of the court summons have failed; when prior notice would likely provoke the irreparable harm that the order intends to prevent; and if the petitioning party shows that a substantial probability of immediate risk of abuse exists.

The law stipulates that these *ex parte* orders be provisional. Once they are issued, the court must hold a hearing within five days. As a consequence, an order could either lose its effect or be extended for the amount of time the court deems necessary.[47]

By the authority conferred by law, the court can grant different kinds of restraining measures, such as ordering the respondent to leave the residence he shared with the petitioner and forbidding him to return; ordering him to abstain from badgering, intimidating, threatening or interfering in any way with the petitioner or with her exercise of custody over the children; and forbidding him from approaching the home, school, place of business or employment of the petitioner.

On the other hand, in issuing a restraining order, every judge of the court of first instance is equally authorized to make decisions regarding the children of the parties and their assets. They can award provisional custody of the children to the petitioner and order the payment of support for them and to the petitioner as well. They can also order any provisional measure regarding the possession and use of real and personal property whose use is shared by the parties.

[46] Law 54, art. 2.4, 8 L.P.R.A. sec. 624.
[47] Law 54, art. 2,5, 8 L.P.R.A. sec. 625.

In addition, the law authorizes the courts to order payment of financial compensation for harm to the petitioner as a result of spousal abuse. That compensation could include, but is not limited to, moving expenses, property repair, expenses for legal, medical, psychiatric, psychological, counseling and orientation services, expenses for accommodations and shelters and any similar facilities, without prejudicing other civil actions to which the petitioner may have a right. The law stipulates, on the other hand, that these compensations be provided by the respondent.[48]

It is important to underscore that, ultimately, the law establishes penal remedies to force compliance with restraining orders: every violation of these will be punishable as a misdemeanor or as civil contempt.[49] The law also obligates the Puerto Rico Police Department to provide adequate protection to the party for whom the restraining order is issued,[50] and to make an arrest even when the order is not in effect, if there is reason to believe that the rules of the restraining order have been ignored.[51] Plainly, the law hoped to combat the general indifference of law enforcement officials in the face of domestic violence cases because they are considered a private matter between the parties.

D. Conduct Typified as a Crime

One of the more important points of the Domestic Violence Law is that which specifically typifies as crimes a series of behaviors in the spousal relationship that have traditionally been seen as intimate problems of the relationship itself. Generally, as a consequence, the pertinent stipulations of the Penal Code were not applied to spouses, but were rigorously applied to persons alien to this type of relationship behaving similarly. With Law 54, the Legislature wanted to make clear its vision that domestic violence is by nature a criminal act and punishable. Aware of the grave effects of domestic violence, in the destruction of the family and in the problem of delinquency, nonethe-

[48] See *infra* note 87 and accompanying text for an analysis of these rules.

[49] Law 54, arts. 2.8 and 2.6 (b), sec. 628 and 626, respectively.

[50] Law 54, art. 2.7, 8 L.P.R.A. sec. 627.

[51] See *supra* note 49.

less, the Legislature believed that establishing harsher penalties than those provided by the Penal Code for similar conduct was vital, and would make a clear statement about the state's public policy regarding domestic violence.

Article 3.1 of Law 54 typifies the crime of "abuse," which sanctions the use of physical force, psychological violence, intimidation or persecution against a person in a current, or past, spousal relationship to cause them physical or emotional harm or damage their personal property. The penalty established for such conduct constitutes a felony: a year's imprisonment subject to mitigating circumstances (up to 9 months) or aggravating circumstances (up to 18 months). A penalty of restitution is also authorized in addition to the established prison term.[52]

It is important to point out that the law recognizes the fact that psychological violence can produce effects as serious, or worse, than physical violence.[53] That understanding also constitutes an acknowledgment that physical violence is not the only means of control utilized in a spousal relationship.

The law defines psychological violence as "a pattern of constant behavior exercised to disgrace, discredit or degrade the value of a person, to limit access and administration of community property, blackmail, constant vigilance, isolation, deprivation of access to food or adequate rest, threats to dispute custody of the children, destruction of objects of sentimental value excepting those that belong solely to the offender." [54] Obviously, this is a broad definition that covers—in a list that by nature must be open-ended—a series of acts that traditionally have been associated with control tactics used by those who fall into domestic violence.

Our investigation showed that some people interpret Law 54 as requiring the existence of a pattern of behavior in both physical and psychological violence. In holding this mistaken interpre-

[52] 8 L.P.R.A. sec. 631

[53] See Esther Vicente, *La Ley de Violencia Doméstica y la actuación política de las mujeres en Puerto Rico,* in VIGILADAS Y CASTIGADAS 87 (CLADEM, 1993)

[54] Law 54, art. 1.3, 8 L.P.R.A. sec. 602

tation reference is made to the definition of domestic violence in Article 1.3. Domestic violence "means a pattern of consistent behavior in using physical force or psychological violence, intimidation or persecution." Some persons have literally transferred this definition, without further thought, to Article 3.1 which typifies abuse, concluding that the provision prohibiting physical force should only be applied when the use of that force has established a consistent pattern of behavior. Consequently, a sole act of physical aggression would be outside the purview of Law 54 and would have to be processed according to *provisos* of the Penal Code.

Now, as the legislative history of Law 54 shows, the intention of the legislators in typifying the crime of abuse was to " describe with clarity and precision behavior that constitutes domestic violence and that, through this legislative proposal, [we] wish to typify as criminal conduct." In that respect, it was pointed out:

> Under our current penal code, most of the cases of domestic violence contain elements of simple assault and aggravated assault typified by Articles 94 and 95 of the Puerto Rico Penal Code of 1974, as amended. In the Substitutive Proposal before our consideration the crimes of Abuse and Aggravated Abuse are created which typify the behavior that constitutes domestic violence in a specific way. This clearly arises in comparing the elements of crimes of assault of the Penal Code to elements of the crimes of abuse that are proposed in the Substitute Proposal.
>
> The elements of the crime of simple assault contained in Article 94 of the Penal Code previously cited, are limited to the following:
>
> (a) when a person uses force or violence against another,
>
> (b) to injure that person.
>
> The crime of Abuse that the Substitute Proposal proposes to typify in Article 4 is much more specific regarding the conduct to be prohibited and requires different elements of evidence that have been defined in Chapter 1 of the measure. To those ends, said Article 4 provides that such crime be configured under the following circumstances:
>
> (a) when the person uses physical force or psychological violence, intimidation or persecution;

> (b) on the person of the spouse, ex-spouse, or on any person with whom they co-habit or have cohabited, or with whom they sustain or have sustained a consensual relationship, or with any person with whom they've had a child,
>
> (c) to inflict physical harm on the person, their assets, or on another, or to cause them grave emotional injury.
>
> ...
>
> Even when some of these previously mentioned elements are present in other crimes, the fact that according to the bill they are joined to the concept of the spousal or consensual relationship, they especially typify a kind of behavior that so far is not sanctioned as a crime. Given that the purpose of the measure is to typify the crimes of Abuse and Aggravated Abuse, incorporating those elements that were not contemplated in crimes of assault already established, the new crimes have the purpose of differentiating this kind of criminal behavior and establishing a specific penalty for it.[55]

As can be seen, in the discussion of the matter the "pattern of consistent abuse" is nowhere mentioned as a central element in the crime of "Abuse" applicable to the index of behaviors: psychological violence, intimidation, persecution and the use of physical force. On the contrary, it all leads one to think that the intention of the Legislature was, besides adding other behaviors that could be sanctioned as abuse, to channel every act of assault (physical violence) that takes place within a spousal relationship which previously could be processed under Articles 94 and 95 of the Penal Code—whether the assault be one or several that could constitute a consistent pattern of conduct—by way of Articles 3.1 and 3.2 of the Domestic Violence Law.

Article 3.2 of Law 54 typified the crime of "aggravated abuse" with a fixed penalty of three years, and with possible variations between a minimum of two and a maximum of five years. That crime takes place when the crime of Abuse is committed and any of the following circumstances are present:

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[55] See *Informe Conjunto del Sustitutivo a los P del S. 90 y 470* presented to the Juridical, Cultural Development and the Social Safety Commissions of the Senate and to the Special Commission on Women's Affairs 8-19 (June 25, 1989).

(a) When the person's dwelling or shelter is entered and abuse is committed there in the cases of spouses or cohabitants when they are separated, or a restraining order is in effect ordering one of the parties to vacate the residence; or

(b) when grave bodily harm is inflicted on the person; or

(c) when it is committed with a lethal weapon under circumstances that do not indicate the intention of murder or mutilation; or

(d) when it is committed in the presence of minors; or

(e) when it is committed after a restraining order or resolution on behalf of the victim of abuse has been issued against the accused; or

(f) the person is prompted, encouraged or forced to ingest controlled substances, or any other substance or means that alters that person's judgment or to become intoxicated with alcoholic drinks; or

(g) when it is committed simultaneously with child abuse.[56]

As can be seen, the Legislature put more force into restraining orders conceiving abuse as aggravated if these provisions were transgressed.

Law 54 also established the crimes of "Abuse by intimidation" and "Abuse by restricting liberty," both as grave, with fixed penalties of 12 months and three years, respectively, which also allow for mitigating or aggravating circumstances. In both cases the possibility of restitution also exists over and above the established prison term.[57] All that is needed to establish the crime of abuse through intimidation is to threaten the spouse with bodily harm; the partner's valued assets, except those that privately belong to the offender; or another's person. The second crime requires the use of violence, intimidation or the pretext that the partner suffers from illness or mental defect in order to restrict the victim's liberty with her knowledge.

[56] Law 54, art. 3.2, 8 L.P.R.A. sec 632

[57] Law 54, arts 3.3 and 3.4, 8 L.P.R.A. secs. 633 and 634, respectively.

Article 3.5 on sexual assault within the marriage comprises one of the most important contributions of the law. For the first time non-consenting sexual relations within a relationship, including those between a married couple, is typified as a crime. Regarding the latter, it's worth remembering that article 99 of the Penal Code of Puerto Rico penalizes "carnal access to a woman not his own"[58] and that provision has traditionally been criticized because it is based on the conventional view of marriage in which the woman is sexually beholden to her husband, as his property, as well as the fact that it does not take in the possibility of the man being raped.[59] That confirms the validity of the stereotypes on which it is based. The language of Article 3.5, however, is broad enough to cover this aspect even when the law is primarily aimed at combating domestic violence against women, since it is more frequently the case.

According to Article 3.5, non-consenting sexual relations, like the violation of Article 99 of the Penal Code, can take different forms: through force, violence, intimidation or threat of grave and immediate bodily harm; if the capacity of the victim to resist has been annulled or reduced through soporifics, narcotics or means of another nature; if the person is incapable of understanding the act in the moment it occurs. Also, if the victim is forced or induced, through abuse or violence, to participate in or become involved in an unwanted sexual relation with third parties. As we can see, the accused does not necessarily have to have incurred in the sexual conduct: it is enough to force the victim to have sexual relations with a third person.

Regarding this crime, Law 54 standardizes the penalties for every form of violation, adopting the most severe penalty established by Article 99 of the Penal Code: a fixed penalty of 30 years, with possible variations of between 20 and 50 years depending on extenuating and aggravating factors. Nevertheless, the fixed penalty is doubled to 60 years, with variations of between 40

[58] 33 L.P.R.A. sec. 4061.

[59] See DORA NEVARES-MUNIZ, CODIGO PENAL DE PUERTO RICO 154-159 (Revised and Commentated, Instituto para el Desarrollo del Derecho, Inc., 1993).

and 99 years, if the form in which force, violence, intimidation or threat of grave and immediate bodily harm are involved, is committed after the protagonist has, without the victim's consent, entered her home or any other place or building where she may be, including their patios and parking places; or when the parties are separated and living in separate residences or have initiated a legal divorce action.

E. Procedural Bypass

Article 3.6 provides a bypass mechanism, available only under certain circumstances for persons convicted of any of the crimes typified by Law 54. Through this mechanism, the court, *motu proprio* or at the request of the prosecutor or the defense, can suspend every procedure following the conviction, and submit the convicted person to a conditional discharge, subject to his participation in a specialized rehabilitation program that addresses the problem and that he remain in it until its conclusion.[60]

F. Measures to Prevent Domestic Violence

Given the gravity of the problem that it intends to resolve, and conscious of the lack of mechanisms to deal with it, Law 54 made the Commission for Women's Affairs responsible for taking multiple steps to assure compliance with the public policy of the State. Among them: to study, investigate and publish reports; to develop strategies that promote change in the policies and procedures of government agencies; to promote the establishment of shelters and, above all, to foster and develop educational programs to prevent domestic violence and orient and sensitize public officials and professionals who, in one way or another, have to deal with the problem.[61]

Unquestionably, the education process is essential because it deals, as we have seen, with a problem that is firmly rooted in social patterns that are difficult to change, with attitudes that re-

[60] 29 L.P.R.A. sec. 636.

[61] See Law 54, art. 4.1, 8 L.P.R.R.A. sec. 651.

spond to stereotypes that generally operate at unconscious levels and with cultural conceptions that are deeply rooted in society. It is also about a problem whose treatment requires that every intervenor have a certain special knowledge of the human psyche and a high degree of sensitivity. That is one reason why the educational role should not rest solely on the Women's Affairs Commission, but on every agency involved in implementing the law.

With respect to judges, the Judicial Branch has invested multiple efforts in doing that. It offered a seminar on domestic violence after a period of experience with the law[62] and issued various internal publications to address any doubts about the law.[63] An issue of Forum, the judiciary's professional journal, was dedicated to the topic with articles produced by the Women's Affairs Commission and by specialists on the subject.[64] That issue has served as a source of continuing reference for the Judiciary and for internal education programs of the Institute for Judicial Education. Law 54 was included as one of the special laws singled out in orientations and training given newly appointed judges. Many regional orientations were coordinated with the Women's Affairs Commission.[65] A special seminar on the topic with participating judges was coordinated with the Department of Justice.[66] The topic was also included in orientations and seminars on judicial ethics.[67] Judges and other officials have been encouraged to attend seminars and symposia on the topic in the United States and other countries in order to develop internal resources who could take part in judicial education and orientation programs for the community.[68] Judges have been encouraged to participate in activities about the topic outside of the system. A summary of the second

[62] Sept.21, 1990.

[63] Memoranda of Sept. 24 and Oct.4, 1990, distributed to judges as special memos on the subject.

[64] FORUM, Year 6, No.3 (1990).

[65] The dates were Oct.2,9 and 16 of 1992. In 1993 additional orientations were coordinated under the direct responsibility of the Women's Affairs Commission

[66] Sept.3, 1993.

[67] For example, domestic violence was one of the topics discussed in session at the Judicial Conference of Puerto Rico held in May, 1993

[68] Sponsorship even included the participation of two female judges of the system at the International Congress of Women Judges, dedicated to domestic violence and held in Rome, Italy, in May, 1994

Report of the Women's Affairs Commission was published for the Judiciary to reflect on the problems encountered in implementing the law.[69]

Further, domestic violence was included as a topic of major importance in this Commission's investigation. Precisely, the education and sensitizing of the Judiciary about this problem is one of the Commission's short and long term goals. Holding focus group interviews about the topic, with the participation of judges, and discussing related aspects in the participator investigation sessions the Commission organized as part of its research process, have also, unquestionably, served this purpose. Finally, consonant with the objectives of this Commission, the Judicial Branch participated with the Women's Affairs Commission in preparing a proposal for federal funds under Title IV of the Violent Crime Control and Law Enforcement Act of 1994. The funds corresponding to the Judicial Branch will be earmarked for educational programs about domestic violence to address specific problems identified by the Commission.

Despite all efforts and many additional exertions by the Women's Affairs Commission, the response has not always been positive or the best. There are still those who refuse to accept the law and those who have reservations about applying it. There are those who become excessively timid in utilizing the many resources that the law offers, often with disastrous results. Unfortunately, those who think and act that way are not generally receptive to available alternative orientations: most of the persons who benefit from them are already somewhat sensitized. It is essential that the educational process in this area widen its radius of influence.

The Federal Violence Against Women Act

On Sept. 13, 1994, the Congress of the United States of America passed the Violence Against Women Act, [70] a piece of legislation that constitutes a milestone in the struggle to eradi-

[69] *Violencia doméstica: Status quo,* FORUM, Year 8, No 4, p 3 (1992)
[70] See 108 Stat 1902 *et seq*

cate this grave social ill. Among other things, the law, which constitutes Title IV of the Crime Bill, assigns funds to the states to combat violence against women,[71] to increase security measures in public transportation and parks,[72] to offer help to victims of sexual assault, to educate youth about the problem[73] and to establish shelters[74] and community programs to prevent and address the problem.[75] Funds are also assigned to train judicial system personnel regarding the crimes of rape, sexual assault and domestic violence. Subtitle B, Chapter 3, grants funds to government agencies to foster the treatment of domestic violence as a serious infraction (felonies) of the penal code.[76] that funding implies acknowledgment of the severity of the problem of domestic violence on the part of the u.s. congress and the fact that domestic violence is usually directed against women.

This new legislation covers many areas. Among other things, it assigned funds to establish a national hotline to help victims of domestic violence.[77] It creates categories of interstate crimes of domestic violence[78] and interstate infractions of a restraining order,[79] each subject to restitution,[80] and establishes that restraining orders issued in one state be honored in others.[81]

On the other hand, one of the most important contributions is the creation of a cause for federal civil rights action for victims of violence motivated by gender.[82] The right of every person to be free of gender-motivated violence is acknowledged. That violence must be indicative of grave criminal conduct. It includes assaults, sexual violations, violence against property and the sexual

[71] Subtitle A, *Safe Street for Women*, Chapter 2, 108 Stat. 1910
[72] *Id.* Chapter 3, 108 Stat.1916.
[73] Subtitle B, *Safe Home for Women*, Chapter 5, 108 Stat. 1935
[74] *Id.* Chapter 4, 108 Stat. 1934
[75] *Id.* Chapter 6, 108 Stat. 1935
[77] *Id.* Subtitle B , Chapter 1, 108 Stat. 1925
[78] Chapter 2 § 2261
[79] *Id.* § 2262.
[80] *Id* § 2264.
[81] Id § 2265
[82] Subtitle C, *Civil Rights for Women*, 108 Stat. 1941.

transmission of diseases. This action based on sexually transmitted diseases becomes even more pertinent with the continuing growth in the spread of herpes and AIDS.

The law specifically states that a person accused of a violent act which is cause for civil action does not have to be declared guilty in the criminal sphere for the civil action to proceed.

To create this civil right, the Congress grounded itself in the powers conceded by the fifth section of the 14th Amendment and the eighth section of Article 1 of the U.S. Constitution.[83] The corresponding provision, contained in the Civil Rights Remedies for Gender-Motivated Violence Act, states:

> Any person (including a person who acts under the protection of any statute, ordinance, regulation, custom or usage of State) who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes of violence motivated by gender] shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief as a court may deem appropriate."[84]

It is convenient to clarify that conduct constituting domestic violence is the prototype of violence motivated by gender. In other words a person may sue their spouse for violating their civil right to live free of violence.

The law confers concurrent jurisdiction to federal and state courts, including the Commonwealth of Puerto Rico, regarding this cause of action. In view of the concurrent jurisdiction of local and federal district courts, a federal case for damages could be initiated against the spouse in the Commonwealth courts.[85]

One of the advantages of bringing suit under the new civil rights law is that state restrictions against presenting actions for damages against the spouse, based either on spousal immunity

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[83] *Id.* § 40302 (a).

[84] Translated into Spanish in the original text.

[85] The advantage of filing suit in the federal court lies in that the suit can be aired in the presence of a civil jury, which, usually, grants higher compensations than those allowed by state court judges

or, as in other jurisdictions, until the divorce is final or on other limitations, are vanquished.[86] In other words, by not making a distinction between federal law in those jurisdictions where community property exists and those where there is a separation of property during marriage, means the law applies equally to all jurisdictions.

At this point, it is fitting to analyze the implications of the action that created the federal law and the action in damages that the Domestic Violence Law of Puerto Rico creates in those cases in which the marriage between the victim and the aggressor is governed by the doctrine of community property. As previously mentioned, the local law establishes in Article 2.1 (i),[87] the right of the petitioning party to indemnity as a result of domestic abuse. It determines the list of expenses incurred, the sum of which must be reimbursed by the aggressor-respondent. This list is not exhaustive because the statute specifies that the indemnity is not limited to the items listed but to all of the damages suffered. It also states that said indemnity does not prejudice other civil actions the domestic violence victim may have a right to, meaning action for damages under article 1802 of the Civil Code.[88] In pointing out that said indemnity covers damages that the petitioning party may suffer as a consequence of domestic abuse, it is understood that the suit covers damages that stem from emotional and sexual abuse as well as from physical abuse.

Action for damages as established in the Domestic Violence Law does not exclude any petitioning party, which means that the wife of the aggressor can also file for damages

Indemnity provided by the Domestic Violence Law of Puerto Rico, Law 54 of 1989, however, must proceed, according to the law, from the private property of the aggressor. Clearly, in

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[86] John Nichols, esq., according to James L. Dam, *Wife Beating a Civil Rights Action Under Crime Bill: Divorce Lawyers Will Be Affected*, LAWYERS WEEKLY USA, Sept. 12, 1994, p. 16
Another advantage of the law is that the sentence can not be lifted in bankruptcy proceedings because it is based on willful and malicious damages. Margaret Howard, professor at the Vanderbilt University School of Law and Kathryn Coleman, bankruptcy lawyer in San Francisco. *Id*

[87] 8 L.P.R.A. sec. 621 (i) (Suppl. 1994)

[88] 31 L.P.R.A. sec 5141.

cases of violence between unmarried couples, between married couples governed by a separate property regime or between married couples governed by a community property regime, although the aggressor has private property, the petitioning victim can obtain compensation for damages suffered. When married couples governed by community property law whereby the aggressor does not own private property, the victim if she is not the wife (that is, the concubine), could recover damages also against the community property of the aggressor and his wife.[89] Under that possibility, the question arises, then, of the remedies open to the wife of the aggressor if she is the victim.

It could be argued in the latter case that expenses listed in the local law are part of the responsibility of community property.[90] That implies, consequently, that owing to the aggressor's abuse, the victim not only suffers the effect of physical or emotional violence but her eventual participation in community property is also at risk. On the other hand, since generally, the man is the aggressor in most cases, and, at the same time, controls access to community property assets, the woman victim of domestic violence is impeded from incurring in incidental expenses related to her flight from the conjugal home, medical assistance, psychiatric or any other kind of help.[91]

The provisions of Law 54 that compensation will proceed from the private property of the petitioned party could be interpreted, however, in that the total sum of payments will be attributed to the aggressor by dint of intentional criminal conduct, even though the community property responds in a subsidiary manner. In this way, his participation in community property at the moment of its liquidation for any reason will be reduced by the total sum paid for the damages caused by his violent conduct toward his spouse. In this way, the public policy of restitution and civil action for damages of Law 54 are upheld. Likewise the Civil Code provision that each spouse respond individually to the fines and decisions imposed upon them.[92]

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[89] Civil Code art. 1310, 31 L.P.R.A. sec. 3663.

[90] *Id.* art. 1308, 31 L.P.R.A. sec 3661.

[91] See Kantara vs Castro, 94 J.T.S. 4, pp. 11437,11440 (Judgment) (Justice Naveira de Rodón, concurring)

[92] Civil Code art. 1310, 31 L.P.R.A. sec. 3663

The Supreme Court of Puerto Rico in cases involving parents and children, has established the public policy of family immunity in the sphere of extra-contractual civil responsibility. The concept of family unity applies whether the children were born within the marriage or out of wedlock. This doctrine "has changed considerably," since the initial ruling 45 years ago in *Guerra v. Ortiz,* [93] or at least the attitude of the Court has been zigzagging."[94]

Thus, civil action for damages of children against their parents has been deterred, justified on the basis of family harmony and unity,[95] except when the outlay of the compensation can be covered by an insurance company[96] or, according to the Supreme Court, when the family no longer exists to protect.[97]

The Supreme Court has readily faced the controversy—whether civil action for damages can be brought by one spouse against the other—in only one instance, *Serrano v. González,* in 1948.[98] At that time, the doctrine established that compensation received for damages sustained by the male or female spouse, was community property. Not until 20 years later, in *robles ostolaza vs. u.p.r.*,[99] did the philosophy change so that the compensation received in a civil action for damages became private property.

The state of law in 1948, up to 1976, made it incumbent upon the husband to administer the community property. Therefore, it was up to him to decide whether to sue even if it was the wife who directly sustained the damage. In *Serrano, supra*, the Supreme Court, ruled against civil

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The payment of... fines and sentences imposed,, could be distributed against community property after the services enumerated in Article 1308 are covered, if the debtor spouse did not have the private capital or it was insufficient; but it will be charged to satisfy the concepts mentioned at the moment of liquidating the society.
Sepúlveda v. Maldonado Febo, 108 D.P.R. 530, 532-533 (1979); Lugo Montalvo v. González Mañon, 104 D.P.R. 372, 374 (1975).

[93] 71 D.P.R. 613 (1950)

[94] Demetrio Fernández, Las acciones contra familiares: Análisis de un problema claro y una jurisprudencia confundidad, 2. REV. DE LA ACADEMIA PUERTORRIQUEÑA DE JURISPRUDENCIA Y LEGISLACIÓN 1 (1990)

[95] *Martínez v. McDougal*, 93 J.T.S. 63 p.10648

[96] *Drahus v Nationwide Ins.*, 104 D.P.R. 60 (1975)

[97] Fournier vs. Fournier, 78 D.P.R. 430 (1955) This case is about an action for damages of a minor against her father as a consequence of his having murdered his former wife, her mother.

[98] 68 D.P.R. 623 (1948)

action for the wife, concluding that, as a married woman, she lacked the capability to bring an action against community property and, therefore, the claim could not be grounds for a suit. Given the legal stipulations and judicial interpretations of that time, it was impossible to consider a possible action for damages between spouses.

The *Robles Ostolaza* case not only established the personal character of compensation received for damages sustained by one of the spouses, but, as a sequel, since it dealt with a personal asset, aggrieved women could now turn to the court to argue their rights for damages without the concurrence of their husbands.[100]

In *Quintana v. Longoria*[101] in 1982, the Supreme Court again faced a claim for extra-contractual damages of a wife against her husband, by way of a suit against a co-party, for damages sustained by his fraudulent administration of their community property. On that occasion, the Court did not state a general public policy over whether a damage action between spouses could ensue. The Court did, however, resolve the specific case by pointing out the following:

> "Regarding damages experienced by the actions [of the husband]... she only stated that in a general way she was slightly nervous and that she took medication. The evidence is not convincing. Such a situation appears to be normal, more a result of problems, inconveniences and anguish that a woman goes through when her marriage ends in divorce after 27 years and she is forced to go to the courts to respond to this failure. The remedy results in costs and professional fees."[102]

Even though the action for damages is not expressly admitted, it is not only because it deals with an action between spouses. In saying that " the evidence is not convincing," the Court seems to insinuate that had the evidence been convincing and had it indicated an "abnormal" situation, indemnity for damages would have been granted.

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[100] *Id.* Civil Code art. 93, 31 L.P.R.A. sec. 286.

[101] 112 D.P.R. 276 (1982)

[102] *Id.* P. 293 (citation omitted)

In Article 1313,[103] the Civil Code contemplates the possibility of a spouse or her heirs bringing a suit against the other spouse for damages that he could cause the community property by unilateral acts in acquiring or disposing of property dedicated to his economic activity, be it a profession, industry or business. However, it specifically states: "This action will only be exercised at the moment the community property regime ceases to exist." It is notable, therefore, how this action expects to recover damages to community property (if anything remains after the dissolution of the regime) and is mute regarding the damages sustained by the plaintiff.

More recently, in *Ramos vs. Caparra Dairy*, [104] in the Supreme Court's ruling to allow the adjudication of a set-off suit that was never formally initiated between the defendant and the co-plaintiff mother, accused as co-causer of the injury suffered by the death of her son. The net effect would be that the mother pay the father and brother of the victim a sum commensurate with her responsibility. The defendant paid all of the judgment that corresponded to the other plaintiffs and subtracted from the amount she had to pay the mother, a sum that proportionately corresponded to her concurrent negligence. In this manner, through the doctrine of set-off, the Court indirectly acknowledges litigation between family members. Ultimately, the final outcome is the same that a lawsuit against a party between family members and co-plaintiffs would have produced. In this case the mother and father were divorced and the minor plaintiff was the brother of the father of the dead child. But the Court did not clarify, as it did in the case of *Fournier vs. Fournier*, [105] that a family constituted as such did not exist, a fact which permitted the set-off action. It was necessary to deduce that this leveling action would operate only in those cases in which the family remained intact.

[103] 31 L.P.R.A. sec 3672.
[104] 116 D.P.R 60 (1985).
[105] 78 D.P.R. 430 (1955)

In *Miranda vs. E.L.A.*, [106] the Supreme Court re-established the doctrine that when a co-causer and accident victim is chargeable with negligence, his or her concurrent culpability may be opposed by third parties entitled to compensation for damages, that is, the co-plaintiffs who are also assignees or relatives of the actual victim, and have their compensation reduced proportionate to the negligence imputed to the victim. In that way, when the situation is one of concurrent negligence in which the actual victim is chargeable the defendant only has to compensate the co-plaintiffs, including the victim, proportionate to the victim's negligence. Eliminated in these cases is the possibility of set-off or compensation, and, therefore the indirect effect equivalent to extra-contractual litigation is not produced.

However, in situations similar to *Ramos vs. Caparra Diary, Inc* ,[107] where the immediate victim is not chargeable with negligence for age or mental condition, but a co-plaintiff- relative is charged, the compensation to his parents or assignees who did not contribute to the damages will be paid by the defendant. Using the set-off factor, the defendant could lower the compensation to the co-plaintiff co-causer party until the remaining co-plaintiffs are reimbursed for what was paid over their corresponding degree of negligence. In other words, the Ramos doctrine remains intact, implying, as previously mentioned, indirect acknowledgment by the Supreme Court of litigation among relatives.

Even though, at face value, the compensation doctrine in concurrent negligence cases is neutral from the point of view of gender-based discrimination, the doctrine has a disproportionate effect on women in those cases in which the actual victim is legally unqualified (especially in the cases of minors), and thus can not be charged yet a relative caring for the victim is charged with concurrent negligence. Due to the stereotypical pattern that holds women responsible for looking after children and other persons lacking legal capacity, in most of the cases in which concurrent

[106] 94 J.T.S. 152, p 519.
[107] 116 D.P.R. 60 (1985).

negligence is imputed to the caretaker, the mother, the woman, will be held responsible for part of the damages.[108] Thus, it is the woman who will see her personal compensation reduced, according to the negligence attributed to her and also regarding the amount the defendant pays to the other relatives.

Nonetheless, it's worth asking whether the activity of caring for a child or the disabled benefits the community property, in which case the damages produced by one or the other spouse by concurrent negligence is a responsibility of the community property.[109] If so, compensation of the defendant will not come from personal indemnity of either co-plaintiff spouse, which is individual, but from the community property. In this case, the net result to the spouses is equivalent to establishing that the defendant pay the co-plaintiffs, as indirect victims, only up to the portion of his negligence, but pays total compensation to the minor or the disabled, as direct victims. Payment over and above the corresponding portion of negligence can be dispensed by the defendant in equal shares by setting-off the payments corresponding to the co-plaintiff spouses.[110]

In any case, by either reducing the amount of personal indemnity to the mother co-plaintiff co-causer of the injury or filing a claim for compensation against the community property, the resulting implication is equivalent to an extra-contractual suit of one spouse against the other and of the children against their mother or father. If the negligence of a spouse can be imputed to community property, however, it could lead to a suit against the community property by family members.

If the Supreme Court insists on upholding the doctrine of family immunity, this action can only occur if a person outside the family is accused as co-causer of the injury, because by way of

[108] Torres Pérez v. Medina Torres, 113 D.P.R. 72 (1982); Ramos Acosta v. Caparra Dairy, Inc., 113 D.P.R. 357 (1982); Ramos v. Caparra Dairy, 116 D.P.R. 60 (1985)

[109] Lugo v. González, 104 D.P.R. 372 (1995)

[110] We are aware that the compensation for the parents will be reduced, which is personal, when the obligation belongs to community property but this facilitates the transfer of funds to the minors because of the indemnity that is theirs

the direct setting-off doctrine, the co-causer father or mother indemnifies the child and the other spouse with moneys from the defendant, not with community property funds.[111]

We believe that Law 54 of 1989 impedes the establishment of the doctrine of conjugal immunity regarding extra-contractual suits that arise from domestic violence. To impose conjugal immunity with respect to extra contractual civil actions that ensue from conduct that constitutes domestic violence, conduct which is willful and intentional, " could be considered as a rejection of the constitutional guarantee of equal protection before the law "[112] since the right to legal action is acknowledged for other victims of domestic violence.

On the other hand, if an action for damages is initiated under federal law in a state court, local courts are restrained from rejecting the suit based on the doctrine of conjugal immunity because that would constitute a violation of the supremacy clause of the Constitution of the United States.[113] Furthermore, to admit an action under federal law and reject the action for damages under local law would foster claims under federal law, to the detriment of and disregard for local law.

Considering the fact that the victim is a woman in nearly 93 per cent of domestic violence cases, impeding an action for damages for intentional physical and mental aggression, could be considered as having discriminatory impact against women since conjugal immunity in these cases would be aimed at protecting the man. Similarly with regard to family immunity before extra-contractual civil actions in the cases of a parent's unfounded refusal to recognize a child born

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111 In light of our realities and comparative law, the Supreme Court should revise the doctrine of family immunity regarding extra-contractual actions. Litigation between relatives is unknown. It takes place in the areas of inheritance law, contract obligations and others. Nothing else needs to be said so that we all recognize the right to damages that, because of its judicial creation, is probably the most modern areas of law. We cannot be blind to our social reality. Fernández, *supra* note 94, p 8.

112 Price v. Price , 732 S.W 2d 316, 320 (Tex 1987).

113 That clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state sball be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Art VI, Cl 2.

within or outside the marriage and in those cases in which the provider, male or female, without justification fails to fulfill their obligation to feed the child. [114] The absence of voluntary recognition of filiation is a problem exclusively caused by men. Likewise, the large majority of providers are the fathers, since the mothers retain or are granted custody of the children. With the doctrine of family immunity not only is the man and his assets protected but his refusal to fulfill legal responsibility and moral duty consequently increases the burden of their children on the mother. That is another manifestation of violence against women.

One of the limitations of Puerto Rico's legal code for action for damages against the spouse is the prescriptive term of one year to take action because some incidents of violence could remain outside the court's consideration unless the principle of continuous tort is applied to these cases. Through this principle, repeated acts of violence occurring prior to the year the complaint filed would be considered as part of the last injury sustained because it deals with continuous conduct.

Jurisprudence of The Supreme Court of Puerto Rico Related to the Problem of Domestic Violence

Not until the decade of the 1980s did the term "domestic violence" appear in the jurisprudence of the Supreme Court of Puerto Rico [115] The problem, however, had already been reflected in innumerable decisions involving murder, homicide and assault committed by men against their wives, former wives, companions, lovers or concubines.[116] In 1981, a few years before the Law to

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[114] Martínez v. McDougal,93 J T.S. 63, p.10648

[115] In the United States, the problem of violence against women begins to gain importance among feminist groups in the 1970s. During this epoch the term "domestic violence is coined to refer to marital and spousal abuse See ANN JONES, NEXT TIME SHE'LL BE DEAD 1-17 (1994)

[116] On murders or homicides see , Pueblo v. Delgado Ramírez, 91 J T.S. 63; Pueblo v. Cepeda Rivera, 90 J.T.S 6; Pueblo v. Gómez Nazario, 121 D.P R 66 (1988); Pueblo v. Torres Rodríguez, 119 D.P.R 730 (1987); Pueblo v. Montes Vega, 118 D.P.R. 164 (1986);Pueblo v. Castro García, 110 D.P.R. 644 (1981); Pueblo v. Guzmán Toro, 107 D.P.R. 700 (1978); Pueblo v. Belmonte Colón, 106 D.P.R 82 (1977); Pueblo v. Sulman, 103 D.P R. 429 (1975); Pueblo v. Prados García, 99 D.P.R 384 (1970); Pueblo v. Pantoja Aguayo, 97 D.P.R. 236 (1969); Pueblo v. Cruz Pabón, 87 D.P R 751 (1963); Pueblo V. Serbiá Bonilla, 75 D.P R. 394 (1953); Pueblo v Segarra, 70 D.P R. 484

Prevent and Intervene with Domestic Violence was passed, Associate Justice Miriam Naveira de Rodón used the term for the first time in her individual vote in Pueblo v. Esmurria Rosario.[117]

In that case the Supreme Court confirmed, through a judgment, the decision of the lower court which declared the appellant guilty of murdering his business partner and lover. The Court did not allude in any way to the underlying problem of violence against women. Justice Naveira, on the contrary, dedicated most of her individual vote to a discussion of the problem, emphasizing that domestic violence is one of the social ills that most affects Puerto Rico and that the problem transcends social classes. She stressed the gravity of the problem as the basis for denying the appellant a suspended sentence

The opinion of Justice Naveira in this particular case leaves no room for doubt about her central role in our highest court regarding the discussion about violence against women. She pointed out that the existence of an intimate relationship between the parties does not alter the severity of the crime. In this respect she said:

> The judgment in this present case recognizes the high degree of violence contained within its circumstance. The fact that the victim was the lover of the appellant, that the commission of the crime involved a high degree of emotional content, and that it dealt with what has been denominated a crime of passion, should not be factors that have the effect of minimizing the nature and gravity of the criminal act committed.[118]

In addition, Justice Naveira issued a call to the justice system to respond affirmatively to the grave situation that women in our country face and underscored the importance of the Judiciary as a protagonist in the process of combating this social ill:

(1949); Pueblo v León Martínez, 53 D.P.R. 415 (1938); Pueblo v Torres 39, D. P R 605 (1929); Pueblo v. Rodríguez Dapena, 35 D.P.R. 431 (1969), Pueblo v Torres, 34 D.P.R. 651 (1925); Pueblo v Garcés, 29 D.P.R. 1029 (1921); On assaults or attempted murder or homicide see, Pueblo v. Rivera Carmona, 108 D.P.R. 866 (1979); Pueblo v Fernández Vázquez, 76 D.P.R. 604 (1954); Pueblo vs Cintrón, 53 D.P.R 415 (1938); Pueblo v Jiménez, 48 D.P.R. 14 (1935); Pueblo v. Ortiz, 45D.P.R. (1933); Pueblo vs. Colón, 39 D.P.R. 118 (19299); Pueblo v. Correa, 34 D.P.R 884 (1926); Pueblo vs. Ruiz, 31 D.P.R. 312 (1922); Pueblo v Bonelli, 19 D.P.R. 69 (1913); Pueblo v. García, 18 D.P.R. 570 (1912).

[117] 117 D.P.R. 884 (1981).

[118] *Id.* p.892.

> If we cannot handle cases of violence, in this specific case against women, with the appropriate judicial focus and interest, we run the risk of having those crimes considered as trivial and insignificant. For those reasons, we judges cannot ignore the severity of these crimes, particularly, those committed against women. To minimize their importance would be to limit the effectiveness of intervention in these kinds of cases and would aggravate an already enormous social problem.[119]

After the passage in 1989 of the Law to Prevent and Intervene with Domestic Violence, one of the first cases to reach the Supreme Court was *Pueblo vs. Lacroix Correa*,[120] in which the petitioner was charged with violating Article 3.2 of this special law and Article 260 of the Penal Code on disturbing the peace. His conduct was described as follows:

> The petitioner Alejandro Lacroix Correa lived consensually for one (1) year with the victim Lizette Malcún Valencia. The relationship ended on September 15, 1988 because every time he became intoxicated, he assaulted and insulted the victim, making cohabitation impossible.
>
> Two (2) months later, as Lizette waited for the light to change at an intersection, the petitioner physically and verbally assaulted her again. On that occasion, he introduced his right hand through the window of the car in which she was a passenger, and smashed his fist under her cheek calling her a "dirty whore bitch." Immediately afterwards he challenged her neighbor Mr. Luis Maldonado Bonilla, who rode with her in the car, to fight.[121]

The accused pleaded guilty to disturbing the peace and aggravated assault to a lesser degree, as a result of a plea bargain arrangement made with the consent of the victim. The Superior Court, founded on the recommendations of the report of the Office of Probation Officers, sentenced the accused to six months in jail for each crime, to be served consecutively, and denied him the benefit of a suspended sentence.

By means of a sentence (which does not establish precedent) and because the petitioner had no prior record, the Supreme Court modified the decision of the court of first instance, granting the accused the benefits of a suspended sentence under certain conditions: that he abstain from imbib-

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[119] *Id.* pp. 893-894.

[120] 90 J.T.S. 124, p. 8215 (Sentence)

[121] *Id.* p. 8217 (Justice Rebollo López, dissenting)

ing alcoholic beverages, submit to treatment for alcoholism and abstain from establishing contact with the aggrieved woman.

Of great interest in this case is the opinion of the probation officer contained in his report to the lower court, as cited in the Supreme Court judgment:

> Regarding the case under our consideration, the report as presented by the Office of Probation Officers reveals that: the petitioner Lacroix Correa has no prior record, holds a bachelor's degree in accounting; he has a history of employment, currently working as a sales representative for a car rental company earning a monthly salary of $1,580.00; he is the father of two adolescent children from a former marriage, who depend on him. Said report also reveals, according to the probation officer who presented it, that the Petitioner manifests "....adequate *social conduct* excepting a *distorted vision* of the feminine figure as a consequence of his past marital experiences. This incites him to become aggressive toward women when he comes into contact with liquor."[122]

Clearly, all of this seems to indicate that the probation officer gave little importance to the "distorted vision of the feminine figure" and to the highly aggressive conduct of the petitioner since the probation officer underscored that the petitioner observed adequate social conduct. On the other hand, in considering that the petitioner's past marital experiences caused his conduct, he gives the impression that, possibly, the woman herself is responsible for that "distorted vision." Compounding that fact is that alcohol also seems to be held responsible for anti-social conduct and not the person who gets intoxicated and contributes to it. In every respect, the aggressor is converted into a victim who needs to be rehabilitated instead of sanctioned

Worth noting is that on the basis of the probation officer's report, as the Supreme Court itself indicates, the majority granted the benefit of the suspended sentence. Although the judgment could have been based primarily on the arguments in the first paragraph of the preceding citation, there is no doubt that it gives the impression of echoing, or of sharing, conclusions that are apparently based on stereotyped visions and discriminatory cultural patterns which have been amply identified and documented in the current literature on the subject. The High Court could be giving

[122] *Id.* PP. 8216-8217. (Emphasis added).

the impression of fostering or reaffirming mistaken postures on the part of lower courts regarding the problem of domestic violence, rooted in those same concepts.

Justice Federico Hernández Denton issued a dissenting opinion in this case and was joined by Justice Naveira. Both justices concurred that the petitioner suffered from a grave problem of perpetrating violence against the woman and that he must be imprisoned because he represented a menace to society in general, particularly to women. They emphasized that both the report of the probation officer and the history of the petitioner showed that the petitioner had previously been reported for assaults against women he lived with, a fact that the majority paid little attention to.

The expressions of Justice Hernández Denton, who exhorted the courts not to assume a passive attitude towards the situation of violence against women, demonstrated an advanced posture at the heart of the Supreme Court. Regarding the case in question, he said:

> It is evident that, besides a prison sentence, the conduct exhibited by the petitioner requires that, additionally, he undergo psychological or psychiatric treatment to address his aggression against women. Otherwise, to suggest another solution will not only cause the petitioner to fail to fulfill his social responsibility for his criminal conduct, but he will also fail to be rehabilitated and unfortunately will continue to be a threat to the women with whom he has a relationship in the future.[123]

On the other hand, he stressed the need to understand that violence against women is a problem independent of alcohol abuse which should not be seen as justification. In this respect, it is opportune to emphasize that aggressors tend to explain their acts of violence as provoked by external stimulants, by which they attempt to down play their own responsibility for their actions. To that end, Justice Hernández Denton quoted the following from a study done by the Puerto Rican sociologist Ruth Silva Bonilla:

> Although men try to excuse their behavior occasionally alluding to "jealousy" or "drink" (González Díaz), in reality any aspect can be offered in the subjective perception of men as a reason for their aggressions against women. Thus, food that is cold or "too" hot or not ready on time; or the temporary absence of women from their homes when they arrive; that women

[123] *Id.* P.6220 (Justice Hernández Denton, dissenting).

> wear clothes they don't like; or to hear the children crying; any slight domestic episode could be escalated in the mind of the aggressors, to the category of a catalytic agent provoking their rage and violence."[124]

Pueblo vs. González Román [125] represents the first opinion in which the Supreme Court deals with the "battered woman syndrome." The facts are as follows: Marina González Román was accused of homicide after she killed her husband during an argument between them. She had been physically and emotionally assaulted by her husband on many occasions. The court of instance blocked the defense from presenting expert witness testimony on the so-called "battered woman syndrome," a novel approach within the area of legitimate defense widely discussed in North American doctrine. Defense for the accused turned to the Supreme Court which revoked said decision.

The high court's decision is of major importance since it opened the doors in our jurisdiction for the admission of expert testimony on the "battered woman syndrome," albeit within the context and complementary to evidence of self-defense. That is, it was admitted, but not as a defense per se or independently.

Arguing for the Court in this regard, Justice Rebollo examined important considerations about domestic violence and the condition of the battered woman, opening up to the most recent studies on the subject.

Regarding the "battered woman syndrome," the Court said: "Said syndrome attempts to describe a series of characteristics that are common to abused women, over a prolonged period of time, by her spouse or companion." [126] In addition, the Court quoted Dr. Lenore Walker, a recog-

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[124] *Id.* P.8219. Citation of RUTH SILVA BONILLA ¡AY!, ¡AY!, ¡AY! AMOR NO ME QUIERAS TANTO EL MARCO SOCIAL DE LA VIOLENCIA CONTRA LAS MUJERES EN LA VIDA CONYUGAL (Centro de Investigaciones Sociales, U P R.)

[125] 92 J T S 17, p.9214

[126] *Id.* p.9218

nized authority on the subject, on the requirement that the couple had to have gone through the cycle of violence at least twice before the woman is considered abused in line with the syndrome.[127]

Although our highest court established the admissibility of expert testimony on the "syndrome" in our jurisdiction, it limited itself to mentioning that said syndrome is a group of characteristics common to abused women.

The "battered woman syndrome: is based on two theories: the cycle of violence and the theory of learned helplessness. According to Dr. Lenore Walker, who coined the term, the cycle of violence is composed of three stages:

> The first is characterized by small incidents of abuse that escalate over time. The woman remains passive even though she tries to console or limit the abusive behavior of the oppressor. The second phase is the actual abuse. It is characterized by an acute act of violence in which the aggressor loses control and the woman feels powerless to stop the aggression. The last phase begins when the violence stops. The aggressor feels remorse at his behavior and begs his victim for forgiveness. As she forgives him, a tranquil period begins. If this cycle is repeated a second time, the woman is classified as abused. [128]

The theory of learned helplessness postulates that as a result of abuse, the woman "learns" that her behavior is not related in any way to the abuse she is subjected to. In other words, any action on her part would not change the situation she's going through. She feels helpless, unable to foresee or control the violence; consequently she is demoralized and deadened.[129]

Expert evidence that is presented in these cases " has the purpose of helping the judge comprehend the singular perspective—consisting of fear and character flaws—of the battered woman accused of killing her husband." Regarding this point, the Court quotes extensively from Schneider's "Women's Self-Defense Work and the Problem of Expert Testimony on Battering." [130]

> "Expert testimony can present a different picture by demonstrating that the battered woman was a victim. Introduction of expert testimony is important because a battered woman who explains a homicide as a reasonable and

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[127] *Id.* (Citing LENORE WALKER, THE BATTERED WOMAN (1979).

[128] Pueblo vs González Román 92 J.T.S 17, p. 9221 (Justice Naveira de Rodón, concurring)

[129] Lenore Walker, et al , *Beyond the Juror's Ken: Battered Women,* 7 Vt L. REV. 8-9 (1982).

[130] *González Román,* 92 J. T.S. pp. 9218-9219.

> necessary response to abuse in the home, threatens deeply held stereotypes of appropriately submissive female conduct and of patriarchal authority. Expert testimony on the experiences of battered women can also answer specific questions that are in the judge's and juror's minds of why the battered woman didn't leave her home, why she may not have reported the battery to the police, and, most importantly, why she believed that the danger she faced on the particular occasion was life-threatening. In short, it can show that her conduct was reasonable.[131]

Taking as a basis the decision of many stateside courts, on the grounds of the foregoing reason, to admit expert testimony on the battered woman syndrome within the context of legitimate defense, the Supreme Court of Puerto Rico also decided to admit it on the same terms. This implies, of course, that the requisites of legitimate defense established by Article 22 of the Penal Code on Causes to Exclude Responsibility,[132] have to concur. These are:

1. That the accused show evidence to believe danger of death or grave bodily harm are imminent;

2. That a rational need exist for the means used to impede or repel the injury;

3. That provocation did not exist on the part of the person invoking the defense; and

4. That no unnecessary injury was inflicted to repel or avoid the aggression.

Now, for it to apply to the defense, the doctrine has traditionally demanded that it be determined whether a reasonable person in the position of the accused would believe it necessary to kill the aggressor to avoid injury. This is what has been called the requisite or objective criterion. That is to say, the conduct evaluated should be what a reasonable person would have followed under the same circumstances.

In adopting the posture that the syndrome is not a defense independent of legitimate defense, the majority opinion in *Pueblo vs. González Román* made the objective criterion equally applicable in cases of battered women accused of killing their husbands or companions. Nonethe-

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[131] SCHNEIDER, WOMEN'S SELF-DEFENSE WORK AND THE PROBLEM OF EXPERT TESTIMONY ON BATTERING. (1986). Translation by Commission in orginal text in Spanish

[132] 33 L.P.R.A. sec. 3095

less, in its argument, it appears to recognize, regarding such special cases as these, the need to consider the emotional state of the accused as an abused woman.

The above, however, was not completely clear, which was what led Justice Naveira to issue a concurring opinion in the case. In that opinion she explains objective criterion:

> Said criterion does not permit the judge of the facts to consider any particular characteristic of the accused. Therefore, it is not adequate to apply it to an abused woman since it doesn't permit the judge of the facts to consider the personal experience of a woman in a relationship of repeated abuse. Since this criterion does not take into consideration the effects of violence or the warnings or threats of future violence, the courts that have recognized the circumstances of an abused woman have adopted a criterion denominated subjective that is broader than the objective. Accordingly, the courts should allow the judge of the facts to determine if the circumstances are sufficient to induce the accused to honestly and reasonably believe that she had to use force to defend herself from imminent harm. The basis to support this is that the conduct of the abused woman should be evaluated on the basis of a criterion that contemplates the circumstances that gave rise to her behavior.[133]

Further along she adds:

> In cases of abused women it is justified to apply the subjective criterion of reasonability in determining whether legitimate defense ensues or not. Interpreting legitimate defense under this new perspective requires that we liberalize its applicability in the light of complex situations encountered by the victim of abuse. An abused woman, albeit acting in self defense, frequently does so in a way that does not conform to the traditional elements and concepts of that defense.[134]

The statements of Justice Naveira, without a doubt, summarize the most current opinions on the subject. Justice Hernández Denton also issued a separate opinion which follows the same direction as that of Justice Naveira.[135] In affirming the importance of expert testimony in these cases, he indicated that the expert can testify about the reasonability of the accused's belief that injury was imminent. To do that, of course, her mental state must be considered.

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[133] González Román, 92 J.T.S. p 9221. On this point, Associate Justice Naveira de Rodón cites W Steele and C.W Sigman, *Re-examining the Doctrine of Self Defense to Accommodate Battered Women*, 18 AM J, CRIM L. 169,170 (1991) and R. J. Willoughby, *Rendering Each Woman Her Due: Can a Battered Woman Clain Self Defense When She Kills Her Sleeping Batterer?*, 38 KAN. L REV 189-191 (1989).

[134] *Id*

[135] *Id.* p 9222

The case of *Marina González Román* reached the attention of the Supreme Court again. Through an opinion of June 20, 1995, our highest court reversed the verdict of a jury that had found González Román guilty of homicide and acquitted her. The opinion of the Court was issued by Associate Justice Hernández Denton. Associate Justices Fuster Berlingeri and Negrón García dissented in written opinions.[136] Associate Justice Rebollo López dissented without an opinion.

The Court concluded:

> As a manner of summary and conclusion, we reiterate that the proof of the Public Ministry demonstrated that a struggle took place between González Román and her husband unprovoked by her and that she, perceiving her life threatened with lethal weapons, a knife and a hammer, had to defend herself. The action of González Román falls within the traditional scheme of legitimate defense since it fulfills the requisites of Art. 22 of our Penal Code.[137] Under these circumstances, it is not necessary to consider the applicability ... of the battered woman syndrome as a complement to legitimate defense.[138]

At the beginning of its opinion, the Court discussed the use of the battered woman syndrome in the courts. It pointed out that the syndrome does not constitute an absolute defense exempt from responsibility"

> Its application is circumscribed to those cases in which the action of the woman victim of violence does not fall within the traditional framework of legitimate defense, by the apparent inapplicability of the requisites of imminence and reasonableness that Art 22 requires.[139]

The High Court, in its decision, pointed out that the syndrome is particularly applicable in those cases where the abused woman does not kill her aggressor-companion while he is abusing her but that she does so in a period of relative calm. Likewise, it mentioned that the syndrome is also

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[136] Associate Justice Negrón García dissented because he considered the majority opinion to be based "on a factual configuration not borne out by the evidence believed by the jury." Associate Justice Fuster Berlingeri dissented because he felt conflicting versions of the facts existed. He concluded, therefore, that the appellate court was obliged to respect the jury verdict since neither passion, prejudice nor manifest error was proven.

[137] 33 L.P.R.A. sec. 3095

[138] *Pueblo vs. González Román*, 95 J.T.S. 86, pp. 983, 989-990. (Footnote omitted).

[139] *Id.* p. 987.

used in those cases where the woman kills her aggressor during an attack whereby she was not threatened by a lethal weapon.[140]

The Court explained that in both cases expert testimony should be presented jointly with evidence of specific acts of the victim, as set out in *Pueblo vs. Martínez Solís*.[141] In that case, the Court gave a liberal interpretation to the statute of legitimate defense since it permitted the presentation of evidence about specific prior actions of the victim. In that case, presenting evidence about specific acts was aimed to prove to the jury that the murder victim had been the first to attack and so corroborated the accused's version of the facts.

The decision to absolve *González Román* despite the jury's condemnatory ruling , was due to the fact that the Court believed that an error in law had been committed that merited revocation. The jury erred in not determining that they faced a case in which all the requisites to prove legitimate defense were present. The Court stressed that the Prosecution could not prove the culpability of the accused beyond a reasonable doubt, thus her acquittal was in order.

In explaining that the evidence presented showed all of the requisites required to invoke legitimate defense, our highest court declared:

> It was proven that a struggle ensued between González Román and her husband in which she was threatened with a lethal weapon. She had reason to believe that she was in imminent danger of death or grave bodily harm; she also had reason to impede or repel the injury because her life was in danger at the hands of an armed man who was intoxicated and whom she knew to be violent.[142]

In its discussion, the Court considered the prior knowledge of the accused of the her companion's violent character. In this way, it applied the concept of broader legitimate defense, which

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[140] In cases in which the abused woman kills her aggressor under confrontational circumstances in which she was not threatened with a lethal weapon, it is necessary to take into account her knowledge regarding force and violence shown by the aggressor on previous occasions in order to demonstrate that, at the moment she killed him, she reasonably believed that her life was in danger. Naturally, being choked, punched or kicked, among other things, can cause death as much as being shot or knifed

[141] 91 J.T.S. 29, p. 8480.

[142] González Román II, 95 J.T.S. p. 988. (Emphasis added).

puts aside the traditional objective criterion and moves closer toward the subjective criterion which *Pueblo vs. Martínez* introduced. In adopting a more flexible criterion to interpret the statute of legitimate defense—a hybrid of objective and subjective criteria—the Supreme Court of Puerto Rico assumed an advanced position that will help abused women obtain justice in the courts of our country.[143]

Recently, there has been a discussion over the "battered woman syndrome" and the disadvantages of expert testimony on that "syndrome" when abused women kill their husbands or companions. The debates have arisen over the following points: (1) risks of greater victimization and stereotyping of women, (2) concerns over the exclusive application of the syndrome to a limited number of abused women, (3) the limitations of this theory in view of other theories that support the capacity of abused women to take action and place them in positions of active resistance, instead of positions of progressive helplessness and passivity.[144]

Ann Jones has commented on the negative effects that expert testimony on the battered woman syndrome in criminal proceedings can have against the women themselves:

> Trying to explain to jurors why women who killed battering men hadn't simply left, experts argued that battering leaves many women with a sense of helplessness. The courts, which at first refused to admit the expert's testimony, have now accepted the concept of "battered women's syndrome" with a vengeance. They have whittled the legal understanding of "battered woman" to such a fine point that few living women fit the description. These days, battered women who got angry, or fought back, or called the cop, or took the batterer to court, or bought defensive weapons, or left,—which is to say, most women who are battered—don't qualify as "helpless." Put up against the legal definitions of the "battered women's syndrome", they seem to be impostors—

[143] We should point out that even though the Court did not deem it necessary to apply the battered woman syndrome to this case, since all the requisites of a legitimate defense approach were present, it based a large part of its presentation of the facts of the case on the testimony of expert Ursula Colón who testified about the battered women syndrome and the particular abusive situation of González Román.

144 For critiques of the battered women's syndrome and its application in the courts, see, Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994); Note, *Developments in the Law: Legal Responses to Domestic Violence* 106 HARV L. REV. 1498 (1993); Mira Mihajlovich, *Does Plight Make Right: The Battered Women Syndrome, Expert Testimony and the Law of Self Defense.*, 62 IND. L.J. 1253 (1987).

> not real battered women at all, but bad girls and heartless killers. They are punished accordingly.[145]

Despite the criticism that has been leveled against the battered woman syndrome,[146] the Commission recognizes that in many cases expert testimony about the "syndrome" is the only means available to familiarize the Judiciary and the jury with the problem of domestic violence. The "syndrome" is also a way out for women who have gone to the extreme in killing a companion who has subjected her to a pattern of constant assault and abuse.

Court of Appeals Decisions on Domestic Violence

During its brief duration, from November 1992 to June 30, 1993, the former Court of Appeals of Puerto Rico considered various cases that dealt with domestic violence. In its decisions, the Court emphasized the severity of the problem of violence against women and its grave consequences for the Puerto Rican family and for society in general. The intermediate appellate forum tackled the subject of domestic violence with a high degree of awareness about the gravity of the problem.

The importance of these cases does not exactly lay in the judicial approaches considered, but rather on their factual situation. The decisions establish as the standard for the court of first

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[145] JONES, *supra* note 114, pp 102-103 (Commission translation in the original text in Spanish)

[146] Alan M. Dershowitz, professor at Harvard University Law School, has criticized the use of the battered women syndrome as a defense. In his book titled THE ABUSE EXCUSE AND OTHER COP-OUT STORIES AND EVASIONS OF RESPONSIBILITY (1994) Dershowitz proposes that the courts have been swamped by a series of syndromes presented as defenses in murder cases and homicides, for example, the battered woman syndrome, the abused child, traumatic and post-traumatic rape, among them.
According to Dershowitz, the purpose of presenting expert evidence about these syndromes is to go beyond the responsibility of the person who committed the crime to the person who abused it or in some way caused the crime to be committed. The subliminal message is that the murder victim is the real delinquent. His concern is that it encourages persons to take justice into their own hands, which increases violence.
Dershowitz's proposals have been characterized as alarmist by Charles P. Ewing, psychologist and professor of law at the New York State University at Buffalo. Ewing believes that accepting the battered woman syndrome does not represent a relaxing of standards, rather it is an effort to rectify a situation of gender-based discrimination that occurs in the judicial system and to incorporate new concepts into the law.

instance a view of the problem of violence against women free of the stereotypes which have traditionally dominated considerations on the subject, clearly aware of its severity and criminal nature.

In *Pueblo vs. Victorero Pernas*,[147] the appellant had been judged and found guilty of aggravated injuries and infraction of Article 3.3 of the Law to Prevent and Intervene with Domestic Violence(abuse by threat). The defense requested the benefits of a suspended sentence. The probation officer turned in a report to the court, recommending that the privilege be denied. The sentencing court accepted the report's recommendation and denied the petition of the defense.

