



CRIMINAL JUSTICE POLICY THROUGH
THE USE OF INDICATORS: THE CASE
OF SEXUAL VIOLENCE IN THE ARMED
CONFLICT IN COLOMBIA*

*POLÍTICA CRIMINAL POR MEDIO
DEL USO DE INDICADORES: EL CASO
DE LA VIOLENCIA SEXUAL EN EL
CONFLICTO ARMADO COLOMBIANO*

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ABSTRACT

The construction of indicators on sexual violence in the Colombian armed conflict result from the statement of the unconstitutional state of affairs issued by the Court in sentence T-025 of 2004 and especially in writ 092 of 2008 through which the Court decided to protect the rights of women who are victims of forced displacement caused by the armed conflict. This construction has been established as crucial for the guidelines of public criminal policy in the country. This process of constructing indicators has been characterized by an active participation of feminist NGOs and by a collective construction process including the women's movements, the Constitutional Court and the Government.

This paper aims at illustrating how this way of constructing indicators, especially with the involvement of what I call *punishment feminism*, may have the potential to determine public criminal policies intended to guide the way the state should deal with sexual violence, even sexual violence that occurs outside the context of internal armed conflict. The discussion will be based on the idea of the indicator as a government technology and its use as a way to legitimize what has been named “new formal punitive control on sexual crimes.”

Keywords: indicator; sexual violence; criminal policy; punitive control; feminism

RESUMEN

La construcción de indicadores sobre violencia sexual en el marco del conflicto armado interno colombiano, derivada de las órdenes impartidas en la sentencia T-025 de 2004 de la Corte Constitucional, y en específico del auto de seguimiento 092 of 2008 —a partir del cual la Corte decidió proteger los derechos de las mujeres víctimas del desplazamiento forzado—, se han convertido en elementos centrales para la fijación de políticas criminales en el país en materia de violencia sexual. Este proceso de construcción de indicadores ha sido además caracterizado por una activa participación conjunta entre organizaciones no gubernamentales feministas, la Corte Constitucional y el gobierno colombiano.

Este artículo busca ilustrar cómo esta manera conjunta de construcción de indicadores, especialmente con la intervención de lo que acá denomino feminismo del castigo, pueden potencialmente tener la capacidad de determinar políticas públicas criminales dirigidas a establecer la manera en que el Estado debe lidiar con la violencia sexual, incluyendo la ocurrida por fuera del contexto del conflicto armado interno. La discusión estará fundamentada en la idea del indicador como tecnología de gobierno y su uso como manera de legitimar lo que ha sido denominado “nuevas formas de control formal penal sobre delitos sexuales”.

Palabras clave: *indicador; violencia sexual; política criminal; control formal penal; feminismo*

SUMMARY

INTRODUCTION.- I. CRIMINAL POLICY, SEXUAL VIOLENCE, AND THE RHETORIC OF INDICATORS.- II. INDICATORS AND NEW PUNITIVENESS.- CONCLUSIONS.- BIBLIOGRAPHY.

INTRODUCTION

The construction of indicators to measure sexual violence in the armed conflict became a necessary input to develop a criminal policy. This construction of indicators derived from the orders issued by the Constitutional Court in its follow-up of sentence T-025 of 2004,¹ and especially in the guidelines set in writ 092 of 2008² through which the Court decided to protect the rights of women who are victims of forced displacement caused by the armed conflict.

Throughout this process, the participation of local feminist NGO's was relevant because they permeated the scenario with two main ideas: *i*. A specific idea of women's reality: the unequal impact of violence that forced displacement and armed conflict caused on women's lives. *ii*. The special consideration they gave on sexual violence as a criminal conduct that not only takes place in the armed conflict, but that it is “habitual, widespread, systematic, and invisible”, as stated by the Constitutional Court, during and after their displacement. These two local NGO's feminist ideas brought about the process of naming the indicators related to sexual violence with the inevitability of criminal law intervention.

The participation of Sisma Mujer—which was one of the main women's human rights non-governmental organization (NGO) that took part in the design of the set of indicators— was not compulsory.³ However, considering the lack of instruments

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- 1 In this judicial decision, the Constitutional Court declared the unconstitutional state of affairs with respect to the displaced population because it believed there was a systematic violation of their rights taking place. Based on this decision, the Court has been issuing a series of orders to national and territorial entities with the purpose of addressing the basic needs of this population. Constitutional Court, Sentence T-025/04, January 22, 2004. Presenter magistrate Manuel José Cepeda-Espinosa. Available at: <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>
 - 2 I translate as “writ” the Spanish term *Auto*, which refers to a judicial decision that resolves matters that are not the ruling of a case. Constitutional Court, Writ 092 of 2008, April 14, 2008. Presenter magistrate Manuel José Cepeda-Espinosa. Available at: <http://www.corteconstitucional.gov.co/relatoria/autos/2008/a092-08.htm>
 - 3 For a closer look on the participation of Sisma Mujer in the process of building indicators and the strategy to transform the agenda into specific parameters for lawmaking, public policy design, and to promote its interpretation of international law, see Lina María

to measure the efficacy and efficiency of relevant public policies, their discourses became relevant as inputs in the construction of indicators with a gender differential perspective.

The Court established the Follow-Up Commission (Comisión de Seguimiento) not only to comment, but also to bring to the table an indicators proposal. This Commission was the outcome of the unconstitutional state of affairs doctrine (doctrina del estado de cosas inconstitucional, ECI), “whereby it is declared that a violation of fundamental rights is systematic, widespread, and due to structural causes, thus warranting a judicial intervention on general policy.”⁴ According to Lina María Céspedes-Báez, The Constitutional Court's courtroom was turned into a forum to debate competing notions of public good, rights, and public policy around the Internal Displacement Persons' situation: “(...) Strong publics finally engaged into a conversation with the weak publics. Governmental agencies, ministries, and policymaking institutions as the National Planning Department, the most technocratic one in the Colombian state, entered into conversation with NGOs and international organizations under the surveillance of the Constitutional Court Justices.”⁵ Even though Sisma Mujer arrived later to the formal process of adopting the indicators and it was not part of the technical sessions between the government and the Commission, their contribution to the joint construction of indicators was undeniable, as well as its theoretical vision on which the indicators were built.

Céspedes-Báez, *Far beyond What is Measured: Governance Feminism and Indicators in Colombia*, 25 *International Law, Revista Colombiana de Derecho Internacional*, xxx-xxx (2014). Céspedes asserts that the process of constructing indicators was a favorable scenario to further the interests of this organization to determining the incorporation and translation of governance feminist discourses in the country. Céspedes also explained how a different set of actors, ranging from the government itself to the Constitutional Court, NGOs and international organizations, incorporated and translated this international law narrative into local discourses through law and policymaking, advocacy and litigation.

- 4 René Uruña, *Internally Displaced Population in Colombia. A Case Study on the Domestic Aspects of Indicators as Technologies of Global Governance*, in *Governance by Indicators: Global Power through Data* (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry, eds., Oxford University Press, Oxford, 2012). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2282812
- 5 Lina María Céspedes-Báez, *Far beyond What is Measured: Governance Feminism and Indicators in Colombia*, 25 *International Law, Revista Colombiana de Derecho Internacional*, xxx-xxx (2014).

