

AN APPROACH TO FEMINISMS, HUMAN RIGHTS AND THE *ALYNE DECISION*\*

ARTICLE

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IN THE INTERNATIONAL FORUM, THERE IS A NEED TO EXPRESS IN PLURAL. FOR example, when addressing the topic of law and international rights, we must speak about human rights in its plural form. Moreover, when discussing women’s rights, it is inevitable to address the topic on *feminisms* because there is also more than one type. The different feminist legal theories vary on how they approach women’s concerns in the human rights forum. Some have been more thorough and successful in advancing women rights as human rights, while others have flourished more with respect to their criticism and need of a universal approach.

Within the next pages, I will generally discuss the development of human rights and its three generations. In addition, I will introduce some strands of feminist legal theories and some of its influences on Human Rights Law. To achieve this goal, attention will be paid to the *three big feminisms* and the *newer feminisms*. Finally, I will discuss what is internationally known as *The Alyne Decision* and the main concern with the employment of the women-gender binary in international human rights.

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## I. OVERVIEW ON HUMAN RIGHTS AND THE THREE GENERATIONS

What we concentrate on today as *Human Rights* is no new concept. Many ideas in human rights and in International Law find their genesis in theories of Natural Law, for example.<sup>1</sup> Moreover, principles such as the social contract, the separation of powers, and the sovereignty of people and nations have paved the way to massive mobilizations like the American and French revolutions.<sup>2</sup> In many instances, progressive theories of Law have emerged after times of conservative policies, social repression and armed conflict.<sup>3</sup> The concept of Human Rights represents an international attempt of setting a common ground for nations in order to bring peace and hope after World War II.<sup>4</sup> Such common ground was possible through the establishment of what is known as the International Bill of Rights.<sup>5</sup> Specifically, this tripartite scheme was possible thanks to the introduction of the Universal Declaration of Human Rights (UDHR),<sup>6</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>7</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>8</sup> This set of principles embodies the three different generations of human rights and the obligations imposed to states.

The first generation imposed *negative obligations*, which were characterized by rights that granted protections against arbitrary state intervention. These rights focused on the preservation of the autonomy of individuals.<sup>9</sup> The second generation, pioneered by the ICESCR, introduced state obligations and required special state intervention and an active role in order to guarantee rights such as health, housing, and education.<sup>10</sup> Finally, the third generation addressed collective rights also known as *the rights of peoples*.<sup>11</sup> Aspects such as self-

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<sup>1</sup> THOMAS AQUINAS, *SUMMA THEOLOGICA*, IN LLOYD'S INTRODUCTION TO JURISPRUDENCE 138 (M.D.A. Freeman ed., 8th ed. 2008).

<sup>2</sup> See HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 201-02 (2000).

<sup>3</sup> See Eduardo R. C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 *CLINICAL L. REV.* 109 (2009) (discussing the Civil Rights Movement in the United States and the welfare state initiatives introduced after the economic depression of 1929).

<sup>4</sup> CHARLESWORTH & CHINKIN, *supra* note 2, at 202.

<sup>5</sup> *Id.* at 202.

<sup>6</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (December 10, 1948).

<sup>7</sup> International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>8</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>9</sup> *Id.* at 203.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 204.

determination, development, and peace are included in the ICCPR as products of the third generation.

Human rights are prerogatives founded on human dignity and worth which contain elements such as interdependency, equality in value, and universality.<sup>12</sup> However, although these are inherent to our existence, such set of principles had to go beyond the tripartite scheme. Moreover, other statutes and principles had to be introduced in order to provide gender specific protection to women and correct language gaps present in previous measures. Examples of specific measures that address women's rights are the Convention of Belém do Pará,<sup>13</sup> the conventions dealing with trafficking, especially of women,<sup>14</sup> and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>15</sup> Although some of these principles have been categorized as *protective*, *corrective*, and *non-discriminatory*, the main focus of women rights protections has been the right to ensure the equal protection of women and the prohibition of sex-based discrimination.<sup>16</sup>

## II. SOME ENGAGEMENTS BETWEEN FEMINIST LEGAL THEORIES AND HUMAN RIGHTS

The task of pointing out a common ground among all feminist legal theories can be very difficult, if not at all impossible. Some might say that a cohesive element rests on the need to end discrimination and violence against women. Others may point out that all these theories and feminisms take into account the dichotomy between the public and private spheres and how this division guarantees or curtails women's rights. Elements like the need to eradicate patriarchy, the influence of androcentrism, and the debate between sameness and difference, also seem to be present. Nonetheless, according to Nicola Lacey, there are three key elements that shaped feminist legal theory: (1) analytical claim; (2)

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<sup>12</sup> *Preamble of the Universal Declaration of Human Rights*, UNITED NATIONS, <http://www.un.org/en/documents/udhr/> (last visited December 27, 2013).

