

*The feminization of criminal law**

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PALABRAS CLAVE: Feminismo, derecho penal, víctima, género.

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RESUMEN: El presente artículo muestra la orientación feminizada del sistema moderno del derecho penal, así como su elaboración en los próximos veinte años. Para estos efectos, se toma como referencia el caso alemán, que comparado con el mexicano, evidencia que entre Europa y Latinoamérica hay mucho en común.

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ABSTRACT: This article shows the feminized orientation of the modern criminal law system, as well as its elaboration in the next twenty years. For these purposes, the German case is taken as a reference, which compared to the Mexican one, shows that there is much in common between Europe and Latin America.

I. INTRODUCTION

The criminal law of the future has the face of a woman. The Mexican case is a good example to prove that this statement is correct and also to warn of the new trends in criminal law, just as Weigend has argued, “even though criminal law does not normally move through big steps, it moves». ¹ This development shows several similarities between Mexico and Germany, despite the fact that there are more differences. What will be briefly exposed could configure a part of the —so called— penal system of the future, although some dimensions are a tangible reality among us. The feminization of criminal law (2) can be accredited by three phenomena that are divided into the following areas: the feminization of criminal dogmatics —especial reference to the causes of justification— (3). A greater synergy between human rights and criminal law (4) and the transition to a feminized criminal law of integration (5).

II. THE FEMINIZATION OF CRIMINAL LAW

The destiny towards which Mexican criminal law is moving —as the German one— is that of its feminization. And what does this mean? It means, in Weigend’s words, that «it is not a casualty to observe a trend towards the re-moralization (also) of criminal law, through an increase in the influence exercised by women in public opinion, as well as in the legislative and jurisprudence ambit. Since a few decades ago, at European level, women have had a greater presence than men in legislative bodies, courts and prosecutors, but also in the media. That does not speak, precisely, that this trend is going to break. A consequence of this development is observed in the growing interest in the position of the crime victim, both in material criminal law and in procedural law. Women are, in greater numbers, victims than perpetrators of the crime, and they identify more easily with those who suffered the commission of the crime». ² If you

¹ 1 Weigend, Thomas; *Wohin bewegt sich das Strafrecht? Probleme und Entwicklungstendenzen im 21. Jahrhundert*; en; *Grundlagen und Dogmatik des gesamten Strafrechtssystems. Festschrift für Wolfgang Frisch*; Georg Freund, Uwe Murmann, René Bloy y Walter Perron (Coordinadores); Duncker & Humblot, Berlin, 2013.

² Weigend, Thomas; *Wohin bewegt sich ...?*; p. 25. In relation to the fact that women are, to a greater extent, victims of certain crimes (such as those of sexual nature), as well as pointing out which criminal types of the German legal system consider as active subjects only women or men; Sick,

look closely, the axes of feminization warned by Weigend reflect a palpable trend in the Mexican reality:

Just think of the fact that a woman that heads the Office of the Attorney General of the Republic and another woman is in charge of implementing the reform of the criminal justice system throughout the country. The same happens in other dimensions of current criminal law. Thus, those who have led the design of all general Mexican laws related to the criminal dimension (kidnapping, victims, human trafficking, forced disappearance of persons, torture, —including the law on women's access to a life free of violence—) are women, and they continue to be the promoters of public policies on the matter.³ Women are also the ones who make up the only Mexican Association of Judges at the federal level⁴ —there are no men— and it is a woman who holds the Presidency of the Mexican Academy of Criminal Sciences (an institution whose Vice-Presidency is also held by a woman).

On the other hand, as Weigend reports, “there is a trend towards the typification or strengthening of behaviors of which, mostly, women tend to be victims. Consider the new criminal type of forced marriage (§237 StGB), harassment (§238 StGB), human trafficking for sexual exploitation (§StGB 232), as well as the exposure of intimate images (§201StGB)”.⁵

Moreover, women are the leaders of the first Mexican foundation dedicated to the protection of the early childhood against abuse, child trafficking and child sexual exploitation,⁶ a situation that —as Weigend maintains— is also current in Germany: «Finally, the trend towards the criminal protection of childhood and adolescence is perceived, focused on the field of sexual abuse, with special reference to the use of child pornography (§§180 and 184c StGB), which can be associated with a gender reason, since the perpetrators of these crimes are usually men».⁷

The feminization of criminal law is also reflected in a broader protection of one's own image and the sanction of its use —without consent— in the media,⁸ as well as

Brigitte; Zweierlei Recht für zweierlei Geschlecht. Wertungswidersprüche im Geschlechterverhältnis am Beispiel des Sexualstrafrechts; on; ZStW, 103 (1991), Heft 1, pp. 44-45.

³ This is the case, to mention a couple of examples, of Angélica de la Peña and Adriana Dávila Fernández, from the Senate of the Republic, or of Isabel Miranda de Wallace and María Elena Morera, from citizen activism.

⁴ Something similar happens with the female judges in Germany, who —as reported by Martina Bosch—; founded the “Deutscher Juristinnenbund”. The question remains open, as the author maintains, about its function: Will it be scientific, feminist or of some other kind? Der Deutsche juristinnenbund; in, Frauen und Recht ...; p. 82.

⁵ Weigend, Thomas; Wohin Bewegt sich ...?; p. 25.

⁶ It is about the non-governmental organization: ¿Quién habla por mí?

⁷ Weigend, Thomas; Wohin Bewegt sich ...?; p. 26. p. 400.

⁸ “In German civil jurisprudence, it is believed that taking a photograph of a person without their consent and making it public infringes the right to personality”; Heinrich; Bernd; Die strafrechtliche

in the establishment of dogmatic figures aimed at justifying a tyrannicide (Tyranenmord) at the hands of the victim, where girls and women are the ones who suffer the most. In Weigend's words: "In any case, criminal law will change its contents: it will no longer be understood as the strict father who seeks to generate conditions for a free life, but rather, a tender mother who accompanies her children".⁹

As it will be seen later, the trend towards feminization of the Mexican criminal justice system —as a whole— is a challenge of a political-criminal nature that must be assumed with solid foundations. Thus, for example, the future feminized reform of the Mexican criminal process cannot wait long, since the deprivation of rights exercised against women lacks —in most cases— a true justification. The same can be said of the police field, where the feminization of the criteria for the use of force by women requires realistic adjustments with a woman's perspective. The area of material criminal law and its dogmatics —as explained below—, is not less important as well as the feminization of jurisprudence in the criminal field.

