
The Gender Perspective in Colombian Constitutional Jurisprudence as a Guarantee of Women's Human Rights

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Abstract

Introduction: Violence and discrimination against women are structural and historical scourges. The Colombian State establishes human dignity and equality as principles, values and rights. In addition, it has ratified international treaties on women's human rights. This implies the incorporation of the gender perspective in all spheres, understanding it as the process of assessing the implications for men and women of any planned action, be it legislation, policies or programs, in different scenarios, including the judicial.

Objectives: To analyze the influence of the gender perspective in Colombian constitutional jurisprudence in order to identify the measures adopted to guarantee women's human rights in the Colombian context.

Methods: This is a qualitative, jurisprudential and socio-legal study, focused on evaluating the application of law in the context of the issues addressed by the Constitutional Court of Colombia. It examines how legal norms contribute to the political purposes of the State, considering the social reality. Its objective is descriptive and it uses the analysis of emblematic rulings of the Court as a data collection technique. The criteria for selecting the rulings include cases on women's rights, their impact on legislation and public policies, and those that establish constitutional precedents.

Conclusions: This paper examines how the gender perspective impacts constitutional jurisprudence in Colombia, in order to identify the measures adopted to safeguard women's human rights. Historically, male power has dominated society, generating inequalities and violence towards the feminine through institutions such as the family, education and religion. Since the 1991 Constitution, which establishes equality as a fundamental principle, laws and policies have been enacted to protect women's rights and combat gender-based violence. Despite this, the application of the gender approach by judges has been insufficient. The Constitutional Court has emphasized the importance of this approach to guarantee women's rights, playing a crucial role in transforming a patriarchal legal system into a more equitable one and seeking to impact both institutions and society in general.

Keywords: Gender, Gender Perspective Judging with a Gender Perspective, Legal Feminism, Women's Human Rights

1. Introduction

The Colombian State, with the promulgation of the Political Charter in 1991, proclaimed itself to be social, democratic, pluralist, based, among other principles, on human dignity, in addition to being egalitarian and respectful of human dignity. It expressly enshrines equal rights and opportunities for men and women. It has also ratified international treaties such as the Convention on the Elimination

of All Forms of Discrimination against Women and the Convention of Belem Do Para, which implies the incorporation of a gender perspective in all areas, understood as the process of assessing the implications for men and women of any planned action, be it legislation, policies or programmes, in all areas and at all levels, including, of course, judicial decisions.

Indeed, the judges of the Republic must administer justice with this perspective, and although for more than a decade the judiciary, through the Rodrigo Lara Bonilla Judicial School and the National Gender Commission, have been providing ongoing training and have published guides and documents in order to provide them with tools and raise awareness about the incorporation of this perspective, this has not yet been fully achieved, which is why the high courts, especially the Constitutional Court, have urged those who administer justice in all jurisdictions and specialities to comply with this obligation.

For this reason, the objective of this article is to analyze how Colombian constitutional jurisprudence has incorporated the gender perspective as a guarantee of women's human rights. To achieve its fulfillment, first a brief history of female subordination and male domination is presented. Secondly, the role of law as a legitimizer of the patriarchal system and at the same time an enabler of gender equality is reflected upon, from the perspective of legal feminism. Thirdly, a conceptual framework is presented to understand what it means to judge with a gender perspective. Fourthly, a review is made of the training materials published by the judicial branch to train legal operators in this subject. Fifthly, reference is made to rulings of the Constitutional Court through which rules have been established for the application of the gender perspective as a guarantee of the protection and fulfillment of women's human rights. Finally, some conclusions are presented.

Thus, this study is qualitative, socio-legal and documentary in nature. It is theoretically based on legal feminism. To this end, some decisions of the Constitutional Court of Colombia will be analyzed from a gender perspective, in light of international and domestic legislation on the matter.

The information gathering technique used is documentary (and jurisprudential) analysis, for which an analysis matrix was created and a bibliographical record was also designed. To this extent, the feminist sociological method is used to interpret the information, since the legal norms on women's rights are interpreted based on reality, taking into account the purpose that these norms seek to achieve.

With this article, it is hoped not only to provide information on what it means to rule with a gender perspective according to Colombian constitutional jurisprudence, but also to contribute to the materialization of women's human rights and consequently to the purposes of the Social Rule of Law, to the extent that this article may serve as a guide for this population group and its social organizations for the enforceability of their rights. Similarly, it can also be taken as a reference for institutions.

1. Methods

This research article is developed from the interpretative paradigmatic perspective and is framed in a qualitative approach. This study, of a jurisprudential and socio-legal nature, aims to evaluate the application of law in a particular context; in this case, it focuses on the problems addressed by the Constitutional Court of Colombia. Through this analysis, it seeks to understand how legal norms contribute to the fulfillment of the political purposes of the State, considering the social reality in which they must be implemented (Giraldo et al., 2005).