<sup>13</sup> *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, DEPARTMENT OF INTERNATIONAL LAW, <http://www.oas.org/juridico/english/treaties/a-61.html> (last visited December 27, 2013) (establishing that women have the right to live a life free of violence and that violence against women amounts to a violation of human rights and fundamental freedoms).

<sup>14</sup> See Janet Halley *et al.*, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 338 (2006), <http://www.law.harvard.edu/students/orgs/jlg/vol292/halley.pdf>.

<sup>15</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, <http://www.un.org/womenwatch/daw/cedaw/> (last visited December 27, 2013) [hereinafter CEDAW].

<sup>16</sup> CHARLESWORTH & CHINKIN, *supra* note 2, at 213.

political ethical claim, and (3) methodology.<sup>17</sup> These elements question how law is shaped, its neutrality, to what extent it is reasonable, and what law should be. In this section, I will focus on what Chamallas has called the *three big feminisms* and the *newer feminisms*.<sup>18</sup>

For Chamallas, the first set is comprised of the *liberal*, *cultural*, and *radical* categories. Liberal feminists start their argument referring to a formal concept of equality and how law should apply equally to men and women. For example, in the United States, liberal feminists demanded equal access and equal treatment for women, particularly in the employment sphere.<sup>19</sup> These feminists approach the equality topic based on how women do not have the same access to certain public goods as men do. Some liberal feminists' arguments challenge how women face barriers in certain public spaces such as job opportunities or on the access to power and decision making positions. On the other hand, cultural feminists value women's capacity of motherhood as well as socially attributed characteristics such as a woman's femininity or the tendency to become caretakers.<sup>20</sup> Feminists of this strand argue that women make different judgment processes than men, because the former values abstract thinking while the latter focuses more on personal relationships.<sup>21</sup> Furthermore, some cultural feminists propose that women's perspectives should be considered and granted equal importance in the configuration of institutions and the approach to normative systems such as Family Law.<sup>22</sup> Male dominance and subordination of women has a main role in the radical discourse. Consequently, radical feminists strongly oppose practices like prostitution and pornography. This specific and well-structured discourse has become a powerful asset to propel legal reforms and to create new legislations. For example, the concept of sexual harassment was developed by Catharine MacKinnon, a radical feminist, to illustrate the notion of abuse of power as a form of violence against women.<sup>23</sup> The influence of the radical school in *governance feminism* initiatives, such as The International Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, and the Rome Statue, have been particularly important. To Kelly Askin, the intervention of "female judges, investigators, prosecutors, and translators," with ex-

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<sup>17</sup> See Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, in GENDER & HUM. RTS. (2004).

<sup>18</sup> Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157 (2010).

<sup>19</sup> *Id.* at 159.

<sup>20</sup> *Id.*

<sup>21</sup> See Esther Vicente, *Los feminismos y el Derecho: ¿Contradicción o interconexión?*, 36 REV. JUR. UIPR 363 (2002).

<sup>22</sup> *Id.*

<sup>23</sup> Lacey, *supra* note 17, at 18.

pertise in gender, has been extremely useful in the prosecution of gender crimes.<sup>24</sup>

However, to some feminists, the language in the radical discourse seems rhetorical and polemical.<sup>25</sup> According to Lacey, a general conception about radical feminists rests on the idea that sexual difference, rather than gender, has a priority in human relations.<sup>26</sup> In consequence, this sole approach on sexual differences has been strongly criticized because it does not incorporate the needs of women from developing countries. It also seems to relegate indigenous and black women, as well as lesbians, transsexuals and intersex persons to the margins; specifically with human rights policies regarding health and economic development. Moreover, although it denounces patriarchal practices, such as *gender territorialization*, it also imposes models of femininity of white women in a better economic position than women in developing countries. As a result, grassroots movements in places such as countries in the Middle East have emerged in an attempt to end the *invisibilization* of economic and social differences, which seem to have fallen to the end of the list in the radical feminism agenda.<sup>27</sup>

In her article *Past as Prologue: Old and New Feminisms*, Chamallas also discusses more contemporary approaches to the Feminist Legal Theory. According to her, the *newer feminisms* are comprised of the *intersectional*, *sex-positive*, and the *post-structural* feminisms.<sup>28</sup> Intersectional feminists are ferocious opponents of radical feminism. For the intersectional strand, inequalities are not a sole result of masculine oppression but a combination of other factors such as racial differentiations, economic status or sexual orientation. With respect to this point, Chamallas stresses that these feminists, whom she also calls *anti-essentialists*, are more willing to recognize that women can be oppressors of other women.<sup>29</sup> For example, an intersectional feminist would argue that white women, especially white feminists, have used feminism to replicate the oppression and the dominance typically enforced by men.

