

# FEMICIDE AND GENDER VIOLENCE IN MEXICO: ELEMENTS FOR A SYSTEMIC APPROACH

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**Abstract:** This article aims to address gender violence and femicide through the analysis of several aspects related with its reality and current problematic or conundrum, the new standards to widen gender perspective in the ministerial practices and judicial reasoning, as well as the controversies and tensions generated by the social risk related to impunity and the current control policies and exception categories created to fight femicides and violence against women with the principles and fundamentals wherewith the criminal justice system and human rights operate in Mexico.

**Keywords:** Femicide, gender violence, equality, discrimination, sexual torture, objective accusation.

**Summary:** I. GENDER AND SEXUAL EXPRESSION EQUALITY OF WOMEN: A PARADOXICAL UTOPIA. II. VIOLENCE AGAINST WOMEN: ITS DICHOTOMY BETWEEN THE PUBLIC AND THE PRIVATE. III. SEXUAL VIOLENCE AGAINST WOMEN AS A TORTURE METHOD. IV. FEMICIDE: SOME KEYS FOR ITS SYSTEMIC INTERPRETATION. IV.1. Femicide: Origin and social reality. IV.2. Femicide as a legal category. IV.3. Objective conviction and radical criminal functionalism.

## I. GENDER AND SEXUAL EXPRESSION EQUALITY OF WOMEN: A PARADOXICAL UTOPIA

On many occasions, when talking about gender, the tendency is to identify this term exclusively with “woman” or “women”. Mistakenly, in some sectors, it is considered that guaranteeing this perspective implies to only incorporate more women in organizations, to use an inclusive language (“los”, “las”, “todos”, “todas” and “todes”)<sup>2</sup>, or create specific offices to see to women’s rights. Although being true that, all this measures are related to the gender perspective, they are not equivalent, nor do they use up the meaning of the term<sup>3</sup>. Sure enough, the concept “gender” has as its content the social construct made on the basis of the existence of two biological sexes and the social, cultural and psycho-social traits of the

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<sup>2</sup> The use of this new gender inclusive language bolstered by feminist organizations and movements, has created controversy with the Spanish Royal Academy (“Real Academia Española”) for its position to defend the naturalness of language and the generic as valid to name all persons.

<sup>3</sup> MANTILLA FALCÓN J. (2007:39)

same, therefore imposed an identity and conduct guidelines for each one of the sexes. Gender is not a synonym for “woman”, but of the differentiated social construct for both sexes and that makes reference to the assignment of differentiated roles, identity, power, resources, moments and spaces, which are assigned a value that permeates any area of life of all human being. Therefore, gender is the social, political, cultural and legal content assigned to each of the sexes. As a consequence of this interiorized socialization, the male gender results to be an expression of a value of superiority and, the female gender, a value of subordination or inferiority.<sup>4</sup> In this way, gender equality is, in connection to women’s rights, the guarantee of their full participation, in conditions of equality, in civil, cultural, economic, political and social aspects of life, as well as the eradication of all forms of discrimination that they might face in any given area.

Meanwhile, contrary to the Mexican State’s advances in bolstering actions in all government levels directed to promote, prevent, and make gender equality a reality and the eradication of discrimination against women through a national legal basis; and despite the numerous treaties and international mechanisms that Mexico forms part of, –even though significant improvements have been achieved–, the desired effects oriented towards giving more effective answers regarding the context of discrimination suffered by women in all spaces of personal and social life and of the inequality political and economic structures between both genders have not been reached. In very few topics such as this one exists a gap so big between the legal framework and its effective application and sociological validity. Therefore, women remain as a one of the groups in situation of vulnerability that are most confronted with discrimination and social inequality because the conditions of poverty, disability, age, ethnic origin, bring as a consequence the greater risk of suffering abandonment, social exclusion, violence and discrimination.

The discrimination suffered by women affects all spaces of personal and social life and of the political and economic structures in which significant differences between men and women endure.<sup>5</sup> In this aspect, women continue to be partially, a secondary workforce,<sup>6</sup> with horizontal and vertical segments, and maintaining an unequal role regarding family and work responsibilities.<sup>7</sup> As a consequence, in Mexico, the gap regarding the administration of

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<sup>4</sup> AÑÓN ROIG, M.J. (2010:133) and GIL RUIZ, J.M. (1996:39).

<sup>5</sup> RODRÍGUEZ-PIÑERO AND BRACO-FERRER (2001:235).

<sup>6</sup> According to the National Poll regarding Discrimination in Mexico (ENADIS 2017), 58.8% of women interviewed declared having experienced at least one discrimination situation in the last 5 years due to the fact of being a woman. The dominating discrimination facts were: the rejection or exclusion from social activities, harassment, insults, threats, pulling and pushing, and banishment from their communities. 44.0% of the women said that their human rights are not very respected or not at all. Another interesting fact is that 87.7% of the paid housemaids, stated that in their last job they did not receive labor benefits.

<sup>7</sup> Regarding the “salary discrimination” against women in Mexico, it has been on the rise, particularly amongst those that live in a situation of poverty, because according to the recent brief about “poverty and gender” in Mexico, women earn a fifth less than men, despite having the same academic level. CNEPDS. (2010-2016: 9-14). It is obvious, that, this type of salary discrimination is emphasized due to the presence of the so-called “crystal roof”, invisible barrier that makes it impossible for highly competent women to access higher

justice, decision-making positions, number of females judges, female magistrates and ministers, remains too large; there is data that proves that, even though women are a numerical majority in the Mexican judiciary system, they are a minority divided in decision-making positions<sup>8</sup>; in this sense, we do not have anything more at the moment, understanding the difference as specification, that is to say, as measures of positive differentiation in favor of women<sup>9</sup>.

In this way, it is important to point out that in countries that possess an adequate living standard alongside a high level of human development, it is acknowledged that allowing women access to areas of responsibility and decision-making, transforms in a proportional and positive manner the society in which this happens, by growing both in equality and justice;<sup>10</sup> it is also conceived that *gender equality* is, regarding women's rights, the guarantee of their full participation, in conditions of equality, in civil, cultural, economic, political and social life, as well as the implementation of public policies and appropriate measures directed towards the eradication of any form of discrimination that women face in any area of their life. Definitely, from this feminist realism, if we had to do an ascertainment about our Mexican society, we would have to sustain that it still seems to be androcentric<sup>11</sup>. The structural causes, depending of the culture the woman belongs to, can sink in that historical level of the cultures referenced by anthropologists. In the case of the woman that is a native Mayan, it is a constant the subordinated position of women before men, may it be the husband, father or brother<sup>12</sup>. In any case, may it be one type of woman or other, it is modern and contemporary history the one that has made the power model based on the male gender to still be, with more or less presence, as the ideology to follow for all society<sup>13</sup>.

