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# CRIMINALISING VIOLENCE AGAINST WOMEN FEMINISM, PENALTY, AND RIGHTS IN POST- NEOLIBERAL ECUADOR

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DISSERTATION SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS OF THE UNIVERSITY  
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# ABSTRACT

This thesis asks how penalty, understood as the whole of the penal complex, with its laws, procedures, and sanctions, has become central to feminist strategies to counteract violence against women (VAW) in Ecuador. A new penal code came into force in 2014, criminalising some forms of domestic VAW, which had thus far been treated as misdemeanours, and introducing the new crime of “femicide”. The thesis argues that human rights discourses have played a crucial role in bolstering penalty by presenting criminalisation as an essential component of human rights protection. Feminist networks resort to a “rights-based penalty” to legitimise criminalisation processes and to frame VAW as a human rights issue to which penalisation is the self-evident response.

While Western literature has associated penal expansion with neoliberal globalisation, and the emergence of a “carceral feminism” with the side-lining of social redistribution in feminist agendas, Ecuador’s 2008 Constitution explicitly challenges neoliberal approaches to wellbeing and development, and incorporates indigenous relational conceptions of justice. In view of this, considering that socio-legal research is limited in the country, this thesis employs a multi-method qualitative approach, including analyses of discourses within historical and current legal documents, and interviews of Ecuadorian feminists who participated in penal reform processes. The findings show that rights-based penalty has become a universalised field of intelligibility to interpret and express the wrongness of VAW. Human rights mask the colonial continuities that travel through penal discourses, displacing indigenous understandings of justice and subjectivity, which have a potential to disrupt hegemonic approaches to gender. Rights-based penalty also reframes feminist politicised conceptualisations of VAW and narrows our possibilities to imagine gender justice outside penalty.

In addition, by complicating legal procedures, the penal system is hindering access to justice for violence survivors on the ground, particularly marginalised women. Feminist strategies are constrained by dynamics whereby legal achievements come at the cost of tolerating exclusionary representations of gender, race, and the family, while the legal protection obtained in return is limited. More broadly, this thesis shows that challenging neoliberalism and implementing a redistributive programme has not sufficed to displace penalty and coloniality, exposing how representations of human rights can remain reliant on penal expansion beyond neoliberal policies. Interrogating the universality of human rights, acknowledging the colonial legacy of penal institutions, and recognising the effects of penalty on women’s access to justice could enable an exploration of indigenous cosmovisions to propose non-hegemonic strategies to counteract gendered violence.

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All translations from Spanish, including texts, laws, and interviews, are the author's.

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# LIST OF ABBREVIATIONS

<b>AFE</b>	Ecuadorian Feminine Alliance	<i>Alianza Femenina Ecuatoriana</i>
<b>AMM</b>	Action for the women's movement	<i>Acción por el movimiento de mujeres</i>
<b>AP</b>	Homeland Alliance	<i>Alianza PAIS</i>
<b>CEIS</b>	Ecuadorian centre for social research	<i>Centro Ecuatoriano de Investigación Social</i>
<b>CEPAM</b>	Ecuadorian centre for the promotion and action of women	<i>Centro Ecuatoriano para la Promoción y Acción de la Mujer</i>
<b>CIM</b>	Inter-American Commission of Women	<i>Comisión Interamericana de Mujeres</i>
<b>CONAMU</b>	National Women's Council	<i>Consejo Nacional de la Mujer</i>
<b>CSW</b>	United Nations Commission on the Status of Women	
<b>DINAMU</b>	National Women's Bureau	<i>Dirección Nacional de la Mujer</i>
<b>DP</b>	Popular Democratic Party	<i>Partido Democracia Popular</i>
<b>ENDEMAIN</b>	Demographic Survey of Maternal and Infant Health	<i>Encuesta Demográfica de Salud Materna e Infantil</i>
<b>ECLAC</b>	United Nations Economic Commission for Latin America and the Caribbean	
<b>FLACSO</b>	Latin American Faculty of Social Sciences	<i>Facultad Latinoamericana de Ciencias Sociales</i>
<b>IACHR</b>	Inter-American Court of Human Rights	
<b>INEC</b>	National Institute of Statistics and Census	<i>Instituto Nacional de Estadísticas y Censos</i>
<b>OAS</b>	Organisation of American States	
<b>OFNAMU</b>	National Women's Office	<i>Oficina Nacional de la Mujer</i>
<b>PAHO</b>	Pan-American Health Organisation	



<b>SENDAS</b>	Service for the Alternative Development of the South	<i>Servicio para el Desarrollo Alternativo del Sur</i>
<b>UNFPA</b>	United Nations Population Fund	
<b>USAID</b>	United States Agency for International Development	
<b>VAW</b>	Violence Against Women	

# TABLE OF LEGISLATION

<i>Código civil del Ecuador de 1860</i>	Civil Code of Ecuador of 1860
<i>Código penal del Ecuador de 1906</i>	Penal Code of Ecuador of 1906
<i>Código Penal de 1938 (Reformado)</i>	Penal Code of 1938 (Reformed)
<i>Convención Interamericana de Derechos Humanos, "Pacto de San José"</i>	American Convention of Human Rights, "Pact of San Jose"
<i>Convención Interamericana para prevenir, sancionar y erradicar la violencia contra la mujer, "Convención de Belem do Pará"</i>	Inter-American Convention on The Prevention, Punishment and Eradication of Violence Against Women, "Convention Of Belem Do Para"
<i>Ley contra la violencia a la mujer y la familia de 1995 (Ley 103)</i>	Law Against Violence Toward Women and the Family of 1995 (Act 103)
<i>Constitución Política del Ecuador de 1998</i>	Political Constitution of Ecuador of 1998
<i>Constitución de la República del Ecuador de 2008</i>	Constitution of the Republic of Ecuador of 2008
<i>Código Orgánico Integral Penal de 2014</i>	Organic Integral Penal Code of 2014

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# INTRODUCTION

In 2010, a series of short video clips was broadcast on Ecuadorian television and other media as part of a public campaign called “*¡Reacciona Ecuador, el machismo es violencia!*” (React Ecuador: machismo is violence!). One of these videos <sup>1</sup> shows a young girl and a young boy as they grow up: the girl always surrounded by pink wallpaper, dolls, makeup, and frilly fabrics; the boy by blue decorations, toy guns, and soldierly patterns. Toward the end, on their birthdays, she is given a pair of handcuffs, and he a pair of boxing gloves. Then they meet on the street for the first time and look at each other in mutual attraction while wearing the symbolic props, signalling the abusive nature of their future relationship.

Although this campaign was criticised by some, due to its use of heteronormative, upper-middle-class, and urban symbols (Salcedo Vallejo, 2012), it was a remarkable initiative nonetheless. This was the first time that a state campaign acknowledged machismo as a cultural and social phenomenon, implying that traditional gender roles are societal rather than biological factors underlying violence against women (VAW). Public policy displays like this, along with the Executive Decree 620 for the eradication of VAW, issued in 2007 (Presidencia de la República del Ecuador, 2007), nourished my and other feminists’ perception of the left-leaning “Citizen’s Revolution” as a project that would implement

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1 Clip available online as of August 2016, at <https://youtu.be/NTxUWQ2IE6s>



progressive policies to address feminist demands, including measures to alleviate the chronic problem of domestic VAW.

Adopting an anti-neoliberal and anti-colonialist rhetoric, Rafael Correa Delgado, a young academic and politician who was not linked to traditional political parties, had been elected President in 2007. Correa's left-turn promised to move away from the thus far dominant neoliberal economic policies, which had deepened social inequality since the return to democracy in the late 1970s (Radcliffe, Laurie, & Andolina, 2004). The international development agenda, including the "modernisation of the state", had impacted on women's lives as well as feminist networks, producing controversial effects. These included the institutionalisation of women's struggles for survival, whereby non-paid labour served as a "buffer" for the economic crisis (Moser, 1993; Lind, 2005). It has also been noted that international development institutions, such as the World Bank, have played a role in the continuation of racialised and gendered norms, in connection to "proper" sexual and economic behaviour (Bedford, 2005; 2009). The effects of neoliberal policy had encouraged the mobilisation of social actors such as the indigenous movement and the women's movement.

Against such backdrop, the campaign "*El machismo es violencia*" opportunely contrasted with previous approaches to VAW, which had centred legal reform and penalisation as the primary routes to counteract gender violence. Indeed, a shadow still hung over the penal system and the police agencies, decades after infamous forced disappearances of individuals who had been associated to leftist "subversive groups" during the 1980s and 1990s. Later, these forced disappearances were catalogued as state terrorism (J. Herrera, 2005; Montúfar, 2000). In fact, under Correa, a Truth Commission was created

to investigate the events (USIP, 2010), and the government of the “Citizen’s Revolution” promised the country that we would leave that past behind.

The first legislative projects under the new regime included a penal code draft-bill prepared by a team of legal scholars and practitioners under the wing of the Ministry of Justice and Human Rights (Ávila, 2009). It was described as an innovative project, crafted in line with a strand of liberal penal doctrine known in Latin America as “*garantismo penal*” (“penal guarantees” or “constitutional criminal law”). From a doctrinal perspective, the draft-bill followed liberal-democratic principles: state coercion should be minimal, only used when all other legal mechanisms have failed, and strictly respect the fundamental rights of the involved. Due process and the principle of legality occupied a central space. Progressive scholars and activists in Ecuador, including feminists, have been enthusiastic regarding this way to approach criminal law.

By 2012, however, the initial draft-bill was discarded. The text that ultimately made it to the legislature was more punitive than its predecessor (Dávalos, 2014; Ávila, 2013). This new code created over 70 new criminal offences (El Universo, 2014), including “violence against women and members of the nuclear family”, and “femicide”. The maximum penalties increased from 25 to 40 years, and sanctions for most of the common crimes were augmented. Also, the last decade has seen new, bigger prisons built in various parts of the country (El Comercio, 2014). In the field of VAW, the Parliamentary Group for Women’s Rights (many of whose members were self-identified feminists) had recommended the full penalisation of domestic violence, which used to be treated as a misdemeanour or “minor offence” (*contravención*). The law then applicable was Act 103, a specialised piece of legislation addressing violence toward women and the family, which had been in force since

1995. Under that law, domestic violence resulted either in a fine or a short time of imprisonment for the aggressor, depending on the severity of the resulting injuries. The lawmakers' proposal was to "upgrade" all forms of domestic violence to the category of serious crime and incorporate them into the general penal code.

While this proposal was not necessarily at odds with campaigns such as *El machismo es violencia*, some controversies arose as Correa's relations with social movements (including environmentalist collectives, the indigenous movement, and the women's movement) became tense (Ramírez Gallegos, 2010; Becker, 2013). Several NGO representatives and non-state feminist activists argued that full criminalisation would negatively impact on women's access to justice (El Universo, 2012a), particularly in the case of psychological violence (emotional abuse), which used to be managed through a relatively simple process in specialised commissariats. Said process would be eliminated if the infraction were to be treated as a full criminal offence. Also, Act 103 had provided women who reported domestic abuse with immediate protective measures including restraining orders, which would also be lost as a result of the reform. In addition, these feminist groups opined that the ordinary procedure would be too cumbersome and dilatory to respond to women's actual needs.

In the middle of these debates, as a recently graduated lawyer who was specialising in criminal law and endorsed the rights-based approaches, I was intrigued as to why the feminist lawmakers who supported the Citizen's Revolution insisted in fully criminalising domestic violence. At the time, I worked in a university's legal aid clinic which offered free advice to citizens. Many of the people I advised were women denouncing domestic violence who came to the office nearly on a daily basis. I understood the value of a measure known

as “*boleta the auxilio*” (a restraining order against aggressors which could be issued as soon as a complainant required it). I also realised that fully criminalising domestic violence would virtually eliminate this option by adding a wider array of requirements to obtain a preventive judicial order within an ordinary criminal trial. Feeling to an extent disappointed, I started to investigate the issue and learned that the criminalising trend was not uncommon and even had a name: carceral feminism.

## 1 “CARCERAL FEMINISM”? CURRENT DEBATES ON FEMINIST POLITICS AND PENAL EXPANSION

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This thesis argues that human rights play an important role in making penal expansion possible within a post-neoliberal context. Under the guise of universal, objective, and neutral instruments, some human rights discourses have facilitated colonial continuities, the displacement of non-hegemonic legal knowledges, and the consolidation of penalty as a self-evident framework to address VAW. This is, in turn, problematic, because the penal logic is hindering access to justice for women on the ground, as I show in Chapter 5. Importantly, Ecuador constitutes a unique site to analyse the relationship between feminist practices and penal expansion, given that the country has recently undergone processes of political and legal reform which are considered post-neoliberal and decolonial. Conversely, recent Anglo-American literature has associated neoliberal agendas and disregard for social redistribution to the problem of penal expansion.

Numerous debates have thus arisen regarding the alleged link between the feminist politics of sex and gender and carceral expansion as an expression of the global capitalist project. While many feminists have denounced the subordinating effects that carceral politics have on imprisoned women, many have also relied on criminal justice as a path to seek legal redress in matters of violence against women (VAW). In so doing, according to some critics, they are bolstering carcerality. As I detail in Chapter 1, “governance feminism”, understood as networks of organised feminist caucuses with access to the institutions through which political and legal power circulates, has contributed to intensifying carcerality. International human rights discourses, which have in turn been associated with neoliberal constructions of subjectivity and justice, also play a part in the propagation of carceral discourses (Bernstein, 2007; 2012; Bumiller, 2008; Gotell, 2007; Halley, Kotiswaran, Shamir, & Thomas, 2006; Halley, 2008a; 2008b). A dynamic interaction between international fora and local legislatures, in which governance feminism plays a crucial role, has thus facilitated penal expansion around the globe. The term “carceral feminism” has emerged from these analyses, not as a self-defining label adopted by a particular collective, but rather as an expression that highlights what is seen as a problematic aspect of feminist engagements with criminalisation strategies; all of this in connection with neoliberal narratives and rights-based discourses. Authors analysing carceral feminism have proposed to move from a narrative of “harm and injury” to one of social redistribution, stressing that feminist socialist politics could be a way to temper the carceral drive (Kotiswaran in Halley et al., 2006). Given Ecuador’s turn to the left and the government’s embracement of “socialism of the XXI century”, a label that has also been adopted by many feminists who support the Citizen’s Revolution, this project’s case study offers a unique opportunity to put the idea of the politics of social redistribution as a remedy to carcerality, to test.

In view of the cited framings of carceral feminism, several questions arise. First, it is not clear from the literature, although it seems to be implied, that there is a deliberate feminist project oriented to “ending impunity” (Halley, 2008a, p. 5). Rather than making this assumption, this dissertation approaches feminist appeals to penalty as a set of dynamics produced by deeper and broader discourses which revolve around the penal complex. We can speak in the same way about a “carceral environmentalist movement” or a “carceral LGBTI movement”, if we looked at trends within those groups, which push for the creation of environmental offences or hate crimes (Moran, 2001; Zaffaroni, 2011). It is then pertinent to investigate what these carceral narratives have in common, what animates them and enables them, and how social actors speak about their objectives, investments, and attachments. It is necessary to delve into the discourses by which penal reform is being legitimised and presented as a tactic from which women can benefit.

The next issue that requires clarification is the adequacy of the term “governance feminism” as an analytic category to identify feminist networks in the global south. Feminism in Ecuador, as this thesis shows, is a sparse political identity embraced by persons within and outside the organisations and institutions that promote anti-violence (and penal) agendas. “Institutionalised” feminism in Ecuador is not stable but rather responds to the upheavals and challenges presented by political contexts. Feminists have had intermittent access to governance agencies, and there is always a perceived risk of losing what they have achieved (see Chapter 4, sections 2 and 3). Moreover, as I show in Chapter 5, the Ecuadorian women’s movement is currently fragmented, women’s NGOs have lost much of their

negotiating power, and the state women's council, which had been relatively prominent during the 1990s has lost much of its capacity to influence public policy.

Finally, the term "carceral" applied to feminism, also requires further discussion. In this dissertation, I will use the term "penality" rather than "carcerality", because the latter refers narrowly to imprisonment as the state response to conducts categorised as crimes. This notion is not useful in Ecuador, as there is no evidence that feminist-driven penal reform has resulted in increased incarceration. On the contrary, most studies show that in matters of gendered violence, attrition rates are very high. According to different estimates, only between 4% and 11% of reports end with some resolution, while the complainants abandon most lawsuits, usually after they have obtained protective judicial orders (Jubb, 2008; Jácome Villalba, 2003). However, it is true that it has become increasingly common for feminists to appeal to criminalisation in matters of VAW. My findings suggest that the reasons why we should care about penal expansion may be different from those exposed in the governance/carceral feminism literature, though. I am referring to the potential consequences of penal expansion for women who attempt to access justice. Hence, I use the term "penality" drawing on critical criminologists (e.g. Garland, 1985; Howe, 1994) who have drawn from Foucault's work to refer to the whole penal complex, including discourses, laws, procedures, and sanctions. Penality is thus posited as a field of intelligibility, which through its definitions, institutions, and procedures, constructs human behaviour, encoding it in particular ways. Penal mechanisms work together to express which conducts constitute a serious break of the established order, and what consequences should follow for the transgressors. Penality also provides the premises to posit legitimate state responses to

social violence and the guidelines that sustain the procedures to which the penal truth of human conduct is established.

Having made these clarifications, the most apparent incongruity that emerges from confronting the governance/carceral feminism literature to Ecuadorian feminist networks, is that the first does not take into consideration the existence of sites where programmes which explicitly challenge neoliberalism are being developed. An example is the Latin American “pink tide”<sup>2</sup>, which within these framings, would constitute a case of exception where penalty is expanding despite the weakening of neoliberalism (Dávalos, 2014; Paladines, 2016; Sozzo, 2015; 2016; Ávila, 2013). In Ecuador, the Constitution of 2008 has been labelled “anti-neoliberal” and “decolonial”, as it inaugurated a period that many refer to as “post-neoliberal”.

At the same time, under said Constitution, a new Penal Code criminalised domestic VAW and introduced the category of femicide. Given Ecuador’s turn to the left and the government’s embracement of “socialism of the XXI century”, a label that has also been adopted by some feminists, this case study offers a unique opportunity to look at the relationship between the politics of social redistribution and penal expansion. Realising that the existing literature cannot account for the situation in Ecuador, I decided to dig deeper, wondering how so many Ecuadorian feminists had come to think about criminal justice as

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<sup>2</sup> The governments of Argentina, Brazil, Ecuador, Bolivia, Venezuela, Uruguay and Nicaragua of the past decade have been regarded as leftist and referred to as “pink tide” (Kampwirth, 2011) or “post-neoliberal” governments (Borón, 2003); while their ideology has often been described as “socialism of the 21st century” (Dieterich, 2009). Ecuador and Bolivia enacted constitutions that express a desire to decolonise their social contracts by incorporating ancestral wisdom, in the form of concepts such as Sumak Kawsay or Suma Qamaña (roughly translated as “living well”).



the best way to address VAW. I started thinking about what would become these project's research questions, which I posit below.

## 2 UNRESOLVED PARADOXES: THE PROJECT'S CENTRAL QUESTIONS

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In view of the gaps and paradoxes mentioned above, this project posits the following driving questions:

- How have Ecuadorian feminists historically engaged with criminal law and penal reform?
- How has penalty come to be central to feminist approaches to VAW in Ecuador?
- What justifications and critiques have been invoked by Ecuadorian feminists regarding the use of penalty in matters of VAW?
- What is the role of human rights in Ecuadorian feminist appeals to criminalisation strategies?
- What are the limitations of neoliberalism as a framework to explain the prevalence of penalty among Ecuadorian feminists?
- How has the post-neoliberal shift impacted on the penal treatment of VAW?
- What are the consequences of the criminalisation process for women's access to justice?

The project thus starts from the realisation that neoliberal policy is insufficient to explain penal expansion in this context. Rather than assuming that neoliberal/punitive

agendas have co-opted feminism, I delve into the ways in which feminists have historically justified the use of criminal law. The project aims at identifying the discourses that have allowed criminal justice to prevail over competing models, despite recent political and constitutional shifts that could have disrupted traditional penal approaches. In this way, the thesis will develop an original account, which will challenge particular aspects of the existing literature. The next sections will map the core concepts and methods that I adopt to such effect.

### 3 NEOLIBERALISM AND THE “POST-NEOLIBERAL” ALTERNATIVE

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The term “neoliberalism” has been used to refer to diverse political and economic practices within contemporary global capitalism. In Latin America, the term is most often used to refer to the financing packages and “restructuring” requirements of the “Washington consensus”. The rubric was coined in 1989 to identify a set of views about development strategies associated with Washington-based institutions such as the International Monetary Fund, the World Bank, and the United States Treasury (Serra, Spiegel, & Stiglitz, 2008). It was first proposed by John Williamson to refer to the policies considered necessary in Latin America to replace the “old ideas of development economics that had governed Latin American economic policies since the 1950s” (Williamson, 2009, p. 7). Broadly, the measures were financial liberalisation, privatisation, openness to foreign investment, lower taxes, and small government (Tabb, 2004). These were frequently tied to conditions for lendings from international financial institutions. In Ecuador, after the return

to democracy in the late 1970s —following a period of military dictatorships across the subcontinent—, successive governments implemented reforms to “modernise the state”, which in practice translated into privatisation and reduction of social welfare expenditure (Endara, 1999). Paying the external debt was prioritised and, consequently, the budget for public education, health, and other social services, never amounted to the minimums established by law (Centro de Estudios Latinoamericanos de la Pontificia Universidad Católica del Ecuador, 2003).

These antecedents are key to understand the term “post-neoliberal” applied to the Ecuadorian government during the last decade. The distinction is not merely chronological: post-neoliberalism has been identified as a shift in development thinking, which “systematically confront[s] the mantras of neoliberal privatisation, state roll-back, and selective social programmes” (Radcliffe, 2012, p. 240). In this sense, post-neoliberalism has been associated with the rise of a Latin American New Left (Grugel & Riggirozzi, 2012), “with popularly elected governments embarking on reversals of neoliberalism informed by autochthonous notions of human wellbeing” (Radcliffe, 2012, p. 240). In Ecuador, the post-neoliberal phase begins with the cessation of right-wing governments and the rise to power of Rafael Correa, the leader of the “Citizen’s Revolution”, in 2007. His programme involved a range of reforms based on the Andean notion of “*Sumak Kawsay*” (“Wellbeing” or “Living Well”): “Living-Well Socialism questions the pattern of hegemonic accumulation, that is, the neoliberal way to produce, grow and distribute. We propose the transition to a society where life is the supreme right” (Secretaría Nacional de Planificación y Desarrollo, 2013).

Of course, there have been debates about the extent to which the Citizen’s Revolution has “truly” or “fully” been anti-capitalist (Dávalos, 2014; Álvarez et al., 2013). I shall clarify, however, that this project starts from the assumption that a political, legal, and

economic shift has taken place in Ecuador. Correa brought stability to a country that had had many ephemeral presidencies during the previous decade. Also, the Citizen's Revolution strengthened social welfare and reduced poverty by applying redistributive measures. These included an increase in benefits for people living in poverty, financial support for housing, investments in public health, education, and social security, and the suspension of external debt payments (Grugel & Riggirozzi, 2012; López Segrera, 2016; Ospina, 2009; Radcliffe, 2012). I will not delve further into the compliance of the Citizen's Revolution practices with anti-capitalist postulates. That would exceed the scope of this dissertation and would also be ineffective, as it would move the focus away from feminist penal reform. Instead, I am interested in localised practices within the post-neoliberal context; that is, the processes by which penal reform has continued to be justified as a feminist strategy to counteract VAW.

Regardless of these ambivalences toward Ecuador's government programme, I retain the use of the terms "neoliberalism" and "post-neoliberalism". This allows me to contrast political periods and explain whether or not current feminist engagements with criminal law relate to market-driven rationalities behind penal expansion, and mass incarceration (Bernstein, 2012; Bumiller, 2008; Christie, 2000; Gotell, 2007; LeBaron & Roberts, 2010; Sudbury, 2005). While carceral expansion has been connected to neoliberalism due to the decline of the welfare state, post-neoliberal Ecuador remains a site of penal expansion. This paradox seems to suggest that redistributive agendas and punitive ones can very well coexist or even be presented as one. Also, neoliberalism is a relevant term with reference to Latin America because it has been used by emancipatory movements to refer to the system against which they stand. That is the case of the Ecuadorian indigenous movement, one of the oldest and most notable collectives in the region (Yashar,

2005), which has explicitly linked neoliberalism to their oppression (Dávalos, 2004). Feminists from different sectors have also denounced neoliberalism: scholars have pointed to the effects of neoliberal policies on women's lives (Bedford, 2009; Lind, 2005, Moser, 1993), and women's organisations have expressed their criticism of neoliberal policies at various fora, including the shadow reports to the CEDAW Committee (CLADEM, 2006).

On the other side, critical scholarship has theorised neoliberalism as a transversal political rationality underlying global power arrangements. For instance, some streams of political philosophy read neoliberalism as a form of "governmentality", that is, a rationality of governance that produces new political subjects and a new organisation of the social realm (Brown, 2005; Foucault, 2008; Oksala, 2013). Governmentality is a notion taken up from Michel Foucault's work, which is concerned with the development of the modern administrative state, whereby the latter is not a natural given or centred as the source of political power, but rather conceived as the mobile disposition of governmental rationalities. Government is understood not only as a political structure or the management of the state, but widely as the ways in which the conduct of individuals and groups are directed by various authorities toward the improvement of the population (Dean, 2010; Foucault, 2010; Garland, 1997). According to Foucault (1982), the modern shifts in power relations are not a matter of "transfer" of power from the state to non-state actors; they are rather a shift in the logics of government, by which civil society is no longer passive, but a key actor for the deployment of biopolitical power; that is, techniques that are directed to populations, whereby power is applied to humans as species.<sup>3</sup>

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<sup>3</sup> For further discussion see Tadros, 1998; Sending & Neumann, 2006; Dean, 2010.

From these perspectives, the free market logic exceeds the realm of the economy and extends to institutions and social practices. However, the sense in which I use the term neoliberalism to distinguish it from post-neoliberalism in Ecuador, is economic, historical and legal: I am interested in legal continuities established between the neoliberal and the post-neoliberal periods. These may or may not result in fully formed “neoliberal subjectivities”, but what the thesis revolves around is how legal discourses impact on alternative approaches to gender and violence. In this sense, the Constitution of 2008 can be considered a contender to neoliberalism, because it introduced Sumak Kawsay and other indigenous tenets as guiding principles, and applied them to the notions of development and wellbeing. Sumak Kawsay centres relationality and balance with nature and the cosmos (Maffie, 2010). In consequence, another puzzle that this project addresses, is the continued presence within the new Ecuadorian constitutional framework, of the same rights-based provisions which were proposed and enacted during the neoliberal years, and incorporated into a constitution that is now deemed neoliberal by the government in office. In the sections that follow, I discuss scholars’ accounts which have addressed the relationship between rights-based discourses and neoliberalism from a critical perspective.

## 4 CRITIQUES OF NEOLIBERALISM AND HUMAN RIGHTS

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Within broader discussions about the role of neoliberalism in the production of knowledge and truth, critical theorists have set out to contextualise the effects of market-oriented ideologies in shaping legal institutions, as well as the role of law in legitimising

neoliberal agendas (Brown, 2011; Santos, 2007a; 2016; Foucault, 1980; Mignolo, 2000). These critics have also denounced the potential complicity of progressive discourses, such as international human rights, in reaffirming neoliberalism, with subordinating consequences for the marginalised groups which are excluded from the benefits of market profits (Beckett, 2016).

The universalisation of international human rights has been historically situated at the end of the Cold War, which in turn coincides with the beginnings of global neoliberalisation (Harvey, 2005; Meister, 2011; Moyn, 2010). In fact, Latin America experienced a “boom” of human rights-based legislation on VAW during the 1990s, a decade during which, as I detail in Chapter 3, VAW was framed as a human rights concern. Act 103, the first Ecuadorian “Law against violence toward women and the family”, was also enacted in 1995. To explain processes like these, a sector of scholarship has argued that neoliberalism facilitates the prioritisation of individual rights such as freedom and property, at the expense of socio-economic rights and redistributive policies (O'Connell, 2011). The assumption behind is that individual freedoms are guaranteed by freedom of the market (Harvey, 2005). As Lacey (2004) explains, critiques of rights often contend that “the form of legal rights centres on the competitive assertion of entitlements: the legal and political world is constructed as a market of rights, competitively asserted as against other market actors” (2004, p. 23).

Wendy Brown (2000) has argued that the rhetoric of rights obscures the fact that the exercise of one person’s rights often occurs at the expense of another’s. Moreover, Brown (1995) has warned about the potential consequences of “installing politicised identity in the universal discourse of liberal jurisprudence” (p. 96) due to the “contemporary proliferation of efforts to pursue legal redress for injury related to social subordination” (p.

27). Brown resorts to the notion of “injury” to analyse social movements’ appeals to legal reform. She argues that by “outlawing” social injury, the injured can place the blame for their suffering onto sovereign subjects, but at the same time law and the state are affirmed as guardians against all injury. The identities of the injured thus become fixed, preventing the resignification of their actions and positions. These dynamics do not result in emancipation, but instead in reproach and a will to punish, to take revenge, which is the opposite of political action; it is a “reaction”, a substitute for the capacity to act. Holding on to law and rights reveals the “wounded attachments” of social movements. At the same time, the “revenge of punishment” and the will to make “the perpetrator hurt as the sufferer does” (Brown, 1995, p. 27) propel political actors to undertake projects that are explicitly or implicitly punitive. In this way, the discourse of law and rights can have subordinating and depoliticising effects. Albeit attaining rights is desirable, because they symbolise the recognition of marginalised identities and the rejection of subordination (as Brown affirms paraphrasing Spivak, rights appear to be that which we cannot not want), their formalisation does not necessarily impact on the mechanisms that reproduce oppression.

In the same vein, other critics have framed human rights as “colonial technologies” (An-Na'im, 2012; Baxi, 2002; Foucault, 2007; Ibhawoh, 2007; Kalhan, Conroy, Kaushal, Miller, & Rakoff, 2006; Kapur, 2006; Stoler, 1995), due to the role of human rights in justifying military imperialist interventions and supporting Western involvement in the internal affairs of the developing world (Kennedy, 2004; Orford, 2003). Since humanitarianism tends to involve a degree of paternalism toward the victims of atrocities, the way in which international agencies and transnational NGOs have deployed human rights, frequently positions first world organisations as saviours of “less developed” people



(Douzinas, 2007; Kapur, 2006). In this way, international human rights potentially mask how the disparities between the global North and South are deepened.

Costas Douzinas (2000; 2007; 2013) has argued that after the Second World War, human rights have further affirmed the distinctions between the “human” and the “sub-human”. On the ground, legal practice adjudicates entitlements only to those who fulfil the requirements to be considered citizens. As Douzinas adds, “the only real rights are those given by the state to their citizens” (2007, p. 10). Since rights differentially empower people depending on their ability to access judicial devices, it follows that “non-citizens” will not necessarily benefit from legal advances in rights. In the next section, I explain how the notion of “coloniality” can be used to understand Latin American and Ecuadorian scenarios.

## 5 COLONIALITY, NEOLIBERALISM, AND LAW: CONNECTIONS BETWEEN RACE, GENDER, AND PENALTY

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The previous section outlined critical perspectives that have arisen mainly in the global North, some of which I incorporate into this project. Specifically, I draw on Foucault to analyse law as a discourse, as I detail in Section 7. It is true that the use of Western critique by Latin American scholars has elicited some controversies in relation to the ways in which this practice may displace our own critical perspectives. For instance, it has been pointed out that although Foucault’s work reveals the processes by which dominant subjectivities are built, it remains blind to colonial subjectivities (Suárez-Krabbe, 2012). Nonetheless, there have also been opinions, which I endorse, highlighting the usefulness of Foucaultian

“tools” for the development of a decolonial critique. For example, there are parallels between decolonial work on subaltern knowledges, and Foucaultian analyses of “power/knowledge” (Alcoff, 2007). Feminist postcolonial work, such as Ann Stoler’s study of race and sexuality draws extensively on Foucaultian concepts. In this way, alongside references to analytical categories such as “penality”, “discourse”, “subjectivity”, “problematizations” and “governmentalisation”, my work builds also on Latin American “decolonial critique”<sup>4</sup>, which refers to a sector of scholarship which broadly builds on the concept of “coloniality”, coined by Peruvian sociologist Anibal Quijano (2000b).

Coloniality relates to the hegemony of “Eurocentric” (Amin, 2009) forms of knowledge that resulted from the colonial processes through which indigenous populations of the Americas were (and are still) subdued. Authors in this tradition have defined coloniality as the “transhistoric expansion of colonial domination and the perpetuation of its effects in contemporary times” (Moraña, Dussel & Jáuregui, 2008, p.2). Quijano posits the “coloniality of power” as a lingering characteristic of global power arrangements which, rather than ending with colonialism, continued to prevail in postcolonial societies. Importantly, colonisation established race as a central system of social classification: race in its modern meaning does not have a history before the colonisation of the Americas (Quijano, 2000a). Racial identities (such as “Indian”, “black”, “white”, and “mestizo”) configured relations of domination and hierarchical social roles. Gargallo (2010) has referred

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<sup>4</sup> Following Walter Mignolo (2000), I use the term “decolonial” rather than “postcolonial”. Although the term has recently been used by some African authors, Latin American critique of coloniality stems from older and different traditions than those from African and Asian postcolonial studies, including early Latin American intellectual work on nation-building and republican independence. In this way, for many authors, the critique of Eurocentrism should start not with the Enlightenment but with the Spanish conquest (Salvatore, 2010).

to these dynamics as “pigmentocracy” (p. 157). During the colonial years, debates regarding indigenous peoples’ deficiencies in rationality and maturity resulted in the contention that “Indians” were inferior to whites. Colonisation thus introduced “racial epistemic hierarchies” (Mignolo, 2011, p. 19) through which the colonial difference was established. Correspondingly, a central characteristic of coloniality is “categorical logic”, that is, a dichotomous and hierarchical chain of reasoning which organises knowledge (Lugones, 2007, p. 742).

As I will detail further on, coloniality is a useful analytical tool to address gendered and racialised norms, including heterosexualism, normative domesticity, and the ideal of family unity. Through the lens of coloniality, racism and other colonial hierarchies become visible as they continue to shape the “processes of social structuration, cultural development, nation-building and state-building” (Santos, 1995, p. 272). Coloniality is adequate to understand the paradigm of the white, middle-upper-class family which is in turn constitutive of normative womanhood, gender, and race in Latin America (Lugones, 2007; 2009; 2010). Decolonial critics consider that neoliberalism is a global and hegemonic phenomenon, but rather than being the axis that articulates various forms of oppression, is a historic phase that follows broader and earlier colonial expansion:

[...] for Latin America both globalization and neoliberalism stand as new incarnations of neocolonialism, and capitalism continues to be the structuring principle which, by ruling all aspects of national and international relations, not only allows for but requires the perpetuation of coloniality (Moraña, Dussel & Jáuregui, 2008, p. 12).

In other words, coloniality is being perpetuated through globalisation and neoliberalism. The latter are, in turn, driven by the market and the international corporations.

Given that coloniality locates the origin of many hegemonic discourses in a historical period prior to the Enlightenment, there have been debates regarding the historiographical risks of homogenising diverse periods and spaces of colonial rule, given the diversity of Latin American postcolonial histories (Salvatore, 2010). Bearing this in mind, I clarify that my use of “coloniality” is not intended to describe a historical period necessarily, but rather a dominant way to make sense of the world, that is, the “colonial order of things” (Foucault, 2005; Stoler, 1995).

As we see, unlike the accounts that associate penal expansion with neoliberalism only, coloniality allows us to conceive that even if a political programme has challenged the dominant logic of the market, deep forms of hierarchisation embedded in law, including race and gender, may not be disrupted. Coloniality accounts for forms of discourse that, even when adopting a critical perspective on global capitalism, remain “‘within’ the territory, ‘in custody’ of the ‘abstract “universals”” (Mignolo, 2000, p. 88). Accordingly, the thesis builds on a framing of human rights and rights-based criminal law as potential reproducers of coloniality to throw light upon *why* organised women in Ecuador have long deployed hegemonic discourses in search for narratives that enable them to gather women’s diverse experiences, and at the same time allow them to communicate with their political interlocutors and intermediaries. Below, I elaborate on coloniality as it relates to the law more specifically.

## 5.1 THE COLONIALITY OF LAW

Authors like Walter Mignolo (2000; 2011) and Boaventura De Sousa Santos (2007a; 2016) have used the term “coloniality of knowledge” to refer to a characteristic of modern epistemology, which resulted from the subalternisation of non-imperial knowledges. “Epistemic racism” (Mignolo, 2011, p. 194) has persisted through nation-building processes after decolonisation, as the law has been used to control and normalise the “primitive” indigenous peoples (Skolodowska, 2008). García Villegas and Rodríguez-Garavito have affirmed: “the route of conquest and genocide, followed by colonisation and independence leaves traces that show up in the contemporary legal practices and culture in the region” (2003, p. 22). In fact, in many regions of Latin America, such as the Andean highlands, the colonial legacy and the continuity of semi-autonomous spheres of indigenous rule has resulted in a marked “legal pluralism” (Merry, 1988; Sieder & Sierra, 2011). At the same time, unitarian nation-building projects have faced the challenge of managing these diverse understandings of justice. As shown in Chapters 4 and 5, political tensions between social actors, particularly the indigenous movement and the governing elites, have shaped the legal history of Ecuador, leading to the recent constitutional recognition of plurinationalism and indigenous justice. However, more often than not, the result has been the subordination of non-Western legalities (Estermann, 2014; Walsh, 2009).

Importantly, the law has been central to the construction of normative gender roles and sexuality as functional elements within nation-building projects. Optimising the “national race” and controlling the sexual behaviour of subordinate family members have been policy goals that can be identified in colonial and early republican regulation (Dore & Molyneux, 2000). In Ecuador, normalising masculinity and femininity has historically been

crucial to the construction of national identity (Radcliffe & Westwood, 1996). The same is true regarding race and indigeneity, which have often been construed as obstacles to the nation's progress (Clark, 2001; Clark & Becker, 2007). As I demonstrate, in Chapter 2, early state intervention to moderate violence in the family was tied to the "modernisation" of patriarchy, which preserved male authority but enhanced the protection of women and children as pivotal members of the idealised white family. Of course, this was long before the advent of neoliberalism in any sense of the word.

Colonial law has historically legitimised imperial expansion, Christianisation, and the overpowering of indigenous societies. In addition to that, law continues to fix norms and make claims to truth based on principles and procedures, which privilege experiences of the world that can be framed in Western legal terms. In sum, as a system which largely relies on binary classifications, hierarchical categories, and dichotomies, the penal apparatus is a colonial technology, not only because it preserves Western epistemologies and worldviews, but also because in terms of contemporary criminal law, it reproduces colonial norms, particularly in relation to women's roles in society and within the family. In this sense, transnational feminism practices and the discourse of women's human rights could also have "imperialist" effects, especially if they reproduce a pattern whereby Western feminism is projected as the rescuer of "Third World" women (see Mohanty, 1991; Spivak, 1988). In other words, in adopting Western transnational paradigms, organised feminists in peripheral locations may reproduce colonial hierarchies (Mendoza, 2002). These relationships between neoliberalism, human rights, and colonial oppression are relevant to this project, because in Ecuador, a large part of the women's movement has been NGO-based and generally frames its programmatic agenda in terms of human rights. This

dissertation thus shows how coloniality pieces together the various roles that penalty has played historically in mainstream understandings of violence against women (VAW) and the relationship between penalty and the discourse of human rights. In consequence, it is crucial to be aware of the colonial, racialised, and gendered implications of legal discourses and penalty more specifically.

## 5.2 COLONIALITY, PENALTY, AND RACE

As explained above, coloniality emphasises the continuity of racial structuring from Luso-Hispanic colonial societies (Quijano, 2008; Salvatore, 2010). These hierarchies, in turn, constituted and have continued to constitute an ethnic field through which social and physical whiteness determines the competences that confer social position (García Linera, 2012). Conversely, indigeneity has been associated to the incapability of self-government and civilised sociability (Salvatore, 2010). The mestizo<sup>5</sup> identity has therefore been built based on the *denial* of, rather than embracing indigeneity (Quijano, 2000a; 2000b; 2008). Hence, state policies have often aimed at “whitening the population”, as I show in Chapter 2. “Ethnic capital” continues to appraise or devalue each person according to her degree of proximity to legitimate or stigmatised ethnicity.

The effects of racialisation have varied across sub-regions and historical periods in the Americas. For example, as Quijano (2008) notes, in Anglo-America, so-called blacks were the most exploited colonised group, since natives were largely exterminated. On the other side, the Andean countries (particularly Ecuador, Peru, and Bolivia) have retained more

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<sup>5</sup> “Mestizo” refers to people of mixed (white and indigenous) ancestry. In Spanish, the feminine plural form of the adjective is “mestizas”.

visible marks of indigeneity and coloniality than, for instance, the countries in the Southern Cone (such as Argentina, Chile and Uruguay). In the Andean highlands, the persistence of “aristocratic privilege, landlord despotism, labor servitude, and open forms of racism” (Salvatore, 2010, p. 341) still affects the lives of many indigenous peoples. In Ecuador, colonisation usually entailed servitude for the subjugated groups, and although enslaved Africans and Afro-descendants were a demographic minority (Antón Sánchez, 2008), they were constructed as a “historical aberration” and “the ultimate Other” (Rahier, 1998, p. 422). Race, in this way, legitimised domination.

In this context, from the start of the colonial process, disciplinary mechanisms were used to subdue the “deviant” groups. As Dussel (2008) puts it, the individuals being watched in the madhouses and French panopticons (Foucault, 1977) had long before been anticipated by the Amerindians and Afro-descendants who were monitored and marginalised in Latin America since the 16<sup>th</sup> Century. “Indians” were constructed as primitive and irrational, which in turn required governmental intervention, given that the indigenous were deemed “naturally” prone to “idleness and vice” (Walker, 2001, p. 45). The argument that authorities *had to* use force with indigenous persons to prevent dangerous behaviours has had a long colonial history.

The “modern” penitentiary was first introduced in Brazil in the mid-19<sup>th</sup> century, with the construction of the first building for the “scientific” treatment of criminals (Salvatore & Aguirre, 1996). The model largely drew on positivist criminology. To Salvatore and Aguirre (1996), the penitentiary epitomised the dreams and obsessions of Latin American ruling elites, as it promised solutions to crime, and at the same time symbolised modernity and civilisation. Nonetheless, this model did not displace but often reinforced, colonial racial



hierarchies. Frequently, criminality and “vice” were portrayed as the effect of racial inferiority. As a result, dark-skinned men have commonly been imprisoned more often than whites (Gallardo & Núñez, 2006). According to a 2009 Amnesty International report, for example, 23 Afro-Ecuadorians were arrested in a public park in Quito, merely because the police thought they had a “suspicious attitude” (Amnistía Internacional, 2009). Some remained in custody for several days although no charges were ever pressed. In Brazil, young black men dominate the country’s crowded prisons (Buenos Aires Herald, 2015).