As the basis for denying the suspended sentence, it was mentioned that since the appellant had married the victim he had stopped working and was supported by her. He physically and verbally abused her and consumed alcoholic beverages excessively. Despite their divorce, the appellant continued to threaten the victim with death. Later she moved to the United States where she suffered an assault that forced her to return to Puerto Rico. She permitted him to remain in her home until she recuperated. After a time, she asked him to leave. The appellant began to drink and to threaten her. On the day of the episode, he threatened to kill her and destroyed the windows of her car.

The Appellate Court took into consideration the seriousness of the facts that were reported by the probation officer and resolved that the sentencing court did not abuse its discretion in denying the appellant the privilege of a suspended sentence.

In *Pueblo vs. Miró Hudge*,[148] the appellant, a policeman, murdered his pregnant wife using his regulation firearm. The events took place at their home in the presence of their two-year-old daughter. The appellant was charged with murder in the first degree and was found guilty of murder in the second degree.

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[147] SSAP 92-0004, Sentence of November 23, 1992. Panel composed of judges Antonio J. Amadeo Murga (Deponent), Angel González Román and Liana Fiol Matta.

[148] SSAP 92-0063, Sentence of February 22, 1993. Panel composed of judges Hiram Sánchez Martínez, Jorge Segarra Olivero (Deponent) and Jeannette Ramos Buonomo.

During the trial, the defense presented evidence to establish the mental incapacity of the accused at the moment of the incident. The defense expert described the victim's murder as a "crime of passion," a product of a violent relationship and dialogue that swung between love and hate. Hate "'because she didn't cook for him or have clean clothes for him and would put on make-up," among other things.

The Appellate Court confirmed the sentence dictated by the court of first instance and determined that the evidence for the defense did not refute the presumption of sanity, rather it "demonstrated more a repeated criminal conduct of marital abuse as a response to the emotional conditions that ended with the death of [the victim]." The Court stressed that the conclusions of the expert witness for the defense "responded to a stereotyped vision of gender, which stemmed from an epoch whereby the woman victim was blamed and the male aggressor excused." The Court proceeded to point out public policy grouped in the Law to Prevent and Intervene with Domestic Violence and to conclude that, by accepting as plausible the psychological theory of the expert witness for the defense, it would have to then justify every domestic violence behavior, including its maximum expression: murder of a human being.

In *Pueblo vs. Ayala Santana*,[149] the appellant was found guilty of violating Article 3.2 of the Law to Prevent and Intervene with Domestic Violence. On appeal, it was pointed out that the application of the law was in error since the relationship between the couple was adulterous. It was argued that the purpose of the law is to combat domestic violence which constitutes a serious problem for the Puerto Rican family and that, under the protection of the law, an adulterous relationship which hardly contributes to Puerto Rico's family and social welfare should not be put on the same level with the concept of family and home.

[149] SSAP 92-0084, Sentence of May 25, 1993. Panel composed of judges Jocelyn López Vilanova, Liana Fiol Matta and Antonio J. Amadeo Murga (Deponent).

The Court of Appeals resolved that the Domestic Violence Law clearly states that it is applicable to individuals who have sustained consensual relationships, independently of their civil status. The Court declared that the law protects the family and every citizen in general who comes up against a situation of violence caused by a person with whom they are sustaining, or have sustained, an intimate relationship.

In *Pueblo vs. Villegas Valcárcel,* [150] the appellant murdered his wife at their home, while the victim was carrying her four-year-old daughter and in the presence of the appellant's sister and the murder victim's other three young daughters. He was accused of murder in the first degree and attempted murder. Following a trial by jury, he was found guilty of murder in the second degree. On appeal, the appellant alleged as an error that there was not enough proof to support a guilty verdict for second degree murder.

The facts of the case, as summarized by the Court of Appeals, were the following: while he argued with his wife in front of the children, the appellant got his revolver, prepared it, put it behind the television set and later under his belt. He sent for his sister and when she arrived, the appellant had the victim grabbed by her hair. She was carrying her daughter at the time. The appellant then shouted: "I'm going to kill this bitch." The appellant himself later admitted that the victim was unarmed, that he had the weapon and that he fired a shot. An autopsy revealed that the cause of the victim's death was the laceration and perforation of internal organs due to two bullet wounds.

The Court of Appeals determined that the evidence before the jury would have been enough not only to declare him guilty of murder in the second degree but also to sustain a verdict of first degree murder. The sentence imposed by the court of first instance was confirmed.

[150] SNAP 93-0007, Sentence of June 4, 1993. Panel composed of judges Jeannette Ramos Buonomo (Deponent), Hiram Sánchez Martínez and Jorge Segarra Olivero

In *Pueblo vs. Pietri Villanueva*,[151] the People of Puerto Rico appealed a decision of the court of instance in which the 10-year sentence imposed on the respondent (Pietri) for killing his wife with a hammer was suspended. According to the sentence dictated by the Court of Appeals:

> The body of the [victim] was found between the bed and the dresser. It showed blows on the face and the head. The skull was destroyed. There was blood on the floor and the walls. A hammer and a piece of a blade were confiscated. The hammer, bloodied, was lying on the dresser. The knife blade also had blood. A bloody mop was confiscated. The pathologist noted eighteen (18) lacerations shaped like a half-moon on the right side of the face, four (4) lacerations on the left side of the head, laceration and evacuation of the right eye, laceration of the right eyebrow, laceration and cuts on the left cheek, abrasions on the neck, bruises on the stomach and the navel. All produced by hammer blows. The brain was lacerated in those areas where the bone compressed it. The right eye had burst but within its orbit. The wound could have been produced by a knife or any other sharp, pointed object. The victim was facing forward.[152]

It was also revealed that the respondent had said that his wife was going to leave him and that he could not live without her, which is why he killed her.

The respondent was accused of murder in the second degree and was found guilty of homicide. The court sentenced him to ten years in prison, but suspended the sentence after a probation report in which the official investigator abstained from making recommendations. In his report, the officer said that the respondent had not expressed remorse.

The court of instance based its decision to suspend the sentence on diverse grounds. It mentioned that the benefits of the Law of Suspended Sentences are applied to crimes that do not represent a great threat to society. The standard to determine whether the benefit is granted is whether the convict possesses a moral defect of such magnitude as to make his imprisonment necessary. It explained that the purpose of the sentence should be rehabilitation, not vengeance. The court concluded that Pietri's conduct had been exemplary before the crime and therefore, deemed it

[151] SSCE 93-0050, Resolution of April 7, 1993. Panel composed of judges Liana Fiol Matta, Antonio J. Amadeo Murga and Angel González Román.
[152] *Id* p 6

an ideal case to suspend sentence. It emphasized that the judge has the discretion to grant the benefits of a suspended sentence.

Like *Villegas Valcárcel,* in the *Pietri Villanueva* case the Court of Appeals found that the evidence was sufficient to justify a murder verdict. To that end it ruled that:

> Although the judge in this case generously gauged as homicide what was clearly a murder, his determination on whether to suspend sentence or not should have considered the facts behind the description of homicide in order to have exercised his discretion on whether to grant the suspended sentence or not, and to consider if the facts of extreme unprovoked violence, warrants under our Law of Suspended Sentences and our public policy, suspending the sentence.[153]

Contrary to what the sentencing court understood, the Court of Appeals, demonstrating its awareness of the degree of violence used by the appellant against his wife, to the point of killing her, and the social impact of that violent act, pointed out:

> The cold, disdainful words on the part of Pietri's wife towards him do not justify any aggression and much less the display of brutal violence against her. The harm to their children and relatives is incalculable and permanent. Further, we cannot see the effects of the gravity of his acts limited solely to the children and relatives of the deceased. The community also suffers, despises itself, is demoralized. Every violent death that is not provoked generates pessimism and anguish in the community. The violent death of [the victim] at the hands of her spouse disregards the value and quality of life in our community and underestimates the need for community safety when faced with persons like Pietri. To not react proportionately to the gravity of the act further mortifies the community and diminishes interest in life which is the supreme value that must be protected in every organized community."[154]

The Appellate Court resolved, then, that the court abused its discretion in suspending sentence and, thus, revoked the decision. Judge Fiol Matta, for her part, issued a concurrent vote in which she emphasized the need for the courts to be fully aware of the social problem of violence and, especially, violence against women.

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[153] *Id.* p 17 (citations omitted)
[154] *Id.* p 17-18.

Analysis of Findings

The investigation conducted by the Commission showed that discrimination on the basis of gender is particularly significant in the application of Law 54.[155] The influence of stereotypes associated with both genders, above all women, is negatively affecting the effective prosecution of domestic violence cases.

Although the Commission's investigation focused on the sphere of the courts, the results in the specific case of Law 54 forces consideration of the criminal justice system as a whole, since the attitudes observed in every component are mutually reinforced and are responsible for the marked resistance against the law and the many impediments that obstruct its implementation. The criminal justice system includes: the Police, Department of Justice, the Courts and the Corrections Administration. It also includes lawyers who, by definition, are officers of the courts.

It is worthwhile noting, however, that a number of judges show a commendable disposition to validate the public policy of the law. Our investigation revealed some judges who are sensitive to the problem and others who genuinely want to study the subject in depth. So much so that members of the judiciary are actively participating as resources in seminars and orientations about the problem geared to members of the system or to the general public. The Commission heard testimony from judge deponents genuinely interested in addressing the multiple facets of the problem.

1. Domestic violence is minimized and trivialized in the justice system

According to declarations by numerous judges, lawyers and specialists on the subject, a common and current attitude throughout the justice system is that of minimizing and trivializing domestic violence, of discounting its importance and impact and belittling the imperative to address this type of case. The tendency is to see domestic violence as a private matter between the couple or of the family that does not warrant the intervention of the justice system.

[155] Law No, 54 of August 15,1989, 8 L.P.R.A. sec 601 *et seq.*

Specialists on the subject said that some judges, prosecutors and defense lawyers see domestic violence cases as a waste of time and as a private affair of the couple that robs the justice system of time to attend to those problems that are really important.[156] A deponent at the hearings recalled having heard a male judge express himself in the following terms: " A shooting, a knifing and a beating should be prosecuted. But a shove that happens in every marriage. Sometimes I've thought that a bullet should be forgiven."[157]

That kind of opinion obviously holds that domestic violence, as opposed to violence between strangers, should be extreme in order to judicially process the aggressor. It also shows a predisposition to consider of minor importance aggressions that could take place in a relationship. This could lead, of course, to the application of criteria in these cases that are not properly judicial. For example, in a hearing a male judge narrated the case of a sister who was a victim of domestic violence. The male prosecutor tried unsuccessfully to persuade her to drop the charges. The male judge heard the evidence and determined: "He looks like a nice young man. I'm going to give him a chance."[158] That is to say, despite the harm the victim may have undergone and the aggressor's criminal conduct, he was treated leniently because he "looks like a nice young man." The comment reflects the application of inadequate and improper standards. The underlying notion is that these cases are distinct by nature and of less importance than other criminal cases.

Trivialization leads to jokes and facetious comments about domestic violence cases. In one of the Focus Group Interviews, a male judge said: "And, finally, in criminal courts, as they said, I think the different treatment is palpable. When you have a woman accused in a case of domestic violence it becomes an event, that is, everybody talks about it, makes fun of it."[159] Sometimes these cases are normal situations, misunderstood by those who are unaware of the cycle of violence and

[156] Hearings, June 10 and 11, 1994, p.49
[157] Hearings, June 17 and 18, 1994, p.42
[158] Hearings, June 17 and 18,1994, p 58
[159] Focus Group Interview, Male Judges, pp 37-38

which lead to negative comments.[160] For example, commenting on domestic violence cases a woman judge said: " Judges themselves [say] 'Ah, that's inane' and then they settle. I have also heard my colleagues [say]: "She'll forgive him in a minute. It's not worth putting him in jail. For what? Later they'll be crying because [the husbands] are not paying support because they're in jail.''[161]

Another male judge said: "And when the domestic violence cases arrive, I believe everyone makes an effort but that's so you lower your guard. [You hear expressions like] "Another case of domestic violence, another inconvenience... She has already complained so many times against that man''' [162]

The trivialization of domestic violence is also highly frequent among the police and bailiffs. The Commission heard many comments on the subject that were similar to those offered by the Women's Affairs Commission in its annual reports.[163] One male judge mentioned, for example, that he heard bailiffs alluding to victims of domestic violence with such statements as "Another one smacked around," "Another who wants to jail her husband, "the court is full of women who were "slapped around'' over the weekend."[164] Another male judge said a bailiff told him: "But look judge, how can I go and get that man out of there... of the house... because you gave the woman a restraining order, if the man continues to pay for the house? That's not fair."[165]

2. *There is resistance among the components of the judicial system to conceptualize domestic violence as a crime*

The misconception that domestic violence is a private family matter has led many to believe that the punitive power of the State should not interfere in those kinds of situations. Further-

[160] See Introduction to this chapter.

[161] Focus Group Interview, Female Judges, pp 65-66

[162] Focus Group Interview, Male Judges, p.38

[163] See COMISION DE ASUNTOS DE LA MUJER, *Violencia doméstica: status quo,* Forum, Year 8, No 4, p. 3 (1992).

[164] Hearings, May 13 and 14, 1994, p.11.

[165] Focus Group Interview, Male Judges, p.28.

more, some justice system employees believe that domestic violence is a social, not a legal, problem and thus has no place in the courts, much less in the penal area.

The Commission heard expressions such as the following: "It deals with human sentiments. What can be accomplished socially can not be done as the Law."[166] "The Law does not respond to social reality. We want to resolve centuries of traditions with a stroke of the pen."[167] "It's preferable to settle or shelve the case in order to maintain family unity. He slapped her because he was drunk...that happens every day."[168]

Specialists on women's issues agreed that some prosecutors prefer to file charges for misdemeanors and not under Law 54. They also avowed having heard prosecutors express the following: "Something has to be done about family violence. I do not believe that lawyers, judges, prosecutors, ... in short, the legal remedies, are the most correct. The man has to be rehabilitated, not punished. The criminal process worsens the family relationship. Usually, these are good citizens who because of social pressures lose patience with their wives."[169] The subject, unquestionably, is about an opinion that is fairly rooted in our society and has been publicly discussed in the press and other media, an opinion that has even swayed prominent people in the community.[170]

The Commission believes that [the community must] break traditions that tend to justify criminal aggression which jeopardizes the constitutional rights of human beings, in this case primarily women. Domestic violence is a crime and that is how it should be addressed. Not to do so is to leave persons in violent relationships bereft of protection.

Even though the Domestic Violence Law includes important civil mechanisms and re-education and re-training programs to address the problem comprehensively, the Legislature con-

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[166] Hearings, June 17 and 18, 1994, p.44.
[167] *Id.* p.47
[168] *Id.*
[169] *Id.* p.49.
[170] It was the subject of discussion, for example, on programs of broadcast journalist Carmen Jovet and a special section of EL NUEVO DIA newspaper, June 25, 1994.

sidered it essential to also typify particular crimes. In so doing, the Legislature made clear that domestic violence is highly undesirable and unjustifiable, to the extent of requiring more severe penalties than usually required when physical and psychological aggression and sexual violence occur between strangers. The very existence of those crimes operates, in principle, as a deterrent to such conduct, but it is only truly effective when it is known that violation of the law implies consequences that the justice system is willing to impose.

Law 54 is unquestionably an advanced law as regards its series of civil, penal, re-education and retraining tools that permit dealing with the many facets of the problem and adapting the responses of the system to the particular circumstances of each case. Every instrument should be used adequately to put in practice the public policy of the Law.

3. *A negative attitude exists towards the Domestic Violence Law on the part of many lawyers*

From the moment of its passage, Law 54 has been subjected to every kind of criticism by persons who feel that domestic violence should not have been criminalized They believe that the problem should be primarily attended to by specialists in family issues. There are lawyers, both male and female, however, who give other kinds of reasons.

One female lawyer, for example, recalled how when a commission of the Bar Association was evaluating the then legislative bill on domestic violence, a criminal lawyer said the following: "Does this mean that if I grab my wife's buttocks that she could accuse me of domestic violence?" [171] This kind of statement clearly demonstrates that members of the juridical profession are just as influenced by sexist stereotypes as is any other person. In fact, it has been pointed out that, in this respect, juridical education falls short of fulfilling its function to raise awareness about discriminatory actions that violate constitutional principles and norms of great scope and significance.

[171] Hearings, June 17 and 18, 1994, p.62

During the same meeting at the Bar Association, a male law professor declared that under no circumstance would he teach that "drivel" (referring to Law 54) in his class on penal law.[172] This kind of attitude lends weight to what was previously noted about the deficiencies of juridical education in this area.

On the other hand, a female lawyer in private practice, told the Commission that on occasion Law 54 is used wrongly, explaining that women use it to get even, "including for a simple slap." [173] This constitutes, precisely, the type of statement that reflects crass ignorance of the problem of domestic violence and an attitude that tends to lessen its importance and gravity, and unlike what occurs when the violence takes place between strangers.

There were negative testimonies about Law 54 from a segment of persons interviewed. Some felt that the law is used to extract vengeance or to achieve other objectives that are alien to the public policy on which it is based. Many of these opinions are frequently served up in the press or in other mass media. Nonetheless, the Commission also heard testimony from numerous persons in favor of Law 54. Some of the complaints or criticism regarding the law could be true but in no way do they constitute the rule. To the contrary, Law 54 fulfills an important function that was explicitly recognized by the Legislature in the statement of motives of the Law: to protect the physical and mental integrity of persons in a spousal relationship.

4. The justice system confers little credibility on women in cases of domestic violence

As is explained in the chapter in this Report on interaction in the courts, generally, women as a group are granted less credibility than men. This is also an observable tendency in the sphere of domestic violence and in the whole justice system.[174]

5. The justice system usually blames women for domestic violence.

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[172] *Id.*

[173] Hearings, May 13 and 14, 1994, p.15.

[174] See the chapter in this Report on Interaction in the Courts

The latest investigations on domestic violence explain that traditional studies on the causes of the problem emphasize the woman's behavior and not the actions of the aggressor.[175] That is to say that the tendency is to see the woman as having provoked the violence by her own conduct and attitudes, putting aside the acts of the aggressor as if he were not responsible for them. Obviously, if one starts from the presumption that the woman is responsible, any version that she gives about the facts is going to be examined with a certain degree of doubt. The fact that her own body bears the marks of the violence only serves to say: "there must be a reason for her beating." That reasoning links up with the routine justification of the aggressors, who insist as a rule, that the women, not themselves, are the ones whose actions or omissions make them violent.[176] This situation is similar to what occurs in sex crime cases, in which more importance is usually given to the conduct and characteristics of the woman victim than to the criminal conduct of the aggressor.

Specialists in women's issues offered concrete examples of this re-victimization of the woman by some employees of the system. A male prosecutor explained: "Many women deserve what they get because they'll drive anyone crazy." A male judge declared: " There are many cases of women who run around with two men and are beaten when their husbands find out. She provoked it."[177] In both situations, the aggressor's conduct is not seen as important, justifying his acts on the basis of a stereotype (women drive men crazy), or a negative presumption regarding women (if a man reacts violently to a woman it's because she must have done something to provoke him). In the second example one can clearly observe the different standards regarding the sexual conduct of men and women at work. Any conduct of a woman that puts in doubt the "dignity" of the man is enough to justify any violent act against her, no mater how grave.

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[175] See the Introduction to this chapter.
[176] *Id.*
[177] Hearings, June 17 and 18, 1994, p.44

A male judge told of an incident that occurred as he presided a courtroom in a case of domestic violence. The male prosecutor requested that the case be shelved. The judge was about to accept the request when he noticed that the woman's arm was in a cast. He asked if the cast had to do with the aggression. She responded in the affirmative. Her broken arm was precisely the result of the aggression. The judge then asked the prosecutor why, if the aggression was of such a nature, he requested that the case be shelved. The gist of the prosecutor's reply was that she had looked for the aggression. The judge notified the district attorney and he did nothing about it.[178] This example, as earlier ones, shows that the problem concerns different employees of the justice system and, in that sense, goes beyond the sphere of the courts.

A specialist in women's issues noted: "I had a case of a woman which went to court on five occasions. On each occasion she went with blows, bruises and cut lips. The last time the women went, the female judge told her: If I see you here again I'm going to send you to [the women's prison.]" [179] This example illustrates that not only men blame women for domestic violence. In this case the female judge, despite evidence of violence before her very eyes, intimidated the victim with an apparently prejudiced action, negative toward the woman who had turned to the court for help.

Similarly, there are numerous examples and anecdotes received by the Commission that confirm the conclusions of the most recent studies in the sense that in these cases the woman is victimized in various ways: she is a victim of aggression and later a victim of stereotypes and cultural patterns that make her responsible for the injuries she receives.

6. *General ignorance exists among the system's employees about the cycle of domestic violence, which impedes an in-depth understanding of what occurs in those cases*

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[178] *Id* p.58.

[179] Focus Group Interview, Specialists in women's issues, p.23

Experts on the issue coincide that domestic violence has a cyclical nature that functions on the basis of a periodic repetition of three basic stages: 1) the accumulation of tension; 2) an incident of acute abuse and violence; and 3) the stage of calm, truce and reconciliation.[180] Only by knowing this cycle can a third party fully understand why the victims of domestic violence stay with their aggressor, why they don't abandon that relationship, why they often drop the charges they've filed against their aggressors.

As a result of this ignorance and lack of sensitivity, misconceptions abound about the supposed justifications for women to remain within relationships marked by domestic violence. One of the more frequent, as the recent literature on the subject points out, is that women "like to be beaten." The Commission also heard testimony in that respect. For example, a female judge commented about a male judge who, facing applications for restraining orders from women who report previous aggressions, habitually makes such comments as: " She seems to like being hit."[181]

In the same interview, another female judge spoke about the general attitude of prosecutors, both male and female. When women file charges, now and again prosecutors give the following explanation: " they like to be beaten, because they [later] go to court and repent because they want to reconcile with him." The judge added: "That is, they don't even bother to learn the cycle of violence... because generally they're not interested... They submit [the charge] because they have no choice."[182]

The foregoing implies that some prosecutors are reluctant to present charges under the mantle of Law 54 because they feel it to be a waste of time since women fairly frequently drop the charges. Employees and other personnel who intervene in these cases do not understand—due to ignorance of the cycle and characteristics of domestic violence—that women go from stages of fear

[180] See Introduction to this chapter.
[181] Hearings, June 17 and 18, 1994, p 54.
[182] Focus Group Interview, Female Judges, p 24

and terror towards their aggressors, to the stage of calm and reconciliation, also called remorse, where their aggressor has convinced them that the situation will change. On the other hand, employees often evade the fears of women who face the consequences of proceeding with the charges, especially if they depend economically on the aggressor to support them and their children. There are also pressures from parents, family and society, who make women responsible for family unity.

General ignorance about the cycle of domestic violence is why many prosecutors and judges are bothered by women who drop the charges.[183] A female judge said that prosecutors, both male and female, are fed up with domestic violence situations, describing the habit of victims presenting and later withdrawing charges as a "relajo" or joke.[184] On the other hand, a female judge interested in women's issues, told an anecdote about a woman judge who told a woman victim of domestic violence: "The prosecutor doesn't like to take on cases of domestic violence because women tend to withdraw them. [They tell them]. "If you drop the charges today don't come to me tomorrow. Look for someone else to help you."[185]

7. *The justice system discourages filing charges of domestic violence and encourages their withdrawal*

Obviously , if the attitude of justice system employees is one of annoyance and inconvenience towards persons trying to file charges of domestic violence, it is not surprising that the victims, already intimidated by ongoing situations of violence, become discouraged and opt either not to file or to drop the charges. More so if a judge, whether male or female, also assumes an intimidating attitude or projects it. In this respect it is important that in exercising their judicial discretion judges be vigilant and avoid inserting stereotypes and presuppositions that would affect women who turn to the courts for remedies.[186] At a hearing a female university professor shared the fol-

[183] Hearings, May 21 and 22, 1994, p 14

[184] Hearings, June 24 and July 1, 1994, p 30.

[185] *Id.* p.37

[186] Focus Group Interview, specialists on women's issues, p 23.

lowing example: A female judge participating in a meeting of jurists at the university said that she was forced to defend the courts and herself because she had already seen too many domestic violence cases in which women dropped the charges. For that reason, the judge established a courtroom procedure requiring that the woman victim sign a sworn statement exempting the court and the judge from responsibility and declaring that she, the victim, had refused to proceed with the criminal charge. The judge also told the woman: " I do not want to be held responsible if you turn up on the front page of El Vocero." The deponent commented that the woman would not return to the court on future occasions.[187]

On the other hand, the Commission heard testimony indicating that prosecutors tended to manipulate victims of domestic violence, making them feel guilty. They asked questions such as: "Is there affection or not?" which spurs the woman to drop the charges and forget what happened.[188]

A male judge explained that if the woman affected says in the preliminary hearing that she wants to withdraw charges, the justice system makes no effort to give her orientation regarding the relief for her and her family if she did just the opposite.[189]

When the justice system takes an active role in proceeding with the criminal action despite the reluctance of some employees, the situation is different. A female judge recounted an experience of a domestic violence case in her courtroom. The male prosecutor requested that the case be shelved because the victim had no interest in it. The judge pointed out that the reason for his request was not permitted in her courtroom because it violated public policy. Proceeding with the hearing, the prosecutor's first question was to ask the woman if she was interested in the case. The judge disallowed the question and told the woman that she had to relate what happened. Scared and

[187] Hearings, June 24 and July 1, 1994, p.38.
[188] Hearings, June 10 and 11, 1994, p 43
[189] Hearings, June 17 and 18, 1994, p 60

trembling, the woman said that her companion had assaulted her for not eating certain foods, among other reasons. She also told about several incidents of assault and of having pressed charges in each one. All of the charges had been dropped. The case being aired, for the crime of threats under Law 54, was the only one that went beyond the stage of probable cause.

The multiple stages in a criminal procedure can have a discouraging effect in these cases. To a person already intimidated by a relationship marked by domestic violence, entering a court environment, unknown to her, can also be intimidating. Each stage in a criminal proceeding represents an additional source of anxiety for her. This is compounded by having to face her aggressor, the court environment, the constant rotation of prosecutors, who have to narrate the facts again.

The justice system also discourages filing charges in other ways. The Commission frequently heard testimony about how the police, bailiffs and different employees involved in these cases often take lightly those situations brought to their attention. They don't take these cases seriously. Their constant allusion to women who drop charges suggests that this is the type of conduct they expect of them.

8. Mechanisms of orientation and support for domestic violence victims are insufficient

Numerous deponents told the Commission that the justice system does not provide adequate mechanisms to orient victims of domestic violence. Not enough employees have the knowledge, disposition and, above all, the time to offer orientation about what the victims will face in the process, about the court environment and the adversarial process, among many other aspects.

On the other hand, there are few advocates[190] who provide orientation and support in the courtroom during the processing of the cases. Furthermore, fairly frequently the courts raise obstacles and even prohibit the appearance of these persons in the court room. From the beginning, some question the presence of advocates when they go to the court. These advocates, who volun-

[190] In Spanish, consejeras or consejeros de apoyo

tarily support women victims, are not allowed to accompany them in the hearings.[191] There are also judges, some of them female, who refuse to admit advocates in their courtrooms, believing that their reputed feminist agenda threatens the court. On occasion, advocates are even ridiculed by court employees.

It is important to underscore that, according to Rule 6 of Criminal Procedure, in hearings to determine probable cause to arrest, judges have discretion to permit or not permit the presence of persons unrelated to the procedure. The same situation applies to hearings on restraining orders. But it is precisely during those procedures that victims of domestic violence need the support and orientation that advocates can give them. The public is allowed, however, in preliminary hearings and the trial process, which means that, excepting certain situations, prohibiting the presence of advocates would violate the right to public trial.

Sometimes, judges start from the premise that these support resources are going to intervene some way in the hearings, by taking the floor or behaving in some activist way that has little to do with giving the psychological support their presence represents for the victims. Clear norms are lacking regarding the role that advocates in the court must or can fulfill in the different stages of case procedures.

In one Focus Group Interview, an advocate pointed out: "... sometimes a judge will let you enter, but at other times he or she will not. They say: You have to remain outside,' And then, someone who has been supporting [the victim] at all times... has to remain outside."[192] According to expressions made to the Commission, the poor woman suffers most the lack of support resources.[193] Upper class women are generally more professionally prepared and can count on other means of support including adequate legal representation. In fact, it was noted that victims are

[191] Hearings, June 10, 11, 1994, pp. 47 and 52. Testimony of specialists in women's issues

[192] Focus Group Interview, Specialists in women's issues, p.66

[193] Hearings, May 13 and 14, 1994, p 16. Testimony of a female lawyer in private practice

treated differently in the justice system when they are accompanied by a lawyer. Although Law 54 serves to help the victims themselves to demand protection, specialists on the subject advise them to use an attorney to further guarantee that their claims will be addressed [194]

9. Justice system employees frequently, and erroneously, assume roles as conciliators in domestic violence cases

In view of the fact that the state repeatedly declares the defense of the family as the nucleus of society and responding to unconscious sexist notions and cultural patterns that hold the woman primarily responsible for maintaining family unity, many justice system employees have adopted a policy of conciliation in cases of couples whose relationship is affected by domestic violence. This is so, despite the fact that specialists on the issue say such a policy is not the most adequate. For judges in particular, this is similar to the work they must fulfill in the so-called acts of conciliation that, by law, apply to divorce determinations.

Some judges, prosecutors and court officials advise the parties and tell them how to reconcile with their spouse. They believe that their principal role is to "save the marriage"—when that institution is at stake—and the family. For that reason they put less emphasis on protecting the victims by prosecuting the aggressors, which leaves the victims defenseless

A male judge made the following point: "There is something of everything. I could give you thousands of examples. But the attitude is a little like...the marriage has to be saved, it has to be given a chance "[195]

Another male judge remarked that, in domestic violence cases, he usually tries to reconcile the parties in order to preserve the marriage. He added, however, that often his attempts at reconciliation fail because although the man is willing, the woman wants to continue with the case. That's when the problem arises, as the man lies in wait for her in any place and at any time.[196]

[194] Hearings, June 10 and 11, 1994, pp. 41 and 52; Hearings, May 21 and 22, 1994, p.13

[195] Focus Group Interview, Female judges p.39-40

[196] Hearings, June 24 and July 1, 1994, p.36

This is precisely the danger for the victim who has decided to press criminal charges when the system attempts to address these cases differently. It puts the victim at risk as does the supposed reconciliation that is sought in many of these cases. Generally, the aggressor is willing to reconcile, an option graciously put at his disposal, but this is his way of avoiding greater repercussions. Those who know and understand the cycle of domestic violence recognize that, in most cases, this "reconciliation" is merely an interval before the violence begins again, with each episode becoming more frequent and more dangerous for the women.

The use of conciliation techniques was confirmed by many other deponents. A female psychologist remarked that male and female judges and other court officials as well assume the role of conciliators. A male judge told the victimized sister of the psychologist to return to her husband because he was the father of her children.[197]

A male judge referred to a colleague of his region who habitually issued retraining orders for a maximum period of 10 or 12 days but who rarely was disposed to remove the aggressor. The reason: to give the marriage a chance to sort itself out. "In the end, you see her fighting today and tomorrow they're lovey-dovey again."[198]

A female social worker related how a female judge begged an abused woman to understand the aggressor and help him to improve himself. At the end of the hearing, the judge distributed prayers of Saint Judas Thaddeus, the Roman Catholic patron saint of the impossible.[199] This kind of reaction, however, has not been observed in those cases where the victim is a man. In those cases, the need to save the marriage does not prevail.

[197] Hearings, May 13 and 14, 1994, p.10.
[198] Hearings, June 17 and 18, 1994, p.55.
[199] Hearings, June 24 and July 1, p.32.

Evidently, actions of members of the justice system range from what could be the result of a large dosage of ingenuity to an obvious lack of foresight regarding the consequences of leaving a woman defenseless in order to attain "reconciliation."

It should be clear that judges are not the persons most apt to be marriage therapists, much less within the context of a judicial hearing. If aggressors could indeed benefit from re-education programs, these programs must not place the victims in danger in any way. These programs tend to be very complex and involve prolonged processes that require the intervention of specialists.

10. Judges often avoid the alternate provision of the procedure (Article 3.6 of Law 54) that allows the convict, under certain circumstances, to participate in a re-education and re- training program

Article 3.6 of Law 54 stipulates that once a person has been convicted of any crime typified in that Law, the court can order probation, subject to the condition that the person participate in a re-education and re-training program.[200] It is helpful to point out here, however, that in the course of the Commission's investigation few such programs were discovered to exist on the Island, especially outside of the capital. In fact, only two programs certified by the Women's Affairs Commission exist in various regional offices.[201] This situation limits the public policy of the Law and places judges in an awkward position in enforcing the remedies of that disposition.

Apart from that, it is essential to note that the Commission was told that many times judges skirt the stipulations of aforementioned article. The Women's Affairs Commission, of the Governor's Office, for example, brought to the attention of the Commission many instances—perhaps in light of the lack of re-education and re-training programs or because the aggressors also present additional problems other than violence—whereby aggressors are sent to drug and alcohol abuse programs. These programs are not effective in breaking the cycle of domestic violence, even

[200] 8 L.P.R.A. sec.636.

[201] The two programs are: Alternativas Socioeducativas, that covers the regions of Carolina, Hato Rey, Bayamón, Caguas, Mayagüez and Aguadilla; and San Juan Capestrano.

though they may be successful in attacking those other problems. Judges should take this aspect into account.

The published reports of the Women's Affairs Commission provided this Commission with valuable information regarding this point. This information was confirmed by our analysis of the sentences and resolutions issued by courts in judicial regions throughout the island. We found, for example, cases dismissed by the court before the aggressor completed his sentence of a year's probation, subject to a re-education program as required by law. We also found sentences in which the court, contrary to the explicit mandate of the law, imposed a probation period of less than one year. Consequently, the coercive power over aggressors to remain in re-education and re-training programs for the rest of the year is lost.

In one specific case, the convict was granted the opportunity to opt for an alternative program even though he had violated a restraining order, a situation which law 54 explicitly rejects as an alternative. in addition, the commission was able to prove that in some cases in which violation of law 54 was the original charge, pre-agreements were reached and the accused declared themselves guilty for violating articles 95 or 153 of the penal code (aggravated assault and threats, respectively). In those cases, the court conceded the benefit of a suspended sentence, without including as a condition of probation attendance in a re-education program—since domestic violence was the underlying problem.

11. Some judges refuse to concede remedies provided by Law 54 without any legal obstacle to do so

Law 54 provides for the issuance of restraining orders in domestic violence cases and authorizes the courts to take a series of additional measures to protect the victims and their children. These measures range from ordering the aggressor to abandon the home he shares with the

victim to determinations regarding the custody of the couple's children.[202] Some judges, however, are reluctant to concede some of these remedies,

For example, judges have refused to set alimony for the victim or for her children, indicating, in clear violation of the spirit of the law, that these are matters better ventilated in family relations courts.[203] A lawyer remarked that judges, both male and female, are reluctant to provide provisional measures related to child support, custody and paternal, maternal -filial relations.[204] By doing that the victims remain defenseless, especially those who come from the poorest sectors. Regarding child support, it is fitting to remember that in Puerto Rico a large percentage of women do not work outside the home and their support and that of their children depend on the income of their spouses. In other sections of this Report, we discuss, exactly, how the economic dependence of women deters them from pressing charges against their aggressors.[205] Contemplating the economic pressures ahead if they decide to press charges against their aggressors, women feel apprehensive and fearful for their future and that of their children. A female lawyer, for example, related the case of a foreigner married to a prominent Puerto Rican. She requested and obtained a restraining order for a relatively long period. With her three-year-old daughter, she took refuge in Casa Julia de Burgos, shelter for battered women. The woman had no economic resources because she had married under a prenuptial agreement and did not work outside the home because her husband forbade it. None of the officials who intervened in the procedure—neither the judge nor the prosecutor—raised the issue of child support even though they were aware of her financial situation.[206] Thus, the woman and her daughter were deprived of the rights that the law guarantees.

[202] See the discussion about the remedies provided in Law 54 in the Analysis of Legislation and Jurisprudence of this chapter.
[203] Hearings, June 10 and 11, 1994, p 46
[204] Hearings, May 13 and 14, 1994,, p 15.
[205] See, for example, the Introduction to this chapter
[206] Hearings, June 24 and July 1, 1994, p.38.

Some judges, male and female, have also refused to issue orders related to community property to avoid the aggressor squandering these assets.[207] Although the law stipulates co-administration of community property, the truth is that, to all practical purposes, this is not the case in many marriages.

The Commission's investigation also revealed that Superior Court judges are reluctant to issue restraining orders. The law, however, explicitly gives that authority to all judges in the system. This situation is detrimental to the victims since it delays the securing of the orders or makes women cease to request them.

Fittingly, Article 5.005 (I) (c) (4) of the Judiciary Law of 1994 reaffirmed the concurrent competence that superior and muncipal court judges have to "know about every issue stipulated in Law No. 54 of August 15 of 1989, known as the Law to Prevent and Intervene with Domestic Violence."[208] Nonetheless, administrative order No. III issued by the Chief Justice of the Supreme Court on January 20, 1995, to make compliance with the Judiciary Law of 1994 viable, stipulated that every request for a restraining order under Law 54 " should be presented before, and considered, by a municipal judge ... with territorial competence over the matter." That is, requests for restraining orders would be administratively channeled to municipal judges, obviously excluding superior court judges. The administrative order was motivated by the fact that, in conformity with judicial reform, a larger number of municipal court judges would be available to consider these and other matters. For the same reasons previously mentioned, the Commission believes that the possibility of superior court judges considering these issues should not be adminstratively limited. Emergency situations could occur whereby a municipal judge is not available. Furthermore, occasionally the process of obtaining a restraining order is delayed if a superior court judge has a divorce case or another petition pending and refuses to issue the order.

[207] Hearings, June 10 and 11, 1994, p.51.

[208] Law of July 28,1994, amending the Judiciary Law of 1952 or Law No. 11 of July 24 of that year.

12. Some judges erroneously require proof that a pattern of behavior exists in cases of physical abuse under Law 54

Several members of the judiciary, as well as specialists who have assiduously studied the application of the Domestic Violence Law in the courts, said that some judges wrongly demand the existence of a pattern of behavior in cases of physical abuse under that statute.[209] The section of Law 54 that establishes crimes of domestic violence, only requires a pattern of behavior in cases of psychological abuse. The Supreme Court of Puerto Rico has not had occasion to express itself on the matter but the Commission understands, as do most judges, that said pattern of behavior is not required regarding crimes of aggression.[210]

13. Some judges do not take into account the father's record of domestic violence in determinations regarding custody and father-child relations within the framework of a restraining order, exposing the victim and the children to possible violent incidents in the future.

"The father is the father. No matter what he does, he has the right to see his children." This is the kind of expression heard among judges in situations in which a request to interrupt paternal-filial relations is part of a petition for a restraining order. A judge remarked that, in general, ample paternal-filial relations are granted the aggressors in these circumstances.[211] This places women at grave risk for their lives. If one of the purposes of restraining orders is to place distance between the victim of domestic violence and the aggressor in order to protect her, to deny her specific precautions regarding paternal-filial relations opens the possibility for the aggressor to approach the victim and harm her once again.

A lawyer in private practice told the Commission that even when the mother and her children are sheltered in a refuge because the man battered them they are summoned by the court be-

[209] See, for example, Hearings, June 10 and 11, 1994, pp 46-47 (Testimony of advocates for domestic violence victims); Hearings, May 13 and 14, 1994, p.12.

[210] For a fuller discussion of this point see Analysis of Legislation and Jurisprudence in this chapter.

[211] Hearings, May 13 and 14, 1994, p.12

cause the father wants to establish paternal-filial relations. This even happened in a case where the father had attempted to burn them all.[212]

A female judge related the following case: An individual was charged with assaulting and threatening his ex-wife with death, at the residence of the victim and her children, while carrying a firearm. During her testimony, the victim argued that she had a restraining order and the accused had violated it when he entered her residence. He replied that the judge had dictated the order authorizing him to enter the house. The victim noted that, effectively, the judge had stipulated that the accused could enter the house to see his children yet, at the same time, she could be jailed if she didn't allow him to do so. Appropriately, in the determination of the fact, the judge had concluded that the victim had been assaulted on various occasions. Even so, regarding paternal-filial relations, he determined that " the petitioner will have a relationship with his children at his discretion." [213]

In this dramatic case, the judge, aware of the dangerousness of the aggressor, ordered paternal-filial relations without taking any cautionary safety measures for the victim or her children. The idea that the father has the right to relate to his children is so internalized that it also operates in extreme situations such as that recounted by a social worker: In a case where the mother died at the hands of her husband, it was recommended that paternal-filial relations with the imprisoned father be denied and that custody of his two sons be given to an uncle. The court social worker questioned those recommendations, claiming that custody should not be given the uncle because he was single.[214]

The fact that a person is single or not, a subject that we discuss fully in the chapter on Family Law, should not be a criterion to award custody or not. Nonetheless, questioning the civil status of the uncle in relation to the possibility of caring for his nephews, points to the sexist

[212] Hearings, June 24 and July 1, 1994, p.35.
[213] Hearings, June 17 and 18, 1994, pp 54-55
[214] Hearings, June 24 and July 1, 1994, p 32

stereotypes with discriminatory consequences for men as well as women. Usually the merits of single women for those ends are not questioned since they form part of the stereotypes related to women

The Commission believes the courts should take into account the history of violence of a father in these circumstances to determine whether the paternal-filial relations should be denied. To grant those relations could put children and women at risk. At the very least, judges should provide special safety measures that govern the exercise of that right. Among them, for example: that the relations be supervised, that the father relate with his children away from the mother's residence without his being able to establish contact with her.

14. Although restraining orders constitute an important remedy to protect victims of domestic violence, there are several problems that limit its effectiveness.

a. Unjustified reluctance of some judges to issue them in certain circumstances.

b. Delays in the concession of the remedy.

c. Concession of restraining orders for too short periods of time.

d. Unwillingness of some judges, both male and female, to issue them ex-parte.

e. Concession of reciprocal restraining orders.

f. Problems with serving subpoenas for hearings and restraining orders.

g. Misconceptions.

Although restraining orders in themselves, absent real and effective protections on the part of law enforcement agencies, do not offer safety to victims of domestic violence, unquestionably their judicial authority serves as a deterrent. Nonetheless, being able to count on a restraining order gives victims greater credibility when asking for police protection in specific circumstances and

should, in principle, activate more quickly police intervention when their presence is required. For that reason these orders are an important resource in the struggle against domestic violence. Nonetheless, many deponents before the Commission said that various circumstances reduced the effectiveness of this mechanism. We discuss them below in the same order noted above.

a. *Unjustified reluctance of some judges to issue restraining orders in certain circumstances*

Although Law 54 does not stipulate that restraining orders be requested where the victims live, some judges require it [215] A judge told the Commission that if a formal complaint is presented and the person is not a resident of the court's corresponding municipality, the restraining order is denied and instructions given to go to the corresponding court [216]

This situation places additional obstacles in the way of domestic violence victims and causes delays in obtaining restraining orders.

Nonetheless, on occasion, judges are unwilling to concede restraining orders if the victim had not formally complained about the aggressor earlier, although Law 54 does not require that step be taken. To the contrary, public policy and Article 5.1 of Law 54 require the facile concession of restraining orders without delay At times some judges apply personal criteria that hinder the victim in obtaining the remedy. For example, a deponent remarked: "A client was denied a restraining order because he hadn't hit her in four days."[217]

b. *Delays in the concession of the remedy*

In addition to the delays that may be caused by requiring that restraining orders be solicited where the petitioning party lives, many deponents indicated that the waiting period to obtain the remedy was at times needlessly long. For example: A lawyer said that many times restraining

[215] See, for example, *Id* (Testimony of a social worker and university professor)
[216] Hearings, May 13 and 14, p.12
[217] Focus Group Interview, Female trial lawyers and prosecutors.

orders solicited took too long to be granted, "up to 43 days."[218] A survivor of domestic violence affirmed that three months went by before she was granted a restraining order.[219] This kind of situation could be due to problems presented in serving subpoenas on aggressors for hearings on those cases. Sometimes, the delay in serving the subpoena could be due to the fact that the order is requested in one municipality while the aggressor lives in another further away. This entails that the summons be processed through the Office of Bailiffs of the Judicial Center of the region to which the municipality in question belongs. Nor is priority attention given the order that it requires, consequently, delays in serving the subpoena can be considerable. The problem with citations can also be due to the fact that, on occasion, the petitioning party does not know the whereabouts of the petitioned party and the Court asks the petitioner to find out his address in order to subpoena him. The Commission realizes that under these circumstances the concession of a restraining order will take longer than usual.

As we will discuss later, because some judges are reluctant to issue orders *ex parte* the victims remain without protection until the hearing mandated by law in the presence of the assailant. This forces the victim to return to their homes without having obtained the remedy and exposes them specifically to what ex parte orders intend to avoid: greater violence and danger. When this happens it is difficult for women to appear again before the court for a new order.

c. Concession of restraining orders for too short periods of time

The Commission heard testimony over and over again on how some judges concede restraining orders with short-lived validity.[220] This forces victims to turn repeatedly to the court to extend the orders for an additional amount of time, with the aggravating factor of having to face their assailants.

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[219] Focus Group Interview, Victims of domestic violence, p.15.

[220] See, for example, Hearings, June 24 and July 1, 1994, p 46 (Testimony of women's issues specialists); Hearings, May 20, 1994, p 1. (Testimony of expert in domestic violence)

Obviously, we are not referring here to ex parte orders, which, by their nature and by law, mandate a hearing within five days of issuance and have to be of shorter duration.

d. Reluctance of some judges to issue restraining orders ex parte

The Domestic Violence Law authorizes the courts to issue *ex- parte* orders under certain circumstances.[221] Nonetheless, it was repeatedly pointed out that some judges refuse to issue them.[222] As a result, the victim is left without protection.

A lawyer recalled having heard judges say that "if Casa Julia thinks that it is going to regulate procedures for ex parte restraining orders, it is mistaken."[223] Naturally, this is a reaction to requests for ex parte orders presented with the advice of support groups. This type of comment clearly reflects the rejection of support organizations for victims of domestic violence by some judges who see these groups as too assertive or as threatening, to the degree that they believe these groups to have feminist agendas. It also underscores ignorance of the reality of domestic violence.

e. Concession of reciprocal restraining orders

Some judges, both male and female, on occasion issue restraining orders to both parties although only one of the parties has requested it.[224] For example, a litigant lawyer, a female, said: "Many times mutual, bilateral restraining orders are issued even when the other person has not claimed violence against himself, but since there was an argument...."[225] This practice reinforces the mistaken idea that the victim is just as guilty of domestic violence as is her assailant.

Another female lawyer said: " The orders don't have to include the woman. If the woman has not committed an act of violence why include her? That is an act of violence against her because it throws the system against her."[226]

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[221] Law 54, art.2.5, 8 L.P.R.A. sec.625.

[222] See, for example, Hearings, June 24 and July 1, 1994, p. 35 (Testimony of a lawyer).

[223] Focus Group Interview, Male trial attorneys and prosecutors, p.34-35.

[224] See, for example, Hearings, May 27, 1994, p.2. (Testimony of a prosecutor).

[225] Focus Group Interview, Trial attorneys, on women's issues, pp. 49-50.

[226] *Id.* p.50.

In some state jurisdictions in the United States, legislation specifically forbids the issuing of reciprocal restraining orders.[227]

f. Problems with serving subpoenas for hearings and restraining orders.

Article 2.4 of Law 54 stipulates that subpoenas and a copy of the petition will be served by a court bailiff or public law enforcement officer as *soon as possible* and *take preference over another kind of subpoena*. Generally, however, municipal judges don't have bailiffs available.[228] This is especially so regarding those judges who are not assigned to a judicial center or to a District Court.[229] In order to serve citations, restraining orders and other legal documents, municipal judges have to coordinate with district judges and depend on them to be willing to offer that support or have the potential to give it. Since the municipal judges see a good part of the requests for restraining orders, many times they find that they don't have available bailiffs to serve citations, etc., once they are issued. They also find themselves having to follow normal procedure in coordinating, which means further delays. For that reason, some judges give the citations to the petitioning parties themselves so they can either serve them or go to police headquarters for a police officer to do it. Sometimes the person has to go to several headquarters before finding a police officer willing to help, although the law stipulates that orders must be served by bailiffs or police officers.[230] In many of these cases, a record of the summons having been served does not exist, which means that if the assailant fails to appear, the judge has no way of knowing if he was actually served.

Evidently, insufficient personnel and the lack of coordination related to this aspect of the system , place petitioners of restraining orders, especially women, in a delicate position concerning

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[227] Legislated, for example, in Florida. See, INFORMATION SERVICE OF THE NATIONAL CENTER FOR STATE COURTS, STATUS OF GENDER BIAS TASK FORCES AND COMMISSIONS IN THE STATE AND FEDERAL JUDICIAL SYSTEMS 60 (2d ed 1993)

[228] This places the victims of violence at risk when they have to face their assailants in courts

[229] Today, District Subsection by virtue of the Judiciary Law of Puerto Rico of 1994 and, until its complete elimination, programmed for a period of eight years.

[230] See, for example, Hearings June 24 and July 1, 1994, p.32. (Testimony of a social worker and university professor); Law 54, art.2.4 (b), 8 L.P.R.A. sec. 624(b).

their personal safety. In addition, it forces persons undergoing emotionally difficult moments to carry out procedures that do not actually correspond to them and that could even affect them more.

g. Misconceptions

A judge told the Commission that she heard judges, prosecutors and police officers say that they would not accuse a person for violating a restraining order because the petitioner herself violated it. These officials believe that when the victim accepts a visit from her assailant, although the visit may be incidental, she tacitly waives the order issued in her favor or violates it.

A restraining order, by legislative fiat, must have a specific timetable according to the discretion of the judge who issues it. This order can only remain without effect at its termination or by judicial agreement. The law does not contemplate the petitioning party having to tacitly surrender the order; only when she goes to the Court and asks that the order be set aside can the judge do so. Even if the parties reconcile, or see each other sporadically which could constitute a violation of the order, the order itself remains in force. But in reality, that's why these officers of the court are reluctant to intervene in subsequent formal complaints of domestic violence presented by the same person even when the order remains in force.[231]

This evident misconception shows lack of awareness and understanding of the problem and places victims of domestic violence in a defenseless position.

15. Ignorance about the problem of domestic violence takes on special overtones for some female judges, who as women in positions of authority, find it difficult to understand the attitudes and reactions of other women who have suffered domestic violence

The Commission's investigation revealed that some female judges assume especially severe and negative attitudes toward women victims of domestic violence. To some extent, their attitude and their difficulty in understanding why women victims of domestic violence remain in that kind

[231] Hearings, June 17 and 18, 1994, p 56

of relationship, could be attributed to their perspective as women in high positions in society. These inflexible attitudes, which sometimes approach incomprehension, are reflected, for example, in accounts such as the following: " First, she denied the restraining order because [the victim] lived in a condominium and therefore, did not need a restraining order because she could tell [the security guard of the condominium] that he [the aggressor] was not to come in. [The condominium] has only one entrance to the apartment. Therefore, she didn't need it [the restraining order]. Second, she told her [the petitioner] 'I'm a divorced woman and we divorced women have to forget about the men and forge ahead with our children. So stop [worrying] about that man and keep going.' She told that specifically to a colleague 'You have to forget that man, not be at his beck and call, because if I've been able to raise my children alone, without looking for a man, well, you should [be able to] raise your children too.'"[232]

There are also women who, to be outstanding and successful in a profession usually filled with or directed by men, have assumed the same working style men traditionally display in society. Thus, they have internalized the traditional style and disposition of men in order to survive in the profession and be considered successful by their peers. That also happens with women lawyers and judges.

One deponent explained: "But I also understand that part of a woman that wants to identify with the male structure. The woman judge assumes the position in which she doesn't identify in any way with that victim... What she does then is deny that victim's situation, because she is also denying the possibility that she too could have been, or will be, a victim..."[233]

16. Discrimination toward male victims of domestic violence exists at every level and in every sphere of the judicial system.

[232] Focus Group Interview, women's issues specialists, p 22
[233] *Id* p.55

Nearly seven (7) per cent of the victims in cases presented under Law 54 are men.[234] The Commission was told that in most of these cases men are also victims of jokes and jests regarding their masculinity. A tendency exists to ridicule men who request a restraining order because a "real man" supposedly does not let his wife or companion assault him. Obviously, sexist stereotypes can also apply to men. This contrasts with what usually happens to women victims of domestic violence. In their case, derision is primarily related to the trivialization of violence and with diminishing their credibility. On the other hand, as a result, women see themselves as subjugated by sexist stereotypes and pressured by different sources to save the marriage while that doesn't usually happen in the case of men. In their case, everything revolves around the fact that their image doesn't jibe with that of "macho."

Underlying these manifestations of discrimination against men is the notion that men have to demonstrate their manhood by being strong, domineering and even aggressive. A man who does not act like that is thought to be less of a man. From that point of view, patriarchal society fosters and justifies male violence.

A bailiff underscored that point. Men, he said, who request restraining orders are not taken care of in the same manner as women. They are ridiculed by the police and officials of the system. They are told in the street that they'll be taunted.[235]

A female judge also commented, as did other deponents, that a man is a victim of wisecracks, jibes and mockery. For that reason, a man will refrain from using the procedure. Some male judges also assume these same sexist attitudes: they consider male victims "wimps."[236] In

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234 See, COMISION PARA LOS ASUNTOS DE LA MUJER, TERCER INFORME DE PROGRESO SOBRE LA IMPLANTACION EN PUERTO RICO DE LA LEY PARA LA PREVENCION E INTERVENCION CON LA VIOLENCIA DOMESTICA (1995).

235 Hearings, May 27, 1994, p 2.

236 *Id.* p. 4.

these cases, the same sexist stereotypes about men at the patriarchal foundation of society work against them and are a source of discriminatory treatment.

The Commission also heard testimony from men convicted for violating the Domestic Violence Law claiming that the courts discriminate against them because often they are not given a chance to be heard. Likewise, they said that many women wrongly use Law 54 to seek vengeance[237], as well as for other purposes. This type of statement, however, should be put into context since aggressors tend to justify their every violent act, even holding the victim responsible. "To be heard" sometimes implies that the court accept their justifications.

Nonetheless, judges should be extremely careful that every accused be heard in conformity with due process of law. By itself Law 54 does not sanction the circumvention of this constitutional requisite. Victims can and must be protected effectively without affecting the rights of the accused or the defendants. But that calls for competence, preparation, care and concentration in fulfilling judicial functions.

17. The courts environment usually intimidates victims of domestic violence

Several deponents told the Commission that the courts atmosphere tends to intimidate victims of domestic violence—by the very setting of the facilities, by the image of authority judges project and by the nature of the adversarial system. This is compounded by the profound overall ignorance of Puerto Rican society about the judicial process and court functions. Clearly, all of that overwhelms victims of domestic violence and their self-esteem is affected. Their lack of education and poverty are additional adverse factors

In domestic violence cases, the mere fact that the victims have to face their assailants in court worsens the situation, especially in cases where aggression has taken place in the court.[238] A deponent, a court advocate for victims of domestic violence, declared:

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[237] Focus Group Interview, Aggressors (domestic violence).

[238] Hearings, May 13 and 14, 1992, p 12

> "Criminal court is a horrible experience. To spend six or seven hours in a criminal court waiting to be called, while the assailant constantly approaches the victim to try to convince her to leave, or if not, intimidating her... It is a horrible experience for the woman as it is for the advocates..." [239]

A domestic violence victim recounted the following experience:

> "I had a horrible experience in court... I went there for a restraining order and I didn't realize that my assailant was pursuing me.
>
> "While there I was crying, nervous because he had hit me with a machete, right here..... on my back. I was on the verge of convulsing because I'm an epileptic and I was with my three children... I was stressed out because my children were crying, they were hungry because I had been [at the court] very early and it was after three and they had not yet called me.
>
> My aggressor was following me and he dragged me out of there punching and kicking me and no one did anything. He came into the courtroom and grabbed me and started hitting me... in the court."[240]

A murder took place recently in a criminal court of a judicial center. A police officer dressed in plain clothes managed to enter the Judicial Center with a non-regulation weapon and fired multiple bullets at his companion, a domestic violence victim who had gone to the court for protection. Subsequently, the assailant tried to commit suicide there.[241]

This type of situation illustrates the dangers victims can face in the courts where special facilities to keep the plaintiffs and defendants separate and apart do not exist. The fact that the justice system also lacks trained personnel to orient and support victims of domestic violence further aggravates the problem.

18. Some judges discriminate in different ways against homosexuals and lesbians in the application of Law 54

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[239] Focus Group Interview, women's issues experts, p.\68

[240] Focus Group Interview Domestic violence victims, p.11

[241] See EL NUEVO DIA, June 25, 1995, p.6

Some judges consider that the Domestic Violence Law in general does not apply to homosexual and lesbian couples and even refuse to issue restraining orders.[242] The Commission believes that, in keeping with the purpose of the law to protect every victim of domestic violence in a spousal relationship, restraining orders apply in these cases.[243] Most judges concur with this posture.[244]

However, several judges did say that homosexuals and lesbians are ridiculed and discriminated against by employees who intervene in the process.[245] They have even kidded the judges who hear this type of case

One judge stated: "The other day I heard a very curious case of two lesbians..... Look, you can't imagine how lightly even court personnel deal with the situation. Since it is not a common relationship and not something you see every day, well, attitudes seem to be different."[246]

Recommendations

1. The Office of Courts Administration should continue to intensify its education and awareness efforts for judges and judicial system personnel about the problem of domestic violence and application of the law, giving special attention to the cycle of domestic violence and the comprehensive and effective use of the law's different penal and civil mechanisms.

2. The Office of Courts Administration should offer special training to all judicial and non-judicial personnel of first contact in the courts to develop better attitudes in dealing with victims of domestic violence and in orienting them, especially in such an intimidating atmosphere as is the court.

3. The judicial system should develop efficient mechanisms of orientation for victims of domestic violence to explain court procedure in civil and criminal application of the law, the rights that are covered and the protection mechanisms they can request.

4. The justice system must develop uniform internal regulations regarding access to judicial procedures by advocates of victims of domestic violence.

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[242] Hearings, May 13 and 14, 1994, p 12. This topic was the subject of discussion in Participative Investigation Session for District Judges, held Sept. 9, 1994

[243] See Analysis of Legislation and Jurisprudence in this chapter.

[244] See Hearings, June 24 and July 1, 1994, p. 33. Focus Group Interview, Judges, p 29

[245] *Id*

[246] Focus Group Interview, Judges, P.29

5. The Judicial Branch should foster government development and establishment of shelters and support programs for victims of domestic violence and of re-education and re-training programs for aggressors throughout the island This would allow the courts to more effectively enforce the public policy embodied in the Domestic Violence Law.

6. The Office of Courts Administration should study the possibility of establishing a specialized court in domestic violence in San Juan's Criminal Investigations Unit, which is justified by the volume of these kinds of cases. Meanwhile, the unit's trained personnel could serve as a resource in orientations on island courts.

7. In coordination with other components of the criminal justice system, the Judicial Branch should develop an efficient information system on domestic violence cases and restraining orders that allow specific studies and investigations about the subject to be done and to follow up on cases and the situation of those accused so that their records are in the system.

8. Internal supervision mechanisms should be activated to attend to complaints about inadequate and discriminatory treatment of victims and to impose the corresponding disciplinary sanctions.

9. Interagency and internal efforts of the judicial system should be better coordinated to process domestic violence cases to address more efficiently issues such as serving subpoenas for hearings on restraining orders, restraining orders proper and formal complaints made outside of working hours. The Office of Courts Administration should coordinate with the Police of Puerto Rico so that the police serve restraining orders, especially in those towns where bailiffs are not available.

10. Criteria for territorial competence to attend to applications for restraining orders should be clarified. Judges should be educated regarding the fact that petitions for restraining orders must be attended by any judge of the court of first instance.

Chapter 8

Criminal and Juvenile Justice Systems

A. Criminal Justice System

Introduction

The impact of Penal Law in society is indisputable. It constitutes one of the principal instruments for maintaining social order. It makes rules regarding what is permitted and what is prohibited, under penalty of law that, in Puerto Rico, fluctuate between a monetary penalty, that is, a fine, to the prolonged loss of liberty, even for life. Obeying or violating the penal statute, apart from the motives to do so, engender certain behaviors that, in the long run, could influence how we see and evaluate the world. Like other codes of behavior, however, the penal rule articulates values. In that sense, it could have an important formative effect.

