

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

1998

Gender, Legal Education, and Judicial Philosophy in the Region

Claudio Grossman

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Law and Gender Commons](#), and the [Legal Education Commons](#)

GENDER, LEGAL EDUCATION, AND JUDICIAL PHILOSOPHY IN THE REGION

CLAUDIO GROSSMAN

I would first like to thank Professor Ann Shalleck for inviting me to this important conference. There are few opportunities in one's academic life in the United States to address a conference in Spanish, and thus, I am taking great pleasure in this opportunity. In fact, I would say that this is the only language I speak without an accent, if you do not count my Chilean accent. I must admit on the one hand it is gratifying to speak Spanish, but on the other it is difficult. For a long while, Spanish was a language only for my home, for intimate discussions, for news about friends, more so than a language used for scientific exchange. So, for me when one speaks Spanish, you are sharing a secret or revealing intimate moments and I ask myself if there is not something like this in what we do today. Today, we aspire to become more familiar with each other and built fraternal relationships and friendship among us.

I would like to welcome you to the Pan American Conference, and tell you a little about the American University's Washington College of Law and from what perspective we work. This is the first law school founded in the United States, and I think, in the world, by two women—Emma Gillett and Ellen Spencer Mussey—one hundred and two years ago. In those times, women could not study law in the United States. The legal environment—especially anything related with cases—required people that were aggressive and women -it was thought at that time—simply did not have those abilities and were to stay in the house. Obviously, the two mothers of this Law School did not believe in that premise, and recognized that in order to achieve a society free of discrimination and supportive of equality towards women, knowledge of the law and the reality of the judicial system was essential. Understanding that this goal would only be attainable through the creation of a law school, they founded the Washington College of Law in 1896, beginning with only three female students.

You can all see now the fruits of their labor and their thoughts in this Law School in which more than half of its 1400 students are women, and in this country in which de jure discrimination is considered illegitimate. In fact, American women owe the universal suffrage in part to the struggle of our founding mothers. Moreover, the two mothers of the law school understood very well the importance of tying together the law school with the fight for social equality and for international relations based on humanitarian values. Therefore, if they were here right now, they would be very proud to see that their tradition continues in programs like the Pan American Conference, because although the capacity of women to study law and universal suffrage have been established, there is still a long way to go. Hence, our Founding Mothers would consider that there still exists a responsibility in continuing the expansion and deepening of democracy and freedom and that this Law School, as well as all others, have a major role in the achievement of such goals. This program strives to contribute to the attainment of some of these goals.

The purpose of the Pan American Conference is to create a forum for the exchange of experiences. We are living in a global world. All countries, including the most powerful, cannot resolve their problems—economic, environmental, national security, etc.—by themselves. In this complex global reality, everything is interconnected. I would like to suggest that it is also impossible to accomplish democratic and just societies and full equality including gender equality, without the achievement of equality at the international level. Thence, the necessity for exchanging strategies and for planning jointly to confront and challenge common problems. In conclusion, the creation of a forum for hemispheric discussion and for the exchange of experiences and the integration of gender perspectives and human rights in legal doctrine and curriculum becomes an imperative that is necessary to achieve the common objective of societies that are equal and just. I think that the mothers of the Washington College of Law would also be proud to know that we are discussing the issue of legal education. Alike them, we share the thought that the teaching of law anticipates our vision of the government, and in some way, reflects the history of our thoughts with regards to society. When teaching law is done in an authoritarian manner it is done exclusively through conference-type classes. When law school stresses memorization, when it does not critique, when it is not directed to spot issues, nor to link the law to reality, you are teaching implicitly and explicitly an authoritarian and hierarchical vision of society. Therefore, the methods used in legal

education must be discussed as part of the strategy to achieve equitable and cultured societies.

Another fundamental issue is the judicial philosophy which inspires the various judicial systems. The Judicial Positivism, the dominant philosophy in Latin America, defines its main objective to establish what the law states. In fact, in everyday language, lawyers that perceived themselves as being experienced say: "being a lawyer is about knowing the location of things," almost as though these "judicial things" were in a drawer and you had to go look for them. The Judicial Positivism has other characteristics, of course, but I would like to spend some time reflecting on this. What is the problem with defining the purpose of practicing law as to establish what the law says? In the first place, this philosophy ignores that what truly happens when we are practicing law is that we are faced with language, and that language is broad and gives way to different interpretations. For instance, the Chilean Civil Code which was followed in many Latin American countries, states that when the essence of the law is clear, its literal meaning shall not be sacrificed in order to search for its spirit. Nevertheless, many have erroneously interpreted the Chilean Civil Code to mean that where a particular law contains words that are clear, these need to be interpreted literally. The problem is that words always have the possibility and potentiality of being obscure. The words of the law speak of national security, of equality, of no discrimination, and society has a very rich and creative capacity of altering the contents of such words. When you teach judges, however, to think that the law itself anticipates every possibility; when you teach that things are, so to speak, "in a drawer" and you must only go out and look for them, you teach them a reactionary perspective of life and the law. You teach them to look back and not to look into the future and adapt the legislation to the needs of the time, including gender issues and discrimination.