This paper analyses how this process of naming the indicator based on the idea of inevitability of intervention of criminal law represents an assertion of power to produce knowledge and to define or shape the way the world is understood.⁶ Based on the questions about the social processes surrounding the creation and use of indicators and the influence of conditions of production of knowledge, this analysis will focus on the effects of indicators as a technology of government and their use as standard-setting instruments that could eventually become key elements to legitimize the intervention of criminal law and determining public criminal policies related to sexual violence.

As it will be explained later, this collective process of production of indicators is embedded in a theoretical conception of criminal law, which is designed to expand the limits of punishment under the framework of a new punitiveness. Stanley Cohen asserts that punitiveness is characterized by coercion, formalism, moralism, and the infliction of pain on individual legal subjects by a third party. His own vision of social control emphasizes the subtler, less visible, and discreet mechanisms through which control is realized in contemporary society.⁷ Roger Matthews explains that Cohen offers a more Orwellian vision, which dwells less on overt strategies involving physical force or mental cruelty than on the development of more continuous and less perceptible forms of regulation.⁸

With the purpose of developing these arguments, the document is divided into two parts. In the first place, it will introduce the context of the issuance of writ 092 of April 2008, and

6 Kevin E. Davis, Benedict Kingsbury & Engle Sally Merry, *Indicators as a Technology of Global Governance*, 46 *Law and Society Review*, New York University School of Law, 1, 71-104 (2012). Available at: <http://www.iilj.org/publications/documents/2010-2-Davis-Kingsbury-Merry.pdf>

7 Stanley Cohen, *Social Control Talk: Telling Stories about Correctional Change*, in *The Power to Punish: Contemporary Penalty and Social Analysis*, 101-129 (David Garland & Peter Young, eds., Heinemann Educational, London, 1983). Stanley Cohen, *Visions of Social Control: Crime Punishment and Classification* (Polity Press, Cambridge, 1985). Stanley Cohen, *Social Control and the Politics of Reconstruction*, in *The Futures of Criminology*, 63-88 (David Nelken, ed., Sage Publications, London, 1994).

8 Roger Matthews, *The Myth of Punitiveness*, 9 *Theoretical Criminology*, 2, 175-201 (2005). Available at: http://www.antonioacasella.eu/nume/Matthews_myth_punitiveness_2005.pdf

it will explain the existing relationship between public policy and criminal policy in order to determine the way in which the orders issued based on writ 092 of 2008 are generating a way of constructing criminal policy around sexual violence based on the indicators. The second part will revolve around the idea of indicators as a government technology and their use as a way to legitimize the new punitiveness formal control on sexual crimes.

I. CRIMINAL POLICY, SEXUAL VIOLENCE, AND THE RHETORIC OF INDICATORS

In the judicial decision T-025 of 2004, the Constitutional Court declared an unconstitutional state of affairs on internal forced displacement. The lack of indicators was one of the factors deemed as a transcendental failure in the execution of a public policy that failed to protect the rights of the displaced population. Through several follow-up writs to that judicial decision, the Court noted that the indicators constitute a close relationship between the different elements of public policy and their impact on the effective enjoyment of the rights of the displaced population.⁹

Based on this assumption, the Court demanded the government to begin the construction of indicators so it could demonstrate progress regarding the inactivity or improvement of the unconstitutional state of affairs. However, taking into account the difficulties faced by the government to build certain comprehensive indicators of the phenomenon, the Court itself became a decisive party in modeling the measurement of the public policy regarding the displaced population.

The government and the Court were not the only ones involved in this joint construction of indicators; entities such as control organisms, Office of the United Nations High Commissioner for Refugees (UNHCR), several national and international NGOs,

9 Constitutional Court, Sentence T-025/04, January 22, 2004. Presenter magistrate Manuel José Cepeda-Espinosa. Available at: <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>

and the Follow-Up Commission were invited to present their own indicator proposals.¹⁰ The Follow-Up Commission became a space for discussion par excellence in which NGOs, sectors of the Catholic Church, academic research centers, and activists who engaged in permanent discussion processes on a regular basis converged.¹¹

It is important to highlight that the Constitutional Court did not finish its duties with the enactment of sentence T-025/04,¹² but preserved its competence by following up on the process with the holding of public hearings in which the Court requested

10 Regarding the participation of displaced population organizations, of human rights NGOs, and the civil society in general, we should acknowledge the work of the Constitutional Court Judge Assistant, Clara Elena Reales, and her efforts to strengthen the participation in the follow-up of the Sentence T-025/04. Among other documents, Clara Elena Reales-Gutiérrez, *Aspectos de la intervención de la Corte Constitucional*. Participation in the IV Conference of the Bogotá Board on Internal Displacement. *Vigencia del Estado de cosas inconstitucional*. Follow-up of Sentence T-025 of 2004. March of 2005.

11 According to César Rodríguez-Garavito and Diana Rodríguez-Franco "(...) the Commission has produced more than a dozen reports and a set of documents submitted to the Constitutional Court, which discuss those presented by the Government and which produce proprietary information about different issues, from the problem of the appropriation of land from the displaced population, to the situation of sectors of the displaced population in special conditions of vulnerability, such as the women who are victims of sexual violence (...)." César Rodríguez-Garavito & Diana Rodríguez-Franco, *Cortes y cambio social. Cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia* (Colección DeJusticia, Centro de Estudios de Derecho, Justicia y Sociedad, DeJusticia, Bogotá, 2010). Available at: http://www.rtfn-watch.org/uploads/media/Colombia_-_Cortes_y_cambio_social.pdf

12 According to the categorization by Rodríguez-Garavito and Rodríguez-Franco, the rulings representing dialogical activism's, such as T-025/04, issued by the Court, share three features: The *first*, dialogical ruling tend to dictate orders which are more open than classic activism's and tend to start a follow-up process that encourages the discussion of alternatives to public policies that solve the structural problem detected in the ruling. From the foregoing, these types of ruling usually do not imply specific obligations of result, but the duty of public authorities to design and implement policies leading to advances in the protection of violated rights. The *second*, if the jurisdiction over the case after the sentence is maintained, the implementation of the ruling takes place through periodic and public follow-up mechanisms, and therefore new decisions are made in the light of the process' progress and setbacks, and encourages the discussion among the parties in public and deliberative hearings. The *third*, dialogical rulings tend to involve these social parties in the follow-up process. The implementation involves anyone that is affected or has legitimate interest in the result of the structural case, whether directly or indirectly. This includes the victims whose rights have been violated, the relevant civil organizations, international human rights organizations, and other parties, from grassroots organizations to academic institutions. César Rodríguez-Garavito & Diana Rodríguez-Franco, *Cortes y cambio social. Cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia* (Colección DeJusticia, Centro de Estudios de Derecho, Justicia y Sociedad, DEJUSTICIA, Bogotá, 2010). Available at: http://www.rtfn-watch.org/uploads/media/Colombia_-_Cortes_y_cambio_social.pdf

reports from different administrative entities, associations for the displaced population, international bodies and others parties affected by or interested in the process. At the beginning of 2010, the Court had called 14 follow-up hearings.