It has been pointed out, with reason,

> that: Historically, the law, especially the penal law, has lacked a gender perspective and reflected an androcentric character. This is to say, it produces and reproduces an image of man as a paradigm of the human being. It promotes a perception of the society that confuses the man with the persons, every person, and perceives women as weak beings, devoid of capacity to make decisions, whose virginity and moral integrity requires special attention.[1]

That is why it is of crucial importance to review this important dimension of the law that governs us—to detect any manifestation of bias, prejudice or discrimination because of gender.

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[1] Commission for Women's Affairs, Office of the Governor, Presentation on Bills of the Senate 1229 and 1230 to 1241 Measures associated with the Penal Code Reform of Puerto Rico (March 31, 1992).

Every aspect and dimension of gender discrimination, however, must be examined in the criminal justice system since whatever takes place in the courts is conditioned by a network of rules, processes, prerogatives and acts that go beyond their authority and scope.

The fundamental legal dimension of the system rests largely on the Penal Code of Puerto Rico, whose most recent version was approved in 1974, and in special legislation that typify specific behaviors as crimes. Hence, it corresponds to the Legislative Assembly to revise and receive any recommendation about penal law.

The structural dimension comprises a series of institutions that include the courts as well as several agencies of the Executive Branch. Their primary duty, through the Police and Justice Departments, is to promote penal actions. The obligation of the courts is to judge persons accused of crimes.

How penal cases are channeled, however, is governed by rules of criminal procedure and evidence, whose adoption is the responsibility of the judicial and legislative branches of government, as required by the Constitution of Puerto Rico.[2]

Finally, the corrections system, attached to the Executive Branch, intervenes in diverse aspects that have to do with implementing the sentence.

In each and every one of these dimensions, as the findings of this Report show, are nests of gender discrimination.

The delegation of these responsibilities, however, does not exempt the Judicial Branch from self-examination, and from taking the necessary measures to eradicate any trace of gender discrimination in its proceedings, procedures, and rules of criminal procedure.

This chapter analyzes several aspects of the criminal justice system and Penal Law in Puerto Rico that the Commission believes pose specific problems related to gender discrimination.

[2] Constitution of the Commonwealth of P.R., Art. V, Sec. 6

The issues discussed here, however, are not the only ones related to the criminal justice system that the Commission considered. Several paramount issues directly tangential with the penal area are thoroughly examined in other sections of this Report. Thus, for example, the Chapter on Domestic Violence analyzes crimes categorized in Act No. 54 of 1989, the administration of that law by the courts and other components of the justice system, the civil and criminal relationship of the statute and the federal Violence against Women Act, pertinent developments to the legitimate defense in cases of women accused of injuring or killing their companions, and the admissibility of expert testimony on the battered woman syndrome. Discrimination associated with the credibility of women victims, witnesses and defendants is discussed in the Chapter on Interaction in the Courts. Criminal courtroom judge assignments and the lack of adequate facilities for women prisoners are included in the chapter on Judicial Administration. All these issues could very well be part of this chapter. Thus, readers with a specific interest in this aspect of the Report should turn to the above-mentioned chapters for a broader picture of the Commission's analysis on problems related to criminal justice and Penal Law

Still, an analysis of several problems associated with the juvenile justice system is included in this chapter. Although the prosecution of minors accused of offenses is not exactly a part of the criminal area, the Commission decided to investigate it along with Penal Law because it contains safeguards and punitive elements similar to those of criminal procedure and both can lead to the loss of liberty.[3]

Several legal professionals and court officials [4] vividly described problems in the area of juvenile justice and insisted that it be a part of this investigation. The force and relevance of their

[3] LEGAL SERVICES OF PUERTO RICO, INC., INFORME COMITE DE PRIORIDADES EN AREA DE MENORES 1-3, 65, 115-116, 121 (1994).

[4] A female juvenile prosecutor, a director of a Legal Clinic, two social workers, a lawyer dedicated to the area of juvenile law, a superior court judge assigned to Juvenile Court, and an ex-judge in the practice of law in ProBono, Inc., through testimonies given in hearings held by the Commission on the following dates: May 13 and 14, May 21 and 22, June 3 and 4, June 24 and July 1, 1994.

arguments moved the Commission to carry out focus group interviews with juvenile delinquents at the Industrial School in Ponce. A group of girls and another of boys were interviewed separately to learn of their personal experiences in court. Superior Court statistics were also compiled. Similarly, the Commission's findings reflect concerns expressed at the hearings and in independent studies.

Since so many other issues are discussed in other chapters, it should be clarified that the findings analyzed here, excepting those pertinent to juvenile justice, focused on those problems that surface in sex crimes where the victim is a woman, an area unremitting in revictimizing women and reproducing diverse stereotypes.

Analysis of Legislation and Jurisprudence

Introduction

To the extent that penal laws contain rules and expressions that may result in discrimination, they actively help to perpetuate discrimination in judicial processes. Therefore, in an investigation such as this one on gender discrimination in the courts, it is appropriate and fitting to examine them. In this section, we will analyze several legal provisions that pose specific problems about gender in the Penal Code, the Rules of Criminal Procedure and the Rules of Evidence.

The Penal Code

Although there has been progressive awareness in this area, the Penal Code of Puerto Rico still contains specific provisions that maintain discriminatory classifications based on gender, or that respond in one way or another to stereotypical conceptions about it. What follows is an examination of crimes that are closely linked to the subject of this Report.

1. Crimes against bodily integrity

Although we refer specifically to several crimes included in Chapter 255 of the Penal Code, titled "Crimes against bodily integrity",[5] it is useful to indicate that the very classification of such crimes reflects conceptions that leave aside important considerations about sexual violence as it is understood today, and the existent view of women in our society. The title implies that the legal right the legislator intended to protect is the virtue of women, that is, their purity, their chastity, conceived within traditional schemas. This kind of conceptualization contributes, without doubt, to keeping alive stereotypes that have discriminatory effects.

a. Rape

Article 99 of the Penal Code, which typifies rape, deems guilty of the crime "Every person who has carnal intercourse with a *woman not his wife"* under certain situations that, in synthesis, imply the lack of consent of the aggrieved woman.[6] The phrase "woman not his wife" excludes forced carnal intercourse of the husband with his wife. This provision clearly reflects the notion of the woman as the man's property in marriage and the traditional conception that the woman must sexually yield to her husband.

Not until 1989 in Puerto Rico, with the passage of the Law to Prevent and Intervene with Domestic Violence, was conjugal sexual aggression categorized as a crime apart from rape.[7] Article 3.5 of the law refers to non-consenting "sexual relations" , an expression that appears to be much broader than the term "rape," which is clearly defined by law and jurisprudence, unlike the expression "sexual relations."

Remarkably, the new tendencies in Penal Law recognize that sexual violence is not limited exclusively to the sexual penis-vagina relation, categorizing as criminal conduct any kind of penetration without consent - whether copulative, digital or instrumental, through the vagina or the

[5] 33 L.P.R.A. secs. 4061-4081.

[6] 33 L.P.R.A. sec. 4061.

[7] Act No. 54 of August 15, 1989, Art. 3.5, 8 L.P.R.A. sec. 635

anus.[8] Does the term "sexual relation", in Article 3.5, include all these variations? The answer could be in the affirmative since the term itself is broader and if the legislative intent, the foundation of Law 54 , is taken into account. But we know more than that is required within the area of Penal Law. Neither Article 3.5 defines what is understood by "sexual relations," nor does the comprehensive legal provision regarding definitions of Law 54. Unquestionably, this is an area that requires court interpretation.

b. Seduction

Article 101 of the Penal Code, categorizing the crime of seduction, provides in the part that interests us here:

> Every person who, under promise of marriage, seduces an unmarried woman of good moral character, under the age of 18 years, and has sexual intercourse with her, shall be punished....[9]

In the background of this penal provision is the dichotomous view of the woman that makes a distinction between pure and chaste women and those who are not because they decide to lead lives that set them apart from the traditional behavior society demands.[10] That is why a woman who does not have "a good moral reputation"[11] and who is not single cannot be seduced legally in Puerto Rico. Obviously, the very definition of the crime opens the door to every type of

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[8] Dora Nevares-Muñiz, *Informe de Revisión del Código Penal de Puerto Rico*, 27 REV. JUR. U.I. 267 (1993).

[9] 33 L.P.R.A. sec. 4063.

[10] See Linda J. Lacey, *Introducing Feminist Jurisprudence. an Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775 (1990)

[11] In Art. 261 of the Penal Code of 1902, the passive subject of the crime was defined as "an unmarried woman, until then reputed as virtuous". In Pueblo v. Millán, 27 D.P.R. 862 (1919), the Supreme Court resolved that it was not necessary that a woman be a virgin at the moment of the crime, but that it was enough that she was reputed to be chaste. In Pueblo v. Martínez, 21 D.P.R. 70 (1914), it was said that to be reputed "virtuous" meant to have the reputation of previous chaste character. According to Olga Elena Resumil, "the phrase repeatedly used in the Spanish text is substantially equivalent to the phrase 'of previous chaste character' that was used in the text in English, since the word *pure* signifies *chaste*, especially when used in seduction accusations, and the concept of the word "reputation", for the purposes of Article [261 of the P.C. of 1902] is equivalent to the word character". Olga Elena Resumil, La Mujer como objecto the tutela penal: Protección legislativa o discrimen judicial? (Manuscript delivered to the Commission by the author).

evidence that could affect the reputation of a woman who has consented to sexual contact because of a promise of marriage.

2. Breach of the peace

The third type of crime, breach of the peace, is configured when a person "uses vulgar, profane or indecent language in the presence or within the hearing of women or children, in a loud or noisy manner".[12]

> In this respect, it has been commented: This classification starts from the premise of a paternalistic view based on the supposed weakness of the woman..... Gross and unseemly language is as offensive to a woman's ears as it is to a man's.....This distinction is totally unreasonable, since, what the prohibition intends to avoid does as much harm to a man as it does to a woman.[13]

Once again, law-making responded to the same stereotyped conceptions of women that have justified discriminatory treatment against her, although in this case it can be argued it works in her favor. Nevertheless, the very existence of this provision reinforces social and mental schemas at the core of gender discrimination.[14]

3 Aggravated battery

Article 95 of the Penal Code, in subsection (d), considers aggravated battery "[w]hen committed by an adult male on the person of a woman or child".[15]

Once again, as in breach of the peace, legislation places women on a par with children, a group in need of special protection. Undoubtedly, the historical image of women as more weak and defenseless than men served as the basis of this legal provision. The Supreme Court of Puerto Rico

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[12] Art. 266 of the PENAL CODE (PEN. C.), 33 L.P.R.A. sec. 4521

[13] Rolando Emanuelli Jiménez, Análisis Constitucional del Delito de Alteración a la Paz, Artículo 260 del Código Penal de Puerto Rico, 55 REV. JUR. U.P.R. 587, 603-604 (1986).

[14] The legal rule that one shall not use "vulgar, profane or indecent" language in front of a woman may be the counterpart of the social norm imposed on women to refrain from using that kind of language, inappropriate even between women, but acceptable between men. Underlying it is a double standard that categorizes stereotypes on the basis of gender. See the discussion on stereotypes and the double standard in the chapter on General theoretical framework.

[15] 33 L.P.R.A. sec. 4032 (Supp. 1994)

evaluated the constitutionality of subsection (d) in *Pueblo v. Rivera Morales*.[16] As we shall later see in our comments on Supreme Court decisions on gender discrimination in penal law, the majority upheld the constitutionality of that provision. We will review discussion of the issue as we analyze the Court's decision which poses several difficulties to consider.

Rules of Criminal Procedure

With respect to the criminal procedure, only two provisions stand out:

1. Rule 108: reasons to excuse from jury duty

This rule establishes the circumstances or situations in which a candidate for jury duty may be excused. In the part of the provision of interest to us, it states: "The court must excuse from jury service any woman who so requests because of her obligation as housewife".[17]

Evidently, the rule only mentions women in relation to the obligations of the home, that is, it does not even leave open the possibility that a man could have that responsibility. It is taken for granted that the woman is in charge of the domestic duties and of raising the children, a role historically imposed on her and which she is presumed to take to naturally, even though the division of labor has nothing to do with that presumption. This involves a schema constructed from a masculine perspective that fits perfectly within a patriarchal society.

Once again, the stereotype operates superficially in favor of women. But in its deepest dimension it reinforces patterns that are based on gender discrimination.

2. Rule 154: corroboration of a woman's testimony

Rule 154 requires corroboration of a woman's testimony in crimes of abortion, seduction and inducing a woman under 21 years of age into prostitution. The testimony of an aggrieved woman, the rule decrees, must be corroborated by other evidence that by itself, and without taking

[16] 93 J.T.S. 83, at p. 10740.
[17] 34 L.P.R.A. Ap. II, R. 108.

her testimony into consideration, tends to establish the relation of the defendant to the offense, and not merely prove the circumstances of the offense and whether it was committed.[18]

The second paragraph of this rule also requires corroborating evidence of the aggrieved woman's testimony regarding rape or attempted rape. That paragraph was declared unconstitutional expressly by the Supreme Court of Puerto Rico in *Women's Commission vs Secretary of Justice*,[19] a case we will discuss further on. Subsequently, through Law 123 of November 11, 1994, the Legislative Assembly amended Rule 154 to eliminate the corroboration requisite for rape or attempted rape. Nonetheless, the rest of the rule remained intact so that corroboration was still required for crimes of abortion, seduction and inducing an unmarried woman under the age of 21 years into prostitution—situations in which the victim or aggrieved person is a woman. This is surprising because the arguments to eliminate corroboration in the one case are the same for the others.[20]

Note that Rule 154 requires corroboration of a woman's testimony in inducing a woman under 21 years of age into prostitution. The existing Rules of Criminal Procedure, as we know, was approved in 1963. Article 110 of the Penal Code of 1994, however, defined an identical crime, to which Rule 154 would apply, in a much broader manner: it makes criminal promoting and facilitating the prostitution of a person older than 18 years even with that person's consent, to profit from the satisfaction of another's lust.[21]

Obviously, the word person includes men as well as women. But keeping current and enforcing Rule 154, which only applies to the testimony of the female victim, clearly constitutes discrimination on the basis of gender twice over. First, it creates a discriminatory category since it

[18] 34 L P R A Ap II, R. 154.

[19] 109 D P R. 715 (1980)

[20] About this subject, the Hon. Crisanta González de Rodríguez, Superior Court Judge, provided the Commission with a comprehensive work that served as a base for this discussion: The rule on corroboration of testimony of the woman and instructions to the jury in cases of sexual aggression (1995)

[21] 33 L P R. sec. 4072

distinguishes between men and women, both protected by Article 110, in requiring proof of a crime, demanding corroboration when the victims are women, but not when the victims are men. The argument of Justice Antonio Negrón García in his concurrent vote in *Pueblo v. Pagán Rivera*,[22] and later adopted by the majority of the Supreme Court in *Women's Commission v. Secretary of Justice*, can also be applied to this provision:

> the rule of qualified corroboration that prevails in rape or attempted rape proceedings, on its face violates the constitutional prohibition of discrimination on account of sex, since it casts doubts *a priori* upon the adequacy and veracity of a woman's testimony, by weakening it against the testimony of a man.[23]

Similar problems, though not identical, arise from an instruction that is still given to a jury in relation to lewd and indecent acts.[24] The instruction warns the jury of the danger involved in convicting solely on the victim's testimony. The pertinent part of instruction reads as follows:

> It is not essential that the testimony of the victim be corroborated by other evidence if, from the complete proof, you are convinced beyond a reasonable doubt of the guilt of the accused. However, an accusation such as that made against the accused, in general terms, is easily made, and once made is difficult to refute, even if he is innocent. Because of the nature of the crime, usually the only witnesses are the aggrieved party and the accused. Therefore, I instruct you to examine carefully the *testimony of the victim;* but the fact that the accusation is easy to make and difficult to refute should not stop a verdict of guilty if you are convinced, beyond a reasonable doubt, that the accused is guilty.[25]

On the surface, that instruction does not pose a problem of gender discrimination. After all, the crime of lewd and indecent acts is written in neutral terms. Both the person who commits the crime as well as its victim could be a man or a woman. But applying that instruction under certain circumstances could be discriminatory. Let us explain.

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[22] 105 D.P.R. 493 (1976)

[23] *Id.* at p. 497

[24] Art. 105 of the PEN. C., 33 L.P.R.A. sec. 4067

[25] MANUAL DE INSTRUCCIONES AL JURADO PARA EL TRIBUNAL SUPERIOR DE PUERTO RICO 182 (1976). (Emphasis added)

In the first place, it must be remembered that in many cases of lewd and indecent acts, the victims are girls and boys. Applied to them, the instruction picks up on a generalized myth that in these cases boys and girls tend to exaggerate. On the other hand, it could reinforce the idea that if a boy or a girl offers contradictory testimony about this type of situations, they are necessarily lying or making up the story. Studies show the contrary.[26]

When the victim is a woman, combined with stereotyped notions that women easily fabricate allegations of sexual aggressions to accuse men, this instruction could be discriminatory because of gender. After all, that instruction is based on jurisprudence established at the beginning of the century, in that the determination of guilt involving an accusation of rape should not be submitted to the jury unless the court warns how dangerous, a conviction based solely on the testimony of the accuser, would be (*Pueblo v. Vidal*[27] and *Pueblo v. Cancel*.[28]) The resonance of this belief, frequent in rape cases, may lead the jury to similar conclusions in cases of lewd and indecent acts where a woman is aggrieved.

In *Pueblo v. Serrano Olivo*,[29] a case regarding the crime of indecency, as categorized in the Penal Code of 1937, and where the victim was a girl, the Supreme Court of Puerto Rico reaffirmed the validity and need for that instruction to the jury when no proof exists to corroborate the victim's testimony.[30] The decision was based on recurring decisions of the Supreme Court of California which interpreted Article 288 of that state's Penal Code which is similar to Article 260 of Puerto Rico's Penal Code. California's state of law changed, however, in *People v. Rincón*

[26] See John G B. Myers et al., Expert Testimony in Child Sexual Abuse Litigation, 68 NEB. L. REV. 1 (1989).

[27] 7 D.P.R. 527 (1904).

[28] 13 D.P.R. 178 (1907). See González de Rodríguez, *supra* note 20.

[29] 93 D.P.R. 745 (1966).

[30] In this case the Court understood that the court of instance had not erred in not giving the instruction because corroboration testimony had been presented.

Pineda[31], which said the instruction had outlived its usefulness and that it is not obligatory to apply it today. That same course of action is justified in our case.

For all the above considerations, the Commission recommends that this instruction be eliminated from the Manual of Instructions to the Jury used in the courts of Puerto Rico.

Rules of Evidence

Rule 21: Evidence of prior sexual conduct of the victim

Rule 21 of Evidence excludes evidence of the victim's past sexual conduct or history in rape or attempted rape trials, except under certain circumstances.[32] This rule was incorporated into the Rules of Evidence to correct discrimination on the basis of gender against the woman that arose in those cases. It originated in Act No. 6 of February 1, 1979 which added Rule 154.1 of Criminal Procedure,[33] whose text is identical to that of the Rule of Evidence. According to the law's Statement of Motives:

> In the case of rape there is resistance on the part of the victim to initiate judicial proceedings and even to report the crime, since she considers that the advantages that she will receive from our criminal justice system are fewer than the disadvantages she will encounter if she reports the crime.

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[31] 538 P.2d 247 (1975)

[32] The rule provides the following:
In any prosecution for rape or attempt to commit rape, evidence of the victim's past sexual conduct or history or opinion or reputation, evidence regarding such sexual conduct or history is not admissible for the purpose of attacking her credibility or establishing her consent, unless circumstances of a special nature show that such evidence is relevant and that its probative value outweighs its defamatory or prejudicial character
If the defendant seeks to offer under such special circumstances evidence of the victim's sexual conduct or history, or evidence of opinion or reputation regarding such sexual conduct or history, he shall follow the following procedure:
(a) The defendant shall file before the court and the prosecuting attorney a written motion sworn by him specifying the evidence he seeks to offer and stating its relevancy in attacking the victim's credibility or establishing her consent.
(b) If the court determines that such evidence is adequate, it shall order a hearing in chambers out of the presence of the jury. In this hearing, the victim may be questioned on the evidence proposed by the defendant.
(c) If the court, at the conclusion of the hearing, determines that the evidence which the defendant seeks to offer is relevant, and that the probative value of such evidence outweighs its defamatory or prejudicial character, it shall make an order specifying what evidence may be offered by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

[33] 34 L.P.R.A. Ap. II, R. 154.1

> By admitting evidence on the victim's past sexual conduct or history or on the opinion or reputation of that sexual conduct or history is to perpetuate a situation feared by the victims as much as the rape itself, humiliation in court, and interference with her right to privacy.
>
> The prejudice that such evidence causes is clear since it disorients the jury, diverts its attention to collateral questions and invades the right to privacy of the victim. Therefore, evidence of the sexual conduct or history, or the reputation of the victim has very little evidentiary value since it is not relevant to her credibility as a witness nor is it material relevant to the controversy if on the occasion of the alleged criminal facts, she consented to, or was obligated to commit the sexual act with the accused.[34]

Prohibiting the use of prior sexual history of the victim of rape or attempted rape was a great step forward for women. It was commonly used either to prove the consent of the rape victim to the sexual act if, for example, she had previous sexual relations with the accused, or to diminish her credibility, since it was thought that a woman with prior sexual experience was not credible as a witness or that she fabricated the accusation to take "revenge" on an old boyfriend. Many times it was implied that a sexually active woman did not deserve protection from a rapist.

Even though approval of the rule was positive , the law still does not protect women completely, since it left open the door to utilizing past sexual history when the court determines that "special circumstances" are present. To make this determination, a hearing must be held. It should be stated, however, that no valid reason or "special circumstance" exists to justify the presentation of this kind of evidence. Its exclusion is due not only to high public interest, but also to reasons of relevance. Whether the victim may have led a sexually active life or had prior consensual relations with the defendant is neither relevant to the credibility she may deserve, nor leads to the inference on whether she did or did not consent. The situation becomes critical any time the law does not define the "special" circumstance but leaves the court to arbitrarily decide on the admission of evi-

[34] Statement of Motives of Act No. 6 of February 1, 1979, Laws of Puerto Rico, 1979, at p. 13.

dence. This is the moment when each judge's stereotypes and negative conceptions about women come into play.

Jurisprudence of the Supreme Court of Puerto Rico in Penal Law Related to the Subject of Gender

The Supreme Court of Puerto Rico has expressed itself on aspects of the subject at hand in several important cases.

In *Women's Commission v. Secretary of Justice*, it had to determine the constitutionality of corroboration required by Rule 154 of Criminal Procedure for rape and attempted rape when evidence exists of past friendly, amorous, intimate or similar relations between the victim and the accused.[35]

Before, in *Pueblo v. Pagán Rivera*, Justice Negrón García had said, in a concurrent opinion, that the qualified corroboration requirement "on its face violates the constitutional prohibition of discrimination on account of sex, since it casts doubts a priori upon the adequacy and veracity of a woman's testimony, by weakening it against the testimony of a man's testimony."[36] There existed, then, in the Supreme Court, a degree of sensitivity about the issue heralding the rejection of the corroboration requirement that came to pass in the case of *Women's Commission*.

Here, the Court cited its opinion in *Zachry International v. Superior Court*[37], to affirm once more that "the Constitution of the Commonwealth of Puerto Rico not only guarantees equal protection under the law, but also, unlike the federal Constitution, expressly prohibits sex discrimination".[38] If, indeed, it is possible to establish classifications on the basis of sex, these cannot be discriminatory. To reach a decision on this issue, this kind of inherently suspect classification must

[35] In 1974 Rule 154 on corroboration evidence was amended to the effect of limiting the requisite of corroboration in cases of rape to cases where the victim had had a previous relationship with the accused. 34 L.P.R.A. Ap. II, R. 154, as amended by Act No. 209 of July 23, 1974

[36] Pagán Rivera, 105 D.P.R. at pp. 497-498.

[37] 104 D.P.R. 267 (1975).

[38] Const. E.L.A., Art. II, Sec. 7

be submitted to the so-called criterion of strict judicial scrutiny. This requires that a compelling public interest be proven to justify the classification and that it be the least drastic alternative to attain it. The Court concluded that the State had not proven those two elements, and therefore, declared unconstitutional the rule of corroboration in cases of rape and attempted rape.

The Court stated the following:

> A legislative expression based on a classification that charges every woman in the situation with the presumption of lying is immediately evident. Otherwise, why require that her testimony be corroborated? Accepting that maybe some woman may lie and falsely accuse someone of rape, it can not be rationally inferred that all women will do the same thing. Nonetheless, the adequacy and presumption of truth which shelters every witness in our jurisdiction is attacked a priori as a result. This is an affront to her dignity that adds to the physical harm suffered and helps make her the victim of two offenses, that of sexual assault and that of society.[39]

The Court later concluded that this rule:

> a priori casts doubts on the adequacy and veracity of a woman's testimony, by weakening it against a man's testimony whose validity in our code of laws not only represents different, archaic and unjustified treatment attributed to her unique feminine condition but also an affront that constantly injures the human dignity of that being....[40]

With that, the opinion of Justice Negrón García became the majority of the Court. At last the invalidity of a rule based on an unfounded presumption of women's lack of women's credibility was recognized.

In November of 1994, the Legislative Assembly of Puerto Rico statutorily eliminated the corroboration requirement.[41] However, as previously mentioned, the corroboration requisite for the crimes of abortion, seduction and inducing prostitution remained intact. The same reasons that serve as basis for the decision discussed here, demand the invalidation of the rest of the rule.

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[39] Women's Commission, 109 D.PR. at p. 732 (Footnote omitted)

[40] *Id.* at p. 739

[41] Act No. 123 of November 11, 1994

In *Pueblo v. Rivera Robles*[42] the Supreme Court encountered another sex-based classification that violated equal protection under the laws. In the written opinion by Justice Antonio Negrón García, the Court upheld the constitutionality of Article 99(a) of the Penal Code of Puerto Rico that typifies statutory rape or the carnal intercourse of a man with a woman under 14 years old not his wife.[43]

The accused-appellant had sexual relations with his daughter, who was under 14 years of age. Instead of being accused of incest, he was accused and convicted of statutory rape. He alleged sex discrimination because the statute only penalized a man and not a woman who had carnal intercourse with a man under 14 years not her husband.

The Supreme Court confirmed the appellant's conviction. Regarding his allegation that the equal protection clause was violated, the Court decided it lacked merit and applied the criterion of strict judicial scrutiny to the suspect classification. The Court reasoned that the compelling interest of the State for establishing the classification was to protect a young woman from the emotional impact of sexual relations and, especially, to protect her from pregnancies. To support its judgment, the Court cited the decision of the federal Supreme Court in *Michael M. v. Sonoma County Superior Court,*[44] which upheld the constitutionality of a California statute, similar to that of Puerto Rico, which justified the sex-based classification as a compelling interest of the state to prevent pre-adolescent and adolescent pregnancies due to the profound psychological, emotional and physical consequences of that sexual activity.

The Supreme Court of Puerto Rico felt that the reasons of the federal Supreme Court equally applied to our jurisdiction under the criterion of strict judicial scrutiny and concluded:

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[42] 121 D.P.R. 858 (1988).
[43] 33 L.P.R.A. sec. 4061.
[44] 450 U.S. 464 (1981)

> In this area we agree with the State that a compelling interest exists to reduce, by way of penalty the problem of pregnancy in girls and the usual serious psychological, emotional and physical problems that it generates[45]

The Court indicated, however, that the solution adopted was not theoretically perfect, conveying that it had arrived at its decision because of the particular circumstances of the case.[46] As we previously mentioned, a case of incest was prosecuted as statutory rape, perhaps because the penalty for rape is more severe than for incest. Had the Court decided that the statute was unconstitutional, the accused would have gone free, despite the evidence of carnal intercourse with his daughter. The foregoing suggests that the Court was uncomfortable with its own decision. Justices Pons Núñez and Rebollo López dissented without opinion in the case.[47]

In *Pueblo v. Rivera Morales*, the Supreme Court also encountered another suspect sex-based classification. In this case the unconstitutionality of Article 95(d) of the Penal Code was alleged under the equal protection clause. The statute reads:

> Battery shall be considered aggravated ..... when committed under any of the following circumstances .....

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[45] Rivera Robles, 121 D.P.R. at p. 875.

[46] One should remember that the scrutiny to examine allegations of discrimination by virtue of classifications based on gender at the federal level is less rigorous than that adopted by the Supreme Court of Puerto Rico to evaluate similar classifications under the Constitution of the Commonwealth of Puerto Rico

[47] This case doesn't necessarily provide for the more difficult problem that emerges when consensual sexual relations occur between two minors, a male and a female, and a petition is filed against the young man under Article 99(c). Please note that only the male is penalized in this case. That immediately raises the problem of a classification based on gender, whose analysis requires strict judicial scrutiny. This situation could be distinguished from that in which the accused is an adult man. In this last case one could believe that there is a compelling interest of the State to protect minors vis a vis adult men, among others because of the unequal relation of power. But, in the case of two minors, in relatively equal conditions, even when the interest continues to be to prevent pregnancies in young girls, how could it be justified constitutionally that the penal deterrent occurs by penalizing only men? It could be argued that since women suffer greater impact in cases of pregnancies, the difference established was justified. But that doesn't do away with the argument that only penalizing the man is not the only way to achieve the objective of the statute. On the other hand, imposing a penalty on the girl could also present problems related to her right to privacy. The Supreme Court of Puerto Rico had this situation before it, but handled it by rejecting the attack on the constitutionality of the statute in these circumstances by way of a short unpublished judgment, in which it merely makes reference to the case of *Michael M. v. Sonoma County*, without explaining the reasons for its decision or discussing the problems presented. See *Pueblo en interés del menor M.M.V.C.*, judgement of January 15, 1986.

(d) When committed by an adult male on the body of a woman or child...[48]

The accused-petitioner alleged discrimination on the basis of sex in favor of the woman.

The Court, in an opinion by Associate Justice Jaime Fuster Berlingeri, upheld the constitutionality of the stipulation arguing that, from an anatomical point of view, a woman's physique is generally lighter and more frail than that of a man and her total strength less. On the basis of studies published by Time magazine, however, the Court also concluded that, from a psychological point of view, a man is usually more aggressive than a woman.[49] As an example, the Court stressed that 92% of the complaints of battery filed against minors under 17 years during 1990-91 had been against males, and it mentioned the serious problem of domestic violence that women suffer in Puerto Rico. In light of the foregoing, it concluded:

> Challenged by this devastating picture of violence against women, it is not possible to consider Subsection (d) of Article 95 of the Penal Code as unconstitutional. The measure is not based on degrading concepts of women; it does not reflect archaic or pejorative ideas of inferiority or abject "frailty".[50]

The majority opinion could cause concern for several reasons. First, it could be interpreted that, despite its language, the Court has relaxed the strict scrutiny application in evaluating allegations of gender discrimination. This could be very prejudicial as far as it opens doors to less rigorous evaluations of suspect classifications, particularly in the lower courts. Ultimately, more women could be affected than men.

Secondly, by making universal the physical weakness and psychological passivity of women, the Court actively helps perpetuate the image of woman as the weaker sex.[51] Remember that Article 95 itself incurs in that by putting women on the same level as children in Subsection

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[48] 33 L.P.R.A. sec. 4032(d).

[49] *Sizing Up the Sexes*, TIME, January 20, 1992.

[50] *Rivera Morales*, 93 J.T.S. at pp. 10744-10745.

[51] See Myrta Morales Cruz, Commentary, *Pueblo v. Rivera Robles and Pueblo v. Rivera Morales, Protección a la mujer o paternalismo?*, 64 REV. JUR. U.P.R. 123 (1995).

(d), and even women in a similar position to the elderly as regards Subsection (c) which aggravates the battery "when it is committed by a person of robust health upon one who is aged or decrepit" [52]

Third,, analyzing the lawmaker's intent in establishing the aggravated circumstance is not without problems. On the one hand, the majority opinion relied on current statistics to decipher that intent. Justice Rebollo in his dissenting opinion said that judges should abstain from speculating about legislative intent, especially in those cases where classifications are being impugned and strict scrutiny is applicable. On the basis of current statistics it is difficult to argue that the turn-of-the-century legislator was interested in addressing domestic violence against women. On the other hand, in a concurring opinion, Justice Naveira relied on historical and literary sources at the end of the 19th century to reach the same conclusion. To a certain extent, Justice Rebollo's criticism could also be applicable. These majority opinions show a clear will to save the validity of the aggravated factor in the face of a presumption of unconstitutionality imposed by a suspect classification, where traditional stereotypes about men and women reside.

The stance assumed by Justice Negrón García in his dissident opinion is a frontal attack on stereotypes. After pointing out that the majority ratified the target of the controversy on the basis of "the disparity, physical superiority and psychological propensity of male aggression towards women", Justice Negrón said:

> We accept that man is usually physically superior to woman. Now then, to assume that she is always weaker than man is simply false. Notwithstanding, and without exception, the legislation referred to, classifies and imposes on the man the absolute burden of the aggravating factor, without considering that his physical condition could be the same or weaker than that of the battered woman.[53]

Although he held that physical battery against women is "despicable," Justice Negrón concludes that conceding unequal treatment without other grounds is unconstitutional, especially

[52] 33 L P R A. sec. 4032(c).

[53] *Rivera Morales*, 93 J.T.S. at p. 10753 (Negrón García, J., dissenting)

when a less drastic alternative based on advantage and physical abuse can apply to both men and women. Justice Rebollo López, also dissenting, agreed that the interest of the State in approving Article 95(d) of the Penal Code was to protect a weak victim from stronger aggressors, and that the establishment of a sex-based classification was not, in this case, less onerous to fulfill the law-maker's intent. He concluded, therefore, that the third requirement of strict scrutiny had not been met,[54] which made the aggravated circumstance unconstitutional. Regarding the stereotyped image of women, he said:

> The conception and generalization of the woman as "weak and in need of special protection, is a paternalistic vision incompatible with the legitimate rights of the human being.[55]

The ensuing discussion within the Supreme Court regarding the constitutionality of Article 95(d) dramatizes the complexity of an issue in which legislative solutions based on old conceptions are interwoven with the rise of a new consciousness about old problems, like violence against women, which are beginning to be interpreted with a more sensitive view about gender.

Unquestionably, the pertinent statute historically responds to stereotyped notions about men and women, as the dissenting judges argued. In that sense, it poses problems regarding the text of the Constitution that prohibits sex discrimination.

The intense discussion of the last decades about the social condition of women, however, has led to legislation specifically tailored to remedy situations of discrimination or power imparity that affect women in our society. Most importantly, the need to adopt measures to prevent overall violence against women has been proposed in many societies. At an international level, for example, the Organization of American States has approved the Inter-American Convention to Prevent,

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[54] The three requisites of strict scrutiny are: (1) that there exist a compelling state interest to protect, (2) that there exist a rational nexus between the classification and the purpose of the government and (3) that the method selected be the less burdensome (onerous) to achieve the interest of the State. See *Zachary International v. Superior Court*, 104 D.P.R. 267, 277-778 (1975).

[55] *Rivera Morales*, 93 J.T.S. at pp. 10754-10755 (Rebollo López, J. dissenting).

Penalize and Eradicate Violence Against Women.[56] In its first article, the Convention defines violence against women as "any conduct, based on gender, that causes death, injury or psychological, sexual or physical suffering to women, in the public sphere as well as the private". The key is that violence is directed against her because of her gender.

In the chapter on domestic violence of this Report we analyze recent legislation approved by the Congress of the United States that establish civil rights violations as cause for legal action for any person who has been the object of violence because of gender.[57] This includes, of course, diverse forms of violence against women, because of gender, including violence in the home.

Seen in this manner, the protection of women from violence against her could legitimately form part of a legislative scheme, of a penal nature, without contravening the constitutional scheme of the United States or Puerto Rico. In fact, what happens is that violence against women is considered as one more manifestation of gender discrimination, against which she must be protected.[58] Violence against woman has also been conceptualized as a violation of human rights.[59]

These considerations call for a legislative scheme designed specifically to prevent violence against women, beyond the domestic scene, according to the new criteria and justifications, without reproducing traditional stereotypes.

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[56] Resolution was adopted by the OAS General Assembly in its Seventh Plenary Session held on June 9, 1994 in Belem do Pará, Brasil.

[57] See the Analysis of legislation and jurisprudence of the chapter on Domestic Violence

[58] In 1981 the Convention on the Elimination of all Forms of Discrimination Against Women entered into effect, approved by the General Assembly of the United States through Resolution 34/180. The Committee [of the UN] for the Elimination of Discrimination Against Women has made clear that the definition of discrimination of Art. 1 of the referred to Convention includes violence based on gender, that that, therefore, such violence constitutes an act of discrimination. Committee for the Elimination of Discrimination Against Women, XI session period, New York, January 20 and 31, 1992, General Recommendation No. 19: Violence against woman, CEDAW/C/1992/L. 1/Add. 15.

[59] See, for example, the DECLARACION DE LA CONFERENCIA MUNDIAL DE DERECHOS HUMANOS DE VIENA (June, 1993).

Analysis of Findings

1 In the criminal justice system, as a result of sexist stereotypes about women and men, a tendency exists to see rape as an act of passion, rather than a crime, provoked by the conduct of the actual victim.

A female prosecutor told the Commission the following incident that took place during the preliminary hearing in a case of rape:

A lawyer asked the judge to take

> "pudic-judicial" [sic] knowledge that the accused is a man [he said, to the effect, that:] You are a man ... and men are men. This woman drank with him [the accused], this woman danced with him, this woman got in the car with him ... Your honor, you are a man, he is a man, and I am a man ...[60]

The lawyer's argument was clearly aimed at justifying the sexual crime as an automatic response, supposedly understandable in a man, as someone who loses control and good judgment in the presence of a woman whose acts are perceived as provocative. Surfacing on the one hand is the stereotyped notion that the man, merely by being a man, cannot repress his sex drive, more so , that he has to respond to a sexual provocation. Not to do so would take away from his manhood, his masculinity.

On the other hand, the example also underscores the idea that for a rape to have occurred, the victim must fulfill the social expectations regarding a woman's virtue, and cannot give the slightest suggestion that she wants to have sex and is leading the man on. That is, in this type of argument, everything depends on the impression the man receives. In the above incident, the alleged victim took a few drinks, danced and later got into the car with him, therefore, presumably she looked for the sexual advance. The implication goes even further: even if she didn't want the sexual advance, she placed herself in a situation that led the man to believe it, or react "as expected" and

[60] Focus Group Interview, Female trial lawyers and prosecutors, at pp. 42-43. The prosecutor pointed out that in this case the judge responded adequately to the lawyer

for that reason she is guilty. The implicit supposition is that something about the victim's behavior forces the aggressor to commit the sexual act.

That something can also be related to how she was dressed. The Commission heard many testimonies regarding defense lawyers who allude to how rape victims were dressed, in order to devaluate the accusations.[61]

One female deponent pointed out that the existing attitude regarding sex crimes in general and rape in particular originates in prevailing myths, prejudices and conceptions that many justice system representatives make manifest.[62] It was stressed, for example, that sexual assault is constantly promoted in the media. Newspapers, television and films constantly allude to woman as sex objects to such an extent that, occasionally, men act not thinking they are committing a crime but doing what is expected of them.[63]

Regarding rape, it was affirmed that, although a violent crime, society does not see it as such, but as an act of passion provoked by the victims.[64] That view is shared by many judicial system officials, including the police, prosecutors, and judges.[65] The Commission received multiple testimonies about discriminatory attitudes of the police, reflected by such expressions as: "You looked for it, [it was] your fault", aimed at women.[66] Prosecutors barely show solidarity with the victims,[67] to the extent of implying that the victims seduce their rapists.[68] The District Attorneys Office allegedly lacks basic information on the problem these cases present.[69]

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[61] See, for example, Focus Group Interview, Female trial lawyers and prosecutors, at pp. 43-44.

[62] Written presentation submitted by the Rape Crisis Center for Women Victims, August 31, 1994, at p. 3.

[63] Focus Group Interview, Counselors of women rape victims , at p. 24.

[64] *Id.* A similar conclusion was reached by the Florida Supreme Court Gender Bias Study, 42 FLA. L. REV. 876 (1990).

[65] See, for example, Focus Group Interview, Counselors of women rape victims, p. 16.

[66] *Id.* at p. 13.

[67] Hearings, June 10 and 11, 1994, at p. 20.

[68] Focus Group Interview, Counselors of women rape victims, p. 36.

[69] *Id.* at pp. 18-19.

The image of rape and other sexual crimes as sexually provoked reactions, shifts the burden of proof and places it on the shoulders of the victim, even from the initial investigation. During the judicial process, the victim is turned into the person judged; she must prove that she is innocent rather than prove the guilt of the accused.[70]

Still, this view of sex crimes, where women are the usual victims, leads to their conceptualization as of lesser importance than robbery, murder and similar crimes, which is why prosecutors and defense attorneys tend not to be well prepared, which is detrimental to the victims.[71]

The lower ranking of these cases is also reflected, according to some deponents, in the constant change of prosecutors assigned to the cases, which forces the victims to relate the incident over and over again, despite the difficulty and sorrow it entails for them, and in frequent postponements of hearings, worsening the burden of the proceedings. The postponements force victims to constantly relive the effects of the rape. In view of the foregoing, the experience of the courts is as bad as the rape itself, and victims prefer not to go before the courts because they believe they will be victimized once again.[72]

2 *In the criminal area, especially regarding sex crimes, the credibility of women victims tends to be diminished within a pattern of revictimization.*

Although, in the section of this Report on Courts Interaction, we discuss the diminishment of women's credibility as a result of sexist stereotypes and discriminatory conceptions profoundly rooted in society, it is opportune to make a specific point about how this situation is manifested with greater force in sex crime cases As we noted in the previous finding, women often become the person on trial in sex crime cases. If the generalization is that women provoke men, then their testimony will be suspect from the beginning.

[70] *Id.* at p. 37.
[71] *Id.* at pp. 18-21.
[72] *Id.* at p. 13.

The Commission was told that first to doubt the victims are the police, both men and women, the prosecutors, both men and women, who often subject them to sexist remarks and to aggressive and disrespectful interrogations[73] It was said, for example, that the District Attorney's interrogations, which often start with the premise that the account is false, are developed in accusatory and intimidating tones making the victim feel guilty of the acts.[74] Incidents, such as the following, were brought to the Commission's attention: A policewoman from the Sex Crimes Unit investigated only those aspects of the case that could prejudice the alleged victim. In the medical room where the victim was present, the policewoman said, before witnesses, that the woman was a liar and that she and the accused were lovers,[75] as if that disallowed the possibility of rape. Similarly, in another incident a prosecutor implied during the interrogation that the victim had seduced the rapist and that she was a friend of the accused and had invited him to her home. The prosecutor said that he resorted to that kind of interrogatory to ascertain that "that girl was not a lover of the accused".[76]

There is also a tendency in incest cases to believe that the victim lies. Prosecutors, and judges, it was said, tend to reject the idea that someone close to the victim, a grandfather, for example, could commit the crime.[77]

Some judges also manifest identical discriminatory attitudes against women. As an illustration, the case was told of a judge who asked a female counselor of rape victims if there sexual abuse had actually occurred in the case under his consideration. He then spoke about all the cases

[73] Id. at p. 13.
[74] Written presentation submitted by the Rape Crisis Center for Women Victims of Rape, August 31, 1994, at p. 5
[75] Focus Group Interview, Counselors of women victims of rape, at p. 38
[76] *Id.* at p. 37.
[77] *Id.* at p. 28.

in which he had intervened and had doubted the accusation.[78] Evidently, the judge in question started from a prejudice that, from the outset, places the alleged victim in a detrimental position.

It is important to remember what we previously said regarding the rule in force up until a few years ago which required the corroboration of a woman's testimony in rape trials, a rule that the Supreme Court says started from the presumption that every woman in a rape case lies.[79]

> 3. *A generalized impression exists that, as a consequence of cultural patterns of a discriminatory nature against women, there is a tendency in the criminal justice system to promote plea bargains in sex crime cases.*

Plea bargaining is a common and accepted practice within the criminal justice system of Puerto Rico and widely conceived as a convenient mechanism to speed up case proceedings and relieve the court backlog. When the court accepts the negotiation, as a general rule the accused pleads guilt to a lesser crime than that for which he was accused. This frequently happens with sex crimes[80] and that, since the aggressors benefit by reduced penalties and a right to probation, victims distrust the system.[81] They get the impression that the law is on the side of the accused and that it is not worthwhile to go to court.[82]

The Commission was told of a case where a prosecutor convinced a rape victim to agree to a plea bargain by telling her that juries are sometimes composed of men and that to convince men that the rape actually occurred was hard.[83] It is not surprising, then, that some victims prefer that the accused declare himself guilty, even if only for a lesser crime, than to take the witness stand.[84]

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[78] *Id.* at p. 54.

[79] See the discussion of this point in the analysis of legislation and jurisprudence of this chapter. The elimination of this requisite was the result of the Supreme Court decision in the case of *Women's Commission v. Secretary of Justice*, 109 d.P.R. 715 (1980).

[80] Focus Group Interview, Counselors of women victims of rape, at p. 36.

[81] *Id.* at p. 58. See written paper presented by the Rape Crisis Center for Women Victims of Rape, August 31, 1994, at p. 4.

[82] Focus Group Interview, Counselors of women victims of rape, at p 58

[83] *Id.* at p. 60

[84] *Id.* at p. 57.

Evidently, intimate matters are aired in these cases and many women, faced with situation, choose to accept what appears to be a lesser evil.

4. In the processing of sex crime cases, women victims are objects of improper interrogations that reflect discriminatory attitudes and a process of revictimization

According to a female deponent, discriminatory practices in procecuting sex crimes are "reflected in a society that wants women to conform to traditional roles, especially when they experience the effects of violence and victimization on the basis of gender".[85] Victims are constantly being judged throughout the process. Their conduct, sexual behavior, dress, lifestyle, and friends are questioned, establishing comparisons with their socially assigned stereotypical roles. Women who do not behave according to these expectations, within the notion of what it means to be a "good" woman, are exposed to sexual attack and are not seen as deserving of the protection of the law.

The Commission was told about prosecutors who make comments such as the following: "The victim was raped but not dishonored".[86] What this type of expression seems to imply is that if the victim has had previous sexual relations and thus was not deflowered, then the nuances of the rape are less grave. Also implied, as we shall see, is that the evidence of the case will be harsher because, surely, the defense will try to present at trial the victim's complete sexual history.

In fact, a similar situation occurs in general practice, according to many testimonies received by the Commission. Defense lawyers tend question victims about their sex lives, as if that were relevant, starting from the presumption that a sexually active woman consented to any sexual advance or at least provokes it with her behavior, hence she should not be protected under the law.

[85] Written paper presented by Coordinadora Paz para la Mujer, June 11, 1994, at ps. 10-11.
[86] Focus Group Interview, Counselors of women victims of rape, at p. 17.

If the victim has had a previous relationship with the presumed rapist, her situation worsens.[87] This is so, although rape can occur even though the woman is the rapist's sentimental partner.[88]

Victims feel that, in addition to having been raped, they are humiliated and discredited with impunity during the process.[89] It has often been pointed out that this practice discourages women from reporting assaults or following through with a case. They fear the damage to their reputation because of the publicity these cases receive and the multiple impertinent questions they are asked: they see themselves as doubly victimized.[90]

In addition to impertinent interrogations, references were made to improper questions and comments, and disrespect, that take place in these cases. For example, a woman of 75 years, raped by a 26-year-old man was asked if the fact that she didn't use force against the rapist meant that she had enjoyed the rape.[91] It was said that these cases elicit a certain morbid, ghoulish and gloating delight about the intimate clothing of the women and details of the sex acts. As a result, the victims feel judged and unworthy.[92]

Several deponents affirmed that some rape victims, with regard to interrogations, are not protected by judges who fail to apply the Bill of Rights of Victims and Witnesses.[93] But, it was also said, that some judges control hostile lawyers and even leave rape cases last on their calendars, when the courtrooms are empty, to save the victims from publicity and humiliation.[94]

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87 *Id.* at p. 37.

88 Law on Domestic Violence, Art. 3.5, 8 L.P.R.A. sec. 635.

89 See, for example, Hearings, June 10 and 11, 1994, at p. 20; Hearing, May 22, 1994, at p. 16; Focus Group Interview, Counselors of women victims of rape, pp. 36-38, 42 and 53.

90 Written paper presented by the Rape Crisis Center for Women Victims of Rape, August 31, 1994, at p. 7; Hearings, June 10 and 11, 1994, at p. 20.

91 Focus Group Interview, Female trial lawyers and prosecutors, at p. 46. With respect to this type of comment, see also, for example, Hearings, June 10 and 11, 1994, at p. 20.

92 Focus Group Interview, Counselors of women victims of rape, at p. 26.

93 Hearings, May 20, 1994, at p. 12; Focus Group Interview, Female trial lawyers and prosecutors, at p. 47.

94 Focus Group Interview, Female trial lawyers and prosecutors, at p. 43; Focus Group Interview, Counselors of women victims of rape, at p. 61.

Recommendations

1. In conformance with the analysis of legislation in Penal Law, the Judiciary and the Legislature should promote the examination of penal legislation and of procedural and evidentiary rules (types of evidence), to amend them so as to eliminate all sexist elements in the language and any discriminatory content from the perspective of gender. Nonetheless, the legitimacy of certain legal statutes that provide a discriminatory treatment of women and men should be kept in mind as an instrument to remedy historical situations of discrimination or power imparity that affect a particular sex.

2. The Supreme Court should promote the examination of the Manual of Instructions to the Jury to eliminate any discriminatory content from the point of view of gender, giving special attention to language of a sexist nature that can affect the determinations of the jury.

3. Appellate forums should be alert to the gender perspective in the interpretation of Penal Law, taking into account the legitimacy of specific legislation geared toward remedying historical situations of discrimination or of power imparity to guide the courts of instance toward an interpretation and application of Penal Law free from discriminatory contents based on gender.

4. The Office of Courts Administration should develop special training aimed at judges of criminal and juvenile law, and support personnel specialized in human behavior, where the perspective of gender is discussed in general terms and, particularly, what is applicable in sex crime trials and to the attention of juveniles in the criminal justice system.

5. The Department of Justice should develop training seminars aimed at criminal prosecutors and juvenile prosecutors to sensitize them to the effects of stereotypes and sexist cultural patterns in the criminal area and within the juvenile justice system.

6. Law schools should include the gender perspective in their courses on Penal Law, Criminal Procedure and on Evidence (Law of Types of Evidence) and to promote thought and inquiry into it.

7. The different components of the criminal justice system should promote the preparation and training of personnel to provide orientation and support that sex crime victims need and to avoid their double victimization.

8. The criminal justice system should adequately disseminate the Bill of Rights of Victims and Witnesses and facilitate access to mechanisms of presentation and processing of complaints that permit the adequate and proper fulfillment of the document's public policy.

9. The Judiciary Branch should carry out more in depth investigations to determine to what extent stereotypes and sexist cultural patterns influence the decision-making process of judges in criminal processes and in the imposition of measures.

B. Juvenile Justice System

Introduction

A recent study points out the general problems that affect minors in the judicial system.[95] The Commission recognizes the importance of many of the problems pointed out in that report. According with the mandate of the Commission, however, our analysis concentrates on whether different treatment towards girls and boys exists within the judicial system and, if so, how is it manifested and what are the consequences.

The Commission's findings confirm that gender discrimination manifested in the courts of Puerto Rico is reflected, to a greater or lesser degree, in the juvenile justice system, an integral part of the judicial system. Just like in the rest of the Judicial Branch, juvenile issues respond to the same cultural and sociological patterns that govern Puerto Rican society.[96] These patterns produce discriminatory practices and policies based on the ideas, conceptions and values that define stereotypes attributed to men and to women.[97] Our findings reflect the discriminatory practices that are manifest in the judicial area of minors.

Before entering fully in the discussion of our findings, we will describe several general aspects of the system and offer some data on the processing of complaints in the area of minors. In that respect, it is important to point out the differences produced on the basis of sex.

Juvenile justice matters in Puerto Rico are entrusted to the Minors Courtrooms of the Court of First Instance, located in those towns that head the judicial regions. These courtrooms

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[95] SERVICIOS LEGALES DE PUERTO RICO, INC., INFORME COMITE DE PRIORIDADES EN AREA DE MENORES (1994); and the following reports that are cited in it: U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, SUMMARY OF FINDINGS REGARDING CONDITIONS AT THE JUVENILE FACILITIES IN PUERTO RICO (1991); Dora Nevares-Muñiz, *Delincüencia Iuvenil en Puerto Rico, Cohorte de Personas Nacidas en 1970*, Senate of Puerto Rico (Supp. 1992).

[96] See the Introduction to this Report.

[97] See the chapter on General theoretical framework of the Report

operate under the direction of an administrator, independently of the adults system and with its own secretaries and bailiffs.

The creation of the juvenile justice system and the separation of processes are based on the theory that the State should act protectively "in the minor's interest," so that, an error committed during their formation and maturation does not negatively affect their future.[98] One starts from the premise that boys and girls are more susceptible to re-education than adults. Although they are required to be responsible and the protection of the community's order and welfare is aspired to, more tolerance of juveniles is proposed because immaturity is characteristic of childhood.[99] It is believed that the juvenile justice system should curtail juvenile delinquency and protect the security of society and the minor through fair and adequate measures that offer the boy and girl a chance to be re-educated and to develop personally and socially.[100]

The juvenile justice system of Puerto Rico only intervenes with minors, boys and girls, accused of a "*falta*," a term that refers to "an offense or attempt to commit an offense, by a minor [under 18 years] of the special penal laws or municipal ordinances of Puerto Rico".[101] Minors considered undisciplined—that is, who exhibit problems in conduct that do not violate the law—are attended directly by the Department of Social Services, without the intervention of the court.[102]

Minors accused of offenses, according to the latest data,[103] tend to belong to low-income families, whose principal source of support is the Department of Social Services,[104] and generally live with their mothers.[105]

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[98] LEGAL SERVICES OF PUERTO RICO, INC., *supra* note 1, at pp. 38-39.

[99] *Id.* See, also, DORA NEVARES-MUÑIZ, RIGHTS OF MINORS 5 (2d ed. rev. 1994).

[100] LEGAL SERVICES OF PUERTO RICO, INC. *supra* note 1, at p. 65.

[101] Art. 3(1) of the Minors' Law, 34 L.P.R.A. sec. 2203.

[102] NEVARES-MUÑIZ, *supra* note 5, at pp. 5-11. It has been pointed out that some mothers with unruly minors complain that they do not receive the necessary support and supervision. The Department of Social Services answers that it cannot do anything until a complaint is filed and the court tells them that they lack jurisdiction. Many use as an alternative filing a complaint before the police for the intervention of court and social workers. See Hearings, June 24 and July 1, 1994, at p. 25.

[103] The Office of Courts Administration, year 1992-93.

The rights of minors are currently governed in Puerto Rico by Law No. 88 of July 9, 1986.[106] Although this law, which replaced the one in force since 1955,[107] maintains its focus on rehabilitation, it is less paternalistic and requires more responsibility from the minors regarding their offenses.[108] The current law contains "subtleties of a punitive nature that go beyond the merely rehabilitative and paternalistic purpose of the [previous law]....."[109] The fundamental change in the treatment of accused minors in the justice system came about as a result of an increase in felonies by minors, a circumstance that led several sectors to demand more restrictive legislation.[110]

Since 1986, when the current Law of Minors was approved, a significant increase in absolute terms is noted in the number of minors charged with offenses and in the number of complaints filed. See Table I, as follows:

[104] 43% of the minors had as their principal source the Department of Social Services; the second economic source is the parent who works (17.7%). Source: Table C-24 of the Office of Courts Administration, year 1992-93.

[105] 37.2% of all accused minors live with the mother; 33.5% with both parents; 9.5% with mother and stepfather; 7.4% with other parents; 4.3% with the father; 1.7% with father and stepmother; and 6.4% in other living arrangements. Source: Table C-20 of the Office of Courts Administration, year 1992-93.

[106] 34 L.P.R.A. secs. 2201-2238.

[107] Law No. 97 of June 23, 1955, 34 L.P.R.A. secs. 2001-2015, revoked.

[108] LEGAL SERVICES OF PUERTO RICO, INC. *supra* note 1, at p. 5. See, also, NEVARES-MUÑIZ, *supra* note 5, at p. 5.

[109] *Pueblo en interés del menor R.G.G.*, 123 D.P.R. 443 (1989).

[110] LEGAL SERVICES OF PUERTO RICO, INC., *supra* note 1, at p. 116.

Table I[111]

YEAR	MINORS AGAINST WHICH COMPLAINTS WERE FILED	COMPLAINTS FILED
1986-87	3,483	6,553
1987-88	4,125	7,712
1988-89	4,407	8,411
1989-90	4,634	8,388
1990-91	4,651	8,844
1991-92	5,335	10,431
1992-93	5,859	11,859

The relative increase in the complaints filed over a period of seven years was 81% and the relative increase in the number of minors against whom complaints were filed was 68%.

During that same period the complaints filed against minors increased in absolute terms for girls as well as for boys, in all age groups, except for girls under 10 years. See the Table that follows.

[111] Tables B-15 and C-15 from the Office of Courts Administrtion, years 1986-87 until 1992-92. The year 1992-93 is the most recent that data was available

Table II[112]

COMPLAINTS FILED BY AGE AND SEX
YEARS 1986-87 TO 1992-93

Years	Minors		10 yrs. to less than 14		14 yrs. toless than 16		16 yrs. to less than 18		18 yrs or more		Total		
	M	F	M	F	M	F	M	F	M	F	M	F	Both
1986-87	29	2	354	69	1,550	181	3,748	252	344	12	6,025	516	6,553*
1987-88	26	2	525	79	1,834	228	4,175	294	537	12	7,097	615	7,712
1988-89	33	—	593	45	2,114	128	4,922	206	354	16	8,016	395	8,411
1990-91	39	1	742	66	2,337	166	4,549	230	232	10	7,899	437	8,388*
1991-92	30	2	725	100	2,417	173	4,847	281	241	18	8,260	574	8,844*
1992-93	31	3	923	142	2,763	369	5,514	355	292	23	9,523	892	10,431 *
1992-93	37	1	902	168	3,082	468	6,248	535	358	28	10,627	1,200	11,859
TOTALS	255	11	4,764	699	16,097	1,713	34,003	2,153	2,358	119	57,447	4,629	62,198

*Includes cases where sex is not specified.

The number of complaints filed against boys are significantly larger than those against girls. However, total complaints filed against girls during those years reflect a relative increase greater than those filed against boys. Complaints against boys increased relatively during those seven years by 76%, equivalent to 4,602 complaints, while those presented against girls had a relative increase of a 133%, or 684 complaints.[113] Due to the large difference in absolute terms between them, however, the proportional distribution did not vary significantly. In 1986-87 the complaints filed against boys were approximately 92% of the total complaints filed, and those against

[112] Tables B-21 and C-21 of the Office of Courts Administration, years 1986-87 until year 1992-93

[113] The change in absolute terms for boys was 6,025 complaints in 1986-87 to 10,627 complaints in 1992-93 and for girls from 516 complaints in 1986-87 to 1,200 complaints in 1992-93. See Table II.

girls nearly 8%.[114] Seven years later, in 1992-93, of the total number of complaints, those filed against boys equaled approximately 90% and those filed against girls nearly 10%.[115]

Generally, girls are not accused of committing the same offenses as boys.[116] The three most common offenses in complaints against girls are, in order of frequency: assault, breach of peace, and traffic violations. In the case of boys, the three most common offenses are, in order of frequency: carrying weapons, traffic violations, and robbery. Of these, the common offense to both sexes are traffic violations; in girls it is the third most frequent, while in boys it is the second. See Tables III and IV that follow.

Table III

ORDER OF FREQUENCY OF THE MOST COMMON OFFENSES FOR COMPLAINTS AGAINST GIRLS ON A SCALE OF 1 TO 5, YEARS 1986 TO 1992-93[117]

OFFENSE	ORDER OF FREQUENCY						
	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92	1992-93
Assault	1	1	1	1	1	1	1
Breach of peace	2	2	—	3	2	3	2
Traffic laws	3	3	2	2	3	2	3
Carrying arms	5	5	4	5	5	5	4
Illegal appropriation	4	4	3	—	4	4	5
Malicious damages	—	—	—	4	—	—	—
Robbery	—	—	5	—	—	—	—

[114] 6,025 complaints against boys and 516 complaints against girls for a total of 6,553. See Table II.