This subjective study aims to offer a detailed representation of the various situations analyzed. To collect information, the technique of jurisprudential analysis is used, reviewing emblematic sentences of the Constitutional Court of Colombia. The criteria for the selection of the rulings address three fundamental aspects: first, those cases related to women's rights are prioritized; Second, the impact on legislation and public policies is considered, as well as the effectiveness in the realization of the rights of victims of gender violence; and, finally, those rulings that establish jurisprudential guidelines and that set a relevant constitutional precedent are chosen.

This approach allows not only to examine current jurisprudence, but also to open a space to reflect on the interaction between legal norms and social reality, thus providing valuable input for a better understanding of how public policies aimed at the protection of human rights in Colombia can be improved.

3. Results

A brief history of female subordination and male domination

Women's lives have historically been marked by discrimination, inequality and violence of all kinds, which take place in different public and private settings, as "a kind of customary law" (Comesaña, 2006, paragraph 1), which were legitimized with the emergence of the modern liberal State, founded on the precepts of equality, freedom and solidarity inspired by the theories of the Enlightenment, but leaving the female sex on the sidelines

Thus, in the origins of the modern State, women were not considered as full subjects of rights, therefore, their citizenship was not recognized, this made them be in a condition of dependence and subjection to men, while they were deprived of participation in public affairs. This form of organization of society was influenced by the ideas of contractualist philosophers such as Rousseau, Locke and Hobbes, who, in their writings, excluded women from public power, with arguments based on human nature. It is in these works, Rosa Cobo warns, where "the origins of contemporary patriarchy and the exclusion of women from democracy must be sought" (Cobo, n.d., par. 3) as well as the explanation of the assignment of tasks related to the maintenance of the home and the conservation of the species (Beauvoir, 1949).

And it is that parallel to the bourgeois liberal State, according to the Irish historian Mary Nash (n.d.), the "gender system" was built; that is, alongside modernity, the symbolic elements, patterns of conduct and social relations that regulate the way of being and acting of men and women were structured. In this context, the author continues, "The mechanisms of subalternity were produced that guaranteed the permanence of inequality and subordination, not only of women, but of the lower classes and races considered inferior." Patriarchal relations were fostered based on religious, social and political theories of the inferiority and subordination of women to men, perpetuating practices, structures and relations of oppression for women; for this reason Nash states that "the contemporary industrial world was a gender factory built in parallel to modernity" (Nash, 2004) that marginalized women from the public sphere and subordinated them in

terms of power, status, income, etc. (Showstack 1987).

According to Hannah Arendt (1958), the separation of the public and private spheres dates back to ancient Greece, where the public sphere was reserved for the few free men who made decisions related to life in the polis; while the private sphere belonged to women and slaves, who were in charge of the physical survival of the species and the bodily needs of life, therefore, it was the place where the power of the male over the family operated the most. With the nascent liberal State, the separation of the social world into public and private spheres was accentuated, a pillar of patriarchy that was concretized with the division of productive and reproductive activities, ensuring a place of privilege and power for men over women, considered inferior beings, only suitable for their performance in the domestic-reproductive sphere, marginalizing them from production activities and participation in the public sphere.

This internalization and undervaluation of women compared to men occurs in all cultures with four characteristic features, as Facio and Fries (1999) explain. First, an ideology and its expression in language that explicitly devalues women by assigning them, their roles, their work, their products and their social environment, a lower prestige and/or power compared to that granted to men. Second, negative meanings attributed to women and their activities through symbolic facts or myths. Third, exclusion of women from participation in, or contact with, the spaces of the highest powers, or where the spaces of greatest decision-making power are believed to be (in economic, political and cultural terms). Lastly, dichotomous, hierarchical and sexualized thinking, which divides everything into things or facts of nature or culture, and which by placing man and masculinity under the second category, and woman and feminine under the first, erects man as the paradigm of the human, while justifying the subordination of women based on their supposed "natural roles."

Law as a Double Weapon: Between a legitimizer of the patriarchal system and an enabler of gender equality, a view from legal feminism.

For the purposes of this study, it is important to delve into the role that law has played in the reproduction of the patriarchal system, supported by the dominant

position of the male subject in society and the inferiority of women “in comparison to man, who is the social and cultural paradigm of humanity” (Lagarde, 1997, p. 97). But at the same time, it is presented as a commitment to reveal the transformative role that the legal system could have if they manage to adequately incorporate the gender perspective in their discourses and practices.

It is worth noting that, in the field of law, one of the main criticisms made by legal feminism is that it has taken the male sex as the hegemonic subject and parameter of the human (Vacca and Coppolecchia, 2012), which, moreover, is a male, adult, white, heterosexual, without any disability and a property owner. From these feminist theories, it is understood that the State's regulations are a reflection of society, therefore, they tend to reproduce its biases and partialities. Thus, “law became a tool of control and discipline, with one of its main functions being prescription and normalization” (Vacca and Coppolecchia, 2012).