Indigeneity and racialisation, are still pressing issues globally. For instance, Loïc Wacquant (2015) has exposed the “hyperincarceration” of certain classes and ethnicities, particularly impoverished Latinos and blacks in the United States. Ruth Gilmore (2007) has shown a continued articulation of class and race as factors that determine the likelihood of incarceration, again in the US. She has also demonstrated that the state’s attempt to produce a geographical solution (incarceration) to the political and economic crisis, is informed by racialised and gendered discourses (Gilmore, 2005). Similarly, Angela Davis (2000, 2003) has linked the expansion of gendered and racialised punishment to the impacts of neoliberal globalisation, especially due to the activities of the various actors who profit from mass incarceration; from private “service providers”, to industries utilising the inmates’ low-paid labour. Davis has also pointed to the gendered dimensions of imprisonment, exposing the prevalence of sexual violence in women’s prisons, which is often justified by the mere fact of their condition of offenders (Davis, 2005). Also, many imprisoned women are themselves survivors of gendered violence (Sudbury, 2005). Furthermore, in countries like Australia and Canada, feminists have denounced the overrepresentation of aboriginal women in prisons (Walker & McDonald, 1995; Williams,

2007), which often obeys to portrayals of indigeneity as over-determined by ancestry, identity, and socio-economic deprivation, thereby feeding stereotypes about criminality. In Ecuador, police intervention and short-term imprisonment for minor offences (such as informal street vending and street littering) have been used as a means to “whiten” the streets (Swanson, 2010).

As we see, the prison is a complex site where gender and race articulate the subordinating effects of globalised economic power arrangements. Penalty also allows the state to individualise social problems, attributing “criminality” to personal traits and failures, which are in turn associated with colonial subjectivities.

## 6 TOWARD A DECOLONIAL FEMINIST CRITIQUE OF “RIGHTS-BASED PENALTY”

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Currently, there are few scholars’ accounts of VAW that expound the relationship between rights-based discourses and penalty from a decolonial perspective. Such an endeavour is necessary as a self-reflective investigation into feminist support for penal reform, but importantly, this task will enable us to unveil how some mechanisms which are presented as benevolent *and* leftist, can reaffirm colonial paradigms. I consider that the link between penalisation and the protection of rights has not been sufficiently studied, especially outside neoliberal scenarios, and this is a priority because there are several scholars’ and activist’s accounts suggesting that penalty undermines the potential of human

rights as instruments of emancipation for women. A more grounded gaze which reaches outside the Western world is therefore needed.

Thus, a central objective of this thesis is to open a line of research for a “decolonial feminist critique of rights-based penalty”. By this, I mean a kind of analysis which situates criminal law historically, recognises its role in perpetuating the colonial difference, including epistemic, race, gender, and class subordination, and acknowledges the “darker side” of international human rights.<sup>6</sup> These critiques will enable an analysis which does not rely on neoliberalism as the only overarching narrative that accounts for most contemporary forms of political subordination. This critique allows me to examine a site where penal discourses are being reproduced despite the explicit rejection of neoliberalism. Such scenario provides a unique opportunity to understand how hegemonic legal discourses impact on different political contexts and social actors, such as feminist networks.

A decolonial critique demands a historical mapping of the legal discourses it scrutinises, to identify how coloniality travels and thrives. This project thus follows Ecuadorian feminists from their early analyses of criminal law, to their most recent penal reform achievements. In this way, the relation between the discourses from the different groups of women interviewed for this project, and the different strands of feminist literature and practices examined in Chapter 1, will become clear. This historicised approach not only reveals the dominance of liberal legalism regarding rights and penalty; it also unmask the displacement of feminist analytical categories, including some from liberal and radical feminism, but also from indigenous understandings of justice and from women’s lived

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<sup>6</sup> In Chapter 1, I provide a detailed review of current decolonial feminist theory in relation to rights and penalty.

experiences. Central to this examination is the rise of human rights as a recurrent discourse that most interviewees mentioned when asked about their stances on criminalisation. Rights-based discourses were certainly recurring amongst NGO-based feminists, but also amongst feminist supporters of the government's Citizen's Revolution. Moreover, progressive scholars also tend to support a form of penal discourse that relies largely on human rights, both as a goal and as a justification for penalty. In looking at how rights-based discourses shape social actors' strategies, it is possible to unmask some of the concealed discourses on race and gender as they relate to the prevalence of human rights. The discourse of human rights often has the ability to disguise race and gender biases by relying on universals, such as legal subjectivities that are out of reach for many, which is aggravated as criminalisation becomes the main form of state response to problems that are deeply connected to political subordination. Through these findings, this project thus contributes to broader discussions about the relation between leftist projects, emancipatory goals, and human rights discourses.

In the next section, I explain how this thesis approaches the coercive discourses underlying feminist agendas, rather than replicating a critique of the "neoliberalisation" of feminism. This exploration is based on documentary analysis and also draws largely from the data I gathered during fieldwork. These methodological aspects are essential to complicate existing literature on "carceral feminism", because the methods have allowed me to address not only the outcomes but also the processes by which feminist interventions have historically been produced and, also, how feminists themselves speak about penalty and justify their chosen strategies. Below, I detail the methodological framework utilised in this project.

## 7 RESEARCHING FEMINIST NETWORKS: ON METHODOLOGY

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Rather than accepting that law is only researchable through traditional sources such as written codes, doctrine, and case law, the thesis builds on approaches which promote interdisciplinarity (Banakar & Travers, 2005; Cotterrell, 2012). Encouragement of interdisciplinarity is based on the claim that legal institutions cannot be understood without considering the entire social environment (Sarat & Silbey, 1987). Law is therefore addressed as a set of social processes embedded in historical and political contexts (Merry, 2006b). Much of penal scholarship in Latin America instead employs traditional exegesis and frames criminal law as a closed and coherent system, which responds to its own logic and internal rules (e.g. Bacigalupo, López, & de Quiroga, 1998; Donna, 1995; Zavala Baquerizo, 2004). This disciplinary isolation has been reinforced by the predominance of a legal formalism which supports the belief in the separation between law and other social fields such as politics and economics (García Villegas & Rodríguez-Garavito, 2003).

At the same time, the project starts from a non-foundational, constructivist perspective. There have been scholarly debates regarding the conciliation between critical inquiry and empirical legal studies. In this sense, I endorse stances which look at law as a social construct that is only meaningful within the discourses that produce it, but it also has very tangible effects on people's lives. As Sarat and Silbey put it, "because the world is socially constructed does not mean that the world is not consequential" (1987, p. 168). This project is thus designed to make a methodological contribution to Latin American penal scholarship by adopting a stance that is both empirical and critical. The thesis historicises

the operation of law in a particular context using a theoretically informed lens to reveal which understandings of justice count as valid legal knowledge and which are relegated, producing observable effects on women's access to justice.

Inspired by Michel Foucault's work on the production of knowledge and the subordination of non-hegemonic knowledges, this study frames law and policy as "discourses" (Foucault, 1996). In line with Foucault, "discourses" are not understood as ahistorical and universal structures of communication (such as Habermas' (1976) "universal pragmatics"). Foucault is rather interested in discourse as constitutive of subjectivity. While discourse is indeed a chain of linguistic events, it is not just language; it is a mechanism for the production and representation of knowledge in a given historical context (Teubner, 1991). A discourse, therefore, is used language that constructs the categories that allow us to talk about things in a meaningful way. Discourses authorise which views can be considered valid or irrelevant; they transform social practices into knowledge (Foucault, 1996). Accordingly, the thesis frames law as an institutionally produced body of knowledge which does not describe a pre-existing reality but rather orders the perception of that reality (Golder, 2015). Law is a system of codes to interpret the world; legal processes are processes of meaning-making. Treating law as a discourse entails that even if it is presented as neutral and objective, we are able to recognise that it deploys power relations (Bacchi, 1999; Shore & Wright, 1997). In the field of criminal law, as Lacey (1998) notes, "the most productive scholarship to date has read criminal law as a powerful social discourse from which much can be learnt about the social order of which it is a part" (p. 102). Criminal law not only indexes unacceptable behaviours, but it also produces certain kinds of subjects based on

the classifications that establish a divide between the “normal” and the “deviant”; between male and female bodies, etcetera.

Certainly, there have also been debates regarding the possibility of reconciling analysis of discourse and socio-legal research. This thesis is designed to bridge this gap by identifying dominant discourses in relation to penalty and rights, and relating them to observable power relations that emerge from the feminist narratives and experiences through which they have been produced. In interpreting my research material, I also appreciate the discourses incorporated to them, which in turn allows me to examine power relations within processes of law-making. In this respect, I draw on Carol Bacchi’s approach to problematisations: to Bacchi, (2009) the goal of studying problematisation is understanding how society is managed, and with what repercussions for different groups of people. To this effect, Foucault’s “governmentality”, which refers to different kinds of thinking associated with particular approaches to government, can be used to assess various rationalities and techniques of rule. This can be done, in turn, by identifying and analysing problematisations, which means to put taken-for-granted assumptions into question and identify the thinking behind particular forms of rule. Foucault's work on governmentality in this way can contribute to explore the role of law in the exercise of power.

In sum, this thesis builds on an understanding of criminal law as an expression of political power, which produces sexualised subjectivities and authorises coercion and punishment (Christie, 2007). This approach enables a “critique”, that is, a scrutiny that goes beyond the superficial appearance of legal practices and discourses (Lacey, 1998). Drawing on Foucault’s methodological approaches (1997), I propose a historicised analysis of “the modes of being that have come to define our present” (Golder, 2015, p. 35) in relation to

rights and penalty. I also draw on the Foucaultian use of concepts such as knowledge, rationality, and power, to approach the themes that compose this dissertation and “explore how it is possible to think in a certain way and how far a specific language can be used” (Dean, 1994, p. 2). This exploration is the methodological core of the project: critique is understood as examination “of the discourses or practices in question in terms of their own realisation of the values by which they profess to be informed” (Lacey, 2004, p. 27).

In addition, I also use “coloniality” to refer to the displacement of subordinated knowledges in post-neoliberal Ecuador, and the construction of hierarchical categories through which some persons are deemed less than human in this particular scenario. The methodology is designed to reveal how penalty and human rights have historically co-produced certain feminist practices with different effects on different groups of women. Legal reform is addressed as a response to a social issue that is represented as a problem. This is, in turn, informed by dominant knowledges from technical disciplines, which define the problem, determine its severity, provide mechanisms to measure it, and suggest how to “solve” it.

Undoubtedly, the complexity of women’s movements in Latin America should prevent their depiction as mere vessels of neoliberalism or Imperialism. However, the contradictions and tensions within women’s movements regarding penal reform still require attention. To reveal the multifaceted processes and debates held within Ecuadorian feminist networks, I have selected the methods I describe in the next section, which allow me to overcome some of the limitations found in the existing literature.



## 7.1 METHODS

To trace the relationships between penalty, feminist politics and human rights, I employed a multi-method approach which included the following primary sources:

- Semi-structured interviews with self-identified feminists
- Current and historical laws and policy documents
- Feminist written materials and press releases
- Observation of a public debate
- Case law from the Constitutional Court of Ecuador

Feminist socio-legal research has often used qualitative methods such as observation and interviews to avoid disregarding the diversity of women's experience, minimise the chances of distorting said experiences, and give participants the opportunity to raise their own topics of concern (Bano, 2005; Robson, 1993). I chose to carry out semi-structured interviews because I was aware that institutional documents tell stories from the point of view of lawyers, judiciary employees, researchers and other actors, who frequently use an institutionally authorised language to compose these texts (Smart & May, 2004). Also, as Tansey (2007) notes, written materials are not necessarily created to document processes; some participants may feel that their actions are not significant enough to record them, or too sensitive to preserve in written form. If my project was to be critical of the ways in which knowledge is produced, I could not extract the feminist perspective solely from the official discourses that were the object of my critique. Given that one of the

research questions relates to the discourses that have enabled Ecuadorian feminists to resort to penalty, I did not want to rely exclusively on documentary evidence, which may reveal an outcome, but not the processes behind it. Instead, I wanted to hear feminists speak about criminal law and I wanted an opportunity to ask about things that happened before I was even born. Of course, interviewees can misrepresent their positions, which is why I have relied on multiple sources. Nonetheless, reliability was not a major issue, given that many participants had a long trajectory as activists or politicians. Importantly, testimonies were not contradictory but rather complementary in relation to each other, even when opinions originated from “opposite” political sides. The oral narratives were not contradicted by the documents either.

It is important to note now that while the interviewed participants were self-identified feminists, not all activists in the women’s movement accept this label. In Ecuador, “women’s movement” is commonly used to refer to various groups, which mobilise a women’s rights agenda. In the dissertation, “women’s movement” refers to all collectives and organisations that have been involved in anti-VAW campaigns. “Feminist networks” refers to the circuits that have intervened in policy and legislation from a specifically feminist stance. I borrow the term from Htun’s (2003) historiographic work on Latin American sexual politics, which applies it to networks of professionals who have undertaken legal reform projects. In the case of feminists, these networks have at times been able to create or modify policies, but they have not gained the stable, steering position that the term “governance feminism” suggests.

To conduct the interviews, I was at an advantageous place. On the one hand, I was acquainted already with some persons who had participated in the processes of penal

reform, having met them in academic and professional fora. On the other hand, I had not been directly or personally involved in any of the organisations or activities analysed in this project. Also, not being based in Ecuador gave me some advantage regarding the interviewees' openness and trust: a few mentioned that I was "lucky" because I could tell the story without fear of political retaliation. Anonymity gave reassurance to most participants, as well as knowing that the interviews were going to be transcribed in English and abroad.

The sample was composed of supporters and non-supporters of the regime in power. I did not consider random sampling given that my objective was to obtain information about highly specific events and processes. The participants were selected initially from a convenience sample of persons whom I knew had played significant roles in the processes of penal reform between 1995 and 2014, and from there through snowballing. I first contacted the persons who I thought would be more likely to accept to be interviewed, but in the end, very few refused. Before finishing an interview, I would ask the participant if she could think of someone else who I should speak to regarding feminism and penal reform in Ecuador, and I was directed many times to the same persons, particularly feminist *históricas* (historical feminist figures). I carried out a total of 25 semi-structured interviews between March and May of 2015. The majority were conducted face to face in Ecuador, while 5 pilot interviews were conducted via video-link before the field trip. Each interview lasted an average of 1 hour.

The group ultimately comprised 6 members of the National Assembly of Ecuador; 8 public servants at non-legislative offices; 7 staff members of non-governmental organisations and 3 independent professionals. I ceased to invite participants when I

considered I had reached the point of saturation, which happened relatively quickly: the accounts from feminists were not significantly contradictory and tended to be echoed among participants. As mentioned above, all were self-identified feminists, mostly women and one man, aged between 28 and 60. The majority were also *mestizas*, which coincides with how other researchers have characterised the mainstream women's movement (Rodas Morales, 2007a; 2007b). Additionally, there was one indigenous and one Afro-Ecuadorian interviewee. I consider this a representative subgroup of the feminists involved in penal reform; I interviewed 6 out of around 11 lawmakers who took part in the creation of the VAW provisions in 2014, and the group included officialist and non-officialist assembly members. As for previous reform processes, I interviewed some women who worked at CONAMU (the National Women's Council) from the 1980s to the early 2000s and spoke to two of the *históricas* (historical feminist activists) that the other participants identified as leaders in the creation of Act 103.

Interviewees were asked to comment on the processes from which the new penal code emerged, the impact it is having on access to justice for violence survivors, the differences between this and previous legal reform processes, and more generally their opinion about the challenges and advantages of using criminal law. All the interviewees consented to have their testimonies recorded and transcribed. Most participated anonymously; however, the assembly members, as public figures, were given a choice to use their real names, to which all of them agreed, signing the corresponding consent forms. The thesis only mentions the actual names of the persons who explicitly consented to reveal their identity.

For coding assistance, I used NVivo, a qualitative data-analysis computer software package. I used codes as a way to identify overarching themes and patterns (Bernard & Ryan, 2009), to recognise the discourses through which feminists make sense of penal reform. To construct the analysis from the codes, I considered the frequency of the themes, the coincidence between portrayals of similar events by different persons, the relationships between the interviewees and the regime in power, and their opinions regarding the adequacy of penal reform to counteract VAW. I also used this strategy to analyse documentary sources.

While the bulk of the data originated from fieldwork, I also analysed institutional documents published by state and non-state agencies which have addressed VAW from the 1980s onwards. The materials include reports from international organisations such as the United Nations (UN) and the Organisation of American States (OAS), transnational and local women's NGOs, Ecuadorian state offices, and ad-hoc women's alliances. I also inquired into current Ecuadorian legislation and policy on VAW. The studied bodies comprised: The Law Against Violence Toward Women and the Family of 1995 (Act 103), the constitutions of Ecuador of 1998 and 2008, and the penal codes of Ecuador (all historical and the one currently in force). Policy documents included: the Ministerial Agreement that created the Specialised Commissariats for Women and the Family (1994); the National Plan for the Eradication of Gendered Violence (2007); the National Plan for Living Well (2014-2017); the National Agenda for Women and Gender Equality (2014-2017); the Resolution of the Judiciary Council that creates the Specialised Courts for Women and the Family as well as various Council Resolutions; the Protocol for the judicial management of violence against

women and the family (2014); and the Regulation for the System of Protection and Attention to Victims, Witnesses and other Participants of the Penal Process (2014).

My approach to documentary sources builds on my analytical framework, which as explained above is designed to identify discourses which constitute specific subject positions within specific documents. When reading institutional documents, I kept in mind that they employ a language destined to be understood by a defined audience. In line with Foucaultian feminist work on the analysis of discourses (e.g. Bacchi, 2005), I focused on being sensitive to the interpretive and conceptual schemas underlying each document. I was aware, for instance, of the legal traditions to which feminist legal reform was adapted in order to be enacted. When not clear, I researched the conceptual premises, that is, the underlying discourses of the claims made in the texts. This was challenging regarding historical documents, especially those written by feminists during the early 20th century when the very term “feminism” was defined and understood differently. To assist my analysis, I thus resorted to feminist historians’ work on gender and the state in postcolonial Latin America. I also used the coding software to facilitate the identification of patterns and be able to return to them as I developed my writing.

In April of 2015, I observed a public debate between judges from specialised courts for women and the family and some representatives of the National Assembly, who were collecting proposals to reform the new penal code. Attendants included psychologists, public prosecutors and pro-bono advocates. I recorded the audio from the session and coded it as I had done with the interviews. During fieldwork, I also worked in the archives of the National Assembly (the legislative organ of Ecuador) to retrieve the parliamentary debates connected to all the penal laws I analyse in this dissertation, that is, Act 103, the

penal reforms of 2005, and the Penal Code of 2014. I was able to scan the originals and keep a digitised version for analysis. Finally, I included case law from the Constitutional Court of Ecuador and applied the same analytical approaches to tease out what are the underlying assumptions to constitutional sentencing regarding human rights and indigenous justice.

In employing conceptual tools provided by critical scholarship and at the same time analysing empirical qualitative data from fieldwork, the methodology that I employ bridges some divides between policy-oriented empirical legal research, critique, and politics (Hunter, 2008). As Lacey (1998) has observed, it is difficult to assess legal theories without taking into account socio-legal debates. I have therefore set out to combine my interest in both critical legal theory and sociological studies of law to make some previously concealed aspects of criminal justice visible, including the consequences for women who try to access justice on the ground.

## 7.2 METHODOLOGICAL LIMITATIONS

As stated above, the focus of this project is on feminist practices within a changing political context, rather than on the question of whether Ecuador's left turn has "truly" or "fully" been anti-neoliberal or decolonial, which is beyond the scope of the thesis. Considering this, a significant methodological limitation of the project stems from the sector of the women's movement it analyses. In many ways, these groups can be considered elites, because they are for the most part middle-class, professional and mestizas. Although feminists in Ecuador are not stable influencers of public policy, particularly within the post-neoliberal context, many activists of the women's movement are of a privileged class. Looking mainly at these "relative elites" may seem contradictory at first glance, given the emphasis this project places on coloniality. However, the most appropriate sampling

procedures are those that identify the key political actors that have had most involvement with the processes of interest (Tansey, 2007). Since the project is centred on penal reform, the scrutinised discourses and practices pertain to the feminist networks that have gained spaces as negotiators in the mainstream political arena. In Ecuador, these groups are composed mainly of professional upper- and middle-class mestizas. Other women's collectives such as community-based associations or indigenous women's groups have indeed been protagonists of women's emancipatory struggles, as explained in Chapter 2; however, penal reform on VAW has not been prioritised by said collectives for reasons that the dissertation does acknowledge throughout the chapters. For example, early indigenous leaders resisted state legislation; women in popular sectors during the neoliberal years suffered the impact of the economic policy on their daily lives and these difficulties occupied their attention above legal reform. On their side, the indigenous women who intervened in the 2008 constitutional process had priorities different to those of the mainstream women's movement.

## 8 FEMINISM, PENALTY AND RIGHTS: CHAPTERS OVERVIEW

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### **Chapter 1.- Feminism and criminal law: between reformism and critical resistance**

This chapter reviews, on the one hand, the main feminist rationalities used to engage with penalty as a framework for VAW, and on the other hand, critiques of the use of penalty as a feminist tool. Given that the thesis follows the Ecuadorian women's movement across the history of penal reform, it is important to review the different streams of thought that



have informed the movement's agenda, many of which can be traced back to the frameworks that I examine in Chapter 1. These include the notions of freedom and equality understood as universal entitlements whose violation deserves a penal sanction. Criminal law can be conceived as a means to protect human rights and seek legal redress for the affected parties. The chapter also covers some radical feminism's conceptualisations, including "patriarchy" and "structural sexual domination" as notions that are also connected to practices of women's organisations. Finally, the chapter discusses some of the recent accounts of the relationship between feminist politics and penal expansion, focusing on work produced around the notions of "governance feminism" and "carceral feminism". I demonstrate that these analyses are not sufficient to address the Ecuadorian case, and set out to propose a "decolonial feminist critique of rights-based penalty".

## **Chapter 2.- Before penalty: Ecuadorian feminists denounce the violence of law (1930s-1980s)**

This chapter addresses historical questions. It initiates the study of feminist engagements with penal reform in Ecuador and demonstrates that there was a "before and after" to the advent of international women's rights. First, it offers a brief introduction to Latin American legal traditions on domesticity and the family, situating the region as a postcolonial site. In providing this context the chapter signposts colonial familial ideologies as antecedents of the management of domestic violence, to show that penal legislation has long been used to reprehend "excessive" violence against women and children, deploying at the same time hierarchies based on race, sexuality, and class. The chapter documents a period comprised between the 1930s and the early 1980s. It identifies the arguments that

feminists from different strands used to frame law: as an expression of illegitimate state coercion, as a source of women's suffering, and as a reproducer of "sexist biases". It then historically situates the emergence of the organised women's movement, mapping the first discussions of penal reform. This historical scrutiny demonstrates that until the late 1980s, criminalising male aggression was not an objective of the women's movement, and an instrumental use of penalty was not part of the feminist legal imaginary. Efforts were instead centred on attaining the repeal of discriminatory penal provisions. In this way, this chapter identifies the period during which penalty begun to be used in matters of VAW, and at the same time reveals how colonial rationalities regarding family protection were present at an early stage, which would later inform VAW policy and law.

### **Chapter 3.- Recognising rights, criminalising injuries: the rise of penalty in feminist approaches to domestic violence (1990s)**

This chapter discusses the relationship between women's human rights discourses, neoliberalism, and the rise of penalty in matters of VAW. It is centred on a period during which penal reform became a central feminist strategy. Also, by documenting the making of the first Ecuadorian law against violence toward women, it reveals the processes of reframing and adaptation performed on feminist demands by the national legislature. Unlike previous decades, when criminal law had been questioned due to its patriarchal nature and sexist biases, from the 1990s onwards feminists began to appeal to penal mechanisms to recognise and protect women's rights. Such approaches arose after the dissemination of transnational perspectives on domestic violence from disciplines such as Public Health, Psychology and Women in Development, which contributed to the

construction of VAW as a social problem that required public policy responses. After examining the interactions between women's NGOs and international agencies like the UN and the OAS, the chapter argues that these discourses accompanied the framing of VAW as a violation of human rights, which in turn brought about an unprecedented focus on criminal justice. Against this backdrop, many women's networks in Latin America adopted human rights and penalty as fundamental frameworks. This resulted in a "boom" of domestic violence laws in the region, including Ecuador's Act 103 in 1995.

The second half of the chapter focuses on the process by which domestic violence first became a subject of criminal law. Mapping the creation of the first domestic violence commissariats, and then of Act 103, it points to the ways in which feminist demands were put together, formulated, and reframed. The existing penal apparatus, the continuity of colonial family-protection discourses, and the reframing of feminist demands by the National Congress were all key in articulating VAW through penalty. There was a degree of compatibility between some pre-existing familial ideologies and the demand to penalise domestic violence, showing that feminism has not been the only discourse shaping the legal construction of gendered violence. The chapter also demonstrates that, contrary to analyses that locate penal expansion in VAW at the level of women's organisations, the penal logic was also deployed by the National Congress, which rather than adopting the specialised model proposed by feminist lawyers, pushed for the utilisation of the ordinary penal system.

**Chapter 4.- Penalty prevails: constitutional turns, women's rights, and penal continuities (1998-2008)**

This chapter addresses the question of how the post-neoliberal shift has impacted on the penal treatment of VAW. It focuses on the rise of “rights-based penalty” as a progressive approach to criminal justice. To define “rights-based penalty”, I explore and contrast two different constitutional moments: 1998 and 2008. First, I analyse the 1998 Constitution, which incorporated women’s rights to personal integrity, introducing a penal framework for VAW. Through a close analysis of feminist documents, constitutional texts, and the lived experiences of feminist activists and politicians, the chapter demonstrates that the rationalities adopted in 1998 and 2008 are nearly identical. Penalisation has been justified using a human rights language in both cases. In the second part of the chapter, focusing on the post-neoliberal turn, the chapter contends that the 2008 Constitution, despite being portrayed as minimalist regarding criminal justice, in practice facilitated the expansion of penalty as a system that not only “punishes” rights violations but also “guards” human rights, thus acquiring renewed legitimacy as an instrument to achieve the highest ends of the democratic state. Finally, through the analysis of a recent Constitutional Court decision, the Chapter shows how rights-based penalty in practice displaced indigenous approaches to justice. The legitimization of penalty further availed new feminist penal reform projects, crystallising in the proposal to criminalise VAW fully in 2014.

#### **Chapter 5.- A New Penal Code: negotiating feminist demands through "rights-based penalty"**

This final chapter brings together the project’s research questions addressed in the previous chapters: how have feminist demands been incorporated into Ecuadorian legislation; how has the post-neoliberal shift impacted on the penal treatment of VAW; and

what are the implications of criminalisation regarding women's access to justice. It shows how penalty travels across progressive discourses that are not necessarily neoliberal and exposes how penalty has become a universalised field of intelligibility, despite all the critiques that have pointed to its oppressive effects. To such purpose, this chapter covers the making of the Ecuadorian Penal Code of 2014. It begins by laying out the changes in the configuration of the women's movement after the advent of the Citizen's Revolution, showing the instability of feminist networks and their generational and ideological fragmentations.

The chapter then maps contrasting feminist stances on the criminalisation of VAW, particularly domestic violence. I show that penal approaches were promoted mainly by feminist supporters of the officialist regime, while non-state organisations, now labelled "corporatist", were more critical of an exclusively penal approach to VAW. However, none of the feminist collectives offered an alternative to penalty; nearly everyone found it difficult to make sense of VAW as a violation of human rights outside of a penal framework. The chapter contends that prioritising social redistribution, as the officialist feminist do, does not necessarily result in a displacement of penalty. Rights-based discourses, in turn, do not always lead to better opportunities for women to access justice on the ground, because they often require the enactment of legal subjectivities that do not correspond to women's lived realities. My findings suggest that penal expansion in the particular case of VAW in Ecuador, does not have the oppressive effects upon imprisoned populations that the literature has (correctly) denounced, given that incarceration as a consequence of gendered violence is not a large-scale phenomenon. However, penal expansion negatively impacts on women who attempt to access justice. The penal code offers legal resources that

are even less practicable than those provided by the defunct Act 103. Based on the testimonies of feminist practitioners, the chapter suggests that penalty hinders the legal protection of violence survivors, especially by re-inscribing race, gender, and class. At the same time, the association between penalty and the protection of human rights permits the perpetuation of hegemonic approaches to gender justice.

### **Conclusions**

This project's main contribution is the identification of "rights-based penalty" and its relationship with the politics of sex and gender in a post-neoliberal context. Feminist uses of penalty are determined by various factors including the coloniality of law, the perceived neutrality of human rights as technical tools, and a need for political and legal intelligibility. In post-neoliberal Ecuador, the efficiency of penalty in communicating "wrongness" is often tied to its relationship with human rights. At the same time, the ways in which normative sexualities are constructed are often related to colonial patterns of thought and action, not only to neoliberal rationalities. The rights/penalty association has caused feminists to rely extensively on criminal justice; penalisation has become so intricately connected to the defence of human rights that it is nearly impossible to express the wrongness of VAW without declaring it a form of human rights violation. And most of the time, a penalisation process follows. Penalisation is thus a common language of recognition. It was domestic violence in the 1990s and femicide in the 2000s: both processes reflected a need to declare that gendered violence is not acceptable, and the most meaningful way to do it was using criminal law.

This final chapter returns to the central questions regarding the prevalence of penalty within feminist strategies, bringing back the 1990s period during which a criminal justice approach to VAW emerged in Ecuadorian feminism, influenced by the rise of human rights discourses internationally. The case of Ecuador as a post-neoliberal scenario enabled a scrutiny of feminist engagements with penalty from an innovative perspective that recognises the role that human rights and coloniality have played and highlights the displacement of other possibilities of imagining justice. This helps us acknowledge discussions that still need to be deepened within feminist networks. Interrogating the universality of human rights, acknowledging the colonial legacy lingering in penal institutions, and recognising the effects of penalty on women's access to justice can be the beginning of a profound conversation regarding the potential of ideas such as Sumak Kawsay to enable alternative approaches to justice and non-hegemonic strategies to counteract gendered violence.

# CHAPTER 1

## Feminism and Criminal Law: Between Reformism and Critical Resistance

I would prefer not to have to spend all this energy getting the law to recognize wrongs to women as wrong. But it seems to be necessary to legitimize our injuries as injuries in order to delegitimize our victimization by them, without which it is difficult to move in more positive ways.

-Catharine MacKinnon, 1987, p. 104

### 1 INTRODUCTION

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This chapter examines various feminist stances on legal reform and on penal reform specifically. The chapter reviews the relevant literature related to the project's research questions, and it explains the conceptual grounds that will be used throughout the thesis to analyse feminist penal reform processes. This chapter thus allows me to position my research in relation to the literature, highlighting its gaps and paradoxes.



Many feminist objections to penal reform are related to a more general scepticism toward the emancipatory power of law, whilst other critiques are based concretely on the coercive nature of the penal system. Although feminist thought is complex and nuanced, and scholars do not always regard penal reform as either valuable or counterproductive (certainly, many times it is both), I have organised the chapter distinguishing between feminists who support penal reform as a means to achieve emancipatory goals, and feminists who see penal reform as a potential reproducer of women's subordination. Again, this divide does not always translate into feminist practice in a uniform way, but many of the concepts outlined in these sections will be identified through the chapters where I refer to Ecuadorian feminist networks. In addition, the two last sections of this chapter outline feminist stances on penal reform which have acquired relevance recently: Section 4 describes the main premises of the literature on "carceral feminism" and Section 5 lays out some decolonial and postcolonial feminist conceptualisations which I use to overcome some limitations of the Western feminist framings. I explain how decolonial feminism can widen our understanding of feminist use of penalty. I propose to frame Ecuador's "post-neoliberal paradox" using the notion of "coloniality" to scrutinise penal discourses. In particular, I propose to use decolonial frameworks to interrogate a trend that has been widely accepted by progressive Ecuadorian scholars and social movements, namely, what I identify as "rights-based penalty". The chapter concludes that decolonial feminist critique can account for the prevalence of penalty as a technology that may operate and expand as part of a reformist, progressive, and post-neoliberal project. In sum, I propose to initiate a "feminist decolonial critique of rights-based penalty".

## 1.1 FEMINIST STANCES ON THE POWER OF LEGAL REFORM

Feminist stances on legal reform as an emancipatory strategy have varied across history and political orientations. Arguments which favour investing our efforts in law reform and also those which are sceptical regarding the differences that legal change can make, are complex and nuanced. However, to the effect of outlining the main feminist assumptions on this issue, I distinguish between two groups: broadly speaking, feminist thought has either regarded legal reform as a tool of value (whether this value is intrinsic or strategic); or, conversely, put the value of legal reform into question considering that penalty can be counterproductive and reaffirm gendered norms. Surely, there are many feminist stances, which acknowledge both the value and the risks of constantly resorting to penal strategies; hence, the dualistic account I present below only has the purpose of contrasting the arguments.

Within the first group, I focus on liberal and radical feminist narratives on VAW. Again, within each of these trends, one can find sophisticated and nuanced elaborations. Notwithstanding the complexity and variety of feminist thought, it is possible to find common ground amongst feminist perspectives advocating legal reform, as they assume, for example, that legal change can facilitate social change and thus help women overcome subordination. Additionally, feminists who advocate legal reform usually draw on an understanding of law as potentially gender neutral; that is, legal neutrality can be achieved through reform processes (Drakopoulou, 2000b). Finally, some feminists who promote legal reform consider that law has a strategic, instrumental, value. In the Nordic countries, for example, many feminists have posited the state laws as tools to plan social transformation. In other words, they perceive law as a mechanism of social engineering (Kantola, 2006). I

will not delve into Nordic feminism, as I have not found it to be critical to penal reform advocacy in the context of this study.

By contrast, feminists who question the value of legal reform tend to stress the role of law in perpetuating women's oppression by fixing and reproducing subordinating categories and hierarchies. Criminal law, more specifically, presents additional challenges as it deploys forms of coercion that are particularly harmful to women, especially those marginalised by class, gender, and race. Moreover, criminal law has historically played a role in the normalisation of women's sexuality through the creation of offences that produce women's "normalcy" or "deviancy". In addition, feminist criminologists have contended that the procedures that criminal justice deploys to establish the "truth" are often inadequate to respond to the lived realities of women and reinforce surveillance mechanisms of women's bodies. In the sections below, I analyse these stances in detail.

## 2 THE ALLURE OF CRIMINAL LAW: FEMINIST ARGUMENTS FAVOURING THE USE OF PENALTY

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This section gathers the main arguments that feminists have used to theorise penal reform and defend the need to criminalise harmful conducts that predominantly affect women. Broadly, these stances favour the use of penalty based on the rationale that criminal law expresses the social rejection of gendered violence and can prevent VAW

mainly through the threat of punishment. In the next subsections, I focus on the discourses that inform these ideas about criminal law.

## **2.1 PENALTY AS A RESPONSE TO ATTACKS ON FREEDOM, AUTONOMY, AND EQUALITY**

This subsection locates legal liberalism as a dominant discourse (Hunter, 2013), which in turn informs liberal feminism. “Liberal feminism” is an umbrella term that could encompass a wide range of perspectives. I will not discuss the nuances here, but rather focus on the ways in which liberal ideas can sustain feminist appeals to penal reform. Broadly, liberal feminism is rooted in the Western traditions of political thought that emerged with the Enlightenment (Lacey, 2004). Contemporary liberal discourses frequently centre the notions of autonomy, universal citizenship, and democracy. The individual is conceived as rational, self-sufficient, and formally equal before the law (Hunter, 2013). From a liberal point of view, therefore, the capacity for autonomy is the main component of what it means to be a person (Lacey, 1998). In legal liberalism, the subject, “in representing law’s understanding of humanity, comprises the fundamental reference for positing legal norms” (Drakopoulou, 2000a, p. 211). The liberal subject is abstract, sexless, raceless, and ageless. As such, the subject possesses natural attributes such as equality and freedom, which law is meant to recognise and protect. To liberal feminists, what is crucial therefore is to ensure that the ideals of equality and freedom apply to women (Lacey, 2004).

Liberal criminal law centres individual freedom and the acceptance of a social contract, which establishes the limits to that freedom as a basis to justify punishment (Hart, 1958; Jakobs, 1997; Roxin, 1997). Theories of justice developed within this tradition, deal with claims to resources by constituting them as legal goods, which in the case of conflict, can be adjudicated through a judicial process. In general, the justification for the existence

of criminal law is the protection of especially valued interests (Lacey, 1998). For example, in sexual offences, criminal law protects “sexual autonomy”: the freedom to determine one’s own sexuality. State coercion and penal sanctions are thus legitimate consequences of the perpetration of an offence which endangers the fundamental legal goods of a citizen. Whether the theories that justify punishment are utilitarian or retributivist (see Lacey, 1988), criminal law expresses the social rejection of certain behaviours. If said behaviours are perpetrated, they entail a juridical consequence, frequently, imprisonment. What justifies penal coercion is individual responsibility, which in turn depends on the capacities of understanding, reason, and control (Lacey, 1998). In sum, punishment is a response to the free individual who voluntarily breaks the social order. State coercion is justified despite the paradox that it “harms the very people it is supposed to protect” (Dubber, 2008, p. 95) because individuals have autonomously consented to respect and enforce each other’s liberties. In this way, punishment presents itself as a form of self-government (Dubber, 2008). Moreover, modern imprisonment has been historically constructed as more rational and “civilised” than its predecessors (Foucault, 1977); thus, the legitimacy and “civility” of incarceration are usually implicit in appeals to penalisation. State coercion and punishment are always already justified as mechanisms for the recognition and protection of liberties, and their legitimacy is not usually questioned.

Liberal feminism construes VAW mainly as an attack on freedom and autonomy: violence and the threat of violence are regarded as constraints on the actions of women (Cudd, 2006). In the same manner, interpersonal violence is regarded as an obstacle to the realisation of a life of one’s choosing (Baehr, 2013). Accordingly, what liberal criminal law protects in regard to sexual violence is “sexual autonomy” or “sexual freedom”. Violence,

understood as a limitation on women's possibilities of self-representation, has often encouraged campaigns for legal reform meant to restrict the "ability of private parties to impose conceptions of gender on others" (Thurschwell, 2008, p. 43). With this backdrop, many feminists have demanded state intervention to ensure women's freedom, autonomy, and equality of opportunity. To scholars like Martha Nussbaum (2005), for instance, VAW diminishes women's "capabilities" —understood as the fundamental functions of human existence. VAW endangers goods such as life, health, bodily integrity, freedom, and even imagination and thoughts, which results in women being denied what they need to live full lives. The fear of violence is ever-present in the life of every woman and while Nussbaum recognises that some women are more vulnerable than others, she claims that the restrictions caused by the threat of violence, are universal. In her words:

Strong and interventionist state action is needed to establish that rape, including rape within marriage, is a serious crime; to get the police to treat domestic violence seriously; to give women remedies for sexual harassment; to stop trafficking and forced prostitution; to end the scourge of sex-selective abortion (Nussbaum, 2005, p. 177).

Capabilities are a central concept to Nussbaum's work. They are presented as universal goods to which all women are entitled, or rather, as inherent attributes, closely associated with human rights, which are threatened by violence. In fact, Nussbaum presents her position as "one species of a human rights approach" (2005, p. 175), which acknowledges that securing a right first requires making the person capable of choosing that

function in the public and private spheres, which in turn requires state intervention and accountability. In other words, rights are “entitlements to capabilities”, which require government enforcement. In the same way, Nussbaum (2007) links the capabilities of citizens to human development. If violence diminishes women’s capabilities, it also hinders development more broadly. Capabilities are numerous, but the minimum that should be granted to achieve a “minimally decent human life” (Nussbaum, 2007, p. 22) include life, health, integrity, imagination and thoughts, emotion, affiliation, practical reason and control over one’s environment. The capability of practical reason, for example, refers to the possibility of planning one’s own life. These ideas have resonated with notions such as women’s right to a life project, which has been used to posit gendered violence as an obstacle to the full development of one’s own personality (Escribens Pareja, 2011).

Liberal feminists have thus supported the intervention of regulatory apparatuses when they are necessary to guard or re-establish an individual’s fundamental prerogative; coercive state action is justified when rights and justice are at stake (Baehr, 2013b). When a right is violated in a way that harms not only the affected individual but also social harmony, one of the apparatuses set in motion is the penal system. For instance, the criminalisation of homicide responds to the consecration of life as a legal good, and punishment is legitimate when it is imposed on someone who has been found guilty of committing an attack on human life. However, since the notions of autonomy, equality and freedom, do not on their own provide cues to distinguish between violence in general and that which is differentially exerted against women, the notion of discrimination has also been incorporated to assert that VAW is different from casual violence (Alm eras et al. 2004; Bunch & Carrillo, 1991; Marcus, 1994). In this case, the offensive conduct is not considered

to be harmful only to individual life or personal integrity, but it also attacks the principle of equality by which everyone is entitled to legal rights without distinction. Certain discriminatory conducts have in this way been categorised as criminal offences and violations of human rights, including novel penal categories such as hate crimes and “femicide” (Russell, 1976), which I analyse in Chapter 5.

Besides these foundational principles, there are other concepts specific to criminal law, which further facilitate the association between penalty and the protection of rights. For example, modern criminal law theory has developed the notions of “special prevention” (individual deterrence) and “general prevention” (general deterrence) to refer to two utilitarian functions of the coercive threat: that of preventing the perpetrator from reoffending, and that of sending a message to the wider community that breaking the order is disadvantageous (Bentham, 1907; Mir Puig, 1986). These principles reflect a conception of criminal law by which punishment is justified as useful to protect legal goods by “reinforcing the juridical conscience of the community” (Faraldo Cabana, 2006, p. 91). While individual motivation is central (Draper, 2002), general deterrence supposes that punishment lets the community see how inconvenient it may be to break the legal order. This “collective intimidation” reinforces social values. Thus, most persons are expected to avoid offensive conducts (Roxin, 1997). The role of criminal law in changing social perceptions is in this way connected to deterrence, that is, the belief that the threat of punishment can motivate people to behave lawfully.

These rationalities can, in turn, result in the assumption that certain crimes, namely those that deploy discriminatory attitudes or are perpetrated in a context of “socially constructed vulnerability” (Faraldo Cabana, 2006, p. 91), deserve to be punished more



severely. If the power of criminal law pivots around its capacity to deter criminals through the threat of punishment, it is possible to argue that rights are most protected when punishment is most dissuasive. In this way, a correlation between the severity of punishment and the degree to which a legal good is protected is established. Criminal law can, therefore, be portrayed as an instrument that in expressing and responding to the social condemnation of conduct, contributes to the protection of rights. For example, Patricia Faraldo Cabana argues:

[Criminal law] perhaps is not the most adequate instrument, but it is undoubtedly the most intimidating instrument used by the social democrat state to eradicate violence against women within relationships, as long as this violence is understood as a structural manifestation of inequality and discrimination related to gender (Faraldo Cabana, 2006, p. 73).

The quote illustrates a liberal feminist perspective on criminal law and VAW. Emphasis is placed on criminal law as an instrument that can intimidate (general deterrence) and communicate what society considers unacceptable. It is also justified as a form of response to the disadvantage (discrimination) in which women find themselves, which requires special legal intervention. Many of these ideas are reflected in international instruments (such as the CEDAW and the Inter-American Belem do Pará Convention), national laws (such as the current penal code of Ecuador), feminist campaigns, and programmatic texts related to VAW. However, these are not the only concepts that have

informed the penalisation of VAW. In the subsection below, I focus on notions taken up from radical feminist traditions, which are also frequently found in mainstream VAW discourse.