This process is described in detail by César Rodríguez-Garavito and Diana Rodríguez-Franco,¹³ who highlight the presence of three phases during its development: the first phase, which took place from the end of 2004 to 2006, was characterized for being a judgment of public policy. The continuity of failures in public policy with respect to the displaced population and, specifically, the failure related to the lack of indicators, resulted in the second phase of the follow-up process, in 2007. During this new period, the Court focused on developing assessment mechanisms that would enable the permanent measurement of progress, stagnation, or regression of the program or the attention in charge of each entity. Sets of indicators were designed and applied by the national Government, commented by the Attorney General's Office, the Ombudsman's Office (Defensoría del Pueblo), the Follow-Up Commission, and UNHCR. The Court, by means of writs 109 and 233 of 2007 and 116 of 2008,¹⁴ was the entity that established which indicators were adopted, rejected or ordered to improve. As a result of that work, a list of 20 topics was agreed upon, which could be assessed based on the indicators.¹⁵ The third phase of the process began by mid-2008 with Writ 092, characterized by a closer supervision

13 César Rodríguez-Garavito & Diana Rodríguez-Franco, *Cortes y cambio social. Cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia* (Colección De-Justicia, Centro de Estudios de Derecho, Justicia y Sociedad, DEJUSTICIA, Bogotá, 2010). Available at: http://www.rtfn-watch.org/uploads/media/Colombia_-_Cortes_y_cambio_social.pdf

14 Constitutional Court, Writ 109/07, May 4, 2007. Presenter magistrate Manuel José Cepeda-Espinosa. Available at: <http://www.corteconstitucional.gov.co/relatoria/autos/2007/A109-07.htm>. Constitutional Court, Writ 233/07, September 7, 2007. Presenter magistrate Manuel José Cepeda-Espinosa. Available at: <http://www.corteconstitucional.gov.co/relatoria/Autos/2007/A233-07.htm>. Constitutional Court, Writ 116/08, May 13, 2008. Presenter magistrate Manuel José Cepeda-Espinosa. Available at: <http://www.corteconstitucional.gov.co/relatoria/Autos/2008/A116-08.htm>

15 César Rodríguez-Garavito, ed., *Más allá del desplazamiento: políticas, derechos y superación del desplazamiento forzado en Colombia* (Universidad de los Andes, Faculty of Law, Bogotá, 2009).

of the government's actions and a reformulation of a new public policy, which included programs for specific groups, such as the women victims of sexual violence within forced displacement.

The monitoring process was jointly built with all those new organizations, among which the Follow-Up Commission on Public Policy on Forced Displacement (Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado), established in August of 2005. In this monitoring process, Consultoría para los Derechos Humanos y el Desplazamiento (CODHES), Corporación Viva la Ciudadanía, and the Dean's Office of the School of Law of Universidad de los Andes also had important contributions. Then, the process was extended in order to include other organizations, such as the Social and Pastoral Care Branch of the Colombian Catholic Church, the Center of Law, Justice and Society Studies (Centro de Estudios de Derecho, Justicia y Sociedad, DEJUSTICIA), and grassroots organizations such as the National Indigenous Organization of Colombia (Organización Nacional Indígena de Colombia, ONIC), among others,¹⁶ should be highlighted.

The Follow-Up Commission became a relevant party in this process. Not only did the Commission perform a systematic and permanent monitoring process on the evolution of the policies, but also it developed analytical reports with the participation of experts and based on the dialogue with United Nations agencies, control bodies, displaced population organizations, and grassroots organizations. Likewise, the Commission formulated alternative political proposals, participated in spaces for deliberation, and built result indicators to measure the effective enjoyment of the rights of displaced population.

This development of the process became an opportunity for women's organizations to find the right moment to establish a direct dialogue with the Constitutional Court. Writ 092 of April

16 César Rodríguez-Garavito & Diana Rodríguez-Franco, *Cortes y cambio social. Cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia* (Colección De-Justicia, Centro de Estudios de Derecho, Justicia y Sociedad, DEJUSTICIA, Bogotá, 2010). Available at: http://www.rtfn-watch.org/uploads/media/Colombia_-_Cortes_y_cambio_social.pdf

14, 2008 was the decisive moment from which the Court validated the idea of the different way in which displaced women experienced this phenomenon, acknowledging that the risks of sexual violence, sexual exploitation, or sexual abuse were among many gender-related risks within the framework of the Colombian armed conflict, which were causes of displacement.

This judicial decision legitimized the voice of women's organizations about differential gender violence and granted them the possibility of actively participating as collective builders of public policies through the use of indicators. The indicators appear here as a useful mechanism to influence political outcomes.¹⁷ According to René Urueña, indicators seem to work in a way similar to soft law instruments:

*They are not menaces backed by armed enforcement, but rather seem to change agents' terms of engagement with the problem. Just as soft law norms have proven effective in the IDP context, indicators influence the way domestic governments behave with regards to their Internally Displaced Population (IDP).*¹⁸

It should be noted here that the argument presented in this paper understands the punitive power as diffuse, subtle, and imperceptible; consequently, criminal policies may end up conducted by governance technologies —such as indicators—, intended to support the legitimacy of the criminal system.¹⁹ This

17 René Urueña, *Internally Displaced Population in Colombia. A Case Study on the Domestic Aspects of Indicators as Technologies of Global Governance*, in *Governance by Indicators: Global Power through Data* (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry, eds., Oxford University Press, Oxford, 2012). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2282812

18 René Urueña, *Internally Displaced Population in Colombia. A Case Study on the Domestic Aspects of Indicators as Technologies of Global Governance*, in *Governance by Indicators: Global Power through Data*, 256 (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry, eds., Oxford University Press, Oxford, 2012). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2282812

19 The concept Foucault's elaboration of the notion of governmentality [Michel Foucault, *Governmentality*, in *The Foucault Effect: Studies in Governmentality*, 87-104 (Graham Burchell, Colin Gordon & Peter Miller, eds., Harvester Wheatsheaf, London, 1991)] refers to the rationalities and mentalities of governance and the range of tactics and strategies that produce social order: "(...) It focuses on the 'how' of governance (its arts and techniques) rather than the 'why' (its goals and values). Techniques of governmentality are applied to the art of governing the self as well as that of governing society." Nikolas Rose defines governmentality as "the deliberations, strategies, tactics and devices employed

essay does not claim that the indicators substitute criminal laws. As Sally Engle Merry explains: “Governmentality does not shift from one system to the next—from punishment to reform or risk management. Instead, there is a pattern of growth and layering in which the new is added to the old, which then redefines the meanings and operation of the new (...).”²⁰

The dimension of the sexual violence phenomenon assumed by women's organizations remained in any case linked to the characterizations made by the constitutional judge, which the Court refers to as “the field of the prevention of the armed conflict regarding gender-related factors,” stipulated in ten specific differential factors “to which women are exposed due to their condition as women within the framework of the Colombian armed conflict.” Among these factors were the risks of sexual violence, sexual exploitation, or sexual abuse, the risk of exploitation or slavery to perform housework and roles considered feminine in a society with patriarchal traits, or the risks derived from personal or family relationships—voluntary, accidental or alleged—with the members of any of the illegal armed groups operating in the country or with members of the Public Force.²¹

by authorities for making up and acting upon a population and its constituents to ensure good and avert ill...” Nikolas Rose, *The Death of the Social? Refiguring the Territory of Government*, 25 *Economy and Society*, 3, 327-356, 328 (1996). See also Nikolas Rose & Peter Miller, *Governing Economic Life*, 19 *Economy and Society*, 1, 1-31 (1990). Nikolas Rose & Peter Miller, *Political Power beyond the State: Problematics of Government*, 61 *British Journal of Sociology*, 1, 172-205 (1992). Nikolas Rose & Mariana Valverde, *Governed by Law*, 7 *Social and Legal Studies*, 4, 541-552 (1998).