[115] 10,627 complaints against boys and 1,200 complaints against girls for a total of 11,859. See Table II.

[116] In several reports of the Commissions for the study of gender discrimination in the state courts of the United States, this finding is also detected, which explains that girls are attributed largely specific "undisciplined" conduct. See the reports of Florida (1990), at p. 908, and Minnesota (1989), at pp. 908-909. These reports point out that "undisciplined" offenses mainly attributed to girls are those related with the stereotypical behavior that is expected of them, such as, for example, to leave the home of their parents.

[117] Source: Tables B-21 and C-21 of the Office of Courts Administration, years 1986-87 to 1992-93.

Table IV

ORDER OF FREQUENCY OF THE MOST COMMON OFFENSES FOR COMPLAINTS AGAINST BOYS ON A SCALE OF 1 TO 5, YEARS 1986-87 TO 1992-93[118]

OFFENSES	ORDER OF FREQUENCY						
	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92	1992-93
Carrying weapons	1	2	2	2	1	1	1
Traffic laws	3	1	1	1	2	2	2
Breaking & Entering	2	3	3	4	3	3	3
Battery	—	5	4	3	4	4	4
Law of Controlled Substances	—	—	—	—	—	5	5
Law 8, Art. 15 &18 protection	—	—	—	—	5	—	—
Illegal Appropriation	5	4	—	5	—	—	—
Robbery	4	—	5	—	—	—	—

Although offenses common to both genders was verified, it was not possible to verify in the period examined a high frequency in violent crimes such as murder and homicide, which are not among the more common offenses for either gender.

Another aspect of the area of minors for which statistics were obtained is that related to decisions in apprehension hearings. See Table V that follows

118 *Id.*

Table V[119]

APPREHENSION HEARING BY SEX OF THE MINOR
SAN JUAN JUDICIAL CENTER
YEAR 1994

Sex	Minors	Cause for apprehension	Percent
Boys	1,161	1,081	93.1
Girls	113	86	76.1
Both	1,274	1,167	91.6

During 1994, apprehension hearings were held against 1,274 minors, of which 91% were boys and 9% girls. Of the total (1,247), cause was found to apprehend 1,167 minors, of which 93% (1,081) were boys and 7% (86) were girls. On the other hand, of the total boys for which hearings were held (1,161), cause was found in 93% (1,081); of the total girls (113), cause was found in 76% (86). See the previous table.

Likewise, the information related to the confinement of minors in institutions or preventive detention centers was analyzed as a result of finding cause to apprehend. The information compiled shows that girls were detained less proportionately than boys: 17% of the total number of girls for which hearings were held were confined, vis ˆ vis 42% of boys. Of the total 322 minors confined, 93% , or 300, were boys and 7%, or 22, were girls.[120] See the following table:

[119] Due to time constraints, the study was limited to the hearings held in the Investigations Unit of the Judicial Center of San Juan during 1994

It was necessary to use diverse sources of information for the compilation, because a register of apprehension hearings by accused minor is not kept. In those cases, where a determination of no probable cause to apprehend the minor was made, forms for complaint/suit were used; for cases in which cause was determined, transfer sheets for cases referred to the Minors' Courtroom were used. Both forms are kept by the Investigations Unit in its archives.

[120] It should be noted that the three most common offenses of girls (assault and battery, breach of the peace, and traffic law) are of lesser gravity than two of the three most common offenses among boys (carrying weapons, traffic law, and breaking and entering), as categorized in the corresponding penal legislation.

Table VI[121]

MINORS DETAINED IN INSTITUTIONS BY SEX
JUDICIAL CENTER OF SAN JUAN
YEAR 1994

Sex	Minors	Minors detained*	Percent
Boys	714	300	42
Girls	129	22	17
Both	843	322	38

*Cases not specifying sex were not included.

In sum: the information compiled shows, in general terms, that the number of minors against whom complaints were filed and the number of complaints filed have increased significantly since 1986[122] and that the most significant relative increase in the number of complaints occurs, for both sexes, against minors in the age group of 14 years to under 16.[123] Likewise, complaints against boys are filed in significantly greater numbers than against girls[124] and that cause to apprehend and detain them in preventive detention centers is also significantly higher than that of girls.[125] On the other hand, a relatively greater increase is observed in complaints against girls than in those against boys and that differences exist between the offenses imputed to girls than those to boys.

The specific findings are explained below:

1. *The behaviors of girls and of boys that prompt complaints have a tendency to be evaluated differently, responding to stereotypes of gender that permeate our society.*

[121] Files of all minors with active cases in the Minors' Court of San Juan in 1994 were used. The number of minors presented in this table is limited to minors with active cases at the time of the study, which is the reason why the number of minors does not coincide with the number of minors for which apprehension hearings were held in Table V.

[122] See *supra* Table I.

[123] See *supra* Table II.

[124] *Id.*

[125] Using data from San Juan as a sample. See *supra* Tables V and VI

Attitudes and myths about attributes and roles of men and women in our society, extend to behavior expected of minors. The Commission was told that the same offenses are evaluated differently, depending on the sex of the accused. An example was cited to the effect that when a girl commits simple assault, generally "sexist remarks" are made, such as "that must be over a male, because she took away another [girl's] boyfriend..." If the accused is a boy, another, more serious motive, is presumed to be the reason.[126]

On the other hand, the difficulty in accepting that girls commit offenses or violate rules was pointed out: if girls incur in that kind of behavior, they are not considered capable of rehabilitation.[127] It is believed that certain offenses are graver if a girl commits them because society doesn't expect her to behave that way. Even being processed by the juvenile justice system can be more stigmatizing for girls than for boys.

Minors interviewed showed that they themselves perceived differences in evaluations of their behavior. In a Focus Group Interview boy minors explained that boys were supposed to be more dangerous, physically stronger, and more delinquent than girls, that boys were expected to get into more trouble and commit more offenses.[128] In a corresponding Interview girl minors explained that girls are supposed to be better behaved than boys because women's place is in the home and they must be on their guard; they are expected to be obedient and different sexual conduct is demanded of them. For this reason, they said, girls who do not stay at home and do things that are only men are expected to do, are severely punished. They also said that boys are at greater liberty to do as they wish.[129] One girl expressed it graphically: "They see me as *macho*, because sometimes I do what I want".[130]

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[126] Hearings, May 13 and 14, 1994, at pp. 23-24

[127] *Id.* at p. 23.

[128] Focus Group Interview, Institutionalized minors (boys) (Industrial School of Ponce), at p. 5.

[129] Focus Group Interview, Institutionalized minors (girls), (Industrial School of Ponce), at pp. 2-3.

[130] *Id.*

These stereotypical evaluations may have an effect at the moment of imposing penalties on them. In fact, the Commission was told that gender could weigh heavily in the imposition of provisional measures. There were contradictory statements, however, as to whether these provisional measures are more severe with boys than with girls, or vice versa.

Some persons, among them a male judge, stated in the hearings and focus group interviews that boys are discriminated against, since the provisional measures imposed on them are more severe, the period of supervision is more extensive, and their conditional freedom is revoked more easily, while girls get more opportunities, are granted more conditional freedom, and a tendency exists to grant their custody to family members instead of detaining them.[131]

Other persons, however, among them a female juvenile prosecutor, discerned that gender discrimination is against girls because provisional measures are imposed on them for longer periods of time and they remain in confinement longer, a larger percentage of girls are submitted to preventive custody, their conditional freedom is revoked more easily because moral requisites are demanded of them that are not imposed upon boys, and sexual conduct different from that of boys is required of them.[132]

The Commission could not carry out a detailed investigation on the provisional measures, however, it recommends that such an investigation be done in the future to verify if, indeed, discriminatory treatment occurs in their imposition.

From information received by the Commission during its study, the need arises to examine at least three aspects in any future investigation: (1) If measures imposed on boys are more severe than those imposed on girls for the same offenses, or vice versa (especially, if the girls are allowed to remain free conditionally more frequently, while boy are more frequently ordered into custody);

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[131] Hearings, June 3 and 4, 1994, at pp. 2-3; Herings, June 24 and July 1, 1994, at p. 26; Focus Group Interview, Institutionalized minors (boys) (Industrial School of Ponce), at pp. 1 and 3.

[132] Hearings, May 3 and 14, 1994, at p. 23. Focus Group Interview, Institutionalized minor (girls) (Industrial School of Ponce), at pp. 2-3

(2) If girls are submitted to preventive custody in a greater proportion than boys and if the moral and sexual conduct required of them is not required of boys; (3) If girls leave the institutions more quickly than boys, and if rescinding conditional freedom tends to favor one sex over the other.

It must be taken into account, of course, that, in addition to the pertinent statistics, numerous factors can help explain the differences, among them: patterns of delinquent activity between boys and girls, including the more common kinds of offenses; the opportunities of employment and access to educational services for youth of both genders outside the correctional system; the existence of institutions to attend to boys and girls; the nature and effectiveness of rehabilitation programs for boys and girls; the access to family resources for assuming custody and care of the boys and girls accused of offenses.

2. *The facilities and many of the services offered to minors are designed for boys and are not adequate for girls.*

From the general statistics that we have supplied in the introduction to this section, it is evident that historically, the number of complaints filed against boys has been substantially greater than those filed against girls. This has led to the fact that facilities and services of the system are designed around boys and that the available resources are not prepared to handle adequately the significant increase in the number of girls imputed.[133] To a great degree the entire system is oriented fundamentally around the boy minor defendant. This is manifested in different ways. For example, no separate cells and baths for girls exist in any of the minors' courtrooms. A similar situation has been noticed regarding adult female prisoners[134] This finding regarding facilities in the courts is a manifestation of unequal treatment based on gender, because the special needs of minors are not taken into account.

[133] Hearings, May 13 and 14, 1994, at p 22; Hearings, June 3 and 4, 1994, at p. 2; Hearings, June 24 and July 1, 1994, at p. 26

[134] On this particular, see the relevant discussion in the chapter on Judicial Administration

3. *Occupational segregation based on gender within the system of juvenile justice, particularly with respect to the positions of bailiff and social work, have discriminatory effects against minors (boys and girls) defendants.*

The immense majority of bailiffs who intervene with boys and girls are men. The absence of women bailiffs creates a serious and recurrent problem regarding the treatment toward girls. Several persons, among them a male judge, repeatedly observed during the hearings and in the focus group interviews that bailiffs frequently act improperly towards the accused girls that they transport and guard.[135] Several male bailiffs treat girls like sex objects, making sexual remarks and advances toward them.[136] It was reported, for example, that last year a bailiff was accused of committing lewd and lascivious acts with a female minor under custody in a cell in the bailiffs office. Another bailiff and a policeman who saw the incident were the plaintiffs.[137] It was emphasized that was not the only case of undesirable intervention by bailiffs with minors under guard, but "what happens is that they don't air it publicly".[138]

Girls who participated in the focus group interview conducted by the Commission confirmed these findings. They indicated that occasionally, the bailiff "gets the minor [under his custody] to fall in love with him", and recalled how a minor "kissed and was kissed by" the bailiff every time she went to court under guard.[139]

Minors of both genders interviewed by the Commission alluded in various ways to the relationship that arises between minors and bailiffs. They offered diverse interpretations about this treatment.

For example, several female minors indicated that the bailiffs treated them well and gave them attention that they did not give the boys, for example, they made sure that the girls ate and

[135] Hearings, May 13 and 14, 1994, at pp. 22-23; Hearings, June 24 and July 1, 1994, at p. 26.
[136] *Id.*
[137] Hearings, June 3 and 4, 1994, at p. 2.
[138] *Id.* at p. 5.
[139] *Id.*

were not cold.[140] Likewise, they mentioned that sometimes a bailiff would make sexual advances to a minor under his custody.[141] Still, several female minors believed that at times, the girls "took advantage" of the situation: "they show their teeth to the bailiffs who respond like the men they are".[142] The girls interviewed said that bailiffs are supposed to respect minors even though they are confined.[143]

For their part, male minors in the focus group interview said that when women violate the law, "they take advantage" of their condition as women and they make sexual advances to the officials in charge to get benefits that the men cannot get.[144] Implicit in that comment, is a complaint of different treatment based on gender.

This whole situation clearly reflects the serious problems that arise from within the system because of a scarcity of women bailiffs to take care of the girls. In itself, this scarcity is a manifestation of gender discrimination, based on stereotypes that preclude beforehand assignment to the functions of guarding and protecting women. Not providing women bailiffs to guard and transport accused girls, on the other hand, constitutes unequal treatment toward the girls. Not only are their special needs not met, but they are exposed to unwanted advances on the part of bailiffs.

The behavior of some bailiffs toward female minors, according to our information, also constitutes unequal treatment based on stereotyped conceptions of the woman as sex object. This is also reflected in the comment that the girls " take advantage" of their condition as women to obtain benefits by propositioning the bailiffs. The image projected is that these propositions are completely normal and that, besides the woman being a sex object, men must respond as sexual beings to the insinuations of female minors. It should be emphasized, also, that the particular attention

[140] Focus Group Interview, Institutionalized minors (girls) (Industrial School in Ponce), at p 3

[141] *Id.*

[142] Id

[143] Id. The girls also pointed out that there exists a similar problem with guards and policemen who generally arrest and frisk the girls.

[144] Focus Group Interiew, Institutionalized minors (boys) (Industrial School of Ponce), at p 5

that bailiffs reportedly extend to female minors, for whatever reason or purpose, simultaneously produces unequal treatment, or at least the perception of unequal treatment toward male minors, who respond with open hostility and aggression.[145]

On the other hand, gender bias is manifested by appointing primarily women as social workers and social technicians in minors courtrooms.[146] These officials are important because they prepare the social reports in which different aspects of the cases are evaluated. The reports are used by judges to determine relinquishment of jurisdiction, referral and imposition of provisional measures.

The officials evaluate in their reports the conditions of the minors such as their personality, their character, their social environment, the degree of control and firmness needed in their supervision, the controls of their parents or guardians and the character traits of the persons with whom they live. The social worker's evaluation of the family situation is extremely important because the conditional freedom that is pending an adjudicative hearing or the detention of the minor as a final disposition depends on it.[147] If the court decides that the custodial person cannot control and discipline the child, the minor could remain in detention

Several deponents declared that male minors receive unequal treatment in corrective measures largely due to the recommendations of female social workers. They said that generally, the result is a nominal measure in the cases of girls, while boys are institutionalized or receive the minimum or maximum that the statute provides.[149]

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[145] The girls manifested in their Focus Group Interview, at p 3, that the bailiffs give them attention that they don't the boys, and that the boys expressed in their Focus Group Interview, at p 4, that the girls benefit, while they get mistreated. Several persons have mentioned that boys are taken to the court with handcuffs and shackles, irrespective of the offense, while girls are not. Hearings, June 3 and 4, 1994, at p. 2.

[146] This situation occurs in the courts in general. See the chapter on Judicial Administration. There are, actually, 60 female social workers, 8 male social workers, 28 female social technicians, and 1 male social technician, according to information obtained though telephone interviews with the administrators of all the minors courtrooms.

[147] In the hearing for the determination of cause to present a complaint as well as in the determination of provisional measures.

[149] Id.

The boys interviewed felt that female social workers give girls more opportunities and that they can't communicate with these officials. They believe that more male social workers are needed so they can communicate.[150] Other deponents, including a male judge, agreed that more male social workers should be appointed.[151]

Several deponents remarked that social workers manifested stereotyped mental schemas and views regarding the role of women in society and in the family.[152] This is important, since these schemas have as much influence in the evaluation of the behavior of minors, boys and girls, as on their homes. These evaluations, as previously mentioned, are pivotal in recommending provisional measures.

4. Judges and officials of the juvenile justice system tend to adjudicate to the mother the complete responsibility, supervision and discipline of the imputed minor.

The Commission learned that the entire system of juvenile justice seems to overload mothers of minors with supervising and disciplining them even when the father also lives at home.[153] This is manifested in different ways.

The person accompanying the minor to court is almost always the mother, even in two-parent families and both work outside the home; the father tends to be marginal.[154] Since it is the mother who must face the judicial apparatus and respond to official demands of greater supervision over the minor, the pressure on her tends to be harder and the responsibility heavier.

Similarly, several deponents including a male judge, saw a tendency of social workers to give more importance to the sex life of the mother than that of the father in judging the adequacy of

[150] Focus Group Interview, Institutionalized minors (boys) (Industrial School of Ponce), at pp. 1,4, and 6.
[151] Hearings, June 3 and 4, 1994, at p. 1; Hearings, June 24 and July 1, 1994, at p. 26.
[152] Hearings, May 13 and 14, 1994, at p. 24.
[153] Hearings, May 13 and 14, 1994, at p. 24.
[154] *Id.* at p. 27.

the home.[155] "The father can be more promiscuous and that doesn't matter, but one slip by the mother causes a stir".[156]

The family situation of most minors is that the mother is head of the household and the family's only support is government aid.[157] In those cases, it was said, social workers evaluate in greater detail whether the mother can control and discipline the minor, female or male.

It is known that, according to stereotype, the boy is presumably stronger and more dangerous, it is not surprising that it often not recommended that the boy remain at home under the sole care of the mother. This may cause additional anguish for low-income women who live alone and do not want to lose custody, but are deemed incapable of providing adequate supervision of their male children, either because of prejudices based on the class perspective of the evaluators or because of stereotypes that combine elements of social class with gender, with which these mothers cannot comply.

Closely related to the above, several persons observed a tendency in minors court to favor families from higher economic and social levels. It was said that lawyers for accused minors belonging to those families recommend that they declare themselves liable for the offense.[158] These minors benefit because they can afford private alternate and rehabilitation programs.[159] This is reflected favorably in social workers reports because they won't have to submit to programs or enter state institutions as must minors from lower socioeconomic levels.[160]

In summary, the adjudication to the mother of the total responsibility of the minor, even when the father lives in the home, perpetuates gender stereotypes that conceive the primary role of

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[155] Hearings, June 24 and July 1, 1994, at p 27.
[156] *Id.*
[157] *Id*
[158] Hearings, June 24 and July 1, 1994, at p 25.
[159] *Id* at p 27.
[160] According to information compiled by the Commission, discrimination on the basis of socioeconomic condition is manifested, in one form or another, in the whole judicial system. See the chapter on Judicial Administration and the chapter on Other Findings.

mother as exclusively in charge of the minor. Thus, that adjudication is also unequal treatment, in this case of the mother, by relieving the father and overloading the mother with greater demands. Likewise, it constitutes discriminatory treatment toward the mother of the minor in not permitting her to retain custody of her children as head of household, basing that decision on the notion that by herself a woman is not strong enough to control and discipline her children. Although these two practices are manifestations of discrimination against the mother, they also affect the minors, mainly boys, regarding the provisional measures. Of particular interest is the alleged unfair treatment of social workers in their evaluation of the sexual conduct of the mother of the minor. This confirms and promotes the double standard in our society about the sex lives of women and men.[161]

5. *There is a pronounced shortage of programs and services in the system of juvenile justice for minors who are intervened.*

Minors, male and female, over which the court assumes jurisdiction may be referred to an agency, institution, or public or private agency as a consequence of an alternative program or as a dispositive measure imposed during the dispositive hearing.[162] In conformity with the purpose of rehabilitation of the Minors' Law, minors who are institutionalized, by Court order, must be placed in an institution that offers them a better chance at rehabilitation and that meets with reasonable conditions of safety.[163] Although the operation of juvenile institutions is not the responsibility of the Judicial Branch, it is responsible to look out for the rehabilitation of the minors whose custody the court entrusts to these institutions.

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[161] See the chapter on Interaction in the Courts

[162] By 1992-93 there existed 40 public and private institutions offering services to theAlternative Program and 7 public institutions under the Administration of Juvenile Institutions. LEGAL SERVICES OF PUERTO RICO, INC supra note 1, at pp. 36 and 92.

[163] Id. at p. 78

It has been said that "the minors are not objects of serious rehabilitative efforts".[164] Public juvenile institutions, under the Administration of Juvenile Institutions, were evaluated by the Federal Department of Justice in 1991. This agency described the conditions of these agencies as depressing, and indicated that they violated the rights of minors. The evaluation stressed that an effective rehabilitation program did not exist and that the minors were not "adequately evaluated, placed, attended to, or served".[165] In 1993, the House of Representatives of Puerto Rico concluded that the Administration of Juvenile Institutions was not meeting its responsibility to rehabilitate minors who had incurred in offenses; that, instead, it was warehousing the minor until he completed the term imposed by the court.[166]

On the other hand, in minors' courtrooms and in juvenile institutions, components responsible for evaluating and serving that sector, have an excessive workload and few alternatives for service for their clientele. Lack of personnel and adequate facilities lead to evaluations and recommendations carried out in limited time and under the tension of an excessive workload.[167]

If indeed the conditions previously described are deplorable, even worse is the fact that existing rehabilitation services, public and private, are primarily for boys. This constitutes unequal treatment for girls regarding rehabilitation resources.[168]

Several explanations have been given regarding this situation.

One male judge explained it as a result of existing resistance to establish services for girls because rehabilitation is considered more difficult for girls because "they arrive more deteriorated", and they are generally "more recalcitrant." He also said that the programs allege difficulties in hir-

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[164] Id. at p. 50.

[165] Id. Not included in this evaluation were the rehabilitation programs for minors in alternative programs or in conditional liberty.

[166] Id. at p. 94, citing a report rendered by the Commissions on Youth, Penal Law and of Work and Matters of the Veteran of the House of Representatives.

[167] Id. at p. 53; Hearings, June 24 and July 1, 1994, at p. 26.

[168] Hearings, May 13 and 14, 1994, at p. 24; Hearings, June 3 and 4, 1994, at p. 4; Hearings, June 24 and July 1, 1994, at p. 26.

ing personnel to work with the girls because the male employee could be exposed to complaints of sexual harassment[169] Of course the solution to that problem, if that were the case, would be to hire female employees.

Another male judge thought that if girls arrive more deteriorated to the court it is because no prevention services are available for her. He explained that fewer complaints are filed against girls, not because they have fewer problems but because [the system] intervenes with them less. By not intervening with them in time, prevention of delinquency is affected and the girl deteriorates more than the boy. He also said that, in the absence of prevention systems, when many of the minors reach the court, they are already prostituted by drug traffickers.[170]

A similar lack of programs and services for girls has been detected in some states of the United States where gender discrimination has been investigated in the courts. In Florida[171] as well as in Massachusetts, programs and rehabilitation services for girls are scarce, and many are limited exclusively to boys. The Massachusetts report specifically pointed out the resistance to establishing programs for girls because they are considered more difficult to work with than boys. The report explained that since girls have special needs such as pregnancy and a greater exposure to sexual abuse, they are disqualified because of the additional problems these needs represent for the service personnel.[173] This could mean that girls are intervened with less, not because they are favored, but because of the lack of resources and expertise.

The situation in Puerto Rico, as in the other two states, is a dramatic demonstration of gender-based discrimination against girls, by not providing them with basic rehabilitation services

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[169] Hearings, june 3 and 4, 1994, at p. 4

[170] Hearings, June 24 and July 1, 1994, at p. 26

[171] *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 909, 913 (1990).

[173] Id. at pp. 114-116.

merely because of their gender. Without these programs, it is not possible to fulfill the purpose of the Minors Law.

Recommendations

1 Seminars should be given to sensitize every official who intervenes in the juvenile justice system so that they are more aware of manifestations of gender discrimination and how they affect minors and their families.

2, Adequate facilities should be provided, such as separate public bathrooms, for girls, to address their particular needs.

3. More women bailiffs should be hired and assigned to guard and transport intervened girls

4. More male social workers should be hired to attend to the particular needs of intervened boys.

5. A system of adequate information for minors and their families should be installed so they can make effective use of the system's procedures to address complaints related to sexual harassment and the different manifestations of discrimination.

6. An more detailed investigation should be carried out to determine if, in effect, gender discrimination occurs in the imposition of dispositive measures, in the orders of preventive detention and in the processes to revoke conditional liberty

Chapter 9

Labor Law

Introduction[1]

Our society has not taken the necessary measures to successfully incorporate women into the labor force. The traditional role of the woman as housekeeper has been to support the man. Most women today, even those who work outside the home, continue to carry the load of domestic work. They also continue to be primarily responsible for the care and development of the children.[2] This responsibility has repercussions in the workplace. In most cases, it is the woman who has to miss work when the children are sick or when problems related to their care arise. It is also the woman whose family responsibilities make it more difficult for her to work overtime when her employer requires it. This socially imposed obligation is frequently cause for discrimination against women at work. Her double duty sometimes makes it hard for her to work with the same liberty as a man. Besides, if she does manage to do so, she may be accused of neglecting her family obliga-

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[1] The purpose of this chapter is not to present a study on the labor problem in Puerto Rico. The mandate of the Commission was to examine certain areas, from the perspective of gender, that impact on or are tangible with the judicial system.

[2] The domestic tasks that women do in the home, as far and as much as they have been circumscribed to them by the socialization process, are not acknowledged as productive work in the labor market. Housework is not salaried because it is not commercially categorized as an object of market exchange. As a consequence, the insertion of women into salaried work is not visualized in this conceptualization of economic productivity as the double duty that women have to assume to develop their intellectual capacities in other areas that do not correspond to traditional tasks society assigns them. Baltazara Colón de Zalduondo, *El valor económico y social del trabajo de la mujer en el hogar*, 10 HOMINES 32-39 (1986-87, extraordinary volume)

The Women's Affairs Commission defines double duty as "that social expectation that after a long day of salaried work, the woman comes home and does all the domestic chores of the housewife, mother and wife." This implies that many women do double work every day. See *La dinámica de la doble jornada de trabajo y algunas implicaciones* (unpublished text)

tions. On the other hand, this reality is frequently used to justify treating working women differently than men, having a negative impact on her job opportunities and promotions. As long as a woman continues to be valued in terms of fulfilling the traditional role assigned her, she will not be able to adequately comply with this double duty through such mechanisms as flexible hours and day care facilities.

Discrimination based on the traditional woman's role is also reflected in the division of labor. Unlike men, most women occupy lower or middle level positions of authority and remuneration. Some social science studies have shown that the percentage of women in a profession is inversely related to its prestige.[3] This means that the more men there are in a position, the higher its prestige and the more women there are in a profession, the lower its prestige. The debate on the issue is very complex. Alice Colón[4] points out that the relation between the incorporation of women into a profession or a job and the discrediting of the profession and reduction in pay should be examined in each profession or particular job. According to Dr. Colón, the access of women (or any other traditionally excluded sector) to an occupation could lead to the lowering of its social and economic value. The process of detraction and lower salaries in other jobs has already begun for economic, technological reasons and other demands of the market. When that happens the doors to an occupation open to women or to racial groups and ethnic minorities. But in others, job access for traditionally excluded groups is made possible because there has been, or will be, a detracting process and a pay decrease in that occupational field.

The process of admitting women to occupations or professions that have already been made less important or are in the process of becoming so, is another manifestation and consequence of historic discrimination against women in the labor market. Even when women attain relatively

[3] Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN L. REV 1172 (1988).

[4] Telephone interview with Dr. Alice Colón, researcher with the Center for Social Research at the University of Puerto Rico, Río Piedras campus, (July 26, 1995).

high positions in professional or corporate structures, they are frequently found in support roles or are referred to areas traditionally reserved for women. In that sense, women speak of a glass ceiling that blocks them from reaching principal positions of power in corporations.[5]

Yet, more subtle kinds of discriminations are at play based on notions and different expectations about predictable or appropriate behavior of each gender in every work situation. Behavior expected of a woman generally has to do with the way she looks and how she relates to men in the workplace. Unwritten rules require that she accept a subordinate relationship to men. For example, a female clerk is supposed to dress in a certain way and respond to sexual allusions by men about her physical appearance along stereotypical behavioral lines based on her subordinate position. A man's actions, however, are measured with a different yardstick. Even though his actions are also based on stereotypical notions and behavior, they are not linked to the way he looks or to the job he has.[6] A woman removed from these stereotypes finds her job performance open to question and she herself could be subjected to discriminatory treatment. A similar pattern occurs when an employee is a lesbian or homosexual.[7]

Sexual harassment is another manifestation of gender-based discrimination in the workplace. It is noteworthy that sexual harassment reflects the imbalance of power in the workplace. Men generally fill positions of greater authority than women.[8] A relatively easy way of maintaining

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[5] For a more detailed discussion, see the Introduction in the chapter on Judicial Administration

[6] Naturally, in the case of the man as well as the woman, these notions also feed upon behavioral stereotypes based on social class. However, in this study we have not focused on that aspect of the problem. In this regard, see the chapter General Theoretical Framework

[7] According to the explanation given in General Theoretical Framework, the Commission conceives discrimination for sexual orientation as gender-based discrimination.

[8] It is important to also point out that although men can be targets of sexual harassment this rarely occurs in Puerto Rico or the United States. Statistics from the Equal Employment Opportunity Commission (EEOC) in 1993 indicate that only about 9% of harassment complaints to the agency were alleged by men. In many of these cases, the alleged harasser was also a man.

Statistics in Puerto Rico are similar. For 1993-94, the Anti-Discrimination Unit of the Department of Labor and Human Resources announced that in nine (9) of 117 cases of sexual harassment reported (7.7%), the victims were men. In a study of sexual harassment of female employees at their work centers, it was confirmed how infrequently a woman harasses a man. It has been calculated that this type of harassment happens in no more than 2% of the total number of cases. LOURDES MARTINEZ & RUTH SILVA BONILLA, EL HOSTIGAMIENTO SEXUAL DE LAS TRABAJADORAS EN SUS CENTROS DE EMPLEO) Center for Social Research, U.P.R., 1988).

the balance of power which, unfortunately, is notably accepted by society, is precisely sexual harassment.[9] Sometimes sexual harassment also poses as a male reaction against female achievement in the workplace. It becomes his mechanism to make clear that he has more power than a woman who has reached a certain position or has managed to be admitted in a work area traditionally reserved for men.[10]

Another manifestation of gender-based discrimination on the job is the discriminatory treatment traditionally afforded pregnant women. Even though an old law in Puerto Rico prohibits discrimination because of pregnancy and deems discriminatory any unjustified decision of the employer that adversely affects a woman in that condition,[11] data indicate that the situation has not yet been surmounted.[12]

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[9] See Rodríguez Meléndez vs. Supermercado Amigo, 90 J T S. pp.7646,7653.
For centuries, the conduct that today we call sexual harassment in the workplace, has been establishing itself. From the master who harassed his slaves, to the powerful landowner who abused the daughter of the "arrimao" to the sexual favor the boss required of his domestic employee —these were only some of the socially "accepted" forms under the prism of normal and natural manifestation of our cultural idiosyncrasy. Bloody social struggles, the advent of our Constitution and legislative intervention were necessary for those practices to be considered a thing of the past. Social change has functioned. *The judicial order, until recently out of step with this new social reality, has evolved and incorporated the necessary law so that other types of sexual harassment on the job —some of them sophisticated — that we refused to recognize as such have lost the aura of acceptable cultural manifestations.*

[10] According to Mercedes Rodríguez (R.Alvarado), psychologist and recognized authority in the field of sexual harassment, in *El Hostigamiento en el empleo* , (10 HOMINES 192-196 (1986-1987 extraordinary volume) sexual approaches on the job reduce the woman to a sex object invalidating and making invisible her intellectual capacity. In the workplace, which she carries out with intelligence, dedication and merit. Sexual harassment on the job is an instrument of power and oppression against women that is rooted in the foundations of a patriarchal and machista society. Here, women are the objects of subordination for men in different instances which is justified by the saying "men are like that," apparently of a genetic nature that is indisputable.
Mercedes Rodríguez (R.Alvarado) points out: Sexual harassment is not a compliment, it is not flattery. Nor should it be confused with a genuine attraction between two persons who seek a temporary or permanent intimate experience. Sexual harassment offends the dignity of women. It is another form of violence against women. It is an extension of dominance, control and masculine power in the workplace. It is a way of keeping women in subordinate positions on the job, and as a last resort, outside of it
Id. p 196

[11] The employer's decision would be justified only if it was based on business need, independently of the pregnancy or decline in productivity that could result as a consequence of it. Law No.3 of March 1942, as amended, 29 L.P.R.A., sec. 467-474.

[12] According to the most recent data from the AntiDiscrimination Unit of the Department of Labor and Human Resources, in 1992-93 a total of 75 discrimination complaints based on pregnancy were filed. That represents 29% of all the complaints filed for sex discrimination. In 1990-91, 27 sex discrimination complaints were filed or 25% of the total number. Evidently, the numbers reflect a high percentage of situations in which discrimination is alleged for reasons of pregnancy. These same numbers can be used as an index to presume that even when discrimination for pregnancy is illegal in Puerto Rico, this has not been entirely surmounted.

Logically, pervasive discriminatory attitudes and perceptions in many work environments could reflect on and influence the adjudicative process. Information gathered by the Commission offers glimpses into the subject but an in-depth investigation is necessary to know if expectations about appropriate behavior based on gender indeed affect the judicial decision process. For example, if the judge prefers a male bailiff in his court room rather than a woman bailiff, would his decision process be affected in determining discrimination in the recruitment of women as security guards? If a judge agrees with traditional notions about passive women and aggressive men[13] would his decision process in a case of unjustified dismissal for alleged insubordination be affected ? How do attitudes about gender influence a decision related to alleged excessive absenteeism because of family matters?

It is necessary to further examine whether traditional notions about women's role as supportive of men and the stereotype that assigns her primarily to the home affect adjudicative determinations about the value of women's work outside the home. If a judge understands that the proper place for women is the home, how does that affect his decisions on the emotional and economic impact of losing a job?

These aspects and others mentioned in this Introduction are examined in separate chapters of this Report in view of their close link with different areas of investigation. It is appropriate to underscore that the study on Labor Law focused on specific angles of the problem of gender-based discrimination preventing the Commission from anticipating certain findings. Instead, we mention them as subjects for future investigations. Leaving aside a general discussion on pertinent Labor Law legislation and jurisprudence, our findings concentrate primarily on litigation of sexual harassment on the job.

[13] See the Introduction to the chapter on Interaction in the Courts.

Legal Framework and Jurisprudence

A. Constitutional Protections

Discrimination because of gender is expressly prohibited in Puerto Rico since the passage of our Bill of Rights in 1952. Section 1 of Article II of the Constitution of the Commonwealth of Puerto Rico states that "discrimination of any kind for reason of... sex ..... cannot be established," [14] thus offering the public employee protection against discrimination. [15] Sections 1 and 8 of the Bill of Rights protect the "dignity" of the family, and the "honor, reputation and private or family life" of Puerto Ricans.[16] These latter sections define rights that can be applied not only against the state but against individuals [17], since the rights to dignity and privacy are highly ranked in the scale of values consecrated in our Constitution.[18]

The constitutional clauses of due process of law and equal protection of the law[19] as well as the right to receive equal pay for equal work[20] also protect all government employees. In the latter clause, constitutional protection gains even more force in conjunction with the Equal Rights clause[21] when an equal rights claim by one gender is compared to the other's rights. Nonetheless, Article II, section 16 of the Constitution, provides protection related to health risks and personal integrity on the job and is applicable to both private and public employees.[22] Lastly, the Constitu-

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[14] It also stipulates that "All *men* are equal before the Law " Art.II, Sec 1. (emphasis added). Today, 40 years after the drafting of our fundamental law, more neutral language regarding gender would probably be used

[15] It is interestiug to note, however, the complete absence of jurisprudence by the Supreme Court on the subject of discrimination because of gender in public employment.

[16] These sections have been utilized as a basis to give constitutional protection in cases that expose problems of sexual harassment on the job López Campos vs Garage Isla Verde, Inc 90 J.T.S. 51, p. 7665

[17] See Arroyo vs. Rattan Specialities, Inc. 117 D.P.R. 35 (198) in relation to the use of the polygraph in private employment as a constitutional violation of the right to privacy.

18 See, for example, P.R. Telephone Co vs. Martínez, 114 D.P.R. 328 (1983); Colón vs Romero, 112 D.P.R 753 (1982).

[19] Commonwealth Constitution, Art.II, Sec. 7.

[20] *Id* Art. II, Sec.16

[21] *Id.* Art II. Sec 1

[22] For an interpretation of the scope of sections 16.17 and 18, see Arroyo vs. Rattan Specialties, 117 D.P.R. 35 (1986) Justice Hernández Denton, concurring and dissenting).

tional Assembly desired to consecrate the right of all pregnant and breast-feeding women to receive special care and assistance.[23]

B. Applicable Legislation

Under the mantle of Puerto Rico's laws, job discrimination based on gender has been expressly prohibited for decades. This section, then, will discuss specific laws which prohibit gender discrimination and the development of related jurisprudence.[24]

Various laws, some promulgated before and others after the passage of the Constitution of the Commonwealth of Puerto Rico, protect pregnant women before and after childbirth. Law No. 3 of March 13, 1942,[25] as amended, protects women employees in the private sector; Law No. 117 of June 30, 1965,[26] as amended, covers pregnant teachers; and Law No. 81 of August 30, 1991,[27] the Municipal Autonomy Law, protects female government employees and its regulations[28] protect female state government employees. These laws and regulations recognize women's rights to a rest

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[23] See the stillborn Section 20 of Article II of the Constitution

[24] It is appropriate to indicate that, despite an explicit constitutional ban against gender discrimination, there are laws in our jurisdiction whose language manifests gender discrimination in employment. Some examples are:
Law No. 45 of April 18, 1935, as amended, known as the Workmen's Compensation Act, approved before the Commonwealth Constitution, contained some stipulations referent to "the widow or concubine' that lead to understand that only men worked outside the home. Since then some of these stipulations have been amended to refer to "spouse, male or female concubine." See, to that effect, Law No 41, of May 30, 1984 and Law No 40 of June 3, 1988, 11 L.P.R.A. sec.3. (Suppl.1994)
Law No 260 of May 9, 1950, that authorizes a pension for the widow or children of a deceased member of the Senate or the House of Representatives, was amended in 1969 to include the widower. See Law No.118 of June 28,1969, 2 L.P.R.A. sec. 23 and 23a. Another amendment in 1991 substituted the term "widow" for "surviving spouse" in relation to the pension to which any surviving spouse of any legislator elected President of the Senate or Speaker of the House has a right. See Law No. 1 of Feb. 16, 1990, 4 L.P.R.A. sec. 240a
Law No. 447 of May 15,1951, that established a retirement system for government personnel, was amended in 1990 to substitute "widow" for "surviving spouse": See Law No. 1 of Feb. 16, 1990, 3 L.PR.A. sec. 772
Law No. 12 of Oct. 19, 1954, that established the Retirement System for the Judiciary, allows an annuity in case of work-related death to the participant's widow. 4 L.P.R.A. sec. 240. However, a section added later granted a pension to the "surviving spouse." See Law No. 2, Jan.4 , 1983, 4 L.P.R.A. sec 240a
Law No.2 of March 26, 1965, on the retirement of former governors, grants a pension to the widow of every former governor, although the term ex-Governor is later defined as any *person* who has filled the position of Governor. 3 L.P.R.A. secs. 23 and 24

[25] 29 L.P.R.A. secs. 467-474.

[26] 18 L.P.R.A. sec. 218 (a).

[27] 21 L.P.R.A. sec. 4567

[28] 3 L.P.R.A. sec. 1355. Regulations of the Central Office of Personnel Administration, sec. 12 (45)

period of four (4) weeks before and four (4) weeks after delivery.[29] Nonetheless, the laws permit the female employee to choose between one (1) week of prenatal leave and extend up to seven (7) weeks postnatal leave, as long as she gives her employer an accredited medical certificate that attests to her ability to work up to one (1) week before she is due to give birth.

The female employee can ask to return to work before her eight (8) week leave of absence is up when she presents an official medical certificate that confirms she is able to work.

While the female employee is on leave, her employer is obliged to reserve her job.[30] Government and municipal female employees can also keep their jobs since the rest period is legislated as maternity leave and employees continue to accumulate vacation days and sick leave.

Law No. 3 of 1942[31] makes liable any employer who fires an employee because of pregnancy without just cause[32]—lower productivity because of pregnancy is not considered as just cause. Further, employers incur in a misdemeanor if they deny an employee a rest period during her pregnancy.[33]

Laws governing mothers employed in municipal governments and teachers specify that a pregnant woman cannot be dismissed without just cause[34]—lower work productivity due to pregnancy is also excepted from that concept. The autonomous municipality law adds that " any decision that in any way affects the pregnant woman's job permanence must be postponed until her maternity leave is over."[35]

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[29] When the employee suffers an abortion, she can claim the same benefits had she had birth. In cases where the employee suffers complications, she can also take vacation and sick leave, and leave without pay, but she cannot be absent beyond a year

[30] 29 L.P.R.A. sec. 468

[31] 29 L.P.R.A. sec. 469

[32] Under the employer's civil liability the concept of double penalty, equivalent to twice the amount of the damages, was incorporated. The double penalty was also adopted in later laws, cited further on, which are aimed at protecting the employee against discrimination because of gender.

[33] 29 L.P.R.A. sec. 471.

[34] 18 L.P.R.A. sec. 218(a); 21 L.P.R.A. sec. 4567

[35] 21 L.P.R.A. sec. 4567(g). This law also grants maternity leave for adoption of a minor, sec. 4568 (g)

Law No. 80 of May 30, 1976, in Articles 1 and 2[36] sets an indemnity to be paid every employee dismissed without just cause and lists a series of incidents that constitute just cause under the law.

Regulations of the Central Office of Personnel Administration, section 12.4 (5), establish that government agencies and affiliates of the Commonwealth of Puerto Rico must pay the female employee her full salary during her eight-week maternity leave. Law No. 81 of 1991, [37] establishes an identical provision for female municipal employees.

Law No. 3 of 1942, as amended,[38] however, stipulates that a private employer pay only half the salary, wage, daily pay or compensation of the female employee during her maternity leave. The Law for Non Occupational Temporary Benefits for Disability (SINOT)[39] was amended in 1985 to include pregnancy as a non-occupational disability so as to increase the benefits for the working woman to seventy-five per cent (75%) and thus bring them more in line with the benefits government employees receive.[40] Thus, it was established that:

> ... the benefits for temporary disability payable for any period that the female employee incapacitated by pregnancy receives benefits under the Law to Protect Working Mothers, 29 L.P.R.A. secs. 467 to 5474, will consist of the difference between paid benefits under that law and seventy five percent (75%) of her weekly salary.

Both laws have been interpreted in conjunction to great effect. Since the Working Mothers Act establishes a *de jure* presumption of woman's absolute incapacity from one week prior to birth and up to two weeks after delivery, only during those three weeks can she qualify for benefits under the Non Occupational Disability Act. The remaining eight (8) weeks is understood to be a period of

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[36] 29 L.P.R.A. secs. 185 (a) and 185 (b)
[37] 21 L.P.R.A. sec. 4567 (b)
[38] 29 L.P.R.A. sec. 467 *et seq*
[39] Law No. 139 of June 26,1968, as amended, 11 L.P.R.A. sec. *et seq.* (Supl. 1995)
[40] See 11 L.P.R.A. sec. 202 (g) -Definitions; sec 203 (d) 2 - Benefits for pregnancy.

rest, not incapacity, thus, to obtain benefits under SINOT, the woman employee must prove, through a doctor's certificate, that she is indeed unable to work and is not merely resting.[41]

These laws balance opportunities for women and for men on the job. Since only women become pregnant, that biological condition can place them at an disadvantage. These laws protect women regarding her right to work and her constitutionally protected decision to have children.[42] Without these stipulations, female employees would be forced to choose between either working or having children, out of economic necessity, or between having children and being deprived of work opportunities and an income. These stipulations, however, require a woman not to work a week before giving birth, and, a doctor's certificate to return to work before her resting period is up. These stipulations are constitutionally[43] questionable because of their paternalistic nature. The requirements suggest that a woman is incapable of making her own decision, without state intervention or orders, as to whether she is physically and emotionally able to return to work, that is, to protect herself and her baby. Further, it means that a woman who affirms that she's fit to work despite her advanced pregnancy is not to be trusted, even if she consults with her doctor which, incidentally, requires a written communication between her doctor and her boss.

Title VII of the Civil Rights Act of 1964,[44] as amended, prohibits discrimination on the basis of sex, among others. This legislation applies to Puerto Rico just as any other jurisdiction in the United States. In 1978, Title VII was amended by the so-called Pregnancy Discrimination Act[45] to explicitly incorporate the stipulation that discrimination for reason of pregnancy is gender discrimination. To that end, it establishes that the terms "because of sex" or "on the basis of sex" in Title VII includes, but is not limited to, because of pregnancy, birth or related medical conditions.[46]

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[41] Torres González vs. Labor Department, 91 J.T.S. 19, p 8395.
[42] Skinner vs. Oklahoma, 316 US 535 (1942).
[43] Cleveland Board of Education vs. LaFleur, 414 U.S. 632 (1974).
[44] 42 U.S.C. § 2000e.
[45] 42 U.S.C. § 2000e-2.
[46] *Id.* §2000e-K.

Law No. 100 of June 30, as amended, prohibits discrimination on the job because of age, race, color, *sex*, social or national origin, social condition, political and religious beliefs of the employee or job applicant.[47] Sex discrimination was incorporated much later into the law by way of Law No. 50 of May 30, 1972. However, Law 100 does not contain an explicit provision on discrimination for sexual orientation, nor is there any jurisprudence in Puerto Rico in this regard.[48]

Law 100 imposes civil and criminal liabilities on any employer who discriminates against an employee or job applicant.[49] In addition, it establishes a debatable presumption of discrimination against an employer when the contested action is done without just cause.[50] An "employer" is a private company or government agency that functions as a business or a private company.[51]

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[47] 29 L.P.R.A. secs 146-151.It is noteworthy that the language of this law, like other laws discussed, is not gender neutral. That's why the term "empleados" (in Spanish) is always used. The masculine term tends to make women employees invisible. On the other hand, the law refers to sex discrimination and is so cited although the Commission has preferred to use the expression discrimination because of gender

[48] Nonetheless, regarding federal jurisdiction, there is interpretative jurisprudence about Title VII of the federal Civil Rights Act of 1964, 42 USC §2000e that deals with the subject. The tendency has been to deny this kind of claim. See Williamson vs A.G. Edwards & Sons, Inc 876 F.2nd 69 (8th Circ. 1989), *cert. denied* 493 U.S. 1089 (1990); De Cintio vs Westchester County Medical Center 807 F.2d 304 (2nd, Cir. 1986), *cert. denied* 484 U.S. 825 (1987); DeSantis vs. Pacific Tel & Tel Co., 608 F. 2nd. 327 (9th Cir 1979); Blum vs. Gulf Oil Corp., 597 F.2d 936,938 (5th Cir.1979); Smith vs Liberty Mut Ins Co., 569 F.2d 325 (5th Cir. 1978). In Ulane vs. Eastern Airlines, Inc ,742 F.2d 1081,1084 (7th Cir.1984), *cert. denied* 471 U.S. 1017, 85 L Ed. 304, 105 S. Ct.2023 (1985), the Seventh Circuit Appeals Court said that " the Congress declared an intention to exclude homosexuals from the protection of Title VII. The Congress never considered nor intended that the legislation of 1964 cover something other than the traditional concept of sex " See *DeSantis vs. Pacific Tel & Tel Co, Inc.* This decision was partially based on proposed amendments to Title VII to prohibit discrimination on the basis of sexual orientation and the Congress has not yet approved any of these amendments

On the other hand in the case of Valdés vs Lumbermen's Mut. Cas. Co., 507 F. Supp. 10 (S.D. Fla. 1980) a female employee sued her employer when denied a promotion when the employer erroneously believed she was a lesbian. The court denied the employer's motion to dismiss determining that an employment practice not to hire homosexuals and not uniformly applied, only against lesbians,, was discrimination on the basis of gender and is prohibited under Title VII. Nonetheless, the court pointed out that in this case a simple solution would have been for the employer to discriminate equally against male and female homosexuals. In that case there would be no distinction because of gender. *Valdés*, p 13.

This Commission has reached the opposite conclusion: discrimination because of sexual orientation is a form of gender discrimination based on concepts and expectations regarding the behavior of both sexes See the discussion in the general theoretical framework. It is also important to note that the United States Supreme Court has prohibited actions based on gender stereotypes. See Price Waterhouse vs. Hopkins, 490 U.S. 228 (1989), in which it was decided that evidence about sex stereotyping is admissible and pertinent with relation to the controversy over gender discrimination in which a woman was denied a partnership because she didn't seem sufficiently feminine to the other partners.

[49] 29 L.P.R.A., sec.146

[50] 29 L.P.R.A. sec. 148.

[51] 29 L.P.R. A. sec. 15 (2).

Although Law 100 covers gender discrimination, the Legislative Assembly passed Law No. 69 on July 6, 1985 to prohibit job discrimination, but specifically limited it to discrimination on the basis of *sex* [52] and included every government agency.[53] The declaration of principles of this special law declares the intent of the Legislative Assembly to "guarantee equal right to work for the man as well as the female, prohibiting the kind of actions that promote discrimination, setting liabilities and imposing penalties[54] Law No. 69 stipulates that:

> An illegal employment practice occurs if the employer:
>
> (1) ... when on the basis of sex, suspends, refuses to employ or dismisses any person or in any other way discriminates against a person, regarding compensation, terms or conditions of employment;
>
> (2) when on the basis of sex, limits, divides, or classifies employees or job applicants, in any way that deprives or tends to deprive that person from an employment opportunity or in any other way that could adversely affect that person's condition as an employee.[55]

The only exception to the classification of employment for reason of sex that the above law establishes is the fact that the latter part be a bona fide occupational requirement, that is, that the person's sex has a direct relation to his or her ability to do the job.[56] A person's sex is considered a bonafide occupational requirement when it is necessary for authentic and legitimate purposes. In addition, it states that the exception should be restrictively interpreted. The law includes some situations in which the application of the exception is not justified, as for example denying employment on the basis of stereotypical characterizations of the sexes.[57]

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[52] 29 L.P.R.A. secs. 1321-1341 (Suppl. 1995) The Legislature makes an exception in the cited law in that the same provisions will prevail over those of Law 100 of 1959 regarding sex discrimination.

[53] 29 L. P>R.A. sec. 1321 (2) (Supl. 1995)

[54] 29 L.P.R.A. sec. 1321 (Suppl 1995).

[55] 29 L. P.R. A. sec. 123. It is worth noting that this law establishes that the concept "on the basis of sex" includes for reason of pregnancy, birth or related medical conditions. See 29 L.P.R.A. sec. 1322(5) Supl. 1995).

[56] 29 L.P.R.A. sec. 1322(7) The classic example is that of the actress or actor.

[57] 29 L.P.R.A. sec. 1328 (Suppl. 1995). See Title VII,§703 (e)

Law No. 69 also prohibits reprisals against any employee who files a complaint or charge or who opposes discriminatory practices or participates in an investigation or process for discriminatory acts against the employee, labor organization or labor-management committee.[58]

Under any of the laws presented here, a discrimination suit can be filed directly in the court or a complaint can be filed for a "conciliation" procedure at the Anti-Discrimination Unit of the Department of Labor and Human Resources, the government agency entrusted with implementing public policy regarding discrimination. If the plaintiff prevails in a judicial process he or she has the right to compensation for all damages, be they economic or moral, and an additional equal sum as a penalty.[59] They can also obtain other remedies, such as reinstatement in the job and promotions. As is typical in labor laws, the law concedes legal honoraria.

Regarding public employees, Law No. 5 of Oct. 14, 1975, as amended, known as the Law of Public Service Personnel, also prohibits discrimination on the basis of gender.[60]

In addition to the labor laws aimed at protecting the worker from discrimination, our legal order typifies illegal discrimination as a crime. Thus, Article 154 of the 1974 Penal Code sanctions the denial of employment or the refusal to employ for political or religious, reasons, for reasons of race, color or sex, for reasons of social condition or national origin.[61]

Law No. 17 of April 22, 1988 recognizes sexual harassment in employment as a form of discrimination on the basis of sex, which constitutes an illegal or undesirable practice that threatens human dignity.[62] Article 3 of Law 17 stipulates the following:

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[58] 29 L.P.R.A. sec. 1341 (Suppl. 1995).

5929 L.P.R.A. sec. 146; García Pagán vs. Shiley Caribbean, 122 D.P.R. 193 (1988)

[60] See 3 L.P.R.A. secs. 1311,1312, 1333 and 1411.

[61] 33 L.P.R.A. sec. 4195, subsections (d) and (e).

[62] 29 L.P.R.A> secs. 155-1551 (Suppl. 1995). Since 1980, the federal agency known as the Equal Employment Opportunities Commission (E.E.O.C.) has included sexual harassment within its concept of discrimination under the mantle of the Civil Rights Act of 1964, 42 U.S.C.¤ 2000e *et seq.* See *E.E.O.C. Guidelines on Sexual Harassment,* 29 C.F.R. 1604. 11 *et seq.* Our Law No. 17 largely adopts the language of the E.E.O.C. guidelines.

It is worth noting that under Law 100 of June 30,1959, relative to incidents that took place before the adoption of Law 17, the Anti-Discrimination Unit of the Department of Labor and the island's courts recognized sexual harass-

> Sexual harassment in employment consists of any kind of unwanted sexual approach, requests for sexual favors and other physical or verbal conduct of a sexual nature, under one or more of the following circumstances:
>
> (a) When submission to said conduct is implicitly or explicitly changed into a term or condition of employment for the person.
>
> (b) When submission to or rejection of said conduct by the person is converted into a basis to make a decision about employment that could affect the person.
>
> (c) When that conduct has the effect or purpose of unreasonably interfering with the job performance of that person or when it creates an intimidating, hostile or offensive work environment.[63]

Law 17 imposes two kinds of liabilities on the employer for sexual harassment in the workplace.[64] First, it imposes on the employer absolute liability for his actions [of sexual harassment] and those of his agents or supervisors "independently of whether the specific acts in controversy were authorized or prohibited by the employer and independently of whether the employer knew or should have known about said conduct."[65] Second, the employer can be vicariously liable for acts of sexual harassment between employees and of non-employees towards his employees in the workplace, if he knew or should have known about said conduct and did not take immediate

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ment on the job as a form of gender discrimination. See Rodríguez Meléndez vs. Supermercado Amigo, 90 J.T.S. 50, p.7646.

[63] 29 L.P.R.A. sec.155b (Suppl 1995). Law 17 gathers the definitions of sexual harassment contained in the previously cited E.E.O.C. guidelines. We also mention that, according to the GUIDES FOR IMPLEMENTING PUBLIC POLICY AND INTERNAL COMPLAINT PROCEDURES ABOUT SEXUAL HARASSMENT ON THE JOB, published by the WOMEN'S AFFAIRS COMMISSION, OFFICE OF THE GOVERNOR in 1988, sexual harassment conduct constitutes:

Any type of unwanted approach or pressure of a sexual nature, physical and verbal, that arises from the job relationship and that results in a hostile work environment, an impediment to do the work or affects job opportunities for the person

Sexual harassment can be expressed in different ways. Its most simple manifestations include coquetry, sexual insinuations, staring at different parts of the body such as breasts and buttocks, telling offensive jokes about sex. Its crudest form is manifested by pinches, rubbing against the body, kisses, hugs and sexual assaults.

[64] Art. 2, subsection 2 of Law 17 provides that:

"Employer" means any natural or juridical person, the Commonwealth of Puerto Rico, including each of its three Branches and their instrumentalities or public corporations, municipal governments and any of their instrumentalities or municipal corporations, profit or non-profit, that employs persons by way of any kind of compensation and its agents and supervisors. It also includes labor and other organizations, groups or associations in which employees negotiate employment terms and conditions as well as employment agencies.

29 L.P.R.A. sec. 155a(2) (Suppl.1995).

[65] 29 L.P.R.A. sec. 155d (Suppl. 1995).

and appropriate action to correct the situation. Here, the liability is less severe or conditioned.[66] The law also stipulates that a person prejudiced by a decision of an employer or supervisor that benefits another employee who submitted to sexual requests has cause to sue the employer for discrimination on the basis of gender.[67]

According to Law 17, the employer must maintain the workplace free from sexual harassment, clearly state to supervisors and employees his policy against sexual harassment and guarantee that they can work safely and with dignity.[68] Contrary to the laws previously cited, which impose civil and criminal liabilities for job discrimination for reasons of sex or pregnancy, Law 17 only imposes civil liability on the harasser.[69] Nor does it establish a presumption favoring the petitioning party, unlike other laws that protect the employee.[70]

One aspect not expressly covered by Law 17 is same-sex sexual harassment, a subject amply debated in the federal jurisdiction. North American courts are divided on this issue.[71]

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[66] 29 L.P.R.A. secs 155e and 155f (Suppl 1995).

[67] Law 17, art 8, 29 L.P.R.A. sec. 155g (Suppl 1995)

[68] 29 L.P.R.A. sec. 155j (Suppl 1995)

[69] 29 L.P.R.A. sec. 155j (Suppl 1995)

[70] This is the result of having adopted the language of the E.E.O.C. guides about sexual harassment since Title VII of the Federal Civil Rights Act of 1964 neither provides a presumption in favor of the employee plaintiff nor criminal sanctions

[71] See García vs. Elf Atochem North Am., 28 F.3d 446, 452 (5th Cir. 1994) (sexual harassment between men is not prohibited by Title VII); Myers vs City of El Paso, 874 F Supp 1546 (W,D Tex. 1995) (sexual harassment of a woman by another woman is not actionable as sexual harassment under the law); Hopkins vs. Baltimore Gas & Elec. Co 871 F Supp. 822 (D Md. 1994) (Title VII does not provide cause for action for victims of same-sex sexual harassment); Vandevender vs. Wabash National Corp , 867 F. Supp 790, 796 (N.D Ind. 1994) (male sexual harassment of a homosexual is cause for action); Golusezek vs. Smith, 697 F. Supp 1452, 1455-56.
On the other hand, the Court of Appeals of the District of Columbia has proposed another view Since the case of Barbes vs Costle, 561 F 2d 983,990 (D.C. Cir. 1977) one of the first cases on the problem of harassment, the D.C. Circuit has recognized in dictum that sexual harassment by a homosexual supervisor would be actionable under Title VII See further Ryczek vs. Guest services, 877 F. Supp. 754 (D D.C. 1995) This is an interpretation adopted by the federal agency in charge of discrimination cases. Equal Employment Opportunity Commission vs. Walden Book, 1995 U.S. Dist LEXIS 6049 (M.D. Tenn May 4, 1995). The inclusion of same-sex sexual harassment as a discrimination prohibited By Title VII has been accepted by various federal courts. See Pritchett vs. Sizeler Real Estate Management Co., 1995 U.S Dist LEXIS 5565 (E.D La, April 25, 1995); McCoy vs. Johnson Controls World Services, 878 F Supp 229 (S.D Ga. 1995); Polly vs. Houston Lighting and Power, 825 F. Supp 135 (S.D. Tex. 1993); Jovner vs. AAA Cooper Transp , 597 F Supp 537 (M.D Ala; 1983); *confirmed without published opinion,,* 749 F 2d 732 (11th Cir. 1984); Wright vs. Methodist Youth Services, 511 F. Supp 307, 310 (N.D Ill. 1981).
It's worth noting that in Wright and Morgan vs Massachusetts General, 901 F 2d 186, 192 (1st Cir 1990,) the courts were correctly disposed to "protect" a person who suffered unwanted homosexual advances from a co-worker or supervisor. However, when the situation takes place inversely, that is, when a homosexual employee is "harassed" by other employees or his supervisor, the tendency is not to "protect" that person in an hostile work environment. See

Nonetheless, in the area of the federal court whose decisions are directly applicable to Puerto Rico, that is, the First Circuit Appeals Court, same-sex sexual harassment has been recognized as constituting discrimination for reasons of sex. See the case, *Morgan vs. Massachusetts General,* whereby a panel presided by Judge Juan R. Torruella implicitly recognized that this type of discrimination is covered by Title VII of the federal Civil Rights Act of 1964.[72] In *Morgan,* an employee dismissed for assaulting a fellow employee initiated an action under Title VII, alleging that the fellow employee had sexually harassed him. Basing its opinion on *Meritor Savings Bank, FSB vs. Vinson,* [73] the First Circuit determined that the alleged conduct was not sufficiently severe or intense as to alter the victim's work conditions and create an hostile atmosphere that would seriously affect the psychological well-being of a reasonable person.[74] See also *Marrero-Rivera vs. Department of Justice,*[75] in which the judge of the Federal District Court in Puerto Rico, the Hon. José A. Fusté recognized that Title VII has been applied to same-sex sexual harassment cases.

