

**COMMITTEE ON THE ELIMINATION OF DISCRIMINATION
AGAINST WOMEN
GENERAL DISCUSSION ON "ACCESS TO JUSTICE"
CORPORACIÓN HUMANAS' WRITTEN SUBMISSION
-FEBRUARY, 2013-**

CORPORACIÓN HUMANAS – CENTRO REGIONAL DE DERECHOS HUMANOS Y JUSTICIA DE GÉNERO is a center devoted to feminist research and political action. Its mission is to promote and defend women's human rights and gender justice in Chile and Latin America¹.

Introductory Lines

In Latin America women face a condition of inequality due to: high maternal and child mortality rates, unequal access to health care, poor education quality, discrimination and violence against rural and indigenous women. Issues which are still present even when related laws have been introduced in regional legislation in order to correct or eliminate those practices².

Access to justice is a fundamental right and a pillar for any democratic state³, it should ensure accessible and appropriate legal remedies to citizens for settling their legal conflicts and attaining a fair and impartial judgment⁴.

First of all, access to justice involves the possibility to *access* the legal system being represented by an attorney. Secondly, it means *obtaining a fair judicial decision within a reasonable time*⁵. And finally, access to justice implies the *possibility to maintain the entire process*,

¹ In 2009 Corporación Humanas was granted consultative status by ECOSOC-UN.

² Articulación Regional Feminista, 2011, Informe preparado para el 144° período de sesiones de la Comisión Interamericana de Derechos Humanos "Avances y desafíos en el acceso a la justicia para las mujeres en las Américas"

³ INDH, 2011, [Informe Anual 2011 Situación de los Derechos Humanos en Chile](#). Pag. 85

⁴ INDH, 2011, Informe Anual 2011 Situación de los Derechos Humanos en Chile. Pag. 85

⁵ Articulación Regional Feminista, 2011, Informe preparado para el 144° período de sesiones de la Comisión Interamericana de Derechos Humanos "Avances y desafíos en el acceso a la justicia para las mujeres en las Américas"

which means that people involved should not be forced to abandon a legal action sometime during the process for reasons beyond their control⁶.

Due to the importance of access to justice in relation to protection of rights States are obliged to ensure its full applicability, especially among the most vulnerable population groups, who have limited access to justice due to social, cultural, economic, and language barriers.

As occurs with the part of the population living below the poverty line, women are facing difficulties when resorting to courts due to their domestic and familiar duties; people with precarious working conditions lose a whole paid workday for having to attend to court; people with a disability condition or financial difficulties are having problems for attending to court, among other issues⁷.

As a result of the above, Chilean authorities have established courts in several parts of the country. In addition, there are translators for indigenous peoples, quality legal counseling for those who are not able to afford a lawyer, legal or judicial information written or delivered in a simple and complete way, among other improvements. Likewise, the role that courts play is vital, and because of that judges should pay special attention to cases involving groups systematically discriminated, for preventing the violation of their rights⁸.

However, when it comes to ensure the free access to justice, we are not only referring to the benefit of free litigation such as court fees and costs of expert witnesses, but also to implied transportation costs and daily wage loss that could affect those people in search of a due process⁹. Therefore, it is necessary that the State is compelled to institute all the required conditions for accessing justice, especially those stipulated in international treaties on human rights¹⁰, that contemplate the States obligation of establishing effective guardianship mechanisms for protecting the fundamental rights of all citizens, without existing gender, ethnical or social discrimination¹¹.

The CEDAW stipulates that all States must condemn discrimination against women in all its forms, and “establish legal protection of the rights of women on an equal basis with

⁶ Articulación Regional Feminista, 2011, Informe preparado para el 144° período de sesiones de la Comisión Interamericana de Derechos Humanos “Avances y desafíos en el acceso a la justicia para las mujeres en las Américas”

⁷ Articulación Regional Feminista, 2011, [Informe Regional de Derechos Humanos y Justicia de Género](#)

⁸ INDH, 2011, Informe Anual 2011 Situación de los Derechos Humanos en Chile. pag.85

⁹ Articulación Regional Feminista, 2011, Informe Regional de Derechos Humanos y Justicia de Género

¹⁰ INDH, 2011, Informe Anual 2011 Situación de los Derechos Humanos en Chile. pag. 86

¹¹ INDH, 2011, Informe Anual 2011 Situación de los Derechos Humanos en Chile. Pag. 91

men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination” (Art. 2 c.). On the other hand, the Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará) establishes the right to equal protection before the law and of the law (Art. 4 f.), and “the right to simple and prompt recourse to a competent court for protection against acts that violate her rights” (Art. 4 g.)¹².