## 2.2 PENALTY AS MEANS TO MAKE OUR INJURIES VISIBLE

Here, I focus on radical feminism in particular because it has offered an extensive analysis of gendered violence, which is theoretically grounded on the notion of patriarchy as a totalising social structure that determines the submission of the feminine subject (Millet, 1969; Rifkin, 1980; MacKinnon, 1989). Patriarchy has been defined as

[...] any kind of group organization in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms, these realms being regarded as separate and mutually exclusive (Rifkin, 1980, p. 83).

Patriarchy thus shapes institutions and individuals by systematically forcing male standards upon society. As is the case in liberal feminism, radical feminism understands subjectivity as universal. However, while liberals constitute the subject as equal in relation to her peers, radical feminists emphasise the difference between men and women and claim that women are structurally subordinated to men, in particular through sexual violence, which is instrumental in the maintenance of the patriarchal order. In other words, radical feminists understand VAW as a phenomenon that is ontologically different from other types of violence (MacKinnon, 1987; 1989). In Catharine MacKinnon's work, we find a structural

theory of women's oppression, which is analogous to the theory of class difference found in Marxism (Brown, 1995; Lacey, 2004; Smart, 1989). From this perspective, law itself is an instrument that facilitates women's subordination.

To MacKinnon (1983), since the difference between male and female is defined by the dominance/submission dynamic, legal "objectivity" is, in reality, an institutionalisation of male power. MacKinnon illustrates this point referring to rape and battery: even if penal systems managed to imprison all those who commit such offences, the prevalence of violence would not be modified, as legal provisions do not address the question of why women are raped or battered in the first place. Consequently, MacKinnon (1987) has advocated for the development of a comprehensive feminist theory of the state and the law, whereby legal reform is not solely a process of inclusion (as is usually the liberal approach); rather, it is a means to denounce the sexism of law and contribute to shifting the patriarchal paradigm. Also, MacKinnon considers that promoting legal reform is necessary because it outweighs the risks of turning away from the law, which could result in a situation where "male power continues to own law unopposed" (MacKinnon, 2005, p. 107). As Brown (1995) notes, rather than giving up legal strategies, MacKinnon seeks to use the law to make women's injuries visible, revealing the social power that subordinates them; that is, turning the law into an instrument of recognition and rectification. Unlike liberal-inspired projects, MacKinnon's proposal is not merely to expand the law's range of inclusion by recognising women's freedom or their right to access basic capabilities; instead, the idea is to force the law to recognise its own sexism and redress domination.

Feminists from various traditions, including radical feminism, have long strived for the public recognition of structural violence in so-called intimate spaces and resorted to

penal reform as a tool to expose conducts that have not previously been considered illegitimate. One essential concern for theorists and activists has been shifting the boundary between socially tolerated forms of violence (such as the “disciplining” of wives in the household or forced sexual intercourse in marriage), and excessive violence that deserves a penal sanction and the reproach of the community (Schneider, 1994). Consequently, feminists have looked for terms and definitions that can encompass a broader spectrum of behaviours to reform the law and make the social repudiation of VAW patent. As a consequence, the expansion of the concept of gendered violence has become a fundamental aspect of VAW discourses, which stemmed from initial identifications of “wife beating” and now includes conducts such as assault, rape, and murder. Also, phenomena like economic violence, prostitution, sexual harassment, forced pregnancy and “cultural” practices like genital mutilation and child marriage, have been framed as VAW, as well as the force applied by state institutions including the police and the military (Merry, 2006a).

As mentioned above, given that law is regarded as a patriarchal construct, radical feminists acknowledge that legal reform is not sufficient to grant women’s equality, and stress the need for concurrent social and cultural change. Many regard penal reform as beneficial once certain conditions are fulfilled: Elizabeth Schneider (2000), for instance, contends that the inclusion of women’s experience in the plural, addressing both the particularity of experience and the generality of abuse as a facet of women’s subordination, is critical in feminist law-making. Legal reform outcomes depend on how a social movement decides to use law, and whether there is an awareness that law-making is part of a larger process of change. In Schneider’s view, since legislation and rights-based claims play a major role in forming political consciousness, feminist law-making is crucial as a practice that builds

on the experiences of women to transform the social meaning of gendered violence. Legal reform projects need not exclude broader transformations: “Feminists understand that genuine equality for women will not be achieved simply by winning rights in court; equality requires profound social reconstruction of gender roles within the workplace, the family and the larger society” (Schneider, 2000, p. 41).

As we see, feminist legal reform projects have aimed at building on the experiences of women and sought to transform the social meaning of gendered violence through law. In this way, various forms of VAW have come to be understood as human rights violations (Schneider, 2000). These achievements have incorporated many of the concepts outlined so far. However, despite these persuasive arguments, questions have emerged regarding the contradictions of legal reform as a strategy to achieve feminist emancipatory demands. Below, I consider some of the most prominent of these arguments.

### 3 THE DOUBLE-EDGED SWORD: FEMINIST CRITIQUES OF PENALITY

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Feminist investment in penal reform has been disputed on various grounds. Some feminist theorists have objected to utilising criminal law to attempt to defeat a type of violence that is fundamentally political. Moreover, not all radical feminists have supported legal reform strategies: many have argued that since law and the state are patriarchal constructs (Rifkin, 1980), feminism should focus on denouncing and resisting the law. In this way, the accounts I refer to next, while presented by radical feminists, hold different attitudes toward legal reform in comparison to the ones outline in the previous section.

Janet Rifkin (1980), for example, has affirmed that law is not only limited as a source of social change, but it also masks social reality: framing issues as questions of law diverts public consciousness from the deeper roots of patriarchal hierarchies. Carole Pateman (1988) famously argued that the liberal fiction called social contract is, in reality, a “sexual contract”, one that establishes the male sex-right and a master/slave model whereby women are subordinated. It follows that law is not neutral, but rather the expression of the gender hierarchy established in the sexual contact: if legal institutions are “contaminated” by patriarchy, utilising them will be counterproductive.

Within a different feminist tradition, which favours the incorporation of Foucaultian and “postmodern/post-structural” theories (Munro, 2001), Carol Smart (1989) has asserted that there is not much evidence that the creation of new rights and sanctions results in the improvement of women’s lives. In her view, prohibition and criminalisation rarely serve the purpose of raising consciousness about gendered violence. As Lise Gotell (1998) has emphasised, criminal responsibility is personal; it is imputed to one individual in particular, resulting in the disappearance of the more general context in which the offence takes place. Centring legal reform as *the* strategy to counteract violence can be an “easy way out” for the state to allege commitment to protecting women. Expanding the catalogue of criminal offences is relatively simpler than adopting and funding integral programmes to assist battered women, including temporary housing, affordable childcare, job training and other investments that could help alleviate the effects of violence and provide women with economic independence (Gotell, 1998). Furthermore, the attainment of new rights and sanctions entails the risk of looking at certain vulnerabilities as if they were resolved just because they have been legally recognised. The risk with criminal law is that issues of social

and political subordination may appear as resolved merely because harsh(er) punishments for aggressors have been established.

As a result, many feminists regard the use of penalty as contradictory in relation to our broader emancipatory objectives, both from a theoretical and an empirical perspective. From the outset, resorting to criminal law entails adopting the representations of violence produced by the dominant paradigms, which in turn define when violence is tolerable or unacceptable. Within a legal system, for example, state coercion and incarceration are not regarded as violent, while the behaviours that criminal law categorises as offences indeed are. Consequently, feminist criminalisation demands may function as regulatory mechanisms once turned into legal provisions, with unsuspected consequences for those who attempt to access justice. This risk has prompted discussions about the paradoxes of advancing anti-violence discourses while accepting state violence directed against others. As Raúl Zaffaroni, has observed:

For a long time, it has been shown that each group which fights against discrimination, severely criticises the discourses that legitimise punitive power, but always vindicates the full use of that power regarding the reduction of the group's particular [form of] discrimination (2009, p. 332).

Also, many feminists have focused on the value of lived experiences and questioned the abstract legal subject of liberalism. Without universal subjectivity and its corresponding

values, legal reform cannot be framed as a process that always moves closer to the truth of human nature. Such perception has led to scepticism about the “quality and value of the fruits of legal reform” (Drakopoulou, 2008, p. 2). In the next section, I focus on perspectives, which based on an understanding of subjectivity as shaped and limited by the political discourses that produce it in a specific historical moment (that is, constructivist stances), identify penalty as a technology which can produce unintended effects, which may harm women.

### 3.1 CRIMINAL LAW AS A TECHNOLOGY OF GENDER

Various feminist critiques have built on constructivist approaches, that is, facts and reality are addressed as created in specific, material relations, rather than being revealed, discovered or interpreted (Asdal, Brenna & Moser, 2007). Here, I refer in particular to some which draw on the work of Michel Foucault,<sup>7</sup> as these have addressed both penalty and gendered violence (Bell, 2002; Howe, 2009; Oksala, 2012; Smart, 1989; Voruz, 2005). These stances build on a historicised and politicised understanding of subjectivity and resort to Foucault’s non-structuralist accounts of power to address feminist questions. These authors broadly contend that consecrating one or several forms of identity through law can result in the relegation of other possible ways of being (Bell, 2002; Brown, 1995; 2000; Butler, 1992; 2004; Drakopoulou, 2000a; Howe, 2009; Sawicki, 2005). Carol Smart (1989; 1995) posited a seminal critique of the limitations of law as a feminist strategy, showing that it plays a key

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<sup>7</sup> There are, however, several critiques of “Foucaultian feminism”. For example, the usefulness of resorting to Foucault’s conception of power has been contested (Fraser, 1981). It has also been argued that there is limited potential in his work to contribute to feminist theory (Hartsock, 1990), and the “gender-blindness” of his work has also been pointed out (Bartky, 1988; Marcus, 1989). It has been stated that a “Foucaultian feminism” is a contradiction in terms (Balbus, 1985). For a discussion of the value of Foucault’s work for feminism see Oksala, 2004.



role in many discourses through which women are produced as subordinate subjects. To Smart, law is a privileged discourse that makes claims to truth and disqualifies non-legal knowledge, including feminist understandings of gendered violence and women's experiences of abuse. Smart criticises criminal law's power to "define and disqualify". By establishing and reaffirming norms, law functions as a "technology of gender", that is, a "discourse which brings the gendered subject into being" (Smart, 1995, p. 125) Addressing law as a technology of gender enables us to examine how legal discourse incorporates gendered distinctions and produces fixed gendered identities, including certain "types of women" (Smart, 1995, p. 193).

Criminal law can thus be a system of classification, hierarchisation, and prohibition of certain gender identities and practices (Correa, 2008), which in turn requires the growth of surveillance apparatuses. In the field of criminal law, the use of closed criminal categories — which is mandatory due to the principle of legality— may risk the consolidation of disciplinary practices and surveillance mechanisms. For instance, hate crimes centre identities such as sexual orientation or race, which can boost interventions that aim at determining when a person "qualifies" as "transgender" or "indigenous", thus creating additional mechanisms to monitor and control women (Jacobs & Henry, 1996; Moran, 2001; Moran & Sharpe, 2004). In fact, the recognition of any phenomenon as a legal issue requires the development of new knowledges and expertise to prove its factual existence, which may potentially result in more regulation. Expert knowledge, in turn, defines the boundaries of what is relevant, what is, for example, "violence against women", "battered woman", "rape survivor" and so on (Bumiller, 2008; Corrigan, 2006). In sum, since formal recognition implies that rights can be claimed only when the bearer meets certain criteria, authorities

are given more opportunities for surveillance through governmental and professional apparatuses, as the attribution of rights rests upon a thorough knowledge of the individual's circumstances (Smart, 1989).

The mechanisms through which the state and other institutions “manage” VAW include medical and psychological interventions as well as security technologies associated with scientific certainty and the determination of individual responsibility (Bumiller, 2008; Gotell, 1998). Indeed, while the creation of a new criminal category may formally acknowledge the existence of oppression, in concrete cases, penal lawsuits require the activation of devices that have not necessarily modified their operational logic. These practices can reinforce mechanisms to control women's bodies. Also, this type of intervention contributes to constructing VAW as a “social problem” that is then handed to technocratic branches of governmental administration, without tackling the political imbalances that feminists denounce (Bacchi, 1999; Corrigan, 2013).

In this way, feminist critics have insisted that the penal apparatus can backfire against the most marginalised of women. As Oksala (2012) puts it, any attempt to define violence is political; consequently, violence is more readily recognised as such when it attacks established hierarchies than when directed against subordinate subjects. For example, criminalising domestic violence can reaffirm women's roles as reproducers within the family; at the same time, the law may remain blind toward the specificity of other forms of VAW, such as aggressions against sex workers (Hunter, 2008; Álvarez & Sandoval, 2013). In Ecuador, as I detail in Chapters 3 and 5, domestic violence has always been confined to the boundaries of the “nuclear family”, potentially precluding women in non-traditional partnerships from utilising the law to seek redress. Likewise, marginalised groups have more

impediments to access criminal justice than those with more resources, and they are more likely to suffer the coercive effects of the penal system. Criminal law may affix universal attributes, which correspond to privileged (white, Western, middle-class, heterosexual) women, who are authorised as the speaking voices (Whitlock, 2004).

The penal system, with its complex legal requirements and focus on the adversarial logic of the trial, can make access to justice extremely difficult for disenfranchised women. Penal procedures presuppose a self-sufficient subject, who is often alien to survivors of violence, as they frequently enact a more submissive subjectivity, traditionally associated with normative femininity (Merry, 2003; 2006). For instance, activist Victoria Law (2009; 2014), has brought attention to the experiences of impoverished and racialised women for whom penal reform accomplishments do not translate into useful tools. She has argued that by relying mainly on penalisation, feminism fails to address the social and economic inequities that disenfranchised women endure.

As we see, there are many grounds to posit penalty as a technology that may reaffirm the very discourses that oppress women by diverting public attention from their political subordination, adding to the expansion of surveillance, social control and punitivism, and complicating access to justice. Not only substantive criminal law is problematic though; procedural law has also been regarded as inadequate to address many women's experiences of violence, as I explain in the next subsection.

### **3.2 GENDERED VIOLENCE AND THE INADEQUACY OF CRIMINAL PROCEDURE**

Feminist interrogations of penal reform have not revolved only around substantive law, but procedural (evidence) rules as well. As Smart (1995) notes, it is important to make

a distinction between the legal text and its enforcement. The existence of a law that promotes gender equality does not secure a non-discriminative judicial process, while even legislation that is explicitly discriminatory may be interpreted in a benign way by a judge, or just not applied at all. Much feminist scholarship in the area of sexual offences has focused on the prosecution and trial and what these reveal about the legal construction of women's sexuality.<sup>8</sup> Law's effects as a gendering technology are evident when legal procedures deem non-legal knowledge secondary or altogether irrelevant. Women's experiences of violence only become intelligible when they can be translated into legal "relevances", so the system selectively prosecutes the cases that fit legal definitions, including "ideal" victims and aggressors (Smart, 1989). Smart (1989) illustrated this point bringing in rape as an example: prosecutors usually attempt to establish the truth using only the aspects of the victim's experience that are relevant to the legal notion of consent —such as the woman's sexual history or her previous relations with the offender—, even if these are irrelevant from the perspective of the claimant. In domestic violence, it is possible that only women who fit the dominant norm of adequate feminine roles within the family can enact the legal subjectivity required to obtain redress (Merry, 2003b; Friederic, 2013). For example, Merry's (2003b) ethnographic study of domestic violence has shown that

Becoming an entitled person [within the legal system] depends on being the rational person who follows through, leaves the batterer, cooperates with prosecuting the case, and does not provoke violence, take

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<sup>8</sup> For a review, see Lacey, 1998.

drugs or drink, or abuse children. A woman's ability to perform such a self is conditional upon conforming to the law's definitions of rational and autonomous reactions to violence (p. 353).

Moreover, penal institutions often fail to respond to the gendered nature of VAW. For example, as Douglas (2008a) notes, treating domestic violence as a crime often entails regarding it as a "one-off" incident, although domestic violence is most likely a chronic problem. A compelling example of criminal law's unresponsiveness in this sense is the case of self-defence, a legal category that could in principle be applied to battered women who kill. However, most legal systems require the exercise of the defence to take place immediately after an unlawful attack. Conversely, research on battered women who killed their aggressors has shown that many violence survivors suffer abuses for a long period and are not always responding to a specific triggering incident when they kill (Douglas, 2008b). Despite this, the greater part of penal scholarship agrees that "chronological excess" in self-defence, that is, a defence that is exercised *after* a lapse of time has passed since the attack, should never be excused (Cerezo Mir, 2006).

Even when the penal system gives credit to women, the processes it mobilises, such as reporting, prosecuting and arresting the perpetrator, deploy state force in a manner which can result in harm (Mills, 1999). Penal measures often entail the intervention of the police and other officials who may question women's decisions and behaviours according to their understandings of gender roles (Bumiller, 2008). It has also been noted that penal processes allow survivors of violence to participate in trials as mere witnesses of their abuse (Bumiller, 2008; Macaulay, 2006). Survivors are often treated as a means to uncover the

procedural “truth” and appear in the courtroom as a “prop used by the prosecution” (Bumiller, 2008, p. 100). Besides, measures implemented to protect women tend to be mandatory, compelling them, for instance, to abandon their partner, prohibiting mediation and agreements, or even conditioning legal protection on women’s willingness to report an assault (Lemaitre, 2013).

In this way, the logic of adversarial dualism in criminal law (the accusatory model in Latin America)<sup>9</sup> tends to neutralise the victim’s possibilities of decision (Ferreiro Baamonde, 2005). The rights of victims and offenders are confronted as antithetical and mutually exclusive: criminal law can only treat intimate partners involved in a violent relationship as adversaries (Whitlock, 2004). By contrast, some studies have suggested that women do not usually want to have criminal charges laid, but rather seek access to measures to relieve imminent violence (Snider, 1994; Tamayo, 1998).<sup>10</sup> Also, a trial is onerous and confronts survivors with public forms of scrutiny such as forensic examinations, interrogatories, encounters with their abuser, requests to narrate and relive the events repeatedly and to comply with legal technicalities that are difficult to understand and navigate. The penal procedure can be an added source of violence; there is an ever-present risk of triggering and expanding oppressive control over women to execute penal intervention. Criminology and Victimology refer to this phenomenon as “secondary victimisation” (Marchiori, 2004; Ferreiro Baamonde, 2005), which encompasses the deficient attention that a claimant

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<sup>9</sup> I refer to the Ecuadorian accusatory model in more detail in Chapter 5.

<sup>10</sup> I address this problem from an empirical perspective in Chapter 5, showing how the full criminalisation of VAW made access to pre-emptive measures more difficult for survivors.

receives from the penal system and state institutions such as hospitals and the police, prolonging or aggravating VAW.

Finally, although some trials may eventually lead to the allocation of criminal liability and the imposition of a sanction, incarceration often does not solve, but rather aggravates domestic violence. For instance, law may facilitate the separation between women and their aggressors by helping survivors to either remove the attacker from the shared home or to move out to start an independent life. However, if women leave their household or obtain a restraining order, this may result in the privation of the economic support provided to them and their children, which is aggravated when there is no reliable welfare system. This problem is especially severe when income inequality is rampant. Criminal law does not answer questions regarding housing, childcare, sustenance, health care, and other recourses that survivors need. Furthermore, maintaining a focus on prisons could mean that welfare services continue to be deprived of public funding (Snider, 1998). Criminal justice's focus on prisons is thus one of the most controversial issues feminists face. The next subsection addresses feminist critiques that have highlighted the harshness and inefficiency of incarceration in relation to VAW.

### **3.3 THE INCONSISTENCIES OF PROMOTING IMPRISONMENT**

Given that the prison has been linked to expressive justice and the commercialisation of crime control (Bumiller, 2008; Christie, 2000), it is not surprising that carcerality has been challenged by critics ranging from human rights scholars to abolitionist

activists.<sup>11</sup> Critiques unmasking the harmful effects of imprisonment have also emerged from feminist sectors. Recently, widespread carcerality has been identified as a way of governance that characterises neoliberal orders (Simon, 2007; Wacquant, 2009). The consolidation of a “leaner and meaner state” (Gotell, 1998, p. 41) in tandem with the multiplication of security discourses, has opened up opportunities for governing agencies to allege commitment with citizens’ concerns about security, through criminalisation. These trends have been deemed “populist punitivism” (Garland, 2012; Larrauri, 2006; Simon, 1998; Voruz, 2005). The expression refers to a pattern whereby governments may respond to civil society claims, using zero-tolerance policies portrayed as measures to end crime, which in turn may give politicians a greater public acceptance.

One well-known example is “Megan’s Law”, a federal law in the United States, which required authorities to make information available to the public regarding registered sex offenders. It was created in response to the scandal and protests provoked by the murder of Megan Kanka.<sup>12</sup> Rose Corrigan (2006) has shown that the enforcement of this law bolstered state power rather than facilitating social change, as it has elicited a return to conceptions of rape as a deviant behaviour performed by “monsters” and predators. Megan’s law is built on allegedly neutral arguments, including the discourses of psychiatry

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<sup>11</sup> Prominent transnational activists’ groups for the abolition of the prison include Critical Resistance, INCITE! Anarchist Black Cross Federation, and the academic/activist conference ICOPA (International Conference on Prison Abolition).

<sup>12</sup> California’s Megan’s Law was enacted in 1996, Penal Code § 290.46. It mandates the California Department of Justice to notify the public about registered sex offenders. It also authorises local law enforcement agencies to notify the public about sex offender registrants found to be posing a risk to public safety. Megan’s Law is named after seven-year-old Megan Kanka, who was raped and killed by a known child molester who had moved across the street from the family without their knowledge. In the wake of that tragedy, the Kankas sought to have local communities warned about sex offenders in the area. All states in the U.S. now have some form of Megan’s Law (for more details see <https://www.meganslaw.ca.gov/About.aspx> ).



and psychology. This focus often resulted in the displacement of feminist understandings of sexual abuse.

More broadly, survey data on the public's attitudes to sentencing and punishment over recent years suggest that in Western jurisdictions the public increasingly supports harsher punishments (Hutton, 2016). The view of citizens regarding the need for more crime control has also been investigated in Ecuador: around 46% of surveyed citizens consider that to improve security in the cities it is necessary to increase the presence of the police and the military. According to the same study, only 9% of the citizens feel safe most of the time (CEDATOS, 2011). However, a study by FLACSO (Gallardo, 2009) shows that generally, the perception of insecurity in the country is higher than the actual levels of victimisation. Still, penalisation often responds to "popular demand", as I show in Chapter 5.

In this context, feminist involvement in projects which "rely on punitive, carceral interventions that extend the surveillance and control to which citizens —including women— are subject" (Munro, 2013, p. 242), is a highly-contested issue. Feminist alliances with victims' movements that argue for greater severity in criminal sentencing are controversial. Some feminist penal reform projects resonate with "law and order" agendas (Gotell, 1998; Bumiller, 2008), facilitating alliances with conservative groups that have historically been averse to feminist demands, including Christian groups and right-wing parties. As Bernstein (2012) puts it, through the advocacy for harsher criminal laws, the "left" and the "right" are joined in a dense "knot of sexual and carceral values" (p. 243). Ideas about the need to protect family values, love within the couple and harmony in the private sphere, appear to underpin such coalitions (Bernstein, 2007; 2012).

The prison has also been criticised from the perspective of coloniality. Importantly, as acknowledged in the Introduction, imprisoned populations tend to coincide with marginalised groups in relation to class, gender, and race, given that prisons have in some places become profitable industries that capitalise on the most marginalised of persons while leaving social inequality unaddressed (Christie, 2000; Sudbury, 2005). Penal coercion and incarceration selectively oppress disenfranchised sectors, such as impoverished men and women of colour. In this sense, there is a strand of feminist critique focusing on how penal systems reproduce oppressive race and gender norms (Davis, 2000; 2003; Gilmore, 2005; 2007; Sudbury, 2002; 2005). The overrepresentation of indigenous people in prisons (e.g. Walker & McDonald, 1995; Snowball & Weatherburn, 2006), especially women (Williams, 2007), continues to be a worrying issue globally. Also, feminist political economists have for a long time claimed that criminal justice typically targets those with the fewest resources (LeBaron & Roberts, 2010; Mahtani, 2013; Snider, 1994). Figures also show that in countries like the United States, the people who are most likely to be imprisoned are people of colour and impoverished people (Whitlock, 2004). In Ecuador, many women are in jail for nonviolent survival crimes, such as drug trafficking. Female “drug mules” are usually persons in situations of extreme vulnerability (Fleetwood, 2014). This phenomenon has also been linked to globalised surveillance discourses such as the “war on drugs” (Díaz-Cotto, 2005). Likewise, feminist criminologists like Snider (1994; 1998) claim that legislation on wife assault and battery has mainly benefited white women at the expense of women of colour, aboriginal women, and immigrant women. Imprisonment, in sum, often stems from the criminalisation of poverty and skin colour, and it potentially deepens gender, class, and race subordination (Haney, 2010; Howe, 1994; Snider, 1998; Sudbury, 2005). The prison

prolongs distinctions and hierarchies which have been associated with processes of colonial domination (Arias & Marrero-Fente, 2014; De Sousa Santos, 2016).

Feminist criminology has also explored the dehumanizing environment of the prison as a factor that can aggravate women's subordination whilst accomplishing none of its expected benefits. It has been pointed out that "the one documented effect of imprisonment is to make those subject to it more resentful, more dangerous, more economically marginal, and more misogynous" (Snider, 1994, p. 87). Snider (1994) stresses that there is not much literature showing that carceral sanctions have a transformative effect on aggressors, and there is also little evidence suggesting that imprisonment increases safety for the women outside. Instead, prisons increase recidivism, nourish criminal subcultures, impoverish prisoners' families and brutalise both the keepers and the inmates. Additionally, the question of how imprisonment can improve the lives of women who turn to the penal apparatus for help is a crucial empirical issue. Especially in the case of domestic VAW, it is necessary to investigate whether the incarceration of aggressors contributes to improve survivors' daily lives and alleviate their suffering.

One recurrent question regarding criminal justice more broadly has to do with the adequacy of the threat of imprisonment to deter men from becoming aggressors (the argument of general prevention). Snider (1998) has indicated that the penalisation of "instrumental offences", that is, those committed as a means to an end, such as monetary gain, may be more amenable to function as deterrents than "expressive offences", namely, those committed for emotional motives. The latter category includes forms of VAW such as sexual violence and intimate-partner abuse, meaning that the preventive value of criminal law in matters of VAW may often be overestimated. Finally, focusing on policing and

imprisonment may discourage non-penal community responses that could create alternative strategies to combat violence. In other words, punishment-centred feminism “abets the growth of the state’s worst functions, while obscuring the shrinking of its best” (Law, 2014, para. 29). These contradictions have recently been taken up by the sets of literatures such as the ones I referred to in the Introduction under the rubric of “governance feminism” and “carceral feminism”. In the next section, I expand on these accounts and assess their explanatory power to elucidate cases like the criminalisation of VAW in post-neoliberal Ecuador.

## 4 CONTEMPORARY CRITIQUES OF FEMINISM, NEOLIBERALISM, AND CARCERALITY

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Because the purpose of the thesis is to investigate how penalty has thrived through feminist discourses in a post-neoliberal scenario, it is important to outline current theorisations on the effects of neoliberalism upon carcerality and the politics of sex and gender. In this section, I discuss feminist literature that has used these perspectives to explore feminist carceral politics.

### 4.1 “GOVERNANCE FEMINISM” AND CARCERALITY

Mainstream feminist networks have been scrutinised as sites where hegemonic discourses are potentially reproduced, and said critiques have acquired a renewed force in recent years. Amongst the authors who have questioned mainstream feminism’s diminished

concern with social and economic issues (suggesting a potential compatibility with neoliberal agendas), there is a sector that has tackled carcerality as a feature of neoliberalism. Carcerality, from these perspectives, is reaffirmed through feminist interventions in local and international law and policy-making, especially in the area of sexualised violence. To Janet Halley (2011), for example, mainstream feminism's focus on women's participation and political rights, as well as on the elimination of discrimination, has facilitated the erosion of social and economic rights. Halley (2008) introduced the term "Governance Feminism" to refer to how organised feminist groups participate in power structures and institutions from which they can implement policy and generate change. Governance Feminism operates at different levels, inside and outside the state, impacting on the various networks through which legal power circulates. To Halley, among the caucuses that have advocated for the criminalisation of sexual violence at international fora "the manifest consensus view was an updated radical feminism, strongly committed to a structuralist understanding of male domination and female subordination" (2008, p. 2). These governance feminists seek to abolish "sex work/sex trafficking and sex between formal enemies in war even when women elect to participate in them" (2008, p. 7). Halley describes this as a feminist structuralism, which tends to criminalise and prohibit practices that can be considered exploitation mechanisms based on gender. The greatest dangers of structuralism, in Halley's account, are related to over-enforcement and overlooking the "side effects" of centring law. Linking these dangers to the practices of governance feminists, Halley argues that "Criminal law is their preferred vehicle for reform and enforcement; and their idea of what to do with criminal law is not to manage populations, not to warn and deter, but to end impunity and abolish" (2008a, p. 5). Similarly, in an

insightful joint work, Halley et al. (2006) affirm that it is not coincidental that governance feminism interventions are centred on criminal prohibition:

[...] we find in international GF [governance feminism] relating to rape and prostitution a heavy bias in favor of fragmented modes of participating in power, coinciding with an equally heavy preference for outcomes that ban, criminalize, or prohibit the conduct of men in order to protect women who would be their victims (Halley et al., p. 419).

Importantly, Halley (2008a) argues that well-organised feminists who intervened in the International Criminal Court processes have translated ideas from the United States' radical feminism into mandatory international rules. In turn, through transnational networks and instruments, these ideas are being "downloaded" by the developing world. Halley (2008a) concludes that carceral feminism, through "the supreme emphasis that this branch of G[overnance] Feminism puts on criminalisation, prosecution, and punishment" (p. 121), invites feminists to abandon a positive vision of a human life well lived. Carceral Feminism is largely based on state forms of power, and in the worst-case scenario, it may become a kind of universalism involving "indifference to the suffering and death of men" (p. 123).

To Elizabeth Bernstein (2012), who coined the expression "carceral feminism", "feminism, and sex and gender more generally, have become intricately interwoven with punitive agendas in contemporary US (and by extension, global) politics" (p. 235). She argues that "neoliberalism and the politics of sex and gender have intertwined to produce a carceral turn in feminist advocacy movements previously organised around struggles for economic justice and liberation" (p. 235). Bernstein builds on the work of critical criminologists who

have identified the incarceration of entire populations as a means to manage “dangerous groups” rather than rehabilitate individuals (Feeley & Simon, 1992). These analyses scrutinise the relationship between carceral punishment and late-capitalist political economy, arguing that carcerality fills the vacuum left by the decline of the welfare state, and serves as a tool to manage deviant groups, which may interfere with the free flow of capital (Garland, 2012; Simon, 2007; Wacquant, 2009). Because neoliberal policy redirects resources away from the provision of welfare, a strong penal apparatus is required to control the resulting disenfranchised populations.

Bernstein’s work is particularly relevant to this project, as she introduces a factor that I also consider crucial to understand contemporary feminist penal reform: the discourse of human rights. Although she does not detail the processes by which penalty and human rights have become feminist resources, in her words, human rights are “a key vehicle both for the transnationalisation of carceral politics and for folding back these policies into the domestic terrain in a benevolent, feminist guise” (2012, p. 233). To Bernstein, human rights are what makes carceral politics dynamic. She draws on critical criminology’s association between neoliberalism and human rights and between neoliberalism and carcerality, to posit her critique of the role of feminism and the politics of sex and gender in the production of carceral expansion. In this way, she depicts human rights as a path through which carcerality travels, landing in feminist politics and masking itself behind feminist demands. Feminist stances on sexual violence are thus taking the form of a moralising discourse, which often converges with conservative sectors such as Evangelical Christians and right-wing groups. Bernstein (2012) concludes that mainstream feminists have provided crucial support for contemporary carceral transitions, and the discourse of women’s human rights

has served to assert carceral versions of feminism on a global scale. Rather than tackling “materially redistributive strategies”, contemporary mainstream feminism reinforces the carceral strategies “that a reconfigured neoliberal state is likely to support” (p. 254).

Regarding the relationship between penal expansion, feminism, and neoliberalism, Prabha Kotiswaran (in Halley et al., 2006) has also argued that India’s ratification of international trafficking protocols has resulted in the displacement of prior conceptualisations of trafficking as forced migration for purposes of exploitation. Resorting to socialist feminist reflections on sex work, she proposes to move from a narrative of “harm and injury” to one of social redistribution, stressing that she resorts to socialist feminists in part because they are “not in a governance mode” (p. 413). This position is also especially interesting, because socialist politics are here depicted as a way to temper the carceral drive of some feminist networks. Given Ecuador’s turn to the left and the government’s embracement of “socialism of the XXI century”, a label that has also been adopted by many feminists who support the Citizen’s Revolution, this project’s case study offers a unique opportunity to put the idea of the politics of social redistribution as a remedy to carcerality, to test.

## **4.2 THE TRAPS OF PUNITIVE POWER: “PUNITIVE FEMINISM” IN LATIN AMERICA**

Arguments akin to those presented by Anglo-American scholars have resonated in Latin America.<sup>13</sup> According to Argentine penal theorist Eugenio Zaffaroni (2009), discriminatory powers have set a trap for feminism, neutralising its emancipatory potential.

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<sup>13</sup> For a compilation of critiques of punitive feminism published in Latin America see Birgin, 2000.



In his view, punitive power has a central function in the corporate, hierarchical society, as it sequesters the victims' access to reparations and centralises the state as the offended party. Therefore, feminism runs the risk of neutralisation when the punitive society recognises feminist vindications. This is not, however, a problem that affects feminism only, but all emancipatory movements; punitive power "mocks" all anti-discrimination discourses, because state coercion has never operated in favour of marginalised groups (Zaffaroni, 2009). Expressing a more forceful critique of feminism, Ecuadorian scholar Jorge Paladines (2014) affirms that feminist collectives are presently focused on demanding rights through victimisation rather than promoting social redistribution. As a consequence, in his view, gender has been devoid of its critical potential and become a tool that is used as a sexist binary code. To Paladines, many feminist campaigns are developing an "egalitarian fundamentalism" (p. 2), which in the area of criminal law translates into a "punitive feminism", which is pushing for the elimination of the universal principles of human rights by demanding specialised legal treatment. Likewise, drawing on Zaffaroni, Daniela Zaikoski (2008) recognises that the penal discourse has been constitutive of feminine subjectivity in a way that often results in oppression. Therefore, she proposes to solve the tensions within the penal discourse by positing a form of criminal law, which rescues feminine and popular knowledges, to facilitate a substantial modification of the present conditions of production of offences and offenders. As we see, debates on "carceral" and "punitive" feminism have emerged in various parts of the world. None of the mentioned authors, however, has analysed the processes by which feminists have come to make such extensive use of criminal law. As explained in the Introduction, this is necessary to figure out how an understanding of penal reform as an adequate feminist strategy has come to be so propagated.

### 4.3 THE POST-NEOLIBERAL PENAL PARADOX

In view of the claims raised in the literature, I now clarify my position and reiterate the various reasons why it is necessary to rework an analytical framework to adequately understand the Ecuadorian case. As I explain in Chapter 3, international processes have indeed influenced Latin American women's movements, but the central instruments in this sense have been the CEDAW and the Inter-American human rights system (as opposed to the International Criminal Court which is centred in Halley's studies). Also, local penal systems have played a decisive role in the resulting legislation on VAW. In addition, while the key themes addressed by Halley, Bernstein, and others are prostitution, trafficking and wartime rape, in Latin America, the issue of domestic violence has been more prevalent. These distinctions are consequential, because while the governance feminism literature centres efforts by feminist activists to expound sexual domination as a structure, Latin American and Ecuadorian feminists have focused more on expressing the wrongness of machismo, and also in providing women with practical tools to alleviate impending violence. Put in a different way, governance feminism centres punishment more strongly than Ecuadorian feminist networks, as I show throughout the thesis. These dissimilar priorities have further implications: while the advocacy for the criminalisation and punishment of prostitution, trafficking, and rape has produced alliances between feminists and conservative sectors (Bernstein, 2007; 2012; Halley et al., 2006), Latin American feminists have historically opposed actors such as the Catholic Church in matters of sexual and reproductive rights. There are no records of alliances between feminists and conservative groups to promote any legal or policy reform. In this sense, Ecuadorian feminists have

always developed counter-hegemonic narratives, and the strategies through which they have promoted criminal law is, as a consequence, differs from so-called carceral feminism.

This project will also show how, in many ways, some Ecuadorian feminists, — those who support the Citizen’s Revolution— have performed the move suggested by Kotiswaran, from “harm and injury to social redistribution”, yet continue to promote the criminalisation of VAW in association with international human rights instruments. Furthermore, as shown in Chapter 5, feminists inside and outside the governing regime have (unsuccessfully) proposed to criminalise “patrimonial violence”, a form of gender violence that is not directly connected to sexual abuse. In other words, penalty is being regarded as a tool that could tackle economic inequalities, not only to “end impunity” as proposed by Halley et al. For such reasons, the explicitly anti-neoliberal position of many Ecuadorian feminists, makes the neoliberalism/carcerality association insufficient to frame penal expansion and feminist reliance on penalty. Moreover, carceral expansion understood as the growth of the prison industrial complex and the increase of imprisoned populations does not resonate with feminist interventions in penal reform in Ecuador. As noted in the Introduction, there is no evidence that the reforms historically promoted by Ecuadorian feminists have resulted in increased incarceration. There is no such thing as mass imprisonment of male domestic aggressors, for example. In view of this, while I agree that penalty is expanding in Ecuador (Sozzo, 2015; Dávalos, 2014; Ávila, 2013), I cannot presuppose a connection between feminism and carcerality. Indeed, this is what I refer to as the “post-neoliberal penal paradox”: the thriving of penalty in a political and legal context whereby neoliberalism has been explicitly challenged. The implications of this paradox for feminist politics are the core of this project’s concerns.

Also, let us not forget that “governance feminism” gestures to dynamic exchanges between international women’s rights caucuses, governing institutions, and local feminist groups. Halley et al. (2006) have argued that a feature of governance feminism is that it “emanates from Western feminism, moves globally via international legal regimes of various kinds, and arrives in locales in which Western power is feared and resented and in which it is, we think, doing much harm” (p. 422). Such characterisation may be helpful in some cases, but it does not accommodate the Ecuadorian case. No evidence has emerged from my fieldwork, for example, that international organisations or NGOs were directly involved in the latest process of penal reform. The project was primarily a part of the Citizen’s Revolution broader legal reform plan. Also, Ecuadorian feminist groups are varied, disperse, and complex. The existence of outspokenly leftist and decolonial feminists who support the post-neoliberal project yet promote penalisation, indeed complicates the picture.

Finally, although I largely agree with Bernstein’s arguments regarding the role of human rights in the growth of carcerality and penalty, I am not convinced that it is only feminist discourse which makes it possible to present carcerality as “benevolent”. Bernstein’s arguments draw from the framework of neoliberal governmentality, consequently, the various phenomena she looks at come together through neoliberal globalisation. However, in a post-neoliberal scenario like Ecuador, such framing does not appear to be sufficient. There is no evidence to argue, for instance, that the legal treatment of domestic violence obeys primarily a cost-benefit logic or responds to the needs of the market. Nor is it related to the prison-industrial complex as a profit-maker. The way in which the state has responded to feminist demands resonates more, I argue, with rationalities that have been present in historical legislation as early as the first years of the 20<sup>th</sup> century.

So far, I have intentionally focused on Western feminism to be able to contrast it with the decolonial frameworks that I consider next. Of course, many of the above theorisations are of enormous value to craft an analytical framework for this project. However, I have also explained why the existing frameworks are not sufficient to address my research questions. I have suggested that there is more to “punitive feminism” than neoliberalisation and co-optation. Now that I have explored the existing literature, it is possible to explain how I intend to use decolonial feminism to address my research questions.

## 5 DECOLONIAL CONVERSATIONS: BRINGING TOGETHER CRITIQUES OF COLONIALITY, PENALTY, AND HEGEMONIC FEMINISM

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In this section, I outline some ideas from decolonial feminist theories to think through the tensions and gaps between existing literature on carceral feminism, and the Ecuadorian case. I discuss the work of authors who have gestured to the relationships between rights-based discourses and penalty from a decolonial feminist perspective and show why the critique I propose is original, as it identifies previously under-researched associations between feminism, coloniality, penalty, and human rights. In the Introduction and the previous sections of this chapter, I delineated the relationships between neoliberalism, human rights, coloniality and penalty. These have been discussed in existing literature (although not necessarily in relation to one another). Here, I elaborate further on

the relationships between feminism, penalty, coloniality, and rights. I target “rights talk” itself, but I also explore the ways in which rights-based discourses may bring about an overuse of the penal system. This association is key, and I am not aware of other feminist critiques that have delved deeply into the processes by which these elements have become connected.

Feminist critics of colonial processes are frequently sceptical regarding the adequacy of institutional tools, such as law, to achieve emancipation, given that they are inscribed within an imperialistic logic (Lorde, 1984). From this perspective, some concepts crafted by decolonial and postcolonial feminists can help us understand criminal law as a technology that deploys the “coloniality of gender”. This notion was coined by Maria Lugones (2010), to refer to hegemonic, hierarchical, and dichotomous distinctions, which are “central to modern, colonial, capitalist thinking about race, gender, and sexuality” (p. 742). The “coloniality of gender” is a theoretical tool, which identifies the imposition of gender as it cuts across questions of ecology, economics, government, and knowledge, as well as everyday practices. This lens lets us understand the construction of normative womanhood, domesticity, and the family in Latin America, as a product of coloniality.

Similarly, developing what she calls “a postcolonial reading of Foucault”, Ann Stoler (1995) has found connections between colonial practices and the formation of gendered identities through racist discourses: colonisation and imperialism use racism and sexism as biopolitical technologies. To Foucault (2008), the articulation of disciplinary and regulatory techniques results in the deployment of “biopower” -the power to make live-, which is put into action through the implementation of biopolitics. These discourses create the binaries

that characterise modern societies, regardless of their economic organisation.<sup>14</sup> The driving force for the racist state, in Stoler's reading of Foucault, is to protect society from itself by producing anomaly and degeneracy to tell dangerous individuals apart. Of course, although Stoler gestures to historical antecedents such as the Spaniards' colonial contempt for the indigenous and "half-breeds" (mestizos), her critique is framed in the tradition of postcolonial studies, and she situates colonialism as a "Victorian project", which Latin American decolonial critics would dispute. Nevertheless, her analysis is illuminating, given that it looks at the operations of gender and race *beyond* neoliberalism. Stoler's work converges with decolonial critiques in that both posit the division between colonised and coloniser as crucial for the organisation of political power thereafter. Racism is hence inscribed within all state-driven policies, for example, those addressing the health of the "race" (eugenic cleansing, purity of blood, purification, etcetera), the solidity of the family, and the individual responsibility of each family member. As explained above, these framings enable an identification of colonial continuities even when the economic neoliberal policy has been challenged.