The next strand that I would like to discuss is the *sex-positive* approach, which is characterized by the way in which sex is perceived. Unlike radical feminists, the *sex-positive* strand suggests that sex can be a site of pleasure and, even, a trench of pleasure and power for women.<sup>30</sup> In this line of thinking, scholars like Katherine Franke clash with ideologies that propose the *motherhood view of women* and how women may feel pressured by the social expectations of sexual

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<sup>24</sup> Halley *et al.*, *supra* note 14, at 342.

<sup>25</sup> Lacey, *supra* note 17, at 17.

<sup>26</sup> *Id.* at 23.

<sup>27</sup> See LILA ABU-LUGHOD, THE ACTIVE SOCIAL LIFE OF "MUSLIM WOMEN'S RIGHTS", IN GENDER AND CULTURE AT THE LIMIT OF RIGHTS 100-19 (Dorothy L. Hodgson ed., 2011).

<sup>28</sup> Chamallas, *supra* note 18 at 159.

<sup>29</sup> *Id.* at 168.

<sup>30</sup> Chamallas, *supra* note 18 at 166.

reproduction.<sup>31</sup> Finally, the *post-structural* notion challenges the traditional male-female gender binary. According to Chamallas, poststructuralist scholars believe the focus of attention should be over *identity performance*, a term that “focuses attention on how a person presents herself through, among other things, dress, language, personal style, and everyday behaviors.”<sup>32</sup> To them, there is no sole identity, but rather, a multiplicity of identities that shape the discrimination to which they are subjected.

Many feminists criticize the limited scope of human rights. For some, these protections focus in state action and barely address actions and violations committed by private actors. Another criticism points out the poor enforcement and implementation of human rights and how international initiatives and principles are developed on notions of formal equality as a starting point.<sup>33</sup> In addition, there are feminist critiques, who point out how human rights can be narrow and individualistic, due to its failure to address problems in a systemic manner. Meanwhile, other critiques focus on how the use of masculine language, which fails to include women, produces rights, which are abstract and indeterminate.<sup>34</sup> This last criticism amplifies how divisiveness and competition are generated when a balance of interests has to be made, and how this exercise ends up oppressing women.<sup>35</sup> Fortunately, codifying certain protections at an international level had some benefits such as giving visibility, which can lead to transformation and to the establishment of accountability systems that offer redress mechanisms.

### III. FEMINIST CONCERNS IN THE ALYNE DECISION

Under CEDAW, the Committee is a monitoring body that scrutinizes States parties' compliances with this convention.<sup>36</sup> As a result, the Committee reviews national reports submitted by the States' parties within one year of ratification or accession to CEDAW. After the first report has been submitted, reviews are made every four years. Consequently, the Committee makes recommendations to States' parties on issues that affect women and that should be monitored more closely by the state. Among these suggestions, this monitoring body is entitled to address specific individual needs and recommend financial redress, among other types of remedies. In October 1999, the General Assembly of the

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 169.

<sup>33</sup> CHARLESWORTH & CHINKIN, *supra* note 2, at 229.

<sup>34</sup> *Id.* at 231.

<sup>35</sup> *Id.* at 240.

<sup>36</sup> See *Committee on the Elimination of Discrimination against Women*, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/committee.htm> (last visited January 16, 2014) [hereinafter *Committee*].

United Nations (UN) adopted an Optional Protocol to CEDAW.<sup>37</sup> By ratifying the CEDAW OP, a State recognizes the competence of the Committee to receive and consider complaints from individuals or groups within its jurisdiction. I decided to present *The Alyne Decision* as an exemplary –yet unfortunate– platform to illustrate how international decisions can be influenced by feminist legal theories.

