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**THE IMPERATIVE TO JUDGE WITH A GENDER PERSPECTIVE IN CRIMINAL
PROCEEDINGS
(OBLIGACIÓN DE JUZGAR CON PERSPECTIVA DE GÉNERO EN EL MARCO DE UN
PROCEDIMIENTO PENAL)**

CASE: *Amparo Directo en Revisión 6181/2016*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: March 7, 2018

KEY WORDS: Gender perspective, gender violence, family violence, structural discrimination, criminal procedure, article 84 of the Federal Criminal Code, article 89 of the Federal Criminal Code.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo en Revisión 6181/2016*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of March 7, 2018, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emplematicas/sentencia/2022-01/ADR6181-2016.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Amparo Directo en Revisión 6181/2016*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO EN REVISION* 6181/2016

BACKGROUND: A woman was found criminally liable for the aggravated homicide of her romantic partner, for which she was sentenced to 27 years and 6 months in prison. The woman filed an appeal. The criminal court chamber that heard the case amended the decision with regard to compensation for death and moral damages for her children. The woman filed an *amparo* lawsuit against this decision, in which she noted that the criminal court chamber had failed to judge her with a gender perspective and to consider the violence she suffered from her romantic partner. The Collegiate Circuit Court that heard the *amparo* determined the woman's detention was illegal and granted the *amparo* so that the criminal court chamber could reclassify it and annul the evidence with a direct and immediate link to the detention. The woman filed a *recurso de revisión* against the *amparo* decision, again claiming that she was not tried with a gender perspective and that articles 84 and 89 of Mexico City's Criminal Code (MCC) were unconstitutional. Mexico's Supreme Court of Justice (this Court) heard the *recurso de revisión*.

ISSUE PRESENTED TO THE COURT: Whether the woman should have been judged with a gender perspective and what are the guidelines for judging with a gender perspective; and whether articles 84 and 89 of MCC are constitutional.

HOLDING: It was decided that articles 84 and 89 of MCC are constitutional, and the *amparo* was granted to the woman, essentially, for the following reasons. Articles 84 and 89 of the Code are in accordance with the postulates of the Constitution, since they do not violate the right of the parents not to be separated from their children neither to interrupt the bond with their children. Likewise, the substitution of the prison sentence fulfills a constitutionally legitimate purpose, it respects the dignity of the person and does not allude to stigmatizing concepts. These articles are neither discriminatory nor unconstitutional because they do not make distinctions based on suspicious categories such as ethnic or national origin, gender, age, different capacities, social status or health condition. Regarding the duty to judge from a gender perspective, the human right of women to a life free of violence and discrimination entails the duty of the State to ensure that in all jurisdictional disputes where a situation of violence or discrimination for gender reasons

is denounced, has to be taken into account in order to make visible if the situation of violence or gender discrimination affects the way of applying the law to the specific case. If the special situations that entails a circumstance of this nature are not taken into account, it may be validated a discriminatory treatment based on gender. Thus, the right of women to a life free of discrimination and violence implies the obligation of all authorities to act with a gender perspective. For this reason, the jurisdictional authorities are obliged to impart justice with a vision in accordance with the gender circumstances and eliminate the barriers and obstacles preconceived in the law regarding the functions of both genders, which can materially change the way of perceiving, assess the facts and circumstances of the case, as in the current dispute. The incorporation of the gender perspective in the legal analysis aims to combat stereotyped and indifferent arguments to achieve the full and effective exercise of the right to equality. Therefore, the collegiate circuit court must order the reinstatement of the procedure, so that the judge applies the method of judging with a gender perspective.

VOTE: The First Chamber decided this case unanimously by the five votes of justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurrent opinion), Jorge Mario Pardo Rebolledo (reserved the right to issue a concurrent opinion) and Alfredo Gutiérrez Ortiz Mena.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=206132>

EXTRACT OF THE *AMPARO DIRECTO EN REVISION* 6181/2016

- p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of March 7, 2018, issued the following decision.

BACKGROUND

On August 12, 2011, a Criminal Judge in Mexico City held a woman criminally liable for the crime of aggravated homicide. She was sentenced to 27 years and 6 months in prison.

- p.2 The defendant filed an appeal. On November 25, 2011, a criminal court chamber issued a decision to modify the decision of the trial court judge.

On March 7, 2016, the woman filed an *amparo* lawsuit. On September 22, 2016, a Collegiate Circuit Court found that the complainant's detention was unlawful. For this reason, it granted an *amparo* for the criminal court chamber to classify the detention as illegal and to annul evidence that had a direct and immediate link to the detention, as illegal evidence.

On October 6, 2016, the criminal court chamber issued a decision in compliance with the *amparo*.

On October 17, 2016, the woman's representative filed a *recurso de revisión* against the decision handed down by the collegiate circuit court.