Importantly, these critiques show that colonial discourses function as gender technologies: the colonies are feminised, destined to be raped and possessed. At the same time, colonial politics are connected to the management of sex because racial purity is linked

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<sup>14</sup> Interestingly, in the 17th March 1976 lecture used by Stoler, Foucault (2003) provocatively declared: "[...] Nazism alone took the play between the sovereign right to kill and the mechanisms of biopower to paroxysmal point. But this play is in fact inscribed in the workings of all States. In all modern States, in all capitalist states? Perhaps not. But I do think that [...] the socialist state, socialism, is as marked by racism as the workings of the modern State, of the capitalist State [...]. Socialism was a racism from the outset, even in the nineteenth century. No matter whether it is Fourier at the beginning of the century or the anarchists at the end of it, you will always find a racist component in socialism. I find this very difficult to talk about. To speak in such terms is to make enormous claims" (pp. 260-261).

to white endogamy. In Latin America, many legal strategies have targeted the family as a central social formation (Dore, 2000; Guy, 2000; Rodríguez, 2000; Varley, 2000). In Ecuador, colonial narratives which crossed over into nation-making projects informed the construction of national citizenship (Radcliffe & Westwood, 1996). Colonial/nationalist narratives also have largely determined the subordination of indigeneity, resulting in successive governmental efforts to “whiten” the population. Such policies have historically targeted mothers, domesticity, and the family. These constructions were inscribed in early republican legislation and were usually mediated through race, class, and gender, as I show in Chapter 2.

The work of Stoler and Lugones, as we see, is useful to understand coloniality as an articulation of political power to which race and gender are central. However, what the authors do not address directly, is the particular roles of law and penalty in constructing “normalcy” and “deviancy”, in the management of deviant subjectivities, and in defining which legal goods are worthy of protection as a result. Indeed, neither Stoler nor Lugones focus particularly on law.

However, other feminist authors have centred the role of law in reproducing coloniality, especially through international legal discourses. As mentioned in the Introduction, some critics have framed international human rights as potential reproducers of coloniality. If rights are recognised using categories of identity such as gender, race, and class, it is possible that the very classifications that produce subordinated subjects are reaffirmed through human rights instruments. While conferring rights may “humanise” some subordinate subjectivities, legal recognition is always performed in the terms by which the dominant paradigm delimits what constitutes humanity. From this position, Ratna Kapur



(2006) has analysed the “dark side” of the human rights project, interrogating its alleged universality and challenging its de-historicised, purportedly neutral claims. She expounds the atomised liberal subject underlying the human rights project, and identifies human rights-based instruments resulting from international encounters as reproducers of the idea that access to justice equates access to the resources of “modernity”. This globalised hegemonic model builds on the liberal tradition of rights and autonomy, which tends to equate justice with criminalisation and punishment (Ahmed, 2000).

Referring more specifically to VAW, and drawing on foundational critiques of hegemonic feminism (e.g. Mohanty, 1991; Spivak, 1988), Kapur (2002) has also argued that, in recreating “native subjects”, that is, in establishing depictions of certain women of colour as victims of their culture, human rights discourses can reaffirm gender and cultural essentialism. When a strong emphasis is put in victimhood as identity, powerlessness becomes the basis to ground legal rights claims. The “victim subject” is thus infantilised, depicted as helpless, and used as the universal standard in the discourse of VAW. In this way, even when diversities are acknowledged, it is by aggravating experiences of oppression. “Third-world” women are produced as defenceless subjects, which may, in turn, justify international intervention to correct a “backward” and “uncivilised” society, which can reinforce the colonial first-world/third-world binary.

In a similar fashion, but from an anthropological perspective, Sally Engle Merry (2006a) has noted that the debate over what constitutes VAW often takes place in terms of culture and tradition. Violent events such as genital mutilation or the incarceration of raped women for committing adultery are usually regarded as “harmful traditional practices”, which results in an antagonism between “culture” and “rights”, or even between “culture”

and “civilisation”. This dichotomy poses the risk of stigmatising women in the “third world”, constructing them as victims of a less worthy culture, while the West is depicted as a saviour that provides answers and solutions in the form of human rights. In sum, the central issue of human rights as vehicles of coloniality is that universalism is gendered and racialised.

What these accounts of VAW, coloniality, and human rights do not address in depth, is the relationship between the use of human rights discourses and the proliferation of penal responses (which also implicate the reaffirmation of colonial discourses). These critiques of human rights, are not mainly critiques of penalty, but rather of the dynamics through which international law and transnational hegemonic feminism reproduce colonial subjectivities. What I propose, conversely, is to use critiques of coloniality and human rights to develop a critique of penalty. Similar to the proponents of the “coloniality of knowledge” and law as “gendering technology”, I address criminal law as a discourse that has the power to disqualify and displace non-hegemonic understandings of gender and justice. Thus, a range of unintended consequences can result from penal reform, including the reproduction of gender and racial norms (Bacchetta, 2015; Howe, 2008; Kapur, 2002; Sudbury, 2005). The coloniality of criminal law is relevant to answer this project’s questions, due to the assumption that the violation of a human right should always result in a penal response, and that the best way to deal with an offender is to imprison him, which is at odds with indigenous tenets regarding community life and justice. Penalty displaces non-hegemonic legal knowledges, and the justifications that are used to do so are frequently based on human rights, which in turn, are identified as potential reproducers of coloniality. This rights/penalty articulation is what I consider insufficiently analysed from a feminist decolonial perspective. Penalty, with all its problematic implications, may be affirmed,

legitimised, and perpetuated via international human rights discourses, and this colonial pattern can travel across political programmes and economic agendas, regardless of their right-wing or left-wing orientation. With this conjecture in mind, I move on to detail the target of my critique, which I refer to as a “rights-based penalty”.

## **5.1 RIGHTS-BASED PENALTY AS A VEHICLE OF COLONIALITY**

From the outset, there is a connection between rights and penalty, given the fundamental conceptualisation by which a right is an entitlement that can be legally enforced against duty-bearers if they do not perform their obligations (Bentham, 1907; Douzinas, 2007; Dubber, 2004; Hart, 1958). Within the penal logic, enforcement can translate into carceral punishment. However, beyond this known association between entitlements and sanctions, there is a newer form of penal discourse which has docked effectively among progressive Ecuadorian scholars, which relies extensively on human rights. The notions of “minimal criminal law” and “penal guarantees”, as I detail in Chapter 4, are grounded on the idea that criminal law can be “tempered” and harmonised with a progressive constitutional framework. This idea attempts to legitimise punitive power by arguing that it is possible to rely on criminal law and at the same time be respectful of the human rights of aggressors and victims. This can be achieved by observing a series of principles whose general aim is to restrict the use of criminal law to situations where another type of legal provisions is not effective (Ferrajoli, 1995). As a result, human rights not only make penalisation possible as a response to offences but also morally legitimise the existence of the penal apparatus, which is construed as a system that, in overseeing constitutional guarantees, is essential to democracy. As we see, the notion of “rights-based penalty” adds nuance and throws light into the justifications that rationalise the extended

use of penal mechanisms by progressive actors, in this case, feminists navigating the post-neoliberal turn.

Of course, it is important to acknowledge that there are many different schools of thought on human rights. This project refers to those discourses disseminated in Ecuador through international organisations such as the UN, the OAS, and transnational NGOs, from the 1990s onwards. I target the role of these projects in enabling and encouraging Ecuadorian feminists to articulate their demands through penalty. This articulation, I contend, is in many ways a vehicle of coloniality, because it legitimises certain worldviews and covertly dismisses “peripheral” knowledges, namely, understandings of justice that do not focus on penalty.<sup>15</sup> Within my analytical framework, coloniality is the capacity of hegemonic discourses to displace competing representations of justice. It is worth clarifying, however, that I do not deny that human rights can and have been used to express “dissent, resistance and rebellion against the oppression of power and the injustice of law” (Douzinas, 2007, p. 13). Indeed, “rights are simultaneously forms of regulation and resistance” (Golder, 2015, p. 57). In fact, rich projects are being developed on the possibilities to decolonise human rights (Barreto, 2013). As some Latin American scholars have observed, there are motives to vindicate the “legal fetishism”, and the attachment to human rights discourses and mechanisms that has characterised the region’s social movements across history (Lemaitre, 2009). Certainly, I do recognise that “rights scepticism” can be a form of privilege (Williams, 1991). However, at the same time, human rights are frequently perceived as

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<sup>15</sup> As Douzinas (2007) has affirmed, the human rights movement is a late result of the convergence of various normative traditions including Greek philosophy, Roman law, Christian doctrine, humanism and classical liberalism, all of which were brought to the Americas through colonisation, mostly resulting in the subordination of indigenous cosmovisions.

being above politics by those who *are* in a position to modify and implement policy, and this is problematic. As Lacey (2004) puts it, before we initiate a “reconstruction of rights”, if we want to use the framework of rights to empower women and dismantle sex-based disadvantage, we must understand their potential and their limitations, which calls for empirical work.

It is my contention that, despite the boost of social and economic rights and the introduction of alternative models for economic development, the Citizen’s Revolution in Ecuador adopted a human rights framework inherited from the 1990s processes. Particularly in the field of criminal justice, a rights-based framework was reaffirmed without modifications despite the ancestral (non-liberal) views of justice introduced in the Constitution. This crossover is a crucial enabler of penalty. Moreover, this is why the ways in which feminists negotiate with the state, how they make use of the opportunities they have, what concessions they make and what “strategic” steps they take to accomplish what is believed to be necessary legal reform, needs to be addressed critically and situated historically. Therefore, I look at penalty as a form of discourse that remits to incarceration but operates through means that are not always explicitly carceral (Foucault, 1977). Said means include “objective” knowledges focused on numbers and measurability, medical disciplines including psychology and psychiatry, and even social redistribution agendas themselves (for instance, during the last penal reform, there was an attempt to criminalise “patrimonial violence”). This is possible because, through rights-based discourses and technical disciplines, penal interventions can be constructed as adequate to solve a problem “technically”. I thus frame penalty as a set of dynamics produced as a consequence of deeper processes, *beyond* neoliberalisation. The rights-based penal discourse used to

address VAW is at its roots, colonial; the horizon, therefore, is to embark on a decolonial feminist critique of rights-based penalty.

## CHAPTER 2

# Before Penalty: Ecuadorian Feminists Denounce the Violence of Law (1930s - 1980s)

### 1 INTRODUCTION

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This chapter initiates an in-depth retrospective journey through the legal history of VAW in Ecuador, specifically examining how Ecuadorian feminists have engaged with criminal law in relation to VAW. The chapter builds mainly on documentary sources such as historical legislation and feminist publications (including articles, press releases, and opinion pieces). In Section 1, I draw on the work of feminist historians who have discussed the relationship between gender and the state in postcolonial Latin America. I then analyse early republican legislation, focusing on laws which aimed at protecting women and children, including penal provisions that criminalised violent men. In the last section, I also incorporate personal testimonies from self-identified feminists who were actively involved in discussing VAW from the 1970s onwards.

The Chapter identifies a period prior to the instrumental use of penalty to counteract gendered violence. In the early 20th century, feminist texts expressed a preoccupation regarding women's role in society. They did denounce women's oppression, although their engagement was more oriented at expanding social opportunities and legal

entitlements rather than focused on law reform. The first part of the chapter refers to the construction of national identity as a racialised and gendered discourse and its relationship with postcolonial constructions of the family. This enables an understanding of the rationalities that informed early state interventions in domesticity, as well as the development of legal measures to limit excessive male violence against women and children. Acknowledging the racialised character of nation-making projects in Latin America is crucial to understand the production of hierarchical political identities based on skin colour and sexuality. Historians have revealed that nation-building projects often entailed the implementation of mechanisms to “improve the national race” by purifying it from “poisons”, which were associated with racial inferiority (Clark, 2001; Stepan, 1991). I show how domestic violence was constructed as a problem that could hinder nation-building by troubling mothers’ abilities to raise good citizens. Legal provisions addressing violence in the family were framed through these rationalities.

Up to the late 1980s, feminist proposals revolved around repealing sexist legal provisions, as opposed to creating new legislation. Initial feminist engagements with criminal law focused on expounding its role in the perpetuation of women’s suffering. This was a moment when penalty was seen as the predicament, not the solution. The findings in this chapter are essential to distinguish the rights-based discourses that emerged in the 1990s and appreciate how they were tied to a penal framing of VAW. By contrast, the first feminist engagements with criminal law differed substantially from the penalising endeavours that would become dominant decades later. In sum, it is my contention that there was a period, before international human rights, when penalty was not a dominant field of intelligibility to express the wrongness of VAW. The possibility for Ecuadorian



feminists to demand penal reform would only come about with the emergence of a women's movement that was gradually professionalised, put in contact with transnational networks, given access to certain governing spaces, and mainstreamed through state agencies as well as emerging NGOs and international organisations.

## 2 LATIN AMERICA: NATION, RACE, AND DOMESTICITY IN EARLY CIVIL AND PENAL LAWS

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The legal construction of women in Latin America has historically been connected to the family, which has in turn been a primary target of state-driven discourses regarding the strengthening of national identity.<sup>16</sup> Due to the virtual disappearance of the state after the independence wars of the 19th century, the criollo and white-mestizo<sup>17</sup> ruling elites confronted the monumental task of bringing together heterogeneous peoples and communities to rebuild the nation. Despite a rhetorical endorsement of liberalism and the ideals of freedom and equality, the ruling elites did not in practice challenge the social hierarchies that had been imposed through colonisation, but rather tended to “denigrate

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<sup>16</sup> I use the term “national identity” to refer to a normalising discourse that the state has often utilised to channel power relations, resulting in a continuous constitution and re-constitution of subjectivities and identities which in turn takes place in different, often fragmented sites where space, time, history and culture are articulated (Radcliffe & Westwood, 1996).

<sup>17</sup> “Criollo” refers to white people of European ancestry who were born in the Americas. In Latin America, the ruling elites after the independence wars were formed by Europeans and Criollos, while indigenous people, Afro-descendants and sometimes mestizos were excluded from governing positions. “Mestizo” refers to people of mixed (white and indigenous) ancestry.

the local and value the West” (Radcliffe & Westwood, 1996, p.13). As Quijano (2000b) has noted, parameters of sexual behaviour as well as family organisation patterns from Europe were put at the service of racial classification in the Americas. The European, Christian, white family, became a site for the normalisation of sexualised and racialised bodies. Postcolonial discourses on nation-making shaped the experiences lived by these postcolonial bodies, which would henceforth discipline themselves to resemble the ideals of whiteness and “Europeanness”. The postcolonial female body was only intelligible within the boundaries of the Christian, heteronormative family, which is still a nuclear site of normalisation in Latin America.

The historical construction of hierarchical categories based on ethnicity and gender and the resulting social stratifications have been central to the Ecuadorian social and political system. In the realm of the domestic, the logic of “patriarchal right” has constituted a fundamental structure whereby the husband/father represents all the other members of the family for legal and economic purposes. The construction of patriarchal right in Ecuador has been related to an ethos that predicates male honour and female chastity, which was imported to the “New World” around the 16<sup>th</sup> century by the Hispanic invaders. Said ethos sometimes justified aggression against women when they did not fulfil the moral qualities of normative womanhood (McKee, 1999). The patriarchal right has also been associated with the Catholic marriage institution, which is considered racialised and heteronormative (Fernández-Rasines, 2001). Under these circumstances, a constant tension between patriarchy and equality was evident in legal provisions and public policy, which subordinated women (Díaz, 2001). Colonial distinctions such as caste, profession, and family name, which had structured society before the permeation of liberalism in the 18th century, continued

to be central to political life well into the republican years (Guy, 2000b). The archetypical family, envisioned as aristocratic, white, and heterosexual, served as a nuclear structure through which national identity and optimal citizenship were mediated. The dominant elites saw the family as a formation that could give the newly independent territories the stability that was needed to build a strong nation-state, and therefore sought to optimise it.

In fact, feminist historians have noted that the regulation of gender roles was key to nation-building in Latin America, often entailing state intervention in domestic life (Dore & Molyneux, 2000; Guy, 2000b; Radcliffe & Westwood, 1996). Law played an important part in this endeavour: Latin American states invested in the rhetorical and educational functions of law since it preserved a Platonic tradition whereby legislation is crucial to produce virtuous citizens (Htun, 2003). Hispanic Latin American countries have considerable legal homogeneity, given that most base their legislation on the Continental Law tradition,<sup>18</sup> which is in turn founded on the principles of Roman Law and European historical laws such as the *Siete Partidas* of King Alfonso “The Wise”, and the Napoleonic Code. Unlike Common Law, Continental systems rely on detailed written codes, which judges are expected to apply at face value, rather than create case law. While high courts have the power to revise judicial decisions and issue binding precedents, most judges decide only for each individual case. Given that legal reform usually comes about through the legislature, legal reform is regarded as a sign of cultural or political affirmation or change. In Latin America, the enactment of a new constitution has often signalled a re-foundational moment (Gargarella, 2013), as law is

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<sup>18</sup> I use the term “Continental Law” and not “Civil Law” (which is perhaps more commonly used) to avoid confusion between the legal system and the branch of law that regulates legal relations between individuals, that is, I use “Civil Law” to refer to a branch of private law.

frequently perceived as “a future prescription for social redemption” (García Villegas & Rodríguez Garavito, 2003, p. 23). The symbolic power of law is therefore not generally located at the level of the trial or the judicial decision as much as at the level of the written codes and their reformation.

In this way, the early codes of law symbolised the rise of a new republican order; however, their implementation often reproduced colonial norms whose continuity was needed for the ruling elites to manage the population. This determined the preservation of a colonial social hierarchy marked primarily by gender, race, and social status (Dore & Molyneux, 2000). In this way, an ideology that indigenous persons, mulattos, blacks, and peasants in general were primitives who had to be forced out of their “natural” laziness, dominated labour practices. Law also established a gender regime by regulating sexual practices, prostitution, vagrancy, contraception, abortion, marriage, and the family (Dore, 2000). Penal provisions penalising deviancy from family norms through categories such as adultery, prostitution, abortion, homosexuality, and infanticide, were put in place to preserve the family’s “good name” and cohesion. Often, penal court decisions punished women who did not conform to the bourgeois ideals of domestic morality (Díaz, 2001). The family archetype thus facilitated the exclusion of the non-conforming or, as Molyneux puts it, the “nation’s others” (2000, p.43). This included “deviant” women, indigenous peoples, Afro-descendants, and other marginalised subjectivities.

Within these nation-making processes, women were assigned roles related primarily to motherhood and the patriotic duty to raise good citizens (Clark, 2001; Guy, 2000b; Rendón, 2006a). On the other side, men were expected to be responsible breadwinners (Tinsman, 2001; 2002). The convergence between national archetypes and

maternal/paternal duties facilitated the articulation of the rationale that it was necessary to assist and protect mothers to “modernise” the nation and ensure the adequate upbringing of children. Legal provisions meant to neutralise violent family members were enforced in that context. Rodríguez (2000), for example, has described courts in Costa Rica, which punished husbands who physically abused their wives. The judge’s reasoning was that these aggressive men were failing their duties as responsible breadwinners. This masculine role was in turn alien to the lower classes, because it delegitimised many of indigenous women’s economic activities outside the home; that is, this model was superimposed over other forms of women’s participation in economic life (Dore, 2000a; Jefferson & Lokken, 2011).

The progressive “modernisation” of patriarchal power has been studied by Ann Varley (2000), who argues that the state attempted to replace violence with more “modern” and reasoned notions of patriarchal power. Donna Guy (2000a; 2000b), has likewise indicated that the use of state mechanisms to curb patriarchal authority within the family was and is typical of Latin America. In sum, while many narratives have depicted the state as “blind” to the violence that occurs in so-called private spaces, critical feminist historians have identified various mechanisms through which the state has long intervened in domestic life in postcolonial Latin America. These interventions were mediated by race and gender norms.

During the “long nineteenth century” (Dore, 2000, p. 3), the new nations received the influence of positive criminology —such as the ideas of Lombroso—, and started to develop a biology-based approach to the management of crime (Díaz, 2001). With this backdrop, mechanisms were activated to manage domestic violence and women’s sexuality from a “scientific” perspective. As feminist criminologists have noted, “familial ideologies”

(Howe, 1994) represented women either as conforming subjects who deserve legal protection, or as dangerous, “abnormal” subjects when they stepped outside the boundaries of domestic discipline and legitimate womanhood. In this way, perspectives on women and domesticity converged with criminological developments that legitimised the imprisonment of the “deviant”. These colonial rationalities, which came from the metropole and reproduced gender, race, and class as part of the colonial project, were in place prior to the consolidation of organised women’s movements and, certainly, prior to the advent of neoliberalism in every sense of the term.

Alongside state-led discourses, other institutions influenced the construction of domesticity in the region. For instance, the Catholic Church's standpoint on sexuality has also shaped the regulation of the family. The Church has gradually moved from a stance that authorised patriarchal violence, to an endorsement of equality between spouses —equal rights for men and women are admissible so long as the “proper nature” of each of the sexes is preserved (Htun, 2003; Kapur, 2006). Interest in moderating violence to promote harmony in family life is connected to the Catholic doctrine of marriage indissolubility, which praises the values of conjugal love and affection (Htun, 2003). Indeed, the Church has traditionally offered counselling and support to spouses and families, and priests have long played a role in mediating marital dispute (Rodríguez, 2000), thus contributing to the construction of a modern, non-violent patriarchy, and the idealised the Christian harmonious family. In fact, the first civil code of Ecuador regulated the effects of marriage through provisions that were brought in from Canonical Law, since the Church was the authority enabled to perform and nullify marriages. Examining early civil codes, I found that the ideal of family harmony was reflected in many provisions through which gender roles

were clearly delimited: for instance, Article 124 of the 1860 civil code indicated: “Spouses are obliged to remain faithful, to assist and help each other in all circumstances of life. The husband must *protect* the woman, and the woman must *obey* her husband” (emphasis added). This illustrates how the ethic of conjugal harmony and the subordination of women to their spouses were brought together and presented as compatible and complementary. Similarly, Article 126 stated: “The husband has the right to force his wife to live with him and follow him wherever he transfers his residence. This right is limited when its implementation brings imminent danger to the life of the woman”. In this case, patriarchal hierarchy was expressed in the husband’s right to impose a place of residence, a right which was in turn limited if it risked women’s lives. As we see, patriarchal violence was moderated by law to avoid excessive force, thus protecting women as functional, but subordinated members of the family.

As the republican state and its judicial apparatuses expanded, secular intervention in family life gradually replaced the Church’s authority. Family-protection discourses resulted from state concerns with matters such as child development, optimal child-rearing, and responsible fatherhood, allowing for protective policy and legislation to be enacted, but at the same time producing racialised and gendered images of deviancy, which justified the penalisation of those who threatened the integrity of the family (Dore, 2000b; Guy, 2000b; Rodríguez, 2000). While civil law was the main corpus governing families, penal mechanisms were also put in place, albeit not as explicitly. Criminal law could also operate as an instrument to protect the innocent and preserve family harmony by moderating patriarchal power. An example of early use of the penal system in this sense can be found in Mexico, where as long ago as 1871, the Penal Code already criminalised domestic violence.

According to Varley (2000), the legislators who supported the project did not question the husband's right to govern his wife, but they re-thought the subjection of women to men in marriage as an effect of a contract based on free will and reason, superposing a liberal rationality over the colonial paradigm. Thus, earlier familial archetypes were rearranged to accommodate newer political approaches, and a form of non-violent domestic patriarchy was inscribed in law, while "domestic violence was reconstrued as the practice of *deviant men*" (Varley, 2000, p. 241, emphasis in original). Put in a different way, as Heidi Tinsman (2002) has pointed out, a version of patriarchy that centred fatherly responsibility was produced, but without fundamentally altering gendered hierarchies.

By the early 20<sup>th</sup> century, while mothers had to be educated for scientific, hygienic household management and child raising, men were expected to be responsible and sober so as to improve the "race". Drunkenness was associated with indigeneity, which was understood to be degenerate and diseased (Clark, 2001; Vaughan, 2000). Normative domesticity was thus produced based on urban, imported models, and "the state's interest in domestic violence was not a concern for wife abuse per se but for the pernicious effects of alcohol on production and family welfare" (Vaughan, 2000, p. 201). Ecuadorian examples of such legal rationalities can be found in the penal legislation of the 1930s. Amidst enthusiasm regarding eugenics, public hygiene, and scientific intervention in the family, alcoholism was referred to in official discourse as a "racial poison", which could jeopardise the building of a strong nation (Clark, 2001; Stepan, 1991).<sup>19</sup> Eugenics and criminal law thus

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<sup>19</sup> The race and class coding of alcoholism is an enduring feature of domestic violence: depictions of the indigenous as prone to be drunkards are still common (Bedford, 2007; Valverde, 2004), while domestic violence is frequently associated with alcoholism (The World Bank, 2000).



came together and conveyed confinement as a means to “cleanse” the population. The penalisation of alcoholism and the legal tools this offered to women who suffered domestic abuse are an example of early use of the penal system to regulate family violence: the Ecuadorian Penal Code of 1938, enacted during a military dictatorship,<sup>20</sup> included a provision on chronic alcoholism, which was used by women to protect themselves from extreme drunkenness and aggressiveness from their partners. The article read:

Art. 607.- Those who, within a period of 90 days have repeated the offence of drunkenness for four times, will be sent to a temperance hospice or another similar place, for a stay of six months to two years; this period can be enlarged or shortened and even revoked when the detailed examination of the detained person offers enough evidence that they have been reformed (Código Penal, 1938).

The best argument for women to convince the police to arrest men under this provision, as Clark (2001) confirms, was to say that they had become dangerous to their families. This provision reveals a convergence between several narratives around domestic violence: race, drunkenness, aggressiveness, and irresponsibility from householders were seen as forms of “deviation” that the state had to respond to. Well-adjusted, dutiful mothers

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<sup>20</sup> During the Supreme Leadership of General Alberto Enríquez Gallo, several legal reforms were enacted in Ecuador, including the Penal Code, a great part of which remained in force until 2014, the *Ley de Comunas*, which recognised some indigenous communal property, and Ecuador’s first Labour Code, which has been considered reflective of progressive ideas (Becker, 1999).

were in turn the target of protection. In addition, the article was informed by narratives seeking to “improve” the race by purifying individual behaviour, given the racialised underpinnings of temperance discourses (Valverde, 1998; 2004). Regulating conducts that were thought to be characteristic of racial and, therefore, moral inferiority was a way to “whiten” the population. More broadly, moderating violence in the family was also a way to whiten the population: there was a confluence between nationalistic ideals, the protection of the family, and aspirations to Europeanness and whiteness.<sup>21</sup> Men could be punished when they deviated from their duties as responsible fathers (by mistreating wives/mothers), because such deviation was regarded as dangerous for the family and consequently the nation. What I want to stress here is that state’s disposition to penalise violence against women historically precedes organised women’s mobilisations; it does not originate in neoliberal carceral trends nor feminist initiatives, and it has connotations that go beyond market-oriented policies. In postcolonial Latin America, neutralising domestic violence was a mechanism to optimise the population by normalising the family, and said optimisation was always mediated by gender and race. The legal subjectivities that were produced in this way were associated to the distinctions and hierarchies that had been carried on from colonial times: a respectable (white, Christian, heteronormative) family required the moderation of male violence.

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<sup>21</sup> Similar associations have been found, in a different context, by Donna Guy in her study of the 1860s South American regulations of “white slavery” (Guy, 2000b), which protected white European women based on racial and moral considerations. Guy’s work reveals that brothels were made illegal not because the oppression of women was acknowledged, but due to a moral narrative regarding family values and the victimisation of white women and children. This suggests that moral prohibitive reform was considered adequate to improve the condition of women, in detriment of economic and social intervention. It also shows how focusing in white women’s vulnerability to sexual violence brought in legislation that justified a sort of extension of imperial power in the former colonies, through international mediation (Howe, 2008).

These examples expound criminal law as a governmental technology which, in addition to fulfilling a role in social control and policing, functioned as a normalising apparatus meant to encourage “civilised” behaviours from good families/citizens. In fact, legal mechanisms giving women access to tools to alleviate violence coexisted with provisions that penalised women’s deviancy (such as adultery, concubinage, prostitution-procuring, abortion, infanticide, etc.), and laws that condoned or reduced sanctions for men who committed crimes such as killing an unfaithful wife, a promiscuous daughter or other non-conforming female family members (see Section 4 in this Chapter for details).

Of course, the relations between state policy, legal change, and the perpetuation of women’s subordination did not have a uniform character; certain provisions which clearly subordinated women could at times be beneficial — indeed, state-gender relations are variable and unpredictable (Cooper, 1995). However, only women within the boundaries of family norms were regarded as worthy of legal protection, and their needs became conflated with those of the family, resulting in an equation between the two. As I demonstrate in the next chapter, this conflation lives on. In fact, contemporary feminist authors in the region have named the phenomenon “familialism” (Facio Montejo, 1992). It is thus key to insist that family-protection rationalities, which allowed for the activation of criminal law to moderate domestic violence, were in place before the emergence of women’s movements and the framing of domestic violence in terms of gender inequality. I argue, in Chapter 3, that some of these narratives, by which the interests of women are subordinated to those of the family and national development, are reflected in current legal representations of domestic violence.

### 3 RESISTING AN OPPRESSIVE STATE: INDIGENOUS WOMEN AND THE MARXIST LEFT

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This section shows how, historically, not all sectors of the women's movement have pursued strategies that centre penal reform. As will be shown later in this chapter, the organised women's movement linked to feminist penal reform in Ecuador was mainly NGO-based, middle-class and mestizo. Conversely, the struggles of indigenous and peasant women, as well as popular sectors, have not been centred on penal reform. It has been argued that a degree of closeness to the governing agencies and access to the benefits of citizenship is required for law to be adopted as a strategy by a group (Yashar, 2005). In Ecuador, particularly through the 20<sup>th</sup> century, legal reform was a political strategy adopted by relatively privileged sectors.

Latin American feminist movements have been shaped through the tension between the influence of Western currents and the regional interrogations of hegemonic discourses. The flow of governmental techniques between colonies and metropolises shaped early feminist discourses, which reproduced, but also resisted Western postulates (Gargallo, 2010). Here, I explore early feminist engagements with criminal law, showing that a profound mistrust regarding the state underpinned some women's demands, thereby impeding the instrumental use of penalty. The first strand of Latin American feminism I will refer to is linked to the Marxist left. While this strand did not significantly impact later feminist appeals to penalty, Marxist approaches have more broadly informed Latin American feminisms since the beginning of the 20<sup>th</sup> century (Chinchilla, 1991). In Ecuador,

socialist and anarchist waves are associated with the creation of feminist trade union centres as early as the 1920s (Goetschel, 2006a).

Nela Martínez, who would become the first Ecuadorian congresswoman in 1945, voiced women's demands from the platform of the Communist Party. Her writings, framed in terms of class struggle, mainly denounced poverty and the precarious conditions that women and children endured, and in so doing she interrogated the dominant family archetype. Martínez denounced idealised depictions of motherhood and pointed to women's poverty as an issue that should take priority over the goal of optimising motherhood:

We cannot yet, Ecuadorian mothers, say only the word "tenderness". A serious human responsibility requires us to address the social conditions in which this promising and sweet mission is performed. The racial problem that has worried so many in our motherland has an imperative: to improve the conditions in which motherhood is performed [...]. As long as the present reality is not overcome, as long as we do not stop the Ecuadorian nation from being hungry and living in misery, as long as each child that is born in this Ecuadorian land is considered a burden that increases poverty, we cannot say that motherhood is joyful (Martínez, 2006, p. 185).

As we see, Martínez resisted normative constructions of motherhood, and although she appears to accept the dominant discourse that framed the optimisation of the

population in terms of “race”, she prioritised the socio-economic situation of Ecuadorian women as the most urgent issue. Challenging the “joyfulness” and “tenderness” of motherhood was a bold audacity at the time, as it contradicted legal constructions of the family. I have not found in Martínez texts relating to women and motherhood, any indication of strategic use of law, or any manifestation of the idea that changing the law was necessary to achieve the social changes that she demanded.

However, Martínez was involved in some discourses that pointed in the direction of penal reform. In 1938, the Ecuadorian Feminine Alliance (Alianza Femenina Ecuatoriana, AFE), a women’s trade union, was founded with Nela Martínez acting as secretary. This organisation focused on demanding better working conditions for women, but interestingly, one of the Alliance’s aspirations, as stated in the exposition carried out during their inaugural meeting, was “a revision of penal laws for female delinquency, with the aspiration to transform prisons and correctional houses into work and education centres for women” (El Día, 1938, cited in Goetschel, 2006b, p. 181). These programmatic goals expressed rejection of penalty and an understanding of the prison as a despotic apparatus. In many ways, more than penal reform, the demand was for penal abolition. There was a drive to challenge the penal system: feminists at the AFE saw the penitentiary as structurally oppressive and imagined alternatives such as replacing it with educational and occupational programmes. While the proposal was grounded in the agenda of the communist party, it was crafted by and targeted at women specifically. This is a kind of critical approach that would not be taken up by future mainstream feminist networks.

The Marxist left also facilitated the coordination of early indigenous mobilisations against the concentration of land ownership. It was women who put together the first

Ecuadorian indigenous organisations, which were supported by the Communist Party. The testimonies of Dolores Cacuango (1881-1971), a Kichwa leader who became an icon of indigenous struggles, have been recorded in interviews in which she recounted the extreme violence that her people suffered in the hands of landowners, local authorities, the Church, and the police (Yáñez del Pozo, 1986). At the time, the *huasipungo* system was in force,<sup>22</sup> and indigenous peasants reclaimed ownership of the land where they worked, as well as the abolition of oppressive laws. This resulted in violent revolts and the burning down of the homes of the protesters. To Dolores, who had suffered abuse from state officials and landowners, state action equated a coercion that was not legitimate, and the force employed by government officials was not regarded as a realisation of justice but as an endorsement of the robbery of the ancestral lands where she and her people lived and worked for centuries. Likewise, emblematic indigenous leader Tránsito Amaguaña (1909-2009) did not see the state as provider of justice: “At that time there was no justice. There was nothing. To their content, they abused. To their content, they trampled on us” (Goetschel, 2006b, p. 203). These women could not have conceived punitive power as a channel to free themselves from exploitation and violence; instead, the state embodied the deepest exploitation and violence. Thus, indigenous women’s struggles could not be invested in legal reform and were rather focused on collective organising and attaining cohesion within their communities to resist state oppression.<sup>23</sup> These practices of resistance

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<sup>22</sup> *Huasipungo* (from the Kichwa words “*huasi*” -house- and “*pungo*” -door-) refers to the small portion of land that indigenous people could plant and harvest, which was adjacent to the shacks they lived in, within a landowner’s grounds. This parcel of land was given as “salary” in exchange for the indigenous family’s work in the lord’s *hacienda*, reproducing feudal systems into the republican years (Borja, 2012).

<sup>23</sup> Dolores Cacuango was founder of the first indigenous organisation of Ecuador, the Ecuadorian Federation of Indians (*Federación Ecuatoriana de Indios*). Dolores’ campaigns eventually led her to work together with the trade unions of Quito, and she became close to the Communist Party, establishing relations

entailed a decentring of the law as a path to obtain emancipation, which in turn precluded direct engagement with penal reform.

Marxist feminist approaches to the relationship between violence, women's suffering, and the law, as well as the thought and practices of indigenous women, reveal that engaging with legal reform requires a degree of trust in the governing institutions. A proximity between political actors and governing agencies allows for dialogues through which negotiations can take place. These negotiations presuppose the existence of a common language; that is, appealing to legal reform requires a degree of inclusion in the structures that define citizenship and access to the benefits of living in society. Put more boldly, in Ecuador, appealing to legal reform required a degree of colonial privilege. Without this proximity to government, which in many cases cannot be attained without a redefinition of citizenship (Yashar, 2005), emancipatory hopes cannot be channelled through law. As Sally Engle Merry (2003b) has argued, the adoption of a rights consciousness requires certain experiences with the legal system that reinforce rights-based subjectivities. Women like Dolores and Tránsito only had painful experiences from that system. We shall keep this in mind to understand why feminist engagements with legal reform would occur through upper-middle class women organisations.

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with feminists within those organisations. Nela Martínez and Dolores Cacuango were protagonists of the 1944 workers' rebellion that ultimately led to the dismantling of the government then in power.



## 4 ZOILA RENDÓN: CRIMINAL LAW AND WOMEN'S SUFFERING

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Another strand of feminist thought in the early 20th century revolved around the protection of children and the family, which sustained women's demands for the state to fund and manage welfare programmes. These "maternalist" approaches are manifest in women's participation in the Pan-American Child Congresses since 1916. These congresses addressed child rights and topics such as abandonment, adoption, education and child criminality, depicting the state as responsible for the protection of mothers and children (Guy, 2000b). In Ecuador, maternalist approaches influenced feminist authors who posited women's responsibility in child-rearing as decisive to raising good citizens, linking the discourse of child protection to women's demands to access education, paid labour, property, votes, citizenship and public life in general (e.g. Rendón, 2006a). Women thus found ways to enter national debates that revolved around "modernizing" and "civilizing" the nation, and were able to negotiate some opportunities for themselves.<sup>24</sup> Prominent feminist Zoila Rendón wrote extensively about the relationship between women, the home, and the nation and while agreeing that the most patriotic duty of women was motherhood, she also argued that to achieve such goal it was necessary to let women access higher education, not only in matters related to housekeeping and child-rearing, but in broader aspects of knowledge (Rendón, 2006a). In this way, "conforming" femininities were used

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<sup>24</sup> Maternalist feminists linked women's issues to children and family, arguing that legal reform regarding custody, adoption and mother's rights, was necessary to help mothers take care of their children (Guy, 2000). Thus, several women's organisations in the turn of the 20th century focused in fighting to obtain *patria potestad* (parental authority) and children protection.

strategically to support advancements regarding women's participation in public life, but the acceptance of these normative paradigms was necessary to enable an engagement with law.

Although some authors have affirmed that criminal law has not been as decisive as civil law or disciplinary power to normalise femininity (S. Correa, 2008; Zaffaroni, 2009), old laws show that women have been constructed as subjects of criminal law when they deviate from their assigned family roles. Acknowledging this problem, in 1948, Zoila Rendón (2006c) presented a thesis at the first International Congress of Mothers in Argentina, addressing, amongst other topics, women's status in the Ecuadorian penal code. She had delivered a petition to the Constituent Assembly of 1928-1929, which included a demand for "legal equality in criminal law, with identical sanctions for common criminal offences" (2006, p. 104). The first issue she denounced was the criminalisation of adultery. Since the enactment of the first Ecuadorian penal code, adultery had been an offence that could be committed by women only. There was no equivalent category for men; although from 1938 a husband's continued cohabitation with a mistress (known as *amancebamiento*) was introduced as a criminal offence (see Table 1, 1938, Art. 479). By contrast, adultery could be committed by women with a single event of sexual intercourse outside of marriage. In other words, women's sexuality was policed at all times, while men's non-monogamous behaviour was only penalised if it blatantly disrupted family life. Also, a spouse who caught the other committing adultery and then killed her and/or her accomplice was not criminally liable (see

Table 1, 1906, Art. 24).<sup>25</sup> Since only women could perpetrate adultery, the article virtually authorised the killing of unfaithful wives.<sup>26</sup>

<i>Table 1: Legal reform of adultery (1906-1938)</i>			
1906	1938	1983	2005
Article 378.- The woman convicted of adultery, will be condemned to prison for three to five years. The husband may suspend the effect of this sentence, by consenting to take his woman back.	Art. 479.- The following persons shall be punished with imprisonment from six months to two years: 1. The woman who commits adultery; 2. The partner of an adulterous woman; 3. The husband if he keeps a mistress within or without the conjugal home; and 4. The mistress of the husband.	Repealed.	
Art. 380.- Prosecution or sentencing for adultery may take place only at the request of the husband, who will not be able to pursue it in the following cases: 1. If he has consented to the unlawful treatment between his wife and the adulterer; and 2. If he has voluntary and arbitrarily separated his wife from his side or abandoned her.	Art. 480. No action may be proposed by the husband against his wife if he has consented to the unlawful treatment of her and the adulterer; or if he has voluntarily or arbitrarily estranged himself from his wife, or has abandoned her.	Repealed	
Art. 24. There is no infraction either when one spouse kills, injures or hits the other, or their accomplice, at the moment of catching them in the act of adultery; or when a woman commits the same acts, in defence of her seriously threatened modesty.	Unchanged	Unchanged	Repealed

<sup>25</sup> Article 22 of the Ecuadorian Penal code was reformed in 2005 following a proposal and draft presented by the National Women’s Council (CONAMU) with the cooperation of women’s NGOs and feminist lawyers. See Chapter 5 for more details.

<sup>26</sup> In practice, the provision was inapplicable due to the difficulty to obtain evidence. There is no binding jurisprudence (case law) on the criminal prosecution of adultery. Adultery was decriminalised in 1983 following the advice of (male) liberal scholars of the time, who considered the provision to be archaic (Albán, 2012; Chico Peñaherrera, 2004). Adultery remains legal grounds for divorce per the Civil Code.

In her thesis, Rendón did not question the criminal category of adultery as such — this would have been at odds with her own arguments regarding the role of women as devoted mothers and wives—. Instead, she denounced men’s impunity. Her critique was grounded in the liberal notion of equality which, she reasoned, meant that men should be punished in the same way as women. She resorted to this argument again to address other criminal offences: regarding the crime of prostitution-procuring, she argued that the men who requested sexual services from an underage woman should also be punished, not only the pimp. She went on to address abortion and the fact that although women were (rightly) criminalised for this offence, there was no established penalty for the men who impregnated them and then abandoned them or facilitated the procedure. An analogous argument was made regarding infanticide: women often killed their infants moved by economic precariousness and despair, yet only mothers were liable for the crime, even though their situations were caused by the men who fathered the children and abandoned them.

Rendón framed her critique of criminal law in terms of inequity, which in her view revealed women’s “legal inferiority”. The inequality she denounced was expressed through the demand that men who harm women and facilitate the conditions under which they offend, be punished just like the women who perpetrate the offences. However, the fairness of punishment, its legitimacy, or the ways in which the criminal offences distinctly subordinated women, were not explicitly addressed. Through the discourses available then, Rendón’s critique exposed inequality before the law, but not necessarily subordination through the law, as the Marxist and indigenous stances had. The influence of Catholic values and colonial continuities were reflected in the way Rendón accepted essentialist sexual

difference and normative gender roles, but she also rejected the inequalities that derived from such distinctions, using notions that could vindicate women within the status quo.

Importantly, in comparison to her own earlier maternalist writings, the thesis on criminal law constituted a diversification in Rendón's approach, as it moved away from child protection to a critique that centred women's suffering, albeit not challenging dominant familial ideologies directly. Rendón made the point that many of women's reprehensible behaviours were the consequence of equally outrageous actions by men, and a closer look at her arguments reveals that she was denouncing the vulnerable condition of women which results from the exercise of masculine power, and therefore demanded that society recognised and condemned these injustices. In an earlier text, Rendón (2006b) had referred to the "seduction" of unmarried women and the shame, abandonment, and public ridicule to which they were subjected when they "lost their virtue". She subsequently demanded that the Ecuadorian state intervene and protect unmarried mothers in the same way it protected married ones, which challenged the convention that only "virtuous" (married) women deserved welfare assistance. This reveals Rendón's drive to make women's suffering visible, exposing how this suffering was caused by a dominant (male) understanding of justice, which in turn prevented women's needs from being addressed by the state. Expounding the ills of criminal law was Rendón's way to denounce women's pain, overcome their labelling as evil or deviant, and demand state intervention, not in the form of new criminal law but mainly as welfare and support.

Marxist and indigenous trends, in comparison with liberal/maternalist stances, were usually more critical of institutions, including the penal system. Rendón mainly addressed the absence of a legal value —equality— within a set of penal provisions that were in

principle accepted as legitimate. Conversely, the Marxist and indigenous approaches questioned the violence that emanates from state law itself. In both cases, however, the idea of creating penal categories around forms of VAW was absent. Evidently, these early feminist critiques did not result in criminalisation proposals. The possibility for Ecuadorian feminists to demand penal reform would only come about with the emergence of a women's movement that was gradually professionalised, established transnational networks, gained access to governing spaces, and mainstreamed its demands through state agencies as well as emerging NGOs and international organisations.