The legal norms that regulate family relations in Colombia, recorded in the civil code, are a reflection of this patriarchal law. This code was copied from the Chilean one by Andrés Bello, which in turn took the Napoleonic code as a model. In this way, a significant number of patriarchal mandates from the Napoleonic code were transplanted into Colombian legislation, including that women owed obedience to their husbands; that it was the man who established the marital domicile; that women had more rights over their sons and daughters than the mother; and those related to marital power over the wife and her property. In fact, in this country, for decades, legislation and legal practice excluded women from their rights, from the administration of their own property and from authority. Only since the second half of the 20th century, Colombian legislation began to recognize the rights of the female gender (Puyana, 2007).

There are several examples of these first legislative transformations that allowed the exercise of women's rights in Colombia, including Legislative Act No. 3 of 1954, through which the right to vote was recognized. Likewise, in 1932, Law 28 abolished marital power, which meant that married women were able to administer and dispose of their property. They were also considered full citizens, and as a result, husbands were no longer their legal representatives. Decree 2820 of 1974 granted

women equal rights to men in civil and family matters.

However, thanks to the active participation of feminist movements around the world and their influence in the United Nations, from the second half of the 20th century onwards, international instruments began to be promulgated to promote women's human rights, especially the right to guarantee them a life free of violence and discrimination. Colombia, as a State Party to the UN, has made a commitment to adjust its legislation to these international standards aimed at guaranteeing civil, political, economic, social and cultural rights, such as the International Convention on the Elimination of All Forms of Discrimination (CEDAW) against Women, approved by Colombia through Law 51 of 1981.

In addition, the promulgation of the Political Constitution of 1991 led to significant institutional changes in Colombia, the issuance of important laws and decrees, and the repeal and declaration of unconstitutionality of norms that violate women's rights, and the design of public policies aimed at guaranteeing the effective enjoyment of their rights, especially equality and a life free of violence, as well as eradicating practices, stereotypes and cultural norms based on gender.

Judging from a Gender Perspective and a conceptual framework to understand its implications.

These are key concepts to understand the implications of justice with a gender perspective and the role that the Colombian Constitutional Court has played in this matter.

Gender Perspective

The gender perspective has its origin and development in feminism. In this regard, Blazquez (2010) states that, although the branches of feminism, both in theory and practice, have divergent positions, they also have coincidences in at least two aspects: first, that gender interacts with many other categories such as ethnicity, sexual orientation, age, socioeconomic conditions, among others, and that it is an organizer of relationships in life in society. Second, in considering that it is not enough to understand the functioning of social life, since action is necessary for equality, so one of the fundamental commitments of feminist theory is

change for women in particular, and progressive social transformation in general through the incorporation of the gender perspective or gender lenses, as the application of this category of analysis has also been called.

Using this same logic, Marcela Lagarde points out that the gender perspective is synonymous with gender focus, gender vision, gender outlook, and that it allows us to analyze and understand the characteristics that define women and men in a specific way, as well as their similarities and differences. It also analyzes their vital possibilities, the meaning of their lives, their expectations, their complex and diverse relationships. As well as the conflicts they have to face and how they do it. But, in addition, she points out that from this approach, the resources and capacities that women and men have to achieve their goals and to counteract the difficulties that life presents to them are taken into account (Lagarde, 1997).

Discrimination against Women:

“Any distinction, exclusion or restriction based on sex which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by women, regardless of their marital status, on a basis of equality between men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other sphere.” (Convention on the Elimination of All Forms of Discrimination against Women. Article 1. December 18, 1979).

Violence against Women:

“Violence against women means any action or conduct, based on gender, that causes death, physical, sexual or psychological harm or suffering to women, whether in the public or private sphere.” (Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. Article 1. June 9, 1994).

Training for Gender Equality: Efforts of the judicial branch to raise awareness of women's rights and eliminate gender violence.

Of interest are the documents published since 2011 by the Rodrigo Lara Bonilla Judicial School and the National Gender Commission of the Judicial Branch (CNGRJ), which aim to raise awareness and provide tools to legal operators in all jurisdictions to include the gender perspective in their judicial decisions in

order to materialize the right to equality, non-discrimination, non-violence, judicial protection and, in general, the human rights of women.

Thus, it is worth referring to the text “Equity criteria for the administration of justice with a gender perspective” published by the CNGRJ and the corporations that comprise it in 2011, which establishes a series of guidelines to determine, first of all, when a gender case may be faced, taking into account whether one of the persons seeking justice is a woman, the facts and the rights in dispute. Secondly, it presents guiding criteria in relation to the judicial procedure, in which it explains the importance of judicial argumentation, of making the specific situation of women visible, of listening to their voices and those of women's organizations, of privileging circumstantial evidence when discrimination based on sex is involved.

It also recommends documenting in detail the impact of human rights violations when dealing with a specific group, for example: women victims of the armed conflict. Thirdly, it sets out criteria to be taken into account in the judicial decision, including, among others, the interpretation of the regulations from a gender perspective, an independent conscience, free of gender stereotypes, taking into account the gender roles that may affect the autonomy, dignity and other rights of women, since judicial decisions must recognize and materialize them.