Specifically with respect to Puerto Rico, it is worth pointing out that sections 1 and 8 of the Bill of Rights[76] of our Constitution contain several protections concerning human dignity and the right to privacy that are broader than the protections provided by the U.S. Constitution. Further, ours apply to every employer, public as well as private. The Commission believes these provisions protect heterosexuals, homosexuals and lesbians against sex discrimination on the job.

No jurisprudence on the subject exists in Puerto Rico. Nonetheless, the Commission firmly believes that gender-based discrimination and consequently, sexual harassment can occur between

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Samuel Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII,* 81 GEO. L. J. 1 (1992).

[72] 42 U.S.C. sec. 2000(e) *et seq*

[73] 477 U.S. 57 (1986)

[74] In Harris vs. Forklift Systems, Inc. 510 U.S.__, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993) the Supreme Court clarifies that psychological damage or economic tangibles are not required in the hostile environment of sexual harassment.

[75] 800 F. Supp. 1024, 1027 (D.P.R. 1992).

[76] Commonwealth Constitution, Art. II, Sec. 1 and 8.

persons of the same sex. Thus, under local law, a person in this situation can initiate a suit for either discrimination or sexual harassment on the job. Contrariwise, true equality in employment could not be accomplished.

C. Jurisprudence on Gender Discrimination on the Job

Despite the protective laws against discrimination, in reality few trials on the subject have been held in our courts. Between 1983 and 1992, only 118 discrimination cases, in any form, were filed in the Court of First Instance of Puerto Rico. Out of those, 23 were for gender-based discrimination.[77] Up to 1994, our Supreme Court has expressed itself on gender-based discrimination in employment in fewer than 10 cases.

In *Ponce Candy Industries vs. Corte,*[78] which was resolved before the Commonwealth Constitution was approved, the Supreme Court interpreted Law No. 3 which protects working mothers. In that case, an employer refused to pay a working mother her half salary for the rest period before and after birth she was entitled to by law. The worker filed suit to claim that payment. The court of instance resolved in her favor. The employer appealed, alleging that the law deprived him of property without due process, in obliging him to pay the working mother a salary for eight weeks that she had not worked at all. The Supreme Court disallowed the employer's petition, holding that the Legislative Assembly had reasonably exercised its regulatory powers in conceding half pay to working mothers during their rest periods, protecting their health and lives and that of their infants. The employer also benefitted since he could retain them after their rest period and increase his production.

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[77] This data was obtained, at the Commission's request, from an examination of files of discrimination cases in all of the island's judicial regions in November of 1994

[78] 69 D P R. 417 (1948).

More than twenty years after the Commonwealth Constitution was in effect, our Supreme Court, in *Zachry International vs. Tribunal Superior*,[79] expressed itself on gender discrimination for the first time. The Supreme Court weighed the constitutionality of a stipulation of Law No. 105 of June 6, 1967,[80] forbidding women to work for more than four consecutive hours, unless they were given a 20-minute lunch break during any of the two periods dividing their workday. Otherwise, the employer was obligated to pay them double time for working during the fifth hour.

In this case, the Supreme Court declared that the legal provision was unconstitutional because it infringed on three constitutional clauses: prohibition of discrimination based on sex, the guarantee of equal protection under the law and the guarantee of equal pay for equal work. The Court determined, on the one hand, that the aftereffect of this legal disposition was discriminatory against women since it put them at a disadvantage to men and, since the employer found it more attractive to hire men, the law did not restrict their working hours. On the other hand, however, discrimination against men was also configured since the double pay compensation only applied to women. This was precisely the end result of this paternalistic law: under the pretext of helping and protecting women it put them, instead, at a disadvantage, all the while denying men the same benefits or rights that were granted women without any reason for unequal treatment. The opinion of the Court showed its intention to promote equal conditions in the workplace, without any distinction based on gender.

On various occasions, the Supreme Court has interpreted Law 100 of 1959, prohibiting job discrimination on the basis of age, race, color, sex, social or national origin, social condition, political and religious beliefs of the employee or job applicant.[81] The case of *García Pagán vs.*

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[79] 104 D.P.R. 267 (1975).

[80] Previously 29 L.P.R.A. sec. 458.

[81] See, for example, Olmo vs. Young & Rubicam of P.R., Inc., 110 D.P.R. 740 (1981) (race discrimination); Ibañez vs. Molinos de P.R., Inc., 114 D.P.R. 42 (1983) (age discrimination); Odriozola vs. S. Cosmetic Dist. Corp., 116 D.P.R. 485 (1985) (age discrimination); and recently, Soto vs. Hotel Caribe Hilton, 94 J.T.S. 128, p. 308 (age discrimination).

Shiley Caribbean,[82] which specifically deals with gender discrimination, was the first resolved by the Supreme Court that allowed compensation for emotional harm that a discriminatory dismissal caused an employee. The Court specifically analyzed Law 100's compensation plan which states that any employer that discriminates against an employee or job applicant:

> (a) will be civilly liable
>
> (1) for a sum that is equal to twice the amount of damages that the act caused the employee or job applicant;
>
> (2) or for a sum of no less than one hundred (100) dollars nor more than one thousand (1,000) dollars, at the discretion of the court, if the pecuniary damage can not be determined;
>
> (3) or twice the amount of damages if this is less than the sum of one hundred (100) dollars,... [83]

The Supreme Court analyzed the legislative history of Law 100. It rejected the prevailing tendency of the federal court in not conceding emotional damages for discriminatory dismissals, a situation federal law does not accommodate.[84] And it pondered the concept of damages in our judicial code. In that respect, the Court resolved:

> When Law No 100, *supra,* stipulates that civil liability will be a sum equal to twice the amount of damages that the act has caused, it is referring to *all the damages suffered by the victim, including damages and mental anguish, in those cases, where, of course, the promoters of the suit have duly established their existence.* As distinct components of the damage, one does not absorb the other. [85]

The Court also upheld that the postulates of equality of our Constitution, gathered in Law 100, have such pre-eminence in our code that:

> their violation is not only a insult to the victim whose right has been infringed upon, but it is also an affront against the interest of the State. The

[82] 122 D.P.R. 193 (1988).

[83] See 29 L.P.R.A. sec.146; this plan was incorporated into Law No. 3, as amended, 29 L.P.R.A. sec. 469, and in Law No. 69, 29 L.P.R.A. sec. 1341 (Supl. 1995)

[84] This federal tendency was partially modified in 1991 with the approval of amendments to the Civil Rights Axt of 1964, in which the U.S. Congress established a remedy for damages in these cases limited to a maximum of $300,000. 42 U.S.C.A. ¤ 1981 a (b) 3(D) (West 1994).

[85] García Pagán, 122 D.P.R. P.212

> State not only has the duty to abstain from infringing upon these rights but it also must intervene to protect the citizens. The State is required to act categorically to the benefit of the citizen.[86]

For that reason, gender discrimination can be compensated even in the absence of proof of damage. When this occurs, the legal provision's second clause—which sets civil liability at a sum of no less than one hundred dollars or more than one thousand dollars when monetary damage cannot be determined—should be applied. Otherwise, when there is proof of damage, including suffering and mental anguish, the provision's first clause—which concedes twice the amount of the damages caused by the act—applies. The Court stressed that "after all, the moral damage, ... is also susceptible to monetary value."[87]

The only case in which our Supreme Court has had the opportunity to discuss the federal law on discrimination for reason of pregnancy is *Rivera Aguila vs. K-Mart de P.R.*[88] This case involved a female employee who claimed damages against her employer for unjustified dismissal for reason of pregnancy. The Supreme Court used the opportunity to discuss federal legislation that prohibits discrimination for reason of pregnancy. It specifically indicated that the Pregnancy Discrimination Act of 1978 amended Title VII, *supra*, to clearly establish that discrimination because of pregnancy is covered within discrimination because of gender.[89] The amendment came about as a reaction of Congress to *General Elec. Co. vs Gilbert,* [90] where the U.S. Supreme Court had resolved that discrimination for reason of pregnancy did not necessarily constitute gender discrimination within the context of Title VII.

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[86] *Id.* p 213 (quoting 3 JOSE TRIAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO, 200 (San Juan, U.P.R. Press, 1982)

[87] *Id.* p 214. Interestingly, the opinion in this case was divided

[88] See 42 U.S.C.A. § 2000e (k) (West 1994).

[89] It is standard to point out that our Law 69, approved in 1985 to prohibit gender discrimination on the job, contains a similar stipulation. 29 L.P.R.A. sec. 1322 (5) (Supl. 1995)

[90] 429 U.S. 125 (1976)

With respect to Puerto Rico, our highest Court pointed out that gender discrimination is prohibited, constitutionally and statutorily, and that Law No. 3 of 1942[91] specifically prohibits dismissal because of pregnancy, which, in turn, constitutes a kind of gender discrimination.

According to the Court, "Law No.3, *supra*, forms part of a schema devised by the State to offer the female worker a greater guarantee against job discrimination for reason of sex," by prohibiting dismissal without cause and excluding the concept of "just cause" from lower job performance because of pregnancy.[92] By this law, the legislature provided the pregnant worker greater job protection than that offered under Law No. 100 which prohibits gender discrimination on the job. That is, under the mantle of the first, the employer is liable for damages if he dismisses a pregnant worker without just cause, while, under the mantle of the second, the employer could prevail even without just cause for dismissal, if he could prove that the dismissal was not discriminatory. In addition, Law No. 3 of 1942 protects all pregnant workers in the private sector, including those on probation. Under its mantle, the employer has the burden of proof to refute the presumption against him that the dismissal was unjustified.

The analysis of the law by the Supreme Court in this case confirms its intention to give practical validity to the law that protects the pregnant employee from her employer.[93]

The Supreme Court has also decided, indisputably, that sexual harassment is a type of gender discrimination forbidden by Law No. 100. In *Rodríguez Meléndez vs. Supermercado Amigo,* [94] the Supreme Court considered a suit for damages for sexual harassment on the job under Law 100 of 1959.[95] The facts of the case were the following. The plaintiff began to work for Su-

[91] 29 L.P.R.A. secs. 467-474

[92] Rivera Aguila, 123 D.P.R. p.609

[93] Since then, our Supreme Court has reaffirmed the protection of pregnant workers in extending the doctrine of employer successor in cases of dismissal for pregnancy Bruno López v. Motorplan, Inc. 93 J.T.S. 123 p.11050

[94] 90 J.T.S. 50, p.7646.

[95] This case took place before the passage of Law No, 17, April 22, 1988 which declares that sexual harassment on the job is a form of gender discrimination.

permercados Amigo in mid-1984 when she was 17 years old. The branch manager began to stare at her and flirt with her, to her discomfort. Various incidents took place: In one, she was about to enter the supermarket's office and the manager approached her. He touched her head and greeted her by saying: "Ay, what a pretty little girl" On various occasions the manager suggested that she not wear make-up because she looked better without it. In another incident she went to the office to look for her pocketbook. The manager was there seated in a swivel chair and as she came in, he tilted the chair backwards, placed his hands on his head and said: "Ay, Carmencita I have a headache, get rid of it for me." She told him to take an aspirin and immediately left the office. As she was leaving, the manager indicated that he did not like pills. The final incident, the young woman recounted took place as she was about to punch out her attendance card in the supermarket warehouse. She sensed that someone had opened the door and was approaching her. It was the manager who touched her hair, her face and her neck and said "How pretty you are! " She immediately left the area and went to the office where she informed the assistant manager about what had occurred. Faced with this situation, the manager met with the assistant manager and the plaintiff to "apologize for any misunderstanding that may have arisen in relation to the incident in the storage room." Following these incidents, and despite having had excellent evaluations, the young woman received a negative evaluation. Ultimately, the company asked for her resignation.

In response to a motion for a summary sentence filed by the defendant, the court of instance concluded that the "trivial nature" of these incidents impeded it from upholding cause for action for sexual harassment on the job and disallowed the suit. The plaintiff recurred to the Supreme Court which, absent specific legislation or Puerto Rican jurisprudence about sexual harassment, proceeded to analyze federal legislation and jurisprudence.

The Court determined that sexual harassment on the job is a type of gender discrimination that could make itself evident in many ways. Federal jurisprudence has recognized two modes: the

"hostile environment" and the *quid pro quo*.[96] The first is produced, in the words of the Court, "when the sexual conduct with an individual has the effect of unreasonably interfering with job performance or of creating an intimidating, hostile or offensive work environment." [97] It is not necessary under this mode that the offender's conduct be explicitly sexual: all that is required is that the conduct be aimed against the person only for reason of gender. On the other hand, the second mode, *quid pro quo,* "is produced," the Court says, "when submission or rejection of sexual advances or demands are considered as a basis for tangible benefits on the job."[98]

The Court then pondered the measure of liability applicable to the employer in cases of sexual harassment in its mode of hostile environment created by his agents or supervisors. In deciding the case under Law 100 of 1959, our Supreme Court moves away from the interpretation that the U.S. Supreme Court insinuates but does not resolve in Meritor Savings Bank vs. Vinson. In that case, the federal Court deemed the employer liable in the hostile environment mode only if he knew or should have known that the harassment was taking place. The Supreme Court of Puerto Rico states categorically:

> "It is not necessary to incorporate that criterion of liability into our jurisdiction. Law No. 100, *supra*, establishes a presumption of discrimination."

This implies that the employer or the plaintiff, in only proving the facts that constitute sexual harassment, a presumption of discrimination ensues and, therefore, the burden of proof falls on the employer to show that the discrimination did not occur. The plaintiff is not obligated to show that the employer knew or should have known. The argument that the employer did not know the

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[96] See Harris vs. Forklift Systems, Inc.510 U.S. ____, 126 L. Ed. 2d 295, 114 S.Ct. 367 (1993); and Meritor Savings Bank, FSB vs. Vinson, 477 U.S. 57 (1986)

[97] *Rodríguez Meléndez*, 90 J.T.S. P.7652

[98] The mode of quid pro quo has a second manifestation, that is, when sexual advances or demands are proposed in exchange for tangible benefits in employment. An example of an explicit advance or sexual demand that affect tangible benefits in employment: " If you sleep with me, I'll promote you if you don't I'll fire you."

facts is not applicable under Law 100 of 1959. If the employer cannot prove that the harassment did not occur, his liability is absolute.

By adopting, in Law 17 of 1988, the guidelines of the Equal Employment Opportunities Commission (E.E.O.C.) about sexual harassment, the criterion of dual liability in sexual harassment cases has been incorporated into our jurisdiction: that of absolute liability in quid pro quo mode, but the employer responds in hostile environment cases only if he knew or should have known about acts of harassment. After upholding that the summary sentence is inadequate in sexual harassment cases, the Court returned the case to the court of instance to hold an evidentiary hearing. Nonetheless, the Supreme Court made important points regarding the use of the summary sentence in those cases. It affirmed, that in addition to dealing with an issue of compelling public interest, "human factors relative to attitudes, conducts, motives, feelings and others are involved and are difficult to specify unless they are aired in a plenary trial."[99] Courts should strictly examine these cases, carefully studying the particular facts that inform them.

Associate Justice Hernández Denton issued a concurrent opinion in the case to explain that the Court had to declare itself on the rule of liability applicable to the employer in sexual harassment cases. He stated in his opinion that Law 100 of 1959 prohibits an employer from setting up conditions or privileges or any kind of restrictions that affect an employee for reasons of sex and that, consequently, the employer is liable for any violation of the law on his part or on the part of his agents, supervisors or representatives.

More than the majority opinion, of interest is the dissent of the then Chief Justice Pons Nuñez, who had upheld the summary judgment of the court of instance for lack of controversy over the factual materials. His argument involves traditional postures. Justice Pons held that the conduct in question did not constitute sexual harassment, even though it was in "bad taste" and showed a

[99] *Rodríguez vs. Meléndez*, 90 J.T.S. p. 7653.

"lack of personal consideration."[100] On the other hand, he placed great emphasis on the historic, social and cultural reality of the Puerto Rican people from which, he said, the court should not cut itself off in sexual harassment cases. Despite sharing the desire to proscribe and eradicate this problem, he warned that:

> In doing so we must not fall into the error of proposing rules that interfere with and chill the natural and healthy interaction and relationship between the sexes. We have to take care to distinguish between normal and healthy conduct and harassment: to not convert natural infatuation into contrived conduct subject to judicial regulation. We do not want a society of dissolutes and satyrs but neither do we want a society of misanthropes and misogynists.[101]

That is to say, Justice Pons considered that type of conduct as normal in our society and that it does not clash with established values. But that is precisely that conception that poses problems because it is based on schemas proper to a society dominated by men who consider it normal to express their sexual desires and interests through flirtatious remarks, gestures and physical advances toward women, even though these are unsolicited. In that environment, women themselves have been psychologically and culturally conditioned to accept that kind of behavior, to the extent that many can't even imagine that its content could be discriminatory. In this sense, the dissenting opinion did not contemplate the element of "unwanted sexual advances" that North American jurisprudence considers basic in sexual harassment cases.[102] Nor did it contemplate the element of control or power of a supervisor over an employee who depends on the job for personal and family survival, above all in a case where the person involved was only 17 years old.

The same day the Supreme Court resolved the case of *Rodríguez vs. Meléndez,* it also issued a resolution, without a written opinion, disallowing *a writ of certiorari* in *López Campos vs. Garage Isla Verde, Inc.*[103] The facts of the case were the following: The plaintiff, a young married

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[100] *Id.* p. 7664.

[101] *Id.* pp. 7664-7665.

[102] See *Meritor Savings Bank, FSB vs. Vinson,* and *Harris vs. Forklift Systems, Inc.*

[103] 90 J.T.S. 51, p. 7665.

woman 19-years-old, began work as a receptionist in Garage Isla Verde, Inc. in October of 1986. She was not personally interviewed by the president since he was traveling. Before he returned to his business, he called his office. Hearing the voice of the receptionist he asked if she was a new employee and then complimented her on her voice and said he hoped she was as pretty in person as her voice. The president, who was also married, returned to his office and tenaciously tried to befriend the plaintiff. He invited her to dinner after work and to ride in his motorboat. When he returned from lunch he offered candies to the employees and as he approached her would ask: " Which of these candies do you want, mine or these?" The plaintiff declined the president's invitations even though she never reproached his conduct. The president frequently telephoned her and constantly make flirtatious comments. On one occasion, to boot, wanting to button her blouse he approached her from the rear and rubbed his body against hers.

By January of 1987, the plaintiff had become secretary-receptionist to the president. By February she had begun to be frequently absent from her job. Some months later she became pregnant and informed the president. Her continued absenteeism was called to her attention several times although she was neither suspended from her job nor her salary docked. When the plaintiff returned to her job after giving birth, the president told her she had gained weight. He also told her that he liked her hair length because it made her look more sensual and " he could wait until her quarantine was over." The plaintiff continued being absent from work. Finally she was fired by her boss.[104]

The court of instance held that these facts configured sexual harassment on the job. The Supreme Court obviously coincided with that position because it did not allow the *writ of certiorari* the defendant had petitioned. Then Chief Justice Pons Nuñez issued a separate concurring opinion to explain, that unlike in *Rodríguez Meléndez,* the facts of this case did indeed constitute

[104] These facts have been compiled from the separate concurring vote issued in *López Campos* by then Chief Justice Pons Nuñez. *Id* pp 7666-7667.

sexual harassment. Although certain obvious differences existed between both cases, nonetheless, they were very similar, thus a different outcome was not as clearly justified. [105]

Recently, in *Soto vs. Caribe Hilton*,[106] which involved a claim for dismissal for age discrimination, the Supreme Court reaffirmed its determination in *Rodríguez Meléndez* about the problems summary judgments entail in discrimination cases under Law No. 100. It said, in effect, that "our jurisprudence has been clear in the sense that it is not advisable to use the procedural mechanism of summary judgment in cases where there are subjective elements, intentions, mental purposes or negligence or when the credibility factor is essential."

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[105] In both cases, supervisors incurred in conduct that had sexual connotations and that was directed at subordinate female employees, who by all accounts did not desire them. There is no doubt that in Rodríguez Meléndez the manager's request to the young female employee that she take away his headache and at the same time rejecting the pills, has a distinct sexual connotation in our culture. In fact, the majority opinion of *Rodríguez Meléndez* rejected the thought that sexual harassment, even in its most subtle or sophisticated forms, is based on acceptable cultural values. 90 J.T.S. p.7653.

In *López Campos* , Chief Justice Pons also recognized the financial need of the victim while he did not do so in *Rodríguez Meléndez*. It is possible to think that in *López Campos* the judge accepted that sexual harassment did occur for the sole reason that the victim was married. One can not lose sight of the fact that our society tends to treat or perceive a married woman differently than a single woman. That is why the proportion of harassed women varies according to their civil status.

To that effect, professors Muñoz Vázquez and Silva Bonilla have stated that:

In a society where people are trained with the ideological understanding that the woman is born to be "possessed" eventually by a man and that to become wife, mother and housewife is the 'natural" destiny of every woman, it is not rare to find the single woman, the widow, the divorcee or the woman separated from her spouse appear socially represented as "nobody's land," and, thus, "territory " that any man can claim. In these cases, the lower proportion of harassment of married women seems to make evident the ideological "recognition" by male workers of the woman as a "woman with an owner." She is already the *property* of another man. The marital bond not only gathers up and reproduces the notion of woman as property, but it also is projected socially as a form of "protection" of the woman against harassment.

MARYA MUNOZ VAZQUEZ & RUTH SILVA BONILLA, EL HOSTIGAMIENTO SEXUAL; SUS MANIFESTACIONES Y CARACTERISTICAS EN LA SOCIEDAD, EN LOS CENTROS DE EMPLEOS Y LOS CENTROS DE ESTUDIOS 11-12 (Centro de Investigaciones Sociales, U.P.R., 1985).

It is interesting to note, that recently, in a case of sexual harassment, a female Superior Court judge determined that it was difficult to believe the version of the plaintiff over how she was sexually harassed, " *especially when this involves a divorced woman and a mother of three children who cannot be easily fooled.* " See Torres vs. Puerto Rico Telephone Company, Judgment of February 28, 1994, San Juan Superior Court, civil case no. kdp-86-3300. The Supreme Court, by judgment, revoked the decision of the court of instance because it considered that the judge had committed an error in assessing the evidence. See Torres vs. Puerto Rico Telephone Co., Judgment of June 30, 1995, case no. RE-94-276.

[106] 94 J.T.S. 128, p 308.

It is necessary to point out that in *Soto*, the age discrimination suit was initiated under Law 100 of 1959 and under the Age Discrimination in Employment Act of 1967 (A.D.E.A.).[107] Since *Ibañez vs Molinos de P.R., Inc.*,[108] the Supreme Court had compared those two statutes. In *Ibañez* it was observed that under the A.D.E.A., the plaintiff had to establish a prima facie case of discrimination by showing that (a) he or she fell within the age group protected by the statute; (b) he or she was fired; (c) he or she was qualified to fill the position; and (d) that he or she was replaced by a younger person. Once the prima facie case was established, the employer is forced to "articulate" a reasonable explanation, which, if believed by the judge, would support the conclusion that illicit discrimination was not the cause of the employer's action. The evidence has to be admissible, but only the employer defendant has to produce it; it holds no persuasive weight. If the evidence is produced, the presumption raised by the prima facie case is debated.[109] Then, the plaintiff has to convince the judge that the real reason was discriminatory. That is, the burden of proof remains on the plaintiff.

The rule followed under federal law is contrary to that stipulated by Law 100 of 1959, which establishes a presumption of discrimination against the employer if the dismissal is carried out without just cause.[110] In that regard:

> Just cause for dismissal of an employee at an establishment will be understood as:
>
> (a) That the worker follow a pattern of improper or disorderly conduct
>
> (b) The attitude of the employee to not render work efficiently or to do it late or negligently or in violation of the rules of quality of the product that is produced or managed by the establishment.

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[107] 29 U.S.C.A. §621 *et seq.*

[108] 114 D.P.R. 42 (1983)

[109] The defendant does not have to persuade the court that, in effect, he was motivated by the reasons given. It could happen that, although the court does not give credence to the defendant's explanations since he fulfilled the requisite of producing some reasons, making the presumption debatable, the court is not obliged to decide in favor of the plaintiff since two factors are required: one, that the reasons are false aud, two, that discrimination was the real reason. St , Mary's Honor Center vs. Hicks, 509 US ____, 113 S Ct 2742 (1993)

[110] 29 L.P.R.A. sec. 148

(c) Repeated violation by the employee of reasonable rules and regulations that have been instituted for the functioning of the establishment as long as a written copy of them have been given the employee in a timely manner.

(d) Total, temporary or partial shutdown of the establishment's operations.

(e) Technological or re-organizational changes, as well as the style, design or nature of the product that is produced or managed by the establishment and changes in services performed for the public.

(f) Job cutbacks that become necessary due to a reduction in the volume of production, sales or earnings that are anticipated or that prevail at the moment of dismissal.[111]

Consequently, under Law 100, once the presumption of discrimination arises, it is up to the employer to refute it establishing, on the strength of the evidence, that the dismissal was not discriminatory. If the employer manages to prove the lack of discrimination, then the controversy is concluded without the need for additional evidence.

Under the mantle of Law 100, and countering the provision of federal law discussed earlier, the plaintiff is not required to prove the intention of the employer to discriminate.[112] This, however, contrasts with what the Supreme Court said in *Soto*, that, under both statutes, "the need to establish the employer's intention is inevitable."

Possibly, because the case was submitted under both applicable laws—A.D.E.A. and Law 100 of 1959—and because, under the federal law, the obligation of the employer to prove discrimination was inevitable, it becomes incongruous, from the standpoint of evidentiary procedure, to distinguish between the two.[113]

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[111] See art.2 of Law No 80 of May 30, 1976, as amended, 29 L.P.R.A. sec. 185b; Báez García vs. Cooper Labs., Inc., 120 D.P.R. 145, 155 (1987); Soto vs. Caribe Hilton, 94 J.T.S. 128 pp. 308, 312.

[112] *Soto vs. Caribe Hilton,* Odriozola vs. S. Cosmetic Dist. Corp., 116 D.P.R. 485, 502 (1985); *Ibañez*, 114 D.P.R. pp. 51-52.

[113] *Soto*, 94 J.T.S. p.313.

Fittingly, Laws Nos. 69 of 1985 and 17 of 1988, which respectively prohibit gender discrimination and sexual harassment at work, do not include intention as an element of discrimination.

In the public area, the standard case is *Rivera Briceño vs. Rodríguez*.[114] This case involves a female state government employee who sued under Law 100 of 1959 and Law 69 of 1985, as a consequence of alleged political discrimination and sexual harassment at work. The case is interesting because the Supreme Court clarifies the scope of both laws. The first, as is clear from the text itself, only applies to private businesses or government agencies that operate as a private business, meaning that Rivera Briceño could not sue under that law because she did not fit into either of the two categories. On the other hand, the Supreme Court resolved that Law 69 of 1985, which applies to public and private employers alike, prevails over Law 100 in cases related to gender discrimination at work. Additionally, it reiterated the standard established in *García Pagán vs. Shiley Caribbean* in the sense that a claim for damages and mental anguish is part of the civil remedy Law 69 concedes.

Regarding the remedies, in *Matos Molero vs. Roche Products, Inc.*,[115] the Supreme Court expressed itself over existing remedies in the state and federal sphere against gender discrimination in employment and about interrupting the prescribed time to file a suit under Law 100. The Court explained that under existing local and federal laws, a person alleging sex discrimination by the employer can turn either to the local forum or to the federal forum under Title VII of the federal Civil Rights Act of 1964 or resort to the Equal Employment Opportunities Commission (E.E.O.C.). Nonetheless, a procedural difference exists: in the local forum, it is not necessary to exhaust administrative remedies before turning to the court, while under Title VII it is. Even though states are encouraged to intervene first in a discrimination case, if a person first turns to the

[114] 91 J.T.S. 103, p.9107.
[115] 93 J.T.S. 6, p 10312.

E.E.O.C., the prescribed term of one year to file suit under local legislation is suspended until that agency has completed its procedures, pending notification of the sponsor. The reason for this, according to the Court, is the compelling state interest to protect workers from discrimination and that the cases be heard in the local forum.

Finally, in *Delgado Zayas vs. Hospital Interamericano de Medicina Avanzada,*[116] the point of controversy was over whether there was just cause to summarily dismiss an employee for having incurred in unwanted sexual conduct towards his female supervisor. Besides discussing Law 80 of May 30, 1976, as amended,—which prohibits dismissal without just cause[117]—and taking into account the allegations of the parties, the Court deemed necessary an examination of the legal principles of sexual harassment in its hostile environment mode.[118]

The case provided the Court with an opportunity to make a distinction once more between the two modes of sexual harassment in employment: the *quid pro quo* and the hostile environment. In the first, the employers condition opportunities and benefits for the employee in exchange for sexual favors, meaning that harassment takes place between supervisor and supervised. In the second, however, any employee, independently of their job position, can suffer a hostile or offensive work environment, likewise any employee can create that hostile environment.[119]

The Court resolved that the act of the employee in blocking his supervisor from leaving the bathroom while demanding that she go out with him was so serious that it endangered the business,

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116 94 J.T.S. 149, p.495.

117 29 L.P.R.A. sec 185a-*l*

118 The events that led to this action were the following:
Mrs. Damaris Pagán was in charge of the Diet Department of Hospital Interamericano and supervised Mr. Lino Alvarez Alvarado. Mrs. Pagán declared that while she was waiting in the kitchen area that she supervised, she was invited by Mr. Alvarez to go with him to the flower festival in Aibonito. She declined. Some time later, Mr. Alvarez physically blocked her from leaving the bathroom, placing his hands on the door frames at the same time insisting that she go out with him. Mrs. Pagán let Mr. Alvarez know how disgusted she was by this situation and proceeded to notify the hospital's diet supervisor about the incident. Mrs. Pagán's complaint started an investigation into the conduct of Mr. Alvarez which resulted in his summary suspension and dismissal. The hospital deemed that Mr. Alvarez had incurred in sexual harassment, conduct prohibited by hospital regulations, as defined in Law No. 17. *Delgado Zayas*, 94 J.T.S., p.499.

119 The Court based this distinction on Ellison vs. Brady, 924 F. 2d 872 (9th Cir. 1991).

justifying his dismissal in conformity with the regulations of the business, even though this was his first violation. In fact, Law 80 authorizes an employer to fire an employee for just cause, even if only one offense is involved, if the intensity of the offense demands it.[120] The Court also resolved that by his actions, the employee had created a hostile environment for his supervisor, thus breaking the company's rules against sexual harassment.

Associate Justice Rebollo López issued a dissenting opinion in this case to explain that the law allowed no margin to consider sexual harassment by a subordinate employee towards an employee of higher rank, not even in the hostile environment mode. Even though he agreed that a subordinate can be disrespectful towards his supervisor by advances of a sexual nature which could be considered just cause under Law 80 to summarily fire him, he firmly rejected the conclusion that this conduct could ordinarily create a hostile and intimidating work environment. He argued that an employee of higher rank always has the authority to take action against a subordinate who incurs in any kind of offensive conduct, thus preventing a hostile environment at the workplace.[121] Justice Rebollo López concluded that the majority had needlessly entered into the subject of sexual harassment when the Court only had to resolve whether just cause existed to dismiss the employee under Law 80, which forbids unjustified dismissals.

If this conclusion is true, it is no less true that the remainder of Justice Rebollo Lopez's reasoning goes beyond the restrictions the text of the law itself requires for the hostile environment mode of sexual harassment in employment. Law No 17 of 1988 does not specify, at any time, that a hostile environment must originate exclusively in the actions of a superior towards a subordinate. On the contrary, the text is broad and permits the interpretation that a hostile environment can also be created by a subordinate towards a superior. That is so because nothing in the law obligates

[120] Secretary of Labor vs. I T T , 108 D P R 536,543 (1979)

[121] A supervisor does not necessarily have the authority to discipline or sanction a subordinate, since that would depend on who has the functions of hiring, disciplining and firing The clearest case about these different work structures involves government agencies and the judicial system

interpreting the specific provision on the hostile environment—Article 3(c) of Law 17—under the same parameters that apply to other modes of sexual harassment on the job, covered by clauses (a) and (b) of that article. These clauses, effectively, typify conduct that proceeds from the superior rank that is directed at subordinates.[122]

It is a standard in labor law that legal provisions be interpreted liberally in favor of the worker or employee. Given the compelling interest of the State to combat every mode of sexual harassment in employment, a restrictive interpretation, such as that pointed out, could deform that general objective.

Analysis of Findings

1. The manifestation of gender discrimination in employment that received the most attention from participants in the investigation was that of sexual harassment.

In Focus Group Interviews held by the Commission, as well as in the hearings in the different judicial regions of the country, it was notable that most of the comments and observations about gender discrimination in the sphere of labor revolved around the problem of sexual harassment. Similarly, when the subject of labor relations within the judicial system was dealt with, the problem of sexual harassment was also prominent.

In both group interviews, male and female lawyers who work in this field, constantly mentioned the topic. But the perspectives of both groups regarding the reality of the litigation of these cases were far apart.

From the perspective of company lawyers, the alleged "wave of harassment cases"[123] was questioned. It was said that "too many cases were being taken, especially in the courts." [124] These lawyers believed that the law over protects women. One male exponent said:

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122 29 L.P.R.A. sec. 155b, clauses (a), (b) and (c) (Suppl. 1995).

123 Focus Group Interview, Company lawyers, p.35

> All the woman has to say is "hostile and intimidating environment" and then it becomes a question of credibility. Generally, it's my word against yours, but meanwhile, in the 'in between,' I am destroying a reputation. Your name is already tarnished and nothing prevents that person from unfairly bringing a case against you. . .
>
> The woman cries, she puts on a show, she files the case. And in many cases it is very difficult to get the employer to defend you because it is [a question] of credibility, because it involves your reputation, because you don't want to go to trial. You have to give in. [125]

On the other hand, labor lawyers gave a totally opposite view. As we shall see further on, they brought up factors that discourage filing and litigating sexual harassment cases. They mentioned the emotional and economic impact that characterizes this type of legal dispute. Even though they recognized that substantive law is fair as respects the employee, they underscored the practical difficulties they face in litigating these cases.

2. *The incidence of gender discrimination in employment is greater than that perceived by the number of cases of that nature under consideration in the courts, pointing to the existence of dissuasive factors to file and process these cases.*

Every study on the subject indicates a large incidence of gender discrimination. They point out, besides, that there is a very high number of incidents of sexual harassment. [126] Statistics, however, reflect a minimum number of cases under consideration in the courts of the country.

Between 1983 and 1992, barely 23 cases of gender discrimination and/or sexual harassment were filed in the courts of Puerto Rico. Only three (3) sexual harassment cases have led to Supreme Court decisions. Data obtained from the Federal Court in Puerto Rico, which has concur-

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[124] This "wave" is not supported by statistics. The reader is referred to statistics on the number of cases filed in the courts in the discussion on finding no. 2.

[125] Focus Group Interview, Company lawyers, p. 35. A company lawyer also stated the view that "there is a very high percentage of . . . fabricated cases of sexual harassment." *Id.* p. 79. Another said "there's an incentive to file that kind of claim, there is nothing to lose and nothing to protect the accused, even though he may be acquitted." *Id.* p. 80. Lawyers for the victims, however, say that there's a lot to "lose" in harassment cases and that the system discourages the filing of those cases. See *infra* discussion of finding 2.

[126] In a study done with a sample of 70 female employees in the education sector it was found that 65 had experienced sexual harassment; of those 65 cases, 39 took place on the job. In another sample of the same study with 45 female employees in the health services sector, it was found that 41 had experienced sexual harassment; of those 41 cases, 30 took place on the job. LOURDES MARTINEZ & RUTH SILVA BONILLA, EL HOSTIGAMIENTO SEXUAL DE LAS TRABAJADORAS EN SUS CENTROS DE EMPLEO (Center for Social Research, U.P.R., 1988).

rent jurisdiction in these cases, also show a dearth of cases on the subject. For example, in 1990 a total of twelve (12) discrimination cases were filed in that forum. By 1994, that number had risen to fifty-seven (57) cases. It is notable, however, that those numbers are global and include every type of job discrimination. Out of these totals, nearly half are cases against government officials, most of which involve political discrimination, not discrimination because of gender.

Comparing the number of cases presented at the Anti-Discrimination Unit of the Department of Labor (U.A.D.) with those that are presented at the courts, one notices that the claims of the alleged victims of discrimination are resolved more frequently at that administrative agency than in the courts. In 1993-94, the agency considered a total of 259 gender discrimination cases.[127]

Focus group interviews of lawyers for the plaintiffs discussed obstacles that could be influencing filing discrimination cases in the courts. The following factors were mentioned: (1) the ignorance of judges about the subject;[128] (2) intimidation of witnesses;[129] (3) the economic impact of the dismissal and the litigation process;[130] (4) the emotional impact of the dismissal and the litigation process.[131]

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[127] Although the requirement to exhaust all administrative remedies does not exist in the local agency, the practice of U.A.D. is to send a letter authorizing filing suit when the administrative process is completed.

[128] See the discussion of finding 6 in this chapter of the Report.

[129] A female exponent in the Focus Group Interview of labor lawyers recalled how she had to desist from a case because the client did not wish to continue. The client explained that the administrator had been the harasser, that he had been stalking her house and that three witnesses withdrew from testifying because he told them that he was going to tell their respective husbands. Focus Group Interview, Labor lawyers, p. 26.

[130] See the discussion of finding 3 in this chapter of the Report.

[131] A female exponent said the following: Many times a woman who loses her job because of discrimination is discouraged, especially when gender discrimination or sexual harassment have intervened. That is, you have to see the physical and emotional deterioration of your client to really understand how her life completely changes. Focus Group Interview, Labor lawyers, p.40.

Another female exponent described her reaction when, for the first time, she encountered the devastating effect of a dismissal in the life of a person who had been discriminated against:

When the first client told me that as consequence of having been fired from her job she tried to commit suicide, I didn't believe it. It was a woman.

I had not litigated many job cases and to me they had alienated her until they finally dismissed her. This involved a married woman with two children and she tried to commit suicide because they had done that. I said to myself: "No, no, wait a minute, this woman had an affair, something happened here." Me and my prejudices. When I investigated, I see that this was the truth, nothing else had happened." *Id.* p. 37-38.

Company lawyers, however, generally do not acknowledge the existence of obstacles to presenting this kind of case. Their complaint is aimed at another aspect: substantive law. They believe that the Legislature has overly favored employees in labor law. For example, a male lawyer said:

> My perception .... is that the problem does not lie in the way the courts respond to this type of statute but in how loaded it is against the employer in implementing it. You have to separate the problems that this kind of litigation carries per se, by its own nature, the presumptions it creates, the disadvantage at which it places certain employers vis a vis the customary practice of the transaction, the conduct of the judges and their presumed prejudices. [132]

The reality is that the problem of gender discrimination is broader than the cases in the courts indicate. The reasons for this disparity have to be explored more deeply.

3. The disproportion in the socio-economic power of the parties affects the litigation of this kind of case.

In cases related to job discrimination, a definite structural aspect limits access to the judicial forum: that is, the disparity in socio-economic power of the parties in the suit. In most of the cases, the person discriminated against is unemployed, while the opponent is a corporation or government agency with greater economic resources.

It was pointed out in the hearings besides, that discovery of evidence in this type of case is usually very costly, especially since the evidence is in the hands of the employer. Another economic factor is the problem of expert reports, which are generally required in discrimination cases. A male deponent at the hearings said that although the court has the authority to order that an expert be designated and paid, this is done in very few cases.

In the Focus Group Interviews of labor lawyers, the problem of lawyers fees was singled out for comment. While the employer can pay its legal agent, the employee rarely has the economic power to do the same. Furthermore, in certain cases labor laws limit the contractual terms of law-

[132] Focus Group Interview, Company lawyers, pp 54-55

yers and their clients. For example, Law No. 80 of May 30, 1976,[133] as amended, forbids lawyers from collecting their fees directly from the client, forcing them to depend exclusively on court-imposed fees. Even though applicable laws provide for honoraria, in discrimination cases judges either don't impose honoraria or, when they do, grant the minimum compensation for the work done.[134]

Discrimination cases are inherently complex and call for ample use of mechanisms for discovery of evidence. As a female lawyer with the Labor Department said:

> Although minimum wage cases have their complexities, the truth is that discrimination cases are more painstaking and require a little more knowledge of the law than other cases in labor practice. I can see five Law 80 in-depth hearings in one week, but if I'm assigned a discrimination case, I need at least a month to prepare.

Discrimination is an area whereby economic imparity is at the base of litigation. Actually, no mechanisms to iron out this imbalance exist.

4. *In harassment and gender discrimination cases a tendency is perceived to permit defenses and discovery of evidence related to the victim's private life, a factor that could be discouraging the filing of these cases*

Labor lawyers in the Focus Group Interviews were greatly concerned by the scope of evidence in sexual harassment cases. They complained that the courts are allowing the defense discovery of evidence about aspects of the intimate lives of women plaintiffs, which would be completely irrelevant in other contexts.

One female exponent said the following:

> My experience has been that in harassment cases and even in discrimination cases, the defense always brings up the sexual element. That is, I argue that my client has been harassed and what does the defense say? That she had an affair with so-and-so or that she provoked so-and-so or that she looked at that man or that she danced with another man, or that she wears short skirts or

[133] 29 L.P.R.A. 185a *et seq.*

[134] In the Focus Group Interview of labor lawyers, one female exponent recalled a labor case in which the judge imposed fees that resulted in a compensation of $1.83 an hour for work done. Id, p. 60. Another said "the problem is that the Law does provide for the imposition on the employer, but they are not doing it. That is, the basic problem is not that the Law doesn't exist, it does, it's just that the judges are not applying it."

> that she is a lesbian. The sexual element is always present. It's fascinating. The defense, in some way, always have to bring it up. It's different with a man. That is if you argue (c)discrimination representing a man—and I have done that—that kind of situation is never raised.[135]

Another female exponent explained that such an investigation is justified based on the damages being claimed. She offered the following example: In a case in which the plaintiff had an intimate relationship with a married man [the alleged harasser] it was alleged that her damages were not due to her dismissal, nor to the harassment, but to her relationship with the married man and his wife was summoned to be a witness.[136]

To the degree that the courts allow discovery of evidence about the sexual life of an alleged victim, access to the courts is limited in such cases. The use of discovery in the way we have described could have a very discouraging effect on sexual harassment cases.[137]

In Puerto Rico, the exclusion of that type of evidence is prohibited only in cases of rape or attempted rape, that is, only in the penal area (in the cases mentioned), not in the civil.[138] Strictly speaking, the exclusion could be justified under Rule 18 on relevance and the admissibility of evidence on the victim's character could be questioned under Rule 20 (A), clause 3.[139] Notwithstanding,, the Legislative Assembly sought to specifically exclude such evidence in Rule 21 of Evidence, since a question of relevance justifying a more restrictive rule comes into play: "the interest of the

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135 Focus Group Interview, labor lawyers, pp. 39-40. Company lawyers present another view, which reflects stereotyped attitudes regarding gender One said:
It is very difficult to control because it is an area of sexual attraction, that is, *this has nothing to do with work,*, sexual attraction and patterns of conduct of persons are deeply rooted. And you can make a big thing about orientations and trainings etc., but despite all of the precautions, one escaped the stockyard. *Id.* p 83. (Emphasis added).
Another said that "the Latin woman dresses so that the man will at least say "how beautiful you look." Another wonders: Where does one draw the line between what is considered sexual harassment and flirting or a kind of sexual conduct between genders that has developed into a custom and you don't know who is inciting and who is being incited?" *Id.* p 84.

136 *Id.* p.43

137 A female exponent in the Focus Group Interview with labor lawyers explained the effect this way: " as women, that kind of attack hurts us to our core, we feel that we are being undressed right there, that we have to air our greatest intimacies in public.. " *Id.* p 40.

138 Rule 21 of Evidence, 32 L.P.R.A. Ap. IV, R. 21

139 32 L.P.R.A. Ap. IV, R 18 and R. 20 (A) (3), respectively. See also commentaries under Rule 21

State in that victims of these crimes not refrain from denouncing the commission of the crime for fear that intimate aspects of their sexual lives will be revealed."[140]

The tendency of the federal forum and of states in the United States has been to eliminate this kind of evidence even in civil cases that involve sexual conduct. Thus, Rule 412 of Evidence was amended to that effect in the federal forum on December 1, 1994.[141] In commentary on the rule, the committee in charge of drafting it specifically made the rule apply to sexual harassment cases.[142]

The Commission recommends that the Legislative Assembly amend the corresponding rules of Evidence, previously cited, to extend these rules to all criminal and civil cases that have to do with alleged illicit acts that involve sexual conduct.

Evidence the Commission has gathered shows the likelihood of improper use of defense and discovery in sexual harassment cases, and that this limits access to the judicial forum in this kind of case. This situation has to be looked into more closely. As a remedy, we recommend changes in the rules of evidence and prosecution.

5. *An efficient internal procedure does not exist in the General Court of Justice to air gender discrimination and sexual harassment complaints; nor do effective policies and adequate regulations regarding these modes of discrimination.*

As a consequence of laws that prohibit sexual harassment at work, a large number of the country's job centers have established internal policies on the issue. These usually include clear definitions on what constitutes sexual harassment and procedures on how to bring legal action. Precisely, according to the *Guidelines to implement public policy and internal procedures of sex-*

[140] See commentaries under Rule 21.

[141] FED. R. EVID. 412.

[142] Id. Of interest is that recently a federal District Court judge of the District of Puerto Rico imposed a fine of $ 500 on a defense lawyer in a sexual harassment case, who asked a question in cross examination that implied that the plaintiff had been promiscuous. The lawyer asked the plaintiff's psychologist *"Did she tell you she had multiple relationships with married men?"* Hon. José Fusté admonished the lawyer for breaking Rule 412 and instructed the jury not to take that question into account. Manny Suárez, *Defense attorney fined in sexual harassment case*, THE SAN JUAN STAR, Aug. 17, 1995, p. 10.

ual harassment suits,[143] distributed by the Women's Affairs Commission, Office of the Governor, an "effective and preventive intervention" on the part of the employer to combat sexual harassment would include a clear policy regarding its prohibition as well as an effective mechanism to air harassment suits. In that document, the Women's Commission gives employers several recommendations on guaranteeing a claim process that is both effective and fair.

The Judicial Branch of Puerto Rico also established an internal policy about the issue which was circulated throughout the system through a Memorandum of the Administrative Director of the Courts, No. 17 of March 2, 1989. Nonetheless, in the Commission Hearings, judges, including three judge administrators, said that neither a procedure to present sexual harassment suits nor a procedure to handle specific suits about them, exist in the courts.[144] Coming from judge administrators, such statements acquire greater significance and lead one to suppose that the public policy and procedure adopted by the Judicial Branch for sexual harassment cases has not been widely disseminated. For all effects and purposes, it is as if they did not exist.

Still, even though the Office of Courts Administration published an informative pamphlet about sexual harassment geared toward its staff,[145] no evidence exists that internal educational programs about the issue, or about discrimination in general, have been instituted.[146] Just like other employers, the General Court of Justice, employer of 3,941 employees,[147] should invest positive efforts in educating its own labor force about the problems of discrimination. This assumes major importance when considering that judges in the judicial system are hierarchical superiors and, at the same time, supervisors of court personnel. Given the authority of the judiciary and

143 WOMEN'S AFFAIRS COMMISSION (1988).

144 Hearings, San Juan, June 10 and 11, 1994, p 4; San Juan, June 17 and 18, p.17.

145 *Hostigamiento Sexual* (Office of Courts Administration, Division of Employee Education and Services) pamphlet no. 3 of the Employee Orientation Service.

146 Even though the Institute for Judicial Education of the Office of Courts Administration offers diverse seminars for the judiciary in which some have covered the subject of gender discrimination, it has never offered trainings that are specifically about the subject, much less about sexual harassment on the job. A similar situation occurs with the Training Division, in charge of continuing education for the rest of the system's personnel

147 Figures obtained from the Office of Courts Administration on November 30, 1994

its special role, employees of the system are apprehensive at the likelihood of bringing suit against a judge, which, once past the administrative process, would be considered by a member of the same judicial class.

During Commission hearings, a female deponent recalled how a judge, in his office, touched the pocket of her sweater. Disgusted by the way he touched her, she refrained from taking action because the hierarchy, as it was, offered no remedy.

On the other hand, in Focus Group Interviews with female judges, one judge said the following about possible sexual harassment committed by judges: "No secretary of the court ... no one... will bring suit because no one trusts what the administration will do with it. Everyone thinks that because the person is a judge the matter will be covered up..."[148]

Expressions such as the above suggest that the procedure adopted by the Office of Courts Administration is not effective. Precisely, since the court is involved and arbitrates specific schemas of power, it is fundamental to establish trustworthy operational mechanisms so that victims of discrimination and harassment can bring suit without fear of reprisal.

Motivated by the above, the Commission examined the public policy and procedure established by the Judicial Branch and confirmed the general impression that revision was required. In view of that finding, the Commission prepared a project, *Rules of Procedure for Formal and Informal Action in Discrimination and Sexual Harassment Cases*.[149] Approval of that project, which forms part of this Report, is included as a special recommendation of the Commission.

6. *A general ignorance on the part of judges is perceived regarding these specialized areas of labor law, as much in applicable law as in the concept of discrimination and its implications.*

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[148] Focus Group Interview, Female judges, p. 39.

[149] Hon. Hiram Sánchez Martínez, Judge of the Circuit Court of Appeals, contributed a wide-ranging work on this procedure on which the project, Reglas de Procedimiento para acciones informales y formales en casos de Discrimen y Hostigamiento Sexual, is based.

Labor law is highly specialized. There are few labor lawyers and few cases brought before the courts. Applicable law contains very technical rules that generally are not known by judges, partly because they have not received training in the subject.[150] This takes on problematic dimensions since labor statutes contain presumptions that alter the burden of proof and the way cases are presented, which are significantly removed from the general rules that are applicable in our juridical system. Evidently, then, the judiciary must be oriented about these matters.

The perception of trial lawyers in this area and of some of the deponents in the hearings held by the Commission is that the judiciary does not know labor law thoroughly. In Focus Group Interviews of lawyers for the plaintiffs, several exponents mentioned this lack of knowledge. One female lawyer went so far as to say that "most judges do not know the field of labor law or they know very little and they don't care."[151] According to several participants, this ignorance and lack of interest is revealed in the adjudicative process. Some judges, for example, pressure alleged victims of discrimination to accept the allowance or statutory compensation as total compensation in these cases, despite the fact that the law prohibiting discrimination provides for the concession of several remedies, including moral and monetary damages, plus an equal amount as a penalty. Obviously, there is confusion regarding Law 80 of May 30, 1976,[152] about unjustified dismissals, which allots an additional amount as compensation.

On the other hand, it was said, some judges have erroneously applied labor law, particularly regarding the burden of evidence. This same point was discussed by a deponent at the Commission's hearings. He said that few judges comprehend the relationship between a prima facie case and the burden of proof in discrimination cases.

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[150] The Institute for Judicial Education of the Office of Courts Administration has not covered this subject in its continuing judicial education program.

[151] Focus Group Interview, Labor lawyers, p 22

[152] 29 L P R A. sec 185a.

Ignorance of these special laws in these cases is compounded by a general lack of sensitivity in the judiciary about cultural patterns and sexist stereotypes rooted in gender discrimination.[153] In the Focus Group Interviews of lawyers for the plaintiff, one participant underscored "the great ignorance about the concepts that constitute discrimination."[154] Another participant described a case where "the judge never could understand that economic reasons [offered to justify the dismissal] could be a mere pretext [for the discrimination]."[155]

Evidently, the lack of special training about discrimination and the lack of a clear public policy in the system as to the prohibition of discrimination and sexual harassment, complicate the situation.[156]

Recommendations

The following is recommended:

1. The reasons for the presentation of so few cases in court related to job discrimination should be thoroughly investigated.

2. Legislation should be proposed to limit the use of evidence about the sexual life of the victim of discrimination or harassment.

3. Mechanisms should be established to promote the presentation of these cases to combat the problems of economic disparity, whether through legislative changes or structural changes in the system.

4. Effective mechanisms for discrimination and sexual harassment suits should be established in the justice system itself.

5. Educational programs should be instituted for judges, officials, employees about employment-related laws and social problems related to gender discrimination on the job.

6. More studies should be undertaken on the connection between discrimination and the adjudicative process in the judicial system.

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153 See the chapter on General Theoretical Framework.

154 Focus Group Interview, Labor lawyers, p.39.

155 Id. p. 23.

156 See our discussion of finding 5 in this chapter of the Report.

Chapter 10

Other Findings

During its investigation, the Commission gathered information that allowed it to formulate additional findings to those contained in the chapters dedicated to the central themes of this study. Several of those findings are general in character, applicable to every legal aspect or area and the judicial system that we have previously examined. Others border on special aspects that merit attention. In view of their importance, the Commission has decided to make them a part of this Report. They are explained below.

1. *The general opinion of the participants of the investigation is that different degrees of gender discrimination exist within the sphere of the courts.*

The Commission received numerous testimonies, data and opinions regarding the existence of gender discrimination in the courts. Certainly there were discrepancies in regard to the degree, forms and manifestations of that discrimination. The Commission evaluated all the information and reached its own conclusions based on the parameters defined by the theoretical framework that guided the investigation, applicable principles and juridical rules, and the balance of the evidence or information given.

Despite possible divergences of interpretation over specific aspects, the broad consensus that arose from every intervention was that gender discrimination in the courts is manifested in diverse forms. The analysis in the preceding chapters point to those multiple forms and manifesta-

tions that, in the opinion of the Commission, sexism and gender discrimination assume in the Judicial Branch.

A dramatic example of that consensus is the result of the Participatory Investigation Sessions for Judges of the Judicial System carried out by the Commission. Although participating judges did not all agree completely in conceptualizing different situations as manifestations of gender discrimination, or how these occur in the courts, the general opinion, after an extended discussion, was that gender discrimination existed within the Judicial Branch.

It is important to emphasize that the percentage of judges admitting the existence of these manifestations was lower at the beginning of the participatory investigation sessions and greater at their conclusion, after the different programmed activities had been held. This was due to the process of individual and collective reflection in which the participants were absolutely free to offer their opinions.

Some 75% of the participating municipal judges believed, at the beginning of their corresponding session, that gender discrimination exists in the courts. At the end of the session, the affirmative response was unanimous. Regarding the participants from the District Court, the percentages were 66.7% at the beginning and 75% at the end. For the Superior Court and the Special Unit of Appellate Judges, who participated jointly, the results were 51.35% at the beginning and 94.12% at the end. In this last case, as we can observe, a substantial change in opinion was registered.[1]

2. *Differences in perception exist between the men and women who comprise the Judicial Branch regarding the degree and forms in which gender discrimination is manifested in the courts.*

[1] See the Report on the Participatory Investigation Session of Judges of the Judicial System. At the time of the Participatory Investigation Sessions, the previous Court of Appeals had been abolished and another created, called the Special Unit of Appellate Judges. This last was substituted for the Circuit Court of Appeals.

A significant finding of the Commission proved that men and women tend to have different perceptions regarding the nature of gender discrimination and interpret differently the specific practices associated with it. This emerged very clearly during participatory investigation sessions the Commission carried out. Thus, for example, at the beginning of each session, when expressing their opinion on whether gender discrimination existed in the courts or not, more women, as a group, tended to answer in the affirmative.[2] Only at the end of the discussions were the answers compared.

Likewise, when interpreting whether a specific hypothetical situation where a male judge complimented a female lawyer in the courtroom constituted gender discrimination, most female judges categorized that act as discriminatory, while fewer male judges agreed. A greater proportion of male judges showed a tendency to interpret the hypothetical behavior of the judge as a manifestation of Puerto Rican culture, without any hints of gender discrimination or prejudice.[3] On the other hand, the male judges showed a greater tendency to analyze the element of intention as necessary for discrimination to be configured, while female judges gave greater importance to the effect of the behavior or act on the person affected.[4]

These differences caused heated discussions between male and female judges. Most of the female judges tended to feel discriminated against in the system, while the male judges showed a tendency to perceive less the discrimination than that alleged by their peers. It should be noted, however, that as the discussions proceeded, when male judges made efforts to place themselves within the perspective of their female colleagues, which happened several times, they ended up conceding that what the female judges alleged was true.

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[2] *Id.*

[3] *Id.*

[4] *Id.* As the investigation transpired, similar divergences of interpretation occurred between men and women deponents or who were interviewed regarding the aspects that were the object of the study

In the opinion of the Commission, all this reflects that the daily life and work situations of men and women tend to condition their view of the problem of discrimination. But also that, to the degree that persons in a position of power develop empathy and put themselves in the position of the disadvantaged they will be able to become aware of the issue and better understand the problem, a prior step toward its solution.

3 *Numerous persons hold the mistaken belief that for situations of gender discrimination to exist, there has to be an intent to discriminate.*

The Commission discerned that many persons, including members of the Judicial Branch, believe that for gender discrimination to exist, there has to be discriminatory intention on the part of whoever incurs in that practice or behavior. This is mistaken conception.

From a sociological point of view, discrimination can exist, apart from an agent's intentional act at a given moment. Thus, for example, occupational segregation by sex—discussed in the chapters on Judicial Administration and Labor Law—is produced and reproduced through social, economic, ideological and political mechanisms that have macrosocial and structural characteristics. Evidently, it is also produced through intentional acts.

Juridically, an intention is not always necessary to configure discrimination. Hence, for example, sexual harassment in the workplace, a categorization of gender discrimination, is configured as an illicit act, even though the harasser does not think that he or she is being discriminatory. It is enough that they incur in the behaviors covered by law with the effects it prohibits.

More extensive and in-depth education is required for all the components of the judicial system regarding these issues to fully comprehend the nature of gender discrimination.

4. *Frequently, attempts are made to justify gender discrimination by arguing that the behaviors or practices in question are not discriminatory but manifestations of our culture.*

The use of the culture argument to justify gender discrimination is very frequent, as the Commission verified. Focusing the matter in this way disguises the true nature of discrimination, its detrimental effects on its target, and the responsibility of those who incur in the practice. Prejudice, sexism, androcentrism, and the enormous range of stereotypes regarding gender, certainly, are all cultural products. But that does not justify them, in any case it just explains them. Culture has oppressive aspects and discrimination is one of them. This is, precisely, about building a culture free of every type of prejudice and discrimination.

5. *Prejudicial attitudes against homosexuals and lesbians are manifested in the courts. These attitudes reveal the possibility that within the context of the court, discrimination occurs against persons on the basis of their sexual orientation. Sexual-orientation discrimination is a form of gender discrimination.*

Homosexuality, lesbianism, heterosexuality and bisexuality are all concepts socially constructed to account for human forms of sexual expression and affection between persons of the opposite or same sex. Throughout the history of humanity, we have seen these sexual expressions acquire very particular meanings. These meanings are influenced by socio-historical constructs that occur between the genders in each society and particular historical moment. Thus, heterosexuality occupies a dominant and hegemonical place as a principle or base for the perpetuation, through procreation, of the human race, assuming cultural values that attempt to devalue that which is different. (homosexuality).[5]

As indicated in the General theoretical framework of this Report, homosexuals and lesbians may be subject to discriminatory treatment since they question the social construct of gender that characterize societies, where only heterosexual relations are considered normal. Discrimination based on sexual orientation refers, then, to those social practices or acts that result in the unjusti-

[5] Edwin B. Fernández Bauzó & Francis Pérez Cuadrado, *El discrimen por orientación sexual como una forma de discrimen por género. Homosexualidad y la custodia de niños/as ante el sistema de justicia* (1995) (unpublished work). Text cited also in the part titled Relations between the couple: marriage, concubinage and the homosexual relationship of the chapter on Rights of Individuals and the Family.

fied devaluation of a person by virtue of their sexual orientation whether it comes from their own sex or

Several persons informed the Commission that negative and prejudicial attitudes are manifested in the courts against homosexuals and lesbians.[7] The following two testimonies illustrate the subtlety of that kind of discrimination. A male superior court judge said the following about friendships between male and female colleagues at work:

> Secretaries tell them that in the court friendship between colleagues of the opposite sex is not proper, because it immediately pose sexual connotations. If they are of the same sex, then inferences and accusations that they are homosexuals are made.[8]

Likewise, a participant in the Focus Group Interview of male trial lawyers and prosecutors told of a judge "accused" of being homosexual: a judge [of] whom comments were made that he had a few inclinations. ..Specifically, they *accused* him of being a homosexual".[9]

The use of the term "accuse" to refer to a homosexual or lesbian carries negative connotations. Its use within this context implies that a socially reproachable offense has been committed and produces the impression that a crime has been perpetrated. By definition, "to accuse" a person of being homosexual or lesbian means that said sexual orientation is in itself a crime.[10] A person's lifestyle, preferences and even desires are judged.[11]

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[7] A study recently performed by a professor and various students of the Department of Political Sciences of the Social Sciences Faculty of the Río Piedras Campus of the University of Puerto Rico shows that intolerance against homosexuals and lesbians is a considerable problem in contemporary Puerto Rico. The study had the purpose of identifying groups that are currently the focus of the most intolerance in the country. A national survey was carried out for the study,

[8] Hearings, May 3 and 4, 1994, p. 18. (Emphasis added)

[9] *Id.* p 39

[10] More than half of the states of the United States have decriminalized sodomy. See Note, Behind the Facade: Understanding the Potential Extension of the Constitutional Right to Privacy to Homosexual Conduct, 64 WASH. U.L.Q. 1`233, 1246-1247 (1986) (citing Bork, Neutral Principles and some Fifth Amendment Problems, 47 IND. L REV. 1, 10 (1971).
Also, more than 40 countries have eliminated homosexuality and lesbianism from the penal law. See Speaking of Being Gay and Lesbian, LOS ANGELES TIMES, Dec. 1st., 1992, p. 6

[11] On this subject see MICHED FOUCAULT, VIGILAR Y CASTIGAR: NACIMIENTO DE LA PRISION (Mexico, Siglo Veintiuno, 1976).