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responsibility positions inside organizations. To review a detailed analysis about the so-called "crystal roof". CAMARENA ADAME, M. E and SAAVEDRA GARCÍA M. L. (2018:312-347). ROLDÁN-GARCÍA, E and LEYRA-FATOU, B and CONTRERAS MARTÍNEZ, L. (2012:43-56). According to the Results Report of ONU-MUJERES, (2017) many barriers continue to appear which prevent the guarantee of women's rights in terms of economic empowerment and their contribution in conditions of equality inside the work environment.  
<sup>8</sup> Women in the Mexican judiciary power represent a divided minority in no more than 5% of the decision-making positions. Resource available in: <http://www.elfinanciero.com.mx/politica/trato-disparejo-para-las-mujeres-en-poder-judicial>

<sup>9</sup> The justification for positive differentiation – has pointed out Professor De Asís – assumes admitting as reasonable measures that are destined for women, and that are directed towards both the satisfaction of needs regarding their inclusion in areas of political and legal power. DE ASÍS ROIG R. "The law of equality in the discourse of human rights", in GÓMEZ CAMPELO AND VALBUENA GONZÁLEZ F. (2008:56).

<sup>10</sup> AÑÓN ROIG (2010:133) and GIL RUIZ J.M. (1996:39).

<sup>11</sup> SÁNCHEZ DOMINGO R. (2008:23-37).

<sup>12</sup> SÁNCHEZ DOMINGO R. (2008:24-32).

<sup>13</sup> Nevertheless, it is accurate to recognize that the androcentric unconscious is also a factor that implies education for men and women all the same. It is known as education in "complex equality" that, besides women, includes men as an active element against the man "machistas" prejudices that, unconsciously, form part of their social expression; in such way, the attainment of equality amongst sexes is a common task. About these feminism topics, which cannot be analyzed with full amplitudes and depth. CAMPS V. (2000). AMORÓS C. (1991) and GUISÁN E. (1992).

## II. VIOLENCE AGAINST WOMEN: ITS DICHOTOMY BETWEEN THE PUBLIC AND THE PRIVATE

The reality of violence against women is a social phenomenon of multiple and diverse dimensions; from a human rights perspective it represents a rupture with a very ample catalogue of standards, guidelines, principles, rights and freedoms in virtue of international law, and with a set of institutional and social models that have contributed continuously for the formation of gender identity; that is why gender violence is understood as a product of a socio-cultural construct based on the biological difference. Therefore, the complete rights equality, and the difference or asymmetric power relationships between men and women, are made from several factors related to gender, such as the use of violence, considered as the greatest source of gender discrimination.<sup>14</sup> This way, violence against women originated because of gender is conceived, –according to the logic of the critical feminist theory of law–, as the expression of a structural discrimination against women created by a sex-gender patriarchy system<sup>15</sup> based on a power relationship historically unequal between men and women<sup>16</sup>, and as a social, political and economic mechanism that forces women into a subordinated situation in relation to men<sup>17</sup>.

Nowadays, violence against women because of gender continues to be a social scourge every day more visible in all aspects of women’s lives, includes a wide range of actions and omissions that affect them severely because of their woman condition, and impacts disproportionately in their personalities and their life projects, by causing them damages and sufferings of physical, psychological and sexual types, or threats of committing such acts, coercion and other forms of arbitrary deprivations of freedom<sup>18</sup>, may they be in public or private life<sup>19</sup>. Thus, it is considered by the international community as the main obstacle for the complete development, exercise and enjoyment of women’s human rights and liberties<sup>20</sup>, which is why, it entails a fundamental obligation of the states and public

<sup>14</sup> MORALES MARENTE M.E. (2007:21) AND SCHWENDINGER, JULIA R., AND SCHWENDINGER HERMAN (1983).

<sup>15</sup> From the feminist discourse, the patriarchal system is linked to the use of force used in all social strata, in which men, - as a product of said system-, believes to have dominium over the rights, liberties, autonomy, and life plan of women. HAMMOCK, AMY, C. (1996:91) in: MONARREZ FRAGOSO J.E. (200:87-117).

<sup>16</sup> AÑÓN ROIG M.J. (2016: 8.12).

<sup>17</sup> For the UN, there are several main mechanisms through which the male domination is maintained and women’s subordination that happens in common and numerous scenarios. Amongst them, the following: “productive and reproductive labor abuse; the control over women’s sexuality and reproductive capacity; cultural rules and practices that defend the unequal condition of women; the state structures and processes that legitimize and institutionalize gender inequalities, and violence against women. Violence against women is at the same time a means to perpetuate women’s subordination and a consequence of their subordination”. UN (2006:72).

<sup>18</sup> General Remark number 6 of the General Recommendation number 19, 1992, “Violence against Women”. Committee on the Elimination of Discrimination against Women of the UN, General Remark number 6.

<sup>19</sup> Article 1 of the Declaration on the elimination of violence against Women, adopted by the UN’s General Assembly on December 20<sup>th</sup> of 1993.

<sup>20</sup> UN-WOMEN (1995).

authorities to adopt actions aimed towards the study of their causes, obstacles, effects, as well as necessary measures for their prevention, penalty and eradication<sup>21</sup>.

For its part, it has been pointed out, that, the cases of violence against women because of gender in Mexico<sup>22</sup> and worldwide, are because of a situation of systematic violations of human rights and cultural and sociological very deep-rooted conditions inside a context of generalized violence and systemic discrimination. Only to mention a shocking fact that shows the magnitude of this global phenomena, taken from the official numbers from the United Nations (UN), in which 1 out of 3 women has suffered some type of violence during their lifetime, may it be physical, psychological, institutional or economic. In comparison Mexico, 6 out of 10 Mexican women have faced at least one case of violence<sup>23</sup>. According to the report done by the Office of United Nations Against Drug and Crime (OUNADC), it was revealed that 87 thousand women were murdered worldwide only during 2017; the most worrying of this data is that almost 60% of this murders were committed by their current or past romantic partners, their parents, brothers, women, sisters and other members of their family environment<sup>24</sup>. This proves that, in fact, the most dangerous place in the world for a woman is her own home, and at the same time is the ideal context for the implementation of a model of male dominium, and the lingering of a value and role order traditionally accepted.

Violence against women turns out to be a very complex phenomenon, not only does it generate vagueness in the processes of interpretation and application of gender perspective in the judges' arguments at the moment of solving cases essentially controversial in matters of violence and discrimination against women; but also, we have to be aware of the complications that the social and institutional model of violence has with the legal, cultural and ideological barriers, which prevent partially, that the violence against women to be conceived still as a phenomenon that cannot extend further than the romantic relationship in the private context. For this reason, we consider that this issue needs to be emphasized, because the lack of precise and sufficient information hinders the taking of appropriate measures, actions and effective resources from the State in violence cases that are committed in the family scenario, as it has been seen, continues to be the most usual place in which violence is exercised and generally the most unpunished due to the anonymity and invisibility of the aggression.

It is clear, that, if it is not achieved for family violence not to be considered anymore as a merely private matter, to see it as a manifestation of origin and social relevance, it will open the gateway, for the cases of violence in Mexico to continue existing, most of all inside

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<sup>21</sup> General Remark number 35 about gender violence against women, for which the general remark number 19 is updated, 2017. Committee on the Elimination of Discrimination against Women of the UN, paragraphs 9, 10.

<sup>22</sup> In Mexico, 66.1% of women have suffered at least one incident of violence during their lifetime. 49% of women suffered emotional violence, 29% economic violence- proprietary or discrimination, 34% physical, and 41.3% sexual during their lifetime at least in one area and exercised by any aggressor. ENDIREH (2016).

<sup>23</sup> UN-WOMEN (2017).