Nevertheless, access to justice is nowadays one of the main issues related to the protection of the human rights of women. Chile has not ratified the CEDAW’s Enforcing Protocol yet, and it is not perceived any political will by the Government or the National Congress intended for such ratification. Therefore, Chilean women are impeded to access this international instance in case that their rights are not appropriately protected at national level¹³.

Violence against Women

Regarding violence against women, the lack of a unified national registry on violence against women and femicide affects the access to justice for women in Chile. The absence of a unified national registry prevents knowing specific information about the rates of violence and femicide in the country, and also which are the causes, significant factors and main expressions of these events¹⁴. Although this obligation has been established in both international and domestic instruments, there is clearly a lack of awareness regarding it.

The lack of deepening in understanding and the fragmentation in the treatment of the phenomenon of violence is clearly evident from a legal approach, by putting the emphasis on the physical consequences of abuse. Thus, a situation of domestic violence is known by different magistrates, depending on the consequences of abuse. In the case of psychological violence, it will be reviewed based on family, as well as physical violence that leaves no evidence. Therefore, a situation of domestic violence will be heard by different magistrates, depending on the consequences of abuse. In the case of psychological violence, it will be reviewed in family court, as well as physical violence that leaves no evidence. On the other hand, the physical violence that leaves marks, will be heard by criminal courts, but not as gender-based violence, but by the specific crime that accounts, which runs from the wide range of bodily injuries, some sexual offenses, up to femicide. Despite the attempts for broadening its range of protection by filing several parliamentary motions, the law still only considers as subjects of protection those considered as *family*, leaving outside the rule of law those relationships without cohabitation known as "pololeos" and some kinship relationships.

¹² INDH, 2011, Informe Anual 2011 Situación de los Derechos Humanos en Chile. Pag. 123

¹³ Articulación Regional Feminista, 2011, Informe Regional de Derechos Humanos y Justicia de Género

¹⁴ Articulación Regional Feminista, 2011, Informe Regional de Derechos Humanos y Justicia de Género

The national legislation related to the phenomenon of violence against women (Law No. 20,066 on Domestic Violence) still shows weak points in its implementation. Reiteration is the element that determines the competence of criminal courts or the new family courts in this matter. However, the latter are who initially hear these cases and determine whether there is or not reiteration. When this does not exist, violence is indicative of an absence which in itself is opposed to the approach that has taken place in international law. In addition, the new proceedings of the family courts, currently collapsed in terms of human resources to meet the needs of its users—primarily women—summon them to resolution hearings, which in practice takes effect 30 days on average after the complaint, posing a problem of protection for victims suffering violence. The law prevents women from going directly to the Ministerio Público to report violence, which eventually is against the due process.

It is also important to demonstrate the **non-existence of institutional mechanisms for coordination between the two judiciaries** in charge of prosecuting these cases, as well as the negligible coverage of information and guidance public services for women on legal proceedings, which is further reduced when it comes to providing legal defense in court.

It has been observed that there is a sustained pattern of legal prosecution oriented to a conditional suspension of the proceeding and other alternative outlets which do not involve the imposition of a penalty. This fact is extremely alarming considering it perpetuates a practice that undermines penalty as part of a policy aimed at eradicating violence against women, resulting in a lack of protection for victims and impunity for crime perpetrators.