“Foucault argues that sovereignty, discipline, and government do not replace each other but constitute a triangle with its primary target the population and its essential mechanism the apparatus of security (1991, p. 102). The triangle suggests mutual interdependence and connection rather than displacement.” Sally Engle Merry, *Spatial Governmentality and the New Urban Social Order: Controlling Gender Violence through Law*, 103 *American Anthropologist, New Series*, 1, 16-30, 19 (2001). Available at: <http://www.veratelles.net/wp-content/uploads/2014/03/Merry-Spatial-governmentality.pdf>

20 Sally Engle Merry, *Spatial Governmentality and the New Urban Social Order: Controlling Gender Violence through Law*, 103 *American Anthropologist, New Series*, 1, 16-30, 26 (2001). Available at: <http://www.veratelles.net/wp-content/uploads/2014/03/Merry-Spatial-governmentality.pdf>

21 The additional risks established by the Court in writ 092 de 2008 are: (v) the risks of belonging to social, communal or political women's organizations, or from their roles of leadership and promotion of human rights in affected areas as a result of the conflict; (vi) the risk of persecution and murder by the coercive control strategies of public and private behavior, implemented by illegal armed groups in large areas of the national territory; (vii) the risk of murder or disappearance of their economic provider or the disintegration

The establishment of those risks not only becomes fundamental in the strengthening of a differential public policy, but those risks—and the process of naming the indicator based on the idea of inevitability of intervention of criminal law— play a fundamental role in the conceptual framework from which a criminal policy can be considered legitimate with respect to sexual violence.

The conditions expressed by the constitutional judge—and named as indicators by Sisma Mujer—, about the generalization and systematization of the episodes of sexual violence against women are imposed through the idea of broader control of sexual integrity. Regarding the rights to life, integrity, freedom and personal safety, Sisma Mujer stated that it was necessary to consider the measurement parameters of the inclusion of other situations that affect women in particular, such as domestic violence crimes or attacks against their personal autonomy. Attacks to personal autonomy, according to Sisma Mujer, include control through: isolation from family and friends; inhibition of access to education, work, or recreation; and their time and personal relationships.

From Sisma Mujer's view, the concept of injury as a key element generator of criminal responsibility of a sexual crime includes not only the harm of sexual integrity, but concepts such as individual freedom and personal autonomy. This situation in our legal system does not only expand the factual scenarios that can be framed as a sexual offense, but also establishes the idea of the penal control expansion through indicators as standard-setting instruments and as a less noticeable form of regulation.

The idea of new punitiveness includes changes in the assessment processes of criminality and the needs to actuarial prediction of risk and managerialism. While such methods of actuarial prediction have been present in many aspects of risk assessment

of their family group and their social and material support networks; (viii) the risk of being dispossessed of their land and property more easily; (ix) the risks of the accentuated condition of discrimination and vulnerability of indigenous and African descent women; y (x) the risk of the loss of their partner or economic provider during the displacement process.

for the best part of a century now, their recent inclusion in the criminal justice arena is highly important. In this regard, John Pratt (1999) claims that:

(...) It is not simply that it is only now that there is a technology available to allow such calculations to be made (see Mannheim & Wilkins, 1955), or that this form of expertise supercedes the by now tarnished method of clinical diagnosis (see Coccozza & Steadman, 1974). By the adaptation of this knowledge, actuarialism fits a criminal justice framework which is prepared to move away from its protection of individual rights: 'the language of rights [gives] way to the language of administration. The quest for individually focused justice [is] superceded by a concern with the management of risk-segregated populations' (Simon & Feeley, 1995, p. 163). By the same token, the emphasis on surveillance in the community (usually with the assistance of electronic monitoring) rather than the provision of treatment is again a pointer to the more punitive, relentlessly suspicious and untrusting response to sex criminals.²²

Anthony Bottoms points out that there is a tension between claims that we are experiencing greater levels of cruelty and punitiveness with emphasis on the intensification of morally charged and cruel forms of punishment, on the one hand, and the simultaneous claim that we are witnessing the ascendancy of actuarial justice which operates on a predominantly administrative basis, presenting itself as morally neutral, on the other. Thus, the emphasis of punitiveness on risk analysis or the indicators as standard-setting instruments involves a significant shift not only in the language of criminal policy but also in its objectives and practices.²³

The collective process of naming sexual violence indicators, led by a feminist vision of punishment and its own vision based on the necessary relationship between violence and punishment,

22 John Pratt, *Sex Crimes and the New Punitiveness*, 8 (Paper presented at the History of Crime, Policing and Punishment Conference convened by the Australian Institute of Criminology in conjunction with Charles Sturt University and held in Canberra, 9-10 December 1999). Available at: http://www.aic.gov.au/media_library/conferences/hepp/pratt.pdf

23 Anthony E. Bottoms, *The Philosophy and Politics of Punishment and Sentencing*, in *The Politics of Sentencing Reform*, 170-190 (Chris Clarkson & Rod Morgan, eds., Clarendon Press, Oxford, 1995).

represents an assertion of power to produce knowledge about the way the sexual violence is understood and the way we must deal with it. The process of legitimation of criminal law will take place 'at a distance' through broader systems or networks. I shall return to this point.

On April 22, 2008, Sisma Mujer submitted a document with comments on the indicators of the effective enjoyment of the rights of the displaced population from the perspective of gender. This document proposed some alternatives to ensure the "mainstreaming of the gender focus in each one of the rights under analysis", and incorporation of topics to be considered in the definition of specific indicators to measure the effective enjoyment of the rights of displaced women. The document also requested the consideration of several specific topics, such as emergency humanitarian assistance, legal status, and reunification of families, education, health, generation of income, housing, participation and rights to life, integrity, security, and personal freedom.

With respect to the last indicator, personal freedom, Sisma Mujer requested the extension of the framework of analysis of the crime of sexual violence, to include, in addition to rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or any other type of comparable violence. This indicator also presented the inclusion of domestic violence against displaced women within the categorized indicators under the idea of personal integrity. Likewise, it also required the inclusion, within the framework of analysis of the right to personal freedom, of all those situations generating psychological violence against women and involving violations to their right to freedom and personal autonomy.

At the same time, Sisma Mujer demanded the inclusion of indicators related to personal autonomy, such as torture and human trafficking, as well as the follow-up on the state's actions in the prevention of crimes of sexual and domestic violence, conducts violating the rights to freedom and personal autonomy, and the protection of victims of these crimes. In addition to the

traditional points of view established by local criminal law, all of these inclusions have, or may have, clear implications with respect to criminal policy and the influence of the usual forms of violence against women.