On October 26, 2016, this Court issued a resolution admitting the *recurso de revisión*.

- p.4 In her claim, the woman indicates that she was not tried with a gender perspective. She believes that her case should have been analyzed in light of the violence she experienced when she lived with her husband and six children, which escaped the attention of the judge. She adds that in order to understand the actions of a woman responsible for the homicide of her partner, it is necessary to understand the problem of family violence, its cyclical nature and – in particular – the physical and pathological effects it produces.

- p.5 She argues that in cases where a woman takes the life of her aggressor, pushed by an intolerable situation, the judicial practice often ignores the violence suffered by the woman and the context in which the acts occurred. She adds that the Criminal Court Chamber failed to comply with the obligation to respect and guarantee the rights to equality and non-discrimination by deciding the case without a gender perspective.
- p.10 In addition, the defendant maintains that articles 84 and 89 of Mexico City's Criminal Code (hereinafter referred to as the Code) are unconstitutional because they are discriminatory, since the application of alternative penalties in Mexico is conditioned by the temporality of the penalty without considering the type of crime, the context and the special circumstances of the case.

In this case, the prison sentence should be replaced in accordance with the principles applicable to gender and childhood, since it must be acknowledged that the petitioner is a woman who is a victim of violence and mother of 7 children. In addition, the prison sentence violates the right of parents not to be separated from their children; the principle of the best interests of the child; the right to health; and the right of children to grow and develop under the care of their parents. The petitioner's imprisonment interrupts the bond with her children and violates the principle that the criminal law should not affect any one other than the offender because a child cannot be forced to accompany his or her mother in prison.

STUDY OF THE MERITS

I. Gender perspective

- p.19 This Court emphasized that this case clearly deserves to be judged with a gender perspective since, in her statement at prosecution, the woman indicated that since 2007 (the year her mother-in-law died), she began to suffer family violence by her husband. She claimed that he told her she was ugly and fat, threw food at her, beat her and raped her because she no longer wanted to have sex with him. In the same vein, the criminological study issued on March 17, 2011, indicated that the woman and her children suffered family violence perpetrated by her husband.

p.20 In addition, the psychiatric assessment of March 15, 2011, concluded that the woman presented an adaptive disorder with prolonged depressive reaction. Therefore, psychological support was requested and constant surveillance was recommended due to risk of self-harm.

Based on the above, this Court maintained that in this case the criteria for judging with a gender perspective should have been applied in order to verify that the defendant suffered from family violence and consider the effects on her generated by such violence .

A. The effects of violence perpetrated in the family against women

p.21 Article 1 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Belém do Pará Convention, states that violence against women is "any action or conduct, based on their gender, that causes death, harm, or physical, sexual, or psychological suffering, both in the public and private spheres." Article 2 of the same treaty adds that violence against women includes physical, sexual and psychological violence and takes place within the family or domestic unit or in any other interpersonal relationship, whether the aggressor shares or has shared the same domicile as the woman, and that it includes, among other things, rape, mistreatment, and sexual abuse.

p.23 Women who are in violent relationships find themselves caught up in the cycle of violence which is also known as battered woman syndrome. According to Elena Larrauri, this is characterized by three phases:

a) Phase 1: abusive episodes (*tension building*) in which acts of minor violence and verbal abuse occur.

b) Phase 2: exercise of greater physical force (*acute battering incident*), product of tension, rage or fear triggers the violent attack.

c) Phase 3: calm, acts of repentance (*loving contrition*), demands for forgiveness and promises to seek outside help.

Women living in contexts of family violence constantly repeat the cycle of violence described, in a way that they believe they lose control of the abusive situation. They believe it is impossible to escape, even when they could.

- p.24 In abusive relationships, aggressive men can come to totally control the women they abuse; they control their money, their clothes, their food. They systematically cut off contact with their family and friends. Battered women know that if they try to escape, they and their children are in danger and face a risk of death when they try to get out of the abusive relationship.
- p.25 On the other hand, the effects of violence are diverse since battered women can experience depression, low self-esteem, insecurity and life in isolation, which implies that they themselves, or because of their difficulty in communicating with others, have broken their social networks, which causes them to feel lonely and helpless.
- p.25-26 Victims of violence are also ashamed of what is happening to them, so they remain silent about their situation. They also have feelings of guilt, as they assume the situation they live in is their responsibility and think they deserve to be mistreated. In addition, a high percentage of women living in contexts of violence have post-traumatic stress disorder, which explains the feeling of terror and constant threat, even without an episode of aggression.
- p.26 Because of these particularities, in trials in which battered women face criminal charges for assaulting their aggressors, judges must take into account the context of women facing domestic violence by their partners.
- p. 27 The expert opinions help to understand whether the battered woman attacking her abuser felt in danger or acted reasonably in accordance with her own context. Thus, the judges take into account the social reality faced by the perpetrator and why she responded in that way, from her own situation and perspective.