Discrimination and Stereotypes

Additionally, the CEDAW Committee has identified several forms of discrimination and violence that women are facing in Chile, whether on grounds of sexual orientation, gender identity, indigenous origin, or HIV positive condition. To the situation mentioned above we can add that those women who are legally indicted are also discriminated for their condition of being mothers. Recent studies commissioned by the Defensoría Penal Pública have shown that judges treat women more leniently, since they are considered as a "social good" in their role as caring mothers of children¹⁵. Indicted women should fit in this socially imposed role model in order to benefit from judicial system, which means the "good woman" model, a woman who is a mother, without criminal history, victim of a crime and a member of an ideal nuclear family. However, women who are far from these ideals and considered as "bad women" (i.e., women who have no children, have criminal

¹⁵ Articulación Regional Feminista, 2011, Informe Regional de Derechos Humanos y Justicia de Género

records, are aggressors or come from a dysfunctional or disintegrated family) are highly affected in the criminal justice system.

In Chile, there is high discrimination against women because of their low inclusion in the legal system. However, in recent years, it has been shown an increase in the inclusion of women in the judicial system. It is possible to observe a low representation of women in higher levels of the legal system, where the gap between men and women increases as the level of importance of the position increases as well, with only men being members of the highest courts. In this way, the Corte Suprema, the highest court of Chile, has never had a woman president in its history, and only a 23.81% of their magistrates are women, and in the Cortes de Apelaciones this increases slightly to 36.42%¹⁶. However, it is important to note that the concentration of women in courts is strikingly higher in Family Courts where 76.57% of judges are women, and in Labor Courts, where 100% of judges are women, which sharply contrasts to the 23.81% women representation in the Corte Suprema¹⁷. The Ministerio Público, in charge of the public criminal proceedings, maintains this inequality and further because only one is headed by a woman among the 18 regional prosecution offices. This also occurs within the Defensoría Penal Pública, where there is only one woman in this position¹⁸.

In addition, the poor training received by officials of the legal organs on women's human rights is alarming. The ignorance of the legal operators about international human rights and international standards on human rights of women is undoubtedly a barrier for women in order to get access to justice¹⁹. An actual access to justice for women implies that both male and female officers are trained and strengthened in terms of expertise on the application of international human rights instruments and specifically, on human rights of women, as well as on jurisprudence coming from international courts establishing clear guidelines for the treatment of these crimes²⁰.

Therefore, some of the essential problems that Chilean Government must address in order to meet the demands of justice are the low number of women holding positions of power in the legal system, the lack of knowledge and training on gender issues, in association with the weak points in legal proceedings²¹.

¹⁶ Articulación Regional Feminista, 2011, Informe preparado para el 144° período de sesiones de la Comisión Interamericana de Derechos Humanos “Avances y desafíos en el acceso a la justicia para las mujeres en las Américas”

¹⁷ Op. Cit

¹⁸ Op. Cit

¹⁹ Op. Cit.

²⁰ Articulación Regional Feminista, 2011, Informe preparado para el 144° período de sesiones de la Comisión Interamericana de Derechos Humanos “Avances y desafíos en el acceso a la justicia para las mujeres en las Américas”

²¹ INDH, 2011, Informe Anual 2011 Situación de los Derechos Humanos en Chile

Finally, in order to meet the demand for justice, the factors of major concern are the lack of knowledge and **training** on gender and human rights in key sectors of the legal system, and the problems in legal proceedings, in addition to its fragmented approach.

Institutional Violence against Women

On one hand, regarding **women victims of enforced disappearances, executions and sexual violence as torture during Chilean military dictatorship** (1973-1990), it is possible to say that there has not existed a gender-sensitive approach to crimes against humanity committed in Chile. There has been limited prosecution of cases involving torture survivors. In addition, the qualification process for victims and compensation given has not had a gender approach. The Valech Commission (committed to qualify victims of political imprisonment and torture) was active in two occasions for brief periods of time, and is currently closed.

On the other hand, it is possible to say that from 2011 to date several social movements have arisen, demanding legal and constitutional transformations. Unfortunately, due to the protests organized by these movements, the installation of a pattern of **sexual violence against women by law enforcement officers** has been confirmed, consisting of fondling, forced nudity, threats of rape, beatings in the vagina and breasts of the demonstrators, always along with sexual-related insults, which seriously violates the physical and mental integrity as well as the dignity of these women, with the aggravating circumstance that many of them are minors.