The production and use of indicators, and the ideology on which they are based, has the potential to alter the forms and the exercise of punitive power. Under this idea, I consider the constitutive relations between quantification and criminal public policy. From this perspective, Nikolas Rose has shown how previous studies have demonstrated that the relation between numbers and politics is mutually constitutive: “the exercise of politics depends upon numbers; acts of social quantification are politicized; our images of political life are shaped by the realities that statistics appear to disclose.”²⁴ As Rose points out, the relation is reciprocal and mutually constitutive.²⁵ This act of social quantification is “politicized” not in the sense that the numbers that they use are somehow corrupt, but because political judgments are implicit in the choice of what to measure, in what way, how often, and in what way to present and interpret the results. This constitutive relation implies that the expansion of the punitive will be legitimized by the “realities” that statistics appear to disclose.

The constitutive realities seeking to shape the punitive framework of sexual violence crimes are not established from the

24 Nikolas Rose, *Governing by Numbers: Figuring out Democracy*, 16 *Accounting, Organizations and Society*, 7, 673-692, 673 (1991).

25 “Democracy, if it be taken seriously as an art of government rather than as philosophy or rhetoric, depends upon the delicate composition of relations of number and numeracy enabling a calculated and calculating government to be exercised over the persons and events to be governed. Democracy in its modern, mass, liberal forms requires a pedagogy of numeracy to keep citizens numerate and calculating, requires experts to inculcate calculative techniques into politicians and entrepreneurs, requires a public habitat of numbers. Democratic mentalities of government prioritize and seek to produce a relationship between numerate citizens, numericized civic discourse, and numerical evaluations of government. Democracy can operate as a technology of government to the extent that such a network of numbers can be composed and stabilized. This is not a question of the *intrinsic* capacity of numbers—we should not expect to find any essential unity to the relations of numbers and politics. Rather, it is a question of the ‘what’ and ‘where’ of the deployment of numbers, and the ‘how’ of their alignment with other governmental technologies.” Nikolas Rose, *Governing by Numbers: Figuring out Democracy*, 16 *Accounting, Organizations and Society*, 7, 673-692, 690 (1991).

more limited idea of constituting an attack to sexual freedom, freedom to choose whether to have sex or not. On the contrary, these constitutive realities emerge from the fact that the punitive should be activated when the legal rights to *personal autonomy* and *individual freedom* are violated, since they are the rights that allow us to envision the phenomenon of sexual exploitation in a broader manner.

The adoption of these standards of the indicators comes from the incorporation and translation of *governance feminist* discourses in the country.²⁶ According to Céspedes, Sisma's stance and involvement in this process can be viewed as an expression of *power feminism*—characterized by a structural understanding of patriarchy—²⁷ extending its influence to a Latin American country, but also as an effort to adapt its content to the Colombian realities.²⁸ Based on the ideas concerning the unequal impact of violence that forced displacement and armed conflict caused on women's lives, and the special consideration they gave on sexual violence as a criminal conduct that not only takes place in the armed conflict, Sisma Mujer concluded the inevitability of fighting the impunity of the crimes perpetrated by male domination, through affirmative action, meaning special public policies.²⁹

26 Governance Feminism is an analytical category used by Janet Halley, Prabha Kotiswaran, Hila Shamir and Chantal Thomas to identify how certain feminist discourse govern in a given time the global understanding of discrimination against women and of the precise actions to overcome it. Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/ Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 *Harvard Journal of Law and Gender*, 2, 335-423 (2006). Available at: <http://www.law.harvard.edu/students/orgs/jlg/vol292/halley.pdf>

Therefore, governance feminism "is an analytical category that exposes what is the agenda feminists are advocating for internationally, how that agenda affects and conditions lawmaking, and by which strategies that agenda makes its way into the international and national strong publics." Lina María Céspedes-Báez, *Far beyond What is Measured: Governance Feminism and Indicators in Colombia*, 25 *International Law, Revista Colombiana de Derecho Internacional*, xxx-xxx (2014).

27 Catharine A. MacKinnon, *Toward a Feminist Theory of State* (Harvard University Press, Cambridge, London, 1991).

28 To a closer look to this debate, see Lina María Céspedes-Báez, *Far beyond What is Measured: Governance Feminism and Indicators in Colombia*, 25 *International Law, Revista Colombiana de Derecho Internacional*, xxx-xxx (2014).

29 Lina María Céspedes-Báez, *Far beyond What is Measured: Governance Feminism and Indicators in Colombia*, 25 *International Law, Revista Colombiana de Derecho Internacional*, xxx-xxx (2014).

Sisma advocated for a broader understanding of sexual violence in accordance with the Rome Statute³⁰ in order to include sexual slavery, forced prostitution, forced pregnancy, force sterilization, among others. By this way, the discrimination rhetoric was integrated into the indicators narrative.

The process of naming the indicators related to sexual violence in this broader approach is characteristic of the punitive turn with the inevitability of criminal law intervention. In the next part I will examine this point and the idea of indicators as a government technology, and its use as a way to legitimize what has been called a new punitiveness formal control on sexual crimes.

II. INDICATORS AND NEW PUNITIVENESS

Governance comprises the means used to influence behavior, the production of resources, and the distribution of resources.³¹ The analyses of the means and impacts of governance can be studied from a Foucaultian perspective, which is concerned with the impact of power relation on identity and consciousness, the constitution of the subject, and the analysis of structures of power or domination, which the actors may not themselves be aware of.³²

In 1978, Michel Foucault defined governmentality³³ in terms of a slow process of transformation of the state over half a millennium, in which the state was not a single entity but non

30 Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. Available at: http://www.icc-cpi.int/nr/rdonlyres/ea9aef77-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

31 Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry, eds., *Governance by Indicators: Global Power through Data* (Oxford University Press, Oxford, 2012).

32 Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Indicators as a Technology of Global Governance*, 46 *Law and Society Review*, *New York University School of Law*, 1, 71-104 (2012). Available at: <http://www.iilj.org/publications/documents/2010-2.Davis-Kingsbury-Merry.pdf>

33 Michel Foucault, *Governmentality*, in *The Foucault Effect: Studies in Governmentality*, 87-104 (Graham Burchell, Colin Gordon & Peter Miller, eds., Harvester Wheatsheaf, London, 1991).

uniform and heterogeneous. To the extent that government was not equivalent to bounded public sector, government was a problematic, concerned with the ‘conduct of conduct’.³⁴ From a neo-Foucaultian work, Peter Miller and Nikolas Rose presented a set of characteristics that can be derived from the governmentality framework. These characteristics involve the notion of ‘controlling at a distance’ through networks, the recasting of subjectivities, the definition of objects of government, the role of knowledge in rendering domains governable, the use of governmental technologies, and the importance of calculation in these processes.³⁵

Governing or controlling “at a distance” is a central concept of governmentality. It implies not that state authorities are seeking to control through direct force or other influence but rather that such control is achieved through broader systems or networks. The key elements in these systems are the links between the various actors and the way that resources are operationalized through those linkages. As Yvonne Rydin explains:

(...) the linkages are needed to overcome the gaps between the state and other actors. Distance between the state and other actors are taken as an a priori given and part of the problem that the state faces. Governance structures are established in order to overcome such distances through networks of various kinds. From a governmentality perspective, the aim is to enable control at a distance, ‘to create locales, entities and persons able to operate a regulated autonomy’ (Rose and Miller, 1992, p. 173).³⁶

The supposed autonomy allows the government to reach its goal. In addition, the subjectivities of actors have to be altered so that they internalize these goals of government. As Nikolas Rose and Peter Miller³⁷ explains, rather than the state directing

34 Nikolas Rose & Peter Miller, *Political Power beyond the State: Problematics of Government*, 61 *British Journal of Sociology*, 1, 172-205 (1992).