Alyne da Silva Pimentel, a Brazilian national of African descent, died on November 16, 2002 as a result of postpartum hemorrhage.<sup>38</sup> Alyne, who was six months pregnant, sought medical assistance at a health centre.<sup>39</sup> Upon her arrival, the attending OB/GYN prescribed anti-nausea medication and some vitamins, and sent her home.<sup>40</sup> No specific medical tests were performed. Quite the opposite, these tests were scheduled to be performed two days later.<sup>41</sup> In the meantime, Alyne's condition worsened and she returned to the health centre. After being admitted for the second time, the doctors noticed that there was no fetal heartbeat and informed Alyne that she needed to be given medication in order to induce the delivery of the stillborn fetus.<sup>42</sup> Later, surgery was performed to remove the remaining parts of the placenta.<sup>43</sup> Alyne's condition further deteriorated and doctors at the health centre decided to transfer her to a more specialized medical facility.<sup>44</sup> However, the municipal hospital that had space availability refused to use its only ambulance to transport Alyne.<sup>45</sup> Another period of eight hours went by, in which Alyne manifested symptoms of a coma. By the time she arrived to the municipal hospital, Alyne had to be resuscitated.<sup>46</sup> Since the medical records were not transferred along with the patient, the medical personnel that transported Alyne gave an oral account of the treatments and the

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<sup>37</sup> See *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, G.A. Res. 54/4, U.N. Doc. A/RES/54/4 (October 15, 1999), <http://www.un.org/womenwatch/daw/cedaw/protocol/> (last visited January 16, 2014) [hereinafter CEDAW OP].

<sup>38</sup> See *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Committee on the Elimination of Discrimination against Women, Rep. on its 49th Sess., July 11-29, 2011, U.N. Doc./C/49/D/17/2008, <http://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-17-2008.pdf> [hereinafter CEDAW/C/49/D/17/2008].

<sup>39</sup> The health centre was a private medical facility that provided health services under a special agreement with the municipality. See Rebecca J. Cook, *Human Rights and Maternal Health: Exploring the Effectiveness of the Alyne Decision*, 41 J.L. MED. & ETHICS 103 (2013).

<sup>40</sup> CEDAW/C/49/D/17/2008, *supra* note 38, at 2.2.

<sup>41</sup> *Id.* at 2.2.

<sup>42</sup> *Id.* at 2.5.

<sup>43</sup> *Id.* at 2.6.

<sup>44</sup> *Id.* at 2.8.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 2.9.

medical procedures that were performed.<sup>47</sup> In an attempt to solve this, Mrs. Maria de Lourdes Silva Pimentel (Alyne's mother) was sent by the new medical personnel to retrieve said records.<sup>48</sup> Upon her arrival to the health centre, Mrs. Silva was questioned and made to wait for them. Unfortunately, Alyne died on 16 November 2002, of a digestive hemorrhage which resulted from the delivery of the stillborn fetus.<sup>49</sup> Due to these unfortunate events, Mrs. Silva filed civil claims against the state in Brazil. However, the claims were either ignored or denied by Brazilian authorities.<sup>50</sup>

Brazil ratified CEDAW and the Optional Protocol. This recognition provided the Committee with jurisdiction to evaluate complaints presented by individuals or groups.<sup>51</sup> For this reason, after the exhaustion of local remedies, Mrs. Silva submitted a claim to the UN Committee on CEDAW and the Committee rendered its decision in August 2011.<sup>52</sup> In essence, the Committee found that Alyne's death was linked to obstetric complications related to pregnancy,<sup>53</sup> that her death had to be regarded as maternal,<sup>54</sup> and that she had not been ensured "appropriate services in connection with her pregnancy"<sup>55</sup>. Additionally, the Committee found Brazil directly responsible for various violations. However, I will center my discussion around the following: (1) the failure to meet Alyne's "specific, distinctive health needs;"<sup>56</sup> (2) the fact that Alyne was discriminated on the basis of her sex and her status as a woman of African descent, as well as on her socioeconomic background,<sup>57</sup> and (3) that Brazil failed to "comply with its obligations to ensure effective judicial action and protection."<sup>58</sup>

Some notions of radical feminism can be identified in this decision. For example, the conclusion that Alyne was discriminated on the basis of sex exemplifies the influence of the radical feminist legal theory. However, it is my view that the most predominant theories in the Committee's conclusions are *cultural* and *intersectional* feminism. Therefore, I will focus my discussion on the last two. The first ruling of the Committee illustrates cultural feminist ideas. Addressing

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47 *Id.* at 2.10.

48 *Id.* at 2.11.

49 *Id.* at 2.12.

50 *Id.* at 3.14.

51 It should be noted that the specific provisions under CEDAW, discussed in the Alyne Decision, are articles 2 and 12(2). With regards to the Optional Protocol, article 2 and 4 provided the Committee with jurisdiction to evaluate Brazil's actions.

52 *See* Committee, *supra* note 36.

53 CEDAW/C/49/D/17/2008, *supra* note 38, at 7.3.

54 *Id.*

55 *Id.* at 7.2.

56 *Id.* at 7.6; *see also* Cook, *supra* note 39.