This pattern of sexual violence against women demonstrators has an additional serious and alarming element, since courts, when victims lodge complaints and/or disputes in the ordinary justice in order to prosecute the criminal liability of the perpetrators, have consistently recused themselves from these cases, because the perpetrators are police officers, sending them to military jurisdiction. The latter, according to the claims made by the Inter-American Court of Human Rights, does not comply with the guarantees of due process.

Indigenous Women

The indigenous women in Chile who try to access to justice are also confronted to adverse situations. As the international indigenous population standard norm does not apply or is implemented incorrectly by justice operators. On one hand it is also possible to notice that some decisions are taken based on stereotypes. Whereas on the other hand, the national legislation has not taken the international standard norm into consideration, the latter combined with an incorrect implementation of norm leaves the indigenous women in a state of vulnerability. Such is the case of Gabriela Blas, who was treated in an extremely

inappropriate way, as police officers and justice operators committed human rights violations against her.

In July 2007 the Aymara shepherdess, Gabriela Blas Blas, lost her three year old child, Domingo Eloy Blas, while carrying out her shepherdess duties having to return to look for two llamas that had been left behind. At the beginning the young shepherdess thought her son had returned home, as it was only 800 metres away. She looked for him there in the corral and in the surrounding areas calling out his name, but had no luck.

When it became dark, she stopped looking, as it was impossible to follow Domingo's track due to the lack of light and to the extremely low temperatures which could cause her death. The following day, she continued looking for her son, however she then decides to ask for help and walks up to a town called Alcerreca, located 17 km away from her home. There she decides to inform the police, however they blamed her for the death of her child.

During the following 7 days, Gabriela was illegally detained in several police premises in the high Andes plateau and in General Lagos province. In these places she declares to have been tortured and to have been victim of inhumane and degrading treatment.

After seven days of illegal detention, Gabriela is transferred to Arica, where she is detained and left in protective custody. This loss of liberty was extended for three years. The first five months of her imprisonment she was confined to isolation and treated as a parricide without been eligible to parole.

The protective custody to which Gabriela was confronted to is one of the longest ever to be know of in Chile. It lacked of reasonableness and proportionality, as it was Gabriela Blas who personally reported the situation. She was always at the disposition of the authorities, she never had the intention to escape or to avoid legal action.

After two oral trails, in which the first one was nullified due to infringements of judicial guarantees decreed by Arica's court of Appeal and in the circumstances in which the body of the minor was found: without life and without traces to show that his death was caused by a third party. Gabriela was sentenced to twelve years of imprisonment for committing the crime of abandonment resulting in death of the child. The sentence was based on an urban and occidental vision of how a mother should act, however, Gabriela's Aymara background was not taken into consideration.

Gabriela was confronted to a double vulnerability situation: one for being indigenous and the other for being a women. Gabriela had to affront a situation in which she lacked access to justice, a common situation for indigenous women in the country when encountered with the legal system (administrative and judicial). Which does not take into account the specific social cultural conditions of their ethnic group. It is also important to

note that the system has been unable to revert a historical model repleted with discrimination.

Gabriela Blas was victim of several fundamental rights violation, such as the right to physic and psychic integrity and freedom and personal security. She was also deprived to the presumption of innocence during all the penal process.

The actions of the police force against the indigenous population are extremely violent. The state has responded with criminalization policies when the indigenous groups have claimed their territory back. Throughout the years, police violence persists, political repressions and violent unlawful entries to the Mapuche community continue to happen, causing damage to women and men of all ages.

Another disturbing situation with respect to indigenous women's access to justice, is the application of reparation agreement in domestic violence (even though there is a legal prohibition to apply alternative exits in case of domestic violence). As requested by the Penal Ombudsman, and with regard to the Articles 9 and 10 of the Convention 169 of the OIT, penal tribunals have accepted the reparatory agreements between victims and imputed, and discontinued the causes and decisions that have been confirmed by the highest courts. It is alarming that those sentences have not been based on the ancient customs of the Mapuche population and have been dictated by violating the international standard norm of women's human rights, that forbids impunity for those types of crimes.

The indigenous groups in Chile are object of different forms of discrimination due to their ethnical background. One of the reasons why these groups are confronted to such high levels of discrimination is because of their political exclusion. As their is no indigenous representatives in the National Congress and they are under-represented in the regional or communal government. The indigenous groups are also under-represented in other stages of the public political power in Chile, such as the executive, judicial and armed forces ²².