35 Yvonne Rydin, *Indicators as a Governmental Technology? The Lessons of Community-Based Sustainability Indicator Projects*, 25 *Environment and Planning D: Society and Space*, 4, 610-624 (2007).

36 Yvonne Rydin, *Indicators as a Governmental Technology? The Lessons of Community-Based Sustainability Indicator Projects*, 25 *Environment and Planning D: Society and Space*, 4, 610-624, 611 (2007).

37 Nikolas Rose & Peter Miller, *Political Power beyond the State: Problematics of Government*,

others, a complex set of apparatuses results in self-regulation among subjects and citizens to achieve the same ends.

In this process of socially constructed identities and through the construction of knowable objects of government, governmentality makes use of a mass of technologies. Among these technologies we can identify techniques with a particular emphasis on the use of statistics and calculation. Indicators seem to be another means of governmentality: “Making people write things down and count them... is itself a kind of government of them, an incitement to individuals to construe their lives according to such norms.”³⁸

Davis, Fisher, Kingsbury and Merry propose thinking about indicators as representations of a differentiated method of producing knowledge about societies.³⁹ They affirm that a particularity of indicators as a technology of governance is the way in which they implicitly represent theories about the appropriate standards against which societies (or institutions) are measured and the adequate means to measure the achievement of those standards. These theories are generated through dynamic collective processes that significantly differ from other political processes. The representation of these types of theories within one indicator makes indicators more or less influential and more or less open to various forms of controversy and regulation. In this sense, the use of one indicator will imply the acceptance of a series of assumptions about the criteria, based on which societies or institutions should be assessed, as well as the processes that will be used specifically for the generation of these assumptions.

In this line of thought, I propose indicators as a way to legitimize the way sexual violence must be handled by the criminal justice policies. Under the idea of new punitiveness we can realize how the normative directionality of indicators and its “improved” performance is just apparent. The alleged neutrality

61 *British Journal of Sociology*, 1, 172-205 (1992).

38 Nikolas Rose & Peter Miller, *Political Power beyond the State: Problematics of Government*, 61 *British Journal of Sociology*, 1, 172-205, 187 (1992).

39 Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry, eds., *Governance by Indicators: Global Power through Data* (Oxford University Press, Oxford, 2012).

of indicators conceals a universalized punitive discourse, through which criminal punishment is legitimized by its retributive function.

The collective process of naming sexual violence indicators, fueled by a feminist vision of punishment and its involvement with this idea of new punitiveness, represents an assertion of power to produce knowledge about the way sexual violence is understood and the way we must deal with it. For instance, some measurements proposed by this collective process of indicators construction were set in terms of absolute statements which referred to groups by using quantifiers such as “all” or “none”, leading to distorted visions of the reality referred to. In that way, one of the indicators suggested by Sisma Mujer established “All displaced women are protected against violations to their freedom, integrity and personal safety” relating this indicator to a number of official records of reports of sexual violence.

This means that the control of the phenomenon will only be successful when the conflict is assumed by the criminal jurisdiction, and when it protects all women. Impunity will only be perceived as the institutional capacity of the criminal system to record complaints and act upon them without further questions regarding what happens inside of the day-to-day structure of punitive action. As a result, it is evident that these indicators are collections of data, simplified and processed into measures of the performance of some organizational unit.⁴⁰ These kinds of simplifications are problematic in themselves because they rarely correspond to the way the criminal justice system is in fact organized.⁴¹

Indicators, as standard-setting instruments, constitute “fictive spaces” for the operation of governance, and they establish

40 Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry, eds., *Governance by Indicators: Global Power through Data* (Oxford University Press, Oxford, 2012).

41 Christopher E. Stone, *Problems of Power in the Design of Indicators of Safety and Justice in the Global South*, Harvard Kennedy School, Program in Criminal Justice Policy and Management, *Indicators in Development, Safety and Justice* (April, 2011). Available at: http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/Indicators-ProblemsOfPower.pdf

a “plane of reality” marked out by a grid of norms on which government can operate.⁴² This idea of reality is embedded in the concept of new punitiveness.

As Pratt indicates, what is new about the new punitiveness in the field of criminal offenses is that it invokes a new set of strategies against sex offenders, particularly those who have committed crimes against women and children. It may appear that what we are seeing as new punitiveness is actually nothing new: more a replay of existing penal severity towards a group of offenders who have committed crimes that we judge to be of the worst kind—including rape, torture, kidnap, and sometimes murder of women and children.⁴³ However, the idea of new punitiveness suggests that the rhetoric around sex criminals represents something more than an answer to traditional hostilities to that group. Following Pratt:

(...) they seem to be reflective of a new punitiveness which is not just confined to sex offenders: these measures are part of a broader set of penal arrangements. What lies behind them (...) are the political and social changes of the last two decades or so that have taken place across modern societies. These changes have unleashed forces that are now channeling us towards a new punitiveness. A new culture of intolerance informs the way in which this is beginning to take shape. One of the consequences of this is that, in a range of ways, the direction of legal punishment seems to be moving beyond the established parameters that had hitherto been set for it in modern society and is prepared to draw on crime control strategies that have more affinity with premodern or non-modern societies.⁴⁴

42 Peter Miller & Ted O’Leary, *Accounting and the Construction of the Governable Person*, 12 *Accounting, Organizations and Society*, 3, 235-265 (1987). Nikolas Rose, *Beyond the Public/Private Division: Law, Power and the Family*, 14 *Journal of Law and Society*, 1, 61-76 (1988). Peter Miller & Nikolas Rose, *Political Rationalities and Technologies of Government*, in *Texts, Contexts, Concepts*, 171-183 (Sakari Hänninen & Kari Palonen, eds., Finnish Political Science Association, 1990).

43 John Pratt, *Sex Crimes and the New Punitiveness* (Paper presented at the History of Crime, Policing and Punishment Conference convened by the Australian Institute of Criminology in conjunction with Charles Sturt University and held in Canberra, 9-10 December 1999). Available at: http://www.aic.gov.au/media_library/conferences/hcpp/pratt.pdf

44 John Pratt, *Sex Crimes and the New Punitiveness* (Paper presented at the History of Crime, Policing and Punishment Conference convened by the Australian Institute of Criminology in conjunction with Charles Sturt University and held in Canberra, 9-10 December 1999). Available at: http://www.aic.gov.au/media_library/conferences/hcpp/pratt.pdf

Jonathan Simon offers a slightly different version of the punitiveness thesis.⁴⁵ Like Loïc Wacquant,⁴⁶ he understands penal measures as being disproportionately directed at the poor and ethnic minority groups creating a ‘revolving door’ whereby members of these groups pass repeatedly through the prison during the course of their life with devastating consequences on individuals, families and neighborhoods.⁴⁷ Simon also identifies what he sees as an even more disturbing development in which some contemporary forms of punishment seem to go beyond simple retribution and claims to protect the public or reduce crime to involve forms of ‘cruelty’ where the objective is to take delight in the pain of others.