The same happens with regard to the issuance of the national law for the execution of criminal sanctions, whose projects —at the time of writing this article— are not yet inclined towards the trend exposed here.¹⁰ Something similar happens with the current laws of victims in the states of the country and —of course— with their penal codes. All this is pending to undergo an irreversible process of feminization.¹¹

III. THE FEMINIZATION OF CRIMINAL DOGMATICS —SPECIAL REFERENCE TO THE CAUSES OF JUSTIFICATION—

The science of criminal law —its dogmatics— is another example of the trend towards the feminization of the system. The paradigmatic example is that of self-defense and the situation of defensive necessity. More and more authors are inclined towards broadening the boundaries of justification causes, in order to provide greater

Verantwortlichkeit von Presse mitarbeitern bei der unbefugten Herstellung und Verbreitung fotografischer Darstellung von Personen; ZIS 5/2011; p. 416.

⁹ Weigend, Thomas; Wohin bewegt sich ...?; p. 30.

¹⁰ For example, as Larrauri argues, "the application of alternative penalties to women must take into account their specific conditions and situations"; *Género y Derecho Penal ...*; p.8.

¹¹ The process of feminization of the criminal justice system has deep roots in social anthropology. If the Mexican context wants to be known - including the myths about the Mexican woman conceived as "a tender and violated entity, protective and lubricious, sweet and treacherous, maternal virgin and Babylonian female", you can consult the work of Marcela Lagarde y de los Ríos; *Los cautiverios de las mujeres: madresposas, monjas, putas, presas y locas*; 4th edition, Postgraduate collection; National Autonomous University of Mexico; Mexico, 2005; pp. 31 et seq.

protection to women and girls who are victims of family and gender violence, even when the new conditions of justified action also benefit male victims. The cases of the “Tyranenmord”, or tyrannicide, at the hands of the victim (usually a woman), have become essential in the dogmatic treatment in Germany, evidencing a trend towards the feminization of lawful causes:

To cite just one example: it is necessary to understand —as Larrauri warns in his criticism of Spanish jurisprudence— that «the judicial practice that automatically mentions “mutual struggles” is erroneous, implying that we are facing behaviors of equal worthlessness. The expression “mutual aggressions” obscures the fact that, despite the mutual attack, the result in terms of fear and in terms of probability of injury is not at all equivalent».¹²

Thus, as reported by Kindhäuser, there are attacks whose actuality extend over time: “the continuous danger (Dauergefahr), can also be considered as a current danger, as long as it can be translated, at any time, into an injury”.¹³ By means of this criterion, tyrannicides are solved, in which the victim of family violence deprives his aggressor of his life when the aggression has not started but the active subject is present in the place, however, the situation will have to be verified at any time. The German doctrine, which has addressed this issue with special interest, is divided between those who accept self-defense or the situation of justifying necessity —with continued danger—, to resolve cases such as the one mentioned before. For either hypothesis, however, the assessment of the victim’s special knowledge can tip the balance in their favor:

This would be the case of a woman who stabs her husband in the back, when he’s barely climbing the stairs, because she knows that every time he arrives in a drunken state, after meeting with his friends, he brutally beats her until imposing anal intercourse on her. Facing a hypothesis like this one, it will be necessary to consider whether, indeed, similar events have happened in the past to give firm foundation to the victim’s special knowledge. If this is confirmed, we would be facing a case of a situation of necessity or self-defense.

The cases of self-defense or situation of necessity with continued danger, should not be confused with the cases of revival aggressions, in which the aggression exists, but its intensity has diminished, in such a way that the danger to the legal good is almost imperceptible. In these cases, the source of danger remains present at the scene and can be reactivated at any time. The difference between ongoing danger and revival aggression can best be appreciated using the example above.¹⁴

¹² Larrauri, Elena; Desigualdades sonoras, silenciosas y olvidadas: Género y Derecho Penal (1); AFDUAM, 13 (2009), p. 45.

¹³ Kindhäuser, Urs; Strafrecht. Allgemeiner Teil; 6a edición, Nomos, Baden-Baden; 2013; p. 160.

¹⁴ In this regard —with examples—, it can be seen; Ontiveros Alonso, Miguel; Legítima defensa e imputación objetiva (special reference to predisposed self-protection mechanisms); National Institute of Criminal Sciences, 2nd edition, Mexico, 2010, p. 288; «If viewed closely, unlike what happens

The woman who is a victim of family violence and rape by her husband stabs him in his sleep —after beating her and before imposing copulation on her—: this would be the case of a revival assault. On the contrary, an aggression with continuous danger is precisely the example previously exposed, where the last aggression suffered by the victim was days ago and she knows —based on her special knowledge— that her partner will attack her again when he arrives home. Both cases would justify the death of the aggressor at the hands of the victim.