Also in 2011, the same CNGRJ published the document “Women's rights and the gender perspective, a legal framework for judicial action”, which condenses the main normative references, both national and international, on women's rights, as a contribution to the understanding of the gender approach and thus facilitate its inclusion in the judicial decision, in any legal area. Likewise, in 2011, the CNGRJ published the brochure “Gender and Family Law”, which reveals the sexist, discriminatory and patriarchal nature of some of the institutions of the civil code related to family relations, concluding that it is necessary to raise awareness of the gender perspective among judicial personnel and to eliminate any trace of discrimination, such as sexist language, in all legislation, including the Political Constitution. (CNGRJ, 2011).

In November 2011, the CNGRJ published the document “Constitutional Justice, Women and Gender”, which emphasizes what it means to give women a voice in judicial proceedings. Later, in June 2012, it published the document called “Gender Equality Policy in the Judicial Branch”, which, in addition to containing the text of Agreement No. 4552 of February 20, 2008, regulating said policy, includes its background, the progress and achievements that had been reached to date.

Another document, which is part of the prolific literature published by the multi-cited CNGRJ, is entitled “Violence and discrimination against women” which includes the presentation “Fully capable women, challenges to gender equality in the 21st century” by Judge María Victoria Calle (2014) in which she presents a reflection on the reality of women and the challenges to be overcome in the present century in terms of gender equality and female empowerment.

Along the same lines, there is the document called “Checklist. Virtual support tool for the identification and incorporation of the gender perspective from the differential approach of sentences” (2018) that offers guidelines for the interpretation and identification of cases in which the gender perspective must be included based on a model consisting of three parts: first: references/inputs within which are the regulations both internal and international, the jurisprudence and the guiding documents. Second: case management, at this point the case is identified from a gender and differential approach and the guiding criteria related to the procedure and the judicial decision are provided. And, finally, the result is issued, that is, the sentence with a gender and differential approach.

The aforementioned checklist proposes the evaluation of cases in which this perspective has been applied in order to identify improvement actions for similar cases that are known. Continuing with its training plan on the right to equality and non-discrimination, the CNGRJ published in the module “Gender and Rights” that it has two guides, one aimed at judges as students and the other for facilitators. Both are intended to help identify when one is faced with a case that requires incorporating the gender perspective and how to use the checklist. (CNGRJ, n.d.).

In 2018, the CNGRJ published the document “Construction of gender justice in Colombia: the influence of stereotypes”, through which it answers questions such as: What is gender discrimination? What does it mean to judge with a gender perspective and why judge with a gender perspective? While providing an explanation regarding the influence of gender stereotypes on judicial decisions.

Then, in 2019, the Rodrigo Lara Bonilla Judicial School published the text “Tools for the application of the gender approach in the administration of justice”, a study authored by Isabel Cristina Jaramillo Sierra and Ana Lucia Jaramillo Sierra, which has as its general objective “to explain what it means to apply the gender approach to a judicial decision and why said approach is relevant given the existing inequalities and the contemporary understanding of the law”, thus proposing a methodology for its application. (Jaramillo and Jaramillo 2019).

In 2020, the document called “didactic material of the Gender Jurisprudence tool of the High Courts of Colombia” was presented, which, as its name indicates, in a graphic and didactic way explains to the personnel that make up the judiciary, how to use the available tools to facilitate the inclusion of the gender perspective, while insisting on answering questions about why its incorporation is necessary and how to achieve it. It also reviews the inter-American regulations and jurisprudence related to this topic (Palacio, et. al, 2020).

According to the jurisprudence of both the Constitution and the other Colombian high courts, judging with a gender perspective is an obligation for those who administer justice, that is, for judges of the Republic, derived from norms of international human rights law, such as CEDAW and Belem Do Pará, among others, ratified by Colombia, and also from constitutional norms that enshrine equality as a value, principle and right and a robust legal body exists in the country on the matter. Well, this is how the Colombian Constitutional Court has understood it:

Incorporating the gender perspective or approach in the administration of justice means, then, making effective the right to equality of women in response to the constitutional, conventional and legal

obligation to combat discrimination through jurisdictional work to guarantee their access to the justice system and remedy, in a specific case, asymmetric situations of power, which requires, in turn, an exercise of deconstruction of the way of interpreting and applying the law. (Constitutional Court, Judgment T 344/2020)

In this regard, the Supreme Court of Justice has stated that, for this corporation, “judging with a “gender perspective” means receiving the case and analyzing whether it reveals situations of discrimination between the subjects of the process or asymmetries that force the evidence to be clarified and assessed differently in order to break this inequality” (CSJ Civil Cassation Chamber, STC2287°, 2018).