Punishment, Simon argues, has become a kind of ‘therapeutic theatre’ in which the offender publicly expresses feelings of pain and moral shame. Although not claiming that these manifestations of cruelty represent a dominant feature of contemporary penalty, he sees these sentiments most prominently expressed in capital punishment, extremely long ‘life-trashing’ sentences such as California’s ‘three strikes’ law and a variety of shaming and stigmatizing measures. Simon does, however, claim that ‘governing through crime’ is becoming a more pronounced feature of contemporary society and that the engagement in cruelty may become a new kind of entitlement distributed by government, as ‘the criminal’ becomes an increasingly legitimate target of public hostility.⁴⁸

Jonathan Simon argues that as the New Deal model of governance began to falter in the 1960s, executive leaders turned

45 Jonathan Simon, *Entitlement to Cruelty: Neo-Liberalism and the Punitive Mentality in the United States*, in *Crime Risk and Justice*, 125-143 (Kevin Stenson & Robert R. Sullivan, eds., Willan, Cullompton, 2001).

46 Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 *Punishment and Society*, 1, 95-134 (2001).

47 Roger Matthews, *The Myth of Punitiveness*, 9 *Theoretical Criminology*, 2, 175-201 (2005). Available at: http://www.antonioacasella.eu/nume/Matthews_myth_punitiveness_2005.pdf

48 Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, in *Prisons*, 63-120 (Michael Tonry & Joan Petersilia, eds., University of Chicago Press, Chicago, 1999). Available at Berkeley Law, Berkeley Law Scholarship Repository: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1584&context=facpubs>

to crime control as a primary mode through which to govern. This was seen in the elevation of the crime victim as the ideal political subject, and was articulated in political rhetoric that demanded we get “tough” on crime in order to honor and protect those victims. According to Simon, *governing through crime* occurs in three main ways: 1) Regardless of the institution, individuals are legitimized when they act to prevent crimes or prevent behaviors that are viewed as criminal (though not necessarily outlawed); 2) Crime is used to legitimize interventions with non-criminal motivations (e.g., laws surrounding fetal death are arguably about abortion rights than crime); and 3) the technologies, discourses, and metaphors of crime and criminal justice⁴⁹ infused the entire language of governance, reshaping the frame through which all kinds of problems were viewed.⁵⁰

This transformation was first evidenced in enormous state investment in punitive “solutions” to the crime problem: enhanced sentencing statutes, major investments in law enforcement and prisons at the state and federal level, and the resurgence of death sentencing and executions in many jurisdictions.⁵¹ Over time, according to Simon, “governing through crime” seeped into the management of other social institutions, including schools, the family, and the workplace.

Regarding sexual violence, there is a global trend towards the use of indicators to measure the scope, prevalence and incidence of violence against women.⁵² By this means, we can perceive the

49 Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, 4 (Oxford University Press, Oxford, 2007).

50 Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, Oxford, 2007).

51 Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, Oxford, 2007).

52 On December 19, 2006, the General Assembly of the United Nations adopted without a vote a resolution entitled *Intensification of Efforts to Eliminate All Forms of Violence against Women* (A/RES/61/143). The resolution requested: “the Statistical Commission to develop and propose, in consultation with the Commission on the Status of Women, and building on the work of the Special Rapporteur on violence against women, its causes and consequences, a set of possible indicators on violence against women in order to assist States in assessing the scope, prevalence and incidence of violence against women”. *Intensification of Efforts to Eliminate All Forms of Violence against Women*, United Nations, General Assembly, Resolution A/RES/61/143, Request 18, December 19, 2006. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/503/01/PDF/>

idea of expansion of the global tendency on new punitiveness and the new efforts, through governance technologies, to legitimize the punishment in contemporary society.

A report produced by an Expert Group Meeting, Organized by the United Nations Division for the Advancement of Women, the United Nations Economic Commission for Europe and United Nations Statistical Division (2007), presented an international framework for indicators on violence against women. This organization expressed the need, as a long-term objective, that all forms of violence against women should be measured:

*In order to achieve this, there is an urgent need for further work on methodologies of data collection and indicator development in relation to different forms of violence against women. Priority should be given to the following forms of violence against women: killing of women by intimate partners; female infanticide; threats of violence; economic and emotional/psychological violence as part of intimate partner violence; crimes committed against women in the name of 'honour'; conflict/crisis-related violence against women; dowry-related violence; sexual exploitation; trafficking; femicide; forced marriage; sexual harassment.*⁵³

In the same direction, the indicators proposed by Sisma Mujer were presented with the rhetoric of punitive expansion:

(...) as a general approach to the proposed indicators of the Monitoring Committee on the rights to life, integrity, freedom and personal safety, it is necessary to take into account the measurement parameters, the inclusion of other crimes that particularly affect women. According to the above considerations, we propose some elements from the gender perspective in the development of this set of indicators:

- *Under the right of integrity, sexual violence must be analyzed in a broader approach, in addition to rape, including sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other comparable violence.*

N0650301.pdf?OpenElement

53 Expert Group Meeting Organized by United Nations Division for the Advancement of Women, the United Nations Economic Commission for Europe and United Nations Statistical Division, presented an international framework for indicators on violence against women. Geneva, Switzerland, October 8 to 10, 2007. Available at: <http://www.unecf.org/fileadmin/DAM/stats/documents/ece/ces/ge.30/2007/mtg1/zip.3.e.pdf>, <http://www.un.org/womenwatch/daw/vaw/v-egms-ind2007.htm>

- *Likewise, the right to integrity must include monitoring for domestic crimes violence against displaced women. While this is a situation in the domestic sphere, it requires state intervention to protect and assist their victims. In particular, in the context of forced displacement, considering that risks increase for women, girls and boys to be victims of domestic violence, due to economic pressures, poor habitability of housing, high levels of overcrowding, etc...*
- *Regarding the right to personal freedom, it is necessary to include all situations that lead to psychological violence against women and that involve violations of their right to freedom and personal autonomy, as acts aimed at controlling or isolating the woman from friends and family, prevent access to study, work or recreation, time control and relationships within the scope of analysis.*
- *Likewise, regarding the right to security, it is necessary to analyze the risks to which women are exposed, which not only depend on external agents, but may be determined by the persistent and progressive domestic violence of which they are victims.*
- *It is also suggested the inclusion of indicators related to personal autonomy such as torture, trafficking in migrants and trafficking in persons (...).*⁵⁴

The old and inveterate questions about how legitimate the punishment seems to be solved through the rhetoric of indicators and its neutral appearance. The elevation of the crime victim, as the ideal political subject that demanded that we get “tough” on crime in order to honor and protect those victims, acts as the main point to legitimize global and broader interventions.