57 CEDAW/C/49/D/17/2008, *supra* note 38, at 7.7.

58 *Id.* at 7.8.



Alyne's pregnancy needs as *specific* presupposes that special protections were based on notions of motherhood. In this case, pregnancy is seen as a gender based difference and acknowledging special protection legitimized the claims of pregnant women.<sup>59</sup> However, it must be noted that ensuring special protection to this biological difference would not amount as discrimination against men. Moreover, although the gender hierarchy is present in the *Alyne Decision*, it is evident that other social hierarchies, such as race and class, were also given special attention. The Committee's conclusion of discrimination based on race and socioeconomic status showcases an intersectional feminist approach. This recognition openly suggests that the medical obstacles faced by Alyne were a direct consequence of her poverty, race and skin color. It acknowledges that women are not equal and that they can experience different kinds of discrimination which may be based on other factors besides gender. To illustrate this reality, Rebecca Cook discusses that there are evident health inequalities in Brazil since Afro-Brazilian women are seven times more likely to die during childbirth than white women.<sup>60</sup>

As part of the Committee's responsibilities as a monitoring body, it must assess a set of recommendations to the State parties involved in a dispute. However, it is important to note that these made no reference to the intersectional feminist strand. Among such recommendations, the Committee did not address the situation of Afro-Brazilian women and it barely mentioned socioeconomic factors. The latter can be exemplified on the Committee's proposal that Brazil should ensure "affordable access for all women to adequate emergency obstetric care."<sup>61</sup> Thus, to what extent were these recommendations successful? How far do they address the racial and socioeconomic inequalities discussed by the Committee when assessing the state's responsibility?

The inconsistencies between the findings and the recommendations of the Committee may be seen as a failure to address important differences among women. On the other hand, this somewhat general approach could have been made as an exercise to ensure that all provisions will apply to women as a universal group. However, the truth of the matter is that women are different in many ways. The gender-female binary present in many international protections fails to recognize the strands within women as a gender. Would the Committee have reached a different conclusion if Alyne was a sex worker? What would the Committee have recommended if the medical assistance had been denied because of her being a lesbian?

For the past decades it seems as if the term *gender* was the category to address women needs and protections. As the discussion further developed, now it appears that this *gender territorialization*, as Ali Miller calls it, has been an ob-

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<sup>59</sup> Cook, *supra* note 39.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

stacle to attend health concerns and epidemics.<sup>62</sup> Moreover, the international level does not seem to be influenced by the *post-structural* strand since female perpetrators tend to be overlooked.<sup>63</sup> Furthermore, the female/victim focus proposed by radical feminists seems to fall short to address these concerns. I have no particular answer as on which strand serves a better purpose.

#### IV. LASTLY, THOUGHTS ON LEGAL CURRICULUM AND HUMAN RIGHTS

There have been successful case studies which have incorporated human rights in Puerto Rico's legislation. An example of this was the creation of Law 54<sup>64</sup> as part of the island's legislation against domestic violence.<sup>65</sup> Nevertheless, as a law student I have a main concern: the lack of implementation of educational programs and courses on women's rights and violence against women. Specifically, I wonder when it will be acknowledged that there is an evident need to include courses on feminist legal theory, domestic violence, reproductive rights, and, gender and human rights –just to name a few– as part of the Law School Curriculum. There is no need to reinvent the wheel. Women's rights and violence against women, as a subject, can be integrated within traditional courses such as criminal procedure, family law, and criminal law.<sup>66</sup> This is fundamental to enrich the legal profession and to influence policy-making arenas. It is an unquestionable and evident tool to progress as society and as legal professionals while it portrays law schools' commitment with providing spaces to educate and transform our society.

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<sup>62</sup> Ali Miller, *Fighting Over the Figure of Gender*, 31 PACE L. REV. 837, 840 (2011).

<sup>63</sup> See Lara Stemple, *Human Rights, Sex, and Gender: Limits in Theory and Practice*, 31 PACE L. REV. 824 (2011).

<sup>64</sup> See Ley para la prevención e intervención con la violencia doméstica, Ley Núm. 54 de 15 de agosto de 1989, 8 LPRA §§ 601-668 (1989 & Supp. 2012).

<sup>65</sup> See Jodie G. Roure, *Gender Justice in Puerto Rico: Domestic Violence, Legal Reform, and the Use of International Human Rights Principles*, 33 HUM. RTS. Q. 790 (2011).

<sup>66</sup> For a detailed discussion on this topic, see Sharon G. Portwood *et al.*, *Social Science Contributions to the Study of Domestic Violence Within the Law School Curriculum*, 47 LOY. L. REV. 137 (2001).