3.1. Are social-ethical restrictions on the right of self-defense against the abusing spouse required?

The exercise of self-defense is restricted when, between the aggressor and the defender, there is a position of guarantor. This circumstance translates into a duty of mutual safeguarding, such as the one that exists between father and son, siblings or between spouses. That is why if the aggressor is located in one of these hypotheses —which are not the only ones in which the indicated guarantee bond exists— then the exercise of defense should be avoided. Here the principle of human solidarity plays an important role, in such a way that the victim must turn around and withdraw, or in a more complex case, limit herself to the exercise of a protection defense (*Schutzwehr*), since the prevalence of the legal system —supra-individual basis of self-defense—, plays a less important role than in cases of full self-defense:

“Wherever the intervening parties are reciprocally obliged, under threat of penalty to avoid harm to others, in cases of aggression against one another, the victim can certainly protect herself by self-defense, but the interest in the prevalence of the right recedes from the duty of human consideration as long as a relationship of solidarity between those involved can still be appreciated”.¹⁵

When a son takes 1,000 pesos from his father’s wallet to spend them without authorization on football bets, he damages the legal heritage. In other words, he configures a real and current aggression, which in turn, supports the abstract necessity

in self-protection phenomena with predisposed mechanisms, in cases such as the one mentioned —authentic hypothesis of continued danger—, the victim has concrete information, due to his previous experiences, about who is the aggressor (husband, partner ...), when the endangerment of their sexual freedom, personal integrity or life usually occurs, and so on; (when the subject ingests intoxicating beverages), but also the intensity of the aggressions (from threats to intense beatings, through sexual assaults), and even also from where the endangerment or injury of the legal assets of those who she is the owner (always in the couple’s room, in the marital home, and in the absence of witnesses) ».

¹⁵ Roxin, Claus; Criminal law. General part. Volume I. The structure of the theory of crime. Translation and notes by Diego-Manuel Luzón Peña, Miguel Díaz y García Conlledo and Javier de Vicente Remesal; Civitas, Madrid, 1997; p. 651.

for defense. However, the ethical-social restrictions require the father to resolve the conflict in another way and not, on the contrary, by exercising self-defense against his son. In these types of situations, it is best to wait until a later time to resolve the conflict. The accuracy of this example is demonstrated by daily life, where there are differences between family members that are resolved later without the necessity —of course— to go to the causes of justification.

As in the two previous hypotheses —aggressions coming from children, people without capacity of guilt or trifle—, the ethical-social restriction does not play any role when any bond of solidarity is broken and exceeds the limits of tolerance that frame a mutual safeguarding relationship between the person with whom a guarantor position is maintained. This is the case of the husband who not only verbally offends his partner, but also physically or sexually assaults her. In a case like the one indicated, the victim of the aggression is not obliged to have any kind of consideration with the aggressor and may fully exercise self-defense.

Cases of family violence such as the one described, in which the victim waits for the right moment to respond to his aggressor, for example, when he is distracted or just arriving home, are not strange to us. Unfortunately, due to the absence of a feminized perspective of the justifications in Mexico, the female victims of aggression who exercised self-defense serve, in their majority, convictions for aggravated homicide.¹⁶

The German doctrine has deepened, perhaps like no other, in the analysis of these cases. Thus, Roxin highlights two hypotheses against which the ethical-social restriction raised here no longer applies. It seems to me, as I will present immediately, that these positions require some adjustments for their application in our country. “First of all, no one has to be in risk of suffering serious injuries, and for these purposes I understand by such injuries those that require medical treatment. Therefore, if necessary, a wife will be able to defend herself even with a knife or a revolver against her husband, if he is about to hit her on the head with a heavy object, attack her with weapons, break her bones, etc.

Second, no wife has to endure continuous (even minor) mistreatment, which denigrates her dignity and makes her an object of the husband’s arbitrariness. A woman who is beaten almost daily by her husband for insignificant reasons no longer owes him the solidarity from which he himself has long dissociated himself, so she can

¹⁶ This phenomenon has several explanations that go beyond legislation, criminal law and its dogmatics, and are based on a moralistic conception rooted among us. The stereotype of the caring woman and housewife that kills her abusive partner makes it unbearable for some judges. About paternalistic conceptions in criminal law (with examples); and around how - according to the author - “we end up being slaves of morality”; Günter, Andrea; Körper und Freiheit im Kreislauf. Zur feministisch-philosophischen Diskussion des Verhältnisses von “Autonomie” und “Paternalismus”; on; Gehört mein Körper noch mir? Strafgesetzgebung zur Verfügungsbefugnis über den eigenen Körper in den Lebenswissenschaften, Nomos, Baden-Baden; 2012; p. 161.

confront him with a firearm if she cannot defend herself otherwise, and she is not obliged to leave the house instead of defending herself».¹⁷

Both cases mentioned by Roxin are shared here, in such a way that the ethical-social restriction no longer plays any role, so that the assaulted woman —without this being a requirement, since it can also be a man or a child— will retain the right to defend oneself without ethical-social restrictions coming into play. Although the solution adopted by Roxin is shared, it is necessary to clarify that the defense faculties should be a little broader than those referred to.

Indeed, in harmony with the Mexican legal system, it will not be necessary for the mistreatment —even if slight— to be continuous, since this is not required in most criminal types related to family violence. The same happens with the example of the woman who is beaten almost daily - for whatever reason - and who responds in self-defense. Here, a single aggression against the victim of interference will be enough to establish the right to self-defense. Finally, the quoted author is absolutely right when he states that the woman “is not obliged to leave the house instead of defending herself”, since not only does it turn out that she is a victim of the aggression, but the rest of the legal system speaks in favor of her stability.

Not only the general law of victims, but also more specific regulations aimed at preventing violence against women, such as the general law of women's access to a violence-free life, speak in favor of the solution adopted here. So, for example, Article 8 defines attention models, such as the “set of measures and actions to protect victims of family violence, as part of the State's obligation to guarantee women's safety and full exercise of their human rights”.

But not all tyrannicides have a relatively simple solution like the one presented here. There is a more complex group of cases, where the victim acts against the abuser before or after the assault, in such a way that it could be difficult to appreciate a necessary defense. I will now deal, by means of the situation of defensive necessity with continuous danger, with the solution of these cases.