B. Judging with a gender perspective

- p.29 The issue of gender perspective has already been addressed by this Court in a number of cases. In the *Amparo Directo en Revision 2655/2013*, the First Chamber of

this Court indicated that the human right of women to a life free from violence and discrimination is recognized in the Federal Constitution and in various international instruments, particularly in the Convention on the Elimination of All Forms of Discrimination against Women, as well as in the Convention on the Rights of the Child and the Belém do Pará Convention. These international treaties recognize women's equality before the law and the duty of any authority to avoid discriminatory treatment on the basis of gender.

p.29-30 The human rights of women were born out of the need to establish a specific protection regime when it was found that the general international human rights law was not sufficient to guarantee the defense and protection of the human rights of certain vulnerable groups such as women who, due to their gender-linked status, require a special approach in the international human rights law as well as different types of mechanisms to ensure effective compliance with and respect for their rights, such as imparting justice with a gender perspective.

p.34 In the same case –the *Amparo Directo in Revision 2655/2013*–, this Court determined that as a result of national and international regulations, the human right of women to a life free of violence and discrimination entails the duty of the State to ensure that in any dispute before the courts where a situation of violence or discrimination for reasons of gender is reported, that situation be considered, with the aim of determining if violence or gender discrimination affects the way the law is applied to the specific case. Failure to consider the special conditions that a situation of this nature entails may lead to the validation of discrimination in treatment on the grounds of gender.

This approach makes it possible to achieve substantive or de facto equality, which is configured as a facet or dimension of the human right to legal equality, derived from article 1 of the Constitution. The purpose of this provision is to remove and/or reduce social, political, cultural, economic or other obstacles that prevent certain persons or social groups from genuinely and effectively enjoying or exercising their human rights in conditions of parity with another set of persons or social groups.

p.35 For these reasons, the right of women to a life free from discrimination and violence implies the obligation of every authority to act with a gender perspective. Therefore, the judicial authorities must dispense justice with an awareness of the circumstances of gender and eliminate the barriers and obstacles preconceived in the legislation regarding the functions of one or another gender, which can materially change the way of perceiving and assessing the facts and circumstances of the case, as occurs in this dispute.

This means that -the introduction of the gender perspective into legal analysis aims to combat stereotypical and indifferent arguments to achieve the full and effective exercise of the right to equality. If this is not done, women's access to justice could be conditioned because their particular situation is not seen.

p.35-36 Thus, in order to eradicate inequality between men and women, states undertake to adopt the gender perspective in all their policies and actions, which is a method of detecting and eliminating the barriers that discriminate against people because of their gender. The gender perspective is a category of analysis that:

- i) Illuminates the differentiated social assignment of roles and tasks by sex, gender or sexual orientation;
- ii) Reveals the differences in opportunities and rights that follow this assignment;
- iii) Evidences the power relations originated in these differences;
- iv) Acknowledges the link between gender issues, race, religion, age, political beliefs, etc.;
- v) Questions the differentiated impacts of laws and public policies based on these assignments, differences and power relations and;
- vi) Determines in which cases differential treatment is arbitrary and in which cases it is necessary.

p.36 Similarly, in the *Amparo Directo en Revision* 1754/2015, the First Chamber of this Court indicated that the gender perspective refers to the method of analysis that is based on the differences that are assigned between men and women through the

construction of gender; of what is appropriate or what can be "expected" of each sex. It is therefore a methodological tool that serves to analyze the roles that men and women play or are expected to play in political, social and cultural contexts. The objective of this method is the identification and correction of the discrimination that stereotyping generates, especially in norms, policies and institutional practices.

p.40 The First Chamber of this Court, in the *Recurso de Inconformidad* 411/2016, emphasized that the judicial authority must analyze all the facts of the case and, if necessary, gather evidence *ex officio* to determine the violence suffered by the woman, as well as the conditions in which the criminal conduct was carried out. As a result of the international treaties to which Mexico is a party, there is an obligation to judge with a gender perspective.

II. Constitutionality of articles 84 and 89 of the Code

p.41-42 The articles claimed as unconstitutional by the petitioner state the following:

Article 84 (Substitution of imprisonment). The judge, having regard to the provisions of article 72 of this Code, may replace the penalty of imprisonment, in the following terms:

- I. For a fine or work for the benefit of the victim or for the benefit of the community, when not exceeding three years; and
- II. For treatment in liberty or semi-liberty, when not exceeding five years.

The equivalence of the fine replacing the prison sentence will be due to one day's fine for one day's imprisonment, in accordance with the economic possibilities of the sentenced person.