There is another problem in the restrictiveness of the concepts used by Judicial Positivism. The notion of what is "strictly legal" in Latin America means you ignore the impact law has on life. When one says, for example, I would like to analyze this principle of equality in the law, in reality, in practice, in the impact it has on the lives of people, the traditional judicial philosophy in Latin America says this "real life" does not present a strictly legal question. If you are interested in such a topic—the traditionalists say—go study sociology or political science. In this manner, the "Positivists" strictly differentiate between the role of lawyers and the pursuit of justice, in spite of the fact that justice is the main reason why many decide to become lawyers in the first place. Therefore, the redefinition of the

term "strictly legal" is fundamental to the issue of gender, as well as other issues. We cannot accept that the impact of the law on people's lives is a "strictly legal" matter, as much as we cannot accept that "strictly legal" matters exclude any issues not subject to ethics, politics, or economics. We have to reclaim life and all its richness to the law and demand justice beyond any empty forms.

The predominance of the Civil Code and the teaching of Civil Law at law schools across Latin America has been fundamental to the adoption of a system of reactionary interpretation of the law. The teaching of Civil Law at the law schools is the basis of the judicial logic, is usually obligatory, and requires three to four years of study. Furthermore, the Civil Code—which is valuable in some areas of the law—expresses very profound restrictive content that include family law concepts derived from Roman law such as the relative legal incapacity of women and a whole system of property relationships that are simply not acceptable, and have not been for many years.

The hegemony of the positivist theory, and of the authoritarian and memorizing method of giving classes is structured from the curriculum standpoint by the dominance of the Civil Law system and the Civil Code in the region. Although there have been modifications to the Civil Codes, their starting points have been structured over a material base very different—without equal rights for men and women—to the material reality where we must operate and live in this modern world.

Our interest in this conference responds to the need for discussing the impact of the law on life from a perspective that includes gender within the contents of the law. The purpose of this conference is to develop a gender perspective concerning both legal substantive and procedures, and to identify strategies to move ahead.

Please allow me an additional reflection about the theme of strategies. I think we all have learned that the issues surrounding strategies for change are not lightweight. Like Gabriel Garcia Marquez said when he accepted the Nobel Prize of Literature, the missing and the dead of the hemisphere could populate a whole country the size of Norway. It's not just enough to be armored by reason; today, it's just not enough to be right. In countries with strong and deep economic and political contradictions, and with the means for mass repression, it is very important to have strategies dedicated to success. It is very important to redefine the meaning of politics and see what forums for change can be created, which policies can function, and how can we advance within those forums and with those policies values of human dignity that will broaden

happiness, equality and justice. For the meanwhile, it's not enough from the viewpoint of gender, or from a perspective of relative economic and social discrepancies to simply be right. It is fundamental to identify within this perspective which coalitions are necessary, which flags should we hang high, and which alliances should we form. When the right ideas are handled improperly with regard to reality, even though one may be right, great problems, great defeats and setbacks arise for the whole movement of expanding democracy and freedom on the continent.

Finally, I would like to point that although I have made reference to the gender issue in Latin America, by no means the issues of discrimination, equality for women, and justice have been resolved in North America. One needs just look at the number of women in the political system, in the highest levels of the judicial system, and in the business world to realize that we are facing a global dilemma, which is not exclusive to Latin America. Accordingly, gender themes—as well as other themes involving the international community—required a global strategy. The reiteration of the universal value of human rights and rights of women is part of the strategy that will allow us to use international regulations and treaties as tools for the improvement of domestic law. Consequently, it becomes essential to promote the value of international treaties that consecrate women's rights domestically.

I am convinced that international conferences such as this one - because of the issues that they address and the quality of the participants- will allow us to establish contacts and information webs and to exchange valuable experiences that will help us move forward. Our founding mothers understood very well the value of discussion and the exchange of experiences for the advancement of essential rights, but also for much more. In an interview done to Emma Gillett in her seventies, she said that there was something very important in this fight for women and the fight for equality and social justice. She said that her seventy years have been "beautiful and very happy." "I have passed through many hardships in funding the law school and fighting for women's rights, but to be honest I don't remember any of them." She added "but what I do remember is the solidarity, the enthusiasm, the care, the love, with which we would pull up our sleeves and work together for solidarity and equality." I am sure that in this conference will do just that, create fraternal ties among all of us who dedicate our lives to the advancement of human rights.