3.2. The situation of defensive necessity with continued or permanent danger (*dauergefahr*) against the abusing spouse

The doctrine recognizes the possibility of reacting in a situation of necessity in the face of a continuous or permanent danger. These are hypotheses in which the protective agent reacts to a danger that's not indeed actual, but latent: «according to this conception, a permanent danger is a dangerous situation that remains for a long period and that at any moment can lead to damage, although the possibility may still

¹⁷ Criminal law ...; p. 652.

be open that it may still take a while for the damage to occur”.¹⁸ The most recurrent example related to acting in a situation of defensive necessity - with continuous or permanent danger - is, as explained here, that of the family tyrant:

Every weekend, when returning from drinking at the bar, the aggressor beats and sexually assaults his partner. After months of being a victim, she decides to stab her aggressor —in the back— when he arrives at the house to avoid the new sexual attack.¹⁹

There is no general rule for dealing with tyrannicides. As already noted, in some hypotheses, self-defense proceeds while, in others, the situation of defensive necessity with continued danger.²⁰ Finally, it is also possible to think of a situation of exculpating necessity —if the victim killed the tyrant while he sleeps—,²¹ just as there will be cases in which no exclusionary one is verified. For now, the situation of defensive necessity, with continued danger, requires that the danger be latent, in such a way that if this is verified again, the victim of the aggression will either run a greater risk when defending itself, or simply will not be able to safeguard against their integrity and sexual freedom in any way.

In the first place, it will be necessary to demand, for the updating of this defense, that the active subject of the justification cause direct his action against the source of danger (defensive situation of necessity) and not against an innocent third party

¹⁸ Roxin, Claus; Criminal law...; p. 680. Also, Kindhäuser; “Continued danger —Dauergefahr— can also be considered a real danger, in those cases in which it can translate, at any time, into injury”; Strafrecht ...; p. 160.

¹⁹ The example proposed by Heinrich is similar, except that the way to kill the tyrant is by placing poison in the coffee, resulting in the death of his husband; Strafrecht. Allgemeiner Teil; 4th edition, Stuttgart; 2014; p. 174.

²⁰ Larrauri, however, goes further: «...a satisfactory solution could be reached if the discussion ceased to revolve around the requirement that the “actuality” of the attack demands, since it is unlikely that women will defend themselves in the precise moment when the attack occurs. For this, perhaps it would be enough to turn the discussion of whether the attack is current with respect to when the defense occurs and concentrate on discussing whether the defense meets the “necessity” requirement. This interpretation would allow incorporating the experiences of a group of women within the institution of self-defense and would make it more “neutral” in the interpretation of its requirements”; Inequalities ...; p. 51.

²¹ In this regard, Roxin; Criminal law...; ob.cit, p. 903. Marneros has recently deepened into these hypotheses from the perspective of forensic psychiatry, in such a way that under its conception, today we can speak of «intimicide» (Intimidid). By this could be understood the deprivation of the life of the couple, with whom they had an intimate and close relationship, but within the framework of which the active subject suffers a psychic alteration (which does not happen in the hypotheses of a situation of justifying necessity with continued danger). Very specific cases such as those described by Marneros could be located in the situation of exculpatory necessity; Intimidid - Die Tötung des Intimparkers; en, Über allem: Menschlichkeit; Festschrift für Dieter Rössner; Bannenberg / Brettel / Freund / Meier / Ramschmidt / Safferling; (coordinators); Nomos, Baden-Baden; 2015, p. 290.

(aggressive situation of necessity).²² This circumstance will allow him to “do something else” to deal with danger compared to the normal reaction in a situation of aggressive necessity. In this regard, the victim’s special knowledge will be relevant for the judicial determination: if based on the experiences, lived for months, the woman knows that she will again be sexually assaulted by her partner, then the picture is clearer in light of the justification, compared to those cases in which such knowledge does not exist.

The feminization of justification causes should not generate suspicions regarding “imbalances” between women and men. It is simply a matter of recognizing —as Larrauri shows— that “identical behaviors” have “different consequences”, depending on whether it is a man or a woman: “thus, for example, the fact that a woman is followed by a group of men at night, or for a man to be followed by a group of women, is an identical behavior with different meanings and consequences, in the same way that it is not the same to touch a man’s breast than to touch a woman’s”.²³

Much remains to be said regarding the feminization of justification causes, just like the long road pending for this process to be reflected in judicial practice. And in this, there are also great similarities between Mexico and Germany. Think, to give just one example and start the debate, in the case presented by Sick, in relation to the position of German jurisprudence and its appreciation of the “vis hauda ingrata” in favor of the actors of sexual violence against women: according to German jurisprudence, “where the woman does not struggle or does not confront the aggressor, then it means that she is not against the fact either. This is verified when she only resists verbally or with a little struggle, but nothing more”.²⁴ With such criteria, the only way left for women is submission.

IV. GREATER SYNERGY BETWEEN HUMAN RIGHTS AND CRIMINAL LAW

Another example of feminization, towards which Mexican criminal law is directed, is that of a greater synergy between it and international human rights law. Indeed, as the doctrine highlights, “the criminal law of globalization and supranational integration will have to be more guaranteeing and prevent the imputation rules from becoming more flexible and the substantive and procedural political-criminal guarantees

²² «Under the presuppositions of an aggressive situation of necessity, the death of a person or the production of bodily injuries cannot be justified - for example, the extraction of blood or organs to help a seriously injured person, as this goes against the principle of freedom contemplated in our legal system as well as against the dignity of the victim, who would be reduced to a kind of “bank of organs””; Kindhäuser; Strafrecht ...; p. 161.

²³ Larrauri, Elena; Inequalities ... p. 43.

²⁴ Zweierlei Recht ...; pp. 57-58.

from becoming relative, even though it will be more unified than the current one. It should be more humane, more respectful of the inalienable rights of the person”.²⁵

That the Mexican criminal law has a close synergy with international human rights law is evidenced by the constitutional reform, which was approved in 2011 on the last matter (also led by a woman). This is broader -not in its drafting, but in its reach-, than the 2008 criminal law. This means, not to be misinterpreted, that an investigation or process cannot be verified, but neither can any sentence be carried out, detached from a humanistic conception of the person and respect for the free development of their personality.²⁶

This is mandated by the Constitution and the National Code of Criminal Procedures in force in Mexico. Despite this, both legal systems require a thorough revision —an update and feminized reform— that, from a woman’s perspective, brings the spirit that motivated the constitutional reform of 2011²⁷ to judicial practice.