A male prosecutor told the Commission that the sexual orientation of a person should be taken into account before appointing them judges or prosecutors.[12] According to this deponent, psychological screening tests to evaluate candidates could be used to avoid appointing homosexuals to judgeship. He based his opinion on the bias that, a priori, homosexuals would have in sodomy cases. This proposal illustrates how homosexuals and lesbians are frequently evaluated only in terms of a sexual dimension. The image that is presented is of sexually uncontrollable and promiscuous persons. As long as they transgress the dominant sexual standard (heterosexuality), their moral capacity and potential are distorted. The male prosecutor admitted, however, that a heterosexual judge need not be automatically biased when judging a case of rape, just because he was heterosexual. The example cited also illustrates how allusions to sexuality or aspects of it, minimize and make invisible the professional and intellectual capacity of the person, similar to the way stereotypes that have to do about women are transmitted. This narrative exemplifies a socially constructed stereotype about homosexuality.

The use of stereotypical phrases or concepts within the contexts of work tend to reproduce the rejection of homosexuals. A clear and generalized manifestation of that rejection takes shape around especially painful jokes and comments. Insulting jokes and comments aimed at homosexuals and lesbians occur in the courts. One male judge expressed it this way: "You should see how lacking in seriousness, even the personnel of the courtroom and others often treat the situation. It's a joke."[13]

One male lawyer told the Commission of a disturbing and intimidating experience he had with a judge and other officials of the court in a case where he represented a male lawyer who was a victim of sexual harassment by his supervisor, also a male lawyer.

> [W]hen the case was summoned, the jokes were already going around in the hallways [by] the officials of the court, bailiffs, and fellow lawyers. That

[12] Hearings, May 20, 1994, p. 11.

[13] Focus Group Interview, Judges, pp. 29-30.

> is, we are before the forum that is supposed to guarantee watching out for the rights of individuals in this country, and there, it turned into, honestly, a spectacle. And what pained me most of the whole incident..... [is that] the judge condoned the spectacle by saying that this was a.....-I'm going to use the language that was used in chambers-.....that this was worthless crap between two fags who had fought between themselves. That it was likely that they had an "affair" and those things.....and that part of the fight between them, the result, was this trial.
>
> I even felt that [.....] they were insinuating, -the judge- that I was also one..... That is, I have nothing against them, but I also felt that they were even insinuating that since.....You, if you are getting involved in this.....as if.....Birds of a feather flock together..... As if they were applying the matter to me too. And I said: "Look, this is the last thing I need". And, let me tell you, I felt intimidated because of that situation.....
>
> On the other hand, [I also felt intimidated] by the fact that he [the judge] talked as if "this is worthless crap, this should not have reached here, this should have been settled before. Look, if he is such a man, they should have settled it like men." In other words, a judge, the person to who we go to resolve a controversy in a civilized manner, was suggesting that this be settled man to man: "Me, if they do that to me, what I'd do is that I'd shove.. If he dares touch my buttocks [.....], right there I'd jump all over him and finish him off". Those were the words of the judge.[14]

Here we see that a judge not only became a participant in turning a very serious matter—sexual harassment in the workplace—into a "spectacle" but that his words and behavior, although in chambers, underestimated the credibility of the parties, by belittling the facts and the controversy inferring that it had to do with homosexual conduct. At the same time, he echoed the worst stereotypes about homosexuals, showing bias or discrimination against them based on sexual orientation, and insulting them in the process. The example also illustrates a strategy used to dissuade lawyers from taking similar cases to court: associating them in some way with homosexuality.

A male municipal judge spoke along the same lines:

> When a homosexual or lesbian requests a restraining order against another homosexual or lesbian, they are the object of ridicule and discrimination

[14] Focus Group Interview, Male lawyers and prosecutors, pp. 40-43

> by court officials who intervene in those cases. Also, lawyers don't want to represent them, and the police make fun of them.[15]

In the examples cited, we can observe that attributing a sexual orientation different from heterosexuality is, in turn, an insult and a way of assuring that the person conforms to the behavior socially attributed to his or her gender. Thus, women who do not act according to the dominant standard of their gender can also be punished and controlled by being labeled as lesbians. As a female judge suggested, those who challenge the attributes of established roles or the expectations imposed on gender regarding how men and women should interact, open themselves to rejection:

> A lawyer's condition as woman is dealt with before her condition as a professional. In that respect, her triumphs are justified for reasons extraneous to her capacity: She won because of her physical charms". If she does not accept funny or joking remarks, then she is labeled masculine or a lesbian.[16]

Within the context of the workplace, a male lawyer in private practice said that lesbians and homosexuals are discriminated against by way of transfers.[17]

The Commission not only received examples of discrimination against lesbians and homosexuals regarding employment opportunities, daily interaction, and treatment in the courts, but it was also proposed that the discrimination may go beyond judicial adjudications. For example, in the area of Family Law it was reported that a party's sexual orientation is used as a reason to determine custody and paternal-maternal filial relations.[18] Also, we have observed that occasionally because of discriminatory attitudes, orders of protection prohibiting sexual harassment in the workplace, and under the Law on Domestic Violence are not available for homosexuals and lesbians. On the other hand, as a female lawyer specializing in women's affairs indicated, the legal order does not recognize that a pair of homosexuals or of lesbians who live together form a commu-

[15] Hearings, June 24 and July 1, 1994, pp. 33-34.
[16] Hearings, May 27, 1994, p. 8.
[17] Hearings, May 21 and 22, 1994, pp. 15-16.
[18] In this respect, see the chapter on Personal Rights and Family Law of this Report

nity property[19], similar to that of the heterosexual concubinage relationship. By compromising the impartiality that should prevail in the adjudication, these attitudes clearly interfere with the judicial process to the detriment of justice.

During the Participatory Investigation Sessions, judges unanimously agreed that discrimination on the basis of sexual orientation constitutes unequal treatment to the detriment of the individual.[20] As part of the design of the activities included during the sessions, judges were given a hypothetical situation[21] to analyze. The hypothesis was that a homosexual judge, because of his sexual orientation, cannot objectively evaluate the evidence in criminal cases, such as sodomy, which if true would lead to the conclusion that homosexuals or lesbians should not be appointed judges. Without distinction, each and every judge agreed that to consider a person's sexual orientation to determine their suitability for a judicial position constitutes discrimination, and that, in itself, sexual orientation - be it heterosexual, homosexual or lesbian—does not imply any limitation in the performance of duties. They also believed that an hostile environment can be generated by simply questioning or commenting on the sexual orientation of a candidate for judge, which would also constitute an element of discrimination.[22]

It should be emphasized, on the other hand, that the Commission's investigation revealed the existence of majority support, by the Judiciary and other participants, of the idea that discrimination toward homosexuals and lesbians—discrimination on the basis of sexual orientation—constitutes gender discrimination

The Commission believes that this is so because it implies, in general terms, that the person chooses not to comply with roles traditionally assigned to men and women by virtue of their

[19] Hearings, June 10 and 11, 1994, p 40.

[20] Superior Court and Appellate Court judges were not asked to analyze the subject of sexual orientation during the Participatory Investigation Sessions.

[21] The principal idea of the hypothetical situation was taken from the testimony presented by a male prosecutor during the hearings; see *supra* note 12.

[22] See the Report of the Participatory Investigation Sessions for Judges of the Judicial System

sex.[23] Homosexual relationships demonstrate or represent an alternative to the dominant model of heterosexuality which is associated with the traditional roles of gender.

6. *Gender discrimination is often linked to discrimination on the basis of socio-economic conditions, which especially aggravate the situation of women.*

Manifestations of discrimination on the basis of socioeconomic condition have been documented in Puerto Rico and in other countries by specialists in the social sciences.[24] Those manifestations affect men and women who see their possibilities of education, mobility and social interaction, access to services, employment and different kinds of benefits undergo detrimental effects. At the same time, they are rejected underestimated and ridiculed. Their intellectual capacities and sensitivities are under appreciated, they are the butt of pejorative jokes and even emotional and physical abuse.

According to multiple testimonies the Commission received, the courts of the country are not oblivious to this reality. Although we have revealed several of those testimonies within other contexts—when speaking of credibility and dress codes, for instance—it is fitting, by way of explanation, to use them once more in this context. A female lawyer in private practice summarized the situation in the following manner:

> Unequal treatment exists in the courts because of differences in the social class of the clientele. For example, a man with a good education, academic titles, and other social credentials, projects greater honesty, gains more credibility and gets better treatment on the part of the personnel and other officials of the court.[25]

The testimony of another female lawyer broadens this perspective:

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[23] For a more in-depth explanation, see the chapter on General Theoretical framework.

[24] See, for example, ALICE COLON ET AL , TRAYECTORIA DE LA PARTICIPACION LABORAL DE LAS MUJERES EN PUERTO RICO DE LOS AÑOS 1950 A 1985: ESTUDIO SOBRE LA CALIDAD DE VIDA Y LA CRISIS ECONOMICA EN PUERTO RICO (Centro de Investigationes Sociales, U.P.R., 1985); Ruth Silva Bonilla, *El lenguaje como mediación ideológica entre la experiencia y la conciencia de las mujeres trabajadoras en Puerto Rico*, 23 (No 1-2) REV. CIENCIAS SOCIALES 21-50 (1981). A work on the subject of great interest in the United States is BARBARA EHRENREICH, FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS (1985). See, also, the part titled *Gender discrimination and social condition*, in the General theoretical framework and the references provided there.

[25] Hearings, June 3 and 4, 1994, at p 28.

> There is a lack of consistency regarding the attire that is admissible in court. Women are strongly admonished regarding the shortness of their skirts, although the rule is applied differently if the person is a professional.[26]

That is to say, according to the perception of these deponents, treatment in the court depends on the socioeconomic condition that one has or appears to have, and that goes for both men and women. An obvious example of this was given during the Focus Group Interviews. A female participant recounted a case of domestic violence involving a doctor accused of battery. The prosecutor treated the doctor with great deference and remarked that Law 54 was created for people in housing projects. This is a clear example of a distorted view of the Domestic Violence law. This view suggests distinctions based on class and cultural differences.[27]

Of interest is the deponent's view that some prosecutors regard domestic violence or spousal abuse as part of the subculture of the slums and public housing. This leads them, she said, to fail to recognize the seriousness of domestic violence under those circumstances and the danger it represents for women. Their perception is that the underclass "grab at each other, break dishes over heads and later make up, forget it all, and the next day the same thing happens again", because that is part of that subculture.[28] Clearly, this perception puts low-income women at a disadvantage.

Another situation regarding the substantial difference perceived in the treatment depending on the social class of the parties, has to do with the value given privacy—more valued when the parties come from a professional class, or middle or upper class. As the foregoing deponent pointed out , this difference can be observed in the courts, since whenever circumstances of a case involve intimate questions, judges prefer the parties meet in chambers and reach an agreement so that shocking situations are not publicly aired. If the hearings must take place, then necessary steps are

[26] Hearings, May 13 and 14, 1994, at p. 9.
[27] Focus Group interview, Persons interested in women's affairs, at pp. 28-31.
[28] *Id.*

taken for them to be held in private. However, the deponent suggested, when persons who belong to the underclass are involved, judges don't object to public exposure of their private lives, and no special precautions are taken to empty the courtrooms or hold the hearings in hours when fewer people are present.[29] This is usually the predicament in cases of domestic violence, divorce, sexual crimes. And, as we've mentioned in other parts of this Report, it is the woman who most suffers the consequences of public exposure of intimate or personal matters in this kind of litigation.

A poor woman is often subjected to all kinds of negative or demeaning attitudes. A female lawyer said, for example, that in family relations courtrooms lawyers make fun of women from poor sectors who are adequately dressed for court.[30] Another female deponent added: "The joking and ridicule by members of the justice system is frequent when it has to do with humble people; more so when it is a woman."[31] A male lawyer also made a similar statement: "The women users of the courts, on the other hand, receive different treatment than men do. Everything becomes harder for them. Social condition is important in this regard."[32]

In fact, the Commission was told how difficult it is for poor women with children to appear in court because the court lacks child care centers; and how, when they do go to court with their children, they are often chastised and are subjected to other acts that are discriminatory because of their impact on them.[33] Poor and uneducated women also have problems going to court for help and services for child support or domestic violence, among other reasons, because of the lack of support resources to offer orientation and because of the attitudes of the personnel.[34]

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[29] *Id*

[30] Hearings, June 3 and 4, 1994, at pp. 11-12

[31] Hearings, May 20, 1994, at p. 4

[32] Hearings, may 21 and 22, 1994, at p. 4

[33] Hearings, May 13 and 14, 1994, at p. 5

[34] See the section of Analysis of findings in the chapters on Domestic Violence and Personal Rights and Family Law.

A female judge explained: "The less education and lower economic level, more evident is the discrimination of the man toward the woman and the woman toward the woman".[35] This perspective is of interest because it adds to a subject brought up in many other testimonies: discrimination between women, particularly if their socioeconomic conditions are different or they hold different positions in the power structure.

As suggested by some of the foregoing testimonies and by many others not presented here in the interest of brevity, discrimination toward the underclass, especially women, occur at different levels of the court structure and environment: in daily interaction, provision of services and even in the adjudication of controversies. One female lawyer pointed out:

> Judges tend to consider women who are poor or from a lower educational background negatively. The more rural the community, the greater the discrimination against women.[36]

7. *Discriminatory and sexist attitudes, behavior and practices are generated in law schools that influence the formation of future law professionals.*

The Commission received valuable and illustrative testimonies from lawyers, specialists in women's affairs, judges, university professors and law students emphasized how schools of law of the country produce and reproduce sexist and gender discriminatory attitudes, behaviors and practices that may have a future impact on court procedures. As one female lawyer said, "sexism in the courts is intimately tied to the formation of lawyers, [which] can have serious consequences in the practice of the profession".[37]

In brief, according to information received by the Commission, to a greater or lesser degree, sexism and gender bias or discrimination is manifested in law schools in their general atmosphere, the predominantly masculine composition of their faculties, in the formal curricula and

[35] Hearings, June 17 and 18, 1994, at p. 22.
[36] Hearings, May 20, 1994, at p. 5.
[37] Hearings, June 3 and 4, 1994, at p. 53.

course content, in interpersonal relations between professors and students, the character and style of education and in the ambience engendered in the classrooms.[38]

As for the general classroom ambience , it was pointed out, many female students feel uncomfortable, out of place, because they sense they are rejected, made to feel contemptible or disqualified as future law professionals.[39] They feel their capacities are less valued because they are women.[40] A recent law school graduate, a female, described the environment as openly hostile, as a result, for example, of sexist jokes some professors make in their classrooms.[41] According to some testimony, many examples used in classes and in tests tend to place women in degrading positions, as sex objects or as intellectually inferior.

Although law schools of the country differ on this point, the composition of their faculties continues to be predominantly male. This holds true even though the female student body in each school has increased considerably.[42] At the University of Puerto Rico Law School, for example, more that sixty percent of new students for the academic year 1995-96 are women.

This disproportion, independently of its reasons, creates a prejudicial situation for female students, "since women are excluded from the empathy and camaraderie created between men (professor-student)".[43] Some professors also take care not to relate to female students fearing that

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[38] Hearings, May 21 and 22, June 3 and 4, 10 and 11, 24, and July 1, 1994; focus Group Interview, Judges, at p. 120; focus Group Interview, Specialists in women's affairs, at pp. 76-78; Focus Group Interview, Female litigation lawyers and prosecutors, at pp. 88-89 Similar allegations have been made in several studies carried out regarding the subject in various schools of Law in the United States See, for example, Janet Taber & Marguerite Grant, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L REV. 1209 (1988); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in nine Law Schools*, 44 J. LEGAL EDUC. 311 (1994); LAW SCHOOL OUTREACH SUBCOMMITTEE OF THE GENDER BIAS FREE JURISPRUDENCE COMMITTEE OF THE CHICAGO BAR ASSOCIATION'S ALLIANCE FOR WOMEN, WOMEN STUDENT' EXPERIENCES OF GENDER BIAS IN CHICAGO AREA LAW SCHOOLS: A STEP TOWARD A GENDER BIAS FREE JURISPRUDENCE (1995)

[39] Hearings, June 24 and July 1, 1994; Focus Group Interview, Judges, at p. 120.

[40] Hearings, June 24 and July 1, 1994

[41] Hearings, june 3 and 4, 1994

[42] See the data in this respect that are reproduced in finding number 1 of the chapter on Personal Rights and Family Law of this Report.

[43] Hearings, June 24 and July 1, 1994, at p 50.

it may be misinterpreted as a romantic approach.[44] Consequently, "women's possibilities and opportunities are limited while they are students as well as in the future, if they want access to the faculty as professors, or recommendations for scholarships and postgraduate studies".[45] Thus it is reasonable to conclude that the dearth of female professors deprives female students of benefits that result from an analysis of juridical problems from perspectives, experiences and expectations of law professionals from their own gender. In addition, academic and vocational departments would be enriched with the participation of female jurists capable of orienting female students on particular problems that they will encounter as women in the professional world.

Still, the considerable influx of female students in recent years is beginning to have an impact on law schools. Subjects once ignored are beginning to be discussed in special activities organized by women students and in courses where female or male professors show a special interest in these issues.[46] More remains to be done, however, according to everyone who addressed this issue.

Deponents boiled down the deficiencies in the curriculum to two types: insufficient courses analyzing the specific problems of women and, two, the lack of a gender perspective in most of the courses.[47] Regarding the first aspect, it was indicated that some schools resist creating courses on women's rights and on feminist theories of law.[48] As for the second aspect it was noted that in some courses of Penal Law, for example, neither the problems posed by sexual crimes, whose victims are primarily women, are discussed in depth, nor is the Law on Domestic Violence carefully thought about. In some courses on Family Law, problems related to abortion, support, and gender

[44] *Id.*

[45] *Id.*

[46] See Focus Group Interview, Specialists in women's affairs, at pp. 76-78; and the Paper of the Organización de Mujeres Estudiantes de Derecho of the School of Law of the University of Puerto Rico presented in the Hearings of June 24 and July 1, 1994.

[47] Hearings, June 3 and 4, 10 and 11; June 24 and July 1, 1994

[48] Liana Fiol Matta, *On Teaching Feminist Jurisprudence*, 57 REV. JUR. U. P. R. 253 (1988).

stereotypes that tend to permeate the decisions on custody and paternal or maternal filial relations are only superficially discussed

It was also said that the character and style of education reflect traditional masculine values, emphasizing aggressiveness, the authoritarian process, and intimidating teaching practices. While female students are required to project a strong image, akin to that of the males, at the same time that they must comply with established standards of femininity. In one way or another, women always end up being criticized: if they are aggressive, they have lost their femininity, if they are not aggressive, they don't have the "right stuff" to be a lawyer.[49]

Deponents insisted that law schools take affirmative steps to produce greater awareness about gender discrimination manifested in legal education, in the profession and the Law, and to eliminate any traces of it.

[49] Hearings, June 24 and July 1, 1994, at p. 54.

Chapter 11

General Conclusions, Relation of Findings and Recommendations

To present an integrated portrait and allow the investigation results to be seen in perspective, the Commission offers its general conclusions in this chapter and reproduces the particular findings of each area that was part of its study. We also provide a complete set of recommendations.

A. General Conclusions

1. The Judicial Branch of Puerto Rico, as the rest of society of which it forms a part, reflects the presence of sexist stereotypes and cultural patterns that are manifested in different ways and degrees, at conscious and unconscious levels. The Commission's investigation revealed, further, that, to a greater or lesser extent, other components of the justice system reflect the same situation: the police, prosecutors, solicitors for Domestic Relations and for Juvenile Affairs, and lawyers respond to stereotyped views of men and women, just like members of the judiciary and the rest of the system's personnel.

2. Those sexist stereotypes and cultural patterns have, as a whole, a discriminatory effect on the judicial system and are a source of particular instances of discriminatory treatment in daily interaction and in the direct response of the system to those who turn to it. This holds true especially for women, as a manifestation and consequence of a society where men have dominated the spaces of power and have structured the world according to their view.

3. From information gathered by the Commission and the special findings of the investigation, enough evidence has been accumulated to conclude that sexism or discrimination on the basis of gender is manifested and influences the process of judicial decisions and the formulation of legal doctrine that affect the adjudication of real controversies.

4. Stereotyped notions based on gender are also manifested in the administration of the justice system and in the different dimensions of its very structure: occupational

structuring, work distribution, available facilities and resources for the users of its services.

5. Traditionally, the judicial system has not taken into account the gender perspective in hiring personnel, in job distribution, in developing educational programs, in applying evaluation and disciplinary systems or in structuring space and facilities to provide services for its users. Our investigation revealed, regarding certain particular aspects, that the previous conclusion applies equally to the justice system.

B. Relation of Findings

Judicial Administration

1. The phenomenon of job segregation by sex is manifested in the labor force of the judicial system.

2. The judicial system responds to sexist stereotypes regarding recruitment of personnel, assignment of duties and responsibilities and promotions.

3. Some officials of the judicial system use possible pregnancy as a negative criterion in selecting personnel.

4. Over the last twenty-five years there has been an absolute and relative increase in the number of women appointed to the judiciary, but these still represent a small minority of that body, especially in high ranking positions

5. There is discrimination against female judges regarding the assignment of material, especially at the superior judicial level of the Court of First Instance.

6. There are instances of unequal treatment base on gender in the assignment of courtrooms and in judicial transfers within the system.

7. The notion that unequal treatment of female judges in the distribution and retention of administrative positions is prevalent.

8. Negative decisions and reactions occur in the judicial system, especially for female judges, that are based on sexist stereotypes and on the application of different standards to women, or that respond to conceptions on their behavior.

9. The judicial system does not adequately intervene with certain behaviors by judges that are discriminatory in nature and distort the judicial code of ethics.

10. The layout of court facilities present certain deficiencies that particularly affect women, employees as well as visitors and users

Interaction in the Courts

1. No effort whatsoever is observed in the justice system to use feminine forms of language or neutral language from the perspective of gender in everyday speech, the processing of procedures, in application forms and in the formulation of internal regulations.

2. Daily interaction in the courts is marked by sexist attitudes that either go undetected or are not questioned and that generally work against women. These attitudes take on multiple forms: use of the familiar and informal treatment, the use of terms of endearment, the particular use of certain linguistic forms, non-verbal language, sexist expressions and jokes, among others.

3. The absence of a clear and uniform dress code in the courts has discriminatory effects based on gender that is even reflected in the treatment of women in the courtroom.

4. The application of standards to women that are different from those for men, based on stereotyped notions of one and the other, occurs frequently in the courts, with results that are clearly discriminatory against women.

5. A detrimental attitude towards the credibility of women that is based on gender is manifested in the justice system.

6. The courts of Puerto Rico reflect the general existence of a sexual harassment problem that affects daily interaction and job performance.

Personal Rights and Family Law

1. Confirming a similar finding discussed in the chapter on Judicial Administration, a tendency is observed to place women judges in courtrooms of Family Relations, to appoint women as Family Solicitors and Child Support Examiners and to associate women lawyers with the practice of family law. This tendency is consonant with the custom of visualizing the practice of Family Law as a "feminine" option, and criminal and civil patrimony litigation as "masculine" options which, on occasion, create situations of gender discrimination.

2. Many women lack adequate access to the courts of the country because they can neither assume the costs of the trial nor surmount the special problems they face in the judicial process in the area of family law.

3. In the area of family relations, gender-based discrimination is manifested adversely against women regarding the credibility they deserve as plaintiffs and witnesses in the courts

4. In maternal and paternal-filial relations (visitation rights) and child custody cases, the courts lack a sufficient number of specialists in human behavior to attend to the service needs of the parties, while some of those professionals have not received adequate training

to attend to these cases from a gender perspective. This especially affects women and children who appear before the judicial system as interested parties in its processes.

5. Gender, or the perception of a person's appropriate behavior according to their gender, is a determining factor in the interpretation and adjudication of a plaintiff's claim to exercise parental authority (patria potestas) or custody over their minor-aged children. This finding is manifested in the following aspects:

   a. In decisions regarding parental authority and custody, women who request them are generally granted them on the basis of their gender; while men who request them are generally turned down on the basis of their gender.

   b. Stricter demands related to sexuality are imposed on women than on men to retain custody and legal authority over their children, which leads many judges to permit the judicial process to veer away from the basic end—the protection of the minors—and steer it toward a woman's intimate life and to other irrelevant behavior.

   c. Therefore, it could be concluded that in the determination of custody and maternal or paternal-filial relations, a double standard or unequal treatment prevails in evaluating the sexual conduct of the mother compared to that of the father, even though this is not relevant to adjudicate the claim.

6. The homosexuality or lesbianism of one party has tended to be utilized as a reason to deprive custody and strictly regulate paternal or maternal filial relations, even though the plaintiff proves other criteria of suitability to exercise their prerogatives as father or mother.

7. In child custody cases, the violence that the aggressor has manifested against his partner or their children is minimized or declared irrelevant to determine the capacity of the aggressor to exercise custody and legal authority and relate with the minors.

8. On occasion, in conceding custody and legal authority to the father because the mother cannot care for the children adequately, the decision is based on the care that the paternal grandparents can give them, not the father.

   There is a tendency to unfairly compare the custodial capacity of a young mother, in the process of maturing and gaining experience, with that of older persons, who are more experienced in carrying out these tasks.

9. At the moment of determination, a mother's contributions to the multiple facets of the lives of her minor-aged children are not given proper due and value: their needs for medical attention, education and recreation, for help in school work, among them. This shows that the check the father gives is of more value than the contributions of the custodian mother.

10. An erroneous perception exists that men are discriminated against as non-custodial fathers because they are required to pay their contribution to the children's upkeep in cash and because, in cases of delinquency, sanctions are very severe, including imprisonment for con-

tempt, attaching their sources of income and other alternatives that affect their economic and personal relationships with others.

11. The child support program in the courts is ineffective because of the lack of human, physical and economic resources to attend to the needs of its clientele, for the most part represented by the mother. Ignorance of the law and of the procedures create the impression that only men pay child support and that women are not obligated to pay it.

12. A father's failure to pay child support and to abide by the plan for paternal-filial visits is not perceived by the judicial system as presumptions of negligence, abandonment or child abuse.

13. Some judges are too lenient or lax in imposing sanctions for the failure to pay child support, thus encouraging irresponsible and delinquent conduct by the provider and worsening the situation of neglect and need of the minors and their custodians because of that failure.

Some judges place the responsibility of selecting the sanction for the delinquent father-provider on the shoulders of the woman, who basically is reduced to choosing between two alternatives: a new and recurrent plan to pay the debt or jail for the provider.

14. The stipulations in most cases of divorce by mutual consent do not address the real needs of the woman and the children of the couple.

Many judges accept the stipulations presented by the parties in a divorce by mutual consent without investigating whether they adequately protect the party with less domestic, social and economic advantage.

Labor Law

1. The manifestation of gender-based discrimination on the job that received the most attention from participants in the investigation was that of sexual harassment.

2. The incidence of discrimination based on gender in employment is much greater than that indicated by the number of such cases under consideration in the courts, which points to the existence of dissuasive circumstances regarding the filing and processing of these cases.

3. The disparity in the socio-economic power of the parties affects the litigation of job discrimination and sexual harassment cases.

4. In discrimination and sexual harassment cases a tendency is perceived to allow defense and discovery of evidence related to the victim's private life, a factor that could be discouraging the filing of these cases.

5. An effective internal procedure to air complaints of gender-based discrimination and sexual harassment does not exist in the General Court of Justice; neither do effective policies nor adequate regulations regarding these kinds of discrimination.

6. General ignorance on the part of judges is perceived regarding specialized areas in labor law, as much as with respect to applicable law as in the concept of discrimination and its implications.

Domestic Violence

The Domestic Violence Law includes civil and criminal aspects. In view of that fact, the Commission decided to place them in a chapter separate from the one corresponding to Criminal Justice System.

1. Domestic violence is minimized and trivialized in the justice system.

2. There is resistance among the components of the justice system to conceptualize domestic violence as a crime.

3. A negative attitude toward the Domestic Violence Law exists on the part of many lawyers.

4. The system of justice confers very little credibility on women in domestic violence cases.

5. The justice system usually blames women for domestic violence.

6. General ignorance of the cycle of domestic violence exists among officials of the system, which prevents them from fully understanding what takes place in those cases.

7 The justice system discourages the filing of domestic violence charges and encourages their withdrawal.

8 Insufficient orientation and support mechanisms are available for victims of domestic violence.

9 Justice system officials frequently mistakenly adopt conciliation stances in domestic violence cases.

10 With certain frequency, judges avoid stipulations of alternate procedures (Article 3.6 of Law 54) that allow the convict, under certain circumstances, to participate in a re-education and re-training program.

11. Some judges refuse to concede remedies provided by Law 54 without any legal reason to do so.

12. Other judges mistakenly require evidence of a pattern of conduct in physical abuse cases under Law 54.

13. Some judges do not take into account the father-aggressor's record of domestic violence in their determinations on custody and paternal-filial relations within the framework of a request for a protection order, exposing the victim and minors to possible incidents of future violence.

14. Despite the fact that protection orders constitute an important remedy to protect domestic violence victims, several problems limit the measure's effectiveness:

    a) Unjustified reluctance of judges to grant them in certain situations.

    b) Delays in conceding the remedy.

    c) Concession of protection orders for too short periods of time.

    d) Reluctance of judges to issue them ex parte.

    e) Concession of mutual protection orders.

    f) Problems with serving summons for hearings and protection orders.

    g) Erroneous conceptions: It is believed that if the victim allows a visit from the aggressor, albeit incidental, the protection order is tacitly relinquished or violated.

15. Ignorance about domestic violence takes on special nuances for some female judges who, as women in positions of authority, find it difficult to comprehend attitudes and reactions of women victims of domestic violence.

16. Discrimination towards male victims of domestic violence takes place at every level and in every sphere of the justice system.

17. The courts environment usually intimidates domestic violence victims.

18. In applying Law 54, some judges discriminate against homosexuals and lesbians in different ways.

Criminal and Juvenile Justice Systems

Although the system of juvenile justice does not fall within the area of penal law properly speaking, for the purposes of this Report, and in view of the whole relationship between both concerns, we are presenting them in the same section.

A. Criminal Justice System

1. In the system of criminal justice, as a result of sexist stereotypes about women and men, a tendency exists to see rape as an act of passion provoked by the conduct of the victim herself, more than as a crime.

2. A general impression exists that, as a result of cultural patterns inherently discriminatory towards women, the criminal justice system tends to encourage plea bargaining in sex crime cases.

3. In the criminal area, particularly regarding sex crimes, there is a tendency to dismiss the credibility of women victims, thus creating a pattern of re-victimization.

4. In the prosecution of sex crime cases, women victims are subject to improper interrogations that reflect discriminatory attitudes and a process of re-victimization.

B. Juvenile Justice System

1. The behaviors of boys and girls that give rise to complaints, tend to be evaluated differently, responding to gender stereotypes that permeate our society.

2. The layout of facilities and many of the services offered to minors are aimed at boys and are not adequate for girls.

3. Job segregation by gender in the juvenile justice system, particularly in the positions of bailiff and social worker, have discriminatory effects against delinquent boys and girls.

4. Judges and officials of the juvenile justice system tend to adjudicate the complete responsibility, supervision and discipline of the imputed minor to the mother.

5. In the juvenile justice system, there is a pronounced lack of programs and services for apprehended minors.

Other Findings

1. The general opinion of participants in the investigation is that manifestations of gender discrimination take place in diverse degrees in the environment of the courts.

2. Different perceptions exist between the men and women of the Judicial Branch regarding the degrees and ways gender discrimination is manifested in the courts.

3. Numerous persons hold the mistaken belief that for situations of gender discrimination to occur, an intent to discriminate must take place

4. Frequent attempts to justify gender discrimination argue that the practices or behaviors in question are actually manifestations of our culture.

5. Prejudiced attitudes against homosexuals and lesbians are manifested in the courts. These attitudes raise the possibility that, within the context of the court, a person is discriminated against for sexual orientation. Discrimination based on sexual orientation is a form of discrimination because of gender.

6. Gender discrimination is often tied to discrimination for socio-economic conditions, which especially aggravates the situation of women.

7. Law schools generate sexist and gender-based discriminatory attitudes, behaviors and practices that influence the formation of future law professionals.

C. Recommendations

In what follows, the Commission offers recommendations for each area of the study. It is important to note that an important part of these recommendations involves the development of educational and sensitizing processes on gender-based discrimination in the courts and in the justice system that lead to attitudinal changes on the subject, and address manifestations of discriminatory treatment in the different dimensions of the institution's structure, environment and work: daily interaction in the courts, occupational structure, availability of essential arrangements for certain services, orientation of the public and provision of services, preparation of jurisprudential standards and the adjudication of real controversies.

Judicial Administration

1. The Judicial Branch should foster the development of training aimed at supervisory personnel, male and female presiding judges. This training should include modules about occupational segregation by sex and discrimination in employment because of gender.

2. The Office of Courts Administration must take affirmative measures against occupational segregation by sex, especially in those areas of employment that affect services to court clientele such as the office of the bailiff.

3. The Office of Courts Administration should endeavor to prepare statistical reports on occupational segregation by sex in order to examine the patterns and existing tendencies in diverse work categories, so that pertinent administrative and educational measures can be taken.

4. The Office of Courts Administration should issue specific directives regarding the illegality of using pregnancy or possible pregnancy as a criterion in hiring personnel.

5. The Office of Courts Administration should emphatically circulate its public policy on gender discrimination in employment and the availability of a procedure for such complaints and legal action.

6. The Executive Branch, through its Office of Judicial Appointments, assigned to the Governor's Office, must engage in more profound studies about occupational segregation by sex, particularly judicial nominations, addressing the different categories on the judicial ladder.

7 The Office of Judicial Appointments, assigned to the Governor's Office, should develop an information system about applications for judicial positions and appointments that facilitates investigations about the subject.

8. The Chief Justice of the Supreme Court should be alert to the diverse manifestations of gender discrimination in employment when he exercises his constitutional powers to assign courtrooms and appoint male and female presiding judges.

9. The Office of Courts Administration, all presiding judges of the system must be alert to the possible manifestation of discriminatory treatment, particularly regarding female judges in subject matter jurisdiction

10. The system of judicial evaluation of the Judicial Branch should evaluate the performance of all judges regarding diverse manifestations of gender discrimination, especially in what is related to judicial temperament.

11. The Office of Courts Administration should be more emphatic in investigating situations that reflect discriminatory attitudes on the part of members of the judiciary and the system's support personnel.

12. The Office of Courts Administration should study the possibility of establishing day-care centers, at least in the largest courts with the largest influx of the public, that are open to employees as well as the public.

13. The Office of Courts Administration should make adequate arrangements in the courts for their female clientele, especially in the areas of criminal matters and the juvenile justice system.

Interaction in the Courts

1. The Office of Courts Administration should review forms, internal regulations, and other documents of the system in order to eliminate gender tarnished language. The review should also determine to what extent they respond to stereotyped notions on gender and how their implementation presents problems of gender discrimination for that very reason.

2. For the same purpose, the language of the codes of judicial and professional ethics should be reviewed and amended to explicitly prohibit all manifestations of discrimination by the Judiciary and members of the legal profession.

3. The Supreme Court, for the same purpose, should also order the revision of language in the Manual of Instructions to the Jury.

4. The Office of Courts Administration should develop educational pamphlets on the problems presented by the use of the masculine generic and on the use of neutral language from the standpoint of gender to awaken consciousness about the subject among the members of the judicial system. It is important to sensitize male and female judges about this matter, because their position and authority in the system have a multiplier effect of great impact on other components of the system.

5. In seminars and orientations on judicial ethics offered by the Office of Courts Administration, particular attention should be given to sexist manifestations reflected in daily court interaction: using the familiar and informality, using terms of endearment, the particular use of certain linguistic forms, non-verbal sexist language, sexist jokes and expressions, and flirtations, among others. The example judges set in that regard should be underscored as well as the corrective function they must exercise from the bench.

6. Employee orientation and continuing education programs of the Training Division of the Office of Courts Administration, should be revised to include modules, aimed at employees and supervisors of the system, on the sexist attitudes that are manifested in daily court interaction, with particular attention given to sensitizing and changing attitudes.

7. In complying with its duty to foster the education of members of the legal profession, the Bar Association should develop workshops and seminars for male and female lawyers to sensitize them to discriminatory behaviors and patterns that occur in daily court interaction, law firms and other employment centers. The Bar should also develop manuals and protocols of acceptable behaviors that address such aspects as language usage that recog-

nizes the presence of women in the courts and that is neither sexist nor offensive; also problems of behavior.

8. The system of evaluating judges and support personnel should take into account different manifestations of sexist attitudes that transpire in the courts and in the rest of the judicial system. Specific questions on the subject should be included in evaluation questionnaires.

9. The Judicial Branch should develop procedures that permit the gathering of information and complaints about sexist behavior and attitudes in the system in order to guide their strategies in eradicating the problem.

10. The Office of Courts Administration should review the Manual of Bailiffs' Procedures to incorporate norms and protocols on the appropriate treatment bailiffs should provide to persons who turn to the courts, especially women.

11. The Judicial Branch should develop seminars and orientations for all the system's personnel, with special attention paid to judges and social workers, on stereotypical ideas that determine different standards of behavior and credibility for men and women. The Department of Justice should do the same for prosecutors and solicitors for Domestic Relations and for Juvenile Affairs.

12. Judges should develop a greater awareness of different manifestations of gender discrimination and their cultural foundations, and should be more alert to ensure the correct and appropriate development of the doctrine in this regard. The judicial system should stimulate awareness that stereotypical and prejudicial ideas, particularly in cases of domestic violence, sexual harassment, sex crimes and family relations, can cause the miscarriage of justice.

13. Law schools should carry out their formative duty conscious of the historic alienation and subjugation of women and of the need to change attitudes and values to allow the full incorporation of women into the legal profession. To do this, law schools should review the curriculum and, wherever possible, incorporate courses that address these needs. Further, study and discussion of such issues that so directly concern justice as a fundamental value should be a part of every course. This should be an object of attention of university divisions in charge of the revision and approval of curriculum. Interaction of the different components of the university community should also be taken into account.

14. The Judicial Branch should amend its policy on sexual harassment to make it more clear and forceful, and to clarify concepts and procedures. The opportunity should be seized to address the requirements of the Constitution and the laws prohibiting different manifestations of discrimination, so that the public policy of the Judicial Branch can be broadened to include them

15. The Office of Courts Administration should give adequate publicity to its public policy on sexual harassment and on the different manifestations of discrimination, including relevant orientation for job applicants in the Judicial Branch.

Personal Rights and Family Law

1. The Office of Courts Administration should develop a special program of continuing training for judges, child support examiners and social workers assigned to Family Court to sensitize them on sexist stereotypes and cultural patterns that influence family relations and to deal with specific problems in the adjudication of custody, parental authority, support, paternal-maternal filial relations, divorce and others.

2. The Puerto Rico Bar Association should include topics on Family Law from the perspective of gender in its continuing education programs for members of the judicial profession and encourage reflection and discussion of those topics in its law review.

3. The Justice Department should develop training programs from the perspective of gender for Domestic Relations solicitors, paying special attention to the problems of litigation in the area of Family Law.

4. Law schools should promote the inclusion of the perspective of gender in courses and seminars on Family Law and develop investigations, studies and analyses of jurisprudence to address different aspects of gender discrimination in Family Law that serve to sensitize and educate all those involved in one way or another in family law litigation.

5. Schools of social work should revise their curricula to include the perspective of gender in compulsory courses and broaden the range of seminars and workshops on the subject, so that social workers are truly and effectively qualified to deal with family relations and other cases and are conscious of sexist stereotypes and cultural patterns that tend to affect them.

6 In consonance with the analysis of legislation in the area of Family Law included in this report, the Judicial Branch and the legislature itself should encourage the study and evaluation of the valid laws in this area in order to propose pertinent amendments to eliminate every sexist element that is discriminatory in content because of gender from the letter of the law.

7. The Justice Department and the Judicial Branch should make efforts to circulate and orient the public about the Bill of Rights of Victims and Witnesses and existing mechanisms to file claims so that the justice system as a whole can take the necessary steps in each particular case to validate the public policy of that document.

8 The Judicial Branch should weigh the creation of specialized family courts that are clearly integrated with special orientation programs for judges assigned to them. These courts should be effectively coordinated with every region and be adequately staffed with support professionals. The Commission received numerous recommendations on creating a Family Court, which should be evaluated from the perspective of a unified system such as the one we have in Puerto Rico

9. The Judicial Branch should give special training to personnel in investigation units and to one-judge courts to properly and adequately serve and orient their clientele on their rights and on judicial procedures.

10. The Judicial Branch, Bar Association, law schools and the Legislature should encourage the complete revision of Volume One of the Civil Code on Personal Rights and Family Law.

11. The Judicial Branch should firmly contest the negative assessment that affects the area of family relations within the different spheres of judicial tasks: assign judges to that area on the basis of special qualifications and prior training; encourage their tenure and establish a continuing training program that is obligatory and serves not only the purely informative aspects but, especially the formative, in terms of attitudes and sensitivity development.

12. The justice system and the Puerto Rican Legislature should continue to explore alternatives to developing systems to collect support that guarantee greater efficiency and adequate compliance by the providers. Available human, physical and economic resources in the child support program should be increased. The Commission is aware that recent legislation has undergone structural changes whose effects and results should be examined in due time.

13. Appeal forums should be particularly alert to the perspective of gender to properly and adequately guide the courts of instance in the daily adjudication of family relations cases to develop a doctrine free of discriminatory traits. The judicial system should encourage judges to take advantage of available specialized courses and seminars about the subject. An organized internal discussion of the subject should also be fostered.

14. Appellate forums, particularly the Supreme Court, should avail themselves of every opportunity the appeals process provides to clarify doctrine in terms of gender perspective and establish clear guidelines about unresolved legal aspects in the area of family relations.

15. The justice system should take steps to facilitate women's access to the courts and to adequate legal representation, especially in the area of family relations where women constitute the great majority of users. In that respect, the Judicial Branch should expedite these cases and limit postponements since delays have negative emotional effects and make the process more costly.

16. The judicial system should expand its resources in the area of specialists in human behavior and tighten requirements regarding their qualifications and formal training to ensure a better work team.

17. The judicial system should consider the needs that arise in litigation of family relations cases. For example: personnel to serve child support subpoenas.

Labor Law

1. The reasons for the presentation of so few cases in court related to job discrimination should be thoroughly investigated.

2. Legislation should be proposed to limit the use of evidence about the sexual life of the victim of discrimination or harassment.

3. Mechanisms should be established to promote the presentation of these cases to combat the problems of economic disparity, whether through legislative changes or structural changes in the system.

4. Effective mechanisms for discrimination and sexual harassment suits should be established in the justice system itself.

5. Educational programs should be instituted for judges, officials, employees about employment-related laws and social problems related to gender discrimination on the job.

6. More studies should be undertaken on the connection between discrimination and the adjudicative process in the judicial system.

Domestic Violence

1. The Office of Courts Administration should continue and intensify its education and awareness efforts for judges and judicial system personnel about the problem of domestic violence and application of the law, giving special attention to the cycle of domestic violence and the comprehensive and effective use of the law's different penal and civil mechanisms.

2. The Office of Courts Administration should offer special training to all judicial and non-judicial personnel of first contact in the courts to develop better attitudes in dealing with victims of domestic violence and in orienting them, especially in such an intimidating atmosphere as is the court.

3. The judicial system should develop efficient mechanisms of orientation for victims of domestic violence to explain court procedure in civil and criminal application of the law, the rights that are covered and the protection mechanisms they can request.

4. The justice system must develop uniform internal regulations regarding access to judicial procedures by advocates of victims of domestic violence.

5. The Judicial Branch should foster government development and establishment of shelters and support programs for victims of domestic violence and of re-education and re-training programs for aggressors throughout the island. This would allow the courts to more effectively enforce the public policy embodied in the Domestic Violence Law.

6. The Office of Courts Administration should study the possibility of establishing a specialized court in domestic violence in San Juan's Criminal Investigations Unit, which is justified by the volume of these kinds of cases. Meanwhile, the unit's previously trained personnel could serve as a resource in orienting court personnel around the island.

7. In coordination with other components of the criminal justice system, the Judicial Branch should develop an efficient information system on domestic violence cases and restraining orders that allow specific studies and investigations about the subject to be made, and to follow up on cases and the accused so that their records are in the system.

8. Internal supervision mechanisms should be activated to attend to complaints about inadequate and discriminatory treatment of victims and to impose corresponding disciplinary sanctions.

9. Interagency and internal efforts of the judicial system should be better coordinated to process domestic violence cases and address more efficiently issues such as serving subpoenas for hearings on restraining orders, restraining orders in themselves and addressing formal complaints made outside of working hours and other aspects. The Office of Courts Administration should coordinate with the Police of Puerto Rico so that the police serve restraining orders, especially in those towns where bailiffs are not available.

10. Criteria for territorial authority to attend to applications for restraining orders should be clarified. Judges should be educated regarding the fact that petitions for restraining orders must be attended to by any judge of the court of first instance.

Criminal and Juvenile Justice Systems

A. Criminal Justice System

1. In conformance with the analysis of legislation in Penal Law, the Judiciary and the Legislature should promote the examination of penal legislation and of procedural and evidentiary rules , to amend them so as to eliminate all sexist elements in the language and any discriminatory content from the perspective of gender. Nonetheless, the legitimacy of certain legal statutes that provide a discriminatory treatment of women and men should be kept in mind as an instrument to remedy historical situations of discrimination or power imparity that affect a particular sex.

2. The Supreme Court should promote the examination of the Manual of Instructions to the Jury to eliminate any discriminatory content from the point of view of gender, giving special attention to language of a sexist nature that can affect the determinations of the jury.

3. Appellate forums should be alert to the gender perspective in the interpretation of Penal Law, taking into account the legitimacy of specific legislation geared toward remedying historical situations of discrimination or of power imparity to guide the

courts of instance toward an interpretation and application of Penal Law free from discriminatory contents based on gender.

4. The Office of Courts Administration should develop special training aimed at judges of criminal and juvenile law, and support personnel specialized in human behavior, where the perspective of gender is discussed in general terms and, particularly, what is applicable in sex crime trials, and to the attention of juveniles in the criminal justice system

5. The Department of Justice should develop training seminars aimed at criminal prosecutors and juvenile prosecutors to sensitize them to the effects of stereotypes and sexist cultural patterns in the criminal area and within the juvenile justice system.

6. Law schools should include gender perspective in their courses on Penal Law, Criminal Procedure and on Evidence and promote thought and inquiry into it.

7. The different components of the criminal justice system should promote the preparation and training of personnel to provide orientation and support that sex crime victims need, and to avoid their double victimization.

8. The criminal justice system should adequately disseminate the Bill of Rights of Victims and Witnesses and facilitate access to mechanisms of presentation and processing of complaints that permit adequate and proper fulfillment of the document's public policy.

9. The Judiciary Branch should carry out more in-depth investigations to determine to what extent stereotypes and sexist cultural patterns influence the decision-making process of judges in criminal processes and in the imposition of measures.

B. Juvenile Justice System

1. Seminars should be given to sensitize every official who intervenes in the juvenile justice system so that they are more aware of manifestations of gender discrimination and how they affect minors and their families.

2. Adequate arrangements should be provided, such as separate public bathrooms, for girls, to address their particular needs.

3. More women bailiffs should be hired and assigned to guard and transport girl offenders.

4. More male social workers should be hired to attend to the particular needs of boy offenders.

5. A system of adequate information for minors and their families should be installed so they can make effective use of the system's procedures to address complaints related to sexual harassment and the different manifestations of discrimination.

6. A more detailed investigation should be carried out to determine if, in effect, gender discrimination occurs in the imposition of dispositive measures, in the orders of preventive detention and in the processes to revoke conditional liberty.

Bibliography[1]

Books

Ackerman, B. The War Against Women :Overcoming Female Abuse. Hazelden Foundation, 1985.

Albaladejo, Manuel, ed. Comentarios al Código Civil y Compilaciones *Forales*. Madrid: Ed. Rev. Der. Privado, 1985.

Ander Egg, Ezequiel. *Técnicas de investigación social*. Buenos Aires: El Cid Editor, 1980.

Arezo Piriz, Enrique. *Concubinato*. Montevideo, (2 volumes), 1983.

Aronowitz, Stanley. Science as Power: Discourse and Ideology in *Modern Society*. Minneapolis University Press, 1988. Austin, J.L. How to do Things with Words London: Routledge, 1962. Baker Miller, Jean. "The Construction of Anger in Women and Men", in Judith V. Jordan, et al., eds., Women's Growth in Connection, 1991.

Bender Leslie and Dan Braveman. "Intersections and Patterns of Power and Privilege", in Power, Privilege and Law: A Civil Rights Reader, 1995.

Berger, Peter and Thomas Luckman. *La construcción social de la realidad*. Buenos Aires: Amorrortu Editores, 1984.

Bernstein, Richard J. Beyond Objectivism and Relativism. Science, Hermeneutics, and Praxis. Philadelphia: University of Pennsylvania Press, 1983.

Bluebook: A Uniform System of Citation. 15ed. Cambridge: The Harvard Law Review Association, 1991.

Bordieu, Pierre. In Other Worlds: Essays Towards a Reflexive Sociology. Cambridge: Politz, 1990.

_____ *Outline of a Theory of Practice*. Cambridge: Cambridge University Press, 1977.

[1] Information about the law and jurisprudence can be found in the footnotes throughout this Report.

Bottomley, Anne. Feminism: Paradoxes of the Double Bind:, in Ian Grigg-Spall and Paddy Ireland, eds., *The Critical Lawyers' Handbook*, Pluto Press, 1992.

Bravo, Milagros, et al. "La construcción social del género y la subjetividad: Educación y trabajo", in Alice Colón, *Género y Mujeres Puertoriqueñas*. An exchange between the City University of New York and the University of Puerto Rico, 1994.

Bunch, Charlotte. Hacia una revisión de los derechos humanos. Ed. de las Mujeres, núm. 15, Isis Internacional, 1991.

Calderón, Alvaro. *La filiación en Puerto Rico*. 2 ed. San Juan: Ed: Colegio de Abogados, 1978.

Camacho, Rosalía y Ada Facio, eds. "El Derecho como producto del Patriarcado", in *Sobre patriarcas, jerarcas, patrones y otros varones*, San José, Costa Rica, 1993.

Capra, Fritjo. *The Turning Point: Science, Society and the Rising of Culture*. New York: Bantam Books, 1983.

Castán Tobeñas, José. Derecho Civil Español, común y foral. 14ª Madrid: Ed. Reus, 1987.

_____ La condición jurídica de la mujer. Madrid: Instituto Reus, 1955.

Corea, Clara. *El sexo oculto del dinero: Formas de dependencia femenina*. Buenos Aires: Colección Controversia, 1986.

Correas, Oscar. *Crítica de la ideología jurídica: Ensayo sociosemiológico*. Mexico: UNAM, 1993.

De Beauvoir, Simone. *El segundo sexo*. Vols. I ("Los hechos y los mitos") and II ("La experiencia vivida") Buenos Aires: Ed. Siglo Veinte, 1984.

De la Asunción, Rosa. "Las mujeres y la pobreza", in *La Sociedad de la desigualdad*. Gipuzkoa: Tercera Prensa, 1992.

Dershowitz, Alan M. The Abuse Excuse and Other Cop-Out Stories and Evasions of Responsibility 1994.

Diccionario de Ciencias Sociales. Madrid: Institute of Political Studies, 1975.

Dixon, Marlene. *The Future of Women*. San Francisco: Synthesis Publications, 1980.

Eco, Umberto. *Tratado de semiótica general*. Mexico: Ed. Nueva Imagen, 1978.

a

Ehrenreich, Barbara. *Fear of Falling: The Inner Life of the Middle Class*. 1985.

Engels, Federico. *El origen de la familia, de la propiedad y del estado*. Madrid: Ed Fundamentos, 1971.

Espín Cánovas, Diego. *Manual de Derecho Civil Español*. 5th Ed. Madrid: Ed. Rev. Der. Privado, 1975.

Facio, Alda. *Cuando el género suena cambios trae: Metodología para el análisis de género del fenómeno legal*. San José: CLADEM, 1991.

_____. "Sexismo en el Derecho de los derechos humanos," in *Mujer y derechos humanos en América Latina* Lima: CLADEM 1991.

Fernández, Blanca. "Feminización de la pobreza", in *La Sociedad de la desigualdad*. Gipuzkoa: Tercera Prensa, 1992.

Foucault, Michel. *La verdad y las formas jurídicas* Barcelona: Ed. Gedisa, 1988

_____*Vigilar y castigar: Nacimiento de la prisión*. Mexico: Siglo Veintiuno, 1976.

_____ *The Archaeology of Knowledge and the Discourse on Language*. London: Tavistack Publications, 1972.

_____ *Power Knowledge*. Colin Gordon, ed., New York: Pantheon Books, 1972.

Goode, William. *La familia 1*. Mexico: Uteha, 1966.

Goodrich, Peter. Legal Discourse: Studies in Linguistics, Rhetoric and *Legal Analysis*. London: MacMillan Press, 1987.

Guaglionone, Aquiles H. Disolución y Liquidación de la Sociedad Conyugal. Buenos Aires: EDIAR, 1965.

Gilligan, Carol. *In a Different Voice*. 1982.

Habermas, Jurgen. *The Theory of Communicative Action* Cambridge: Polity Press, 1991.

Hamilton, Mykol C., et al. Jury Instructions Worded in the Masculine Generic: Can Woman Claim Self-defense When "He " is Threatened ?" in Camille Roman, et al., eds., *The Women and Language Debate, a Sourcebook,* 1994.

Harding, Sandra. *The Science Question in Feminism*. Ithaca: Cornell University Press, 1986.

HeHenley, Nancy and Barrie Torne. "Womanspeak and Manspeak: Sex Differences and Sexism in Communication, Verbal and Nonverbal", in Alice G. Sargent, ed., *Beyond Sex Roles*. 1977.

Jones, Ann. *Next Time She'll be Dead*. Boston: Beacon Press, 1994.

Khun, Thomas. *La estructura de las revoluciones científicas*. México: Fondo de la Cultura Económica, 1962.

Lerner, Gerda. *The Creation of Patriarchy*. New York: Oxford University Press, 1986.

Leyh, Gregory. *Legal Hermeneutics: History, Theory, and Practice*. Berkley: University of California Berkeley Press, 1992.

MacKinnon, Catherine A. *Only Words*. Cambridge: Harvard University Press, 1993.

_____ *Toward a Feminist Theory of State*. Cambridge: Harvard University Press, 1989.

Marsá Vancells, Plutarco. *La mujer en el Derecho Civil*. Pamplona: Ed. Navarra University, S.A., 1970.

Mill, John Stuart. "The Subjugation of Women", in *On Liberty and Other Essays*. Oxford University Press, 1991.

Minow, Martha. *Making all the Difference: Inclusion, Exclusion, and American Law*. Cornell University Press, 1990.

Mock, Gloria and W. Martínez. *Sexualidad: sus conceptos básicos*. Río Piedras: Ed. Cultural, 1995.

Moliner, María. *Diccionario de uso del Español*. Madrid: Ed. Gredos, 1966. Muñoz Morales, Luis. Reseña histórica y anotaciones al Código Civil *de Puerto Rico*. Río Piedras: Ed U.P.R., 1947.

Muñoz Vázquez, Marya and Edwin Fernández Bauzó. *El divorcio en la sociedad puertorriqueña*. 2a ed. Río Piedras: Ed. Huracán, 1988.

Nevares-Muñiz, Dora. *Derecho de Menores*. 2nd ed. rev. Hato Rey: Instituto para el Desarrollo del Derecho, Inc., 1994.

_____ *Código Penal de Puerto Rico*. Revised and discussed, Instituto para el Desarrollo del Derecho, Inc., 1993.

Nielsen, Joyce McCarl, ed. *Feminist Research methods*. Westview Press, 1990

Nuevo Derecho Civil de la mujer casada. Madrid: Ed. Civitas, S.A., 1975.

Parker, Ian. *Discourse Dynamics: Critical Analysis for Social and Individual Psychology*. New York: New Routledge, 1992.

Pennigton J. and E. Thomas. *Custody Litigation on Behalf of Battered Women*. 1987, supp. 1988.

Pharr, Suzanne. *Homophobia: A Weapon of Sexism*. Chardon Press, 1988.

Puig Brutau, José. *Fundamentos de Derecho Civil*. 3rd. ed. Barcelona: Ed. Bosch, 1979.

Real Academia Española, Diccionario de la Lengua Española. 21st. ed. Madrid: España Calpe, 1992.

Real Academia Española, Esbozo de una nueva gramática de la lengua española. Madrid: España Calpe, 1973.

Reskin, Barbara F. and Patricia A. Roos. "Status Hierarchies and Sex Segregation", in Christine Bose and Glenna Spitze, eds., Ingredients for Women's Employment Policy. 1987.

Riger, Stephanie. "Rethinking the Distinction Between Sex and Gender", in Leslie Bender and Dan Braveman, *Power, Privilege* and Law: *A Civil Rights Reader*, West Publishing Col., 1995.

Rivero Hernández, Francisco. *La presunción de paternidad legítima*. Madrid: Ed. Tecnos, 1971.

_____ *Los conflictos de paternidad en el Derecho Comparado y Derecho Español*. Madrid: Ed. Tecnos, 1971.

Román, Madeline. "Préndeme fuego si quieres que te olvide... : del delito pasional a lo pasional del delito", in H. Figueroa Sarriera, et al., eds., *Más allá de la bella (in)diferencia: Revisión post feminista y otras escrituras posibles*. San Juan: Publicaciones puertorriqueñas, 1994.

Salazar, José Miguel, et al. *Psicología Social*. Mexico: Ed. Trilla, 1979.

Sanders Pierce, Charles. *La ciencia de la semiótica*. Buenos Aires: Ed Nueva Visión, 1986.

Schneider. Woman's Self-Defense Work and the Problem of Expert Testimony on Battering. 1986.

Schultz, Vicki. "Women 'Before' the Law: Judicial Stories About Women, Work, and Segregation on the Job", in Judith Butler and Joan Scott, eds., *Feminist Theorize the Political*, 1992.

Shiva, Vandana. *Abrazar la vida: mujer, ecología y ciencia*. Uruguay: Third World Institute, 1988.

Silva Bonilla, Ruth M., et al. *Hay amores que matan: La violencia contra las mujeres en la vida conyugal*. Río Piedras: Ed. Huracán, 1990.

Safa, Helen I. *The Myth of the Male Breadwinner: Women and Industrialization in the Caribbean*, 1995.

Spota, Alma L. *Igualdad jurídica y social de los sexos*. Mexico: Ed. Porrúa, 1967.

Straus, Murray A. "Conceptualization and Measurement of Battering: Implications for Public Policy", in Michael Steinman, ed., *Woman Battering: Policy Responses*, 1991.