Constitutional Jurisprudence with a Gender Perspective

The Constitutional Court has issued several rulings since 1992 related to the right to equality and non-discrimination, to live free of violence and women's access to justice. Below is a list of the most representative ones.

Ruling T 494 of 1992 recognized the domestic work of a permanent partner as a contribution to society.

Ruling T 026 of 1994 protected the rights of a career administrative employee who was retired because his work in various services was to be performed by a woman. This ruling analyzed labor discrimination based on sex.

Ruling C 408 of 1996, through which the constitutionality of Law 248 of 1995, which approved the Convention of Belém Do Pará, was examined.

Judgment C 622 of 1997, which declared unconstitutional the norm that prohibited night work for women.

Judgment C 082 of 1999, which declared unconstitutional numeral 7 of article 140 of the civil code, related to marriage between an adulterous woman and her accomplice, indicating that the aforementioned norm discriminated against women and therefore violated the principle of equality and non-discrimination.

Judgment C-112 of 2000, declared an article of the civil code related to the celebration of marriage in the woman's place of domicile, considering that it violated the right to equality between the sexes.

Judgment C 371 of 2000, which carried out the constitutionality trial of Law 581 of that year, better known as the Quota Law, related to the participation of women in the different decision-making levels of public administration.

Judgment T 530 of 2002, dealt with a matter related to equality and the discriminatory treatment of a woman due to her gender.

Judgment C 507 of 2004, declared unconstitutional the provision of the civil code that allowed a 12-year-old woman to marry, considering that it ignores the minimum protection to which she is entitled, as well as the right to equality.

Judgment C 101 of 2005, declared unconstitutional article 1134 of the Civil Code, considering that it perpetuated the condition of inferiority of women compared to men.

Sentences related to the right to live free from violence and the duty of protection of the authorities in the context of domestic violence.

Sentence T 027 of 2017. It was considered that, in cases of domestic violence, mutual aggression between partners must be analyzed from the context of structural violence against women, since the stereotype of the weak woman who does not defend herself is a manifestation of discrimination and, therefore, the defense of the assaulted woman cannot be an excuse for the State to take adequate and effective measures to guarantee her a life free of violence.

Sentence T 735 of 2017. Case of institutional violence, due to actions and omissions of both administrative and judicial authorities, in a case of gender violence against a woman who went to them seeking protection. In this ruling, the Constitutional Court warned that administrative and judicial officials who deal with cases of violence against women must ensure that their decisions are not based on gender stereotypes.

Sentence T 015 of 2018. This is a case of domestic violence. The authorities (family police station and family court) who heard the case assessed the

evidence without taking into account the gender perspective.

Sentence T 311 of 2018. The plaintiff is a woman who had requested protective measures for domestic violence, but the authorities did not provide timely protection to her. Thus, the Constitutional Court has ruled on the judicial, police and administrative measures that must be taken to overcome violence against women within the family

Judgment T 338 of 2018, deals with a matter of domestic violence of a psychological nature in which a family court issued a ruling against her, with arguments that, in the opinion of the Constitutional Court, contribute to perpetuating violence and discrimination against women and to making domestic and psychological violence invisible, for which reason, in addition to protecting the rights of the plaintiff, it orders the Superior Council of the Judiciary to require the mandatory attendance of all family court judges throughout the country to attend gender training.

Judgment T 462 of 2018. It refers to institutional violence in the case of a woman who was a victim of psychological violence by her ex-partner, and to whom the competent authorities did not provide effective protection by not assessing the evidence from a gender perspective.

Judgment T 093 of 2019. This is a case in which a judge orders the restitution of rented property and its corresponding eviction without considering that the defendant opposed it, arguing the existence of a de facto marital union. The Court reiterated the obligation to administer justice with a gender perspective.

Thus, in judgment T 967 of 2014, the Constitutional Court warned that, as a general rule, the gender perspective is only applied in judicial proceedings, when the physical integrity and/or life of women is at serious risk, that is, in criminal matters. Therefore, it questions the preventive and protective role of civil law and family law, to prevent disputes between people from reaching criminal proceedings. And it adds that in civil and family matters, the gender perspective should also guide the actions of justice operators. Especially considering that these jurisdictions are governed by the principles of equality of arms, autonomy of will, requested justice, procedural rigidity and evidentiary

formalism, giving great importance to procedural truth, above, many times, notes this high court, structurally unequal factual realities. (Constitutional Court, Judgment T 967/2014, 2014).

In the dispositive part of this ruling, the Constitutional Court urged Congress and the President of the Republic to take action to reconfigure the discriminatory cultural patterns and gender stereotypes present among justice operators in Colombia. It also requested the Superior Council of the Judiciary to require all judges in the family jurisdiction to attend mandatory gender training at the Rodrigo Lara Bonilla Judicial School and to take this ruling into account so that in the future they would apply a differential gender approach when deciding any matter under their charge. (Constitutional Court, Judgment T 967/2014, 2014).