A sign that, although slow, Mexican criminal law “does move” and that it does so in the face of a better destiny, is the “legislative restraint” shown by the legislator in the bill to prevent and punish forced disappearances of people (promoted —as usual— by a woman and President of the Human Rights Commission of the Senate of the Republic). Despite the social demand and the atmosphere of revenge that is currently verified on this issue, the legislator opted for a rational proposal of the legal consequences of the crime. This shows that, in times of greatest security crisis, the answer is, not restriction, but creation of freedom.

V. THE TRANSITION TO A CRIMINAL RIGHT OF FEMINIZED INTEGRATION

The expression “criminal law of integration” belongs to Fernando Velásquez. By means of this, the author evidences the «changes of course» of German criminal science caused by political, economic and philosophical factors.²⁸

²⁵ Velásquez, Velásquez, Fernando; From normative functionalism to the criminal law of integration; Notebooks on Criminal Law; No. 1, 2009; p. 17.

²⁶ Regarding the free development of the personality and its impact on Mexican criminal law, with special reference to its distinction from morality and good customs; Ontiveros Alonso; Michael; Die Freie Entfaltung der Persönlichkeit (Ein würdevolles Rechtsgut in einem Rechtsstaat; en; Strafrecht als Scientia Universalis. Festschrift für Claus Roxin; Heinrich/Jäger/Achenbach/Amelung/Bottke/Hafke/Schünemann y Wolter; (coordinadores); De Gruyter; Berlin, 2011, pp. 245 y ss.

²⁷ Some guidelines for the feminized reform of the National Code of Criminal Procedures can be seen at the end of this document. The design of a catalog of reforms to the Constitution - under this same concept - is pending development.

²⁸ Velásquez, Velásquez, Fernando; From normative functionalism ...; pp. 7 et seq. This is an article whose content is —especially— interesting, since it highlights the transnational nature of the crimi-

The transition to a criminal law of integration is reflected in three basic pillars: harmonization, unification and internationalization of criminal law. This is an area in which the criminal law of the European Union has good experience, as Vogel explained it more than a decade ago, and which has maintained a slow, but also constant evolution: “the Europeanization of material criminal law is located between current and fashionable issues in the science of criminal law (...) another current considers this situation in a different way, since it proposes to accelerate and strengthen the Europeanization of criminal law: globalization also means globalization of criminality, whose combat would only be possible in a globalized way». ²⁹

Contrary to popular belief —and as the first pillar of integration criminal law—, legislative harmonization at European level has not been verified in the general part, as it has in the special part. ³⁰ This responds to a basically economic interest: the first legislative efforts to harmonize penalties focused on the protection of financial interests, hence, the most obvious results are perceived in criminal types such as subsidy fraud at the level of the union. And what similarities does this have with the Mexican model?

The similarities are located at the point of origin of the legislative harmonization: the special part of criminal law, with special reference to the protection of girls and women. Indeed, for more than a decade the first harmonizing tasks began in Mexico in conjunction with international organizations linked to the protection of human rights. ³¹ Its first results can be seen today in thematic axes —clearly feminized—

nal law of the future. However, his position on the possible “goodbye to normative functionalism” is different, since, on the one hand, the emergence of a new systematic or construction of crime is not noticed, but rather —as the author himself points out this - a trend towards the “unification of positive rights”, a “uniformity of dogmatic categories” and the possibility of “building a supranational science of criminal law.” This shows, in my opinion, that it is not a question of a new system that surpasses the one currently dominant in Germany -the functionalist-, but that this criminal law of integration is a manifestation of a political-criminal nature. And in that sense, it is fully shared here.

²⁹ Vogel, Joachim; Status and trends in the harmonization of substantive criminal law in the European Union; Translation by Miguel Ontiveros Alonso; in, *Fundamental Contributions to Criminal Law*; UBIJUS-Professional Training Institute; Mexico, 2010, p. 42.

³⁰ This is evidenced by Hassemer, Winfried; “The main area where the renewal of criminal law occurs is in the special part, either in the penal code or in complementary criminal laws. The reforms do not consist of decriminalization, but rather an expansion or incorporation of new criminal offenses. The main areas in which this expansion occurs are: environment, economic criminal law, data protection, drugs, taxes and foreign trade”; *Features and crisis of modern criminal law*; Translation by Elena Larrauri. Reviewed by Monika Mainicke; p. 241.

³¹ This is a series of studies aimed at unifying - and in other cases harmonizing - crimes related to child sexual exploitation and human trafficking that, financed by the International Labor Organization (ILO) and the Ministry of Labor and Social Security, we elaborate in the National Institute of Penal Sciences (INACIPE): «Legal-criminal study related to the commercial sexual exploitation of children. Bases for its legislative unification in Mexico; Gómez Tagle, Erick, Ontiveros Alonso, Miguel; Inacipe, Mexico, 2004. This was followed by several more studies that addressed state legislation. All of these are current law in Mexico today.

such as the prevention and punishment of child pornography and sexual exploitation. This harmonization process continued until it became an authentic criminal unification in very specific areas of the special part: kidnapping and human trafficking. The most important difference between harmonized European and Mexican law is located, however, in protected legal rights: relative to the economy, in Europe, and essential to the human person, in Mexico.

This trend towards a feminized criminal law of integration can also be seen in the feminist current that promoted —justifiably— the classification of intrafamily, domestic, family or gender violence on a national scale. The same can be said, and here the feminizing trend is more than evident,³² in the typification of feminicide.

Another evidence of the transition to a criminal law of integration is that since the 2008 constitutional reform, the establishment of a single code of criminal procedures for the entire country was derived, as well as a single law of alternative dispute resolution mechanisms, execution of sentences and criminal justice for adolescents. In addition to this 8-year-old process of legislative unification, the constitutional reform that establishes the bases for a single legislation on the forced disappearance of persons, as well as torture and other cruel, inhuman or degrading treatment or punishment was settled.