## 5 THE NASCENT WOMEN'S MOVEMENT AND THE REPEAL OF SEXIST LAWS (1970s-1980s)

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In this section I address the decades during which the strand of the women's movement which would later engage in penal reform, emerged and became differentiated from other political groups. During this period, women's organisations managed to attain the repeal of some penal provisions which authorised VAW. I demonstrate, however, that feminists did not see the creation of criminal categories as a suitable response to VAW. In many cases, VAW was posited as a problem of welfare and social security. During the 1970s, military dictatorships ruled across Latin America. It was also the decade of "second-wave" feminism. Although the distinction between feminist "waves" is not always applicable in the region (Miller, 1991), from the 1970s onwards, women's movements begun discussing

issues besides suffrage, labour, and motherhood. They started to recognise women's subordination as a pervasive pattern, which led them to question gendered roles as social impositions. In Ecuador, organised female participation in political life increased from 1975 onwards, when the rejection of the military regime led to increased mobilisation and protest (UNESCO, 1984). Leftist university groups that had cooperated with trade unions since the dictatorship years, were the first spaces where self-identified feminists organised. Many of the ones who are considered *históricas* (historical feminist leaders) today, began their political activities at university associations.

Through the 1970s, links were established between women's issues and economic growth, especially in emerging fields such as Women in Development (e.g. Boserup, 2007). International cooperation facilitated the dissemination of discourses that called for national modernisation and promoted the revision of the "archaic" laws that undermined the status of women. For instance, married women's economic and legal dependency on their husbands began to be regarded as an obstacle for women's inclusion in development. Ecuador subscribed to the World Plan of Action from the 1975 United Nations World Conference on Women, which contained recommendations pertaining to legal reform to facilitate women's incorporation to development. In effect, through the 1970s some liberal reforms, at the time controversial, passed.<sup>27</sup> These included a new regime which preserved the legal capacity of women after marriage, allowing them to perform legal transactions without the authorisation of their husbands. Many of these changes were leveraged by

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<sup>27</sup> The paradox of liberal legal reform taking place in Latin America during military dictatorships, (which are generally regarded as conservative in matters of women's rights), has been addressed by Htun (2003), whose main argument is that it was the existence of "expert issue networks" paired with the ability of elite reformers that determined the possibilities for policy change. I would add that the influence of international cooperation was also crucial.

economic development requirements: for example, the administration of communal property, which had been an exclusive right of husbands, was now to be shared by both spouses at the request of international organisations (UNESCO, 1984) supported by the interventions of liberal jurists (Htun, 2003). These factors facilitated the first civil law reforms expanding women's individual rights.

Re-democratisation in 1979 brought opportunities for feminists to enter mainstream politics working at ministries, secretariats, and other state bureaus (Molyneux, 2000). Ecuador was the first country in the region to return to democracy with the election of Jaime Roldós Aguilera as constitutional president.<sup>28</sup> The actions undertaken by his wife Martha Bucaram, a lawyer involved in groups which promoted women's rights in Guayaquil, initiated the institutionalisation of feminist politics through the activation of the Women's National Bureau (*Oficina Nacional de la Mujer, OFNAMU*), which had existed on paper since 1970 by request of the Organisation of American States (UNESCO, 1984), but only became operative under the new regime. This process, which mirrored the rise of women's bureaus in other Latin American countries (Chant & Craske, 2003), opened opportunities for feminists to participate in decision-making, often with the support of international agencies.

Yet, in the early 1980s, criminal justice was not seen as a means to counteract VAW in Ecuador nor the broader region. For example, the Latin American and Caribbean Feminist *Encuentros* (meetings) which started in 1981 and continue to this day, did not prioritise the declaration of women's rights nor the promotion of penal reform. They more urgently

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<sup>28</sup> Jaime Roldós was a populist young politician with no affiliation to the traditional right-wing or Marxist-left parties. He was also a firm promoter of human rights at a time of prevalent authoritarian rule in the Southern Cone, and the circumstances of his death in a plane crash have never been thoroughly clarified.



demanded social measures that could help women in their everyday struggles against poverty and discrimination (Navarro, 1982). A conceptualisation of patriarchy as a large-scale system of domination that included militarism, authoritarianism, obligatory heterosexuality, homophobia, and violence against women, was outlined at the very first Encuentro. This framing was developed further in later *Encuentros* which emphasised the complicity of the state in various forms of VAW. November 25th was declared the International Day of Non-Violence Against Women, in memory of the Mirabal sisters, killed during Trujillo's dictatorship in the Dominican Republic.<sup>29</sup> However, VAW was not framed in terms of rights, it was regarded instead as a matter of political subordination connected to issues of social redistribution and state violence.<sup>30</sup>

There were arguably four strands of women's rights activists in Ecuador at the time: working-class/popular women (some involved in leftist parties); bureaucrats; *damas* (upper-class ladies) who worked in charity and philanthropy; and women's NGOs (Lind, 2005). The strand that would most notably engage in anti-VAW campaigns emerged as result of NGO staff experiences in implementing development programmes at popular sectors. For instance, the Ecuadorian Centre for the Promotion and Action of Women (*Centro Ecuatoriano para la Promoción y Acción de la Mujer*, CEPAM), founded in Quito in 1982 and active to this day, was one of the first entities to offer services to women suffering domestic

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<sup>29</sup> This date was later taken up by the UN and declared it International Day for the Elimination of Violence Against Women (<http://www.un.org/en/events/endviolenceday/>)

<sup>30</sup> This trend has been relatively constant at the *Encuentros*. During the 2010s, for instance, one central topic was femicide, which refers to the genocide of women centring the responsibility of the state. The documents of the encounters are generally careful at acknowledging women's popular organisations, diversity in sexual orientation and forms of sexual dissidence, and recently, decolonial discourses have become important tools to express rejection of advanced capitalism. The *Encuentros* have also officially opposed certain UN processes, such as Beijing 1995, which they criticised for being organised with little participation from feminist autonomous collectives.

abuse (CEPAM, 2014). The organisation targeted popular neighbourhoods particularly, where it offered medical advice, counselling, and legal assistance on issues such as divorce and child alimony.

However, just like the feminists at the international *Encuentros*, Ecuadorian women in popular sectors did not conceive the solutions for VAW in terms of legal change. For instance, there is a 1984 report to the UNESCO which covers some meetings carried out by women's trade unions and neighbourhood organisations, which were convened by CEPAM. These meetings mainly addressed worker's rights and social benefits, as well as women's daily struggles for survival: many lacked access to basic services, education, and training to potentially get better jobs; they also required better transportation links, and more medical centres. It is reported that at one meeting in which women leaders from popular neighbourhoods in Quito gathered together, husband abuse against women and children was raised. Women were concerned that there was "no one to turn to for help" (UNESCO, 1984, p.35). Their claim was for an entity to assist them when they suffered abuse, and, importantly, the predicament was not framed as absence of legislation; it was rather posited as one of the many hardships that women endured due to social marginalisation. While the researchers who wrote up the report for the UNESCO posited the problem as "lack of insertion into the productive process" (UNESCO, 1984, p.44), no one proposed penal reform as a solution. In fact, the first women's penal reform projects in Ecuador were oriented at analysing the content of the penal code from a feminist standpoint and proposing the annulment of discriminatory provisions, as I show next.

## 5.1 THE FIRST MEETINGS TO REFORM THE PENAL CODE: TACKLING DISCRIMINATION

In 1980, Ecuador signed the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and ratified it in 1981. The Convention, which today is considered an international bill of women's rights, emerged from the UN's World Conferences on women, which were in turn informed by the Gender and Development field (Fraser, 1995). The latter aimed at identifying gender-based differences in access to resources and good working conditions, which led to the identification of VAW as a phenomenon that affects women's personal and social development (Cuvi, 1999; C. Miller & Razavi, 1995). The CEDAW did not initially mention VAW, but its ratification has been identified as a key factor leading to legal reform on VAW in many countries (Hallward-Driemeier, Hasan, & Rusu, 2013).<sup>31</sup>

In Ecuador, the first joint efforts to propose changes in civil and penal legislation began in the early 1980s. In 1982, the first workshop to discuss "Women in the Ecuadorian Legislation" took place in Guayaquil (Valdez, 1982), resulting in a set of drafts elaborated by feminists, which addressed cases of discrimination and proposed changes such as the elimination of the "carnal act excuse" from the penal code (detailed below), and an equal legal treatment of adultery through the penalisation of men and women identically, a topic that had been addressed by Zoila Rendón. These proposals, despite being delivered to representatives of legislative organs, did not result in any legal change. However, the initiatives facilitated the formation of feminist networks during the 1980s, including "Action

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<sup>31</sup> In 1982, the General Recommendation 12 advised states to present reports on VAW indicators, and a decade later, in 1992, the General Recommendation 19 declared gender-based violence a form of discrimination.

for the Women’s Movement” (*Acción por el Movimiento de Mujeres, AMM*), created in 1986.<sup>32</sup> This was one of the first spaces where a set of women’s demands directed at the state was put together. The proposals, which included petitions to parliamentary candidates, came to be known as “the green portfolio” (former AMM member, personal communication, March 16, 2015). The portfolio promoted the creation of the first “Parliamentary Commission for Matters of Women, Children, and the Family”, which crystallised in 1988 and was referred to in feminist press as the first public achievement of the women’s movement (Ayala Marín, 1988). The members of the Commission were the only female legislators at the time,<sup>33</sup> who did not have links with the women’s movement, nor identified themselves as feminists.<sup>34</sup> Nonetheless, the Commission was an important ally of the AMM. For instance, it promoted a reform to the Civil Code which was enacted in 1989, broadening married women’s rights to conjugal property and facilitating legal divorce.<sup>35</sup>

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<sup>32</sup> Another historical feminist network formed in 1986 is the local *Red de Mujeres del Azuay* (Azuay Network of Women), which grouped mainly socialist feminists and constitutes an important precedent of feminist action in the south of Ecuador.

<sup>33</sup> By 1986, Cecilia Calderón was the only woman at the Congress; she had no links with the women’s movement. In 1988, there were three women in the Congress, including Calderón. They arrived at the legislature through their political parties and not via the women’s movement’s sponsorship. While by 1990 there were five congresswomen —the highest number thus far—, representing less than 7% of the total of representatives (Ayala Marín, 1990), analyses suggest that during the 1990s and early 2000s most women in parliamentary posts were included in electoral lists due to quota laws or as the result of their relationships with male politicians (Mosquera Andrade, 2006); once in office they would be appointed to “women and family issues” commissions, frequently due to their alleged lack of knowledge in legal and economic matters.

<sup>34</sup> One of the three congresswomen, Teresa Minuche, publicly made the point that she was not a feminist (Baquerizo, 1988). Some feminists showed concern with this. Estrella Cedeño (1988) wrote about the importance of preserving a “feminist conscience” despite the diversity of the women’s movement.

<sup>35</sup> The reforms were not unopposed: prominent jurists, such as priest Juan Larrea Holguín, famously disputed them arguing that they constituted an aggression against the family institution (Larrea Holguín, 1989), while businessmen asserted that women’s economic autonomy disrupted the dynamics of commercial companies and obstructed trade (Briones, 1989a).

In 1988, the Commission alongside women's organisations, convened the first national meetings on "Criminal Law and Women" to study potential reforms to the Penal Code. For the first time, discriminatory provisions were publicly discussed. Around 200 representatives of women's organisations from different provinces of the country attended. The resulting proposition was to reform 23 articles of the penal code to "erase [their] patriarchal traits" and to tackle "day to day acts that affect women and minors of both sexes" (Ayala Marín, 1989b, pp. 5-6). As we know, penal constructions of women and the family were based on colonial representations of domesticity which subordinated women, thus feminist penal reform projects sought to repeal the provisions that legitimised VAW, rather than propose legislation. The drive to defeat sexist provisions was apparent: while more controversial topics such as the decriminalisation of homosexuality and abortion were not discussed, the event was celebrated as a feminist accomplishment. CEDAW was cited as the basis to reform "laws that are still sexist" (Ayala Marín, 1988, p. 3). These are also the first instances where an international instrument was used by women's organisations and feminist networks to press the state to reform domestic legislation.<sup>36</sup>

In 1989, Article 27 of the Penal Code, which excused the killing of women who were caught committing an "illegitimate carnal act", was declared unconstitutional in response to a lawsuit signed by Anunziatta Valdez and Mercedes Jiménez, two feminist lawyers who

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<sup>36</sup> The CEDAW does not prescribe sanctions for countries that do not comply with its mandates, but the CEDAW Committee has an international prestige that allows it to expose lack of compliance through the publication of comments and reports that account for state policy measures oriented at eliminating discrimination. One aspect of the CEDAW monitoring process is that it provides spaces not only for government commissions, but also for women's NGOs to present their views through the reception of "shadow reports", which I analyse in the next chapter.

presented the petition before the Tribunal of Constitutional Guarantees.<sup>37</sup> The resulting nullification was received with joy: a news release published in Fempress, a transnational feminist newsletter, referred to the defeated article as a provision that had authorised men to kill women (Cuvi & Buitrón, 2006).<sup>38</sup> Its annulment was celebrated as a feminist triumph.

*Table 2:Reform of the "carnal act excuse" (1906-1989)*

1906	1938	1989
Art. 30.- The infraction that <i>one</i> commits when catching one's daughter, granddaughter or sister during carnal act, is also excusable, whether one kills, injures or beats up the <i>delinquent</i> , or the man who lies with her.	Art. 27.- Likewise, the infraction committed by <i>a person</i> who catches their daughter, granddaughter or sister during <i>illegitimate</i> carnal act, is excusable, whether the person kills, injures or beats up the <i>guilty</i> woman or the man who lies with her.	Declared unconstitutional.

## 5.2 DISPLACED PERSPECTIVES: LAW IS INVOLVED IN OUR OPPRESSION

This subsection highlights some feminist stances which appeared through the 1980s and explicitly challenged the value of legal reform to improve women's lives. Feminist publications from the late 1980s continued to denounce sexist laws which were regarded as result of an imposition of "men's honour and women's modesty", which were deemed

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<sup>37</sup>As shown in Table 2, the article had been reformed in 1938. The excuse originally targeted any "carnal act" and it deemed women who were found engaging in sexual relations, "delinquents". In the 1938 code, the active subject of the offense changed from "one" to "a person", and the carnal act was now to be "illegitimate" —presumably to prevent the possibility of a father killing his own son-in-law if found engaging in sexual relations with his daughter—. The woman was now called "guilty" rather than delinquent. The changes had been inspired by the Italian code of 1930 and the Argentinian code of 1922 (Albán, 2012), which were considered modern. But the words "daughter", "granddaughter" and "sister" preserved their feminine form, therefore hardly entailing any significant difference, as killing sons, grandsons and brothers was never excused.

<sup>38</sup> This is not totally accurate; in the Ecuadorian system, an "excuse" functioned as an incomplete exclusion of criminal liability which resulted in a reduced sanction for the defendant.

patriarchal traits (Ayala Marín, 1989a, pp. 5-6). An example is statutory rape,<sup>39</sup> which was reformed only in 2005 and until then read: “Art. 509.- Statutory rape is intercourse with an *honest* woman, resorting to seduction or deception to achieve her consent” (Código Penal, 1971, emphasis added). As a 1988 Matapalo magazine article noted, only “honest” women could be victims of statutory rape, which implicitly excluded “deviant” women (such as sex workers) from the law’s scope of protection, as they would not be considered “honest”. Marena Briones, the feminist lawyer who authored the article, claimed that these rules exposed women’s status as second-class citizens who were actively discriminated against by the Penal Code (Briones, 1988a). She emphatically condemned the moral underpinnings of the penal regulation of women’s sexuality, which in her view protected values such as chastity and virginity, exposing the family as the “origin of women’s oppression, because it has been until today a patriarchal institution that has glorified the reproduction of the species, and law has consolidated the inequalities” (Briones, 1988a, p. 4).

Briones’ opinion pieces, published in various magazines through the 1980s,<sup>40</sup> stand out due to their critical stance regarding the emancipatory power of law. In several texts, Briones expressed her concern that the law was more of an obstacle than a means for social change, and that it is limited by its bourgeois and sexist biases, which subject women to the “patriarchal scheme of the father/husband/employer” (Briones, 1988b, p. 9). At the time,

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<sup>39</sup> In Ecuador, statutory rape (*estupro*) does not refer to consensual sexual relations with a person under the age of consent as it happens in other legal systems; it refers to consensual sexual relations with a youth over the age of consent but obtained through seduction or deception. Relations with children under the age of consent (14 years of age) are always penalised and considered simply rape.

<sup>40</sup> Importantly, while some of Briones’ articles were published in magazines dedicated solely to women’s issues, others circulated widely as supplements alongside national newspapers. Such is the case of “Matapalo”, a publication that regularly included feminist opinion pieces. Some critical perspectives on law were thus disseminated at a large scale.

feminist legal reform projects were starting to be put together, as legal strategies were being discussed in international fora for women's liberation (Briones, 1989). However, Briones was suspicious of such tactics, as she questioned that the legislation could be an instrument of emancipation (Briones, 1989b). She instead stressed that law, as a cultural and social product, cannot be regarded as neutral, objective, or apolitical (Briones, 1989c). Regarding the Penal Code specifically, she considered that there were articles that urgently needed to be repealed. She argued: "women have one more challenge: to discover our marginality within [law] and strive to defeat it" (Briones, 1989c, p. 8).

Besides lawyers, politicians, and activists, feminist academics also scrutinised the role of law and other normative discourses in the oppression of women. For example, 1989 research project from the Centre for Planning and Social Studies (*Centro de Planificación y Estudios Sociales*, CEPLAES) stated:

It is not only the individual experience of women we are interested in, but the matrix of social relations in which those particular experiences are settled; for instance, how the laws, the policies targeted at women from the state, the social institutions, the media, *facilitate* gender violence or not (María Cuvi cited in Ayala Marín, 1989c, p. 10-11, emphasis added).

The authors argued that Marxist approaches were insufficient to analyse the "micro-politics" of the home and intimate relationships. They spoke about law and policy as instruments which are involved in the production of violence, thus challenging the alleged



neutrality of state policy. Overall, the various feminist stances that denounced the law's "complicity" in the subordination of women, translated into the expression of a desire to defeat the law, embodied in reform proposals aimed at *annulling* rather than enacting legal provisions. However, these stances would later be displaced by campaigns proposing the creation of new laws, based on a construction of law as a neutral tool, not a politicised structure. This was not because the denounced discriminatory provisions had been overcome—in fact, some remained in force until the 2000s. However, as I show in the next chapter, the sceptical style of feminist critique that could be found through the 1980s was displaced by the discourses mainstreamed in the 1990s, which would increasingly represent law and rights as a means to reach emancipation and equality.

## 6 CONCLUDING REMARKS

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This chapter first exposed the colonial norms embedded in state policy on domesticity and the family, which reflected dominant discourses on family roles and associated the ideal family with whiteness, heteronormativity, and "non-violent patriarchy". Law's role in subordinating women was identified by many feminists and denounced, first, by women in the Marxist left and early indigenous organisations, and then by maternalist feminists who built on liberal perspectives on equality. However, the Marxist and indigenous strands would not inform later engagements with legal reform. On the other side, feminists like Zoila Rendón, who came from an upper-middle class circle, tended to trust in and appeal to liberal notions of law and justice. Later, counter-hegemonic accounts of penalty emerged

from discussions such as the ones held at the Latin American *Encuentros*. Feminist lawyers and researchers in Ecuador wrote critically about the role of law in women's oppression from the mid-1980s onwards.

I have thus shown that the first feminist achievements in penal reform did not have the purpose of penalising behaviours but rather of repealing discriminatory provisions. At the same time, I demonstrated that there were feminist stances which expressed scepticism regarding the benefits of penal reform. These critical points of view framed law as a potential reproducer of violence and likely insufficient as a mechanism to address an oppression that is deeply political. These forms of engagement were reflected in the actions carried out by the 1980s feminists, who sought to eliminate sexist provisions from the Ecuadorian legal system. In this way, I have established that many feminists endorsed a perspective which contrasts visibly with the rights-based discourses that would arise from the 1990s onwards. Along the line, I have suggested that already within this "pre-penal" period, certain feminist approaches had more resonance than others, as was the case of the equality-based discourses present in Zoila Rendón's critique, the CEDAW, and the penal reforms of the 1980s. These were more successful in reaching governance agencies than others such as the Marxist stances, the indigenous perspective, the Latin American *Encuentros*, or popular sectors' appeals to state welfare. The position occupied by political actors, who can be included in prevalent definitions of citizenship to different extents, is thus a factor linked to the opportunities they get to endorse and propose legal reform through various political periods.

## CHAPTER 3

# Recognising Rights, Criminalising Injuries: The rise of Penalty in Feminist Approaches to Domestic Violence (1990s-2000s)

### 1 INTRODUCTION

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In this chapter, I argue that feminist penal approaches to VAW are historically connected to the rise of the international women's human rights discourse. In Chapter 2, I demonstrated that until the mid-1980s feminist engagements with criminal law mainly consisted in denouncing the sexist biases of the legal system. As penal constructions of women and the family were based on colonial representations of domesticity, feminist penal reform projects sought to repeal the provisions that legitimised VAW, rather than propose new legislation. The setup of women's state offices, the incorporation of some women to the legislature, and the rise of women's NGOs, were factors that facilitated the attainment of the repeals. By the late 1980s, international human rights instruments started to generate enthusiasm amongst many feminists, which contrasted with previous sceptical stances that identified criminal law as deeply involved in the oppression of women.

In this chapter, I focus on the most prominent topic of feminist legal work at the time: domestic VAW and the creation of legal mechanisms that could help palliate its effects.

The chapter begins with an introductory reference to the emergence of domestic violence as a social phenomenon and field of study, which was defined through disciplines such as psychology, public health, and economic development, in a context that encouraged scientific approaches to public policy design. To explain the emerging trends in approaches to domestic violence, I use the idea of “governmentalisation” (Foucault, 1991), understood as a process whereby the different actors that manage the conduct of individuals and groups, rationalise their goals and strategies by acting in a calculative manner towards the improvement of the population. The “governmentalisation” of domestic violence had commonalities with previous approaches to the regulation of domesticity. Professionalisation was key in the consolidation of the mainstream women’s movement, while economic development projects allowed NGO staff to witness the struggles of disenfranchised women, including domestic abuse. These grounded experiences also shaped the type of engagements feminists would have with law. It is my contention that these governmental constructions of domestic violence, and the idea that rights are only justly recognised when their violation is categorised as a crime, contributed to the rise of criminal justice as the main framework to address VAW. Through an examination of historical documents from the United Nations (UN) and the Organisation of American States (OAS), I show how the call for penal intervention emerged and intensified through the expert recommendations issued by these agencies. Penalisation was thus mainstreamed internationally as an essential component of the recognition of women’s rights.

With these antecedents, the chapter will move on to trace the impact of the turn to criminal justice on Ecuadorian feminist law-making. Through the 1990s, the idea of using the penal apparatus to address VAW arose, spread, and ultimately led to the creation of Act

103, the first law against violence toward women and the family. Here, I incorporate the testimonies of the mainly NGO-based feminists who promoted the draft-bill. In this way, I address the question of how feminist activists have historically justified the use of penalty to counteract VAW. Alongside the human rights framework, through my analysis of feminist interventions in the creation of Act 103, I also show that the role of the national legislature was key in the adoption of a punitive framework. The original draft-bill proposed by feminists did not initially contemplate incarceration. This process of penalisation, which targeted violence in domestic spaces, resonates with some provisions described in Chapter 2, which were mediated by race, gender and class. Again, domestic violence was portrayed as a danger to family harmony, without challenging traditional gender roles or linking it to the systematic subordination of women. This understanding of violence as a threat to the family facilitated the positive reception of the reform by the legislature, which in turn adapted the text to the existing penal system. This entailed the application of the ordinary rules for misdemeanours (minor offences) to most cases of domestic violence, which included short terms of imprisonment as sanctions. In this way, feminist proposals were reframed through family-protection narratives and criminal justice procedures. This will be demonstrated through a close reading of the recorded parliamentary debates preceding the enactment of Act 103, the testimonies gathered during fieldwork, and an analysis of the relevant legal provisions and policy documents.

## 2 THE PERSONAL IS GOVERNMENTAL: TECHNICAL PERSPECTIVES ON DOMESTIC VIOLENCE

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In Chapter 2, I examined the postcolonial rationalities underpinning early state interventions in domesticity, such as nation-building, racial optimisation, the protection of harmony in the family, and the idealisation of men as breadwinners and women as domestic guardians of the nation. Colonial discourses elicited diverse responses from feminists over time, from the indigenous and Marxist denunciations of state violence to the maternalist-feminist condemnation of non-egalitarian laws. These critiques influenced the burgeoning women's networks which, during the 1970s and 1980s, would demand the repeal of discriminatory penal provisions. By the 1990s, the gradual professionalisation of the women's movement contributed to solidifying a technical approach to VAW (Alvarez, 1999; Rodas Morales, 2007c).

Discussions within feminist networks begun to revolve around ways to tackle domestic violence efficiently and the question was often answered by NGO staff from the perspective of disciplines such as public health and economic development, which surfaced from the approaches utilised by their funding agencies (Cole & Phillips, 2008). The Gender and Development field started to refer to VAW as a phenomenon that affects women's personal and social development, and more widely, the development of the population (Cuvil, 1999; C. Miller & Razavi, 1995). The World Bank (2000) identified male violence against women as a "gender-related development issue" (p. iv) which was also associated with public health concerns, for instance, the prevalence of alcoholism. Unlike feminist

critiques, these accounts often omitted to address violence as an effect of deep-rooted patriarchal structures. At the same time, while feminists preferred to use terms like “patriarchy” and “sexism” during the 1980s, “gender”, “gender approach” and “gender perspective”, became the most frequent expressions through the 1990s.

For their part, the women’s NGOs which worked in popular sectors began to collaborate with the state in the implementation of programmes to incorporate women into development, such as community (non-state) networks for child-development established from the late 1980s.<sup>41</sup> These had the purpose of assisting women in their incorporation to paid labour and public life. One activist who was initially involved in such projects and later led anti-VAW campaigns told me that her work in rural neighbourhoods, where she witnessed first-hand how women were mistreated on a daily basis, allowed her to understand the magnitude of domestic VAW. Likewise, a staff member of a veteran NGO stressed that her work initially comprised economic development projects which included providing microcredit for women in popular sectors. These activities made her aware that domestic violence was rampant in the highlands, where she was based. As development projects put NGO staff in direct contact with peasant, indigenous, and impoverished women and their families, domestic abuse was identified as a priority. NGOs then initiated programmes to assist violence survivors and staff begun to think of ways to help battered

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<sup>41</sup> Many of these were established during the presidency of Rodrigo Borja (1988-1992) and were presented as a way to overcome paternalistic approaches to social welfare; however, they operated on the assumption that women could absorb the costs of services by providing unlimited amounts of their time for little or no pay, thus becoming the bearers of the state’s welfare responsibilities (Bedford, 2009; Lind, 2005). These day-care centres, are an example of how the formulation of traditional gender roles has served to institutionalise women’s struggles for survival (Lind, 2005).

women. In effect, NGOs founded the first shelters for battered women in the early 1990s,<sup>42</sup> often alongside legal departments offering advice mainly in civil areas such as divorce, child custody and child support pensions. According to staff, the reality of domestic violence had become crudely apparent, driving them to conclude that they needed to expand the scope of their services.

Development and public health discourses were also useful for feminists arguing that domestic violence should be taken more seriously. The Pan-American Health Organisation (PAHO) identified domestic violence as a risk factor for women during their reproductive cycle (Cuvj, 1999), and the expression “health with a gender perspective” became common in technical texts that endeavoured to show professionals how to identify domestic abuse, presenting violence as a threat to family well-being. The Demographic Survey of Maternal and Infant Health (*Encuesta Demográfica de Salud Materna e Infantil*, ENDEMAIN), sponsored by the United States Agency for International Development (USAID), was carried out in Ecuador every five years from 1987 to 2004. This was the first and, until recently, the only source of statistics on the incidence of domestic violence, measured through reports of maternal health. The data was used by women’s organisations as evidence that domestic violence was generalised and therefore required public policy responses. In fact, researchers have shown that statistical information is often a useful resource for weaker political negotiators (Porter, 1996). While most feminists do understand domestic violence as a political problem, to push governing institutions to

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<sup>42</sup> *Casa de Refugio Matilde*, the first in the country and one of the earliest in Latin America (Zambrano, 2015), was created in Quito in 1990 with the sponsorship of CEPAM. It implemented assistance guidelines that were standardised and involved aspects such as social work, medical care, psychological counselling and legal advice.



respond, the organisations had to use discourses that already had legitimacy and credibility, given that their power as political actors was not stable. These technical approaches also enabled definitions of VAW from perspectives outside of feminist critique, facilitating the support from the state and transnational agencies (Cole & Phillips, 2008), but frequently masking the political aspects of gendered abuse.

Also, domestic violence was formulated as a risk for mental health. Psychology provided many of the notions that are still widely used by women's organisations and state agencies. For instance, a late 1990s report on VAW sponsored by the PAHO (Cuvi, 1999) shows that NGO staff frequently framed abusive partnerships through the concept of "affective dependence", which is said to confine women to a dead-end determined by the "cycle of abuse".<sup>43</sup> The latter is mentioned in virtually all printed materials related to VAW ever since, and was cited by most informants I interviewed for this project. Women's refusal to leave their abuser is in this way understood as result of a psychological disorder and assessed as a risk situation in relation to their overall health.

From the late 1990s, institutional documents reveal how these technical discourses were linked to women's human rights. For example, a report sponsored by the UN indicates that the Regional Programme of Action for the Women of Latin America and the Caribbean, 1995-2001, referred to human rights and established the strategic guidelines for the protection of women's rights in a "healthful environment" aiming at consolidating

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<sup>43</sup> The "cycle of abuse" or "cycle of violence" is a concept coined in 1979 by psychologist Lenore Walker, who published the book "The battered woman"; it was based on interviews to 1500 women in the United States. Per the model, domestic abuse takes place through three basic stages: 1. Tensions building; 2. Acute incident, when the abuse occurs; 3. Loving-contrition or Honeymoon, when there is no abuse and the incident is forgotten (Walker, 2000).

full respect for the human rights (civil, political, economic, social and cultural) of women in the region, within a context where priority is given to the elimination of gender-based violence and discrimination and to the rights of poor and uprooted women, taking ethnic and racial differences into account (Alméras et al., 2004, p. 17).

Regulating domestic violence thus became a governmental goal, while feminist emancipatory perspectives were to a large extent displaced. Although these discourses made the devastating effects of VAW visible, framing the problem as a maternal health issue, a psychological disorder, or an obstacle for economic development did not challenge traditional gender norms at their origins. Despite the input provided by feminists—which was not usually incorporated by policymakers—, framing domestic violence as a social problem susceptible to technical management facilitated its depoliticisation. Domestic violence was reaffirmed as an obstacle to national development, which converged with racialised distinctions and family-protection discourses. In this way, VAW was constructed as a “genuine” problem and not a mere allegation prejudiced by feminist “ideology”. Thus, state intervention could be regarded as “objectively” necessary.

The discursive formations that legitimised VAW as a site of regulation were vital “conditions of acceptability” (Foucault, 1997) for the implementation of subsequent penal reform processes. In practice, domestic violence was addressed as a threat to families, an obstacle to economic development, and a mental and physical health ailment. These disciplines provided a language to speak about domestic violence and design the solutions.

One of these solutions would be the penal response, which was embedded in these discourses, particularly through international frameworks. At the same time, the penal response resonated with existing legal constructions on family-protection. In the next section, I refer to criminal justice concretely as a system to manage VAW, promoted by the international discourse on women's human rights.

### 3 NEOLIBERALISM, INTERNATIONAL AGENCIES, AND HUMAN RIGHTS

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This section situates the rise of the international human rights discourses, particularly from the UN and the OAS, in a period during which various neoliberal economic policies were implemented across Latin America. Both the UN and the OAS steered processes which led to the creation of international women's rights instruments, which would be significantly influential in Latin America. Here, I reveal that women's human rights brought an unprecedented emphasis on criminal justice to feminist politics, which largely displaced previous welfare-oriented narratives around domestic violence. In this context, critics have also pointed to the crucial role of non-governmental organisations (NGOs) in the dissemination of rights-based approaches, as well as their contribution to the decline of welfare by taking charge of the public services that the state failed to provide. These new governance networks have been identified as potential reproducers of neoliberalism, which may in addition mask neoliberal agendas through human rights discourses.

As mentioned in the Introduction, the universalisation of international human rights has been situated around the end of the Cold War, which coincides with the beginnings of

global neoliberalisation. In Latin America, however, some authors have identified the rise of neoliberalism as early as the mid-1970s, with the beginning of Pinochet's dictatorship in Chile (Taylor, 2006). After the end of World War II and into the post-1989 order, human rights became a symbol of the promise that war atrocities would never again be overlooked by the international community (Meister, 2011). With the collapse of communism, international human rights thus became "the ideology after the end of ideologies" (Douzinas, 2013, p. 51). The proliferation of rights-based discourses converged with the neoliberal turn (Harvey, 2005; Meister, 2011; Moyn, 2010), given that the state needs to ensure the conditions for the free flow of economic entrepreneurship without increasing the provision of welfare. Penal discourses thus centre the importance of managing deviancy and poverty as obstacles for market development (Christie, 2007; Wacquant, 2009), and the protection of the market and individual liberties is attached to penalty as a way to govern and manage "troublesome" individuals. As Nils Christie (2000) has affirmed:

Market economy rules the world with an "obvious" demand for rationality, utility and, of course, profit. The lower classes, easily transformed into the dangerous classes, are there. So are scientific theories with potential for action. [...] Nobody believes in treatment anymore, but incapacitation has been a favourite since the birth of the positivistic theories of crime control (p. 190).

VAW thus begun to be constructed as a human rights violation at international fora from the 1980s onwards. Contemporary international instruments have framed VAW as a

violation of the individual right to a life free of violence and to personal integrity. These representations drew on rights-based discourses as well as the demands of women's organisations which had emerged since the 1970s, such as battered women's movements from Anglo-American countries (Merry, 2006a). The emergence of these movements and their influential roles in international agencies was key to position VAW as a matter of human rights. Accordingly, Latin America experienced a "boom" of international and domestic legislation on VAW during the 1990s, when the discourse of development began to be used to approach women's inequality as a human rights concern. National laws were largely informed by international human rights processes such as the United Nations (UN) world conferences on women, and the Organisation of American States (OAS) Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belem do Pará Convention). Act 103, the first Ecuadorian "Law against violence toward women and the family", was enacted in 1995.

### **3.1 WOMEN'S RIGHTS ARE HUMAN RIGHTS: UNITED NATIONS EXPERTS APPEAL TO CRIMINAL LAW**

The United Nations (UN) have undoubtedly been pivotal for the mainstreaming of women's human rights, in particular through the World Conferences on women. Until the mid-1980s, however, UN framings of domestic violence were not explicitly connected to criminal justice or posited as violations of human rights. CEDAW, for instance, did not originally mention VAW. Likewise, the Copenhagen 1980 report, which is one of the first instances where domestic violence is recognised in a UN document, uses the expression "battered women and violence in the family" to refer to "a problem of serious social consequences" which requires the intervention of states to provide women with assistance

in the form of shelters, abuse rehabilitation, child care, employment, healthcare and housing (United Nations, 1980, p. 67). Similarly, the Nairobi 1985 Report prompted governments to “undertake effective measures, including mobilizing community resources to identify, prevent and eliminate all violence, including family violence against women and children” (United Nations, 1986, p. 47). The end of the Cold War facilitated the clearance of some spaces in the UN agenda, allowing NGOs to access its processes and gain consultative status and negotiating power. This included women’s NGOs which directed their efforts towards (re)positioning VAW at the UN. In this period, the construction of universal goals for women’s movements strengthened (Mendoza, 2002).<sup>44</sup>

In this context, women’s NGOs who lobbied at the UN, considered that the perception of domestic violence as a private matter obstructed its recognition as violation of human rights (Joachim, 1999). For example, the Centre for Women’s Global Leadership (CWGL), based in the United States and directed by Charlotte Bunch, has been identified as protagonist in the process of bringing VAW to the UN (Joachim, 1999; 2007). Bunch and her allies campaigned for a long time, affirming that certain rights violations are connected to being female. They also denounced the failure of mainstream human rights and development debates to address issues such as domestic VAW (Bunch & Carrillo, 1991). Bunch claimed that governments dismiss domestic abuse and refuse to recognise it as a violation of human rights for which they should be accountable. She pointed out that domestic violence is often accepted as normal and tolerated publicly, which is illustrated by

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<sup>44</sup> The interventions of women’s NGOs have been critiqued by many feminists because, although in many cases they act as mechanisms to assist marginalised women, at the same time have become entangled with development apparatuses and neoliberal policies (Nagar & Raju, 2003). It has also been argued that NGOs have facilitated the dissemination of First World feminism to frame the extent and content of women’s rights (Mendoza, 2002).

the fact that some forms of VAW, such as domestic abuse, “are *not crimes in law*” (1991, p. 11, emphasis added). This example illustrates how criminal law was beginning to function as a field of meaning through which the recognition of a legal good and the rejection of the behaviours that can damage said good are expressed. The fact that some forms of VAW were not criminalised was portrayed by many NGOs as detrimental to the recognition of women’s human rights. In other words, lacking penal sanctions for VAW was equated to normalising it. There was an implied equivalence between protecting the rights of women and penalising VAW. Of course, neither Bunch nor other feminists “invented” the linkage between the violation of rights and the penalisation of an offending behaviour; but positing denunciations of VAW in this way resulted in an association between the violation of women’s rights and penalisation as indispensable to respond to the former.

These framings were gradually incorporated to the UN agenda. Examining UN historical documents, I found that the first endorsements of criminal justice to address VAW appeared between 1985 (in the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders) and 1993 (in the World Conference on Human Rights in Vienna). The 1985 Congress for the first time recommended that the UN General Assembly adopt a resolution to explicitly invite member states to introduce “civil and criminal legislation in order to deal with particular problems of domestic violence, and to enact and enforce such laws in order to protect battered family members and punish the offender” (DESA, 1985, p. 51). In 1986, the Economic and Social Council (ECOSOC) convened an “Expert Group Meeting” on “violence in the family with special emphasis on women”. Technical studies and statistics were used to declare that VAW crossed cultures, ethnicities, and social classes, and the grouped experts formulated legal reform recommendations which, in contrast to

the previous welfare-oriented approaches, specifically called for the intervention of the criminal justice apparatus (United Nations, 2010). This is a key moment in the history of penal approaches to VAW. As we see, it is closely tied to rights-based discourses. The experts appealed to the symbolic power of criminal law, stressing that the legislation, in naming and penalising VAW, could *communicate* that domestic violence is unacceptable. This would also fulfil the purpose of *detering* the perpetrator as well as making him *personally* responsible for his actions. These are the cornerstones of the human rights-based penal approach to VAW that would be mainstreamed in Latin America and Ecuador, and the framework already contains all the fundamental concepts utilised by most of the feminists I interviewed during fieldwork. As Joachim (2007) notes, “the criminal justice frame proposed by the experts was a radical departure from the therapy and welfare frames that had been more common until then” (p. 120). This points to the emergence of the approach that would thereafter dominate the mainstream discourse on VAW.

In 1992, the UN Committee on the Elimination of Discrimination against Women introduced General Recommendation No. 19 into the CEDAW, which states that “Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men”. For the first time, VAW was formally framed as a matter of inequality, a hindrance to women’s individual freedoms, and a violation of fundamental rights. Just one year later, the campaigns carried out by Bunch’s CWGL and other NGOs paid off, when the 1993 Vienna Conference declared that “women’s rights are human rights”. During the Conference, a Global Tribunal on Violations of Women's Rights was put together. Representatives of organisations and shelters for battered women, including Latin American collectives, denounced that there were no explicit legal provisions



for domestic violence in their countries, and therefore the police and the judiciary would not take reports seriously when they were filed by women (Bunch & Reilly, 1994). In writing about the Tribunal, Bunch (1994) noted that violence in the family was “the most ignored sphere of human rights abuse” (p. 22). This is another key moment: gendered violence in domestic spaces was explicitly framed as a matter of human rights. Again, the acknowledgement of women’s human rights and the subsequent framing of domestic violence as a human rights violation coincided with strengthened appeals to penal reform. Immediately after Vienna, the UN Declaration on the Elimination of Violence Against Women, drafted by another Expert Group in 1991, was unanimously adopted by the General Assembly. The Declaration recommends that states “develop penal, civil, labour, and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence” (United Nations, 1993, Article 4.d). This confirms the centring of legal and penal strategies during this period.

Penal approaches were further reaffirmed in the 1995 Fourth World Conference on Women in Beijing; its Platform for Action identified VAW as a “critical area of concern” that is exacerbated by “the *lack of laws* that effectively prohibit violence against women; failure to reform existing laws; inadequate efforts on the part of public authorities to promote awareness of and enforce existing laws” (United Nations, 1995, para. 118, emphasis added). The Beijing processes have certainly been decisive for Latin American feminist networks: The Platform prompted the creation of new legislation in virtually every country in the region, indicating a reconfiguration of identities through the incorporation of activists to international agencies and transnational NGOs.

It should be noted at this point, that although UN-style perspectives predominated, they were not uncontested. Feminist movements including black feminism, popular feminism, lesbian feminism, and ecofeminism, to name a few, objected to the ways in which agenda-setting takes place at these fora (Alvarez, 1998; Joachim, 2007). For example, the Latin American and Caribbean Feminist *Encuentros* (EFLAC) have not always aligned with the UN, because they are critical of its centralisation, hierarchies, and the unilateralism of the debate streams (EFLAC, 2014). Activists have also pointed out that UN instruments, which are based on consensus amongst states, often represent the lowest common denominator. For instance, the traditional alignment of Ecuador with the Holy See at the UN has elicited protests from some Ecuadorian women's organisations.<sup>45</sup> These practices of resistance are indicative of the tensions and gaps between mainstream feminist and human rights discourses, and other manifestations of feminism.

Overall, this section has shown how transnational NGOs and the UN played leading roles in positing penalty as frame to address VAW as a matter of human rights. This occurred during a period in which new governance networks were rising and neoliberal approaches to the economy propagated. Both NGOs and human rights have been critiqued for playing a part in facilitating the deployment of neoliberal agendas. At the same time, a new type of transnational feminism emerged around the themes of human rights and VAW. Through various international expert meetings, welfare-oriented approaches were gradually

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<sup>45</sup> Ecuador has traditionally aligned with the Holy See in matters of sexual and reproductive rights at the UN Conferences. While the idea of women's rights as human rights has not been contested by Latin American governments, the Ecuadorian state has supported the Vatican against many feminist claims, opposing many proposals because they undermined "Christian family values" (Alvarez, 1998). For instance, the Holy See and the countries that have aligned with it (such as Ecuador), have objected to the use of "controversial" language including the words "gender" and "sexual orientation" in UN instruments.

replaced by penal-oriented frameworks to convey the wrongness of VAW. These approaches have landed in local spaces through different channels and have been incorporated differentially. In the next subsection, I highlight the role played by the Organisation of American States in the development of a regional Latin American approach to VAW.