<sup>24</sup> OUNADC (2017).

indigenous communities<sup>25</sup> or municipalities, like those of the State of Yucatan, where native Mayan women<sup>26</sup>, are affected by this very dichotomy, which is one of the causes and at the same time the obstacle which stops women from being seen as violence victims, as subjects of rights and protection<sup>27</sup>. It is true that, like in no other case, –except when it is about extreme violence–, after having suffered mistreatments, physical and psychological damages, Mayan women have to remain at home with their aggressor; because, in general they ignore the existing legal protection mechanisms, and in the cases in which for some reason are convinced of filing their criminal report before the Public Ministry, this results as the greatest of provocations for violence to repeat itself and increase<sup>28</sup>. But, also, such circumstance creates a paradox, thus, whilst in the public space, stereotyped gender roles have been transforming, on the other hand, the social order of these communities remain virtually unaltered<sup>29</sup>.

### III. SEXUAL VIOLENCE AGAINST WOMEN AS A TORTURE METHOD

Sexual torture, is understood as the most extreme way of gender discrimination, is an essential human rights topic, and, thus, demands actions from the states for its eradication and conviction. The documentation of torture cases carried out by national and international organisms, as well as the investigations and sanctions regarding actions of sexual torture against women are relatively recent. However, sexual violence as a form of torture had already been developed in the context of an armed conflict by the international legal precedents, specifically in the International Criminal Court for the Former Yugoslavia and Rwanda by foreseeing in the statute for both courts that the violation found in the sexual crimes catalog is a crime against humanity, a war crime and one of the constitutive elements of genocide; this, due to the legal, social, public health, real damage to freedom – personal integrity and life project of women consequences. The acknowledgement of gender violence

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<sup>25</sup> According to the Report “Indigenous Women” of the Inter-American Commission of Human Rights (ICHR) (“CIDH” in Spanish), the indigenous woman in the Latin-American region presents a high grade of vulnerability because of the systematic violation to their human rights due to their gender; and, besides, gives a detailed report about how this situation exposes them to violence and different forms of discrimination. Regarding the prevalence of family violence against indigenous women in Mexico, the ICHR points out in their report that 47% of the indigenous women older than 15 years old have suffered some type of couple’s violence. In the aforementioned report it is pointed out that the different obstacles faced by indigenous women who are violence victims appear in the Mexican justice system. In this way it turns out to be fundamental that in the judiciary processes for a Protocol to Judge with Gender Perspective and the Acting Protocol for those who Administer Justice to be applied in cases that involve persons, communities and indigenous populations, to start eradicating the structural discrimination because of gender and ethnicity, so sadly generalized in Mexico. ICHR (2017:82).

<sup>26</sup> According to official data from INEGI, taken from the National Poll on Home Relationships Dynamics (ENDIREH 2016), Yucatan, is one of the states where women suffer the most violence, with a prevalence at a national level of 65.2%. The highest being Mexico City is of 78.4%.

<sup>27</sup> About the public/private dichotomy of violence against women. AÑÓN ROIG. M.J. (2016:11-13)-

<sup>28</sup> Sure enough, this proves, just as it is pointed out by Stuart Mill, that, when we talk about gender violence, we talk about a silent evil in the private area and silenced in public. STUART MILL. J.S. (2001:183) and GIL RUIZ J.M. (2006:65)

<sup>29</sup> Information taken from the results of the social investigation project, UADY-KELLOGG. (2018).

as serious international crime contributed for the International Criminal Court to typify in its statute of acts of sexual violence sexual slavery, forced prostitution, forced pregnancy, forced sterilization, gender persecution, judging them as crimes against humanity, war crimes and in specific circumstances as genocide, for example, when the sexual aggression has the intent of causing real physical and psychological damages to the members of a group; as well as taken measures destined to prevent births within a group through forced abortions, sexual mutilations, rapes and forced pregnancies<sup>30</sup>.

Recently the ICHR (CIDH) started to develop legal precedents and international standards in cases related to sexual violence against women<sup>31</sup>. The first international matter on gender violence was the *Case of the Criminal Miguel Castro Castro Vs. Peru*<sup>32</sup>, which constitutes an extremely important legal precedent in female penitentiary matters and women protection inside the context of an armed conflict.<sup>33</sup> In the presence of armed individuals it constitutes *sexual violence*. Other paradigmatic cases add up to this legal precedent such as *Ines Fernandez Ortega and Valentina Rosendo Cantu vs. Mexico*, in which the Corte decided that “military institutional violence” for the sexual raping and torture of two native women of the *me ‘phaa* community by members of the Mexican army.<sup>34</sup> With this sentence the Inter-American Court of Human Rights creates a new international standard<sup>35</sup> by categorizing *sexual violence* against women as an act of *torture*<sup>36</sup>. Recently the Inter-American Court of Human Rights, on December 21<sup>st</sup> of 2018 notified conviction for the Mexican State for the case *Women victims of sexual torture in Atenco Vs. Mexico*, in which the internationally convicted State for accounts of physical and psychological violence, sexual torture exercised against 11 women during their detention and their following transportation to a Social Re-Adaptation Center during the days 3 and 4 of May 2006. In this ruling, the Mexican State acknowledged their international illegality for the violations to human rights of health

<sup>30</sup> ONOFRE DE ALENCAR, E.C. (2011:2 and ss.)

<sup>31</sup> According to the UN, worldwide, 43% of women have been victim of sexual violence; more than 200 million women in Africa’s 30 countries and the Middle East have suffered clitoris excision. UN WOMEN-MEXICO, (2017).

<sup>32</sup> Inter-American Court of Human Rights, (2006).

<sup>33</sup> FERIA TINTA, M. (2007:30-40)

<sup>34</sup> Inter-American Court of Human Rights, (2010). Inter-American Court of Human Rights (2007: paragraph 79) and Inter-American Court of Human Rights, (2018: paragraph 186).

<sup>35</sup> Inside the international *Corpus Juris*, none of the international treaties which forbid torture such as: The International Convention against Torture, and other Cruel, Inhumane or Degrading Treatments or Punishments of June 26 of 1987, nor the Inter-American Convention to Prevent and Punish Torture of February 28 of 1987, is *sexual violence* included as a form of *torture*. BUSTAMENTE ARANGO, D.M. (2014:465). Pontifical Bolivarian University, Colombia Medellin.

<sup>36</sup> The Inter-American Commission of Human Rights (ICHR), in other matters such as de one (Ana Beatriz and Celia Gonzalez Perez vs. Mexico), has repeated its standing regarding sexual violence as torture. In this case, for the torture of three Tzeltal women who were detained by members of the armed forces to interrogate them with the intent of forcing them to confess that they were part of the Zapatista Army of National Liberation. During the women’s detention, one of them being a girl, were separated from their parents, beaten and raped several times. ICHR (CIDH), Report (No 53/01. Background). Ana, Beatriz and Celia Gonzalez Perez (Mexico), April 4, 2001. ICHR (CIDH) (2017:19).

protection, judicial guarantees, equality before law, as well as for the non-compliance of their obligation to investigate acts of torture and violence against women. The Inter-American Court of Human Rights stated in this case, that, in overall terms, the sexual raping, the same as with torture, has the purpose of degrading, threatening, humiliating, discriminating, punishing and controlling or nullifying the victim's personality. Also, it establishes standards to categorize a sexual raping as torture, by considering as the basic elements: the intent, the severity of the torture, as well as the purpose of the act of torture, taking into consideration the context and specific circumstances of each case<sup>37</sup>.