Taquini, Vidal. *Derecho de familia: régimen de bienes en el matrimonio*. Second ed. Buenos Aires: Ed. Astrea, 1978.

Taud, Nadine and Elizabeth Schneider. "Women's Subordination and the Role of Law", in *The Politics of Law*, ed. rev., 1992.

Tolson, Andrew. The Limits of Masculinity: Male Identity and *Women's Liberation. 1977*.

Trías Monge, José. *Historia Constitucional de Puerto Rico*. San Juan: Ed. U.P.R., 1982.

Tribe, Laurence. H. *American Constitutional Law*. 1978.

Valdés, Joaquín. *La procreación irregular y el derecho*. Madrid: Ed. Nacional, 1972

Vaz Ferreira, Eduardo. *La sociedad conyugal*. Buenos Aires.

Vázquez Bote, Eduardo. *Tratado del Derecho Puertorriqueño, Vol. XI Derecho de Familia*. San Juan: Butterworth of Puerto Rico, Inc., 1993.

VOX, *Diccionario General Ilustrado de la Lengua Española*. 1987.

Walby, Sylvia. *Theorizing Patriarchy*. Basil Blackwell Ltd., 1990.

Walker, Lenore. *The Battered Woman Syndrome*. 1984.

_____ *The Battered Woman*. New York: Harper & Row Publishers, 1980.

Weedon, Chris *Feminist Practice and Poststructuralist Theory*. New York: Basil Blackwell, 1987.

West, Candance. "Rethinking 'Sex Differences' in Conversational Topics", in Camile Roman, *The Women and Language Debate*, 1994.

Wikler, Norma. "Identifying and Correcting Judicial Gender Bias", in Mahoney and Martin, eds., *Equality and Judicial Neutrality*, Toronto: Carswell, 1987.

Wittgenstein, Ludwig. *Tractatus Logico-Philosophicus*. D.F. Pears and B.F. McGuinnes, trads., London: Routledge, 1974.

Young, Iris Marion. *Justice and the Politics of Difference*. Princeton University Press, 1990.

Zannoni, Eduardo A. *Liquidación y clasificación de bienes de la sociedad conyugal*. Buenos Aires: Ed. Astrea, 1976.

_____. *El concubinato*. Buenos Aires: Ed. Depalma, !970.

Journals

Adams, D. "Identificando al esposo agresor ante el tribunal". Forum, year 6, num. 3, page 6, 1990.

"American Bar Association's Model Joint Custody Statute". 15 Fam. L. Rep. (BNA) 1494, 1989.

Andes, Nancy. "Social Class and Gender: An Empirical Evaluation of Occupational Stratification". 6, num. 2, Gender & Soc'y 231, 1992.

Barbosa, Belén. "Consideraciones en torno al concubinato, las comunas y el derecho de la familia". 42 Rev. Jur. U.P.R. 345, 1973.

Bartlett, Katherine E. "Feminist Legal Methods". 103 Harv. L. Rev. 829, 1990.

Bender, Leslie. "A Lawyer's Primer on Feminist Theory and Tort." 38, num. 3, J. Legal Ed. 22, 1988.

Bordieu, Pierre. "The Force of Law: Toward a Sociology of the Juridical Field" 38 Hastings L.J. 805, 1987.

Bowels, Gloria. "The Uses of Hermeneutics for Feminist Scholarship". 7, num. 3, Women's Stud. Int.1 Forum 185, 1984.

Browning, James and Donald Dulton. "Assessment of Wife Assault with the Conflict Tactics Scale: Using Couple Data to Quantify the Differential Reporting Effect". 48 J. Marriage & Fam. 375, 1986.

Cahn, N.R. "Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions". 44 Vand. L. Rev. 1044, 1991.

Cain, Patricia A. "Feminism and the Limits of Equality". 24 Ga. L. Rev. 803, 1990.

Castán Tobeñas, José. "En torno al Derecho Civil de Puerto Rico". 26 Rev. Jur. U.P.R. 7, 1956.

Charney, Dara A. and Russell, Ruth C. " An Overview of Sexual Harassment". 151 Am. J. Psychiatry 10, 1994.

Colón, Alice. "La participación laboral de las mujeres en Puerto Rico: Empleo o sub-utilización". 7(44) Pensamiento crítico 25, 1985.

_____ "O será cierto que hemos invadido el mercado de empleo". Num. 2 Mujeres en Marcha 2, 1989.

Colón de Zalduondo, Baltazara. "El valor económico y social del trabajo de la mujer en el hogar". 10 Homines 32, 1986-87 (special volume).

Comisión de Asuntos de la Mujer. "Violencia doméstica: Status quo". Forum, 8th. year, num. 4, 1992.

Comisión de Derechos Civiles. "Informe sobre discrímenes por motivo de raza, color, sexo, nacimiento y condición social". 22 Rev. Col. Ab P.R. 299, 1962.

Coughlin, Anne M. "Excusing Women". 82 Cal. L. Rev. 1, 1994.

Cruz de Nigaglioni, Olga y Magali Hosta de Guzmán. "La nueva legislación que rige la sociedad de gananciales". 37 Rev. Col. Ab. P.R. 701, 1976.

Cruz Jiménez, Olga. "Cómo discriminan las leyes contra la mujer puertorriqueña". 37 Rev. Col. Ab. P.R. 469, 1976.

Curet Cuevas, Ariel. "La división de los bienes concubinarios en el Derecho puertorriqueño". 34 Rev. Jur. U.P.R. 61, 1965.

Custodio, Gloria M. "The Discourse of Discrimination: How Lesbian Mothers Are Judged in Child Custody Disputes". 63 Rev. Jur. U.P.R. 531, 1994.

Dam, James L. "Wife Beating a Civil Rights Action Under Crime Bill; Divorce Lawyers Will be Affected". Lawyers Weekly USA, September 12, 1994.

De la Cruz, Lillian. "Análisis para una legislación del concubinato 'more uxorio' en Puerto Rico". 49 Rev. Jur. U.P.R. 317, 1980.

"Developments in the Law: Legal Responses to Domestic Violence". 106 Harv. L. Rev. 1498, 1993.

Ducci, Claro C. "Las cosas incorporales en nuestro Derecho (Chile)". 83 Rev. D & Jurisprudencia 29, 1986

Eisler, Riane. "Human Rights: Towards an Integrated Theory for Action". 9 Hum. Rts. Q. 287, 1987.

Emanuelli Jiménez, Rolando. "Análisis Constitucional del delito de Alteración a la Paz, Artículo 260 del Código Penal de Puerto Rico". 55 Rev. Jur. U.P.R. 587, 1986.

Entenza Escobar, P.F. "La capacidad contractual de la mujer casada". 4 Rev. D.P.61, 1962.

Fernández, Demetrio. "Las acciones contra familiares: Análisis de un problema claro y una jurisprudencia confundida". 2 Rev. Academia Puertorriqueña de Jurisprudencia y Legislación, 1, 1990.

Fernós López-Cepero, Antonio. "Análisis del origen y desarrollo histórico de la sociedad de gananciales". 18 Rev. Jur. U.I. 207, 1984. Fiol Matta, Liana. "On Teaching Feminist Jurisprudence". 57 Rev. Jur. U.P.R. 253, 1988.

Ford, David A. "Wife Battery and Criminal Justice: A Study of Victim Decision-Making" 32 Fam. Rel. 463, 1983.

Forum, 6th. year, num. 3, 1990. (Edition dedicated to the topic of domestic violence).

Fraticelli Torres, Migdalia "Un nuevo acercamiento a los regímenes económicos del matrimonio: La sociedad legal de gananciales en el Derecho puertorriqueño". 29 Rev. Jur. U.I. 413, 1995.

Fusté Pérez, José A. y Roberto Boneta Carrión. "Doctrina de la ratificación tácita y los Artículos 91 y 1313 del Código Civil". 37 Rev. Jur. U.P.R. 807, 1968.

Gerhard, Ute. "Women's Experience of Injustice: Some Methodological Problems and Empirical Findings of Legal Research". 2 Soc. & Legal Stud. 303, 1993.

González Tejera, Efraín. "Bienestar del menor: Señalamientos en torno a la patria potestad, custodia y adopción" 54 Rev. Jur. U.P.R. 411, 1985.

Gordon, Robert W. "Critical Legal Hostories". 36 Stan. L. Rev. 57, 1984.

Hernández López, D. Juan. "Comentario al Código Civil Revisado presentado a la Asamblea Legislativa de P.R. en diciembre de 1901". 14 Rev. Jur. U.P.R. 276, 1945.

Hosta de Guzmán, Magali. "La situación jurídica de la mujer puertorriqueña dentro del régimen de la sociedad de gananciales". 36 REv. Col. Ab. P.R. 743, 1975.

Hotaling, G. and D. Sugarman. "An analysis of the Risk Markers in Husband to Wife Violence: The Current State of the Knowledge". 2 Violence and Victims 101, 1986.

Jackson, Margaret. "Sexual Liberation or Social Control" 6, num. 19, Women's Stud. Int'l F. 7, 1983.

Jaffe, et al. "Similarities in Behavioral and Social Maladjustment Among Child Victims and Witnesses to Family Violence". 56 Am. J. Orthopsychiatry 142, 1986.

Joariles, E.N. and O'Leary, K.D. "Interpersonal Reliability of Report of Marital Violence". 53 Consul. & Clin. Psychol 419, 1985.

Johnston Jr., John D. and Knapp, Charles L. "Sex Discrimination by Law: A Study in Judicial Perspective". 46 N.Y.U. L. Rev. 675, 1971.

Kalmus, D. "The Intergenerational Transmission of Marital Agression". 5, num. 4, J. Marriage & Fam. 11, 1984.

Krauskopf, Joan M. "Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools".44 J. Legal Educ. 244, 1994.

Lacey, Linda. "Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute". 25 Tulsa L.J. 775, 1990.

Law, Sylvia A. "Homosexuality and the Social Meaning of Gender". 187 Wis. L. Rev. 187, 1988.

_____. "Rethinking Sex and Constitution". 132 U. Pa. L. Rev. 955, 1984.

Littleton, Christine A. "Reconstructing Sexual Equality". 75 Cal. L. Rev. 1279, 1987.

Malaret, Augusto. "Condición jurídica de la mujer puertorriqueña". 7 Rev. Jur. U.P.R. 7, 1937.

Marcosson, Samuel. "Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII". 81 Geo. L.J. 13, 1992.

Martínez, Armando. "La esfera de poder del comerciante casado: Necesidad de delimitar el ámbito de la gestión mercantil". 18 Rev. Jur. U.I. 289, 1984.

Menéndez, Emilio. "Direcciones contemporáneas del Derecho de Familia". 38 Rev. Col. Ab. P.R. 207, 1977.

Mertz, Elizabeth. "Language, Law, and Social Meaning: Linguistic Anthropological Contributions to the Study of Law". 26, num. 2, Law & Soc'y Rev. 413, 1992.

Mihajlovich, Mira. "Does Plight Make Right, The Battered Woman Syndrome, Expert Testimony and Law of Self Defense". 62 Ind. L.J. 1253, 1987.

Morales Cruz, Myrta. "Comentario: Pueblo v Rivera Robles y Pueblo v. Rivera Morales, ¿Protección a la mujer o paternalismo?". 64 Rev. Jur. U.P.R. 123, 1995.

Muñoz Morales, Luis. "Enmiendas al Código Civil de Puerto Rico posteriores al 1930". 13 Rev. Col. Ab. P.R. 4, 1950.

. "Anotaciones al Código Civil de Puerto Rico". 8-14 Rev. Jur. U.P.R., 1938-1945.

. "El Código Civil de Puerto Rico: Breve reseña histórica". 1 Rev. Jur. U.P.R. 75-78, 1932.

Myers, John G.B., et al. "Expert Testimony in Child Sexual Abuse Litigation". 68 Neb. L. Rev. 1, 1989.

Nevares-Muñoz, Dora. "Informe de Revisión del Código Penal de Puerto Rico". 27, num. 2, Rev. Jur. U.I. 267, 1993.

Note, "Domestic Violence and Custody Litigation: The Need for Statutory Reform". 13 Hofstra L. Rev. 407, 1985.

Note, "A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances". Col. 92, L. Rev. 1164, 1992.

Picó, Isabel and Idsa Alegría. "El texto libre de prejuicios sexuales y raciales". 28, num. 2, El Sol (Revista oficial de la Asociación de Maestros de Puerto Rico) 14, 1983.

Picó Vidal, Isabel. "Derecho de Familia y cambio social: Una interpretación histórico-social de la reforma de la administración de los bienes gananciales". 54 Rev. Jur. U.P.R. 537, 1985.

_____ "Sentido y alcance de la reforma de la administración de los bienes gananciales". 18 Rev. Jur. U.I. 241, 1984.

_____ "La equiparación de la mujer en el crédito financiero: Análisis de Banco de Ahorro del Oeste v. Santos Cintrón". 17 Rev. Jur. U.I. 313, 1983.

Polikoff, Nancy D. "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non Traditional Families". 78 Geo. L.J. 459, 1990.

Ramos López-Oliver, Pedro and Teresa Saladise. "La discriminación sexual y la sociedad legal de gananciales en el Derecho puertorriqueño". 8 Rev. Jur. U.I. 198, 1974.

"Report of the Florida Supreme Court Gender Bias Study Commission". 42, num. 5, Fla. L. Rev., 1990. "Report of the New York Task Force on Women in the Courts". 15 Fordham Urb. L.J. 17, 1986-87.

"Resolución XVIII de 1988 adoptada por la Conferencia de Jueces Presidentes de los Estados Unidos" 26 Ct. Rev. 5, 1989.

Resumil de Sanfilippo, Olga. "La condición jurídica de la mujer puertorriqueña en el siglo XX: ¿Continuamos interpretando la parte de la leona?". 54 Rev. Col. Ab. P.R. 5, 1993.

Rhode, Deborah L. "Feminist Critical Theories". 42 Stan. L. Rev. 617, 1990.

_____ "Perspectives on Professional Women". 40 Stan. L. Rev. 1163, 1988.

Rivera Quintero, Marcia. "Las adjudicaciones de custodia y patria potestad en los tribunales de familia de Puerto Rico". 39 Rev. Col. Ab. P.R. 177, 1978.

Rivera Ramos, Efrén. "Derecho y Cambio Social: Algunas reflexiones Críticas". 56 Rev. Jur. U.P.R. 251, 1987.

Rodríguez, Mercedes. "El problema de la violencia doméstica: preguntas y respuestas". Forum, year 6, num. 3, page 14, 1990.

_____ "El hostigamiento sexual en el empleo". 10, num. 2, Homines 192, 1986-1987 (special volume).

Romany, Celina. "Ain't I a Feminst?". 4 Yale J L. & Feminism 23, 1991.

Rosenblum, David. "Comment, Custody Rights of Gay and Lesbian Parents" 36 Vill. L. Rev. 1665, 1991.

Rule, Sheila. "Right for Gay Couples in Denmark". N.Y. Times, October 2nd 1989, page A-8.

Scales, Ann C. "The Emergence of Feminist Jurisprudence: An Essay". 95 Yale L.J. 1373, 1986.

Schafran, Lynn Hecht. "Documenting Gender Bias in the Courts: The Task Force Approach". 70 Judicature 280, 1987.

Shahen Yamhure, Patricia. "La equiparación jurídica de los cónyuges en la gestión de los bienes matrimoniales". 43 Rev. Jur. U.P.R. 41, 1974

Silbey, Susan and Austin Sarat. "Critical Traditions in Law and Society Research". 21 Law & Soc'y Rev. 165, 1987-88.

Silva Bonilla, Ruth. "El lenguaje como mediación ideológica entre la conciencia de las mujeres trabajadoras en Puerto Rico". 23, num. 1-2, Rev. Ciencias Sociales 21, 1981.

Simmons, J.L. "The Virginity Cult in the Civil and Criminal Law of Puerto Rico". 40 Rev. Jur. U.P.R. 103, 1971.

"Sizing Up the Sexes". Time, January 20, 1992.

Steele, W. and C.W. Sigman. "Reexamining the Doctrine of Self Defense to Accommodate Battered Women Her Due". 18 Am. J. Crim. L. 169, 1991.

Straus, Murray A. and Richard J. Gelles. "Societal Change in Family Violence From 1975 to 1985 as Revealed by Two National Surveys". 48 J. Marriage & Fam. 465, 1986.

Taber, Janet and Marguerite Grant. "Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates". 40 Stan. L. Rev. 1209, 1988.

Teitelbaum, L., et al. "Gender, Legal Education and Legal Careers". 41 J. Legal Educ. 443, 1991.

Torres Torres, Rafael J. "Cánones de Etica Judicial de Puerto Rico". Forum, year 9, num. 1-4, page 7, 1993. . "La coadministración de la sociedad legal de gananciales en el Derecho Puertorriqueño". 64 Rev. D.P.413, 1976.

Trías Monge, José "Los derechos de la mujer". 44 Rev. Col. Ab. P.R. 43, 1983.

Vázquez Bote, Eduardo. "Reforma del Derecho de Familia: Avance de un juicio crítico" Rev. D.P. 13, 1976-77.

Walker, Lenore, et al. "Beyond the Juror's Ken: Battered Women". 7 Vt. L. Rev. 8, 1982.

West, Robin "Jurisprudence and Gender". 55 U. Chi. L. Rev. 1, 1988.

Westra and Martin "Children of Battered Woman" 10 Maternal Childnursing J. 41, 1981

Williams, Wendy W. "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate". 13 N.Y.U. Rev. L. & Soc. Change 325, 1984-85.

Willowghby, R.J. "Rendering Each Woman: Can A Battered Woman Claim Self Defense When She Kills Her Sleeping Batterer?". 38 Kan. L. Rev. 189, 1989.

Varona Méndez, Aleida. "Las órdenes de protección". Forum, year 6, num. 3, page 22, 1990.

Velázquez, Guaroa. "Alcance de los poderes del marido como administrador de la sociedad de gananciales". 22 Rev. Col. Ab. P.R. 281, 1962.

Studies, Reports and other Publications.

Administrative Office Judicial Council of the Courts of California. *Achieving Equal Justice for Women and Men in the Courts, The Draft Report of the Judicial Council Advisory Committee on Gender Bias in the Courts*. 1990.

Annual Report of the New York Judicial Committee on Women in the Courts. 1993.

Benítez Nazario, Jorge. *Notas sobre la intolerancia y la cultura política puertorriqueña. Manuscript, s. f., near publication.*

Burgos, Nilda and E. Colberg. *Madres solteras con jefatura de familia. Características en el hogar y en el trabajo*. Río Piedras: Centro de Investigaciones Sociales, University of Puerto Rico, 1990.

Centro de Estudios, Recursos y Servicios a la Mujer (C.E.R.E.S.). *Informe Preliminar, Projecto de Investigación: Dificultades del Estado en la Implantación de la Ley 54 de agosto de 1989*. Río Piedras: Centro de Investigaciones Sociales, University of Puerto Rico, 1993.

Centro de Investigaciones Sociales de la Universidad de Puerto Rico. *Estudio para determinar el alcance y ramificaciones de la discriminación por razón de color, sexo y origen nacional en la empresa privada en Puerto Rico*. Río Piedras, 1974.

Colón, Alice et, al. *Trayectoria de la participación laboral de las mujeres en Puerto Rico de los años 1950 a 1985: Estudio sobre la calidad de vida y la crisis económica en Puerto Rico. Río Piedras*: Centro de Investigaciones Sociales, University of Puerto Rico, 1985.

Comisión de Derechos Civiles. *La Igualdad de derechos y oportunidades de la mujer trabajadora*. 1972.

Comisión para el Mejoramiento de los Derechos de la Mujer. *Informe Especial Núm. 2: La mujer y la nueva legislación sobre derecho de familia*. 1977.

Comisión para los Asuntos de la Mujer. *Tercer informe de progreso sobre la implantación en Puerto Rico de la Ley para la Prevención e Intervención con la Violencia Doméstica*. 1995.

Comisión para los Asuntos de la Mujer de la Oficina del Gobernador. *Guías para la Implantación de Política Pública y Procedimiento Interno de Querellas sobre Hostigamiento Sexual en el Empleo*. 1988.

Commonwealth of Massachusetts, Department of Youth and Family Violence. *A Study of Abuse and Neglect in the Homes of Serious Juvenile Offenders*. 1985.

Cruz Díaz, Edwin, et al. *Reflexiones en torno a la ideología y vivencia masculina*. Río Piedras: Centro de Investigaciones Sociales, University of Puerto Rico, 1990.

Departamento del Trabajo y Recursos Humanos. *Empleo y Desempleo en Puerto Rico: Promedio años fiscales* 1993-94 y 1991-92, Informe Especial núm. E. 86, Tabla 1.

Facio, Alda and Rosalía Camacho. *Vigiladas y castigadas: Seminario regional "Normatividad penal y mujer en América Latina y el Caribe"*. Lima: CLADEM, Comité Latinoamericano para la Defensa de los Derechos de la Mujer, 1993.

Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts. 1989.

First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts. 1984.

Information Service of the National Center for State Courts. *Status of Gender Bias Task Forces and Commissions in the State and Federal Judicial Systems*. 2nd. ed. 1993.

Lagan, Patrick A. and Cristopher A. Innes. *Preventing Violence Against Women*, U.S. Dept. of Justice, 1986.

Law School Outreach Subcommittee of the Gender Bias Free Jurisprudence Committee of the Chicago Bar Association's Alliance for Women. *Women Student's Experiences of Gender Bias in Chicago Area Law Schools: A Step Towards a Gender Bias Free Jurisprudence*. 1995.

Martínez, Lourdes and Ruth Silva Bonilla. El hostigamiento sexual de las trabajadoras en sus centros de empleos Río Piedras: Centro Coordinador de Estudios, Recursos y Servicios a la Mujer (C.E.R.E.S.), Centro de Investigaciones Sociales, University of Puerto Rico. 1988.

Muñoz Vázquez, Marya and Ruth Silva Bonilla. *El hostigamiento sexual: sus manifestaciones y caracteristicas en la sociedad, en los centros de empleos y los centros de estudios*. Río Piedras: Centro Coordinador de Estudios, Recursos y Servicios a la Mujer (C.E.R.E.S.), Centro de Investigaciones Sociales, Univerity of Puerto Rico, 1985.

Nerhot, P. "Law, Interpretation and Reality". Dordrect: Kluwer, 1989.

New Jersey Supreme Court Task Force for Women in the Courts, First Year Report. Trenton, New Jersey, Administrative Office of the Courts, 1984.

Picó Vidal, Isabel, et al. *Estudio para determinar el alcance y ramificaciones de la discriminación por razón de color, sexo y origen nacional en la empresa privada en Puerto Rico.* San Juan: Centro de Investigaciones Sociales, 1972.

Preliminary Report to the Task Force of the D.C. Circuit on Gender, Race and Ethnic Bias Special Committee on Gender, 1994.

Ramos Buonomo, Jeannette. *La mujer y el derecho puertorriqueño.* Estudio realizado para The Fletcher School of Law and Diplomacy de la Universidad de Tufts en Massachusetts, 1976.

_____. *Estudio sobre igualdad de los sexos en la legislación laboral.* 1974.

Ramos de Sánchez, Jeannette. *La mujer y la nueva legislación sobre Derecho de familia.* San Juan: Comisión para el Mejoramiento de los Derechos de la Mujer, 1977.

Report of the Gender Bias Study of the Court System in Massachusetts. Supreme Judicial Court, 1989.

Servicios Legales de Puerto Rico, Inc. *Informe Comité de prioridades en área de menores.* 1994.

Silva Bonilla, Ruth. *¡Ay!; ¡Ay!; ¡Ay! amor no me quieras tanto El marco social de la violencia contra las mujeres en la vida conjugal.* Río Piedras: Centro de Investigaciones Sociales, Universidad de Puerto Rico, 1990.

_____, El marco social de la violencia contra las mujeres en la vida conjugal. Río Piedras: Centro de Investigaciones Sociales, Universidad de Puerto Rico, 1985.

Torres Torres, Rafael J. *Memorando sobre la Ley de Violencia Doméstica,* 24 de septiembre de 1990, dirigido a los Jueces del Tribunal de Primera Instancia, Jueces Municipales y Oficiales Jurídicos.

Vicente, Esther. "La Ley de Violencia Doméstica y la actuación política de las mujeres en Puerto Rico", in *Vigiladas y Castigadas,* CLADEM, 1993.

Wickler, Norma J. *Data Collection: Surveys.* National Center for State Courts, 1990.

Theses, Presentations and other Unpublished Works

Buel, Sarah M. *Rescuing the Victims of Family Violence*. National College of District Attorneys, Presentation on Dynamics of Family Violence, NITA.

Comisión de Asuntos de la Mujer. "La dinámica de la doble jornada de trabajo y algunas implicaciones". Trabajo inédito.

Comisión para los Asuntos de la Mujer, Oficina del Gobernador. *Ponencia sobre projectos del Senado 1229 y 1230 al 1241. Medidas relacionadas con la reforma del Código Penal de Puerto Rico*. 31 de marzo de 1992.

Fernández Bauzó, Edwin and Francis Pérez Cuadrado. "El discrimen por orientación sexual como una forma de discrimen por género: Homosexualidad y la custodia de niños/as ante el Sistema de Justicia". Borrador preliminar, 1995

Lamas, Marta. *Usos, dificultades y posibilidades de la categoría género*. Monografía fotocopiada, sin fecha.

Resumil, Olga Elena. "La Mujer como objeto de tutela penal: ¿Protección legislativa o discrimen judicial?". Manuscrito entregado por la autora a la Comisión

Rivera Ramos, Efren. *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*. Manuscrito, *s.f., próximo a publicarse*.

_____, *El Derecho y la formación de los contenidos de la conciencia*. Ponencia presentada en el XVIII Congreso Mundial Sociología, celebrado en la Universidad de Bielefeld, Alemania, julio 1994.

_____, *Derecho y Subjetividad*. Ponencia presentada en el Seminario sobre el mismo tema celebrado en el Instituto Internacional de Sociología Jurídica de Oñati, Gipúzkoa, España, en el verano de 1994.

_____, The Legal Construction of American Colonialism: An Inquiry into the Constitutive Force of Law. Tesis doctoral, University of London, 1993.

Silva Bonilla, Ruth. Debate de teoría y método en los trabajos de investigación en la Ciencias Sociales. Ponencia presentada en el Encuentro de Investigadores, Decanato de Asuntos Académicos, Universidad de Puerto Rico, Recinto de Río Piedras, 1986.

Wikler, Norma J. *Credibility in the Courtroom: Does Gender Make a Difference?* Documento inédito facilitado por la autora en 1994.

APPENDIXES

APPENDIX A

REPORT

PROCEDURE FOR FORMAL AND INFORMAL ACTIONS IN CASES OF SEXUAL HARASSMENT AND DISCRIMINATION ON THE BASIS OF GENDER, RACE, COLOR, BIRTH, ORIGIN, OR SOCIAL CONDITION, OR POLITICAL OR RELIGIOUS IDEAS

PROCEDURE FOR FORMAL AND INFORMAL ACTIONS IN CASES OF SEXUAL HARASSMENT AND DISCRIMINATION ON THE BASIS OF GENDER, RACE, COLOR, BIRTH, ORIGIN, OR SOCIAL CONDITION, OR POLITICAL OR RELIGIOUS IDEAS

I. Legal Base

This procedure is adopted and enacted according to the provisions of Article V, Sections 7 and 11 of the Constitution of the Commonwealth of Puerto Rico, Articles 2.004 and 8.001 of the Judiciary Act of Puerto Rico of 1994, and Act No. 64 of May 31, 1973, as amended.[1] Also according to Article II, Section 1 of the Constitution of the Commonwealth of Puerto Rico that stipulates that the dignity of the human being is inviolable and that all men are created equal before the law. In particular, it clearly states that no discrimination shall be established for reasons of sex, race, color, birth, origin or social conditions or political or religious belief. It also states under Article II, Section 6 of the Constitution that protection is provided against risks to personal integrity and health on the job.

It is also adopted according to the legislative mandate that arises from Law No. 100 of June 30, 1959[2] of Law No. 69 of July 6, 1985,[3] and Law No 17 of April 22, 1988,[4] as amended. The first prohibits the employer from discriminating in the workplace because of age, race, color, sex, social or national origin, social condition, political or religious beliefs of the employee or job applicant. The second, regarding the workplace, likewise reaffirms the general constitutional mandate that sex discrimination, also known as gender discrimination, is intolerable. The third recog-

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[1] 4 L.P.R.A. secs. 521-525. This law creates an autonomous personnel system for the Judicial Branch, establishes a system based on the principle of merit, devoid of any kind of discrimination

[2] 29 L.P.R.A. sec. 146.

[3] 29 L.P.R.A. secs. 1321-1341 (Supp. 1994)

[4] 29 L.P.R.A. sec. 155(a), 155(l) (Supp. 1994).

nizes sexual harassment as a manifestation of gender discrimination in the workplace and requires of the employer affirmative action in preventing that illegal practice and investigating and processing any complaint that arises because of it.

II. Declaration of Public Policy

Discrimination on the basis of gender, race, color, birth, origin or social condition, political or religious ideas and sexual harassment in the workplace is injurious to the dignity of the human being and infringes on rights of persons that are protected by the Constitution. All persons who work in the Judicial Branch as well as any citizen receiving public services from this Branch, have a legitimate right to dignified and honorable treatment.

The joint and cooperative effort of all members of the Branch is necessary to achieve this objective. Accordingly, the Judicial Branch:

a) Shall take affirmative measures directed towards guaranteeing a respectful, fraternal and harmonious work environment.

b) Shall guarantee confidentiality during the course of corrective actions and disciplinary processes.

c) Shall take measures to avoid reprisals against persons who exercise their rights and make use of the procedure provided here to complain or to request corrective and disciplinary actions

d) May appoint an examiner with expertise in the legal, social and psychological aspects, to be present during complaints of the forementioned discriminations or of sexual harassment in the workplace. During the formal procedures against judges, employees, and officials, the Judicial Branch shall facilitate the means to appoint experts with this kind of knowledge, at the request of any of the parties.

e) During the formal process, educational and corrective action shall be given priority over the punitive action.

III. Purpose

The procedure established here shall be used to submit complaints or lawsuits because of alleged acts of sexual harassment or for any other manifestation of discrimination that happens within the General Court of Justice, to investigate such complaints and lawsuits, and to take informal or formal action in this regard.

IV. Interpretation

The procedure shall be interpreted according to the provisions and purposes of the laws that confer authority, as cited in Part I, and shall be applied to facilitate a fair and prompt solution to the complaint or lawsuit in harmony with the rights and interests of the prejudiced parties and with the guarantees that, according to the laws of the Commonwealth of Puerto Rico, protect individual defendants. This procedure does not preclude the use of other available legal remedies under the current law.

V. Definitions of Sexual Harassment, Discrimination and Gender

A. Sexual Harassment

Sexual harassment in the workplace, as defined by law, is a manifestation of gender discrimination that consists of any kind of unwanted sexual approach, request for sexual favors, and any other verbal, gestural, or physical conduct of a sexual nature when one or more of the following circumstances occur:

a. When the need to submit to such behavior becomes an implicit or explicit term or condition of the person's employment.

b. When the need for the person to submit to such behavior, or if he or she rejects it, becomes a motive for making decisions in the workplace or regarding the job that affects that person.

c. When that behavior has the effect or purpose of interfering unreasonably with the person's job performance or when it creates an intimidating, offensive or hostile work environment.

Sexual harassment can also happen in the courts outside the employee-employer relationship. In that case, sexual harassment is understood to mean any kind of unwanted sexual approach, request for sexual favors, or any other verbal, gestural, or physical behavior of a sexual nature that is inappropriate for a member of the judicial system, especially when one or more of the following circumstances occur:

a. When submission to such behavior becomes an implicit or explicit term or condition to receive the service or remedy that is requested or to carry out the action for which the person has turned to the judicial system.

b. When submitting to or rejecting such behavior becomes grounds to make decisions regarding the reason for which the person has turned to the judicial system.

c When that behavior has the effect or purpose of interfering unreasonably with the job performance of persons, professional or otherwise, working in the courts and are not employees of the system, or when it creates an offensive, hostile and intimidating work environment for them.

Sexual harassment may occur among persons of the same sex or of different sexes.

B. Discrimination

Discrimination constitutes, in general terms, any unequal treatment of a person because of her or his gender, race, color, birth, origin, social condition, political or religious beliefs. Such discrimination may occur in the Judicial Branch concerning individuals who are not employed by it, and, in that case, is prohibited by the Constitution of the Commonwealth of Puerto Rico and by the general rules of behavior that apply to employees of the judicial system and the judiciary. It may also occur in the Judicial Branch regarding individuals who work at the General Court of Justice as employees, officials, and judges. This is defined as job discrimination and may also affect indi-

viduals seeking employment in the Judicial Branch. In this particular case, discrimination may also occur when preferential treatment given to one employee adversely affects another.

C. Gender

The term gender means not only the strictly biological differences between men and women, but the collection of attributes that are culturally and socially ascribed to one and the other. Thus, it refers to the historical-social construct of the characteristics that are believed to define men and women and the expected behaviors of one and the other in our society. It involves the historical assigning of qualities, rights, responsibilities and behaviors expected of women and men.

For the purposes of this procedure, the term "sex discrimination" used in Law No. 69 of July 6, 1985, is substituted by the broader term "gender discrimination."

VI. Definition of Terms

The following terms shall have the meanings expressed below, except when otherwise indicated:

1. *Personnel* - refers to the Human Resources area of the Office of Courts Administration.

2. *Courts Administrator*, tenured or auxiliary - the first term refers to the Courts Administrator of the courts of Puerto Rico; the second to the Auxiliary Courts Administrator of the courts of Puerto Rico.

3. *Judge* - the person who by appointment or designation discharges her or his duties as judge of the Judicial Branch of Puerto Rico, except the judges of the Supreme Court.

4. *Chief Justice* - refers to the Chief Justice of the Supreme Court of Puerto Rico.

5. *Corrective measures* - non-disciplinary measures used to correct a situation or disciplinary measures that the Regulation of the Personnel Administration delegates to Presiding Judges and to the Area or Office Chiefs: verbal reprimand, written reprimand, and written reprimand with a copy to the personnel file.

6. *Legal Affairs Office* - the Office of Legal Affairs of the Office of Courts Administration or that office in charge of the initial investigation of a complaint and petitions for separation.

7. *Promoter Party* - person who files an unsworn complaint against another employee, official or judge of the judicial system of Puerto Rico.

8. *Promoted Party* - employee, official or judge of the judicial system of Puerto Rico against whom an unsworn complaint is filed.

9. *Complainant Party* - person who files a sworn complaint against an employee, official or judge of the judicial system.

10. *Defendant Party* - employee, official or judge of the judicial system against whom a sworn complaint is filed.

11. *Unsworn Complaint* - a verbal or written unsworn petition for an informal procedure to be initiated against an employee, official or judge of the judicial system as a result of an alleged behavior constituting sexual harassment or any other manifestation of discrimination.

12. *Sworn Complaint* - a sworn statement filed requesting that a formal procedure be initiated against an employee, official, or judge of the judicial system as a result of an alleged behavior constituting sexual harassment or any other manifestation of discrimination that, after a preliminary study, merits an in-depth investigation for that purpose.

13. *Supervisor* - any individual who exercises any level of control over one or more employees, or whose recommendation is considered for the hiring, promotion, transfer, dismissal, or fixing of work conditions of employees; or any individual who must guard that employees, officials or judges of the judicial system meet with their duties and obligations.

14. *Examiner* - any individual who can be an official of the Judicial System and has mediation, social and psychological skills, who may be designated to carry out the informal complaint procedure.

15. *Rules for the Investigation of Accusations and Complaints against Officials of the Judicial Branch* - Rules for the Investigation of Accusations and Complaints against Officials of the Judicial Branch approved by the Courts Administrator on December 1, 1980.

16. *Rules of Procedure for Disciplinary Actions of Judges* - Rules of Procedure for Disciplinary Actions and of Separation from Service due to Health Reasons of Judges of the First Instance Court and Circuit Court of Appeals of November 24, 1992.

17. *Court of First Instance* - means the Court of First Instance including the District Court through the process of its abolition.

VII. General Provisions

A. Circulation of Institutional and Procedural Policies

The Judicial Branch shall adequately circulate its institutional policy on sexual harassment and discrimination on the basis of age, race, color, sex, social or national origin, social condition, political or religious beliefs in the workplace and shall disseminate the procedures established here. As part of its responsibility, it shall develop and disseminate educational documents or pamphlets on sexual harassment and discrimination on the job and shall ascertain that each new employee receives copies This shall be the obligation of the Personnel Division. Likewise, ample disclosure shall be given in the workplace to the prohibition of sexual harassment and discrimination based on age, race, color, sex, social or national origin, social condition, political or religious beliefs in the selection of job applicants so that they understand their rights and the protections afforded them by law. The Personnel Division shall coordinate the preparation and subsequent distribution of the pamphlets to job applicants with the necessary information about these issues.

B. In any Procedure, Whether Informal or Formal, the Following Rights Shall Be Safeguarded:

a) Right to the timely notification of all complaints against a party.

b) Right to present evidence and to refute the evidence of the opposing party.

c) Right to an impartial adjudication.

d) Right to be notified of the decision and that it be based on the record.

C. The Responsibility of Supervisors

Every supervisor of the General Court of Justice shall be responsible for notifying his or her supervisor, and through her or him or directly when appropriate, the Courts Administrator, of any situation of sexual harassment or discrimination in the workplace that they should become aware of, or regarding any complaint that is filed in this respect

In the case that the sexual harassment or discrimination is related with the Courts Administrator, tenured or auxiliary, the notification shall be made to the Chief Justice.

D. Confidentiality

The Judicial Branch shall guarantee, correspondingly, confidentiality during the entire process, in the informal procedures established here, to protect he rights and interests of the complainants or defendants.

E. Importance of the Educational and Corrective Aspects

During formal procedures, educational and corrective aspects, over and above its punitive aspect, shall be considered important.

During informal procedures, the Judicial Branch shall not take any corrective measures that have any additional prejudicial effect on the injured party

F. Direct procedure Before the Courts

According to Article 13 of Act No 17 of April 22, 1988, and with the interpretation given to Act No. 100 of June 30, 1959 and Act No. 69 of July 6, 1985, victims of sexual harassment or of discrimination are not obliged to exhaust the administrative remedies established here to initiate a judicial procedure before the courts.

G. Complaints of sexual harassment and of discrimination extraneous to the job relationship

In view of complaints of sexual harassment and other manifestations of discrimination within the judicial system presented by persons who are not a part of its personnel, meaning that Laws 17 of April 22, 1988 and 69 of July 6, 1985 do not apply, the Judicial Branch shall investigate the matter and apply to it the same disciplinary provisions of the judiciary and Judicial Branch personnel, according to the formal Procedure in Section IX of this Procedure.

VIII. Informal Complaints' Procedure

1. Individuals authorized to initiate procedure

   a) Any person who is a part of the General Courts of Justice, whether an employee, official or judge, and any individual who is an applicant for employment with the judicial system, or any person who alleges sexual harassment or any other manifestation of discrimination carried out by any person who is a part of the General Court of Justice may present a complaint, as provided below, and request that, through the informal process of conflict resolution, an investigation be carried out and the corresponding action be taken by the Judicial Branch.

   b) During the process, the complainant shall be advised as to his or her right to request and to appeal the formal process at any time if she or he is not satisfied with the development of the informal process, in which case it shall end immediately.

2. Manner and place of filing

The complaint may be filed, in writing, duly signed or may be filed verbally in the Office of the Director of any of the Conflict Resolution Centers located in the Judicial Centers of the country. In the alternative, the promoter may file the complaint before the corresponding Regional Presiding Judge, the chiefs of the corresponding Area or Office, or the Courts Administrator when it involves a Presiding Judge or Chief of an Area. If the complaint is filed verbally, the official who receives it shall write it down and have the document signed by the promoter party.

If the complaint is filed against the Court Administrator, tenured or auxiliary, it shall be channeled to the Office of the Chief Justice.

3. Complaint, information required

The complaint shall indicate the name of the promoted defendant party, his or her place of work and also briefly relate the events that motivate the complaint.

4. Initial determination

Once the facts that give rise to the complaint are filed, the established procedure shall be followed, in the case of officials as provided in Section II of the *Rules for the Investigation of Complaints Against Officials of the Judicial Branch of 1980* , or in the case of judges, as provided in Rule 11 of the *Rules of Procedures for Disciplinary Actions, and Separation from Service due to Reasons of Health of Judges of the Court of First Instance and of the Court of Appeals of Puerto Rico of November, 1992*, in order to reach the initial determination as to whether these constitute or could constitute discrimination or sexual harassment.

If it should be determined that the complaint does not, in any way, present a case of discrimination or of sexual harassment, the person who filed the complaint shall receive orientation as to other possible violations of regulations or laws that the behavior for which the complaint was filed could imply, or under which regulation or law additional remedies could exist. No inquiries regarding the complainant's prior sexual history or behavior shall be made during the investigation, nor shall this information be taken into account for any purpose during the procedure.

The initial determination shall not take more than two work days from the date that the person filed the verbal or written complaint.

5. Notification

The corresponding official who, as previously mentioned, receives the complaint, or other person authorized to do so by the Chief Justice, shall notify the defendant employee, official or

judge in writing that a complaint has been filed and shall summon him or her to the informal procedure that is to be held. If the procedure is not held in a Mediation Center, an Examiner shall be appointed who may be an official of the judicial system with mediation, social or psychological skills and who may be present during the informal procedure.

Informal proceedings shall be strictly confidential. The interests, concerns and desires expressed by the complainant shall be given priority during these processes.

6. Procedure

The Examiner or the Official of the Mediation Center in charge of this procedure shall hear the version of the complainant and shall give the defendant ample opportunity to present his or her position and defenses.

All evidence presented by the parties shall be considered, and witnesses, who can contribute information to clarify the incident, shall be heard. A record of the event shall be prepared. The Rules of Evidence do not apply to this procedure.

Anyone in the Judicial Branch has a duty to cooperate with the investigation and procedure provided in the informal proceeding established here, or, otherwise, be subject to the corresponding penalty.

7. Final determination

Within a period no longer than twenty (20) work days, the examiner or official in charge of the proceeding shall evaluate the evidence submitted, produce and deliver a report directed to the Courts Administrator. The report shall contain the determinations of fact and recommendations to solve the conflict. The Courts Administrator or the Supreme Court, whichever corresponds, shall issue the final decision of the complaint no later than ten (10) work days from the date of delivery of the report. The Courts Administrator, the Chief Justice or the Associate Judge to whom the matter is delegated, may adopt, modify or revoke the recommendations of the report. The com-

plainant and the defendant will be immediately notified in writing of the decision, and be advised of their right, should any of them not be satisfied with the decision, to request a reconsideration before the Courts Administrator, or Chief Justice, in writing within fifteen (15) days from the date the decision was issued.

If it is decided that a complaint should be filed to impose disciplinary sanctions, the formal procedure shall be initiated.

IX. Formal Procedure

Whenever the injured party chooses not to initiate the informal procedure, or when the defendant party of a complaint does not meet the corrective and educational measures imposed within an informal procedure, the formal procedure shall be initiated according to the specific guidelines that follow.

Upon initiating the formal procedure, the record produced during the informal procedure, should this have occurred, shall be transferred to the forum of the formal procedure. The corresponding Examiner or Official who intervened during the informal procedure or the complainant party of the complaint shall notify the Legal Affairs Office of the Courts Administration when the defendant party has not fulfilled the corrective measures imposed during the informal procedure. If this is the case, the Legal Affairs Office shall be responsible for initiating the procedure.

1. Who may initiate the procedure

Any employee, official, judge or employment applicant or any person who alleges discrimination or sexual harassment in the Judicial Branch can initiate a formal procedure of complaint.

2. Manner and place of filing

The complaint shall be filed in writing and sworn, and shall include a narrative of the events constituting sexual harassment or discriminatory treatment. The complaint may be filed personally or mailed to the Office of the Courts Administrator. If mailed, it shall be addressed to the Office of Courts Administration, Box 190917, Hato Rey, Puerto Rico 00919-0917. If the complaint is filed against any official of the Legal Affairs Office, the Courts Administrator shall determine the investigative procedure to be followed in the case

If the complaint is against the Courts Administrator, tenured or auxiliary, it may be mailed to the Chief Justice, Supreme Court, Box 2392, San Juan, Puerto Rico, 00902-2392, who will determine the investigative procedure to be followed in the case.

If the alleged injured individual prefers to file the complaint personally, he or she should go directly to the Director of the Legal Affairs Office of the Office of Courts Administration, located on Vela Street, Stop 35 ½, Hato Rey, Puerto Rico.

If the complaint is against the Courts Administrator, tenured or auxiliary, it should be presented personally to the Secretary General of the Supreme Court

3. Procedure

The processing of the complaints filed in this manner against any judge of the Court of First Instance and the Circuit Court of Appeals of Puerto Rico shall be carried out according to the *Rules of Procedure for Disciplinary Actions and of Separation from Service due to Reasons of Health of Judges of the Court of First Instance and of the Circuit Court of Appeals of Puerto Rico*, approved on November 24, 1992.

The Supreme Court shall make the final determination on the action to be taken and shall notify the complainant party according to the Rules of Disciplinary Action of 1992.

The processing of complaints against any non-judicial employee or official shall be carried out according to the "Rules for the Investigation of Actions and Complaints against Officials of the

Judicial Branch," approved by the Courts Administrator on December 1, 1980, and with any other requirements established by law or jurisprudence regarding due process of law.

The Courts Administrator shall make the final determination regarding the required action within thirty (30) days of filing it, and shall notify the complainant party within that term.

The investigation of complaints against the Courts Administrator, tenured or auxiliary, or against an official of the Legal Affairs Office shall be carried out according to instructions of the Chief Justice, and the proceeding shall take place in the Supreme Court.

X Corrective and Disciplinary Measures

1. Any employee or official of the Judicial Branch against who, as a result of this procedure, is proven to have incurred in behavior that constitutes discrimination or sexual harassment in employment, or who has refused to cooperate or has obstructed an investigation of this kind, shall be subject to the disciplinary measures provided in the Regulation of the Personnel System Administration of the Judicial Branch, or in any other applicable regulation.

2. Any judge against who, as a result of this procedure, is proven to have incurred in behavior that constitutes discrimination or sexual harassment in employment or who has refused to cooperate or has obstructed an investigation of this kind, shall be subject to the disciplinary measures provided in the Rules Of Procedure for Disciplinary Actions and of Separation from Service due to Health Reasons of Judges of the Court of First Instance and the Circuit Court of Appeals or in any other application regulation.

APPENDIX B

REPORT

PROPOSAL OF AMENDMENTS TO THE CANONS OF JUDICIAL ETHICS AND THE CODE OF PROFESSIONAL ETHICS

PROPOSAL OF AMENDMENTS TO THE CANONS OF JUDICIAL ETHICS AND THE CODE OF PROFESSIONAL ETHICS

Introduction

Canon I of the Canons of Judicial Ethics establishes the general principle that should rule the conduct of the members of the Judiciary: "The faith of the people in justice, an essential value of democracy, should be preserved by the courts at the highest levels of public responsibility".[5] For this to occur, it is indispensable that those who have the responsibility of administering justice act and so demonstrate that they act free from prejudice and of discriminatory conceptions that violate the dignity of the human being. In fact, the judiciary, as all members of the legal profession, have the responsibility, individually and collectively, of "seeing that the different legal procedures of society embody and consecrate effectively and adequately the principles of democratic living and of respect for the inviolable dignity of the human being".[6]

Neither gender discrimination, nor any other kind of discrimination, has a place, then, in the lives of those who have such a high calling, even less in their professional performance. Notwithstanding, neither the Canons of Judicial Ethics nor the Code of Professional Ethics contain specific provisions on this matter. On the other hand, that both documents are drafted in the masculine generic, and exclude the feminine forms of language, contributes toward strengthening the masculine vision that prevails in society in general and, with it, accentuates discriminatory patterns based on gender.

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[5] CANONS OF JUDICIAL ETHICS OF PUERTO RICO (1977), 4 L.P.R.A. App. IV-A

[6] CODE OF PROFESSIONAL ETHICS, General Criteria (1970), 4 L.P.R.A. App. IX

The Special Judicial Commission to Investigate Gender Discrimination in the Courts of Puerto Rico believes that these deficiencies should be corrected. In view of the foregoing, it proposes the following amendments:

Amendments

1. A general revision of the Canons of Judicial Ethics and the Code of Professional Ethics is proposed, so as to use the feminine forms of language together with the masculine and, to the degree possible, use neutral language from the perspective of gender.

2. An amendment is proposed as an addition to Canon XI of the Canons of Judicial Ethics to provide the following:

> Judges should perform their judicial duties free from discrimination and prejudice. In the exercise of their judicial duties, they shall not incur in discrimination, through words or behavior, based on race, color, birth, origin, socio- economic condition, political or religious beliefs, physical condition, age, socioeconomic condition, gender or sexual orientation. They shall guard that their words and behavior are not interpreted in any way as manifestations of discrimination or prejudice for such motives, and shall not permit such manifestations by the personnel, officials of the court or other persons who act under their supervision and control.
>
> Judges must require that those individuals who are a part of the legal profession during judicial proceedings, abstain from manifesting, through words or behavior, any discrimination or prejudice based on race, color, birth, origin, socioeconomic condition, political or religious beliefs, physical condition, age, gender or sexual orientation, with respect to parties, witnesses, lawyers and other individuals. This section does not prohibit allusions to such conditions or factors and to others of a similar nature when they refer to a matter that is legitimately in controversy.
>
> Judges must not allow that members of the legal profession who act in their courtrooms, as also other officials of the court, harass or intimidate any individual on the basis of the foregoing conditions.[3]

[3] The Commission based its amendment, in part, on the MODEL CODE OF JUDICIAL CONDUCT of the American Bar Association, Canons 3B(5) and 3B(6) (1990)

3. An amendment is proposed as an addition to the general Criterion of Part I of the Code of Professional Ethics to the effect of providing the following:

> No member of the legal professional shall, in the practice of his professional activities, incur in discrimination on the basis of race, color, birth, origin, socio-economic condition, political or religious beliefs, physical condition, age, gender or sexual orientation with respect to clients, litigants, witnesses, members of the Judiciary and legal professional, jurors, and court personnel.
>
> No lawyer shall incur in behavior that threatens, harasses, intimidates or denigrates any individual on the basis of the foregoing conditions or factors.

APPENDIX C

REPORT

PARTICIPATORY INVESTIGATION SESSIONS FOR JUDGES OF THE JUDICIAL SYSTEM

Table of Contents

PARTICIPATORY INVESTIGATION SESSIONS FOR JUDGES IN THE JUDICIAL SYSTEM

REPORT

I. Introduction

The main purpose of the Participatory Investigation Sessions for Judges was to incorporate the judiciary directly into the investigative process. An investigation session of one day was planned in order to receive the maximum experiences and opinions of the judges on the subject of this study, and for which the following objectives were identified:

1. Share the meaning of gender discrimination in the courts of Puerto Rico.

2. Analyze specific situations to determine if they constitute gender discrimination in the courts.

3. Explore how situations of gender discrimination, from the position of judge, may be prevented in the courts.

Three activities were designed taking into account those objectives.

II. Procedure

Three Participatory Investigation Sessions were held, one for each level of the court, Municipal, District, Superior and the Special Unit of Appeals.

A. Selection of the Sample

Of the 284 judicial positions, a sample of 113 judges was chosen. An official list of judges by judicial region and courtroom was used, which was provided by the Office of Courts Administration, from which the following were eliminated:

- vacant positions
- judges with expired terms
- judges relieved from their duties
- judges who had already participated in the investigation, by making presentations during the hearings or by participating in the Focus Group Interviews.
- judges members of the Commission

Simple random sampling[8] was used for choosing the sample. The key number to select the number of the first judge was chosen by chance. The sample was of 50% of the judges. These were chosen from the list in an alternate manner starting with the key number until reaching the predetermined amount

To guarantee the participation in the Participatory Investigation Session of the judges chosen, the Chief Justice, the Hon. José A. Andréu García, issued individual administrative orders to each individual (see Attachment A).

Of the 113 individuals who comprised the sample, there was a total of 82 participants or 73%. Participants who were unable to attend were excused for valid reasons for their judicial functions, such as trials by jury and civil trials in process, municipal judges who had no one to replace them in their courtrooms, and district judges with multiple case appointments in their calendar on the day of the session.

[8] Simple random sampling is based on chance. It implies that all the elements have the same possibilities of being selected and, therefore, a statistically representative sample is obtained. DICCIONARIO DE CIENCIAS SOCIALES (Instituto de Estudios Políticos, Madrid, 1976).

Table 1, that follows, presents the distribution of the sample, by court and sex of the individual participants. By using the procedure of simple random sampling, it should be pointed out, the total men and women indicated here reflects the proportion that actually exists between men and women judges in the judicial system.

Table 1: Distribution of the sample by court and sex

Court	Women	Men	Total
Municipal	8	8	16
District	6	21	27
Superior and Appellate	10	29	39
TOTAL	24	58	82

B. Design of Activities

At the beginning of each session, as part of the introduction of the work of the day, Judge Jeannette Ramos Buonomo explained to the audience the origin of the Commission and the purposes and objectives of the investigation. Dr. Efrén Rivera Ramos, a member of the Commission, briefly explained the difference between the social investigation and the determination of facts of the judicial procedure.

Later, the participants introduced themselves and gave: (1) their name, (2) their length of time in the judiciary, (3) the judicial region to which they belong and (4) their opinion as to whether gender discriminatory practices exist or not in the courts of Puerto Rico (see Attachment B).

An activity was designed for each one of the three objectives. For these activities, all the judges were grouped by sex into small groups of between five and twelve persons. In Table 2, that follows, the number of subgroups by court is described:

Table 2: Number of subgroups

Court	Number of subgroups
Municipal	2
District	4
Superior and Appellate	5
TOTAL	11

There was a facilitator and a reporter for each small group[9]. Each group elected a spokesperson to take notes of the internal discussion to later share it with the rest of the judges.

III. Results

A. Activity I

Objective: Share the meaning of gender discrimination in the Courts of Puerto Rico

The judges reflected individually and put in writing what the terms "sex", "gender" and "gender discrimination" meant to them. The meanings were shared in the small groups and a spokesperson informed the rest of the participants (large group) of the diverse meanings.

In general terms, the meanings provided by the judges were the following:

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[9] The facilitators and reporters were trained to perform the following functions:

Facilitator - to explain in detail the purpose of each activity and to give the instructions, distribute the necessary material for each activity, direct the work of each group, control the time and make sure of everyone's participation

Reporters - to observe and listen attentively to the participants during the group discussions, take notes on the discussion and uon-verbal communication of the participants.

Sex

Biological element of identity. Biological identity or physical characteristics are emphasized. The biological condition, anatomical and physiological of the human being differentiates a man from a woman by natural order. This includes the innate capacity to reproduce.

Gender

Goes beyond the physical or biological quality, and includes ways of being and thinking as a man or woman, attributes that can be changed. They are concepts constructed or developed and, therefore, may cause confusion. They are the peculiar characteristics of personality, behavior, character and social conceptions of the man and the woman. Type or class; species of classification that is made of the natural or social reality. It includes the aspects of sexual preference or orientation.

Gender discrimination

Unequal or preferential treatment is an attitude whereby one person is benefited and another prejudiced because of gender or because of the differences in characteristics, traits or behavior patterns expected of each gender. There is no valid or recognized reason for the social community to establish that difference or unequal treatment.

Preferential treatment excludes or favors individuals, whether it is because of their sex, race, beliefs, ideas, origin, social condition, political orientation, or physical appearance. It includes distinctions between men and women, widows and minors and differentiation in treatment against sectors or groups because of their sexual preferences.

1. *Observations of reporters*

As previously indicated, for each small group reporter produced a report of the discussion. Various observations included in several of their reports are presented below; their commentaries are relevant to the investigation.

In a group of judges it was explained that most meanings defined gender as a classification of groups by their particular characteristics. It was also said that the term gender is synonymous with the term species. If something falls under gender it is because it possesses characteristics that distinguish it from another gender, but are common to the components of that same gender.

The group said they understood gender to be a broader concept than sex. Some judges, however, said that gender is based precisely on sex Others said the concept is much broader and includes any classification (old and young, rich and poor, etc.). No agreement between the two positions was reached in this debate.

Still, in another group of judges there were comments about homosexuality. This term was not included in the previous definitions; some judges narrated experiences in their courtrooms with homosexuals (men and women). Although one judge pointed out that he would not know whether to place homosexuality under sex or gender, a brief discussion led many , including the judge who made the commentary, to affirm that homosexuality is a subdivision of gender.

In a group of female judges, the point was raised that gender is also defined as type or class. One female judge understood that gender referred to social classes within the court, who do not receive equal treatment. That is, heterogeneity exists within the same gender.

Finally, in another group of female judges, the diverse meanings of "gender" were grouped under three types of conceptualization:

a. "Gender" broadens the concept of man and woman because it allows other options.

b It refers to species; classification.

c. It refers to forms of being, beyond the physical; to what is socially constructed; the cultural in the ways of being.

2. *Summary*

After sharing the meanings given of gender discrimination with the whole group of judges, Dr. Marya Muñoz Vázquez, a member of the Commission and facilitator in the sessions, summarized the meanings provided by the groups and, whenever necessary, clarified the Commission's policy regarding these terms. The highlights of the summary, by court, is presented.

Municipal Court

The meanings provided by the judges of the Municipal Court demonstrate understanding of difference between the terms sex and gender.

Sex refers to the biological aspects ("the way we are") and gender to those aspects that are socially constructed or culturally developed.

"Sex" also refers to identity, what one is sexually, whether a man or woman. By entailing biological aspects, basically it is not something we can easily change.

Regarding the term "gender" they indicated that it refers to the forms of being that are adjudicated to the person for being a man or a woman. These forms of being include sexual orientation, ways of thinking, of seeing the world and ideological matters. All this denotes aspects that can be changed and transformed over time. Female judges said that "man" and "woman" refer to the person, whereas "feminine" and "masculine" are changeable attributes.

Using the term gender can cause confusion, a female judge said, since the concept has a history dating from when Aristotle classified the world to study it. Gender refers to category. Another female judge emphasized that the term gender is euphemistic because it is not used to speak of things or situations not as they are.

Regarding the meaning of "gender discrimination" the male and female judges said the term entails unequal or unjustified treatment; the latter because it lacks a basis. It includes gender-

based behaviors and attitudes, that may come from a man or a woman. Gender discrimination blocks a person's intellectual, personal and emotional development to perpetuate privileges.

District Court

The meanings provided demonstrate that District Court judges also understand that there is a difference between the terms sex and gender. "Sex" refers to the biological reality or to the physical differences between men and women, while "gender" refers to the social (political, economic, etc. aspects) and transcends the physical.

"Gender" also refers to the characteristics of what it means to be a woman and be a man in our society, which are products of a social construction, subject to a specific period or time in history. This also includes sexual preference or orientation toward the same or opposite sex. The definition of gender can be confusing because the term has more than one meaning, among these, type or class, and species of classification that is made of the natural or social reality.

Regarding the meaning of "gender discrimination", judges pointed out that it involves preferential or unequal treatment, in excluding or favoring, that is detrimental or prejudicial to other individual or group on the basis of a particular characteristic, in this case gender, for unjustified reasons.

Superior Court and Appellate Unit

Superior Court and Appellate Unit judges also recognized a difference between the terms "sex" and "gender". Regarding the first, they said it refers to the physiological, anatomical and biological differences between male and female. This includes the innate capacity to reproduce and sexual identity for reasons of biology.

"Gender" refers to the socially constructed aspects of what it means to be a man or a woman in society: the feminine, the masculine, what is attributed to the man or the woman in terms of actions, attitudes, and sexual orientation. "Gender" also has a broad classification.

"Gender discrimination" means unequal or preferential treatment; the attitude by which one individual gains and another loses because of gender or differences in characteristics, traits or behavior patterns that are expected of each gender. There is no valid or acknowledged reason for the social community to establish that difference or unequal treatment.

On the other hand, it was questioned whether an isolated incident or manifestation of a prejudicial attitude constitutes an act of discrimination. A female judge said that by itself, the attitude entails or results in a pattern of conduct and, to that extent, the attitude and the discriminatory act are closely linked.

B. Activity II

Objective: *Analyze situations to determine if they constitute gender discrimination in the courts of Puerto Rico.*

The judges evaluated, individually, two situations to determine if they constituted gender discrimination in the Courts of Puerto Rico.[10] They then shared their thoughts in small groups and a spokesperson from each group informed the rest of the participants (large group) about the diversity of opinions.