### **3.2 REGIONAL BRIDGES: THE ORGANISATION OF AMERICAN STATES, THE BELEM DO PARÁ CONVENTION, AND THE FOCUS ON PENAL REFORM**

Through the 1990s, women's NGOs multiplied in Latin America. The processes by which they came to play a central role in articulating and sustaining feminists movements in the region has been referred to as "NGOization" (Alvarez, 1998; 1999). These processes shaped feminist knowledge in crucial ways (Herrera, 2001). The professionalisation of NGO staff accelerated, producing experts in mediating women's demands before international and domestic governing agencies (Gargallo, 2006). In 1994, the OAS appointed its first Special Rapporteur on Women's Rights. In the same year, it adopted the first VAW international treaty in the world: The Convention on the Prevention, Punishment and Eradication of Violence Against Women, known as "Belem Do Pará Convention" after the Brazilian city where it was signed. The Convention is legally binding for all signing states and has been ratified by all the OAS members except for the United States and Canada. The approval of the convention was the result of the work that the Inter-American Commission on Women (*Comisión Interamericana de Mujeres, CIM*) had been carrying out since the 1980s.

The CIM defines itself as an autonomous technical body whose objectives are to ensure that state policies comply with human rights standards (Organisation of American States, 2015b). It was established in 1928 as result of the mobilisation of suffragists (Organisation of American States, 2015a) and it played an active role in the UN processes thereafter. In fact, it has been regarded as the “mother” of the UN Commission on the Status of Women (CSW) (Meyer, 1999), which is exclusively dedicated to the promotion of gender equality. The affiliates of the CIM pressed for the creation of the CSW and many were founding members of both commissions. In 1988, the CIM’s Executive Committee first identified the lack of laws that specifically addressed domestic VAW in the American states, deeming the matter an urgent issue. It also detected the void in the CEDAW, which at the time did not mention VAW (Poole, 2013). A special Meeting of Consultation was held therefore in 1990, which requested member states to send national reports on existing legislation and statistics on VAW. The Meeting concluded that VAW surpassed the realm of the private and recognised that institutions, including the state, were involved in its perpetration.

As we see, two years prior to the issuance of the CEDAW Recommendation 19, the CIM had already stated that VAW constitutes a serious case of discrimination and a violation of human rights (Organisation of the American States, 1994b). In other words, the OAS was ahead of the UN. Ultimately, the CIM decided that an Inter-American Convention was necessary, and a first draft was prepared by a team of 10 female jurists with experience in women’s rights and international human rights law. The committee met again in 1993 to refine the text, and the final version was submitted to the General Assembly in 1994 after the member states had been asked to comment on it. Ecuador reported the results of a

national meeting where NGOs and state representatives, including the Parliamentary Commission for women and the family, had expressed their support for the project (Organisation of the American States, 1994b).

Expectedly, Belem do Pará builds on the concept of VAW as a violation of human rights, defining it as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere” (Organisation of American States, 1994a, Art. 1). Article 7, which establishes the duties that signing states acquire, focuses extensively on legal mechanisms. Six out of eight items are related to the adoption of legal measures, including sanctions and penal reform (see Table 3, in bold).

*Table 3: Duties of member states under the Belem do Pará Convention*

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Article 7

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;

**b. apply due diligence to prevent, investigate and impose penalties for violence against women;**

**c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;**

**d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;**

**e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;**

- f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;**
- g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and**
- h. adopt such legislative or other measures as may be necessary to give effect to this Convention.**

In this way, within Belem do Pará, state accountability takes the form of legal change and penal reform commitments. In Article 7, penal punishment and the eradication of VAW are paired, while imposing penalties is established as a state obligation. Mechanisms outside penalty are contemplated as well, but they are framed as programmatic goals intended to progressively provoke socio-cultural changes to counteract gender stereotypes, while legal remedies are presented as immediate courses of action.

Alongside Belem do Pará, the decisions of the Inter-American Court of Human Rights (IACHR) and the recommendations of the Inter-American Commission on Human Rights, have come to make up the Inter-American case law (*jurisprudencia interamericana*), which is based on the Belem do Pará Convention and the American Convention of Human Rights (Pact of San José). The main concepts utilised by the Court and the Commission in relation to VAW are “women’s right to a life’s project” and “women’s right to a life free of violence and discrimination”. Especially relevant are the cases of *Maria da Penha Maia Fernandes Vs Brazil* (2001), in which the Court found the Brazilian state responsible for repeatedly failing to prosecute a persistent perpetrator of domestic violence;<sup>46</sup> and *Gonzáles and others Vs*

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<sup>46</sup> In 2006, the Federal Brazilian Law 11340, now known as the “Maria da Penha Law”, was enacted. It increased the severity of punishment for domestic VAW [http://www.planalto.gov.br/ccivil\\_03/ato2004-2006/2006/lei/11340.htm](http://www.planalto.gov.br/ccivil_03/ato2004-2006/2006/lei/11340.htm)

Mexico (also known as *Caso Campo Algodonero*, or Cotton Field case, 2009), in which for the first time the Court produced specific recommendations regarding the state's duty to prosecute and punish perpetrators of VAW.<sup>47</sup> In the sentence, which refers to the murders of three women in Ciudad Juárez, México, the Court considered that the crimes were committed "for reasons of gender", and that they could be categorised as "femicides", because they were framed in a context of VAW. Therefore, since the crimes had been left in impunity, the Mexican state failed to criminally prosecute the murders of the victims, thus committing a state crime (Abramovich, 2010). This case's decision is largely based on a conception of women's human rights in correlation with the state's obligation to punish. Although the IACHR recognised VAW as a "structural" problem, it did not refer to other social, cultural and political conditions which feminist usually bring forward. The state's duty to protect women is central to the sentence, but it is expressed fundamentally as an obligation to prosecute crimes. In this way, women's human right to a life free of violence is expected to materialise in a type of state action which is penal in nature and can only be verified through a criminal process and the imposition of punishment.

Belem do Pará and the Inter-American jurisprudence have been especially important for the Ecuadorian women's movement, as they propelled a period of productive mobilisation which, as noted above, is identified as a "peak" that the movement reached. CONAMU, other state agencies, and civil society organisations had gained experience and become holders of solid technical knowledge and a presence in the national political arena. As one activist who worked in various state offices during the 1990s explained:

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<sup>47</sup> For further detail on the Inter-American human rights jurisprudence on VAW see Tojo, 2011.

The key moments commenced with the Belem do Pará Convention, the years 95, 96, until 98, when it was possible to create very important policies such as Act 103, the commissariats for women [...]. I feel that these were the years when most things were attained regarding state policy and also in relation to civil society because in every way this was a theme that encouraged women's organisations (personal interview, May 2015).

This quote confirms that the Belem do Pará years were crucial for the consolidation of the women's movement. In analysing the UN and OAS instruments, I have revealed a pattern by which the social welfare perspectives that dominated before the 1990s, as well as feminist critiques of criminal law, were displaced by technically-informed, rights-based strategies, which were largely oriented toward penal reform and criminal justice. The main rationale underlying these new framings was that penalising offending conducts is indispensable to granting the protection of rights. The focus moved from other possible forms of state action to imminently legislative measures. The post-1989 political context facilitated collaborations between international, national, and regional movements (Cole & Phillips, 2008), while NGOs arose as new governance actors. The subsequent achievements made regarding women's human rights recognition (Lemaitre, 2009; 2013), appear to have nourished feminist faith in the promise "to make justice happen by means of law" (Brown & Halley, 2002, p. 7). In several cases, these processes enabled state liability for not implementing international policy guidelines, which as shown above was understood mainly as a state obligation to enact or reform laws, and to initiate penal prosecutions. In Ecuador,



international human rights framings were highly influential and at times operated in lieu of feminist critique, facilitating an approach that increasingly focused on penal procedures. The next section will show how these internationally developed frameworks shaped Ecuadorian feminist initiatives in penal reform.

## 4 ECUADORIAN FEMINIST NETWORKS AND THE TURN TO CRIMINAL JUSTICE

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After the death of President Jaime Roldós in 1981, Ecuador entered the period which would later be deemed the “long neoliberal night”.<sup>48</sup> Presidents Oswaldo Hurtado (1981-1984), León Febres-Cordero (1984-1988), Rodrigo Borja (1988-1992)<sup>49</sup> and Sixto Durán-Ballén (1992-1996) implemented the policy prescriptions of the Washington Consensus, while discourses of “state modernisation” (*modernización del Estado*) —mostly meaning privatisation— increased during these years. The regimes dedicated a significant portion of the national budget to pay off external debt, to the detriment of investment in social welfare (CLADEM, 2006; Endara, 1999). This situation resulted in social movements’ mobilisations to protest the neoliberal measures. For instance, in 1990 a major indigenous uprising forced the government to negotiate around various issues with the Confederation of Indigenous Nationalities of Ecuador (CONAIE). Frustrated by stagnated petitions regarding bilingual

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<sup>48</sup> The expression was coined by Rafael Correa during his presidential campaigns (2012).

<sup>49</sup> While President Borja represented a left of centre party (and identified as a social democrat), he did not fundamentally disrupt the neoliberal agenda deployed by the other presidents.

education, agrarian reform, and demands to recognise Ecuador as plurinational, the grassroots members of the CONAIE marched across the country, kept their agricultural produce off the market, and blocked the Pan-American Highway, the country's main north-south artery (Clark & Becker, 2007). The CONAIE thus acquired international notoriety as a political actor (Yashar, 2005).

Sectors of the women's movement, particularly popular organisations, also protested the dominant policies. On their side, as noted above, scholars and activists have referred to the 1990s as the "golden age" of the women's movement.<sup>50</sup> This tension between rejection of neoliberalism and the embrace of the period as the "good old years" is reflected on the fact that mainstream feminist stances on neoliberal restructuring have at times been ambivalent (Lind, 2005). Nonetheless, due to the growth of women's state offices and the rise of women's organisations, opportunities to impact on policy design broadened as NGOs obtained more funding from the international cooperation. One feminist who worked at CONAMU (the National Women's Council) and its predecessor DINAMU (The National Women's Bureau) reminisced:

From then on, the movement decided to enter institutions directly,  
this is the process of the 1990s, right? Where the movement enters, creates

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<sup>50</sup> Some of the most prominent women's alliances created in Ecuador between the 1980s and 1990s include: the Ecuadorian Women's Permanent Forum (1994), the Ecuadorian Women's Political Coordinator (1995), the National Movement of Women from Popular Sectors (1989), the National Council of Indigenous Women and the Black Women's National Coordinator (1997) (Rodas Morales, 2007b; Vega, 2004). NGOs created between the 1980s and 1990s include: CEPAM in Quito and later in Guayaquil, *Fundación María Guare* in Guayaquil, and *Corporación Mujer a Mujer* and SENDAS in Cuenca. These NGOs are still active and have played a key role in the design and deployment of VAW legislation.

a model of a National Women’s Council [based on] the experiences of Cairo and Beijing [...] and nourished by an entire Latin American regional process through which national state councils of women were created, as well as mechanisms of state accountability (personal communication, March 16, 2015).

Also, since international development agencies often required local NGOs to incorporate a “gender approach” (*enfoque de género*), the demand for “gender experts” increased. Training programmes, inside and outside universities, and with the sponsorship of international organisations, were implemented. Because the need for expertise was urgent, training often took the form of short workshops with an instrumental/technical perspective, designed to enable the trainees to use the tools immediately rather than reflect critically on feminist themes (Cuvi, 1999). Nevertheless, this expertise allowed feminists to intervene in state policy design, as they were hired either as external consultants or incorporated to state institutions.<sup>51</sup>

In this context, although the Ecuadorian women’s movement is composed of diverse collectives —including popular sectors, indigenous and peasant organisations, women’s NGOs and state officials—, the strand that would engage with penal reform during the 1990s corresponds to what Htun (2003) has termed “expert issue networks” and “feminist issue

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<sup>51</sup> Following Beijing 1995, Ecuador made the commitment to give institutional autonomy to DINAMU, which was ascribed to the Ministry of Social Welfare. The National Women’s Council (*Consejo Nacional de la Mujer*, CONAMU) was created through a presidential decree that gave it the assignment to oversee public policy involving women. In this way, state offices and NGOs hosted groups of feminist professionals who worked in networks that could promote some changes in policy and legislation.

networks". I borrow these expressions to refer to the state and non-state collectives that participated in the design of the first projects that addressed VAW through criminal law.<sup>52</sup> As I have noted in Chapter 2, this strand of the women's movement was mainly professional, upper-middle class, and mestiza. Women's NGOs such as CEPAM, Fundación María Guare and Corporación Mujer a Mujer, had been working closely with domestic violence survivors, offering assistance mechanisms that included legal advice. The NGO lawyers were encountering a series of difficulties when attempting to initiate legal processes for domestic VAW. At the time, physical violence against could in principle be tackled through general criminal categories such as injuries and homicide, which could result in an increased sanction, since the Penal Code treated aggressions against a spouse as aggravated crimes. However, it was uncommon for women to follow this path. With the backdrop of the law-focused international approach to VAW, prominent feminist lawyers like Anunziata Valdez (1988) and NGO staff interpreted the situation as result of the lack of an expeditious procedure for women to access justice, which, it was assumed, could help battered women overcome a perceived fear of reporting the offences. Also, it was noted that complainants were treated with disdain if they turned to police stations (Gómez, 1989), which prompted feminists to start thinking about legal provisions that could force the police officials to prosecute the infractions and, better yet, provide specialised police stations dedicated to women.

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<sup>52</sup> Gender as a concept was disseminated through channels that were largely technocratic. According to some critics, this contributed to a depoliticisation of women's action (Vega, 2004) and a lack of deeper theoretical reflection in Ecuadorian mainstream feminism (Rodas Morales, 2007a).

In parallel, a crucial debate was taking place: there was a prohibition on Article 28 of the Code of Criminal Procedure which mandated: “No accusation shall be admitted from descendants against ancestors and vice versa, nor from a spouse against the other, nor a sibling against a sibling” (Código de Procedimiento Penal, 1983). This article made it difficult for women to report aggressions from close family members, and although the code did allow for a public prosecutor to act ex-officio in cases of spouse abuse, this was an unlikely scenario, given the concealed nature of domestic violence. Meanwhile, feminist magazines were disseminating reports about women being killed by their partners due to jealousy or because they did not fulfil their domestic responsibilities. It was estimated that 95 out of every 100 women in Guayaquil admitted having suffered physical, sexual or psychological violence inflicted by their husbands (Ayala Marín, 1989a). Activists then figured that, because of Art. 28, if a woman wanted to report her husband for abuse, a third party would have to place the complaint formally.<sup>53</sup> In this way, for some time NGOs acted as said third party. A former staff-member of *Fundación María Guare* recalled:

[...] since it was not possible to report [domestic violence] we had to come up with a strategy: the woman, with us taking risks as advocates, would inform us, would tell us, would narrate what was happening and we, as we did not have a kinship relation with the aggressor, presented the report

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<sup>53</sup> This situation persisted until after the first year of operations of the specialised commissariats for VAW which opened in 1994. Although a 1989 note from Fempress mentions that the AMM had requested the revision of the article to the Parliamentary Commission for Matters of Women and the Family, it was only the taking precedence of Act 103 as a special law in 1995, that allowed women to report violence of their own accord. The article itself would only be repealed when a new Code of Criminal Procedure was enacted in 2000.

against him. We operated in that way for almost a year, but we realised that this could not continue [...]. I then started to investigate [...] and noticed that in other countries there were police stations for women (personal communication, April 13, 2015).

As we see, NGO staff was embracing a mainly legal and judicial approach to domestic violence based on their acquired knowledge of gender. Even though women in popular sectors did not necessarily consider domestic VAW as a problem of lack of law (see Chapter 2, p. 133), women's organisations still focused on legal reform. The same participant reminisced that there were long queues of women waiting to file complaints of abuse through the NGO every day. A similar situation was confronted by CEPAM in Quito. The organisations thus started to discuss ways to enable women to report their abusers directly. Already in 1988, during the meetings convened by the Parliamentary Commission for Women, Children and the Family, the domestic violence working group made a visionary proposal: they wanted each provincial capital provided with a specialised police station to attend to women's complaints and to judge the misdemeanours they committed. This demand revived as activists proposed the creation of specialised police stations equipped with an interdisciplinary team that could effectively respond to women's needs. These discussions are the immediate antecedents of the creation of the first commissariats for women and the family and, shortly after, the first VAW law.

#### 4.1 THE COMMISSARIATS FOR WOMEN AND THE FAMILY

In 1985 in Sao Paulo, Brazil, the first commissariat for women and the family in Latin America was created,<sup>54</sup> starting a regional trend whereby specialised police stations for women in a situation of violence appeared, all of which preceded the enactment of specialised laws penalising VAW (Jubb, 2008). The creation of commissariats is considered the first state response to the women's movements' denunciations of VAW. Presently, more than 13 Latin American countries have some police or judiciary service specialised in VAW. According to Jubb's (2008) regional study, the creation of commissariats marks the beginning of the state's "recognition of its duty to provide access to justice and to sanction, prevent and eliminate VAW" (p. 22).

In Ecuador, *Fundación María Guare*, a women's NGO, had sent one of their associate lawyers to Lima, Peru, to find out how the specialised police stations functioned there, with the objective of creating a similar model in Ecuador (former staff-member, personal communication, April 13, 2015). Drawing from the information gathered during this trip, and based on international treaties, expert recommendations, and their own experience, a team of feminist lawyers prepared a proposal to create specialised commissariats for women, which was taken to the legal advisor of the President of the Republic. Shortly after,

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<sup>54</sup> In Brazil, the Secretary for Public Security at the time received the visit of a group of women who complained about how they were treated by police officers in police stations, particularly when they denounced sexual violence. Frequently, the police officers would tell them that the attacks were provoked by themselves. As a response, specialised police stations were created to the purpose of offering women a friendlier environment to denounce sexual assault, in which all the officials would also be women. Although they were initially intended to attend to complaints of sexual violence perpetrated by strangers, it soon became apparent that many women were denouncing their own spouses or partners. For more details on the history of the Brazilian police stations see <http://www.brasil.gov.br/cidadania-e-justica/2015/08/delegacia-da-mulher-deu-inicio-ha-30-anos-a-politicas-de-combate-a-violencia>

in 1994, the efforts resulted in the inauguration of new units known as “*Comisarías de la mujer y la familia*” (commissariats for women and the family).

Several interviewees agreed that the good relationships between some NGO leaders and Marcelo Santos, the minister of government, were key to success. The pilot commissariats were established through a Ministerial Agreement in Guayaquil, Quito, Portoviejo and Cuenca. In smaller towns and villages, existing police stations were enabled to process domestic violence complaints, which provided remote communities with a facility to report abuse. While the offices in Peru and other countries were actual police stations, in Ecuador the commissariats were constituted as hybrid entities administratively ascribed to the Ministry of Government, but with the ability to administer justice. The model built on the existing misdemeanour commissariats to facilitate a quick set up, because creating a new structure would have required a new law. Instead, the commissariats used the structure that was already in place, whereby minor offences (*contravenciones*, or misdemeanours) were processed outside of criminal courts and managed by these hybrid commissariats.

Importantly, each commissariat worked alongside a “counterpart NGO” whose staff provided the technical expertise to assist women. However, the commissariats were not set up exactly in the way the women’s movement had envisioned. As mentioned above, the proposal put forward during the 1988 meetings had devised entities that would deal not only with offences against women but also with minor infractions committed by women; that is, they were from the outset envisioned as an alternative to ordinary penal justice in the field of misdemeanours. In practice, the commissariats were created on the premise that the family, whose vulnerable members are women and children, needed protection to



prevent domestic abuse and its devastating consequences for public health and development (Ministerio de Gobierno y Policía, 1994). Since the commissariats managed “family issues”, anyone was enabled to file a report, including husbands, siblings, in-laws, etc. One of the professionals who worked at a counterpart NGO during this phase told me that while the organisations had proposed the creation of commissariats “for women”, the expression “and the family” was added at the request of the Ministry of Government. In fact, the exposition of motives of the Ministerial Agreement that created the commissariats clearly states that violence against women and minors is a social problem that requires resources to be “technically managed”, which the existing police commissariats lacked (Ministerio de Gobierno y Policía, 1994). Violence against children was conflated with VAW even though specialised tribunals already existed for children and teenagers. In fact, child maltreatment has never been processed at a women’s commissariat. The Ministerial Agreement reveals how the narrative of family-protection was articulated effectively alongside the technical and rights-based arguments that feminists had presented.

The state/NGO co-governance model for the commissariats was initially implemented with Fundación María Guare in Guayaquil, CEPAM in Quito, and Corporación Mujer a Mujer in Cuenca. At the beginning, the attributions of the commissariats included attending to *all* incidents of domestic and sexual violence against women and children, because at the time, police officers had attributions to initiate criminal inquests. However, towards the end of 1994 this attribution was revoked and assigned to courts exclusively, which in consequence constrained the commissariats’ jurisdiction, enabling them to process misdemeanours only (Jácome Villalba, 2003). The NGOs worked with vast autonomy: while they were required to sign an agreement with the Ministry of Government prior to working

with a commissariat, their employees did not have any contractual relationship with the state, that is, they were not public servants and their salaries were paid by the NGOs. As the number of commissariats increased over the years due to greater demand, it became more difficult to rely on an associated NGO for each new commissariat, as these did not always exist in smaller districts. Some ad-hoc NGOs were sometimes set up, but eventually the requirement of a counterpart NGO ceased to be mandatory when, in 1997, a new Ministerial Agreement established commissariats for women and the family in all of the country's provinces (Ministerio de Gobierno y Policía, 1997). However, the end of the co-governance model also entailed the loss of the non-legal services that some NGOs offered, such as psychological therapy, which the government did not fund. As noted earlier, the debate regarding the role of NGOs in providing services is ongoing, as many feminists are critical of their contribution to neoliberal models (Nagar & Saraswati, 2003). In Latin America, the debates have addressed not only the state's duty to offer such services; there have also been questions regarding the implications of relying mainly on NGOs whose monies often come from transnational development agencies (Jubb, 2008).

Regarding procedural rules, the commissariats attempted to apply the general code of criminal procedures, but their day to day operations were affected by uncertainty about the mechanisms that could be used to grant women effective protection and impede the aggravation of violence. The general penal code did not contemplate preventive/protective mechanisms, so there were discordances in the ways the commissariats handled the cases

in different provinces.<sup>55</sup> Activists then felt compelled to propose a law to establish more uniform procedures. This is the context surrounding the creation of Act 103, the first law against violence toward women and the family.

## 5 A LAW OF OUR OWN? ACT 103 AND THE RE-INSCRIPTION OF FAMILY PROTECTION

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Act 103 (*Ley contra la violencia a la mujer y la familia*) passed in 1995, surrounded by a wave of Latin American laws on domestic violence which followed the subscription of Belem do Pará. Specialised laws on domestic violence were enacted in Peru in 1993 and 1997; Chile and Argentina in 1994; Bolivia in 1995, Colombia, Costa Rica, El Salvador, Guatemala and Mexico in 1996; and Venezuela in 1998 (Wilson, 2013). Ecuador's Act 103 is considered a landmark in the history of feminist legal reform, as it was the first piece of legislation that specialised in VAW. Overall, the representatives of the organisations that participated in the discussions felt that the draft-bill was, as one of them put it, "made by us, legitimate" (personal communication, April 16, 2015).

However, the right-based framing that animated women's organisations did not land unmodified in the national arena. The state's approach to the protection of women and

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<sup>55</sup> Even after the enactment of Act 103 in 1995, which clarified the competences of the commissariats, and an executive decree that created rules of procedure in 2004, the problem of discordances persisted to the point that the Ministry of Interior issued a manual of procedure in 2010 to homogenise the procedures.

children, as shown in Chapter 2, had long been mediated by postcolonial ideologies on the protection of the family. Additionally, the women's organisations' original project involved the creation of a new law that would establish specialised procedures for all domestic violence misdemeanours. They did not demand at this point that VAW be treated as a full criminal offence. After the proposal was presented, it was the national legislature which created the link between VAW and the criminal code. Rather than approving an entirely new procedure, the legislature mandated domestic violence to be processed as an ordinary misdemeanour, except for one case: psychological violence. The latter emerged from my investigation as a crucial theme across the project, which I analyse next.

As acknowledged by several interviewees, Act 103 had two main promoters: Anunziata Valdez and María Leonor Jiménez, two feminist lawyers who acted as spokespersons of the women's movement. Valdez and Jiménez did not have formal political affiliations, but they were close to some influential networks: Valdez had connections with the Bar Association (*Colegio de Abogados*) and a centre-right party, while Jiménez had links with the Marxist left. DINAMU, several NGOs, the Parliamentary Commission for Women, Children, and the Family, and international organisations supported the proposal. The draft was submitted to the Legislative Commission for Civil and Penal Matters, which then entrusted José Cordero Acosta, a liberal jurist and member of a centre-right party, with a preliminary study of the project (Congreso Nacional del Ecuador, 2004).

It is important to note that while Belem do Pará does mention the family as one of the contexts in which VAW can take place — the others being the community and state institutions (Convención interamericana para prevenir, sancionar y erradicar la violencia contra la mujer, 1995)—, “family violence” was the main *ratio legis* of in Act 103. I was told,

and other researchers have confirmed (Camacho & Hernández, 2009), that the draft-bill was originally entitled “Law against violence toward women”, whereas “and the family” was added after the preliminary negotiations, allegedly because a law for the protection of the family was better placed strategically to be accepted by all the members of the Congress. In this way, VAW and family protection were formally conflated within the regulation of domesticity, with no explicit acknowledgement of the “inequalities in power relations within the couple” (Camacho & Hernández, 2011, p. 237) that feminists had long denounced.

During the first parliamentary debate, Congressman Cordero introduced some modifications to the proposal on behalf of the Commission, amongst which was a redefinition of the “nuclear family” which, in his opinion, should not include lovers and ex-lovers as the original draft had. Partners and ex-partners in consensual relationships remained potential aggressors but not members of the nuclear family, revealing a preoccupation with definitions of the family that were circumscribed within normative marriage and kinship. Family union was the central legal good to be protected: congressman Santiago Bucaram, for instance, asked the Commission for Civil and Penal Matters to present, in addition to Act 103, “a project for the State to care about the situation of the family, because it is not only a matter of dividing the family but also of defending the family” (Congreso Nacional del Ecuador, 1995, p. 78). The re-inscription of normative familial ideologies was evident in other moments as well: during the second debate, Congressman Bucaram objected that the law protected the “sexual freedom” of women; he opined that “sexual integrity” was a better expression. In his words: “there is not, anywhere, a definition that tells us what kind of sexual freedom is being spoken about” (Congreso Nacional del Ecuador, 1995, p.10). He added that protecting “sexual freedom” equated leaving a

“programmatic door” open to legitimise and protect activities such as prostitution. Another congressman then requested to preserve the original article as a tribute to “these beautiful women” (presumably referring to the activists that were present in the session), and to “save” them after “two thousand years of Christian existence” (Congreso Nacional del Ecuador, 1995, p.10).

By contrast, the intention of feminists had always been to expose and prevent everyday sexual violence in intimate spaces. Article 4 of the original draft-bill referred to sexual violence in these terms:

Notwithstanding cases of rape and other crimes against sexual freedom, sexual violence is any maltreatment that constitutes an imposition in the exercise of a person's sexuality, forcing them to have intercourse or other sexual practices with the aggressor or a third party, using physical force, intimidation, threats or any other coercive means (Congreso Nacional del Ecuador, 1995, pp. 21-22).

The goal was to enable the prosecution of sexual violence within marriage and partnerships, a kind of sexual violence that was “invisible” to the ordinary penal code, which already punished rape and other forms of sexual assault. Although the ordinary penal code did not contain provisions precluding the prosecution of marital rape, ideas such as “conjugal duty” were still socially accepted, hence the emphasis. These discrepancies between feminist stances and the legislature’s interventions reveal competing paradigms

regarding gendered violence and women's sexuality: Bucaram's perspectives on protecting women's sexual "integrity" on one end, and feminists' intentions to expose and condemn sexual violence as an attack on women's freedom, on the other (see Table 4). Ultimately, only four congressmen supported Bucaram on the issue of sexual freedom, but he still succeeded in modifying Article 13 (which prescribed the protection measures) by replacing the expression "sexual freedom of women" for "sexual freedom of the family". He insisted that singling out women was dangerous because it authorised behaviours that were "morally wrong" (presumably sexual promiscuity). This reframing illustrates the continuity of legal imaginaries whereby women are worthy of protection only within the family and so long as they conform to the parameters of sexual morality prescribed by dominant familial ideologies. This partial acceptance of women's demands by traditional politicians can be framed as a continuity of the postcolonial "non-violent patriarchy" described in Chapter 2 (Tinsman, 2002; Varley, 2000).

As we see, despite the mainstreaming of the women's human rights approach, introducing a corresponding conceptualisation of women's sexual freedom in the national legislation proved difficult. As Lise Gotell (1998) has observed, the recognition of gendered violence by the state is often marked by the appropriation and transformation of feminist discourses, as well as a simplification of the social complexity that feminists identify. In consequence, therefore was successful to the extent to which it "fit" in the established system without disrupting its foundations and structure. To paraphrase Corrigan (2006), there are limits to the kinds of changes that legal systems will tolerate.

*Table 4: Reframing Act 103 (Ley contra la violencia a la mujer y la familia)*

<b>Original draft</b>	<b>Negotiations/Debate</b>	<b>Final text</b>
Violence against women	Violence against women and the family	Violence against women and the family
The family includes unmarried partners	The nuclear family does not include unmarried partners	The nuclear family does not include unmarried partners
Sexual freedom	Sexual freedom vs sexual integrity	Sexual freedom of the family
Temporary child support as urgent measure	Temporary child support restricts men's rights	No temporary child support included

As we see on Table 4, there were significant conceptual adaptations during Act 103's approval process. To summarise: women's organisations were not initially demanding carceral punishment, but the legislature responded by positing domestic VAW as a penal misdemeanour that could result in short imprisonment; women's organisations wanted a law to protect women, but they obtained one for the family; women's organisations demanded a specialised procedure to manage domestic VAW but most infractions were assigned to existing procedures for misdemeanours; women's organisations used a liberal rights-based language, such as the expression "sexual freedom", but some legislators interpreted it as sexual promiscuity and replaced it by "family-friendly" expressions; women's organisations stressed non-penal mechanisms such as the need for a pension for violence survivors and their children, but the legislature denied it. While some of these reframings could appear to be merely linguistic issues, we know from the legislative debate's transcriptions that there was a lot more at stake. The parliamentary records let us see that protecting "these beautiful women", who were expected to display a morally acceptable sexuality as members of the family, was the real priority. Not too different from the way things had been thus far, since the early republican years.



## 5.1 PENALTY IN ACT 103: SUCCESS AND FAILURE

It follows from the analysis above that Act 103 was conceived by feminist networks to provide legal means to prosecute forms of violence that affected women in particular, and to deliver tools to cease ongoing aggressions and prevent their aggravation. In many ways, the Legislature prioritised the second objective over the first: the original draft bill emphasised pre-emptive mechanisms designed to restrict the aggressor's access to the complainant; and also, the sanctions were fines and reparations. Furthermore, sanctions could be substituted by alternative measures such as community work if the aggressor did not have sufficient resources. The latter possibility was unprecedented in the Ecuadorian legal system and was introduced to the National Congress as an innovative alternative to imprisonment. Whether it was because women's organisations did not think that a full criminalisation proposal would be successful, or because their experience with violence survivors had taught them otherwise, the draft bill did not revolve around incarceration. One interviewee who participated in the discussions noted:

[Act 103 is part of] the first wave of laws where violence is not categorised as a crime but as a misdemeanour; but it also has its good things, such as the restraining orders and the immediate support for women, which was a sort of good bait to build what is today's model (personal communication, March 16, 2015).

The participant was comparing Act 103 to the current Penal Code, identifying the former as belonging to a previous stage, before full criminalisation. Ultimately, the penal

apparatus was used to activate Act 103, but this happened through the reassessment of the project carried out by Cordero and the Legislative Commission. In the Ecuadorian system, penal infractions are classified as either criminal offences and misdemeanours (*delitos y contravenciones*), per their severity. Physical injuries can qualify as either, the objective criteria being that if an injury causes inability to work for up to three days, it is considered a misdemeanour (*contravención*), and when the inability exceeds that time, it is considered a criminal offence (*delito*). The draft presented by women's organisations was intended for cases of VAW that did not already constitute a criminal offence (physical injury, sexual assault and rape were already criminalised). The Act was intended to fill in the gaps and enable the prosecution of behaviours such as battering, verbal abuse, humiliation, sexual coercion, daily hostility, emotional abuse, and physical injuries that do not leave bodily marks. However, Congressman Cordero considered that a manifestation of family violence that did not constitute at least a misdemeanour was "inconceivable" (Congreso Nacional del Ecuador, 2004, p. 19), meaning that, in his view, the existing penal code already covered all possible forms of interpersonal abuse, and what that the new law would do was situate them in the context of the family. This was surely a way to legally express that violence in intimate spaces was wrong, but beyond naming the family as a setting where crimes can be committed, the reform did not entail a major change from a legal and penal point of view. There was no modification of legal structures or adoption of special procedures. In other words, the new law would not have added anything new, had it not been for the prohibition to prosecute family members that was in force, which Act 103 overcame. And also, as I explain below, Act 103 enabled the prosecution of psychological violence, which was not possible before.

When judging domestic violence, the commissariats were expected to use the existing misdemeanour categories, comprising verbal abuse, property damage, and minor physical injuries; battering was adapted to the existing physical injury misdemeanour. In other words, the law that feminists had devised to be a specialised alternative for women, ended up relying on general categories and ordinary procedures, and these were taken up from the existing penal system.<sup>56</sup> The feminist contention that domestic VAW is different in nature from ordinary offences was in this way side-lined. Women's organisations knew from experience that ordinary procedures were difficult to implement; their project sought mainly to enable a swift mechanism to obtain legal protection in the form of preventive measures that were not available through the ordinary system.

The only category that was treated as feminists had intended was "psychological violence" (see Table 5 below), which included forms of sexual and physical violence that do not leave physical marks and were not already categorised as criminal offences. Apparently, the legislature could not find any other category in the ordinary legislation to frame psychological violence. This infraction refers to any act or omission that causes emotional distress; a definition broad enough to enable commissioners to process a range of conducts that did not fall under existing misdemeanours or crimes. Psychological violence thus functioned as a residual infraction that covered cases of day to day emotional abuse and aggressions.

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<sup>56</sup> The first years of application of Act 103 were not free of confusion and irregularities. There were differences amongst the ways each commissioner interpreted the law, some of them applying the Act's special procedure to all misdemeanours, others resorting to the general penal procedure for the misdemeanours prescribed in the penal code. This was regulated later in 2004 and 2006 with the introduction of General Rules and a manual of procedure, respectively.

*Table 5: Definition of psychological violence*

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Art. 3.- b) Psychological violence. - It is any act or omission that causes damage, pain, emotional distress, psychological distress or diminished self-esteem to the assaulted woman or family member. It is also the intimidation or threat exercised upon a family member using moral pressure instilling dread or fear of imminent serious wrongdoing on them or their ancestors, descendants or relatives up to the second degree of affinity.

In this way, the approval of Act 103 led to an atypical situation: some infractions resulted in imprisonment and others did not. Act 103 turned out to be civil and penal at the same time in the light of Ecuador's legal system. For instance, Act 103 applied tort liability for psychological violence and property damage, but also, if a commissariat came to identify an infraction that qualified as a criminal offence, it was obliged to redirect it to the Public Prosecutor's Office. Since psychological violence was treated as a civil infraction, there was no need to detail each behaviour that could cause emotional damage, which would have been necessary under the penal principle of legality.<sup>57</sup> Also, psychological violence had to be assigned a *sui generis* non-penal procedure (the one originally suggested by women's organisations for all the VAW offences). The procedure was rapid and simple; it was predominantly oral (which was innovative at a time when most legal procedures were carried out in writing), and based on negotiation and settlement: only when an agreement was not possible to reach, was the commissioner to call for the presentation of evidence. Later, however, negotiation in matters of VAW was prohibited in all cases.<sup>58</sup> On Table 6 we

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<sup>57</sup> In the Continental Law system, private law categories are not as constrained by the principle of legality (the exhaustive definition of an illicit conduct) as criminal offences are. The action of judges is also less constrained by the letter of the law than when they judge a criminal offence, as the latter can result in the imprisonment of someone who has a right to be presumed innocent. For that reason, any extensive interpretation beyond the legal text is prohibited in criminal law.

<sup>58</sup> A 2006 Ministerial Agreement explained that the Code of Criminal Procedure of 2000 prohibited the renunciation of one's rights to propose an accusation in matters of family violence, and that Act 103 itself established that the rights it consecrated were not susceptible of waiver. It concluded that transaction, as form

find an overview of the infractions that were entrusted to the specialised commissariats and the sui generis combinations of civil and penal provisions that were allocated to process them.

*Table 6: Act 103: Infractions, procedures, and sanctions*

<b>Infraction</b>	<b>Procedure</b>	<b>Authority</b>	<b>Sanction</b>
Psychological violence/ Sexual violence not resulting in physical injury and not categorised as crime in the penal code	Special rapid procedure created by Act 103	Specialised Commissioner	Payment of compensations, from one to fifteen minimum wages.
Attacks on property	General penal procedure for misdemeanours	Specialised Commissioner	Payment of a fine from seven to 14 US Dollars and imprisonment of two to four days.
Non-defamatory insults	General penal procedure for misdemeanours	Specialised Commissioner	Payment of a fine from seven to 14 US Dollars and imprisonment of two to four days.
Physical injury that does not cause inability to work	General penal procedure for misdemeanours	Specialised Commissioner	Payment of a fine from 14 to 28 US Dollars and imprisonment of five to 30 days.
Physical injury causing inability to work for up to 3 days	General penal procedure for misdemeanours	Specialised Commissioner	Payment of a fine from 14 to 28 US Dollars and imprisonment of five to 30 days.
Physical injury causing inability for work for more than 3 days	General penal procedure for criminal offences	Criminal Court	Varied per severity. From 15 days to five years of imprisonment.
Sexual offences	General procedure for criminal offences	Criminal Court	Varied per offence. From three months to 25 years of imprisonment.

Interestingly, interviewees and other researchers recognise that the merits of Act 103 were at the level of the protection measures it established rather than the penalties

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of renouncing one's rights, did not proceed. In 2014, the new Criminal Code expressly prohibited transactions in matters of violence against women and the family.

(Camacho & Hernández, 2011); that is, the pre-emptive and not the punitive scope of the Act produced the most benefits. The protection measures had been proposed by feminists considering that domestic violence involves a continued exposure to abuse, which is generally difficult to prove because it occurs “behind closed doors”. For this reason, once commissioners received a report, which could be presented in writing or orally, they were bound to acknowledge it immediately and issue one or more protection measures without fail, meaning that the claimant’s testimony was presumed truthful before any evidence was presented and even before a lawsuit was formally initiated.

In the experience of practitioners and researchers, the most frequently requested measure was the restraining order (Tamayo, 1998; Valdivieso & Armas, 2008), used to prevent the aggressor from approaching the claimant (see Table 7 below). It also allowed women to request immediate assistance from police officers if the aggressor attempted to contact them. While violating the restraining orders could entail one to six months of imprisonment (as it would constitute a violation of a judicial order), there is not much evidence suggesting that incarceration for violating restraining orders was a common occurrence. However, restraining orders were requested on a day-to-day basis.

*Table 7: Protection measures in act 103*

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Art. 13. The authorities referred to in Article 8, when in any way come to know of a case of domestic violence, shall immediately impose one or more of the following measures of protection in favour of the assaulted person:

1. Grant the necessary restraining orders to women or other members of the family;
2. Order the aggressor to leave the home if cohabitation involves a risk to the physical or mental safety or the sexual freedom of the family;
3. Impose a ban on the aggressor impeding them from approaching the assaulted person at their place of work or study;
4. Prohibit or restrict the attacker's access to the abused person;
5. Prevent the aggressor from performing acts of persecution or intimidation of a victim or a member of their family, be it on his own or through third parties;

6. Reintegrate the assaulted person to their home, ordering the simultaneous departure of the aggressor in case of common housing, preventing them from withdrawing the goods of family use;
7. Grant the custody of the child victim or legally incapable individuals to an adequate person following the provisions of Article No. 107 (108), rule 6th of the Civil Code and the provisions of the Code of Minors; and,
8. Define the therapy that is needed by the parts and their underage children if it be the case.

Today, many feminists feel ambivalent toward Act 103. Some consider that besides the protection measures, one of its merits was that it became ingrained in the community's legal imaginary. It was widely agreed that for many women, Act 103 brought tools to be safer and feel enfranchised, as the restraining orders often symbolised a sort of “shield”, even if limited, to defend themselves from violence (Camacho & Hernández, 2011; Friederic, 2013). However, through the years, feminist collectives started to regard the Act as insufficient. The workload was always increasing at the commissariats, suggesting that domestic violence was not diminishing. Staff was aware that most cases were dropped before a sentence was issued (Jácome Villalba, 2003; Tamayo, 1998), which made it difficult to assess if the sanctions were effective, simply because they were not being applied. Per different estimates, only between 4% and 11% (Jubb, 2008; Jácome Villalba, 2003) of the reports ended with a resolution. In most cases the procedures were interrupted after the issuing of the protection measures, which in turn appeared to be the main motivation for women to report violence. In fact, some research has shown that most women would not try to advance a lawsuit because they did not want the aggressor to be punished in the first place (Camacho & Hernández, 2011). This was acknowledged by most participants. As one activist said:

Often, what [the complainant] wants, is the commissioner to tell her husband “stop beating your wife”, “I will give you a protection measure”, “he cannot enter the house”, “behave yourself!” We always suspected that it was not going to be so good for the woman to have to go to a judge, because a judge is a different thing, even worse a public prosecutor [...] (personal communication, March 11, 2015).

This narrative depicts the judge and the public prosecutor as distant characters associated with long and costly legal processes, not as specially assigned officers who would listen carefully; perhaps approach the aggressor directly and reprimand him, which was usually expected from the specialised commissioners. NGO staff were aware that bringing the cases to ordinary criminal courts could be of little benefit to complainants. One former staff member of a counterpart NGO said:

I remember that at the women’s commissariat sometimes we preferred that the person, even if the injuries were of more than three days [...], sometimes we preferred to process it as a misdemeanour rather than as a criminal offence because [violence against women] was not recognised as a crime, so it had to be framed in a different categorisation, and therefore it would have to follow a long process [...]. The lady would have to pay for a lawyer and all that. So sometimes, in injuries that were more serious than three days [...] the commissioner preferred to treat it as a misdemeanour, so



[the claimant] would be able to access the protection measures and everything else (personal communication, February 20, 2015).

Despite the mistrust in the penal system, the prevalence of domestic violence was still attributed by some feminists to lack of harsh enough sanctions that could function as deterrents. The same staff member observed that Act 103 allowed commissioners to order imprisonment “for seven days *only*”, implying that VAW should not “just” be a misdemeanour, but a criminal offence in full. To overcome the paradox, feminists insisted on the need for a *specialised* criminal procedure, stressing that it should still be expeditious and simple.

By the end of the decade, women’s organisations and CONAMU had expanded and become more solid. Opportunities to promote further policy change were seized. Notably, in 1998 the problem of VAW was brought forward again when a new constitution was enacted. The promise of a different legal framework, one that was not “tainted” by the sexism of the state, appears to have allowed feminists to lower their guard regarding the shortcomings of legal reform.