Sexual violence as a method of torture in Mexico has been categorized in the new General Law to Prevent, Investigate and Punish Torture, and other Cruel, Inhumane or Degrading Treatments or Punishments, by acknowledging in its article number 27 a new type of torture, committed with discriminatory purposes or with "any other objective". In this type of torture, the penalty increases up to half when the victim is a girl, a pregnant woman and when the victim is subjected to any form of sexual violence. In this way, the SCJN (Nation's Superior Justice Court) ruled for the first time, that the State has to compensate as a torture victim an underage woman who was denied the interruption of a pregnancy resulting from a rape on February of 2015<sup>38</sup>, despite the fact of the product originating from a sexual raping criminally reported, and presented a congenital malformation. This represents an important legal precedent, because it establishes that the denial of the authorities to carry out and abortion when the pregnancy is a result of a sexual raping, it constitutes a serious infringement of human rights, generating real damage pertaining the act of torture –sexual aggression– allowing it to continuously materialize through the passing of time.

The expression of these criteria, has been established in the Isolated Thesis of the SCJN that established that: "Sexual violence has specific gender-related causes and consequences, because it is used as a form of submission and humiliation and method of destroying women's autonomy and that, even still, it can come from an extreme type of worsened discrimination because of situations of extreme vulnerability, –such as poverty and childhood–, which implies that the victim would suffer a conflux of discriminations. Sure enough, sexual raping constitutes a paradigmatic form of violence against women whose consequences, can even transcend to their persona. In that context, judges must, officiously, analyze the cases of sexual violence that are presented to them, with gender perspective, which leads to the acknowledgement of an appraisal evidentiary standard of a special nature, reason for which they shall: (I) attend to the nature of the sexual raping, which, by its own characteristics, requires evidentiary means different from other illicit conducts; (II) grant a dominant value to the testimonial information for the victim, due to the secrecy in which this aggressions occur, which limits the existence of graphic or documentary evidence; (III) evaluate in a reasonable manner the inconsistencies in the victim's story, according to the

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<sup>37</sup> Inter-American Court of Human Rights (2018) and the International Criminal Court for Rwanda. (1998: paragraph. 59)

<sup>38</sup> SCJN. (2017:75)

traumatic nature of the facts, as well as other factors that may present themselves, such as obstacles in the way of expressing oneself, the intervention of third parties, or the use of different languages, tongues or interpretations during translations; (IV) take into account the subjective elements of the victim, amongst other, age, social condition, academic background or belonging to an historical disadvantageous group, to be able to establish the feasibility of the criminal fact and concrete impact; and, (V) to adequately use the circumstantial evidence, the presumptions and clues to be able to extract consistent conclusion”<sup>39</sup>.

In this sense, *sexual torture* is defined as a modality of gender torture, which occurs when the action is understood as sexual violence inflicted upon a person, causing physical suffering or psychological anguish to obtain a confession, information, to punish or intimidate or a third part or for any other reason. Therefore, *sexual violence* is defined as any action that is directed towards nullifying the victim’s personality, in their physical, psychological and sexual integrity, or that goes against their freedom and life project<sup>40</sup>.

Indeed, for the SCJN, sexual raping may constitute an act of torture even when it consists of a single fact or happens outside of state facilities, in sight of the objective and subjective elements that classifies an act of torture do not refer neither to fact accrual nor to the place where it is carried out, but to the intent, to the severity of the suffering and its objective. The jurisprudential (precedent) development of these guidelines can be found in the *Case: Rosendo Cantu and Others vs. Mexico*, sentence of August 31 of 2010, in paragraphs from 110 to 122, and afterwards in some manner has been expressed in the recent SCJN V/2015 which establishes that: “The Inter-American Court of Human Rights has stipulated that sexual raping is subsumed in an act of torture when the mistreatment reunites the following elements: (I) it is intentional; (II) causes severe suffering may it be physical or mental; and (III) it is committed with a certain purpose or end. Thereon, it must be pointed out that, because of the severe suffering caused intentionally, the sexual raping constitutes an extremely traumatic experience that has grave consequences and causes great physical and psychological damage that leaves the victim “physically and emotionally humiliated”, a hard situation to overcome through the passing of time, unlike of what happens in other traumatic experiences. Therefore, the victim’s severe suffering is deduced to be concomitant to the sexual raping, even when there is no evidence of injuries or physical illness, because it is clear that the victims of such actions also experience severe damages and scars/repercussions of psychological and social natures.

Finally, in reference to the third of the requirements, it follows that sexual raping, the same as torture, have as their objectives, amongst others, to intimidate, degrade, humiliate, punish or control the person that suffers from it. In the understanding that a sexual raping can constitute torture even when it consists of a single action or occurs outside of state facilities, due to the fact that objective and subjective elements that categorize an act of torture do not

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<sup>39</sup> SCJN, (2015) XXIII. (10 a.).

<sup>40</sup> CNDH-RECO.09. (2018:39).

refer to the accumulation of facts nor to the place in which it is committed but, as it has been pointed out, to the intent, to the severity of the suffering and to its purpose.”<sup>41</sup>.

#### IV. FEMICIDE: SOME KEYS FOR ITS SYSTEMIC INTERPRETATION

##### IV.1. Femicide: Origin and social reality

Femicide (“Feminicidio”) is a neologism that comes from the English word *Femicide*, used in 1974 by the American feminist Carol Orlock, in her unprecedented book titled “Femicide”. Hereinafter in 1976 the south African feminist activist Diana Russel uses the expression for the first time during a feminist forum with 40 countries known as the International Court for Crimes against Women in Brussels, Belgium. Afterwards, in 1982, in her book “Rape in Marriage” (*Violación en el Matrimonio*), she defined Femicide as “the killing of women for being women”, and later on co-edited alongside Jill Radford an anthology titled *Femicide: The Politics of Woman Killing* in 1992, giving the concept legal and social content, by defining it as “the misogynistic killing of women committed by men regarding their condition of belonging to the female gender”, define the types of Femicide and the motivation as one of the fundamental characteristics for this type of crimes, such as: anger, hate, jealousy, the search for pleasure, misogyny, contempt or a sense of superiority or ownership towards women<sup>42</sup>.

Later on in Mexico, Marcela Lagarde retakes this notion of *Femicide* from Russel and Radford to investigate the women killings in Ciudad Juarez Chihuahua in 1993, translating it to *feminicidio*, but including in this new concept the political sense, because of the context of impunity, the vagueness of the legal order, the omission and insensitivity from the State, as well as the gender reasons because of the social construct as fundamental components which generate this type of crimes<sup>43</sup>, that at the same time, because of the cruel, systematic and violent manner of commission, as well as the causes that showed certain characteristics, reasons and manifestations very different in the mortality conducts that happened between men and women, they started to be called “feminicidios” (femicides); exposing, the fact that violent acts that were inflicted upon women had all the legitimacy to be able to consider it as a form of violence based on gender<sup>44</sup>. As a result of this culture of violence and discrimination based on gender, the Inter-American Court of Human Rights (CoIDH) rules against the Mexican State in the case *Gonzalez and others (“Cotton Field” “Campo Algodonero”), vs. Mexico*, in which the court uses for the first time the expression “women homicide because of gender”, known nowadays as “feminicidio” (Femicide)<sup>45</sup>.