The transition towards a feminized criminal law of integration —expression that includes the processes of harmonization and legislative unification with a woman's perspective—, produces plausible effects that are now evident among us: it generates greater certainty, not only for citizens, but also among the operators of the justice system, since judicial decisions have a greater degree of predictability, while legislation (input from criminal dogmatics), exercises its general preventive effects more efficiently.³³ At the same time, the unified criminal legislation is more difficult to reform, since it is no longer enough (this was the case on some occasions), with the instruction sent from the head of the executive power to approve a reform of the penal code without opposition.

This feminized criminal law of integration also generates a harmonization of the criteria of academic training and training of the operators of the justice system with a

³² To answer questions about the influence of women in the evolution of the justice system —and that based on this phenomenon it is moving towards its feminization—, one can turn to the work of Barbara Degen; *Der Umgang von Frauen mit Recht - Einführung in Rechtswendo. Erfahrungen des Feministischen Rechtsinstitut e.V.; in Frauen und Recht ...*; p. 97: "Women influence the law in many ways: they implement laws of a political nature, formulate proposals for legal reforms, are part of the justice apparatus, speak in front of the courts, interpret the law, write, publish and argue".

³³ This, however, has its limits. Thus, as evidenced by Bergalli / Bodelón; «In relation to the first objective —the reduction of the incidence of the problem—, it must be said that he makes the assumption that the penal system can influence in terms of it. In the case of sexual violence, such incidence is limited, since the way in which the penal system addresses the problem is limited"; *The question of women ...*; p. 69.

women's perspective, while the scientific elaboration at the criminal justice scale is strengthened: a single procedural order and general laws (which gradually unify the special part), facilitate the exchange of ideas between the academy and the students, while strengthening the argumentative capacity of the actors in the process and the protection of groups in special situations of risk (where girls and women rank first). In addition: another effect of the feminization of criminal law is its integration. And this is a political-criminal factor that the cases of Germany and Mexico share.

VI. THE CHALLENGES OF FEMINIZATION IN THE NEXT 20 YEARS

The theoretical analyses carried out in Europe have detected —and since then they have also promoted—, axes of feminization in various areas of criminal justice. Although only a few have been addressed here, it is worth noting some others, since their legislative development is one of the challenges that Mexican criminal policy will face during the next decades, hand in hand with the —so called— new criminal justice system.

Taking on the challenge of the feminization of the Mexican penal system could contribute to the transformation of the —masculinized—³⁴ criminal justice system in our country because, as Bergalli affirms, “feminist studies on the State reveal the central role of law as an element that reproduces the oppression of women”.³⁵

In the course of the next 20 years, the Mexican penal system will show —according to what is argued here— a reform aimed at its feminization in core areas of the justice system, which will be oriented to the following dimensions: police law (a), criminal process (b), material criminal law, (c) right of execution of sanctions (d) and jurisprudence (e).

In relation to police law (a), feminization will revolve around —although not only—, the criteria that regulates the use of force by members of security and justice institutions. Until now, the current laws on the use of force do not make any distinction about what a woman or a man can do, and how far they can go, performing police tasks: both dimensions are governed by the same standards. But this will change thanks to the feminization process:

³⁴ In the words of Bergalli / Bodelón: «...criminal law reinforces and reflects a construction of gender, since it starts from a “masculine” model, from a universalist model, in which diversity is annulled»; The question of women and symbolic criminal law; in, *Anuario de Filosofía del Derecho*, IX (1992); p. 55.

³⁵ “The exclusion of women from the public world becomes a fundamental element, which will have to be legitimized by resorting to new “scientific” explanations and also taking shape in the criminal sphere”; Bergalli / Bodelón; *The question of women ...*; p. 46.

Just as it is not the same for a group of men to follow a woman or for a group of women to follow a man, it is not the same for a policewoman to confront a group of aggressors than for a man to do so: submit —by force— a pair of aggressors in a drunken state, it will not be the same for a man as for a woman, so the powers of use of force and police self-defense will be broader (less rigid) for women than for men.

Feminization at the police level will also impact different criteria for the recruitment of new staff and their training. As the German experience shows, women will be more inclined towards intelligence and internal affairs areas, while men will continue basically in operational tasks. Likewise, more and more women will occupy positions of high responsibility in the police function, and they will lead the feminization of police institutions in Mexico.

In the field of criminal prosecutions (b), feminization will impact on such delicate areas, such as restricting the powers of the authority to impose precautionary measures on women —especially preventive prison—, (articles 157 and 165 CNPP), the feminized graduation of the types of guarantee (article 173 CNPP), the feminized conditions for the conditional suspension of the process (articles 191 and 192 CNPP), the restrictions for taking samples of body fluid, hair or hair on women (article 252 CNPP), or the criteria for judicial individualization of the sentence for women (Article 410 of the CNPP). These are just some of the legislative challenges facing coming into force of the adversarial procedural system in our country.

Reforms to the national code of criminal procedures should be thoroughly debated.³⁶ It's a new order that is, to put it in some way, in the testing stage. It is possible, however, to think that its feminization requires constitutional adjustments. And that would be good news for the Mexican justice system. Towards a feminized constitution?

Regarding material criminal law (c), the feminization process will have an impact —particularly, although not exclusively— on the special part. This is a very broad dimension, which is why I am going to limit myself to sexual criminal law, since as Sick argues, “of all areas, it is in that of sexual crimes where gender plays its most important role”.³⁷ And this is essential, since the masculinization of criminal law is manifested in its maximum expression, when the legislation maintains that —to cite an example referred to by the same author—, for a man to be consummated a sexual crime, the woman had to become pregnant or, even reach orgasm.³⁸

³⁶ The most prominent “staging” that I know of regarding the reforms to the single procedural order is the one prepared by Moreno Hernández, Moisés; Comments to the National Code of Criminal Procedures; Moreno Hernández, Moisés / Ontiveros Alonso, Miguel; (coordinators); Ubijus-Alpec-Cepolcrim; Mexico, 2014; in fine.