## 6 CONCLUDING REMARKS

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The findings in this Chapter reveal that the turn to criminal justice was marked, on the one hand, by the adoption of international women’s rights as signifiers of feminist

demands; and on the other hand, it was only possible through the national penal system. I have shown how the post-1989 human rights discourse was integrated into transnational responses to VAW. Positing domestic violence as a violation of human rights made the issue intelligible through the language provided by international fora and technical disciplines. However, it also centred penalty to address violations of rights, producing a discourse through which the processes of criminalising behaviours and recognising rights were constructed as vital parts of the same intervention: the recommendations of international organisations and expert committees frequently revolved around penal reform, while previous welfare-based policies were side-lined.

Transnational instruments, expert recommendations, and the knowledges acquired through transnational processes and NGO practices were utilised by local women's organisations, which (unlike the feminist collectives that had previously critiqued criminal law as a reproducer of patriarchal oppression) began to represent criminal justice as a tool that could be used to counteract VAW. At that point, during the 1990s, we see an unprecedented wave of laws on domestic violence emerging all over Latin America, in a period of shifting governance models, unprecedented NGO intervention, increased privatisation of services, and overall application of neoliberal policy. Women's NGOs were in turn primarily composed of middle-class, white and mestiza professional women. This chapter confirms that not all women have had equal access to legal reform projects and that the legal/penal framing of VAW emerged from a specific sector of women's organisations. There is no evidence to show that women in popular neighbourhoods or indigenous women, for instance, considered that reforming the law would ameliorate their lives. In addition, the mainstream feminist demands were also re-framed once they made it to the legislature.

While women's organisation's proposal of a specialised law for VAW was in great part shaped by a rights-based language, the reception of the project was subject to significant modifications. By drawing parallels between documentary data and the testimonies of feminist activists, I demonstrated that the draft proposed by women's organisations envisioned the treatment of VAW via special commissariats and civil measures. However, the legislature enclosed VAW within penalty, and this move institutionalised the use of criminal justice in matters of gendered violence. This finding also answers the question of how feminist demands have been incorporated into the national legislation, as it shows that what opened the space for their claims to enter the legal system was a convergence between what feminists posited as human rights and what the legislature defended as family values. These family models which, as shown in Chapter 2, displaced other possible family configurations by establishing a male-breadwinner/female-homemaker dichotomy, were re-inscribed in Act 103, a law that protected women but would not name them outside of the family or recognise that they are entitled to child pension. The law enabled sanctions for irresponsible men who faulted their duties as husbands, but it would not protect women's "sexual freedom" lest the expression be interpreted as licentiousness. Put in a different way, the postcolonial norms of family-protection that were embedded in the legislation, as shown in Chapter 2, were not completely disrupted by Act 103. Furthermore, familial ideologies facilitated the reception of the project.

Although feminist networks in Ecuador grew and became more influential during the 1990s, this chapter has shown that there were marked limitations to the topics they could tackle and how they could speak about them. While the prevalence of penalty has been

portrayed as facilitated by the pervasiveness of neoliberal politics amongst governance feminists, I have shown that legislative re-framing and lingering postcolonial narratives played a key role in mainstreaming penalty. Also, Ecuadorian feminist networks focused on mechanisms besides punishment, such as the pre-emptive protection of violence survivors. Of course, the Ecuadorian women's movement resorted to the discourses and practices that were available during a period that is widely regarded as neoliberal. It is not my contention that neoliberalism has not played a role in the affirmation of penalty. However, my findings reveal that penal rationalities have not thrived exclusively through the market-oriented discourses of neoliberalism. Penalty was rationalised and embedded in the gendered discourses that have long constructed women and the family since postcolonial times. Through the narrative of family-protection, these hegemonic discourses were made compatible with the women's movement's agenda, at least in what pertains to moderating violence in domestic spaces. Moreover, the state's earlier preoccupations with protecting the family consolidated a link between VAW and penalty, which would shape the course of future legislation.

## CHAPTER 4

# Penalty Prevails: Constitutional Turns, Women's Rights, and Legal Continuities (1998 - 2008)

The carceral, with its long gradation stretching from the convict-ship or imprisonment with hard labour to diffuse, slight limitations, communicates a type of power that the law validates and that justice uses as its favourite weapon. How could the disciplines and the power that functions in them appear arbitrary, when they merely operate mechanisms of justice itself, even with a view to mitigating their intensity?

-Michel Foucault, 1977, p. 302

### 1 INTRODUCTION

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The preceding chapters have shown how Ecuadorian feminist engagements with penalty have shifted, moving from early stances which criticised the role of criminal law in perpetuating women's subordination, to an instrumental use of penalty as a field of intelligibility through which the violation of women's rights can be exposed and condemned. This chapter, which covers a time span between the late 1990s and mid-2000s, looks closely

at the relationships between human rights, penalty, and VAW, from a constitutional perspective. The objective is to appreciate the effects that a rights-based penal framework can have on legal interpretations, judicial decisions, scholarly thought, and law-making. The chapter thus examines how two different Ecuadorian constitutions, in 1998 and 2008, established much the same frameworks regarding human rights, penalty, and VAW, despite having emerged in very dissimilar political moments, such that they have frequently been presented as antagonistic. It is my contention that in reaffirming the rights-based penalty established in 1998, the 2008 model re-inscribed dominant penal paradigms and further legitimised them, notwithstanding the introduction of decolonial concepts such as *Sumak Kawsay* and *Pachamama*. To support my argument, I first examine the Constitution of 1998 in what pertains to VAW, alongside the parliamentary debates concerning the 2005 penal reforms on sexual violence. Then, I compare this framing to the one introduced in 2008. The primary sources are laws and the testimonies provided by feminists who took part in both constitutional processes.

I also analyse the scholarly arguments elicited by the new Constitution, as well as a Constitutional Court decision which applied a human rights framework to an indigenous justice conflict. These analyses show the impact of rights-based discourses on the implementation of decolonial constitutional principles. The chapter thus enables us to foresee the limitations of the post-neoliberal Constitution as a potential restraint to penalty in the field of gender. I suggest that the new Constitution in reality enables the construction of penalty as the preferred response to the violation of rights. The adoption of a rights-based penal framework by progressive scholars, justice administrators, activists, and lawmakers, is having the paradoxical effect of reinforcing penalty within an otherwise

progressive discourse. I focus mainly on a particular theoretical stance, endorsed by many progressive scholars, which advocates for a minimal criminal law. I argue that despite rebuking state coercion, this rights-based penal discourse contributes to legitimising penalty as a field that is rational and compliant with human rights. I demonstrate this by scrutinising the principles of “*garantismo penal*” (rights-based penal law) as presented by Ecuadorian scholars, and then refer specifically to feminist work based on this framework. Finally, I provide a Court example of how the rights-based paradigm moulds judicial reasoning, resulting in the rejection of models which frame social conflict outside of penalty. This scenario, whereby a ground-breaking constitutional shift reaffirmed rather than challenged previous penal formations, delivered the context in which the subsequent reform of VAW would take place.

## 2 PENALTY IN THE FIRST CONSTITUTIONAL FRAMEWORK FOR VAW (1998)

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This section delineates how the international human rights framework was adopted in the Political Constitution of 1998. Through the 1990s, as the damages caused by structural adjustment programmes became apparent, international agencies such as the World Bank assumed a renewed stance on the economy, often emphasising social and human dimensions while preserving a pro-market practice (Bedford, 2009). Sustainable development and human rights were reaffirmed, opening spaces for some activists and

social movements to mobilise, including strands of feminism and various women's organisations. In this way, for the first time, the right to a life free from violence was constitutionally recognised due to the mobilisations of the women's movement during the Constituent Assembly of 1998. This produced, in turn, the first constitutional penal framework to address VAW. Importantly, this Constitution has come to be considered emblematic of the neoliberal period in Ecuador, as it consecrated a "market social system", which accommodated the goals of the Washington Consensus (Quintero López, 2008, p. 18). Moreover, contemporary critics have denounced that although the constitution expanded the catalogue of collective rights, it failed to transform institutional structures and provide means to materialise what it recognised formally (Grijalva, 2009). This phenomenon has been identified more broadly as recurrent in Latin American constitutionalism (Gargarella, 2010-2011). Nonetheless, social movements attained some historical reforms: the 1998 Constitution was the first body of law to proclaim Ecuador as a "multicultural" country, recognise the collective rights of indigenous peoples, and consecrate the right to a life free of violence, which included a specific mention of women and other vulnerable groups. Hence, the corpus has also been regarded as a pivotal achievement in the field of women's rights.<sup>59</sup> While Act 103 introduced some elements of the international human rights framework into the treatment of VAW, the Constitution of 1998 deepened and solidified this discourse, making it fully applicable to the national legal system. These factors,

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<sup>59</sup> I should insist that while women's movements did reach a peak during the years of neoliberalism, this does not mean that they did not contest and resist the measures and programmes that were implemented by the regimes in power. Tensions and paradoxes were always present in the relationship that women's organisations had with state-led programmes at all levels (Lind, 2005).



I argue, are linked to the consolidation of a rights-based penal discourse, which would have continuity after the political turn occurred in 2008.

The late 1990s were politically unstable. After the presidency of Sixto Durán-Ballén (1992-1996), which implemented privatisation, labour flexibilisation, and deregulation of markets and financial institutions, populist leader Abdalá Bucaram Ortiz (1996-1997) was elected president. Corruption scandals within his cabinet elicited major protests from social movements, including women's and indigenous organisations. After only six months in office, in the middle of dubious political manoeuvrings, the National Congress appointed Fabián Alarcón (1997-1998) as interim president to take the place of fugitive Bucaram. During Alarcón's mandate, DINAMU, the existing state women's office, was given institutional autonomy and became CONAMU, the National Women's Council. This decree strengthened the women's movement despite the broader political crisis, as it expanded the office's autonomy. After Bucaram was deposed, President Alarcón called a popular referendum which included a question regarding whether or not the country's political constitution should be amended: a majority favoured reforming it. Social movements' pressure also ensured the constitutional assembly despite obstruction by some political elites (Andolina, 2003). The National Congress thus summoned a Constituent Assembly to produce a new Constitution after a long period of instability. Social movements, including women's organisations, were granted unprecedented spaces to voice their petitions. As noted in a document prepared by an ad-hoc women's alliance:

In the constitutional process of 1997-98, which was marked by the hegemony of sectors that were close to the neoliberal project, we obtained

the integration of new individual and collective rights into the constitution, through a tireless work of proposals, mobilisation, lobbying and alliances with other social movements (Movimiento de Mujeres del Ecuador, 2008, p. 1).

Indeed, the sphere of influence of women's organisations over some areas of policy was relatively wide at that point. The consolidation of women's NGOs as well as the strengthening of CONAMU —partly due to funding provided by international organisations (CLADEM, 2006; The World Bank, 2000)—, had contributed to this growth in influence. However, stabilisation came at the cost of circumscribing projects within the boundaries of the requirements and framings provided by international agencies and state officials. In fact, the multiple instances of negotiation between the movement and governing institutions have been regarded as evidence of the loss of its subversive character (Rodas Morales, 2007c). As one former CONAMU official said:

This is a period, as I say, a very high “peak” [word originally in English] for the feminist movement and the women's movements, with important achievements which are also regarded critically by some of us now because it is said, or we say, that this was a moment when we let ourselves be co-opted by a state apparatus, by an institutional feminism that subtracted force from the movement as such. Well, this is very debatable, it is an entire discussion [...] (personal communication, March 16, 2015).

Indeed, this “institutionalisation” coincided with the constitutionalisation of international rights-based frameworks. The mainstream women’s movement was formed by groups that had access to the flow of knowledges and resources put into circulation by transnational governing agencies. Also, during the constituent process of 1998, securing alliances with non-feminist politicians was decisive. Female assembly members, including right-wing personalities such as Cynthia Viteri, were not linked to the movement but agreed to take on some items of the agenda. For their part, popular or indigenous women’s organisations were not widely represented. Indigenous women preferred to channel their demands through the umbrella organisation CONAIE, which in 1998 attained the historical recognition of Ecuador as a “pluricultural and multi-ethnic” country.

As we know, most of the women’s movement campaigners were NGO-based, middle-class, mestiza and professional, while the beneficiaries of the interventions were frequently less privileged women. However, as Alvarez (1999) has noted, a general characterisation of NGOs in this way would probably lose sight of their diversity and complexity: women’s NGOs have invested efforts in altering gendered patterns of domination through various strategies, legal reform being particularly central (Molyneux & Lazar, 2003). The modus operandi of the mainstream women’s movement has not escaped criticism (Rodas Morales, 2007a; 2007b; 2007c; Herrera, 2001), but at the same time, it has been considered effective in unifying and formalising women’s human rights. This was evident in 1998 when the women’s movement participated in the making of a new Constitution.

The Constitution of 1998 consolidated a rights-based discourse, with an unprecedented adoption of international human rights elements. It has been described as a corpus which enshrined the “fundamental principles of protection and promotion of human rights on the basis of equality and non-discrimination” (United Nations, 2002, p. 4). Likewise, the women’s organisations’ Shadow Report<sup>60</sup> to the CEDAW stated that “the Political Constitution [of 1998] constitutes a fundamental advancement in the legal-formal field of human rights in general and women’s rights in particular” (CLADEM, 2006, p. 7). The organisations had obtained the approval of 34 items of their agenda, which included women’s political participation (quotas), affirmative action, the recognition of unwaged domestic work as labour, and some sexual and reproductive rights. However, the influence of conservative sectors was patent in the reframing of the proposals. Debates and tensions regarding the integrity of the family arose again during the constituent process; there were concerns that expanding the definition of the family outside the traditional, heterosexual, two-parent household would promote same-sex unions (Valladares, 2003). Centre-right assembly members such as, Marcelo Santos, who as Minister of Government had facilitated the creation of the specialised commissariats for women and the family, where the ones

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<sup>60</sup> The Shadow Report is a periodical document prepared by women’s organisations from the civil society as a counterweight to the state reports that are periodically submitted to the CEDAW committee. Shadow reporting is an important tool for NGOs as it allows them to present alternative information and highlight issues not raised in the state’s official report. The shadow report becomes part of the official record (UN Women, 2007). The Report for 1990-1998 was presented by the Latin American and Caribbean Committee for the Defence of Women’s Rights (CLADEM) together with local organisations such as the Women’s Communication Workshop, the Equity, Justice and Development Foundation, the Women’s Permanent Forum, the Black Women Organisation of Ecuador and the Lesbian Women Organisation of Ecuador. The Report for 1998-2006 was prepared by the Andean Programme of Human Rights (based at the Simón Bolívar Andean University), CLADEM and the Youth’s Political Coordinator for Gender Equality.

who predominantly made such arguments. In this way, there were no advancements regarding abortion or same-sex marriage.

International human rights instruments such as CEDAW, Belem do Pará, and the Beijing Platform were emphatically invoked by women’s organisations during the dialogues with the constitutional assembly members (Valdez, 2006; Vela, 2006). As mentioned above, the Constitution of 1998 for the first time consecrated the fundamental right to personal integrity, with a special reference to violence against women, children, adolescents, and people of old age (see Table 8, Art. 23, 2, in bold). The women's movement received this recognition as the state’s acknowledgement that gendered violence *is* a human rights violation (Camacho & Hernández, 2011) and a social problem which requires policy measures and legal reform to be effectively managed (Valdez, 2006). The proclamation had almost immediate effects in public policy: VAW was declared a public health problem in November of 1998. Alongside the recognition of the right to personal integrity, Article 23 Num. 2 of the Constitution established the state’s duty to *punish* violence, especially against women, who were now considered part of the “vulnerable groups” defined in Article 47 (see Table 8). The protection of the newly recognised right to personal integrity and the obligation of the state to prosecute and punish its violation were linked together, deploying the penalty/rights assemblage derived from international instruments.

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***Table 8: Constitutional framework for VAW (1998)***

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<b>Constitutionalisation of the right to personal integrity</b>	Art. 23.- Notwithstanding the rights established in this Constitution and the international instruments in force, the State will recognise and guarantee the following:
	2. Personal integrity. It is prohibited to apply cruel penalties, torture; all procedures that are inhumane, degrading or involving physical,

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	<p>psychological, sexual or moral violence, and the application and unlawful utilisation of human genetic material are forbidden. The State will adopt the necessary measures to avoid, prevent, eliminate and <b>sanction violence especially against children, adolescents, women and the elderly.</b></p>
<p><b>Criminal prosecution of family members</b></p>	<p>Art. 24.- 9. Nobody shall be forced to declare in a trial against his or her spouse or family members up to the fourth degree of consanguinity or second of affinity, or forced to declare against oneself, in matters that can result in criminal liability. The voluntary declarations of those who turn out to be victims of a crime or those of their family members will be admissible independently of the degree of kinship. These persons, additionally, will be able to present and pursue the corresponding criminal prosecution.</p>
<p><b>Legal defence in family violence lawsuits</b></p>	<p>Art. 24.- 10. Nobody shall be deprived of the right to legal defence in any stage or degree of the corresponding procedure. The State will provide public attorneys for the legal sponsorship of indigenous communities, workers, women and minors who have been abandoned or are victims of family violence or sexual violence, as well as every person who does not have economic means available.</p>
<p><b>Vulnerable groups</b></p>	<p>Art. 47. - In the public and private sphere, children and adolescents, pregnant women, disabled people, people with highly complex catastrophic illnesses, and seniors, will receive priority, preferential and specialised attention. Persons in situations of risk and victims of domestic violence, child maltreatment, natural or anthropogenic disasters, will be cared for in the same way.</p>

Other provisions linked to VAW included Article 24 Num. 9, which explicitly authorised criminal complaints against family members. This entailed the explicit repeal of a provision, until then in force, which prohibited the initiation of lawsuits against close relatives. The impediment had been overcome through Act 103 for cases of domestic violence, but it was fully defeated in 1998, revealing a renewed political will to enable the prosecution of family members. Furthermore, it was prescribed that the state should

provide public attorneys for those lacking sufficient funds to pay for a private lawyer (Article 24). This measure was meant to facilitate and encourage the pursuit of the judicial path in cases of family violence. The constitution did not, unsurprisingly, establish any welfare state obligations to address gendered violence. Also, feminist accounts of gendered violence as a result of political subordination were not clear in the new constitutional definition of VAW. For instance, the provision on personal integrity (See Table 8) posited violence as an interpersonal conflict rather than as an effect of political subordination. Women's organisations acknowledged the limitation but, paradoxically, they identified further penalisation as the adequate strategy to enhance the visibility of gendered violence. As stated in the Shadow Report to the CEDAW for 1990-1998:

The Penal Code does not categorise family violence *specifically* as a crime. However, kinship constitutes an aggravating factor for the punishment of crimes such as injuries, rape, etc. One of the consequences of the inexistence of a specific categorisation is the dismissal of family violence as a severe violation of women's rights (CLADEM, 2006, p. 7, emphasis added).

As we see, the rights-based constitutional framework, together with the international human rights discourse, facilitated the emergence of the first demands to *specifically* criminalise domestic violence, rather than continue to address it through general categories such as physical injuries. The quote above is the earliest public document I have identified which contains an explicit appeal to full criminalisation. The potential limitations

of the Constitution's rights-based framework were not analysed in depth, and the penal code became the new target of intervention. The Shadow Report to the CEDAW denounced that Act 103 treated domestic violence "only" as a misdemeanour, understood as an "inferior category" compared to a criminal offence. Lack of penalisation was presented as evidence of the state's indifference towards VAW. The argument was replicated in the Shadow Report for 1998-2006, which stated that the non-penalisation of domestic violence restricts access to justice because it "reinforces the justice officials' conception that family violence is a problem of little importance" (Programa Andino de Derechos Humanos, CLADEM, & Coordinadora Política Juvenil por la Equidad de Género, 2006, p. 12). Impunity and high rates of attrition were brought forward as the main obstacles in the struggle against domestic VAW. The reports did mention issues such as the lack of funds for women's shelters. However, despite recognising that these difficulties were related to the reductions of social investment implemented through neoliberal policy, the main focus of the Shadow Reports was still law: it demanded coherence between international instruments, the Constitution, the ordinary legislation, and public policy. Accordingly, "updating the legal framework that sanctions gender violence upon the basis of international standards" (CLADEM, 2006, p. 10), that is, penalising it, was declared a priority.

It is important to note, at this point, that the growing practice of shadow reporting is usually carried out by non-governmental organisations, which has been the case in all of Ecuador's Shadow Reports to the CEDAW. Different civil society collectives have led the preparation of the reports each time, and the task usually involves various NGOs and human rights activists. As such, Shadow Reports present accounts of human rights violations from the perspectives of the organisations that write them, rather than the persons affected by



violence. Also, the reports are expected to comply with CEDAW guidelines and must use the language of the CEDAW convention. In this context, the post-1998 Shadow Report incorporated a broader understanding of VAW, extending its focus to forms of violence that take place outside the home, such as sexual harassment at the workplace and school. This expansion converged with the consolidation of the rights-based penal framework for vulnerable groups occurred through the Constitution of 1998: appeals to criminalisation in the report were now also directed at child sexual exploitation and child pornography, which at the time were not categorised as specific criminal offences. The constitutional inclusion of children as part of the vulnerable groups was another leverage for the women's movement. The arguments from the shadow reports anticipate the upcoming penal reform of 2005, which I address next.

## **2.1 THE CRIMINALISATION OF SEXUAL VIOLENCE AGAINST CHILDREN**

A process to criminalise child sexual exploitation and child pornography began in 2004. For the first time, the women's movement demanded the full criminalisation of conducts related to gendered violence. As noted above, the focus had expanded from the home to other sites where women and children were considered most vulnerable. The scenario appears to fit the conceptualisations of "governance" and "carceral feminism" (Bernstein, 2007; 2012; Halley, 2008a), in view of the dominant neoliberal agendas, the "peak" reached by women's NGOs, the drive to particularise crimes of a sexual nature, and the new rights framework provided by the 1998 constitution. It is important to stress this here, so it becomes clear, later on, what the differences are between this process and the post-neoliberal reform of 2014.

This time, the reform was propelled by the exposure of child pornography networks in Galápagos and Azogues, which affected mostly young girls. CONAMU thus presented a set of proposals to the Legislative Commission for Civil and Penal Matters, which accepted the suggestions. The proposals included contributions from organisations such as CEPAM (Congreso Nacional del Ecuador, 2004). From the standpoint of CONAMU, “the absence of a specific internal law that enables a *more drastic penal sanction* for the persons who commit these crimes [...] has contributed to letting unscrupulous individuals find a suitable place to carry out this type of activities in our country” (Mosquera Andrade, 2006, p. 122, emphasis added). Jointly with child-protection agencies and civil society lobbies, CONAMU formed a united front to press the Congress for the approval of the reforms. Interestingly, various draft bills on child pornography were simultaneously introduced by legislators from both ends of the political spectrum. The situation somewhat resonates with the mid-1990s acceptance of Act 103 as an instrument to protect the family,<sup>61</sup> and also brings to mind historical “scares” which resulted in policies to protect the sexuality of women<sup>62</sup> and children<sup>63</sup>. In fact, the most frequent argument, per parliamentary records, was the need to protect innocent children. The constitutional provisions granting the right to a life free of violence and establishing children as a vulnerable group, provided the grounds to enable the reform formally. Left-wing Congressman Ernesto Pazmiño, who was not linked to the

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<sup>61</sup> Albeit these reforms were approved with relatively few impediments, it has been noted by other researchers that a proposal to criminalise child sexual exploitation had already been presented by women’s organisations two years prior to this reform. It has also been noted that the National Congress had then prioritised the political negotiations following the ousting of Lucio Gutiérrez, while many (male) legislators treated child sexual exploitation with indifference (Mosquera Andrade, 2006).

<sup>62</sup> See for instance Donna Guy (2000b) on the historical discourses around “white slavery” in Latin America.

<sup>63</sup> For an account of organ trafficking in children as an “urban legend” which encapsulates widespread anxieties about modern life, see Leventhal, 1994.

women's movement, played a key role in designing and promoting the project, as did right-wing congresswoman Cynthia Viteri, who presided the Commission during the first debate.

The need for harsh penalties was stressed during the process by many legislators. Viteri manifested that the "specific reform to the sexual rights of children and adolescents [...] is about categorising offences that are not contemplated in the Penal Code" (Congreso Nacional del Ecuador, 2004, p. 12). She insisted that the existing categories such as procuring, indecent assault, or statutory rape, had a maximum penalty "of 5 years only", which was insufficient, especially if compared to countries such as the United States, where sentences "prescribing up to a hundred years" were imposed for similar crimes. Congressman Raúl Ramírez even argued that the only way to effectively stop these crimes should be the death penalty, but it was a shame that "our legal system has not so far evolved in that direction" (Congreso Nacional del Ecuador, 2004, p. 20). In the end, the reforms established sanctions of up to 35 years of incarceration (the maximum accumulation permitted at the time) for crimes against children and adolescents, including child pornography, "sexual tourism", sexual exploitation, trafficking, and extraction and trafficking of body organs. This was the first time in history that a reform to the general penal code incorporated some suggestions from the women's movement.

Other sexual violence offences were also reformed at this time: for instance, "indecent assault" was partially substituted by "sexual abuse". "Indecent assault" (*atentado contra el pudor*) had been an offence that consisted of forcing a person to perform acts of a sexual nature upon herself or others without the occurrence of sexual intercourse. The reform renamed the offence "sexual abuse" (*abuso sexual*) specifying that the passive

subjects of the offence were persons under the age of 18.<sup>64</sup> Also, the definition of rape was broadened to include penetration with objects other than the penis. According to the parliamentary records, the issue was extensively debated by (male) legislators. Initially, the objective of the reform was to modify rape to broaden the protection of children: until then, rape could be perpetrated through sexual intercourse, consensual or not, when the victim was under 12 years of age. In 2005, this changed to 14 years of age, thus broadening the scope of protection. As this reform was discussed, it was noted that rape was defined as penetration with the “virile member” only. Several congressmen argued that rape could be perpetrated with other instruments, which resulted in a change of the general definition of rape itself, broadening its scope for all cases, not only those against children.

Following the recommendations of CONAMU, sexual harassment was also expanded to include cases which lacked a hierarchical power relation between the parties (such as peers at the workplace), which had been a requirement previously. Finally, the ancient reference to the “honest woman” as the only passive subject of statutory rape (see Chapter 2, Section 5.2), was deemed obsolete and eliminated. As we see, the opportunity brought by the child pornography scandals was seized upon to tackle some ancient sexist provisions which feminists had been denouncing for decades. Nonetheless, the drive to focus on crimes against children was evident in several remarks made by congressmen who reminded their peers that the process was not meant to reform other criminal categories:

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<sup>64</sup> This specificity regarding age was not present in the former version of the offence, although there are different interpretations of the older text. The Congress afterwards issued an interpretive law in 2006 which confirmed that the passive subjects were children under 18.

When the Ecuadorian society was scandalised in recent times, and saw that our children and adolescents were not duly protected by the state, in a series of events which cause social alarm but were not categorised as crimes, it demanded from the National Congress, as the institution that is constitutionally authorised to do it, that we legislate in that sense, creating those criminal categories which did not exist, and *penalising them with rigorous sanctions*, because one of the most vulnerable parts of society is being affected. However, when it gets in our head that we have to reform many other things in the Penal Code is when we encounter this type of problems (Sandoval Baquerizo, in Congreso Nacional del Ecuador, 2005, p. 13, emphasis added).

As we can see, the reforms of 2005 expanded some criminal categories and penalties for sexual crimes which are frequently committed against women and girls. Several factors facilitated this process: protecting vulnerable family members from violence, as shown in Chapters 2 and 3, is a governmental rationality that has at times converged with feminist demands to counteract gendered violence. Also, the turn to penalty as a type of state response that is recommended by international human rights instruments, suggests patterns comparable to those that led to the approval of Act 103. In addition, the 1998 Constitution had provided the conceptual tools and legal grounds to facilitate criminalisation, as rights-based discourses linked protection with penal prosecution. However, although the women's movement was proactive in demanding and recommending criminalisation, the reforms did not deploy any feminist conceptualisation

nor acknowledged the gendered nature of the conducts that were criminalised. What is instead evident from the parliamentary records is an urgency to respond to the shock of citizens who reacted to the discovery of scandalous pornography networks. In addition, the climate in the National Congress was favourable: on the one hand, there was a need to respond to the citizenry; on the other hand, the topic on the table was not particularly controversial: no one would object to punishing a child abuser, not even conservative sectors (although there is no evidence that any religious or right-wing groups supported this reform).

What I want to stress again is that in the period between the late 1990s and the early 2000s, we can identify most of the elements that the literature has associated with “carceral feminism” in a context of neoliberal governmentality. We find a strengthened and “institutionalised” women’s movement emphasising the need for more severe punishment; there were citizen’s scares about “sexual predators” and a subsequent demand for criminalisation which was swiftly addressed by the legislators without proposing any other type of measures to address the problem. We see a displacement of feminist framings of gendered violence, and a predominant penal approach to the regulation of sexuality. At the same time, human rights-based discourses served as the formal legal framework that authorised the reforms. If we are, as it appears to be the case, in front of an illustrative example of the type of penal policies that result from the imposition of market-oriented agendas, we should expect, when the neoliberal paradigm shifts, to see also a transformation in penal approaches to VAW.

In any case, the 1998 and 2005 reforms were owned by the women’s movement as crucial milestones. They are frequently cited as evidence of the “peak” reached by women’s

organisations during this period. The golden age, nevertheless, came about during a time that, as we know, has been depicted as emblematic of unprogressive economic policies, a dark stage of our history which would be tackled through the next constitutional turn.

### 3 POST-NEOLIBERAL TURNS: SUMAK KAWSAY AND THE CONSTITUTION OF 2008

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This section brings us to the constitutional reform of 2008. First, I outline the relevant political conjuncture and then I refer to basic Andean cosmovision tenets<sup>65</sup> which allow us to appreciate the disruptive potential of the Constitution as grounds for alternative understandings of gender justice, and as a challenge to penalty. The Constitution of 2008 came together under the presidency of Rafael Correa, a young politician and academic who had no links with the discredited party system. President Jamil Mahuad (1998-2000) had been ousted by an indigenous uprising supported by civil society: popular discontent had been exacerbated by the measures taken for the bailout of the collapsed banking system. In this context, Correa secured the support of left-leaning leaders, some small political movements, and also leftist intellectuals, thus setting up an electoral coalition known as “Fatherland Alliance” (*Alianza PAIS*, AP). Correa called for the end of “the long and sad

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<sup>65</sup> The term “cosmovision” is more frequently used to refer to Andean thought, as opposed to “philosophy”. The term is an adaptation from the German *Weltanschauung*, first used by G.F.W. Hegel. Cosmovision specifically refers to the ways in which a group internalises their culture; it comprises the beliefs that allow a group to understand everything that exists, and to interpret its own nature (Cano, Mestres & Vives-Rego, 2016).

neoliberal night” (2012, p. 4) attributed to the manoeuvres of the old political parties and the governments’ subjection to international financial institutions. Once elected in 2007, Correa summoned a Constituent Assembly. His project to change the country was proclaimed as the “Citizens Revolution” (*Revolución Ciudadana*) and identified with socialism of the 21st century (Dieterich, 2009), which positioned Ecuador as one of the “pink tide” Latin American countries. As noted in the Introduction, it is widely accepted that the Citizens Revolution configured a turn to the left, away from neoliberal orthodoxy (Ospina, 2009). Indeed, public expenditure increased in the form of budgetary rises for education, health, housing and social benefits.

During the Constitutional Assembly of Montecristi —the small coastal town where the process took place—, AP formed alliances with other leftist groups, including Pachakutik, the electoral wing of the indigenous movement.<sup>66</sup> Civil society organisations comprising indigenous organisations, environmentalist activists, LGBTI collectives, and the women’s movement, presented demands at this forum. While in 1998 the social movements had strived for the formal recognition of rights, in 2008 the struggle was to defend and expand these conquests, within wider efforts to transform the development model (Ospina, 2009; Ramírez Gallegos, 2010).<sup>67</sup> The new Constitution was approved via national referendum in 2008. It has been considered innovative by progressive scholars (e.g. Santos, 2010a; 2010b) and situated within the trend known as “Neo-Constitutionalism”, that is, a rights-based or

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<sup>66</sup> The indigenous organisations had not been an ally of AP during the electoral process that resulted in the election of Correa. They had instead presented their own candidate (historic leader Luis Macas), attaining a minor percentage of votes.

<sup>67</sup> The Constitution of 2008 introduced provisions that secure a central role for the state in regard to the economy. For instance, the privatisation of key resources such as water and oil is constitutionally prohibited.



guarantee-oriented constitutional law; and also “New Andean Constitutionalism”, referring to Bolivia’s and Ecuador’s incorporation of several tenets from Andean cosmovision.<sup>68</sup>

The Kichwa expression “Sumak Kawsay” (included in the Constitution of Bolivia as *Suma Qamaña* in Aymara), which is roughly translated into Spanish as “*Buen Vivir*” or “*Buen Convivir*” (living well, coexisting well),<sup>69</sup> has been projected as a decolonial concept (Dávalos, 2008, Medina, 2011). Indigenous and non-indigenous Ecuadorian intellectuals have considered that an intercultural legal pluralism could sustain the reconstruction of “a utopia of our own, pre-Hispanic and which becomes anti-capitalist” (Ávila, 2013, p. 186). Andean thought ostensibly differs from Western worldviews in that it does not posit dichotomies such as body and soul, health and illness, human and nature, feminine and masculine. Opposites exist, but they are complementary, reciprocal and inseparable, and always give origin to a third possibility which is *relational*. As a result, there is no hierarchy between the opposites (Ávila, 2011, Medina, 2011).

Scholars in the field of the economy have referred to Sumak Kawsay as an alternative to neoliberal ideas about development and progress (Gudynas and Acosta, 2011). Sumak Kawsay conceives wellbeing not as mere access to goods and services or the accumulation of capital, but rather as the possibility of coexistence in harmony with nature, without poverty, without discrimination and with a minimum of material conditions that allow people to increase their capacities (Acosta, 2011). The introduction of Sumak Kawsay as a

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<sup>68</sup> Contemporary Andean thought is syncretic and presented in diverse ways (Estermann, 1998). This Chapter only analyses the concepts as they were incorporated into the 2008 Constitution of the Republic.

<sup>69</sup> The common Spanish translation “*buen vivir*” (living well) has been questioned by indigenous intellectuals who consider that it does not correspond exactly to the notion of Sumak Kawsay, which is related to and can only occur within the community understood as a relational space. By contrast, “living well” is considered a Westernised interpretation that alludes to what is beneficial or desirable, independently of life in the community (Macas, 2011).

decolonial alternative to neoliberalism and coloniality was, nonetheless, accompanied by the previously consolidated human rights-based principles. Andean constitutionalism, in fact, relies largely on human rights, as I show in the next sections. Such encounter between “Western” and “Amerindian” knowledges has been regarded with enthusiasm by some scholars. Boaventura de Sousa Santos (2010) recognises, on the one hand, that enormous difficulties can emerge from the encounter between Sumak Kawsay and Occidental paradigms in what he calls a “civilizatory debate”. On the other hand, he argues that the dialogue between worldviews is necessary for the transition from colonialism to “sovereignty”, understood as peoples’ self-determination. Santos proposes an “ecology of knowledges”, that is, a combination of Western and Amerindian thought that rescues the wealth of both. In the same vein, Ramiro Ávila (2013) identifies Ecuadorian constitutionalism within a liberal legal tradition, but he argues that the new Andean constitutionalism inaugurates a “post-liberal” era by incorporating original institutions that are absent from Western legal theories. These are plurinationalism, Pachamama, Sumak Kawsay, community democracy, indigenous justice and interculturalism, all of which are complemented by the principles of human rights.

As we see, there are two distinct trends within the 2008 Constitution. The first is the reaffirmation of the international human rights framework, reflected in 64 articles which recognise human rights and their corresponding constitutional guarantees. The second is the incorporation of indigenous non-liberal notions, which had never been part of an Ecuadorian legal body before, such as the recognition of Pachamama (Mother Nature) as

the bearer of legal rights,<sup>70</sup> and Sumak Kawsay as the guiding principle of the social order. Below, I outline the potential implications of the latter in the field of gender and penalty.

### 3.1 GENDER, PENALTY, AND THE PROMISES OF SUMAK KAWSAY

Sumak Kawsay is “inscribed in an entire historical process of [indigenous] peoples’ social organisation” (Macas, 2011, p. 48).<sup>71</sup> As noted above, within Andean cosmovision, the world is animated by a single life force, and the basic principles that govern it are opposition and complementarity (Maffie, 2010). Because reality is formed by interconnected, inseparable beings, Andean ontology can be considered a form of robust monism (Trowsell, 2013) whereby human existence is not above or at the centre of nature but exists within it in reciprocal interdependence. The constitutionalisation of Sumak Kawsay supposes a transversal integration of this cosmovision across institutions, policy, and legislation. It is thus pertinent to ask what the adoption of Andean tenets would entail for gender politics and penal policy. As one historical feminist leader put it: “[...] what type of law do we need in the [penal] field that is in line with a new vision of all that *Buen Vivir* represents? How does such type of code fit in the context of an alternative conception of society?” (personal interview, April 15, 2015). To propose possible answers, I will refer to

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<sup>70</sup> This controversial recognition illustrates the complexity of the encounter between liberal and non-liberal legal knowledges, as the recognition of the “rights or nature” elicited numerous debates amongst lawyers and academics in Ecuador. Many of them found it very difficult and even absurd to conceive a right without a legal bearer in the form of a person or company. Various theoretical reflections around the issue have been published (see Llásag, 2011; Zaffaroni, 2011; Ávila, 2011).

<sup>71</sup> The concept has its roots in pre-Columbian traditions but its contemporary rendition dates back to the 1970s and 1980s. It was developed mainly by indigenous intellectuals who draw from oral histories, the chronicles of authors like Guamán Poma de Ayala and Pachacuti Yamqui Salcamaygua, and archaeological evidence.

some ways in which Sumak Kawsay could disrupt coloniality by highlighting conceptual aspects that could overturn gender in relation to the penal discourse.

Feminist theoretician María Lugones (2009) has resorted to the Andean image of *Chacha-Warmi* (man-woman), the father/mother of all, characterising it as a “parallel unity of complementary opposites” (*unidad paralela de opuestos complementarios*, p. 156), to show how, within Andean cosmovision, the feminine and the masculine are always moving and producing balance, without dichotomy or hierarchy between them. Similarly, Carolyn Dean (2001) considers that, although Andean gender is based on the opposition between feminine and masculine, complementarity is so vital, that contrast becomes relative, situational and negotiable, allowing for diverse expressions of gender to emerge and be embraced. Since Andean opposites do not exclude or contradict one another but rather interrelate continuously, they produce a third “potentiality” which is always embraced and included (Medina, 2011). This provides the theoretical grounds for a “decolonisation” of gender, that is, an open, continuous negotiation and reconfiguration of the roles and identities that have become narrow and rigid through colonial and postcolonial power arrangements. The constitutional shifts could thus also result in opportunities for the inclusion of feminist concerns in public policy (Lind, 2012).

Regarding penalty, moreover, the implications of Sumak Kawsay have been examined by politicians and scholars who consider that an Andean-inspired legal system would offer alternatives to jail since imprisonment is part of indigenous conceptions of conflict resolution (Ávila, 2012). Given that relationality and not the individual is the fundamental category in Andean cosmovision, technologies like the prison, based on isolation and exclusion, would be considered a destiny worse than death. For such reasons,

communal solutions revolve around reparations and the reinsertion of the offenders into the community, rather than seclusion-based punishment. The idea of incarceration is also incompatible with other premises of community life; for instance, indigenous leader Lourdes Tibán (2009) has noted:

[...] the *ama killa* is our fundamental principle, to not be lazy. Incarceration, instead, teaches us to be lazy and imposes fifteen years of sitting down to play cards, eating for free on the state's account. That cosmovision is not part of indigenous justice (p. 72).

In imagining a framework that tackles gendered hierarchies and penalty from an Andean perspective, we could project an array of possibilities to depart from dominant legal paradigms. If a non-hierarchical complementarity is expressed through reciprocal interdependence, the realm of the relational becomes fundamental when it comes to managing violence, which is in turn understood as a breach in the continuous balance that must be produced to reach Sumak Kawsay. Consequently, damage and injury cannot be posited only in terms of individual interest or even interpersonal relations, but should be assessed in a way that considers the all-encompassing harmony that Sumak Kawsay continuously seeks. In other words, injuries produced as result of the disruptions of relational balance cannot be healed through the exclusion or elimination of any element that is part of the continuum. Imprisonment would not solve the imbalances and ruptures that violence generates, and alternative mechanisms of redress would need to be put in place. Put simply, injuries do not heal by producing further injury.

In fact, initial efforts have been carried out by some indigenous women's organisations in Kichwa communities to promote *Sumak Kawsaipa Katikamachik* (good coexistence and good treatment) community rules which are not based on state penalty, but on Sumak Kawsay (Sieder & Sierra, 2011). The efforts are in their early stages, so there are no conclusive analyses regarding their implementation, and also, not all communities appear to be willing to adopt them. Nevertheless, their sole existence demonstrates that it is possible to think about violence and gender justice outside of penalty.

Of course, it is important to acknowledge that duality and complementarity are not necessarily unproblematic for a women's politics of emancipation. Burman (2011) has discussed the gaps between complementarity as an abstract ideal and the actual socio-political practices that have historically impacted on Andean women's lives. She shows that Bolivian indigenous women sometimes represent machismo as a colonial introduction, but she also suggests that pre-colonial Andean societies were unlikely non-hierarchical in relation to what we now call gender. Gargallo (2014) has also affirmed that some women from indigenous communities recognise the existence of an "ancestral patriarchy", and distinguish it from the one introduced through colonisation. She refers to this intersection as the "patriarchal junction". Indigenous leader Norma Mayo (2009) has affirmed that "In practice, complementarity hides the true inequalities that exist between men and women" (p. 139).

These inequalities have been denounced by recently formed indigenous women's organisations in Ecuador: for example, the Provincial Network of Kichwa Women's Organisations of Chimborazo successfully campaigned for the inclusion of constitutional provisions to ensure that indigenous justice procedures do not undermine indigenous

women's status (Cucurí, 2013). This resulted in the creation of Article 171 of the Constitution, which mandates:

The authorities of the indigenous communities, peoples, and nations shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories, *with a guarantee for the participation of, and decision-making by, women*. The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and the human rights enshrined in international instruments (Constitución de la República del Ecuador 2008, emphasis added).

Regarding domestic violence, some research has shown that at times, not unlike state approaches, indigenous justice responses result in the dismissal of the problem as an intimate issue that does not deserve to be mediated through the communal authority (Barrera Vivero, 2016). In other cases, when the authority does intervene, the conciliatory nature of the solutions has been read by some as inadequate, because the negotiations often exclude the opinion of women and potentially facilitate the persistence of violent situations (Pequeño, 2009; Vintimilla, 2009). As Gargallo (2014) argues, coloniality has imposed a "sexual hierarchy" over the idea of complementarity; that is, outside the Andean ontology of interconnectedness, complementarity can result in fixed, hierarchical gender representations. For these reasons, it is important that appeals to Sumak Kawsay as an alternative to traditional justice consider that complementarity and reciprocity result in

“correspondence” and not a hierarchy (Sobrevilla, 2008). There would be no dichotomy between “maleness” and “femaleness”, as these characterisations arise only in relation to one another (Burman, 2011). If within Sumak Kawsay, Chacha-Warmi is fluidity between different aspects of reality, which are equally valuable but also diverse, this could open possibilities for women to recreate themselves outside dominant legal hierarchies.