Despite the existence of the aforementioned orders, the highest constitutional court has subsequently had to rule on cases in which trial judges have overlooked the incorporation of the gender perspective in their decisions. For example, in Sentence T 012 of 2016, in which it recognized that women victims of gender violence who come to the courts are often re-victimized, since the response is not only not what was expected, but is fueled by social stigmas that promote discrimination and violence against them. Identifying two reasons: the first is the “naturalization” of violence against women, ignoring the application of gender approaches in the reading and resolution of cases. The second, due to the reproduction of stereotypes. In this line of thought, the Constitutional Court considers that the gender perspective allows to correct the traditional vision of law according to which in certain circumstances the legal consequences can generate oppression and detriment of women's rights, hence, it affirms that it is a constitutional duty to interpret the facts, evidence and the legal system based on differential gender approaches and in this way give content to constitutional article 13 (Constitutional Court of Colombia, T 012/16, 2016), for the fulfillment of this purpose it provides some guidelines:

At the very least, they must: (i) deploy all investigative activity in order to guarantee the disputed rights and the dignity of women; (ii) analyze the facts, evidence and norms based on systematic interpretations

of reality, so that in this hermeneutical exercise it is recognized that women have been a traditionally discriminated group and as such, differential treatment is justified; (iii) not make decisions based on gender stereotypes; (iv) avoid re-victimization of women when carrying out their duties; recognize the differences between men and women; (v) make the burden of proof more flexible in cases of violence or discrimination, favoring indications over direct evidence when the latter is insufficient; (vi) consider the transformative or perpetuating role of judicial decisions; (vii) carry out a strict analysis of the actions of the person who allegedly commits the violence; (viii) evaluate the real possibilities and resources for access to judicial proceedings; (ix) analyze the power relations that affect the dignity and autonomy of women. (Constitutional Court, T 012/16, 2016).

However, the incorporation of the gender perspective continues to be a challenge for those who administer justice. Indeed, as an example of this, in Judgment T 462 of 2018, the Constitutional Court upheld the fundamental rights of access to justice, due process and a life free of violence for a woman and her child, because in its opinion the trial family judge in his decision gave precedence to the family-oriented approach and not to the gender approach. (Constitutional Court, T 462/18, 2018).

On the other hand, in judgment 093 of 2019, the Court established three criteria in terms of evidence, which civil judges must take into account every time they hear cases where a type of gender violence against a woman may be involved. The first, which it called "systematic evidentiary analysis" translates into the judicial duty to deploy all possible evidentiary activity, even *ex officio*, to corroborate the factual assumptions of the case. The second is reasonable doubt, according to which the judge must deploy all possible evidentiary activity, in order to achieve clarification, with complete certainty, of the existence or not of gender violence, before making a decision. And the third criterion, which he called "respect for competences" according to which an ordinary civil judge has no competence to declare the existence of violence against a woman nor to

determine the configuration of a punishable conduct, therefore, he must make a decision within his competence, such as rejecting the claim and referring it to whoever he considers competent, given that it is the family and criminal judges who have those powers (Constitutional Court, Sentence T 093/19, 2019).

Later, in Sentence T 368 of 2020, the Constitutional Court decided to protect the right to due process of an adolescent to whom a family court decided to revoke a protection measure imposed by a family police station, in her favor, within a proceeding for domestic violence, arguing that it was admitted late and that there was no evidence that the aggressions inflicted on the minor were continuous. For the highest court, the family judicial authority failed to comply with the obligations of protection and guarantee against the protection of women from any form of violence against them. (Constitutional Court, Judgment T368/2020, 2020).

In an unprecedented ruling in 2020, through Judgment SU 080, the Court indicated that analyzing specific cases where women victims of violence are involved from a gender perspective did not imply a biased action by the judge in favor of them, and that on the contrary, it required the impartiality and independence of the judge, meaning that his judgment does not perpetuate discriminatory gender stereotypes, and that using both the sources of international human rights law and domestic law, he should seek the most favorable interpretation for the female victim, in its words, construct a pro-female interpretation.

Precisely based on the above, it decided to protect the rights to live free of domestic violence, to have the woman compensated and not to be re-victimized by a woman who had suffered domestic violence of a psychological nature and who requested alimony as a form of reparation for the damages suffered. On that occasion, the Court recognized that there was a lack of protection given that the norms that regulate the divorce process and the cessation of civil effects of Catholic marriage did not contemplate clear, fair and adequate mechanisms that guaranteed effective access to reparation, for which reason it requested the trial judge to order in this matter, the opening of an incident of comprehensive reparation in which the damages suffered by the woman victim of domestic violence are specified and assessed.

In this same ruling, the Court urged the Congress of the Republic to regulate the fundamental right to access comprehensive reparation in cases of domestic violence, through a judicial mechanism that respects due process, reasonable time and non-re-victimization. (Constitutional Court, SU 080/20, 2020).