<sup>41</sup> SCJN (Nation’s Supreme Justice Court). Thesis P. XXIV.

<sup>42</sup> RUSSEL. D and HARMES R. (2006:78).

<sup>43</sup> LAGARDE, M. (2005:155)

<sup>44</sup> INCHAUSTEGUI ROMERO, T. (2001:374).

<sup>45</sup> Inter-American Court of Human Rights (CoIDH), (2009).

In this sentence the Inter-American Court of Human Rights (CoIDH), it was very adamant in pointing out the silent and insensitive manner in which the state officials and authorities responded, that even knowing about the context of generalized criminality regarding violence against women in Ciudad Juarez, Mexico, a social, political and economic context of systematic violence and discrimination against women, in which according to reports done by the UN, a total of 328 women were murdered during the period of 1993-2003<sup>46</sup>, minimized such issue, showing a lack of interest in diligently taking care of the reports regarding women's disappearances, because establishing 72 hours to officially declare a woman as missing inside this context<sup>47</sup>, resulted for the Inter-American Court of Human Rights (CoIDH) as irrational, and therefore determined its international responsibility<sup>48</sup>.

Therefore, Femicide seen from a gender perspective, locates itself in an historical-social context, were it is thought of as the most extreme display of patriarchal force exercised to recover the gender borders historically delimited, and to protect the male rights and privileges socially established due to the advance the indexes of women empowerment in the physical, economic and political advance gained over the last 30 years represent<sup>49</sup>. It is precisely the main thesis that establishes the sociology regarding gender violence and Femicide, is it that breach or gap generated between a gender-regulatory paradigm centered in the subordination of women and the current empowerment of the female figure present in all areas where men and women commonly interact, may it be in the interpersonal level or in the public one. Thus, from this feministic logic, there have been substantial changes in matters of gender, such as the advances in the process of visibility, awareness and sensitization, social acknowledgement of inequalities, the inclusion of gender perspective in argumentative reasoning from judges, in protocols, in ministerial criteria, investigation, forensic services, the creation of education policies, which have fostered a network of specialized knowledge in matters of gender, besides of the underwriting, signing and

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<sup>46</sup> UN (2003:2)

<sup>47</sup> This non-compliance of the obligation to guarantee is severe due to the context in which the State was aware of the matter, therefore, the previous contextual analysis is highly relevant, because of it the manner in which the State should have acted coming from that context that placed women in a situation of extreme vulnerability and in which the three gender-based related homicides occurred and that gave way to the aforementioned sentences is sized-up. It is important to point out that the context is used by the Inter-American Court of Human Rights (CoIDH), as a parameter to measure the seriousness of the actual and immediate risk, and, if as a consequence of the State's acting under said context there was or was not a real damage by not establishing general measures of prevention that would guarantee the personal integrity and human rights of the women who were victims of that context of structural violence against women. ANGULO LOPEZ G. (2016:25-26).

<sup>48</sup> It is precisely in this sense the Inter-American Court of Human Rights (CoIDH), points out that: "...the State, given the context of the case, had knowledge that there was a real and immediate risk that the victims could be sexually assaulted, subdued to ill treatments and murdered. The Court considers that in sight of said context a duty of due and strict diligence facing the reports of women's disappearances arises, in relation to the search during the first hours and the first days..." Inter-American Court of Human Rights (CoIDH), (2009).

<sup>49</sup> CAPUTI, JANE (1989: 437-456). INCHAUSTEGUI ROMERO, T. (2001:377-382) and MONARREZ FRAGOSO, (2000:887-117).

ratification of international treaties, the enactment of laws directed towards the elimination of violence against women, the classification and categorization in most criminal codes of the federative entities of the crime of Femicide (feminicidio), myriad of scientific production and of disclosure, as well as the design of mechanisms and resources directed towards the prevention and eradication of violence against women.

Nevertheless, the Femicide violence in Mexico is so serious, that, according to official data from the Nacional Institute of Statistic and Geography (INEGI), only from 2000 until 2015, in Mexico, 28,710 violent murders committed against women took place. In the year 2013, 32 out of 100 women were killed, the main causes for these crimes are: strangling, burning, stabbing, mutilations, or beaten with objects; whilst most of murders committed against men, 65.2% were due to the use of firearms. However, specialists and organization from the civil society say that there is no registry that allows to fully size-up the magnitude of this phenomenon. Besides, in many of these cases, the authorities do not report women's murders, the even consider them as un-intentional or suicides in many occasions. Regarding the access to justice, the Public Ministries and experts do not carry out the investigations of these crimes according to the specialized protocols of action, reason for which, in many cases, it prevents them from being qualified or classified as femicides. About this matter, according to official data given by the Justice Procurations Offices and State Prosecution Offices to the National Citizen Observatory of Femicide (OCNF), just between 2014-2017, approximately 6297 women were murdered in Mexico, however, only 30% of the cases were investigated under the Performance Protocol for the Investigations of cases of femicide<sup>50</sup>. On the other hand, the lack of measures to prevent, investigate and judge the guilty parties, as well as obstacles that get in the way of access to justice for the victims, generates a generalized perception of impunity that inspires socially violent practices against women, that end in many of the cases in the commission of femicides<sup>51</sup>.

#### **IV.2. Femicide as a legal category**

In fact, femicide, understood as the death of women due to gender<sup>52</sup>, continues to be one of the most controversial issues due to its multidimensional concept, the resistance of its causes, the critical situation in some regions of the country due to the increase in this type of crime, the damage caused by the victims and the social delegitimization of the criminal

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<sup>50</sup> OCNF: (2018:35).

<sup>51</sup> UN-CEDAW (2018).

<sup>52</sup> The Committee of Experts (CEVI) of the Follow-up Mechanism for the Implementation of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belém do Pará" (MESECVI) in its Declaration on Femicide (2008) ) states that: "femicides are the violent death of women for reasons of gender, whether it takes place within the family, domestic unit or in any other interpersonal relationship; in the community, by any person, or that is perpetrated or tolerated by the State and its agents, by action or omission. Latin American protocol model for the investigation of violent deaths of women due to gender. Resource available in: <https://www.ohchr.org/Documents/Issues/Women/WRGS/ProtocoloLatinoamericanoDeInvestigacion.pdf>

system that leads to impunity and lack of prevention and due diligence in investigations. Hence, the implications of this phenomenon are still subject to extensive debates both from the academy and in the political, jurisdictional and legislative exercise. However, beyond the political debate, the legal issue has been gaining relevance due to the prevalence of cases of murdered women, and the particularities in which they occur. In this sense, the analysis has focused on finding elements that allow us to distinguish between a femicide and other types of criminal violence that occur in the domestic sphere, in communities, produced by state agents or individuals; but above all to acquire a new awareness of the need to find a solution to prevent, eradicate and punish this phenomenon.