Discrimination against women in law

In Chile, women suffer the highest levels of discrimination in matters of social security and health through Pension Funds Administration, where women are heavily sanctioned for having higher life expectancy and lower wages than men. Therefore, when they retire they are 60 years old and receive a pension three times lower than a man who has worked the same amount of time receiving the same salary. In the cases of Isapres (private medical insurance companies) women must pay a much more expensive health plan than men, as they live longer and during their lives they have a long fertile period which may cause a

²² Corporación Humanas, 2012, Observaciones finales del Comité para la Eliminación de la Discriminación contra la Mujer. Chile

high increase to health provider companies. Therefore, women must pay higher health insurance than men, even though they receive a lower salary²³.

In matters of assets regime, even though different international organisms including the CEDAW have strongly criticized the action of the Chilean government, as women are still highly discriminated. Specially those living in a conjugal society, as the legislation establishes that this is a supplementary legislation which is applied due to the lack of other agreements. It also states that the husband is the head of the family and has the legal right to be the only owner and manager of the assets of the union. Therefore, it deprives women to administer her own assets just for the fact of being a women. Since 1995 there has been a legal reform disputed which intends to provide equal rights to men and women with respect to their matrimonial assets, however, this reform has not succeeded. In April 2011 the President drew up a new proposal that would change the main discriminatory matters in force. However, by not accepting the legal reform and by not establishing a co-administration regulation, women will continue to be subordinated by their husband's authority. The situation will be even more aggravated by the new proposal as it gives the husband the possibility to be able to have reserved assets aside of his social assets, leaving the women in a more vulnerable situation.

Women in Chile are also discriminated by the legislation as it only recognizes and protects women that have established a caring and loving relationship through marriage. The lack of recognition and protection is aggravated in same sex unions, as the Chilean norm does not offer any legal protection to these types of unions, increasing the discriminatory situation. Even against the jurisprudence of the Inter-American Court of Human Rights with respect to the family protection (Case of Karen Atala against the State of Chile) the legislative proposals with respect to egalitarian matrimony drew up by congressmen have not been debated, neither has the presidential project of August 2011, with respect Cohabitation agreement, which would regulate personal and joint assets of same sex and different sex unions, however without recognizing their civil status.

Even though the Comity observes that the new anti discrimination legislation forbids discrimination based on gender, gender identity and sexual orientation, it still worries them that the State has failed to incorporate in their legislation a broad definition of female discrimination in accordance with Article 1 of the Convention, and with the principle of equality between men and women in accordance with Article 2 (a). Furthermore the Comity has also observed that even though the Convention uses the concept of equality, the terms equality and equity used in the plans of the State may be interpreted as synonyms²⁴.

²³ Corporación Humanas, 2012, Observaciones finales del Comité para la Eliminación de la Discriminación contra la Mujer. Chile

²⁴ Corporación Humanas et al, 2012, Resumen Ejecutivo Informe Alternativo para el Examen del Estado de Chile ante el Comité CEDAW en su 53º sesión

In order to reduce the high discrimination rates to which Chilean women are victims, a national organism was created. Whose main mission is to design, propose and coordinate policies, plans and legal reforms working together with ministries and services leading to guarantee and make visible equal rights and opportunities between men and women. In order to accomplish this objective the National Service of Women (SERNAM), works together with several ministries and services of the nation. They focus on different areas intending to promote and incorporate gender equality in the public sector ²⁵.

Some of the services that the organism provides to women are, legal representation and advice to participants of Women Centres and Shelters, who must be adults and victims of domestic violence. In 2011 9652 women were sponsored, from which 2971 cases constituted a crime. Between 2009 and 2011 there was a 43.8% increase of sponsored cases, the highest increase was observed in cases of domestic violence. It is important to state that the cases admitted by the Family Law Tribunal regulated by Law N° 20.066, are related only with physical and psychological violence in a matrimony or cohabitation, however it does not include situations of violence that could be present in other types of relationships ²⁶.

²⁵ Articulación Regional Feminista, 2011

²⁶ Articulación Regional Feminista, 2011, informe alternativo 2012