³⁷ Zweierlei Recht ...; p. 43.

³⁸ Zweierlei Recht ...; pp. 54-55.

As Larrauri reports regarding Mackinnon's thesis; "In this author's opinion, interpreting that carnal access is synonymous with penetration is what has historically allowed access, for example, with an object, not to be considered aggression".³⁹

The feminization of material criminal law will also be reflected in the expansion of the modalities of violence that will configure elements of the type.⁴⁰ This is already observed in the General Law on Women's Access to a Life Free of Violence, but it is not yet covered by criminal law. Thus, as Bergalli / Bodelón warn, "the term violence tends to be used in a restricted way and refers only to types of physical and interpersonal violence, excluding psychological and structural violence".⁴¹ This means that structural violence (although with restrictions), will become —along with physical or moral violence— a commissive mean, or else an aggravating factor, in crimes that protect sexual freedom.

Literature has already identified multiple pending items —so to speak— of an adjustment with a woman's perspective. This is the case of qualifying or aggravating crimes against life and personal integrity: «the second example that the literature has highlighted, especially the German —feminist—, is the assumption of treachery. That is the classification as murder of the death of the domestic tyrant precisely because, by the means that the woman must use, these will normally be classified as treacherous».⁴²

There are other areas that will be feminized and that cannot be addressed here: the free disposition of organs, the permissibility of the —so called—, surrogacy when there is no submission or vices in the will, crimes committed in the family environment (abandonment, bigamy or breach of obligations, for example.).

³⁹ "Curiously, as Mackinnon affirms, obviously for the woman the aggression was identical and the humiliation as well, this however, if access was interpreted as the demand for penetration with the penis, could not be classified as rape. This shows that rape was defined from the point of view of the aggressor, not from the point of view of the victim"; Larrauri, Elena, *Gender ...*; p. 8.

⁴⁰ A comparative study of the forms of violence, with special reference to the family environment, can be seen in; Pérez Duarte and Noroña; Alicia Elena; *Family violence. A diffuse concept in international law and national law*; Mexican Comparative Law Bulletin, new series, year XXXIV; Number 101, May-August 2001, p. 540; «The broadest of these circles is violence itself, that discriminated violence that affects all the most vulnerable people; from there it goes on to structural violence, that is, through those social scaffolds that perpetuate social and economic inequalities... »; p. 540.

⁴¹ Bergalli / Bodelón; *The question of women ...*; p. 60.

⁴² "From this point of view, the death carried out by the husband of his wife can be classified as homicide, but it is practically impossible for the death of the husband, at the hands of the woman, to be classified as homicide, since the latter must, almost by definition, take advantage of a situation in which he is defenseless and his defense capacity is diminished. In the same situation, a man can kill in one way or another and therefore the legal qualification can be different, however, women are practically always in the situation of killing in a treacherous way. The application of treachery, regardless of whether the woman had another option to kill, is what in my opinion can be discriminatory"; Larrauri, Elena; *Gender...*; p. 8.

The feminization of the right to execute sanctions (d) will be of particular interest to the penal system. This is not new. The specialists in this matter have already noticed this for a long time, as is the case of Larrauri; "The application of alternative penalties to women must take into account their specific conditions and situations".⁴³ That is why I believe that the prison sentence⁴⁴ will be used less and less—at least in the case of women—, because besides being extremely violent (and here we must consider the damage caused to the family), it does not even seem necessary or recommended, except in truly very serious hypotheses (homicide, kidnapping or forced disappearance of persons, for example):⁴⁵

"The same thing happens when the prison sentence is analyzed. Starting with the weekend arrest, it is quickly observed that the reasons for which this penalty was introduced are only applicable to productive men, since it's about not interrupting their working hours. If, on the contrary, one thinks of a woman who is in the care of the family, the criterion that interrupts or does not interrupt is blurred. Consideration must be given to what the woman should not interrupt, in order to adapt the sentence to her circumstances, usually her own".⁴⁶ And this should also apply to the cases of men—without stereotypes—. ⁴⁷

Finally, the criteria of intimate visitation, together with the stay in prison of mothers in the process of pregnancy, lactation or with born children, will be radically feminized: there will be few—very few— hypotheses of women who, under conditions

⁴³ Larrauri; Gender...; p. 8.

⁴⁴ «Only the design of a system under the tow of men allows us to maintain an ancient institution. This does not find justification in its current dimensions either for men, but certainly even less for women, in whom there is not even the "social alarm", the "dangerousness" or any of the assumptions that are normally believed to justify this. specific form of punishment "; Gender...; p. 10

⁴⁵ According to "The Sentencing Project" (Research and Advocacy for Reform), by 2003, women were deprived of their liberty for crimes related to drugs or against property, but less than men for violent crimes; Women in the Criminal Justice System: An Overview; p. 1. All information can be accessed through the portal www.sentencingproject.org . About how women are implicated in crimes against health, which are actually committed by men; Cruz Parceró, Taissia; Sexist criteria in force in the criminal justice system in Mexico; on; Women through criminal law; Cruz Parceró, Juan A. and Vázquez, Rodolfo; (coordinators); Mexico, 2013; The author - Mexican federal judge - presents eight cases (almost all, by the way, related to drug crimes), in which women were charged without legal grounds, but through an act of discrimination due to their status as women: «That's right, the joint analysis of these cases and a closer look at them, reveal the existence of common patterns of conduct of the various police and public ministries (in cases in which the arrest occurred when executing a search warrant), that imply the use of criteria that, in fact, are manifested as sexist "; p. 124.

⁴⁶ Larrauri; Gender...; p. 8.

⁴⁷ I think it is true, "states Larrauri," what was revealed by the original analyses that indicates that the entire system of penalties is designed taking into consideration men, and women always appear as an appendix. For example, the institution of the prison, fundamentally justified to contain dangerous men, appears scarcely necessary for women. It is possible that this institution could have already been replaced, for example, by the existence of sheltered apartments for women; Gender...; p. 10.

such as those indicated, enter or are kept in prison (here, home roots will play a fundamental role).