In this sense, at least, from the criminal dogmatics, one of the demands has been concentrated on the need to create a specific criminal offense that has practical effects on reality<sup>53</sup>. So, from this perspective Femicide as a legal category, is understood as the most extreme and bloody expression of violence against women, making reference mainly to homicides committed by men against women because of their gender, and other factors and variables that allow for it to be distinguished from other homicides. In our Federal Criminal Code femicide is typified in article 325, which says the following: “Commits the crime of femicide (feminicidio) the one who deprives a woman of her life because of reasons related to gender. That gender-related reason remains *in abstracto*, unless its existence can be rationally justified throughout the configuration and pinpointing of the following factual assumptions: “I. The victim must present signs of sexual violence of any kind; II. The victim has suffered injuries or defamatory or degrading mutilations, prior or subsequent to the deprivation of life or acts of necrophilia; III. For there to be any records or information about any type of violence in the family, work or school environment, of the active subject against the victim; IV. Had there been between the active subject and the victim a romantic relationship, an affectionate one or one of trust; V. For there to be pre-existing data that establish that there were threats related to the criminal fact, harassment or injuries from the active subject caused against the victim; VI. That the victim has been uncommunicated, for any given time prior to the deprivation of life; VII. For the victim’s body to be exposed or exhibited in a public space”<sup>54</sup>.

In this way, besides having the legal elements, and the factual circumstances that lead us to the comprehension of the criminal fact, the evidentiary element is fundamental to rationally justify the accusation or indictment of the conduct. Therefore, in this assessment judgement, in order to establish if a woman’s murder was committed because of her gender, it will not be enough to know the victim’s sex, but also the competent authorities must investigate the “motivation” and the “context of the crime” to be able to prove the existence of the crime called femicide. Under these parameters it will be possible to ascertain if the deprivation of life constitutes a manifestation of discrimination, or as a part of a context of subordination, and of inequality in the relationships of power between men and women. Sure

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<sup>53</sup> SOLYSZKO GOMES, (2013:35).

<sup>54</sup> Article 325 CPF.

enough, the SCJN points out that at the moment of setting this criminal type (“tipo penal” in Spanish), evidentiary difficulties arise, because out of all the cases of women murders there should not ensue from the assumption that all expression of violence inflicted upon a woman had at its origin a gender motivation or that it developed in a context of domination, because not only would that be incorrect from the legal dogmatic point of view, but constitutionally unacceptable, most of all because that conclusion brings as a consequence the qualifying on the upgradability of the aggravating circumstance of the criminal type (“tipo penal”) of murder<sup>55</sup>. However, every event in which a woman loses her life, independently of the causes the clues might point to, for example, criminality, organized crime, suicide, accidents, etc., must be investigated and judges with gender perspective<sup>56</sup> to establish if the homicide happened because of a gender motivated reason. Therefore, this approach of the centrality of femicide in its context, the motivation as well as its factual circumstances, are fundamental components that must be included in the argumentative reasoning of judges working towards a broader perspective that allows them to ascertain the femicide violence, and prove the criminal type (“tipo penal”) of femicide.

Indeed, it is important to overcome technical-operational difficulties in the implementation of the criminal offense of femicide, complying with a series of international and national standards, based on human rights, equality and non-discrimination, in accordance with article 7 paragraph b) of the Convention of Belém Do Pará and with article 1 of the Mexican Constitution, regarding the obligation of the State to adopt necessary measures and effective remedies to guarantee the rights, and to act with due diligence to prevent, investigate and sanction violence against women. In this sense, it is important first of all to implement permanent training aimed at eradicating institutional discrimination based on the gender prejudices that still prevail during the preliminary investigation stage of the ministerial authorities, police, judges and prosecutors. Secondly, comply with the specialized protocols, which establish that when investigating the violent deaths of women that in principle would seem to have been caused by reasons related to crime, suicide or accidents, the investigating bodies should carry out their research with a gender perspective, in order to determine whether or not there were gender reasons in the cause of the event, or also to be able to confirm or rule out such reasons<sup>57</sup>. Precisely, in the resolution of the proceedings to

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<sup>55</sup> SCJN. (2016): “Homicide because of gender. To establish said circumstance, it will not suffice to identify the victim’s sex, but it is also necessary to know about the motivation and the context in which the crime occurred”.

<sup>56</sup> Judging with gender perspective requires a reasoning that goes beyond the mere consideration of a linguistic context, or even, de application of a textual criteria to a particular case; the introduction of this approach in the work of legal operators, implies to question the supposed neutrality of guidelines and laws, the establishment of a legal framework adequate to solve issues in the most respectful way to human rights; besides that, it must work as a criteria for legitimacy of the judicial exercise to justify a differentiated treatment and give reasons for which it is necessary to apply certain rules to a certain context or facts. About the methodology to judge with gender perspective. SCJN (2015).

<sup>57</sup> Latin American protocol model for the investigation of violent deaths of women due to gender. Resource available in: <https://www.ohchr.org/Documents/Issues/Women/WRGS/ProtocoloLatinoamericanoDeInvestigacion.pdf>

investigate a case of feminicide with a gender perspective, Mariana Lima case of the Supreme Court of Justice of the Nation, establishes that in the case of deaths of women it is necessary to: a) Identify the behaviors that caused the death of the woman; b) Verify the presence or absence of reasons or reasons of gender that originate or explain the violent death; c) Preserve specific evidence to determine if there was sexual violence; d) Make the relevant experts to determine if the victim was immersed in a context of violence<sup>58</sup>.

Certainly, with this differentiated approach, the system of criminal investigation and protection of women victims of violence, forensic expertise, and judicial procedure to accredit the criminal type of femicide is sought to be made more efficient. Despite the criticism of authors who consider that a general gender aggravating factor is insufficient to face this criminological reality, we consider that feminicide has an excessive unfairness over simple homicide, since, at the epicenter of feminicide is the exercise of power based on systematic violence that causes the death of a woman in a context of non-compliance or imposition of a gender stereotype<sup>59</sup> which creates a dominant, persistent collective imaginary that reinforces the position of inferiority, real inequality and structural discrimination of women in society; hence the importance of establishing the centrality of these crimes in their context, modifying socio-cultural patterns based on concepts of subordination, as well as defining the reasons or factual circumstances that led to the crime, among others, they are key pieces for a systemic understanding of this type of crime, and therefore, judges must take into account in their argumentative reasoning and the competent authorities to broaden the gender dimension in the procedures, and in the care strategies and resolution of specific cases of violence against women.

### IV.3. OBJECTIVE CONVICTION AND RADICAL CRIMINAL FUNCTIONALISM

Violence against women has been generalized to the point that it cannot be understood in a definite nor objective manner, we have lost predictability, and the expectancy or expectation is that this reality may come to be no more. According to the first Worldwide Report Burden of Armed Violence 2015, Mexico stood out as one of the 5 countries in the world with the biggest growth in its rates of women homicides between 2011 and 2014. So far in 2019, Mexico ranks first in femicides in 24 countries in Latin America, according to the United Nations Office for the Prevention of Crime and Drugs<sup>60</sup>. Besides this alarming number regarding femicide cases, the violence has extended in such a way, that it produces not only gender breaches in economic development, social, political participation, but it also impacts on the creation of strategic measures of security, like the very controversial proposal

<sup>58</sup>SCJN, Case Mariana Lima, (2015). Resource available in: <https://www.scjn.gob.mx/sites/default/files/igualdad/sentencias/documento/2017-08/PENAL%20II%20%28NACIONAL%29.pdf>

<sup>59</sup> DÍAZ CASTILLO (2019:90).