Thus, the Constitutional Court has repeatedly recognized that this perspective is still unknown in the administration of justice. Indeed, in judgment 016 of 2022, it warned of the need to do training work so that those who administer justice integrate women's rights, for which it demanded the attendance of judicial authorities to training courses on the subject, and insisted on the need to promote the creation of new interpretative frameworks with a gender perspective in order to reconfigure discriminatory cultural patterns and gender stereotypes (Constitutional Court, Judgment T 016/22, 2022).

4. Discussion

The different strands of feminism agree that gender, as a category of analysis, allows us to unravel the androcentric nature of law. This critical perspective highlights the need to recognize the ways in which legal and regulatory structures have traditionally been configured from a masculine point of view, thus marginalizing not only the experiences of women, but also those of other gender identities. As Torres (2018) points out, it is imperative to continue promoting the integration of the gender approach as an essential category of legal analysis, but more importantly, to consolidate it as a key mechanism to guarantee women's rights in a legal framework that often remains hostile or indifferent to their demands.

This approach is not merely academic; it has practical implications that must be considered in the administration of justice. In Colombia, academia has become aware of this need and has dedicated itself to carrying out studies that address the complexities of justice from a gender perspective. A significant example is Guzmán's study (2011), which begins with the premise that in order to achieve a truly democratic and inclusive society, it is essential that women's experiences be integrated into the dynamics of transitional justice. This implies recognizing that women are not only victims of violence, but also agents of change in the process of peacebuilding and reconciliation.

The Peace Agreement signed between the Colombian government and the FARC in 2016 was a milestone in this regard, as it included the gender approach as a fundamental principle. This commitment resulted in the incorporation of gender into the mechanisms of the transitional justice system. The Special Jurisdiction for Peace (JEP), which was created as part of this agreement, has sought to lay the foundations for a justice system that not only sheds light on the violations that occurred during the conflict, but does so from a framework that recognizes and addresses gender inequalities. In this context, the publication in 2020 of the book "The JEP as seen by its judges" is crucial, as it reflects on the first year of operation of the JEP and its effort to implement the gender approach in its actions.

One of the most representative essays within this work, entitled "The advances and challenges of the implementation of the gender approach in the Special Jurisdiction for Peace", highlights the actions carried out to put this approach into practice. Among the measures adopted, the formation of a Gender Commission with specific functions stands out, whose fundamental objective is to recognize and transform the unequal power relations that have historically subordinated women and the LGBTI population. Such a transformation is crucial, given that the perpetuation of these hierarchies produces an environment of discrimination and violence, which in turn conditions the guarantee and effective enjoyment of human rights.

However, the analyses and jurisprudential results derived from the rulings of the Constitutional Court reveal a double reality. On the one hand, the leading role of this court in the promotion and protection of women's rights is recognized. On the other hand, there is significant resistance on the part of many judges who, despite the methodologies established by the National Gender Commission and the Rodrigo Lara Bonilla Judicial School, continue to ignore the historical and contextual conditions that generate inequalities towards women. This lack of recognition perpetuates not only inequality, but also gender violence in the legal and practical spheres.

This situation poses serious challenges for the effective implementation of the gender approach in the justice system. Continuous training and awareness of justice operators are imperative to ensure that knowledge and awareness of gender

inequalities are translated into judicial practices that truly respect and protect the rights of all people, regardless of their gender. The fight for equality in the legal sphere is not only a matter of social justice, but is also essential to guarantee a lasting and sustainable peace in Colombia.

5. Conclusions

Historical evidence shows that male power has permeated the entire structure of society, becoming a structure of domination in all areas of life. This has been maintained thanks to institutions such as the family, education, religion and law, which, through discourses, practices, social and legal norms, have imposed and perpetuated the dominant position of men along with everything masculine, at the cost of the oppression and subordination of everything considered feminine. Consequently, the lack of power and authority of women, or the asymmetries of power between men and women are the cause of the inequalities and violence that they experience.

In Colombia, with the issuance of the Political Constitution in 1991, the State was established as social, constitutional and democratic under the rule of law. This form of social and political organization enshrines equality as a value, principle and fundamental right. Since then, institutional transformations have occurred, a significant number of laws and decrees have been issued, others have been repealed and declared unconstitutional. Public policies have also been designed to ensure the effective enjoyment of women's human rights, especially equality and a life free of violence, as well as to eradicate practices, stereotypes and cultural norms based on gender.

The gender perspective, view or approach is a critical tool that seeks to challenge and transform historically unequal power relations between men and women. From here, gender equality and the eradication of gender-based violence and discrimination are promoted and fought for. To this extent, the entire society is responsible for applying this approach and, even more so, state authorities.

In harmony with the above, judging with a gender perspective is a duty of those who administer justice, which arises from the international treaties on women's human rights ratified by Colombia, constitutional norms and constitutional jurisprudence. However, the judges of the Republic of Colombia have not managed to adequately

incorporate this approach in their decisions. This has led the highest constitutional court in this country to repeatedly speak out, drawing attention to the issue, because, as expressed in Judgment 016 of 2022, "although this Court has issued similar orders in other decisions, there is still guidance work to be done so that the judges of the Republic assume the comprehensive protection of women's rights" (Constitutional Court, Judgment T 016/22, 2022).