Jurisprudence (e) will be the most difficult dimension to feminize,⁴⁸ but it will not escape it, since women judges will take care of it.⁴⁹ And this will not be a minor thing, since it is in the judicial dimension where discrimination against women, exercised by criminal law, shows its true face. Thus, one of the factors that will change thanks to the feminization process⁵⁰ will be the imputation of responsibility to the victim for her own victimization —basically, although not only, in sexual crimes—.

The foregoing has been evidenced by Sick: the exclusion of the type due to an alleged consent of the rape-victim woman —or worse still—, benefiting the sexual offender by appreciating a type error, because he believed that she agreed in penetration, since “it did not offer an evident and solid resistance” and thus exclude the type, will be unbearable in a feminized criminal law.⁵¹

Although the above considerations have their point of reference in German jurisprudence, they are legion among us. The same can be said about the statements close to those already mentioned, such as mitigating or excluding guilt since “the sexual

⁴⁸ Here too, there are similarities with the German case, as evidenced by Schultz, Ulrike; Between 1900 and 1909 the first women enrolled in a law school in Germany and until 1912 the first state examination -for a lawyer- was taken by a woman. However, to allow women to join the judiciary, a special law had to be enacted on the matter. This was due, among other factors, to the prejudice that, due to their emotionality, they would not be objective in their resolutions. They were also considered weak for the arduous judicial task. By 1930, 74 out of 10,000 judges were women and in 1933 there were, in Germany, 252 lawyers for 18,766 lawyers. National Socialism systematically excluded women from the judiciary and the legal profession, in such a way that from 1935 no woman could any longer join the exercise of law. Hitler himself maintained, in 1936, that no woman could be a judge or a prosecutor. They must, he argued, assume their destiny as housewives, mothers, and honor the Führer. By 1939 there were still 9 lawyers; *Der aufhaltsame Aufstieg der Juristinnen in Deutschland; in, Frauen und Recht ...*; pp.61-62.

⁴⁹ «Jurists interviewed have argued that they have a different vision of the judiciary and that other methods are proposed, different from those of their colleagues: the jurists who focus more on their task, invest more time in the cases, show greater empathy. The judges, for their part, are less oriented to the exercise of authority and competence in office “; Schultz, Ulrike; *Der aufhaltsame Aufstieg ...*; p. 70. Among us, the feminization of jurisprudence will also be verified through the sentences handed down by judges. A model can be seen at; Cruz Parceró, Taissia; *Sexist criteria ...*; p. 115; “Despite the ostensible progress that all the regulations mentioned imply, in fact, and from my professional experience of more than five years as head of a court of federal criminal proceedings in the capital of the country, it is not possible to observe a significant change in the action of the various operators of the criminal justice system, which allows them to identify, from a gender perspective, specific situations of discrimination, inequality, exclusion and violence against women implicated, rightly or wrongly, in the commission of a crime » .

⁵⁰ About the presuppositions and consequences of the feminization of jurisprudence, one can see the vast literature - almost endless - of feminist jurisprudence.

⁵¹ Sick; *Zweierlei Recht ...*; pp. 58-62.

burden on the aggressor makes him unable to control himself”,⁵² or thinking that in sexual crimes “intent is only credited when it’s evident to the aggressor that the woman does not want penetration».⁵³

Similar is the case —verified in Mexico— where the judge released the accused, arguing that “the girls who were victims of corruption of minors no longer had morals —because they lacked hymen—, they had ingested alcohol in the past or because they signed a contract in which they agreed to have sexual relations with the accused”.⁵⁴

Synthesis: the Mexican penal system is heading towards its feminization —process that entails the exclusion of any form of paternalism—. ⁵⁵This development is already taking place in some dimensions of the criminal sphere and will be extended to all areas of the system. Feminization will be led by women who, as is already evident, will dominate decisions related to Mexican criminal policy, as well as the procuration and impartation of justice (judiciary). The question is which group of women will prevail, conservatives or liberals?⁵⁶

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⁵² Sick; *Zweierlei Recht* ...; p. 62.

⁵³ Sick; *Zweierlei Recht* ...; p. 63.

⁵⁴ In this regard, see —with express quotations and criticism included—; Ontiveros Alonso, Miguel; *Die Freie Entfaltung der Persönlichkeit* ...; pp. 249-252.

⁵⁵ Paternalism is understood here —with Lagodny—, “the fact that the State, for purposes of control over the person, places itself in a place prior to that of the subject and —also— before the subject can exercise the ability to decide itself. That is, the person is not asked for her opinion about her wishes or interests, but rather the State decides for the person and behaves as if she were herself”; Lagodny, Otto; *Paternalismus im deutschen und österreichischen Strafrecht*; in, Beck, Susanne; *Gehört meine Körper ...?*; p. 272. And he adds: “Other forms of paternalism can be seen, for example, in the crime of organ trafficking: while in Austria a person can sell his organs, in Germany this is prohibited”; Idem, p. 278. Paternalism —according to the same author—, “can also lead to authoritarian rules. Thus, for example, while in Germany it is a sacrosanct rule to respect the privacy of the defense conversations and contracts with the accused, in Austria the opposite is the case, as is clear from §59 of the Austrian procedural ordinance”; Idem; p. 282. Around this issue, but from the anthropological dimension and in relation to our context; Lagarde y de los Ríos, Marcela; «The most relevant forms of sexism are machismo, misogyny, and homophobia. And a characteristic common to all of them is that they are the expression of strong forms of patriarchal masculine dominance”; The construction of human. Gender identity and human rights; in, *Feminism in my life. Milestones, keys and topias*; Institute of Women of the Federal District; Mexico, 2012, p. 22.

⁵⁶ This question is not a minor thing. The moralization of criminal law, which from my particular conception is questionable, depends on the answer to the question posed.

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