<sup>60</sup> Forum "Femicides in Mexico. Analysis and legislative challenges 2019", Resource available in: <https://www.elsiglodetorreon.com.mx/noticia/1571635.mexico-primer-lugar-de-femicidios-este-ano-onu.html>

of militarizing police forces with the creation of the national guard, or from the current criminal system, with the new ways of convicting criminal conducts that look to aggravate the penalty when the victim is a woman or gender reasons in the commission of crimes meet, or for a higher penalty regarding the crime of femicide, in the factual premise that the victim is an underage woman; measures that go against the protective positions and of human rights. The truth is that law cannot subsume before a social reality that demands intersubjective rules that are valid for liability and duties for society as a whole. In the case of femicide violence, new dangers are perceived for women, in the public area, as well as in the intimate one, which implies having the capacity of reacting on a bigger scale to face, what Arnaud calls, the paradox of paradoxes<sup>61</sup>, which has to do, in this case, with the lack of regulative ability of law to interpret de complexity of legal-social phenomena such as violence against women, the lack of efficiency from state agents in the lack of applying instruments to size-up gender violence and prevent and eradicate it more effectively, and of legal operators, at the moment of identifying it inside de procuration, impartation and administration of justice.

This situation creates a dialectic tension between a punishment and control logic through the implementation of restrictions and categories of exception designed to fight the effects of criminality and femicide violence, such as the officious preventive prison, with the principles and legal bases the accusatory criminal system works with, directed mainly towards maximizing the respect of human rights and legal guarantees in criminal processes<sup>62</sup>. In this way, facing the growing complexity of gender violence and femicide cases, the criminal justice system seems to find itself far from balance, between the non-impunity –the punishment of the guilty parties– and the protection of human rights of women as victims of a crime and of the social group; and, on the other hand, a model to criminalize supported in the assumption of guilt, in constrained rights and minimal procedural guarantees for the accused. Therefore, amongst the criminal dogmatic, we will expose briefly, two types of criminal functionalism: *the criminal evaluating functionalism* and the *rigorous or radical legal criminal functionalism*; models whose study and analysis result necessary to have better effective logistics and a broader vision about the way to face this social phenomenon.

Firstly, we present the *thesis of the criminal evaluating functionalism or also called moderate* backed up by Claus Roxin, who states that, in order to fight off criminality, or in this case femicide violence, it must be based on a strategy of national interdisciplinary prevention and one of respect of the fundamental rights directed towards the search of alternatives to the criminal punishment, that is to say, the penalties system must limit whenever possible the criminal behaviors with the criminal punishment threat. From this conception the person accused of violating a rule or law only answers for the damage to the protected value, therefore, the punishment acquires a reinsertion function, of repair of the

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<sup>61</sup> ARNAUD A.J. (1994:1003)

<sup>62</sup> For a greater comprehension of the criminal amendment and the accusatory criminal system in Mexico, vid; GOMEZ GONZALEZ, (2016: 1-1046). A., Criminal Amendment 2008-2016. The Accusatory Criminal System in Mexico, Mexico City, INACIPE, first editorial. 2016, pages 1-1046.

social damage as a positive general prevention, the criminal's reeducation and not a deprivation of his/her freedom, except in specially serious crimes<sup>63</sup>. Consequently, from this axiological perspective, a narrow bond is seen between the conception of the absolute value of human rights and guarantees and the "critical interests", that is to say, that the criminal's value as a person is independent from their personal fable, the type of crimes he/she commits, the level of cruelty of his/her actions, or the impression they generate in society; that is to say, the inherent character of their rights and their dignity, are not affected, nor do they depend of the perception of the damage inflicted upon the victim or the welfare of the community<sup>64</sup>.

Secondly, we have, the *rigorous or radical legal criminal functionalism*, which will try to overcome the abstract of the criminal evaluating functionalism adopting a rigorous stand in order to achieve social stabilization. From this conception the subject appears as a danger for the State and society itself. Therefore, a type of criminal law of exception appears with the objective of fighting those dangers through the use of certain security measures as the restriction of certain human rights<sup>65</sup>. A kind of extreme reason, that is, as a legal mechanism that operates when all other forms of social control have failed<sup>66</sup>. With this argument, human rights will be subservient to a set of expectations of behavior sustained by the general consensus. In such way that, if the legal and social expectations for behavior are not met, human rights might be restricted through a type of law that serve as an instrument of social cohesion<sup>67</sup>.

In the center of this criminal theory we find Günther Jakobs, considered as one of the most polemic jurists, author of the so called "criminal law of the enemy". Jakobs bases his thinking on the quality of the subject that fails to comply with the legal expectation, modifying the structure of guilt and the punishment, in the assumption of "the enemy". For Jakobs, the punishment's function is not the coercion directed against the person, but of fighting the risk generated by the dangerous individual through security measures<sup>68</sup>. Sure enough, the fundamental part of this theory will focus in the efficacy of the punishment in a relation to the reaffirmation of the rules validity and the reestablishment of the social order<sup>69</sup>. Jakobs considers that "who does not give a sufficient cognitive security of a personal behavior, not only cannot expect to be treated still as a person, but the State must not treat him/her as a person anymore, because if not it would affect the right of other people's

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<sup>63</sup> ROXIN, C. (1998: 885 and ss) "Zur Kriminalpolitischen Fundierung des Strafrechtssystems". em Festschrift für Günther Kaiser. Berlin. Duncker & Humblot, and ARIAS EIBE, M.J., (2006:440-442). "Moderate criminal functionalism or teleological value versus legal or radical functionalism", Doxa, Legal Philosophy Notebooks, no. 29.

<sup>64</sup> DWORKIN, R. (1996: 306 and ss) and PEREZ TREVIÑO, J.L. (2007).

<sup>65</sup> PORTILLA CONTRERAS, G., (2005).

<sup>66</sup> TOLEDO VÁSQUEZ, (2009:70)

<sup>67</sup> MONTORO BALLESTEROS, A. (2007:370).

<sup>68</sup> JAKOBS, G. (2003: 24-25).

<sup>69</sup> ARIAS EIBE, M.J., (2006:447-448).

safety”<sup>70</sup>. Therefore, the person exists according to their social relationship bases not only in the personal self-determination, but is also defined through an independent rule regarding any decision or preference, being able to be invoked by others.

This rule turns into a social rule in the strict sense for Jakobs: in the moment in which we realize what we want for us, that is to say, that nothing bad is done to us, that can be considered as cruel, inhumane, unfair, it is valid also for others. In this sense, in Jakobs it is highlighted that the importance in the formation of “all personal order,” of the “duties to contribute to the preservation of the group which exists through the order”<sup>71</sup>.

As a part of this conception of the *rigorous or radical legal criminal functionalism* in which the approach that is privileged is that one of “dangerousness” of the criminal from a “legal construction”, we can see it clearly in the constitutional acknowledgement of the figure of “entrenchment” (arraigo in Spanish), preventive measure that justifies the legitimate restriction to human rights such as personal freedom and the presumption of innocence when there are indications that the accused might evade justice, hinders investigations or might place the crimes’ victims at risk. A fundamental aspect, regarding this preventive measure, is what was resolved by the SCJN, in the thesis contradiction 293/2011<sup>72</sup>, that nullifies the validity of any other known legal content acknowledged in an international treaty of human rights, or the interpretation criteria which might result from them when confronted with the explicit restrictions to the exercise of human rights contained in the Constitution. Therefore, under this SCJN criteria, it leaves without effect every judicial resource of this preventive measure even if it violates principles and human rights acknowledged in article 1 of the Mexican Constitution that entail a series of acting mandates and of optimization of the legal system.