1 Situation 1

A judge opens court, the case is called, and the lawyers representing the parties are present.

Judge: "It is a real privilege to hear the sweet voice of the distinguished colleague in my court". And addressing the male attorney adds, "don't you agree?".

Lawyer: "I am in total agreement, your Honor. The courtroom shines, thanks to the presence of the elegant colleague".

[10] The members of the Superior Court and the Appellate Unit only evaluated the first situation ("the flirtatious comment")

Following is a summary of the reasons given by female and male judges over whether the above situation presented a case of gender discrimination.

IT IS DISCRIMINATORY

FEMALE JUDGES

- The judge's comment undermines the professional capacity and dignity of women.
- The conduct is inappropriate because an image of objectivity and impartiality should prevail in the court.
- Although the intention is not discriminatory, the effect or result is.
- It constitutes unequal treatment on the basis of being a woman; the comment is sexist.
- As to "shines", it refers to us as the light in the darkness, but we only shine in the way we dress or in our elegance, not in our intellectual capacity.
- "Sweet" is associated with women and frailty.

MALE JUDGES

- It is discriminatory, depending on the intention.
- It is discriminatory because it places the man at a disadvantage.
- It is discriminatory against both; against the woman, because attention is not being called to her professional capacity but to her physical attributes, and against the man because he is being put aside because of his sex and is asked to participate in the discrimination.
- The discrimination will depend on the effect the comment has on the female lawyer, whether it affects her or she likes it.
- Preference is insinuated by the mere fact of being a woman. Prejudice against the other party.

FEMALE AND MALE JUDGES

- It establishes a situation of disadvantage for the man with respect to the outcome of the case, because it may give the impression beforehand that the judge favors women lawyers.

IT IS NOT DISCRIMINATORY

FEMALE JUDGES

- It is not inappropriate, it is a gentlemanly and elegant comment, even more so when the male lawyer agrees with the judge.

MALE JUDGES

- Flirtatious (*piropos*) comments are not discrimination, they are an expression of our culture. In a court, however, it is unethical on the part of the lawyer and the judge.
- It is flattery, courtesy, but improper conduct on the part of the judge for sociological and cultural reasons. If the decision were in the woman's favor, it would be discrimination.
- You should be careful with flirtatious comments. Times have changed. Before, a flirtatious comment was considered appropriate of good gentlemen; today, it is discriminatory and unethical.
- In order for discrimination to occur, there must be an element of intention.

- Isolated acts do not create patterns of discriminatory behavior. The attitude is what reflects or involves a pattern of discrimination.
- It is inappropriate, but it depends on the context. It may give the appearance of favoritism, but it is not discriminatory.

Summary

After sharing the reasons with the entire group of male and female judges, in each session Dr. Efrén Ramos, a member of the Commission and facilitator, summarized the reasons given by the participants, emphasizing some differences in the perspectives of men and women. Highlights of his summary are as follows.

Municipal Court

The reasons given by the male and female judges of the Municipal Court confirm how different the perceptions between men and women can be. Female judges said that, even though the situation may be an isolated incident, it has an unfavorable effect on many women. Aside from the impact that it may have on the outcome of the case, if the immediate effect on the woman is that she feels less appreciated, in terms of her intellectual capacity, and that she is treated as a mere woman-sex object and not as an attorney, that in itself is discriminatory.

According to the male judges, the situation constitutes discrimination if it affects the outcome of the case. If it does not, then it could illustrate an act of courtesy and deference, that is the result of a cultural expression. Notwithstanding, this kind of behavior was also considered inappropriate and unethical.

District Court

The reasons given by the male and female judges of the District Court also confirm how different the perceptions among men and women can be. For the female judges, contrary to that

expressed by the males, the intention behind the flattering remark is not the criterion that determines whether the situation is discriminatory; what is important for them is the effect that the comment has on the female lawyer. They pointed out that women tend to have their physical features singled out, which devalues other attributes such as their professional capacity as female lawyers.

Male judges understood the comment to be one of flattery, which is culturally acceptable in Puerto Rican society. Although some recognized it as inappropriate, they did not consider it discriminatory toward the woman because, in any case, complimenting her physical attributes favors her.

Superior Court and Appellate Unit

Contrary to the participating judges of the Municipal and District Courts, the male and female judges of the Superior Court and Apellate Unit coincided in regarding the situation as discriminatory. They pointed out that the situation should be evaluated within the context of changing values, which implies that the interpretation of what is acceptable or not, is not fixed, but variable.

Each group started with the premise that the effect is important; not the intention. What is important is how it affects the person. Also, two kinds of considerations were made: (1) that independently of whether the situation was discriminatory, it is inappropriate and if the behavior exists, it should be eliminated; and (2) that independently of the inappropriate behavior, an element of gender discrimination was present.

Among other things, the discussion also disclosed that male and female judges were greatly concerned with the image that must always prevail in a court. It was stated that this kind of situation is inappropriate in any context of the court: in the open courtroom, for the record, in the court, off the record, in the hallway, and in chambers. Finally, the possibility was raised of discriminatory

conduct against men and women at the same time, an analysis that involves an important theoretical consideration that has not been adequately contemplated by the Commission.

2 *Situation 2*[11]

A male and female lawyer are at the entrance of the Court talking.

MALE LAWYER: You know, I'm seriously concerned with the appointment of attorney XXX to a judgeship.

FEMALE LAWYER: What's your concern?

MALE LAWYER: I've heard he's a closet homosexual. That's why I think that psychological testing should also be performed along with his evaluation for the appointment to determine his sexual orientation as to whether he is homosexual or heterosexual.

FEMALE LAWYER: Why do you say that?

MALE LAWYER: Well, because in criminal cases, such as sodomy, the sexual preference of an individual such as that can influence in the determination of evidence. That's why I believe he should not be appointed judge.

All the participants, both male and female judges, believed that the situation revealed discrimination. The reasons given were the following:

- It constitutes unequal treatment in detriment to the person.
- It takes into consideration the sexual preference of an person to determine his suitability for hiring him.
- Sexual preferences do not disqualify a person from performing certain duties.
- This comment creates a hostile environment, which is an element of discrimination.
- The intent may not be to discriminate, but the result could be, by denying him the opportunity of being considered for the position.

Summary

Following are highlights of summaries by Dr. Efrén Rivera Ramos:

[11] The members of the Superior Court and Appellate Unit were not asked to evaluate this situation

Municipal Court

There was a consensus among male and female judges to regard the situation as discriminatory on the basis of gender. Two reasons explain the foregoing: (1) that the sexual preference of a person does not disqualify him or her from performing the duties of judge and (2) that the comment itself fosters an hostile environment, which constitutes a kind of harassment against that person.

District Court

Among the male and female judges of the District Court there was consensus to regard this kind of situation as discriminatory, although a group of judges said that it could also reflect prejudiced thought without being a discriminatory act. Notwithstanding, whether a discriminatory act or a prejudiced attitude, it is clearly because of gender, whether one thinks there are two basic genders or three. The majority understood that sexual orientation is not related to the capacity to judge.

From a legal point of view, on the other hand, it was questioned whether making the comment itself constitutes a discriminatory act. Some were inclined to believe so, since the mere act of commenting could be detrimental to the person. If the comment is repeated over and over, it becomes detrimental.

C. *Activity III*

Objective: *Explore how, from the position of the judgeship, situations of gender discrimination in the courts may be prevented.*

Judges had the opportunity to reflect, individually, on an experience or situation known to them in the courts that, in their opinion, was gender discriminatory. They later shared the situation or experience in small groups. Of those shared experiences, several were selected and possible alternatives for treatment were discussed. Later, a spokesperson for the group informed the rest of the participants.

The different situations, divided by subject, court and sex of the participant, are numbered below. Several of the situations are followed by alternatives for treatment provided by the judges.

1. Domestic Violence

Municipal Judges (Women)

1. In petitions for restraining orders, in general, whenever the petitioned party is summoned and he learns that the judge is a female, a discriminatory prejudice occurs to the effect that the petition will be granted because the judge is a woman and she favors the female petitioner.

2. Police agents discriminate against a woman who file domestic violence accusations. Instead of filing a criminal case, they refer it to civil court, for a protection order. These cases are negotiated.

3. In domestic violence cases where the battered person is man, he is ridiculed. The court does not treat the case with the same seriousness. The bailiffs laugh out loud. On one occasion, they trooped into the office of a female judge to tell her about a man who testified that he was threatened by a woman who insisted on having sex or she would cut off his penis.

4. One party (male) who was in court said that women always win in court. He said: :Judge, you decide."

Alternatives—Situations 1,2, 3 and 4

a. Encourage the police to participate in trainings and seminars on the management of domestic violence cases.

b. Speak with area commanding officers on how to train their police officers on this matter so that they file criminal cases. Advise them of their duties, independently of the result of the case. (If charges are later withdrawn).

c. Judges should be more alert, unlike robots in the courtroom, to signs of requests for help.

d. Educate the community more, through speeches and conferences, regarding their rights and Law 54.

e. Explain to the community the Judge's work, duties and impartiality.

f. The Judge should reflect on his or her objectivity and neutrality. Judges should periodically meet, for example, to share experiences.

g. Explore the problem of men and protection orders through seminars.

Municipal Court Judges (Men)

5. A female judge told a male judge that she had been the victim of domestic violence and that because of that terrible experience, she decided that a man would have to prove his innocence in every domestic violence case she saw. If an issue of custody was involved, she would grant it to the woman 99 per cent of the time and set very high bail for men.

Alternatives - Situation 5

a. Suggest that the judge inhibit herself in cases of domestic violence

b. Use a personal experience that illustrates how a judge could surmount a similar traumatic experiences without it affecting his or her judgment.

c. In a conversation with the judge, make her aware that we are all products of our experiences, and that these must not be conclusive.

d. Point out to the judge that one cannot punish others because of one's own negative experience. It would be similar to expecting others to pay for something they are responsible for.

e. A general orientation should be given judges on how to manage these types of situations.

f. Make the judge see that she is discriminating and that this is not the way to resolve controversies.

g. One judge said that he would make the judge believe that he had taken her comment as a joke, in that way she'd realize that it was not correct to say it. If someone says something like that, he takes it as a joke because he doesn't believe that it is possible for it to happen.

h. Another judge said that he would tell her that it is important to separate the personal from her role of doing justice.

6. A judge commented on the time a man consulted him regarding domestic violence (protection order). The man found his wife in bed with a mutual friend. The wife left the home with his children and asked for a protection order. The court ordered the man to vacate the home and adjudicated the custody of the children to the mother, although the children wanted to be with their father.

Alternatives—Situation 6

a. The man should consult a lawyer.

b. Several judges said that there was not enough information to offer more alternatives. The action to vacate, in itself, could not be considered discriminatory; they did not know the woman's version.

District Court Judges (Women)

7. A female judge said that in cases under Law 54 of domestic violence, often the victim is not interested in pursuing the case, but the judge insists on continuing it. The woman feels discriminated against. The Women's Affairs Commission goes to court only when the victim has an interest in the case; in this sense, it also discriminates since it doesn't go before the court to support the woman who is not interested in pursuing the case

8. Another female judge expressed a similar concern as to Law 54, particularly regarding the continuous "wish" of the victims to withdraw charges of assault and psychological abuse against their male aggressors out of fear or for economic reasons. This particular judge admitted that she does not file the case without hearing evidence; not to do so would turn the court into a farce.

Alternatives—Situations 7 and 8

a. Regarding Law 54 and the Women's Affairs Commission, women should b informed about the domestic cycle and the law. Women victims should be referred to special programs.

b. Law 54 should also be amended so that the alternative program is used before probable cause to arrest is decided.

District Court Judges (Men)

9. A man's request for protection order was denied because an order had been issued by another judge in favor of his wife. The petitioner alleged that he was denied the protection order because he was a man. The judge who heard his plea verified the facts with the first judge and, after considering the situation, issued the order.

Alternatives—Situation 9

a. A group of judges understood that to not issue the order would be discriminatory.

b. Law 54 was discussed and it was pointed out that its application is problematic. To make their position more believable, they invited Prof. Rivera Ramos to question female judges, secretaries and prosecutors regarding the law. Their opinion, they said, would confirm theirs. The pressure created by the Law is such that judges are urged to apply it for fear of "what others would say", even though a petition may be absurd (as they sometimes are). They used the example of a divorcee who wanted her husband out of the house and requested a protection order. Women use the Law to avoid the regular procedure, which distorts its purpose. However, social pressure hinders judges from making their decisions based on the Law. One judge described the Law as a "law of fear on the part of officials who deal with it." Another problem found with the Law was that of women who desist from pursing a case, even when the judge is interested in hearing it.

c. In the case of women, a protection order is issued with only her testimony, and later he is summoned for a warning. Why, it was asked, is the same thing not done when a man asks for a protection order?

d. Procedures should be mechanized or more rigid criteria established. Judges should receive orientation and uniform guidelines.

e. The right of the couple to obtain protection orders should be recognized.

f. A similar question arose regarding protection orders for same- sex couples who live together.

2. *Custody*

Municipal Court Judges (Women)

1. A female judge confronted her own prejudices when she had to resolve a case in which a lesbian and her partner requested the custody of the son of the former. The judge realized that the boy would be better off with the mother and her partner, among other reasons because the father was an alcoholic and did not take care of the boy. The judge decided in the mother's favor but not before having doubts over the lesbianism of the women.

2. A doctor requested a protection order against a woman with whom he had lived and had a child. The court, under Law 140 of Provisional States of Law, adjudicated the custody to the mother. However, she voluntarily ceded the custody of the boy to his father. Nonetheless, he continued to pay support for the boy. Urged to request permanent custody, he said: "How am I going to ask for custody, when the judges always believe that the mother should have custody. It would be a waste of time. The court always favors the mother."

3. It was pointed out that in custody cases, the Department of Social Services, as well as the courts, discriminates against the male in its investigations.

Sometimes the mother fails to deliver the children to the father on weekends. If the father goes to the police, they do not help him.

4. It was also said that in custody retention cases, the court has to communicate directly with the police sergeant because the woman is not helped if she goes to the police on her own. The police do not assume their corresponding role.

Alternative—Situations 1,2, 3 and 4

- Provide orientation to the effect that the determination of custody is based on the evidence that is presented, not on discrimination against the father as custodian.

Municipal Court Judges (Men)

5. A paternal grandmother had custody of her grandson (8-9 years old). The mother of the child claimed custody. The boy looked "effeminate." In a meeting with the judge in chambers, the mother's lawyer recommended that she withdraw her claim and let the grandmother retain custody, since the boy's evident mannerisms showed homosexual tendencies and that the mother should not bear the blame for the damage wrought by the grandmother.

District Court Judges (Women)

6. A female judge said that mothers feel that their motherhood allows them to possess all rights over their children. This is often the case in custody and filial relation disputes. They pretend that fathers are discriminated against for being men. The man goes to court with the belief that he will lose because he is a man.

Alternative—Situation 6

- The role of the judge, particularly in custody and filial relation cases, is to educate the parties that the welfare of the child is of primary importance.

Superior Court and Appellate Court Judges (Men)

7. A judge recalled a personal experience while presiding a case to determine custody of a boy in which it was revealed that the mother was a lesbian. A lawyer requested that the case be transferred to another court because the director of the Family Relations Division was a lesbian and would not render an impartial report.

3. Penal Law

Municipal Court Judges (Women)

1. A female judge said while she was acting as a District Judge at a preliminary hearing, she was assigned a sodomy case (six fishermen accused) where the victim was a seven-year-old boy.

Before starting the hearing, the defense requested that the judge inhibit herself since it planned to show the genitals of the accused so the minor could identify the accused by the markings and tattoos on their organs.

The defense also alleged that one of the accused was clinically impotent, which had to be proven through physical and clinical evidence, and that having a female judge visually inspect their bodies would intimidate them.

Alternatives - Situation 1

a. Request photographic evidence.

b. Bring in medical experts to testify to the physical condition of impotence.

c. Not to inhibit herself just for being female.

Municipal Court Judges (Men)

2. A judge recalled how, as a lawyer, several men were accused of violating the weapons law. When the judge in the case set bail, he ordered that the woman, who had been accused with the same crime along with the others, to pay 10 per cent of the bail in cash. The judges justified his decision by saying that since the accused was a woman and a mother, he could allow bail at 10 per cent of the amount.

Alternative—Situation 2

- The group was unanimous in saying that it is the circumstance that should be considered in setting bail, not whether the accused is a woman or a man. That the woman was a mother, for example, is a circumstance that could influence the reduction of bail.

District Court Judges (Women)

3. A judge brought up the case of a woman of about 65 who slashed the face of another woman nearly half her age. During presentation of evidence, it was revealed that the victim had an intimate relationship with the husband of the accused. That relationship had ended because the husband could not decide with which woman he wanted to stay. The accused retained a prominent lawyer. He alleged that the mutilation was nonexistent because it could be remedied by plastic surgery. He requested additional time to bring in an expert witness to testify to that allegation. Time was granted but the lawyer did not bring the witness. Cause for mutilation was found. The female judge who recounted the episode told the lawyer that a legal study had shown that mutilation was culpable even if plastic surgery could erase the wound. The lawyer responded: "Judge, all I need to prove my point is twelve married women on the jury."

4. *Interaction and Courts Administration*

1. A female judge recalled an experience while she was pregnant. A fellow judge told her that "women who can still have children should not be appointed as judges." The judge was referring to women in their reproductive years. According to the female judge, male judges believe that special favors are granted pregnant women. Their shifts and cases are changed and males are assigned to them. Male judges, however, don't understand that such treatment is justified.

Alternative—Situation 1

- The policy of the Courts Administration should be to not assign shifts to female judges in their seventh month of pregnancy.

2. One female judge observed that female lawyers often have to go over their male colleagues' heads for their shifts and many are unsuccessful. The game is between male and female lawyers, especially between prominent males and inexperienced females. The women lower their guard and let themselves become intimidated.

Alternative—Situation 2

- Female lawyers should not allow male lawyers to underestimate them; they should avoid discrimination.

District Court Judges (Men)

3. One female judge reportedly does not allow women bailiffs to be assigned to her courtroom, allegedly because she does not feel safe.

Alternatives—Situation 3

a. The judges understood that the situation is discriminatory because gender does not impede performance of a bailiff's duties.

b. Explain to the judge the qualifications the system requires of bailiffs.

c. Ask the presiding judge to intervene. d. Use the mechanism of judge of trust e. Speak to the chief bailiff.

Superior and Appeals Court Judges (Women)

4. Denigrating remarks were reported when a judicial decision is issued by a female judge and it affects a male.

A participant recalled how she once had to make a controversial decision and someone from the forum, a male lawyer, remarked: "She is qualified, but what bothers us is that a woman leaves a man without a job."

5. It was also reported that if a male judge dances a lot at a party where judges are present, it is remarked "How much he's enjoying himself." But if a woman judge dances a lot it is said that "She is crazy."

6 A female participant said that at a Christmas party, , she always had a glass in her hand, like her male colleagues. (She was drinking Perrier water and they were drinking hard liquor). Comments heard after the party was that "she didn't put the glass down. that she was smashed."

7. It was pointed out that remarks have been made from the forum on the partiality of a female judge of a family division in favor of the woman and against the man as, for example, "Don't worry, this judge does not forgive men."

8. A situation was recalled in which a male judge asked a female judge for a ride in front of other judges and invited her to his office after 5 p m. to decide the route they would take.

9. It was pointed out that what is expected of a female judge's private and social life vis-a-vis a male judge is very different.

10. Some male judges visit the offices of female judges to make flirtatious remarks.

11. Some male judges don't acknowledge or resent the intellectual capacity of a woman judge and when discussing law they ignore her.

12. In meetings of judges, a female judge can make a contribution but is ignored; not until a male judge has repeated what she had said is credit given to the idea, but as originating with the male judge.

13. A female judge noted that the administration is more indulgent with the male judge who goes out with a married woman than with the female judge who goes out with a married man. The female judge is asked to resign.

14. A female judge remarked that some judges are known as "charmers." When the State wants to obtain a conviction in a criminal case, the district attorney's office usually assigns a pretty prosecutor to manipulate the judge. The judge is more permissive in favor of the People in the presentation and admission of evidence, for example, because of the woman prosecutor. These women prosecutors sometimes wear low-cut necklines and very short skirts.

15. It was mentioned that male judges are assigned the personnel of their preference and female judges get whoever remains, the worst courtroom personnel. Further, personnel is transferred without consulting the female judge.

16. A female judge spoke about child support cases when contempt hearings were held. In one courtroom, when the man is summoned, the male judge prevents him from explaining why his payments are in arrears. The support provider feels humiliated and at a disadvantage.

Alternatives—Situation 16

a. The rights of the support provider to explain his reasons for not meeting child support payments should be recognized.

b. Awareness among judges must be created; that the different components of the system must be made aware that people perceive that the court favors the woman.

17. Another female judge discussed the stereotyped roles of the positions within the system. Women hold positions that are not as highly paid. Positions that involve authority, the position of bailiff, for example, are almost always filled by men. The criterion of physical strength is utilized. Masculine and feminine attributes are set apart.

Alternatives—Situation 17

In the case of job disparity, it was asked, why does this constitute discrimination? It was pointed out that, historically, job opportunities for men and women have not been the same. Some improvement, however, was recognized. The following alternatives were offered:

a. A study undertaken by specialists in personnel; the different job classifications should be revised.

b. Judges should set an example in hiring personnel of trust (for example, they should be open to hiring male secretaries, etc.).

18. There are male bailiffs at the monitors who, when female judges walk by, sing songs with double meanings.

19. A female judge can implement guidelines and the personnel will resent them and not accept them. A male judge, however, can give the same guidelines and the personnel will pay attention.

Alternatives—Situations 18 and 19

a. Receptive presiding judges, open to listening to, and not avoiding, this type of situation.

b. Design awareness activities on the problem.

c. Making the administration sensitive and receptive to identifying suitable personnel.

d. Fostering self-criticism by the institution, the system, and paying adequate attention to the situations that are created.

e. Following up on the educational role, becoming aware.

f. Once a receptive presiding judge is identified, taking adequate disciplinary measures.

g. Receiving the support of the Office of Courts Administration.

h. If a regional presiding judge is involved in this type of problem, taking the problem directly to the Courts Administrator.

i. Holding meetings to confront and discuss.

j. Creating sub-commissions in the different courts to receive, report and resolve complaints (similar to an Ombudsman).

k. Holding periodic meetings with support personnel. Superior Court and Appeals Units (Men) 20. It was pointed out that, occasionally, a qualified woman is not appointed to a position in the courts because she is pregnant.

20. It was pointed out that sometimes a woman fitted for a possition in court would not be appointed to it because she was pregnant

21. A judge mentioned the case of a female judge who did not allow women wearing pants to appear before her.

22. A judge explained that some cases do not constitute discrimination, rather they involve cultural issues. He affirmed that " we are men of our times." As an example he said that he would prefer a male, rather than a woman, as bailiff in his criminal courtroom.

Another judge added that "a woman with a 38 on her waist makes us feel uncomfortable." Another judge retorted " And what if she claims her right to be there?" The first judge replied, "Of course, she has a right, but many of those elements identified as discriminatory are more absolute outside of San Juan."

23 A judge brought up the inclination to select women as judges for family divisions and juvenile courtrooms.

24. Another judge said that he had not had any particular experience of bias, but noted in turn, that he had not seen any male secretaries, not even men applying for those jobs.

25. The lack of holding cells for delinquent female minors was also brought up.

26. A judge stated that a relation of discrimination exists among court employees. They make statements and assume prejudiced attitudes. These attitudes are evident in the relationship of bailiffs and the court secretaries. He explained that the bailiffs refer to the secretaries as "good-looking broads" and that when elegant women on occasion enter the courtroom, " the bailiffs go berserk."

27. This same judge explained the need for women bailiffs to search women and in eviction cases to "attend to the evicted woman."

On this occasion a judge explained that there is no discrimination when a man is needed for a particular situation., such as an uproar in the courtroom. He asked: "How can a woman get the convict to obey?" He said that the physical strength of a man, compared to that of a woman, justifies the preference for males for those positions.

28. The need for cells for women was also raised. Also mentioned was the discrimination a father may suffer in custody cases. An example was presented of a situation where the woman could be more dangerous than the man but the court grants custody to the mother because allegedly the mother loves the children more. It was explained how, in this way, the reproductive role of the mother is favored.

29. It was pointed out that lawyers with beards are not allowed in the courts.

Someone explained that some pretty women expect favors and are not efficient at their jobs because they are flattered Another judge observed that the lower the man is in rank, the more free he feels to flirt with women. It was said that those situations cannot be supervised.

In view of the entire discussion, a judge explained that the root of the problem is in the "monolithic" institution that starts in San Juan and that was established 40 years ago and that the situation has not changed excepting the fact that the Chief Justice named a woman as Courts Administrator. He said many of these things are cultural and are deeply rooted in our tradition. He also said that" this is more of a cultural situation" than discrimination against women.

30. One judge stated that he had been appointed at the same time as a group of women. He said that the male judges were assigned courtrooms out on the island, outside of the metropolitan area, while the female judges were assigned courtrooms in the metropolitan area, near their homes. When the judge questioned this practice, he was told that the women were not going to travel and the men could do so.

Alternatives—Situation 30

a. A raffle under equal conditions should be carried out A person's gender should not be taken into account to determine courtroom assignments or appointments.

b. Clear criteria should be established based on the necessities of the system and the ability and experience of the judges to be appointed.

31. One judge heard of a judge who only named male law clerks. That was how he expressed it in private, but not officially.

Alternatives—Situation 31

a. The selection of law clerks is at the discretion of the judge. Perhaps the best way to resolve this kind of situation is through orientation and education of judges.

b. A colleague should approach the judge to indicate that a discriminatory action is involved and that he must correct it.

32. An acceptable practice at the central level is that men, not women, are assigned to investigation units.

Alternative—Situation 32

Since this situation is similar to number 30, above, the same alternatives are proposed.

33. One judge admitted that he once selected a woman bailiff over other male candidates who were better qualified. The judge based his action on the need for a woman bailiff to guard and search women. A problem could arise with male bailiffs.

Alternatives—Situation 33

a. Some judges believed that selecting women bailiffs over better qualified male candidates does not constitute an act of discrimination. They based their position on the fact that a valid and reasonable motive existed to choose the women even though the male candidates were better qualified. A woman was need to guard women.

b. A solution to the problem proposed encouraging a larger number of women to apply for the position of bailiff, a position traditionally filled by men.

34. Some judges said they could not recall, or simply did not know of, any clear discrimination in the courts of Puerto Rico.

IV. Evaluation

Once the activities of each session were concluded, an evaluation sheet (see Attachment C) was distributed to the participating judges Their results, grouped by court and by the sex of the participants, are presented below.

QUESTION 1: To what extent did the developed activities achieve the proposed objectives?

Municipal Court

	To no extent 1	2	3	4	5	6	To a great extent 7	Total	Avg.
women					1	6		7	6.86
men			1		3	4		8	6.13
Subtotal			1		4	10		15	6.47

District Court

	To no extent 1	2	3	4	5	6	To a great extent 7	Total	Avg.
women					1	2	2	5	6.2
men	1	1	3	2	2	2	6	17	4.94
Subtotal	1	1	3	4	3	4	8	22	5.23

Superior Court and Appellate Unit

	To no extent 1	2	3	4	5	6	To a great extent 7	Total	Avg.
women				1	1	4	4	10	6.1
men			1	5	5	11	4	26	5.46
Subtotal			1	6	6	15	8	36	5.64

QUESTION 2 Please comment on what you most enjoyed about participating in this investigation session.

	MUNICIPAL		DISTRICT		SUPERIOR & APPELLATE		TOTAL	
PREMISE	F	M	F	M	F	M	F	M
1. Most productive meetings of small groups	3	2	2	—	5	3	10	5
2. Exchange of ideas with colleagues	2	—	3	—	5	1	10	1
3. The active and spontaneous participation, and the group discussion	—	1	6	1	3	1	9	2
4. Being able to discover the problem of discrimination in the judiciary that I was unaware existed	—	1	—	—	1	3	1	4
5. The opportunity to speak openly about the subject	—	—	1	—	4	—	5	—
6. The last part of the session (exchange of experiences)	—	3	—	—		1 —	—	4
7. The way in which the study was done	—	—	1	1	1	—	2	1
8. The initial position of colleagues that there wasn't any discrimination and how it changed at the end of the session	—	—	—	—	—	2	—	2
9. The good organization and adequate resources	—	—	—	—	1	1	1	1
10. To observe the differences in analysis and the classification of gender discrimination	—	—	—	1	1	—	1	1
11. The diversity of situations presented and the spon-	—	—	—	1	—	1	—	2

	MUNICIPAL		DISTRICT		SUPERIOR & APPELLATE		TOTAL	
PREMISE	F	M	F	M	F	M	F	M
taneity and ease with which the subject matter was discussed								
12. Awareness of the group of what constitutes discrimination, of its presence in the multiple facets of our work	—	—	—	—	—	2	—	2
13. The issues discussed and their solutions	1	—	1	—	—	— 2	—	
14. They enjoyed the activity	—	—	2	—	—	— 2	—	
15. The first activity of defining sex, gender and gender discrimination	—	—	—	1	—	1	—	2
16. The attitude of the advisors	—	—	—	—	1	—	1	—
17. The formal and cordial relationship that formed between the participants	—	—	—	—	1	—	1	—
18. Clarifying concepts and doubts regarding the subject. Receiving clear explanations.	—	1	—	—	—	—	—	1
19. Individual participation	1	—	—	—	—	—	1	—
20. Learn the situation that exists in Puerto Rico.	—	—	1	—	—	—	1	—

QUESTION 3: Please comment on what you least enjoyed from participating in this investigative session.

	MUNICIPAL		DISTRICT		SUPERIOR & APPELLATE		TOTAL	
PREMISE	F	M	F	M	F	M	F	M
1. I enjoyed everything	4	3	5	3	6	2	15	8
2. Too intense for one day	4	1	—	—	—	—	4	1
3. Too personal expressions by some colleagues	—	—	—	—	3	1	3	1
4. Time was too short	—	—	—	1	3	—	3	1
5. It was predirected and determined before it was started	—	—	2	—	—	—	2	—
6. The attitude of the male judges and their reaction on learning of the existence of gender discrimination	—	—	—	—	—	2	—	2
7. Everything	—	—	—	—	1	—	1	—
8. Particular cases	—	—	—	—	1	—	1	—
9. To continue with thetask of eradicating gender discrimination	—	—	—	—	1	—	1	—
10. Expose personal problems with presiding judges that have nothing to do with discrimination	—	—	—	—	1	—	1	—
11. Participants who were always on the defensive	—	—	—	—	1	—	1	—
12. Persons who expressed examples of discrimination that were only in their minds	—	—	—	—	1	—	1	—
13. New situations could have been used that could be discriminatory	—	—	—	—	1	—	1	—

	MUNICIPAL		DISTRICT		SUPERIOR & APPELLATE		TOTAL	
PREMISE	F	M	F	M	F	M	F	M
14. More information is needed for work that is pending	—	—	—	—	1	—	1	—
15. Participants' interruptions during presentations by others	—	—	—	—	1	—	1	—
16. Some complexes manifested	—	—	—	—	1	—	1	—
17. Too little receptivityon the part of several colleagues regarding the subject's discussion	—	—	—	—	—	1	—	1
18. Too little seriousnesson the part of some participants when dealing with the subject	—	—	—	—	—	1	—	1
19. More opportunities should have been given judges to present situations where they have felt discrimination	—	1	—	—	—	—	—	1
20. Feminist stance of several female judges	—	—	1	—	—	—	1	—
21. That they ended the same way, women are not objective	—	—	1	—	—	—	1	—
22 The subject matter should	—	—	1	—	—	—	1	—
23. The subject is difficult to identify and define	—	—	1	—	—	—	1	—
24. The distance of the place for some regions	—	—	1	—	—	—	1	—
25. Level of interaction on 1 the part of some female participants	—	—	—	—	—	1	—	

QUESTION 4. How important do you consider it would be for the judicial system to work on the subject of gender discrimination?

Municipal Court

	To no extent 1	2	3	4	5	To a great extent 6	7	Total	Avg.
women		1					7	7	7
men		1			1		6	8	6.13
Subtotal		1			1		13	15	6.53

District Court

	To no extent 1	2	3	4	5	To a great extent 6	7	Total	Avg.
women					1		4	5	6.6
men	2	1	4	6	1	2	3	19	4.11
Subtotal	2	1	4	6	2	2	7	24	4.63

Superior Court and Appellate Unit

	To no extent 1	2	3	4	5	To a great extent 6	7	Total	Avg.
women						2	8	10	6.8
men		1	2	3	5	2	13	26	5.65
Subtotal		1	2	3	5	4	21	36	6

CONT. QUESTION 4: Comments regarding the answer to the question "How important do you consider it would be for the judicial system to work on the subject of gender discrimination?"

	MUNICIPAL		DISTRICT		SUPERIOR & APPELLATE		TOTAL	
PREMISE	F	M	F	M	F	M	F	M
1. It is indisputably necessary, because of the nature itself of the judicial function as mirror and caretaker of hope, to keep at a minimum any discrimination and to safeguard all persons rights.	3	2	2	—	—	3	5	5
2. I don't believe it is the chief priority of the system, but it merits in—depth study.	—	—	2	—	3	—	5	—
3. It's a problem that should be addressed.	—	—	—	—	3	3	3	3
4. To create awareness on the existing problem.	—	1	1	—	1	—	2	1
5. To conclude the study, receive recommendations, and try to find solutions to the situations of discrimination.	—	—	1	1	1	—	2	1
6. Identify the nests of discrimination and to eradicate them.	1	—	1	—	—	—	2	—
7. The need to provide orientations and to educate the support personnel is imperative	—	—	—	—	—	1	—	1
8. Because of the repercussions of the decisions that will affect the whole system and people	—	—	—	—	1	—	1	—
9. In our ever changing society, of constant evaluation,	—	—	—	—	1	—	1	—

	MUNICIPAL		DISTRICT		SUPERIOR & APPELLATE		TOTAL	
PREMISE	F	M	F	M	F	M	F	M
self— examination and awareness are necessary								
10. It is imperative that the courts be the standard—bearer in the struggle against gender discrimination	—	—	—	—	1	—	1	—
11. It is not a serious problem	—	—	—	—	1	—	1	—
12. Injustices are committed and it is our responsibility to correct them.	—	—	—	—	1	—	1	—
13. It will depend on the results of this study	—	—	—	—	1	—	1	—
14. If the scientific findings on extent of the problem were known it could change my answer	—	—	—	—	1	—	1	—
15. Many situations can be identified where discrimination can occur	—	—	—	—	1	—	1	—
16. Recommend a permanent commission for filing complaints	—	—	—	—	—	1	1	—
17. Only in that way can significant changes be achieved	—	—	—	—	—	1	—	1
18. To avoid greater errors	—	1	—	—	—	—	—	1
19. The adjudication of cases would be fairer and more objective	1	—	—	—	—	—	1	—
20. Revision of laws (Law 54, Family Relations)	—	—	—	1	—	—	— —	
21. Gender discrimination exists. Equality of the genders	—	—	—	1	—	—	—	—

	MUNICIPAL		DISTRICT		SUPERIOR & APPELLATE		TOTAL	
PREMISE	F	M	F	M	F	M	F	M
should be promoted and this study may shed light on this issue								
22. No, thank you.	—	—	1	—	—	—	1	—
23. The way things are going, man is an extinct being	—	—	1	—	—	—	1	—
24. I don't think discrimination was defined clearly	—	—	1	—	—	—	1	—
25. Because it's discrimination, it doesn't manifest itself openly.	—	—	1	—	—	—	1	—

QUESTION 5: How interested would you be in participating in other educational activities on this subject?

Municipal Court

	To no extent 1	2	3	4	5	6	To a great extent 7	Total	Avg.
women					1		6	7	6.71
men		1				1	6	8	6.25
Subtotal		1			1	1	12	15	6.47

District Court

	To no extent 1	2	3	4	5	6	To a great extent 7	Total	Avg.
women					1	1	3	5	6.4
men	5	2	4		1		6	18	3.78
Subtotal	5	2	4		2	1	9	23	4.35

Superior Court and Appellate Unit

	To no extent 1	2	3	4	5	6	To a great extent 7	Total	Avg.
women					1	2	7	10	6.6
men			3	2	5	4	12	26	5.77
Subtotal			3	2	6	6	19	36	6

Suggestions and Comments

	MUNICIPAL		DISTRICT		SUPERIOR & APPELLATE		TOTAL	
PREMISE	F	M	F	M	F	M	F	M
1. Offer similar seminars	2	—	—	—	2	1	4	1
2. Repeat the activity with more judges and include support personnel from the court	—	2	—	—	1	—	1	2
3. Perform a greater number of activities of this kind (confront problems, situations, and recommendations)	—	1	—	—	—	1	—	2
4. Take into account the hours of the personnel from the island	—	—	1	—	1	—	2	—
5. The investigation session was excellent. The selection of the place and the attention was appropriate	—	—	—	—	1	1	1	1
6. In a future meeting after receiving more reliable information on the magnitude of the problem, and work intensely to seek corrective solutions	—	1	—	—	1	—	1	1
7 Similar meetings with judges to address other problems in the judicial branch. ie administiative	—	—	1	—	—	1	1	1
8. The final result of this work should reach other sectors of our community with authority in the development and formation of our people, so that we can change those cultural patterns that promote discrimination								
9. Include in seminars the discussion of legal rules on discrimination	—	—	—	—	1	—	1	—
10. It is possible that many im-	—	—	—	—	1	—	1	—

	MUNICIPAL		DISTRICT		SUPERIOR & APPELLATE		TOTAL	
PREMISE	F	M	F	M	F	M	F	M
pressions of possiblediscrimination are due to the lack of a clear prior directive								
11. It should be repeated	—	—	—	—	1	—	1	—
12. The Commission should be permanent and investigatespecific cases	—	—	—	—	—	1	—	1
13 Persons in charge of the activity appeared to bevery capable and motivatedto contribute to the definition of the problem and provide serious alternatives to eradicate gender discrimination	—	—	—	1	—	—	—	1
14. After this investigative stage, followup should begiven so that the SupremeCourt expresses itself on thismatter so that this investigation is not stillborn	—	—	—	1	—	—	—	1
15. Amend Law 54 (Alternative Program may be developedat the level of determiningcause to arrest)	—	—	—	1	—	—	—	1
16. Excellent Seminar	—	—	1	—	—	—	1	—
17. It's important that an erroneous image of the situation is not given	—	—	1	—	—	—	1	—
18. Very good speakers	—	—	1	—	—	—	1	—
19. Good luck to the Commission on its mission	—	—	1	—	—	—	1	—
20. Notify activities with enough time to make arrangements	—	—	1	—	—	—	1	—

ATTACHMENT A

MODEL OF ADMINISTRATIVE ORDER SENT
TO MEMBERS OF THE DISTRICT COURT

OFFICE OF THE CHIEF JUSTICE
SUPREME COURT OF PUERTO RICO

ADMINISTRATIVE ORDER

Special assignment for effects of attendance to activity of the Special Judicial Commission to Investigate Gender Discrimination in the Courts of Puerto Rico
Hon. _____
_____

ORDER

In San Juan, Puerto Rico, on August 17, 1994.

The Special Judicial Commission to Investigate Gender Discrimination in the Courts of Puerto Rico shall soon hold several participatory investigation sessions, aimed at receiving the viewpoints and perpectives of the judiciary on gender discrimination as a source of information that is fundamental for the study that is being carried out and as a means for promoting individual and collective reflexion on the subject prior to celebrating the Judicial Conference which we shall dedicate to this Report. Three sessions shall be held on different dates, one for each judicial category. Those persons participating have been chosen through a

random procedure from a list of judges who have not had the opportunity to contribute to the study in any other way.

You have been selected within your judicial category and your participation is indispensable for the Commission to conclude its work. In view of the above, a special assignment is made for you to attend the activity on the corresponding date. For those judges selected from the District Court, the date shall be on Thursday, September 15, 1994, from 8:30 a.m. to 4:00 p.m. in the Restaurant El Cielito, Road 715, Km. 3 8, Bo. Cercadillo, in Cayey. See enclosed map.

Should there be a problem that keeps you from attending this activity, you are advised to inform the Office of the Judicial Conference beforehand at 753-0133.

Decreed and signature.

José A. Andréu García
Chief Justice

CERTIFIED:

Mercedes M Bauermeister
Courts Administrator

ATTACHMENT B

Consultation

Before starting the activities of each session, and as part of the presentation of the participating judges, they were asked their opinion regarding the existence of gender discrimination in the courts They had the following alternatives for their response:

- it exists
- it doesn't exist
- I don't know
- I don't want to answer

Upon concluding the activities, the same question was asked, with the same alternatives. The distribution of the answers, by court, is presented in the following tables. The comparison of the initial results, obtained in the morning (AM), with those of the afternoon (PM) permit an analysis of the degree of change in the opinions expressed by the judges, that could well represent a change in perception on gender discrimination, as a result of their participation in the session.

Findings by Court

Table 1. Municipal Court

	Men		Women			
Session A.M.	Total	%	Total	%	Total	%
Yes, it exists	6	75.0	6	75.0	12	75.0
It does not exist	1	12.5	0		1	6.25
I don't know	0	1	12.5		1	6.25
I don't want to answer	1	12.5	1	12.5	2	12.5
TOTAL	8	100.0	8	100.0	16	100.0
Session P.M.						
It exists	8	100.0	8	100.0	16	100.0
It does not exist	0	0	0			
I don't know	0	0	0			
I don't want to answer	0	0	0			
TOTAL	8	100.0	8	100.0	16	100.0

Seventy-five percent of the members of the Municipal Court who participated in the session believed, at the start of the session, that gender discrimination exists in the courts. There was no difference perceived on the basis of sex. At the end of the session, the response was unanimous, all of the judges of the Municipal Court believed that gender discrimination exists in the courts.

Table 2. District Court

	MEN		WOMEN			
Session A.M.	Total	%	Total	%	Total	%
It exists	14	66.67	4	66.66	18	16 67
It doesn't exist	6	28.57	1	16.67	7	25.93
I don't know	0		1	16.67	1	3.7
I don't want to answer	1	4.76	0		1	3.7
TOTAL	21	100.0	6	100.0	27	100.0
Session P.M.						
It exists	15	75.0	6	100.0	21	80.77
It doesn't exist	4	20.0	0		4	15.38
I don't know	1	5.0	0		1	3.85
I don't want to answer	0			0		0
TOTAL	20	100.0	6	100.0	26	100.0

At the start of the session, 66.7% of the district court judges who participated in the session believed that gender discrimination exists in the courts. The difference in sex was insignificant. At the end of the session, all judges affirmed that discrimination exists. Among the men, the change was from 66.7% to 75%.

Table 3: Superior Court and Appellate Unit

	MEN		WOMEN			
Session A.M.	Total	%	Total	%	Total	%
It exists	12	44.0	7	70.0	19	51.35
It doesn't exist	4	15.0	0	16.67	4	10.81
I don't know	11	41.0	3	30.0	14	37.84
I don't want to answer	0		0		0	
TOTAL	27	100.0	10	100.0	37	100.0
Session P.M.						
It exists	22	91.67	10	100.0	32	94.12
It doesn't exist	2	8.33	0	2	5.88	15.38
I don't know	0		0		0	
I don't want to answer	0		0		0	
TOTAL	24	100.0	10	100.0	34	100.0

Of the judges of the Superior Court and the Appellate Unit who participated in the session, a significantly higher percentage of women (70%) than men (44%) believed at the start of the session that gender discrimination exists in the courts. In the second consultation, 100% of women and 91.67% of men affirmed that such discrimination exists. The increase or change expressed by the men was ample, because out of the 24 judges, only 2 denied the existence of discrimination.

General Conclusions

If the answers are compared, by court, it may be observed that in the first consultation (AM) there is a certain relation between the men's answers and the level of the court to which they

belong: the higher the level of the court, fewer the men who affirm from the start that discrimination exists (75% municipal; 66.67% district; 44% superior and appellate). Among the women, such a relation does not appear to occur. At the three levels, almost 2/3 of the women believed from the start that discrimination exists (75% municipal; 66.67 district; 70% superior and appellate unit).

Notwithstanding, if the results of men and women are seen together, a relation can be observed between the level of the court and the perception of discrimination. That is, the higher the level of the court, the lower the percentage of total persons who found discrimination at the start of the session.

If the percentages of the first (AM) and second consultation (PM) are compared, it is observed that the percentage of persons who believed there was gender discrimination in the courts at the end of the session increases significantly. Thus, it could be interpreted that: (1) those who answered the question affirmatively from the start, reaffirmed their position and (2) many of those who did not answer affirmatively at the start, did so at the end of the session's activities.

If the above is analyzed, by court, it is observed that the change or increase was greater among the judges of the Superior Court and the Appellate Unit (from 51.35% to 94.12%).

If the answers are analyzed by sex, it is observed that at the end of the session all the women, at every level of the court, affirmed that gender discrimination exists in the courts. Among the men, this occurred among the judges of the Municipal Court, all of whom answered in the affirmative at the end of the session. Nonetheless, the change is most noticeable among judges of the Superior Court and Appellate Unit, who demonstrated an increase in affirmative answers from 44% to 91.67%.

The court whose judges reflected less change is that of the district. The results of this consultation, as well as the evaluation of the activity, showed that the opinions of the members of this court were the most varied regarding the existence of gender discrimination in the courts.

ATTACHMENT C

Special Judicial Commission
to Investigate Gender Discrimination
in the Courts of Puerto Rico

Participatory Investigation Session
for Judges of the Superior and Appellate Courts

E V A L U A T I O N S H E E T

SEX:

____woman

____man

1. To what extent did the developed activities achieve the proposed objectives?

1———2———3———4———5———6———7

To no extent — To a great extent

2. Please inform what you enjoyed most about participating in this investigative session:

3. Please inform what you least enjoyed from participating in this investigative session.

4. How important do you consider it would be for the judicial system to work on the subject of gender discrimination? (Please mark on the scale provided)

1———2———3———4———5———6———7

Not Important — Very Important

Comment:

_____

_____

5. How interested would you be in participating in other educational activities on this subject?

1———2———3———4———5———6———7

Not Interested — Very Interested

SUGGESTIONS AND COMMENTS:

APPENDIX D

REPORT

COURT WATCHING

By Efrén Rivera Ramos

I. Introduction

As part of its investigation the Commission decided to conduct an exercise of direct observation in the courtroom (Court Watching) to detect possible instances of sexist actions or discrimination based on gender. The exercise was carried out by a group of seventeen law students in the course Sociology of Law of Professor Efrén Rivera Ramos, of the University of Puerto Rico Law School, during the second semester of academic year 1993-94. Participating students were: Carmen E. Arraíza González, José Carreras, Angel M. Cuevas Tristán, Norah Fernández Vallejo, Edwin Montañez Melecio, Vivian L. Neptune Rivera, Ivonne Olmo, José Olmo Rodríguez, María del Mar Ortiz Rivera, Gabriel Peñagarícano, Alfonso Ramos Torres, Karen Rivera, Francisco Sabat Carmona, Sigfredo Steidel Figueroa, Miriam Toledo David, María Eugenia Torres Gregory and Teresita Zamora.[12]

II. Explanation of Method

Court watching is a technique of investigation that consists in observing the procedures that occur in some courtrooms, previously selected, by a team of persons duly trained to identify and interpret the practices to be studied.[13]

The techniques allow for the appraisal of individual conduct as it develops in real situations. Usually the participants are not informed of the purpose of the observation, so that their behavior is not influenced by the awareness that they are being observed. This technique is particularly viable in the observation of public events, as judicial processes are normally, that do not require the consent of participants to either be observed or be informed of the observation.

12

13 LYNN HECHT SCHAFRAN AND NORMA JULIET WIKLER, OPERATING A TASK FORCE ON GENDER BIAS IN THE COURTS: A MANUAL FOR ACTION 37 (Women Judges Fund for Justice, 1986)

On the other hand, this technique of investigation is much more susceptible than others of being affected by the completely subjective appreciation of the observers.[14] Therefore, it is necessary to take measures that reduce this danger to the maximum. In the following section the precautions taken in this study to reduce this limitation as much as possible will be explained.

To study gender bias using this technique, a team composed of a minimum of two persons of both sexes is recommended to benefit from the different perspectives on the observed actions.

The court watchers note down what they perceive; later compare notes and make a joint report pointing out common appreciations and those in which they differ.

III. The Procedure Followed

The following procedure was followed for this exercise.

Before the beginning of court watching, the group prepared itself regarding what constitutes gender bias. For several weeks, they studied readings on the subject and discussed them in class. They also examined several similar reports from the United States. Each meeting lasted two hours. During the discussion, a common understanding was reached about the theoretical framework that would guide the investigation. Its elements are the same that were gathered in the general theoretical framework adopted by the Commission. The technique of court watching was also discussed, pointing out its advantages and limitations.

A pair of students, a woman and a man, designed the discussion exercise that consisted in the preparation of a list of hypothetical discriminatory situations in the context of court proceedings. The entire group extensively discussed each one of the hypothetical situations to determine if, indeed, it could be taken as a manifestation of gender-based discrimination. The purpose was to

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[14] *Id.*

sharpen the perception of the court watchers and resolve beforehand, as far as was possible, probable differences in interpretation.

It was decided not to conduct the court watching on the basis of pre-prepared charts, as is usually done in this type of exercise. It was understood that the charts would probably limit the capacity of observation and that it was better to let the teams concentrate on observing and freely taking notes while they were capturing the situations that merited being recorded. Their annotations would be made on blank sheets of paper.

The teams were constituted of couples comprising a male and a female. The composition of the pair was also alternated so that each court watcher paired up with more than one person. It was expected that the strategy would contribute to a greater combination of similar opinions in the analysis of the situations.

Six courtrooms at the San Juan Judicial Center were selected: two criminal, two civil and two family relations. Included were courtrooms presided by male and female judges. Court watchers were instructed that, if a designated court was not in session, they were to move to previously-chosen alternate courtrooms. If these courtrooms were also not in session during their assigned shift, then the court watchers were to move to any courtroom that was in session. If those situations occurred, they were instructed to say so in their reports.

A calendar for the courtroom visits was prepared. An attempt was made to court watch during consecutive days and, as far as possible, the whole day. The purpose was to observe each courtroom for a considerable period to avoid reaching conclusions based on isolated actions picked up in too short a time. Each courtroom, in addition, was to be observed by different teams to obtain diverse interpretations.

A total of 30 hours was dedicated to observing family, criminal and civil courtrooms. Procedures were observed in 11 courtrooms because six courtrooms originally selected were not always in session.

Nearly halfway through the process, the class met to discuss the observations of each team to evaluate the exercise up to that moment and incorporate suggestions that could make their observations more precise. After each evaluation, the students continued their visits to the courtrooms.

At the end of their observation sessions, each team compared notes. Each rendered a joint report. The reports were discussed in two sessions of two hours each Some members of the Commission also participated in this discussion.

This report gathers the summary of each team's report and the fruits of the discussion by the whole group.

IV. Summary of Findings

In the relatively brief lapse of time that the exercises lasted, it was possible to observe some incidents or situations that reflect sexist or gender-based discrimination attitudes and practices. Notably, however, these incidents of situations did not necessarily occur in every courtroom. In some courtrooms, in observation periods of two or three hours, no incident was observed that could be cataloged as discriminatory. In others, at analogous periods, more than one incident was registered. Some of those incidents or situations reported were more indicative of subtle prejudicial attitudes than openly discriminatory practices

The manifestations of sexism or gender-based discriminations that were identified are as follows:

1. In most of the courtrooms visited, an unequal distribution of functions based on gender could be observed: for example, secretaries tended to be female and bailiffs, male.

2. The usage of sexist language persists in the procedures, especially in the forms used to read instructions to different participants, such as the accused or members of the jury.

3. Some incidents of sexist expressions were observed to the detriment of women and reaffirming stereotypical roles.

4. The court suffers the impact of subordination and inequality that affect women in society in general. These conditions are reflected in some of the situations that are created in the courtrooms.

5. Impoverished women with children face particular problems to go to court. Several cases were observed, especially in the family relations courtroom, of poor women who go to court with their small children.

6. Some teams reported having observed behavior, that they qualified as "aggressive," on the part of some female lawyers.

V. Support and Explanation of the Findings

A. Unequal Distribution of Functions

In every courtroom observed, secretaries were women. In nearly every courtroom, the bailiffs were men; only in one courtroom was a woman a bailiff. The distribution of male and female lawyers who intervened in the procedures tended to be more proportionate.

B. Persistence of Sexist Language

Three cases were observed where the reference to members of the jury was in masculine terms: "gentleman of the jury," "gentlemen of the panel."

One case involved a process of jury selection that took a whole morning. The terms used to refer to persons who were to be selected for the jury included: "gentlemen of the panel," "gentlemen of the jury," although women formed part of the group.

Also observed in the courtroom was a guilty plea and waiver of the right to a trial by jury on the part of the accused. In informing the accused of the right he was relinquishing, the female presiding judge explained that "the gentlemen of the jury were selected from citizens of the community."

In the third case, court watchers witnessed the reading of the jury's verdict to the accused. The jury was composed of seven women and five men. The secretary read each charge and indicated the verdict. It seemed that she was reading a pre-printed form. In about each charge, the secretary read:" ..we, the gentlemen of the jury, find the accused not guilty." This was repeated for each charge, nearly twenty times.

In the judgment of the group this responded to the ongoing thinking of the primary figures in the judicial process as male figures. The language used in the official forms and formulas that officials use in their explanations reflect that conception.

C. Sexist Expressions and Reproduction of Stereotyped Views

In one case, a defense attorney referred to the People's representatives as "the young ladies of the prosecutor's office." Both protested vehemently. Later, when an observer approached one of them about the incident, the female prosecutor complained of the "passivity" of the judge, a male, at the lawyer's behavior that she qualified as "improper."

In another case, a jury was being selected, comprising a group of candidates of five women and nine men. A female judge presided the courtroom. The prosecutor was a woman and the de-

fense attorney a male. The accused was a man. The bailiff was a male and the secretary and stenographer were women

The defense attorney began to question the women first. When he finished with them he said "They call us the ugly ones, now we'll question the men, the ugly ones."

It was obvious that the defense attorney's decision to start off with the women was a choice based on sex, although the reasons for doing so were not evident. The two observers asked themselves whether the remark, that men are called the ugly ones, implied that the attorney had been interrogating "the beauties."

In a third case, a sentence was pronounced for aggravated assault and Weapons Law violations against a woman for assaulting the woman who lived with the accused's ex-husband. The female judge reproached both women, and according to the court watcher's report, made the following statements: "It is unbelievable that two women with children fight like this for jealousy over a man." She described their conduct as "intolerable" and "shameful." She asked them to think about their children " who are the greatest thing a woman has" " and they have to come first." In the observer's opinion, those comments tended to reaffirm stereotypes related to the role of women as mothers and in her report she wondered if the judge would have made similar remarks if two men had been involved.

In a custody case, both parties, the man and the woman, were represented by women lawyers. The man, the defendant in the case, sat next to his lawyer. The bailiff, a man, was taking attendance, before the judge entered the courtroom. The bailiff approached the defendant and asked if he was the lawyer in the case. Immediately, the woman seated next to him stood up and clarified that she was the lawyer. According to the two court watchers, male and female, as well as the entire group, the incident reflected stereotypes that unconsciously guide the conduct of many persons: in this case, the bailiff presumed that the lawyer had to be the male and the woman his client.

D. Impact on the Court of Situations of Subordination and Inequality that Are Prevalent in Society as a Whole

Several instances verified that court procedures are affected by unequal and subordinate situations that women are subjected to in society as a whole, without necessarily interceding actions that could be attributed to officials of the Judicial Branch. What occurs in these cases is the consequence of pre-existing situations that are reflected in what transpires in the courtrooms.

The report of one of the court watching teams gives a dramatic example of the foregoing. In a hearing for lascivious acts allegedly committed by a stepfather against his step daughter, a 17-year-old adolescent, the mother of the girl testified that she did not believe her daughter. Questioned by the female prosecutor, the mother defended her husband because he provided for the home. According to the court watchers, male and female, and to the entire group, this situation makes evident the subordinate condition and economic dependence of many women on their husbands or partners.

The court watchers reported that in every family relations courtroom they visited, the claimants for support were women. If this is a pattern sustained in the courts, it could be concluded that the women in our society are bearing most of the responsibility to care for and feed their children after the separation and the divorce. On the other hand, it is obvious that the role of men and women in relation to their children has been constructed on grounds that the mother is the caretaker and the father, the provider.

In a divorce case the woman plaintiff did not request child support because, she said, her husband was in jail. The group interpreted the incident as indicative of a budding phenomenon in Puerto Rican society. Those convicted of a crime in Puerto Rico are primarily men (which was corroborated by the fact reported by the court watchers that in criminal courtrooms most of the accused were men). When the father is convicted, the mother usually remains with the burden of

supporting their children. The group suggested that this observation be used as a working hypothesis for future investigations.

E. Particular Problems of Poor Women

Various reports pointed out the presence of obviously poor women in the courts, accompanied by their minor-aged children. That fact suggests the lack of resources to provide needed child care services when they have to go to court. In one case it was observed how the need to attend to several small children in the courtroom made the mother tense and distracted her from the efforts she had to undertake.

F. The "Aggressive" Behavior of Female Lawyers

More than one team said they had observed some female lawyers and prosecutors exhibit court behavior that the court watchers described as "aggressive." This observation generated intense discussion in the group. They made the following points, among others:

1. The description of "aggressive," concerning the behavior of female lawyers, could reflect the stereotyped views over behavior expected of women by the court watchers themselves. If the behavior at issue were observed in male lawyers, possibly it would not be described that way. It was pointed out that much depends on perceptions and evaluations that form part of the world view of the court watchers themselves. Thus, for example, one female observer preferred to describe the conduct of some female lawyers, primarily prosecutors, as ""energetic," rejecting the characterization of "aggressive."

2. It is also possible that the behavior observed responded to the need for female lawyers in legal disputes to adopt characteristic male patterns of behavior to be respected, paid attention to, taken seriously or considered as equal to men. An hypothesis was proposed that, if this were true, we would be facing a profound dimension of gender bias: the imposition on women of traditionally

male patterns of conduct, which would result in self-sacrifice as the price of admission into work spaces historically reserved for men.

It was suggested that this aspect be subjected to broader empirical study and deeper interpretative analysis.

3. Any study of this aspect requires the formulation of an operational definition of "aggressive" conduct to avoid wholly subjective appreciations.

VI. Limitations of the Study

The group agreed that the study undertaken was prone to the following limitations:

1. The duration of the study did not allow for prolonged observation that would permit the identification of recurrent patterns of conduct. Because the courtrooms are not in continuous session, since a good part of the work of the courts takes place outside the courtroom, a larger amount of time would be required in each one.

2. The study was only carried out in the Judicial Center of San Juan. Court watching in other areas of the country is indispensable in obtaining complete information about the entire system.

3. The study was limited, almost exclusively, to the observation of courtroom procedures. This fact did allow observers to concentrate on conditions in offices of judges and work spaces in the court. It is possible that the formality of the procedures helps lessen the probability of obvious incidents of gender bias. Certain manifestations of sexism and bias could flourish more easily in more informal scenarios that are less exposed to the public. On the other hand, in limiting itself to observing conduct, this technique does not allow for queries into interpretations and meanings that participants in the observation process give to their own conduct and to that of the persons with whom they interact. In only one case did one of the court watchers interview a person affected by

sexist remarks ("the young ladies of the prosecution"). The prosecutor's interpretation of the incident added a broader perspective to the situation, which shows the need to always incorporate this dimension in every study on human behavior.

VII Conclusions and Recommendations

Despite the limitations pointed out in the previous section, the exercise has been of great value. It has permitted the identification of problematic areas related to gender bias in the courts. By itself, the result of this exercise could not serve as a basis to reach definitive conclusions about this question. But the findings can be useful in two ways: (a) as starting points to more exhaustively explore the aspects noted, with the help of other investigative tools, or (b) to add examples that uphold the findings that arise as a result of public hearings, focus group interviews and the participatory investigation sessions the Commission carried out.

Therefore, it is recommended that the findings of this study be considered by the Commission, insofar as they are useful.

If other court observation sessions are undertaken, it is recommended that they be carried out for prolonged periods of time in courtrooms throughout the country. If possible, court watching should be complemented by interviews with the persons involved to obtain their interpretation of the incidents and situations that were observed.