Thus, it is worth highlighting the fundamental role of the Colombian Constitutional Court in the transformation not only of an androcentric and patriarchal legal system into an increasingly egalitarian and fair one; but also in the practice of institutions, since through its decisions it has protected the human rights of women and with its orders it has influenced transformations in institutions and society in general.

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References

- [1] Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore et dolore magna aliqua.
- [2] Ipsum dolor sit amet consectetur adipiscing elit pellentesque. Orci eu lobortis elementum nibh. Faucibus a pellentesque sit amet porttitor.
- [3] Arendt, H. (1958). **La condición humana** (pp. 37-95).
- [4] Beauvoir, S. (1949). **El segundo sexo** (Edición en español). Debolsillo.
- [5] Blázquez, N., et al. (2010). **Investigación feminista: Epistemología, metodología y representaciones sociales**. UNAM.
- [6] Calle Correa, M. V. (2011). **Justicia constitucional, mujeres y género**. Comisión Nacional de Género de la Rama Judicial.
- [7] Cobo, R. (1995). La democracia moderna y la exclusión de las mujeres. **Revista Mientras Tanto**, (62), 107-119.
https://cv.uoc.edu/mat/03_001/da14.htm

- [8] Comesaña, G. M. (2006). La violencia contra las mujeres como mal radical. *Revista Venezolana de Estudios de la Mujer*, 3(1). https://ve.scielo.org/scielo.php?script=sci_artext&pid=S1316-37012006000100002
- [9] Constitución Política de Colombia, Art. 1, 5, 13, 40, 42, 43, 53, 93, 94. (1991, 7 de julio).
- [10] Convención para la eliminación de todas las formas de discriminación contra la mujer. (1979, 18 de diciembre).
- [11] Convención para prevenir, sancionar y erradicar la violencia contra la mujer. (1994, 9 de junio).
- [12] Corte Constitucional. (2014, 15 de diciembre). Sentencia T-967/14 (Gloria Stella Ortiz Delgado, M.P.).
- [13] Corte Constitucional. (2016, 22 de enero). Sentencia T-012/16 (Luis Ernesto Vargas Silva, M.P.).
- [14] Corte Constitucional. (2018, 3 de diciembre). Sentencia T-462/18 (Antonio José Lizarazo Ocampo, M.P.).
- [15] Corte Constitucional. (2019, 5 de marzo). Sentencia T-093/19 (Alberto Rojas Ríos, M.P.).
- [16] Corte Constitucional. (2020, 31 de agosto). Sentencia T-368/20 (Diana Fajardo Rivera).
- [17] Corte Constitucional. (2020, 25 de febrero). Sentencia SU 080/20 (José Fernando Reyes Cuartas).
- [18] Corte Constitucional [CC]. (2020, 21 de agosto). Sentencia 344/20 (M.P.: L. G. Guerrero). Obtenido el 15 de julio de 2023. <https://www.corteconstitucional.gov.co/relatoria/2020/T-344-20.htm>
- [19] Corte Constitucional. (2022, 24 de enero). Sentencia T-016/22 (Gloria Stella Ortiz Delgado)
- [20] Facio, A., & Fries, L. (2005). Feminismo, género y patriarcado. *Revista Academia*, (3), 6.
- [21] Guzmán Rodríguez, D. E. (2011). *Justicia transicional y género: Un acercamiento desde las mujeres* [Tesis de maestría, Universidad Nacional de Colombia].
- [22] Jaramillo Sierra, C., & Jaramillo Sierra, A. L. (2019). *Herramientas para la aplicación del enfoque de género en la Administración de Justicia*. Consejo Superior de la Judicatura.
- [23] Lagarde, M. (1997). *Género y feminismo: Desarrollo humano y democracia* (2a ed.). Grafistaff.
- Nash, M., & Muñoz, M. (n.d.). El Estado como constructo masculino: España 1808-1837. https://www.academia.edu/3611439/El_Estado_como_constructo_masculino
- [24] Nash, M. (2004). *Mujeres en el mundo: Historias, retos y movimientos*. Alianza Editorial.
- [25] Palacio Puerta, M. A., Boisvert-Chastenay, I., Rojas Moreno, M., Chaparro Moreno, L. R., Mora, K. E., & Rodríguez Peña, V. (2020). *Material didáctico de la herramienta de jurisprudencia de género de las altas cortes*. Comisión Nacional de Género, Consejo Superior de la Judicatura.
- [26] Puyana, Y. (2007). El familismo: Una crítica desde la perspectiva de género y el feminismo. En Y. Puyana & M. H. Ramírez (Eds.), *Familias: Cambios y estrategias* (pp. 263-277). Universidad Nacional de Colombia.