Recently, on February 19 of the current year, with 377 votes in favor, 96 against and 15 abstentions, approval was carried out in the Republic’s Senate, the project of amendment to constitutional article 19 which pretends to adjust the accusation’s criteria of criminal responsibility to contain the realization of criminal conducts, with the expansion of the crimes catalog which deserve officious preventive prison –amongst them the crime of femicide–, a measure –from our point of view–, as an exception to the constitutional and conventional guarantees of freedom that pretends to be implemented without any legal reasoning that justifies the need and the adequacy of such preventive measure, that can be obtained through scientific evidence, with the application of “neuropsychological reports” and of “risk predictions” that might be exploited as assessment instruments to measure the cognitive

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<sup>70</sup> JAKOBS, G. (2003:47).

<sup>71</sup> JAKOBS, G., (2003:342-343) and JAKOBS, G. (1996:79).

<sup>72</sup> Thesis contradiction 293/2011. SCJN. (2011:96).

capacity of the criminal behavior, the high degree of danger, the risk of violence that might place the victims of the crime in danger or jeopardize the safety of others.<sup>73</sup>

We consider that these measures point towards a restrictive criminal functionalism of human rights and judicial guarantees; we do not deny that it could be implemented on a temporary and exceptional basis in a context in which public lack of public safety exists, extreme violence, terrorism, and high criminality, a rigorous and radical standing in criminal law, that might be feasible, so that in a judicial process, a person or a group of people that commit actions directed towards the destruction of the social structure, and that shock the state's security and safety, so they can be judged with the maxims of criminal law within the bounds of the minimum guarantees of due process. However, we believe that the constitutional amendment regarding the officious preventive prison, depends on other circumstances, first: to effectiveness problems in the implementation of social reinsertion and alternative justice; second: in the lack of capacity of the State of reducing organized crime to reasonable limits; third: the lack of prevention, investigation and punishment of crimes, now cataloged as serious, like: first-degree/intentional murder, rape, kidnapping, person trafficking, abuse and sexual violence against minors, femicide, forced disappearance, amongst others: that obviously, originate from a generalized perception of public lack of security/safety, corruption and impunity, which has led to a social delegitimization of the current criminal policy, of public safety/security and of the essential mechanisms and parameters used by criminal justice in Mexico uses to operate<sup>74</sup>.

In this way, we uphold that cataloging femicide as a serious crime resulting in automatic preventive prison, is a speech which indicates a vision ever so unadjusted by the State of the reality of gender violence in Mexico. Femicide, from the current criminal dogmatic, it has become a typical relevant fact, in an unconventional crime, a crime of abstract and concrete danger. Therefore, the social relevance that could be attributed to a femicide, do not only have to focus in the causative result, or in the gender reasons or circumstances or the socio-psychical one of the aggressor's presumption, but in the starting point the meaning of the unlawfulness of the conduct in a specific social context must be placed as well. In these cases of femicide or femicides in attempted degree, it is important that the following is taken into account: the seriousness, the cause, the purpose, motive, reason, but it also has to be taken into account that the causality only operates on a first degree of communication, giving us the original elements of the *criminis notice*, which has to be submitted to an assessment judgement done by the legal operators to reach conviction. In such a way, which determines the typical relevance of a conduct, is the assessment judgement. Therefore, from the objective conviction theory –as defended by Caro John–, it is determined that a reprehensibly legally-criminal conduct is considered ad typical not because of its causality, nor for its seriousness, nor for its objectives, but because of when it

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<sup>73</sup> About the practical application of reports based on neuropsychological studies and risk prediction in the Mexican judicial system. DZIB AGUILAR, J.P. (2013).

<sup>74</sup> ANGULO, LOPEZ, G. (2017:55-60).

communicates the overcoming, overreaching of extracriminal rules and laws.<sup>75</sup> In such a way, that the aggressing subject with the femicide violence not only defrauds the legal expectation, but also creates an unbalance between his real behavior and the conduct expected socially from him/her, that is to say, defrauds institutionalized expectations and conceptions with a strong universal consensus,<sup>76</sup> so that the reproach to his/her conduct is legal and social. However, the reproach must also be political; the State also defrauds a social expectation. In this argumentative thinking, the restrictive measures will be sterile, such as the officious preventive prison for crimes such as femicide, if the authorities and legal operators do not investigate and judge with gender perspective in cases of violence and homicides committed against women. From this it is obvious that important theoretical and legal obstacles originate at the moment of investigating, proving and judging this type of cases such as femicides. Even though we find ourselves before a criminal and social relevant fact, because from the objective conviction theory, the conduct in this type of crimes surpasses the *socially permitted risk*; for the case of gender violence and femicide, it will not be enough that the punishment's function to only be coercion against the aggressor, but also to fight the risk generated by the subject's conduct and by the omissions of state agents. Therefore, we consider that, prefixing only punitive restrictions that modify the structure of guilt to contain the realization of criminal conducts, like increasing the crimes that deserve officious preventive prison, will not fix, at least, a phenomenon so complex such as gender violence and femicide in Mexico<sup>77</sup>.

Definitely, the accomplishment of an authentic substantive equality between men and women, is far-off from women's reality in Mexico. Violence against women, has reached a culminating point from a spiral of violence originated in a context of high criminality, lack of safety/security, discrimination and violence extended to all spaces in which women and men interact with each other. According to official data from the Public Safety/Security National System (SNSP in Spanish) of the Governance Secretariat, between January and August of 2018 21,877 first-degree/intentional homicides and 538 femicides were registered, all of them committed with a high level of violence and cruelty. This data gave led to 2018 being the most violent year in Mexico's history. This regrettable situation finds itself within a realist fallacy, which reduces all legal dogmatic and feminist views to a minimum level, which results to be ineffective to diminish the high violence indexes and femicides in Mexico. In this way, it is necessary to carry out a rethinking of the problematic from all possible variables; it would be a mistake to try to explain and solve such a complex phenomenon from the criminal dogmatic perspective, or from a single reasoning, –the asymmetry of gender power–, proper of the feminist discourse. We cannot evaluate, or approach violence against women, as we have been doing so during the last 30 years; without a doubt, today women's reality is another. We need resources that several disciplines or fields may provide, such as: psychology, sociology, anthropology, criminology, according to the current context of

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<sup>75</sup> CARO JOHN J.A. (2003:26)

<sup>76</sup> POLAINO-ORTS M. (2009:73-74).

<sup>77</sup> GÜNTHER JAKOBS (2003)

gender violence and femicide; and most of all that the State is willing to integrate those criteria to their public policies of prevention, treatment and punishment of aggressors, and protection of the victims. This is a path that deserves to be taken in order to achieve new perspectives regarding violence against women, according to me. It is a paradoxical utopia, that might lead us from this very complex social problem, to a new horizon, where generalization, universal satisfaction of human rights, the growth, progress and peace for all women, is seen as something possible.

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