Article 89 (Requirements for the appropriateness of the suspension). The judge or the Court, as the case may be, when sentencing, at the request of a party or *ex officio*, will suspend the execution of sentences on a reasoned basis if the following conditions are met:

- I. The duration of the sentence imposed does not exceed five years imprisonment;

II. When, in view of the sentenced person's conditions, there is no need to substitute the penalties, for the purpose for which they were imposed; and
The sentenced person has a positive personal record and an honest way of life. The judge will also consider the nature, modalities and motives of the crime.

p.42-43 III. The requirements for such a benefit presumes that a person's responsibility has been validly established through a process governed by rules, both substantive and procedural, previously established in a secondary law. Thus, the condition restricting access to a benefit is strictly linked to the principle of legality.

p.44 The petitioner maintained that articles 84 and 89 of the Code are unconstitutional because the application of alternative penalties in Mexico is conditioned by the temporality of the penalty without taking into account the type of crime. However, the *Amparo Directo en Revision* 3980/2013 studied the requirements contemplated in article 89 of the Code and this Court concluded that they were constitutional and in accordance with the Tokyo Rules.

p.47 The establishment by the State of the instrumental measures necessary to achieve social reintegration, such as the benefits provided for by law, is a fundamental right. Consequently, judges cannot refuse to grant benefits on grounds other than those provided for in the law, i.e., they must be granted to the extent that the parameters governing their granting are met. This makes it possible to argue that, although the instrumental measures necessary to achieve social reintegration, such as the benefits provided for in the law, have the nature of a human right, the parameters that condition their granting still must be met.

The petitioner also stated that articles 84 and 89 of the Code are unconstitutional because they are discriminatory. However, this Court has already determined that the requirements for substituting the prison sentence with other measures, and the requirements to take advantage of a sentence suspension, do not violate the constitutional principle of equality, since they constitute institutions and measures that

guide the criminal and penitentiary policy of the State toward the objective of the social rehabilitation of the offender, so this is in an area in which there is no direct impact on the human rights of individuals.

- p.48 The provisions are constitutional because they are not "norms that establish classifications among citizens on the basis of the criteria mentioned in article 1 of the Constitution as prohibited grounds for discrimination between persons (ethnic or national origin, gender, age, different abilities, social status, state of health, etc.); rather they are legal provisions issued in compliance with the mandate of article 18 of the Constitution.

Finally, the petitioner argues that the challenged provisions threaten family rights because they violate the right of parents not to be separated from their children, the principle of the best interests of the child, the right to health and the right of children to grow and develop under the care of their parents. The petitioner's imprisonment disrupts the bond with her children and violates the principle of criminal law that only the offender should be affected.

- p.49 The provisions governing the substitution of sentences are not contrary to the family rights of convicted persons or to the best interests of children, because the proper safeguarding of these principles does not depend on the granting of the mentioned benefits, but on ensuring that such rights are not affected by provisions that prevent the prisoner from contacting the members of his or her family.

In other words, the articles regulating the substitution of the penalty do not affect family rights because the prison sentence does not prevent the appellant from having contact with her children, since they can visit her. It should be borne in mind that the prison system is organized on the basis of respect for human rights, which makes it easier for the sentenced person to continue to interact with the outside world during the execution of his or her sentence, for example, through family visits. This will enable the persons serving a prison sentence to have a positive influence on the education of their children, which is also a means for them to achieve the expected constitutional goal of their reintegration.

p.49-50 In conclusion, for all the reasons explained, articles 84 and 89 of the Code are in compliance with the Constitution since they do not separate parents from their children or interrupt the bond with their children. Furthermore, the substitution of the prison sentence serves a constitutionally legitimate purpose, respects the dignity of the person, and does not refer to stigmatizing concepts. The above-mentioned provisions are also not discriminatory or unconstitutional because they make no distinctions based on suspect classifications such as ethnic or national origin, gender, age, different abilities, social status, or state of health.

DECISION

p.50 This Court overturns the appealed sentence and returns the case to the Collegiate Circuit Court so that it may order the reinstatement of the procedure so that the criminal judge may apply the method of judging with a gender perspective.

p.52 The criminal judge is required by the precedent of this Court to draw on sufficient evidentiary material to clarify the situation of violence, vulnerability, or discrimination on the basis of gender.

p.52-53 It will therefore order the relevant tests for the detection of violence, which may include – without limitation – psychological and physical expert testimony or a psychosocial expert report which "focuses on the experience of persons affected by human rights violations, through which the psychosocial environment [of the woman] as well as the circumstances and the environment she was surrounded by will be analyzed".

p.53-54 Finally, the criminal judge will consider that the method of judging with a gender perspective requires that, at all times, the human rights of the complainant and of all the persons involved, especially the children, be respected. The judge will also avoid the use of language based on stereotypes or prejudices and avoid making sentencing arguments that are based on such stereotypes. This item is particularly relevant in this case since the specialized literature indicates that it is quite common to assume that a battered woman must appear defenseless or helpless, passive and without any history of having committed violent acts.