The involvement of women's movements in the process of implementation of indicators is characterized by what I call *punishment feminism*.⁵⁵ This categorization assumes that the

54 Corporación Sisma Mujer, *Comentarios desde la perspectiva de género a la propuesta de indicadores de la Comisión de Monitoreo y del Gobierno Nacional para mediar el goce efectivo de los derechos de la población desplazada* (Corporación Sisma Mujer, Alicante, Bogotá, 2008). Available at: http://www.sismamujer.org/?attachment_id=553
Observatorio de los Derechos Humanos de las Mujeres en Colombia, *Documento marco conceptual* (Confluencia Nacional de Redes de Mujeres, Corporación Sisma Mujer, Alicante, Bogotá, 2001). Available at: http://webs.uvigo.es/pmayobre/textos/cecilia/documento_marco_conceptual.pdf

55 I perform this categorization in my doctoral dissertation and it is part of an attempt to rethink the way in which the various feminisms are related to criminal law. With this categorization, as well as those of regulation and critical feminism, aims to show more comprehensible conceptual differences that have been generated in feminism and in their understanding of sexual violence and the relationship that should exist with punishment.

subordination and violence are par excellence the basis of the feminist theory, and there is a necessary and automatic relationship with punishment.

These attempts to link violence against women with the need for more punitive intervention are not new. They are a phenomenon that has been expanding and has been intrinsic to the structure of the theory and practice of feminisms from the Global North. Also, these attempts have even been intrinsic to contemporary's anti-racist or postcolonial feminisms in the Global South. Janet Halley gathers essentialist character of these feminisms, or *hybrid feminisms* as she calls them,⁵⁶ and regrets the overlap that make the assumption of the superiority of men over women to make it a structural statement.⁵⁷

Paranoid feminism and *moral requirement to convergence*⁵⁸ represent the permanence of the superiority of men over women and the necessity to adopt a single strategy to overcome the damage done to women as well as the assumption that any deviation within feminism is bad in a moral sense. These circumstances reproduce the idea of naturalness of punishment around behaviors such as rape, pornography, sexual harassment, or children abuse.

This automatic and necessary relationship with punishment offered by *punishment feminism* entails its own vision about the symbolic effects of criminal law. It is assumed that from the use of criminal law some values shall be transmitted in the

I think this categorization is another step to break the deadlock that feminism displays in its relations with the criminal law, and also involves a space for reflection to take a step beyond the idea of feminism to use criminal law as symbolic mechanism to prevent sexual violence against women. Marcela Abadía, *Feminismos y sistema penal: retos contemporáneos para una legitimación del sistema penal*. Tesis doctoral presentada a la Facultad de Derecho de la Universidad de los Andes, 29 de mayo de 2014 (en proceso de publicación).

- 56 Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, Princeton, 2006). Available at: <http://press.princeton.edu/TOCs/c8258.html>
- 57 Dan Danielsen, Brenda Cossman, Janet Halley & Tracy Higgins, *Gender, Sexuality and Power: Is Feminist Theory Enough?*, 12 *Columbia Journal of Gender and Law*, 3, 601-637 (2003).
- 58 Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, Princeton, 2006). Available at: <http://press.princeton.edu/TOCs/c8258.html>

conscience of citizens, binding this ideal to the condition that the transmission of values will occur only if the instrumentality of law actually operates. However, as criminal decisions unfold in uncontrollable directions and in an unexpected manner, punishment feminism blames this on the criminal justice system “in action” for its transforming incapacity. This incapacity is what punishment feminists often complain about, without taking into account the intrinsically illegitimacy of the criminal system.

The *punishment feminist* proposal lies in two aspects. First, it questions the patriarchal nature of criminal law and, second, it focuses on finding the best legal amendment that goes beyond the patriarchal inefficiency. In addition, these feminists' versions, which advocate for a form of retribution, do not provide a detailed justification for the State to punish. They also end up assuming a universalist vision of punishment which should serve to neutralize the negation of legal order in any society.

The punishment feminism lacks the necessary elements to give a plausible answer to the justification of punishment and denies any questioning about the relationship violence-punishment. It also assumes that “the crime is real.” That is, it is assumed that crimes are ontological entities, naturally existent outside of our reality, and which are harmful per se. From this view, rape is a crime that has real and proper nature, and hence, the inability to question or conceptually separate a social act of forced sex with the imposition of punishment.

The social constructions of phenomena such as forced sex or prostitution are however assumed by the feminism of punishment under the idea that “crime exists.” Retribution for the injury does not admit any questioning or rethinking outside the feminist canon. Therefore, once a problematic situation (violence) is recognized, there is an equivalent and necessary conclusion that the system of social control is the criminal law (automatic relationship violence-punishment).

According to the above, it can be said that the categorization of this punishment feminism involves the conjunction of the following elements: 1. This feminism is always in favor of

“women”, and they are always victims. 2. There is no question of criminal law, and punishment vision embraces its retributive ends. 3. Crime is real.

From this perspective, the punishment feminisms construct indicators as a way to legitimize sexual crimes. Under the idea of new punitiveness the alleged neutrality of indicators conceals a universalized punitive discourse, in which the constitutional court and the government, in this joint construction of indicators, naturalize the justification of punishment and the punitive expansion as the only possible solution to combat violence.

The collective process of naming sexual violence through indicators denotes an assertion of power to produce knowledge about the manner the sexual violence is understood and the way criminal law and public policies must deal with it.

CONCLUSIONS

This paper attempted to explain how indicators can be used to legitimize the way sexual violence should be handled by the criminal justice policies. Under the idea of new punitiveness, we can understand how the normative directionality of indicators and its “improved” performance are just apparent.

As it has been said, the alleged neutrality of indicators conceals a universalized punitive discourse, by which criminal punishment is legitimized by its retributive function. The collective process of naming sexual violence indicators fueled by a feminist vision of punishment and its involvement with this idea of new punitiveness represents an assertion of power that end up influencing the establishment of criminal public policies, as well as the criminal law legitimacy.

This perception of the indicators is important because it allows understanding, questioning, and criticizing the path acquired by specific criminal policies. Understanding the way in which sexual violence against displaced women within the framework of the armed conflict is being regulated, will also suppose the understanding of a clearer reason why, in the repeated follow-up reports of writ 092, there is no evidence of progress in criminal policy and of state's assistance to complaints of sexual violence. One of the proposed ideas is that the extension of the meaning of sexual violence assumes a naïve view of the criminal system and of its own way of constructing the phenomenon of sexual violence against women, whether it is within the framework of the armed conflict, or not.

The contributions to the construction of indicators from the women's movement may have or may not have been applied in their entirety by the Government in order to measure the phenomenon. However, the truth is that the Court itself acknowledged women's organizations as legitimate parties that became relevant to the implementation of the ideas built around the sexual violence indicators within the framework

of armed conflict and legitimate parties in the joint construction of criminal policy.

Indicators such as social technology, which affects power and legal relationships, can end up intervening as essential factors in the formulation of a criminal policy. Although it is impossible to draw definitive conclusions in this paper with respect to the benefits or disadvantages that may be caused by the construction of a criminal policy, from the main role of the indicators as a contemporary form of governance, the fact remains that it is a phenomenon that may go unnoticed and have unknown specific effects in the punitive practice. The case study presented in this paper is an appropriate example to start thinking about this.

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