## 4 A CHANGE OF PARADIGM? HUMAN RIGHTS, PENALTY, AND VAW

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Thus far, I have explored the emancipatory potential of Sumak Kawsay in relation to gender and penalty. With that background, I demonstrate in this section that the 2008 constitutional framework for VAW did not in practice produce any significant breach of penalty. The inclusion of indigenous decolonial notions, I argue, has not resulted in transformations of the rights-based penal discourse that dominates the treatment of VAW. Put simply, the new Constitution reproduced the framework of 1998. The first article of the 2008 Constitution declares Ecuador “a constitutional state of rights and justice, democratic, sovereign, independent, unitary, *intercultural, plurinational* and secular” (emphasis added). The terminology is worth emphasising because, while the Constitution of 1998 proclaimed Ecuador as a “pluricultural and multiethnic” state, later critiques of neoliberal constitutionalism have identified “multiculturalism” as a market-oriented reframing of indigenous demands, which did not break the hierarchy between coloniser and colonised, but only recognised the existence of difference (Estermann, 2014). Instead, “interculturality” refers, as the Constitutional Court of Ecuador has affirmed, to “relations



and articulations between heterogeneous peoples and other social groups and entities that coexist in the civic nation” (Corte Constitucional del Ecuador, 2014, p. 10).

Although, as mentioned already, scholars have envisioned “ecologies of knowledges” through which the wealth of different worldviews could be redeemed and seized (Santos, 2007b), the encounter of worldviews has also elicited debates regarding the hierarchies that may have continuity due to coloniality. It has been noted that there are limitations when it comes to the incorporation of alternative models into hegemonic legal structures. For instance, the concept of *Pachamama* (Mother Earth), when absorbed by the penal logic, rather than enabling the treatment of nature as a subject of rights, frames it as a legal good, triggering an almost immediate response from penal law through the creation of environmental crimes (Zaffaroni, 2011). The new penal code in Ecuador in fact introduced an entire chapter on “Crimes against the environment and nature, or Pachamama”.<sup>72</sup> Another example of subordination of the Andean view by the Western-style human rights discourse is the one I address below.

Despite its ground-breaking potential, the new Constitution seems to have followed a Western model regarding penalty, an area from which Sumak Kawsay is all but absent. The integration of Sumak Kawsay is evident in the constitutional provisions that refer to environmental rights (with the recognition of the rights of Pachamama), property (with the recognition of communal property and the limitation of private property through social and environmental responsibility), and development (which is now oriented toward living

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<sup>72</sup> There are five sections about environmental crimes in the Fourth Chapter of the Penal Code. These include: crimes against biodiversity; crimes against natural resources; crimes against environmental administration; and crimes against non-renewable natural resources.

well).<sup>73</sup> However, Sumak Kawsay is not invoked in the provisions linked to VAW, such as the recognition of the rights to freedom, personal integrity, and a life free from violence. One could say that at a constitutional level Sumak Kawsay has impacted civil rights less significantly than social and economic rights. Nevertheless, contemporary constitutional scholars have pointed out that the change of paradigm in the Constitution of 2008 entails an elimination of the distinction between individual and collective rights that was made in 1998. To Ávila (2008), the new framework supposes that all human rights are fundamental rights and that all fundamental rights have both an individual and a collective dimension. Accordingly, the Constitution of 2008 established a new hierarchy for international human rights. Art. 417 indicates:

The international treaties ratified by Ecuador shall be subject to the provisions set forth in the Constitution. In the case of treaties and other international human rights instruments, the principles of benefit for the human being, of non-restriction of rights, of direct applicability, and open clause, shall be applied as set forth in the Constitution.

To clarify, per Art. 425, international agreements concerning human rights (including those relevant to VAW, such as Belem do Pará) prevail over the Constitution when they are more favourable than the latter for the effective materialisation of human rights (Art. 424).

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<sup>73</sup> Development is defined as “the organised, sustainable and dynamic group of political, socio-cultural and environmental systems which underpin the achievement of the good living, the sumak kawsay” (Constitución de la República del Ecuador, 2008, Art. 275).

This indicates a deeper penetration of human rights in comparison to 1998, whereby international treaties were considered part of the national legal system, but hierarchically inferior to the Constitution. Regarding the framework for VAW, as shown in Table 9, the 2008 constitutional is nearly identical to that of 1998. One notable addition is the prescription of a specialised penal process (Art. 81) to deal with crimes against “groups with priority needs” — equivalent to the former “vulnerable groups” —, including crimes of family violence and sexual offences, which are not explicitly named as VAW, although the expression “gender violence” is used in Article 77. This set of provisions, as was the case in 1998, is based on the recognition of the right to personal integrity (Art. 66), which crossed over unmodified, alongside the mandate to protect integrity by enforcing legal sanctions. As a result, the notion of gendered violence, which was again constructed through human rights, continued to rely on criminal justice as the preferred form of state response.

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*Table 9: Constitutional framework for VAW (2008)*

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Art. 66.- The following rights of persons are recognised and guaranteed:

3. **The right to personal integrity** which includes:

a) **Bodily, psychological, moral and sexual integrity.**

**Right to personal integrity and to a life free of violence** b) **A life free of violence in the public and private sectors. The State shall adopt the measures needed to prevent, eliminate, and punish all forms of violence, especially violence against women**, children and adolescents, elderly persons, persons with disabilities and against all persons at a disadvantage or in a vulnerable situation; identical measures shall be taken against violence, slavery, and sexual exploitation.

c) Prohibition of torture, forced disappearance and cruel, inhuman or degrading treatments and punishments.

d) Prohibition of the use of genetic material and scientific experimentation that undermines human rights.

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<p><b>Obligation to declare in cases of gender violence</b></p>	<p>Art. 77.- 8. <b>No one can be required to make a statement in a criminal trial against one’s spouse, life partner or relatives</b> up to the fourth degree of consanguinity or second degree of affinity, <b>except in cases of family, sexual and gender violence.</b> The voluntary statements made by the victims of a crime or by the relatives of these victims, regardless of the degree of kinship, shall be admissible. These persons can file and pursue the corresponding criminal proceedings.</p>
<p><b>Groups of priorities needs</b></p>	<p>Art. 35.- Senior adults, girls, boys and adolescents, pregnant women, disabled persons, those deprived of their liberty and those who suffer catastrophic or highly complex illnesses, will receive specialised priority attention in the public and private sphere. The same <b>priority attention will be received by persons in risky situations, victims of domestic and sexual violence, of child maltreatment,</b> natural or anthropogenic disasters. The state will provide special protection to persons in situation of double vulnerability.</p>
<p><b>Specialised procedures to prosecute gender violence</b></p>	<p>Art. 81.- <b>The law shall establish special and expeditious procedures for prosecuting and punishing the crimes of family violence, sexual offences, hate crimes</b> and crimes perpetrated against children, adolescents, young people, persons with disabilities, elderly persons and persons who, due to their specific characteristics, require greater protection. <b>Specialised public prosecutors and defence attorneys shall be appointed for the treatment of these cases,</b> in accordance with the law.</p>
<p><b>Specialised courts for the family.</b></p>	<p>Art. 186 [...] In each canton, there shall be at least one <b>judge specialising in the family, children, and adolescents</b> and one judge specialising in adolescent offenders, in accordance with the needs of the population.</p>

References to Sumak Kawsay cannot be spotted anywhere in the VAW provisions or in the broader criminal justice framework. Individual freedoms, specifically personal integrity, were brought in virtually unchanged from the 1998 model, privileging a rights-based approach over the Sumak Kawsay perspective. Predictably, the state’s obligation to respond to the violation of a right translates into penal prosecution. Art. 77.- 8 explicitly enables the prosecution of family members (see Table 9). Even the formal right to a

specialised penal process (Art. 81), while intended to widen access to justice and minimise re-victimisation, confirms that the protection of rights is understood primarily as a set of conditions that enable penal litigation and facilitate the use of the criminal justice apparatus. Few articles in other parts of the Constitution refer to welfare or the prevention of gendered violence. Although there are provisions which regulate the media (Art. 19) and the dissemination of discriminatory messages (which is also leads to penal sanctions), the penal response remains central.

The prolongation of the 1998 rights-based framework into a Constitution that was meant to break the paradigms established by its predecessor can be attributed to various factors alongside coloniality. Regarding women's rights, feminist networks were initially suspicious of the constituent process, because they "thought that several of the things that we had conquered in 1998 would be put at risk" (former member of CONAMU, personal communication, March 16, 2015). When the constitutional reform became inexorable, organisations across the country put together a "Women's Pre-Constituent Assembly" to prepare themselves for the process. The agreement reached in this forum was to defend the achievements of 1998 at all costs (Rosero, 2007), which predictably translated into a set of proposals which mirrored those of the previous constituent assembly. In this way, the resulting "Women's Agenda" reflected the concerns of the movement facing an impending political turn and the perceived risks of "losing it all" in the transition. Thus, rather than reimagine gender-state relations, the Agenda shields the achievements of a recent past. This fear of rollback could be related to women's organisations' recent experiences with the legislature:

We have to take into account that in the 2006-2007 National Congress, there were attempts to diminish women's rights, led by Pascual del Cioppo, from the Social Christian Party. An attempt was made to eliminate reproductive and sexual rights achievements from the Public Health Code. In 2007, the Congress debated a proposal to criminalise therapeutic abortion by various ultraconservative legislators (Palacios Jaramillo, 2008, para. 31).

At this point, Correa had already been elected but the new Constitution was not yet in force. It appears that the women's movement did not have reasons to believe that the Constitutional Assembly would protect them from regressive shifts. Indeed, the women's agenda for the constitutional process does not evidence alliances between the movement and the Citizen's Revolution. Furthermore, the agenda reveals concerns with the preservation of the secular state and worry about potential proposals from the Catholic Church in the Assembly. Perhaps because Correa has publicly declared himself a Catholic man (RTVE, 2008), there were no assurances that his government would accept a gender politics that would frontally contradict the Church. These fears would later be confirmed.

However, the Women's Agenda did to a great extent endorse the economic project promoted by the new government, something that would appear contradictory if we framed the women's movement merely as a vessel of neoliberalism. The agenda stated that the new economic model should be "caring, non-discriminatory, communal, equal, democratise the means of production, redistribute wealth amongst individuals, collectives and regions, with social, economic and environmental justice" (Movimiento de Mujeres del Ecuador,

2008, p. 8). As we see, the women's movement supported the social redistribution goals proposed by the government. However, the Agenda did not allude to Sumak Kawsay nor any of the concepts that were proposed by the indigenous movement. Women's organisations did not take part in those discussions or reflect on the implications of such framework for the politics of gender. Moreover, although some indigenous women participated in the Pre-Constituent Assembly, their demands were not taken up in the mainstream Women's Agenda. Indigenous leader Cristina Cucurí (2009), who led the campaigns to ensure the participation of women in indigenous decision-making, noted: "in [the Constituent Assembly] we saw that our proposals had fallen off along the way: the topic of indigenous women did not exist anymore in the proposal of the general women's movement" (p. 134). Rather than resorting to Sumak Kawsay, the women's movement emphasised the "pre-eminence of human rights" and "universal and non-discriminatory inclusiveness" (Movimiento de Mujeres del Ecuador, 2008, p. 8), depicting them as the foundations for the construction of a more democratic state. In this manner, the movement remained outside the currents that were putting forward alternative community models and instead relied on the women's human rights discourse that had been developed since the mid-1990s.

This framing expectedly led to the re-centring of state criminal justice to convey the constitutionalisation of women's rights. The Women's Agenda referred to penal sanctions as an important means to counteract discriminatory practices: "it is necessary to identify material and symbolic forms [of discriminatory practices], both visible and subtle, and act upon them through concrete measures for sanction and non-impunity" (Movimiento de Mujeres del Ecuador, 2008, p. 3). The focus on penalty was likewise evident in parts of the document which rejected statutory limitations and alternatives to incarceration in matters

of gendered violence:<sup>74</sup> “these crimes are not susceptible of pardon or amnesty, and they are not susceptible of an alternative sanction” (Movimiento de Mujeres del Ecuador, 2008, p. 10). In sum, the movement centred penalty and overlooked alternative approaches to gender justice. There is no evidence that the indigenous movement or any other collective explicitly proposed a non-penal approach to VAW, but the alternative was there, given the constitutional recognition of indigenous justice, which is widely known to be non-carceral. The women’s movement’s stance was from the outset unresponsive to alternatives besides penalty, on the assumption that a different framing would belittle VAW. What underlies this perspective is again the great symbolic value attributed to criminal law and the threat of punishment, as well as the now solid connection between penalisation and the protection of rights.

Ultimately, the women’s movement achieved the inclusion of several demands. A pact was signed between some assembly members and the organisations, which secured the preservation of the prerogatives attained in 1998 (Palacios Jaramillo, 2008). This was not without arduous negotiations and some reversals on certain topics: for instance, demands such as same-sex marriage and legal abortion were obstructed by Catholic lobbies and sectors which feminist activists often refer to as “anti-rights groups”. Also, a petition to elevate CONAMU to the category of State Ministry was dismissed. In fact, not long after the Constituent Assembly, CONAMU ceased to exist as the main governing body for matters of gender, and was replaced by a smaller secretary. According to the Shadow Report for 2014:

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<sup>74</sup> This call for the indefeasibility of gender violence was not included in the final constitutional text.



The ephemeral illusion that the “Citizen’s Revolution” as a re-foundational agenda for the country, would contribute to establishing the rights of women and gender equality, as stated in the Constitution of 2008 as a priority for the democracy, evaporated as soon as the Constitution was approved via referendum. [...] The long institutional transition process, from 2009 to 2014 significantly debilitated the public institutions for gender equality. [...] From 2009, the transition commission, just like all other Equality Councils, had their decision-making competence dismantled, and as a consequence their attributions and technical, political and budgetary capacities [also diminished] (Coalición Nacional de Mujeres, 2014, pp. 26-27).

Despite these reversals, VAW was not substantially modified during the Constitutional Assembly. VAW was in fact, one of the least controversial issues on the table. A feminist leader who had worked for decades with women’s collectives in the south of the country said:

I remember that the violence issue was not too complex to manage in the Constituent [Assembly], it was one of the [topics] that better fitted the discourses of the assembly members [...]. Very rarely an assembly member would say that [violence against women] should not constitute a criminal offence and that it should continue to be treated the way it was in Act 103 (personal communication, May 15, 2015).

In the constitutional construction of VAW, not only is Sumak Kawsay absent, but also, the resulting framework reaffirms penalty as a pathway to secure human rights, precluding the inflow of alternative representations of justice. This is also reflected in recent literature, including feminist elaborations on the penal system as well as judicial interpretations of the Constitution. Such discourses, which I scrutinise in the next sections, build from an acceptance of penalty as legitimate, so long as it is contained by due process and other principles.<sup>75</sup>

## 5 THE NEW CRIMINAL LAW: A “RIGHTS-BASED PENALTY”

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In this section, I show that the new criminal law that progressive scholars and politicians promoted after the enactment of the 2008 Constitution, facilitated the reaffirmation of penalty by presenting criminal justice as a system that can be humane and just. It does so by positing a series of “penal guarantees” whose objective is to ensure that the penal apparatus complies with human rights. My contention may sound counter-intuitive at first, but I show that rights-based stances on criminal law legitimise punishment, not only because they construct incarceration as a fair consequence of rights-violation, but

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<sup>75</sup> For a discussion of the theoretical implications of this perspective see also Chapter 1, Section 2.

also because they argue that the penal apparatus itself can function as the guardian of human rights.

Many progressive Latin American scholars have advocated for a guarantee-oriented, rights-based criminal law, whose main objective would not be to punish but rather to contain and limit punitive power (Vallejo Jiménez, 2011). In Ecuador, after the enactment of the 2008 Constitution, proponents of a more progressive penal doctrine had an opportunity to introduce this framework, aiming at the constitutionalisation of criminal law (Ávila, 2009; 2013). In this section, I argue that such rights-based framework, which has also been adopted by many feminists, reconciles penalty and human rights. Such reconciliation, in turn, facilitates the dismissal of non-penal alternatives to tackle social violence, reaffirming criminal justice as the only legitimate legal path. I prove this by examining the discourses underlying the theoretical perspectives that inform rights-based penalty, and showing how these relate to the legal treatment of VAW. I further support my contention through the analysis of a Constitutional Court decision, which will contrast the outcomes of indigenous representations of justice with the solutions provided by the rights-based penal discourse. In this way, I provide a clear account of the socio-legal and political context that surrounded the feminist penal reform of 2014.

After the Constitution of 2008 passed, jurists based in Ecuador began to discuss the possibility of proposing a new penal code. Some scholars have reflected on how state law could learn from indigenous justice as an alternative to the prison (Ávila, 2013). However, a more widespread trend in the region has revolved around building a criminal law that ceases to be oppressive by implementing “guarantees” that limit coercive power and ensure the protection of human rights. Post-2008 scholarly work in Ecuador is largely based on a

theoretical framework known as “*garantismo penal*” (Ferrajoli, 1995), a guarantee-based or rights-based criminal law.<sup>76</sup> Authors from the United States (US) have referred to analogous approaches as “constitutional criminal law” (Dubber, 2004; Scott, 1957). These perspectives aim at limiting penalty while protecting the human rights and dignity of the individuals who are involved in a trial. A limited, minimal criminal law promotes the observation of “penal guarantees”, that is, substantial and procedural principles that act as “dams against arbitrariness and error” (Ferrajoli, 1995, p. 210). Guarantees are expected to minimise the rates of inefficiency (impunity) and injustice (incarceration of innocents) that the penal apparatus could produce. A guarantee is a *conditio sine qua non*, to impose incarceration since it defines the minimum human rights standards required to activate the penal apparatus.

To a great extent inspired by the theory of penal guarantees, a new “theory of constitutional guarantees” (*garantismo constitucional*) also emerged. Scholars distinguish this framework from traditional “legalistic” constitutional law because it promotes the direct enforceability of human rights, including entitlements that had been considered “programmatic” goals in older models. This means that some constitutional provisions used to point at a desired political horizon but were not matched with any procedural rules to make them directly judiciable. Rights-based constitutionalism, conversely, maintains that principles, not only rules, are always directly enforceable (Ávila, 2008). Such principles

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<sup>76</sup> Perhaps the most influential expression of this view is the work of Italian scholar Luigi Ferrajoli (Ferrajoli, 1995), who is amply cited by Ecuadorian and Latin American authors working with rights-based criminal justice. Ferrajoli positions himself as a critic of the “social projects that are disciplinary, correctionist, police-oriented or otherwise anti-liberal” (Ferrajoli, 1995, p. 213), contrasting the minimal criminal law he advocates for, with a maximum or authoritarian criminal law which, he contends, has been prevalent historically.

appear in Chapter VIII of the 2008 Constitution, entitled “Protective Rights” (*Derechos de protección*), which institutes human rights as “fully actionable”.

Based on all these principles, the theory of penal guarantees reorients the focus of criminal law from social control to the protection of rights. The function of criminal law is no longer to repress, but primarily to *guard* the rights of victims and offenders. In this way, the Constitution declares that the state should defend the “rights of the victims, of the defendants, and of those deprived of their freedom” (Ávila, 2013, p. 204). As we know, criminal law restricts individual freedoms to repel attacks on individual freedoms —or, as Dubber puts it, “criminal law consists of the state’s most potent and most potentially intrusive means of interfering with those very rights” (Dubber, 2004, p. 46). This paradox is overcome by establishing principles which minimise the effects of coercion by limiting it through human rights. Such arguments resonate with broader stances which consider that “law’s violence” can be tempered by ethics.<sup>77</sup> Penal guarantees, as I explain below, are often invoked as an ethical basis for penal intervention.

Within the penal guarantees framework, incarceration can only emerge from a valid trial through which an offence has been duly substantiated and whereby the human rights of the parties involved have been protected. In this way, punishment is licit and reasonable. As we know, due process is meant to guarantee that responsibility is ascribed on “fair terms” from a factual point of view (Lacey, 1998, p. 198). However, penal guarantees reach further,

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<sup>77</sup> As Lacey (2002) explains, law’s violence, and its ethical limits and possibilities, have provided a productive seam of enquiry in contemporary social theory. While this thesis does not delve into the relationship between ethics and law, it is important to acknowledge that rights-based criminal law, in the way it is expressed by Ecuadorian scholars, is a stance that broadly contends that an ethical (although admittedly violent) criminal law is possible.

as they are intended to humanise and vindicate those who would have been deemed deviant through traditional penal doctrines. Nevertheless, in so doing, the framework does not dispute the legitimacy or adequacy of penalty, at least thus far. A reinscription of penalty is possible, not only because the legitimacy of the penal apparatus is already accepted, but also because, through penal guarantees, it becomes possible to argue that the penal apparatus *itself* can function as the guardian of human rights. See for instance this quote from a 2009 draft bill for a Code of Penal Guarantees (*Anteproyecto de Código de Garantías Penales*), prepared by a technical team of scholars and practising lawyers on behalf of the Ministry of Justice and Human Rights. The project was introduced as “the penal code that a guarantee-based constitution demands” (Ávila, 2009, p. 21). One passage of the preface reads:

Guarantee-based criminal law allows us to deliver a justification for the existence of criminal law, as it regulates and minimises punitive violence; it establishes the parameter of legitimation of the state when it uses its sanctioning power; it is adapted to a model of substantial democracy characteristic of a constitutional State of rights and justice (Ávila, 2009, p. 23).

This quote implies a pressing need to justify penal coercion, which penal guarantees respond to. Moreover, the rights-based legal system introduces penal guarantees as a constitutive element of democracy: legal rules not only limit the coercive power of the state (as in classical liberal legalism); now that they have evolved into guarantees, they set out to

transform such power into the very custodian of rights. If one conceives penal guarantees as a *conditio sine qua non* in the democratic state, penalty, as an effect, also becomes an indispensable element for the construction of rights and justice within a democracy. All appeals to penalisation (feminist or not) are thus already legitimised at the highest levels of the legal system. Specifically, the 2008 Constitution establishes “procedural guarantees” (Article 76), meant to protect the rights of the person who is subject to an administrative or judicial process. These include the presumption of innocence, the principle of legality, *in dubio pro reo*, *non bis in idem*, amongst others. The process by which these guarantees are expected to “radiate” into substantive and procedural penal legislation, has been referred to as the “constitutionalisation of criminal law” (Ávila, 2013). Put more boldly, rights-based stances on criminal law, rather than interrogating or limiting penalty, contend that coercion and incarceration should be human-rights-compliant. Unsurprisingly, progressive social actors, including feminists, have resorted to rights-based penalty as a base framework.

### **5.1 IMPACT OF RIGHTS-BASED PENALTY ON FEMINIST DISCOURSES ON VAW**

A rights-based portrayal of the relationship between the Constitution, penal guarantees, and the protection of human rights, has echoed in recent feminist analyses of VAW (see for instance Arroyo Vargas, 2011; Ramírez Huaroto, 2011). In Ecuador, Gayne Villagómez (2013) has considered that the New Constitutionalism favours human rights, including women’s rights and the right to a life free of violence. Initially, she recognises that law has been “one of the main articulators of feminine subordination”, and that Latin American criminal codes, in particular, are “permeated by archaic conceptions when it comes to women” (p. 56). However, she then presents penal reform as an “opportunity to substantially advance” (p. 57) women’s rights, revealing an investment in a new form of

criminal law that has overcome the sexism of traditional legislation. While Villagómez acknowledges that criminalising VAW can be problematic, she resolves the tension through the penal guarantees argument:

Minimal or guarantee-based criminal law does not perceive offences as less serious; far from it, but it addresses them from the perspective of social and individual responsibility on the one hand, and on the other it provides the victim with an active role to find the reparations to her life project (Villagómez, 2013, p. 57).

Here, the author touches a key feminist trope: the symbolic value of criminal law, that is, the idea that through penalisation the state and the community recognise and condemn injuries to women as serious offences. In Villagómez' view, rights-based criminal law seizes this asset without the inconveniences of traditional (patriarchal) penalty. In other words, rights-based penalty offers the advantages of penalisation while minimising its problematic consequences. In this way, penal minimalism accomplishes a reconciliation between potentially questionable judicial and police practices, and the rights-based utopia of New Constitutionalism, whereby injuries can be vindicated, symbolically and materially, with minimal "side-effects".

Furthermore, criminal law promises to address reparations for violence survivors; that is, in Villagómez' view, besides symbolising the social rejection of gendered violence, criminal law could and should repair damages —a function traditionally attributed to civil



law. Through penal guarantees, reparations are accomplished without de-centring penalty; further, they are now a component of penalty. Looking ahead to the new Penal Code, Villagómez argues that the older code “responds to retributive justice in contradiction to the guarantee-based conception of the Constitution, when it should be in line with restorative justice” (p. 66). This contention makes evident that Villagómez supports the installation of a criminal justice model which includes reparations for survivors. What is not so clear within this framing is the role of criminal law regarding protective measures. This is unfortunate because prevention has historically been central to feminist-promoted legal reform, as well as an empirically observed requirement of women who report violence. As noted in Chapter 3, many feminists consider that protective measures are the main motive for survivors to report domestic violence. Moreover, as I show in the following chapter, the adoption of ordinary penal procedures in VAW can have detrimental effects on available pre-emptive measures, given that the penal apparatus is not primarily designed to prevent violence.

In other words, this “multitasking” criminal law, which is meant to be symbolic, protective, and restorative, may not in practice suffice to address some of women’s most urgent concerns, even in its human rights-friendly form. The idea of prevention, which was centred in Act 103, becomes secondary in this way, because it is not a main goal of the penal system. The new criminal code refers to prevention mainly in two senses: as deterrence (through the symbolic power of criminal law at an individual and societal level) and as assurance of the penal process, that is, the “prevention” of attrition. For this reason, preventive measures in the criminal code, as I demonstrate in Chapter 5, are mainly oriented

at ensuring the presence of the parties in the trial, not designed to halt a continued situation of violence.

In any case, even if rights-based penalty succeeds in instituting a kind of criminal justice that favours rights and reparations, this does not mean that incarceration will cease to be the typical sanction following penal interventions, with all that everything it entails. The Constitution consecrates penal guarantees, but it does not contain any principles or rules that wholly or partially displace the prison. Although rights-based penalty is presented as opposed to retributive criminal justice, given that the prison remains unchallenged, carceral solutions are still available for justice administrators and policy makers to call upon at any moment. Imprisonment is essentially legitimate and justified. I demonstrate this in practice through post-2008 constitutional jurisprudence (case law). In the next section, I corroborate that the post-neoliberal incorporations have failed to disrupt hegemonic penalty. State jurisdiction does not accommodate a response to human rights violations outside of penalty, which in turn suggests that rights-based frameworks can hold back the counter-hegemonic potential of Andean cosmovision.

## 6 RIGHTS-BASED PENALTY IN PRACTICE: A LESSON FROM INDIGENOUS JUSTICE

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Critics have noted that encounters between different approaches to justice can result in the subordination of the non-dominant perspective (Estermann, 2014; Merry,

1988; 2003a) which, in turn, hinders the possibility of an inclusive legal pluralism. Sally Engle Merry (1988) refers to legal pluralism as a situation in which two or more legal systems coexist in the same social field. Legal pluralism creates complex problems regarding the applicability of each system; in fact, the Constitutional Court of Ecuador has addressed the applicability of indigenous community justice to ordinary crimes, as we will see here. Merry (1988) considers that in the case of colonial societies, in which the metropole imposes a legal system on the periphery, legal pluralism is embedded in relations of unequal power. She also argues that the study of colonialism can teach us about law and globalisation in the present: in the current era, reformers promote human rights, development, and the rule of law as “improvements” to ameliorate the lives of “less developed” populations, assuming that the improvements they advocate are of universal value. In Merry’s view, there is a parallel between colonialism and globalisation in this sense.

In the context of Andean communities, Estermann (2014) makes a connection between colonisation and “coloniality”. While “colonisation” refers to a historical process, coloniality refers to a variety of current economic, politic, psychological and existential phenomena, which have one thing in common: that a type of cosmovision, philosophy, religiosity, and form of living, dominates over other alternatives. Interculturality, that is, inter-cultural dialogue, thus emerges as a form of decolonisation. Decolonisation recognises political asymmetries related to gender, class, and race. However, as Estermann argues, there is a risk that law and policy reform do not tackle the dominant matrix, which could remain enclosed within colonial structures. Attempts to decolonise become in this way a “folkloric makeup” which leaves unequal power relations intact. From a constitutional law perspective, Gargarella (2010-2011) similarly contends that “legal implants” are unlikely to

function in the way the reformers expect them to, especially if they are immersed in processes of “unequal legal integration”, whereby the main institutional structures remain unchallenged. In other words, decolonial notions would not disrupt the dominant body of law if they have been adopted using “inferior recognition” (Walsh, 2009), which can occur when the ancestral is reinterpreted to adapt it to available legal categories.

One example is a decision made in 2014 by the Constitutional Court of Ecuador on the application of indigenous customs to violations of human rights. A group of men had been found responsible for killing a person in the village of La Cocha, a community of Panzaleo people, of Kichwa nationality. The local authority (the Communal Assembly) ordered the men to be whipped with stinging nettle (a ritual plant), forced to undress, and to carry heavy rocks around the village. They were also bathed with cold water,<sup>78</sup> ordered to ask forgiveness from the entire community, and to pay monetary compensation to the mother of the deceased. However, the media depicted these procedures as “torture” (El Universo, 2010), and as a consequence, a public prosecutor and the police forcefully entered the community to “rescue” the offenders. A state penal court then heard the case and considered that the defendants had been “abducted” by the indigenous authority and since there was evidence that a murder had been committed, both the offenders and the indigenous authorities were held in custody. Later, the indigenous authorities were released through habeas corpus.

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<sup>78</sup> According to some research carried out in various provinces of the Ecuadorian highlands, physical punishment is an exceptional sanction amongst indigenous authorities’ decisions. Most cases are solved through conciliation (Vintimilla, 2009).

Facing these events, a community member presented an “extraordinary protective action” (*acción extraordinaria de protección*)<sup>79</sup> to the Constitutional Court, demanding a binding pronouncement on the application of indigenous justice. Amongst other queries, the petitioner asked whether the trial that the offenders were facing while in police custody constituted “double judging”, that is, a violation of *the non-bis in idem* principle, since the indigenous authority had already sentenced them. In 2014, the Constitutional Court finally issued a resolution. The conclusions reached by most judges are illustrative of how a form of human rights discourse played a role in presenting penalty as sufficient to frame social conflict, as explained next.<sup>80</sup> The Court commissioned an expert report to confirm that the applied sanctions were customary, to confirm the legitimacy of the indigenous authority,<sup>81</sup> and to provide the relevant insights from indigenous cosmovisions. The objective was to “take into account criteria and parameters that are characteristic of legal pluralism” (Corte Constitucional del Ecuador, 2014, p. 10). At first glance, this signals an endorsement of what Santos (2007a; 2010) terms “ecologies of knowledges” and Estermann (2014) calls “interculturality”. However, as Estermann argues, interculturality and decolonisation can only be based on an acknowledgement of political asymmetry and the hegemony of certain

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<sup>79</sup> This action (Art. 94 of the Constitution) proceeds against sentences of definitive authority resolutions through which constitutionally recognised rights are presumed to have been violated.

<sup>80</sup> In regard to this resolution, there was one dissenting vote from a judge who considered that the indigenous proceedings were legal and legitimate, and that any additional state trial would constitute a second judging.

<sup>81</sup> Curiously, the Court resorted to the doctrinal concepts of Austrian jurist Hans Kelsen to provide a notion of what an authority is and determine if the Communal Assembly was enabled to administer justice. Although the conclusion was that, indeed, the authority was legitimate and the imposed sanctions corresponded to the customs of the Panzaleo communities, it is rather puzzling that the voice of a paradigmatic representative of legal positivism was authoritative in this case. Despite the best efforts of the Court to apply the principle of interculturality, appealing to the rational voice of juridical science was an imperative, even though the legitimacy of the Communal Assembly was never questioned by any of the concerned parties, including the affected offenders.

cultures over others. Interculturality as a critical tool needs to address asymmetry in class, race, and gender relations. I argue that the Court's decision lacked such recognitions.

While the Court explicitly mentioned legal pluralism, it also laid the grounds to favour penal legitimacy for future similar cases. The Court posited the problem as a dichotomy: how to make “the legal devices of the local constitutional system” (the fact that indigenous justice is recognised) compatible with “the conventional and international juridical order of human rights” (Corte Constitucional del Ecuador, 2014, p. 13). In other words, they presented indigenous justice and human rights almost as mutually exclusive. From the standpoint of the community, the killing caused a rupture of harmony in communal life, a break of *Sumak Kawsay*. Correspondingly, the role of the authority was to strive for the re-establishment of balance by designing mechanisms to repair the damages and eventually reinsert the offenders into the community. As noted above, “balance is achieved through the inclusion (social reintegration) of the offender and the compensation for the victim, which also strengthens the community ties” (Ávila, 2013, p. 198). However, the Court considered that such restoration did not constitute a sufficient response to the central issue: the violation of the human right to life.

The Court's judges' reasoning revolved around the ethical principle that an individual's life is an end in itself. They implied that the indigenous representation of life as relational and interconnected (which leads to the interpretation of a killing as rupture of communal balance) is incompatible with this view. Through the notion of “protected legal good” (*bien jurídico protegido*), the Court established a distinction between what the community intended to preserve — that is, the relational harmony that leads to *Sumak Kawsay*—, and what it left unaddressed, namely, life itself:

What the community members who are vested with authority investigate is the degree to which the behaviour of the implicated [offenders] produces damage to the collective community. This is evinced by assessing the sense and scope of the sanctions prescribed by the [Community] Assembly (Corte Constitucional del Ecuador, 2014, p. 20).

The Court then cites a passage from one of the expert reports:

[For the indigenous community, life] is not a personal value of an individual entity but only to the extent to which it participates in the family (*ayllu*) or community [...], and what is meant to be protected is precisely this: life as a value of communal cohabitation, of social understanding and harmony with one's surroundings (Corte Constitucional del Ecuador, 2014, p. 22).

The Court concluded that indigenous justice does not regard life as a human right in the strict sense of the term. This moved the leitmotif of the resolution to the protection of human rights. The Court asked itself what the duty of the state is, facing the violation of fundamental rights, and answered that since the Constitution and the Universal Declaration of Human Rights “determine that all individuals have a right to life, freedom and the safety

of their own person”, the public authorities are obliged to establish a system that that protects life by sanctioning any attacks against it, that is:

[...] it is necessary to activate all the national and international means and mechanisms for its effective protection, including the obligation of all the states to effectively *prosecute* any behaviour that endangers this right, *and to attain the sanction of its authors*, always aiming at *preventing impunity* and eliminating behaviours that are against the right to life (Corte Constitucional del Ecuador, 2014, p. 27, emphasis added).

The Court thus ruled out the implementation of indigenous justice by stating: “The jurisdiction and competence to hear, resolve, and sanction cases of attack against the life of all persons is an exclusive and exclusionary power of the Ordinary Criminal Law System” (2014, p. 35). The duty to prosecute and sanction human rights violations, therefore, is an exclusive prerogative of the state, which in turn eclipses the constitutional recognition of indigenous justice. Even though the offenders had been judged and sanctioned by the indigenous authority, the Court declared: “Ultimately, it is the duty of the state and its institutions, as a priority, to prevent crimes against life from going *unpunished*, granting that the corresponding *sanction* falls into the responsibility of whoever causes the death” (Corte Constitucional del Ecuador, 2014, p. 27, emphasis added). In short, only the state can prosecute and punish violations of the human right to life:



Since the inviolability of life is a right protected by the Constitution, by the international instruments of human rights and by the principles contained in the *ius cogens*, it is the duty of the state to grant this right in all its dimensions and ensure that facing any threat or violation, the behaviour as such is judged and sanctioned [...] (Corte Constitucional del Ecuador, 2014, p. 27).

The Court does not analyse other issues such as the extent to which incarceration may not facilitate the restoration of the violated right; how indigenous procedures may be more efficient and swift than state-installed trials (which commonly take several years); the efficacy of the sanctions; the fact that the offended party and the whole indigenous community expressed their satisfaction with the decision of the indigenous authority; the compliance of the offenders themselves;<sup>82</sup> or the downsides of incarceration considering that it is at odds with indigenous understandings of justice. As indigenous leader Lourdes Tibán (2009) has asked: “sanctioning a person with a stinging nettle whiplash, or putting them in jail for 14 years, which violates human rights the most?” (p. 70). Put in a different way, indigenous justice, although constitutionally recognised, was judicially construed as an obstacle to protect human rights. Furthermore, criminal justice emerged as the only legitimate path to address the violation of a human right, which precludes the

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<sup>82</sup> Initially, when the constitutional action was presented, the offenders demanded that the Court declared the indigenous procedures contrary to human rights, arguing that they had been treated inhumanely. Their pretension was for the community authority to be prosecuted for the crime of abduction. However, by the time the first hearing took place, the offenders, who were then confronting an ordinary criminal trial, stepped back and supported the petitioner’s argument that the state procedure constituted double judgment and demanded that the Court declare the indigenous procedure valid, thus accepting all the community decisions.

implementation of alternative conceptions of justice. As mentioned in Chapter 1, some progressive criminal law scholars consider that feminism reaffirms punitive trends (Paladines, 2014; Zaffaroni, 2009), but they may need to pay closer attention to other ways in which dominant legalism condones coercive power.

The resolution, which constitutes the first binding precedent in matters of indigenous justice since the enactment of the 2008 Constitution, did not invalidate the decisions made by the Community Assembly, but it did not accept that the ordinary penal trial constituted “double judgment” either. The Court endorsed communal justice only as a response to the affectation of community life —fortunately rejecting depictions of indigenous procedures as “barbaric” or “uncivilised”—; but at the same time, indigenous justice was deemed inadequate to tackle the violation of human rights as such. While on the surface an alternative perspective on justice was validated; the sentence blocked an opportunity to legitimise indigenous justice. Bluntly put, the custom was authorised, but the sanctions applied by the community authority were not considered sufficient and were excluded from the sphere of “genuine” justice. In the opinion of indigenous leader Mónica Chuji:

[...] in fact, the Constitutional Court has basically disowned and ceased to recognise the indigenous justice system... that is, it has disallowed the communities from exercising indigenous justice. It disregards [indigenous justice] and assumes that the established system is the only one that can judge (personal communication, April 17, 2015).

The above findings illustrate the limited responsiveness of rights to incorporate non-dominant legal knowledge. The case of La Cocha lets us anticipate how a reaffirmation of VAW as a violation of human rights can favour the re-centring of criminal justice as the means to respond to it. If Sumak Kawsay has not yielded fruits in the field of indigenous justice, it is even less likely that it impacts on a domain that has long been mediated by human rights and penalty, such as VAW. Feminists must navigate this ocean, and these are the instruments currently available to frame legal reform. The impossibility to dislodge penalty from dominant representations of justice results in a fertile land for penal expansion. Penalty in this way constitutes a foundation for law-making in VAW.

## 7 CONCLUDING REMARKS

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In this chapter, I have compared two constitutional frameworks which emerged in different political moments. First, I showed how the Constitution of 1998 adopted international human rights as a central framework. This, was considered an advancement by the women's movement, especially due to the recognition of the right to a life free of violence. Such framing facilitated subsequent penal reforms and preceded the first public demands of full criminalisation for VAW. Although the Constitution of 2008 introduced promising decolonial concepts to promote new understandings of social relations, welfare, and wellbeing, it deployed essentially the same framework as the Constitution of 1998 regarding rights and penalty. In this way, the post-neoliberal turn reaffirmed the international human rights framework in matters of VAW. Such foundations have sustained

the reaffirmation of a rights-based penal discourse which has reconciled human rights and penalty. Many social actors have defended their demands to penalise the conducts that injure them (Brown, 1995). However, in the attempt to overcome the penal paradox, the rights-based penal discourse has also reaffirmed the legitimacy of penalty, via constructions that present it as human-rights-compliant. The re-inscribed legitimacy of penalty has led to further universalisation of criminal justice as essential for the protection of human rights, which in Ecuador has also translated into the subordination of the indigenous justice models that the Constitution itself recognised.

This chapter has shown that penalty and rights are interlinked fields of intelligibility, rooted in principles that continue to bolster hegemonic legality and resist the disruptive potential of decolonial concepts. Put bluntly, this mode of penalty has become constitutive of rights-based representations of justice. Therefore, the constitutional foundations to legislate VAW remain strongly reliant on criminal justice. As Avila (2013) notes, the Constitution provides guidelines for a criminal policy that is coherent, integrated and protective [*garantista*] of rights. I have argued that *this* is the actual “trap”: the constitutional authorisation of the penal system as guardian of human rights is what makes penalty available, legitimate, and therefore capable of expansion within this post-neoliberal context.

## CHAPTER 5

# A New Penal Code: Negotiating Feminist Demands Within Rights-Based Penalty

[...] this demand of maximal penal intervention which we usually attribute to politicians, to representatives, to legislators... we cannot lose sight that it probably does not originate in their will, their conviction, but the pressure of the political game. [...] It is not that right-wing parties are punitive; society is punitive, it is fascinated by the Penal Code, by punishment, they ask you for it.

-María Paula Romo, personal communication, April 24, 2015.

## 1 INTRODUCTION

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So far, I have unveiled early postcolonial constructions of women, domesticity, and the family in Latin America. I have also examined historical feminist critiques of said constructions in Ecuador and traced the rise of rights-based penal discourses as strategies to counteract VAW. In addition, I showed that international human rights facilitated the conflation of criminalisation and the protection of women's human rights, with significant impact on Ecuadorian feminist networks, particularly through the 1990s. In 1998, the rights-based approach to VAW consolidated via a Constitution that incorporated many feminist

demands. In 2008, a different constitutional paradigm introduced innovative decolonial notions into the legal system but preserved the framework of human rights. Many progressive scholars and politicians have henceforth promoted a minimal criminal law, which purportedly moderates coercive power by observing constitutional rules and human rights principles. In this context, the process to create a new criminal code began.

This chapter addresses the justifications and critiques that Ecuadorian feminists have invoked in relation to the use of penalty in matters of VAW; how the post-neoliberal shift impacted on feminist uses of penalty; and how their demands were incorporated into the legislation. To this purpose, the chapter documents the making of the 2014 Penal Code. This analysis is based on both institutional documents and testimonies from feminist activists, politicians, and public officials who were involved in the negotiations. In this way, I scrutinise contemporary feminist networks, revealing generational and ideological divides, the struggles to incorporate feminist demands into the code, and the controversies surrounding the negotiation process.

The divisions I found within the women's movement mainly related to their stance on using the general penal code to address the VAW. For instance, the *históricas* (historical feminist leaders) tended to be more suspicious of penalty than their younger counterparts, many of whom also were "officialists", that is, supporters of the Citizen's Revolution. I demonstrate that officialist feminists, who stressed social redistribution as a priority, did not turn away from penalty. Instead, they promoted the full criminalisation of VAW and sponsored the creation of "femicide", framing it as a matter of human rights. Regarding domestic violence, many NGO-based feminists, who could by some standards qualify as "governance feminists", were, in fact, sceptical of the use of penalty. However, most

feminists supported the criminalisation of femicide; moreover, feminists inside and outside state agencies attempted to use penalty to address economic inequality by proposing a criminal offence called “patrimonial violence”, which suggests that penalty was conceived as a tool for social redistribution as opposed to applicable to sexualised violence only.

Overall, while there were partial objections to penalty, I demonstrate that criminal justice continues to be an irreplaceable framework for VAW in post-neoliberal Ecuador. This, limits feminist strategies. Penalty has facilitated the reformulation —and in the case of abortion, straightforward rejection— of feminist proposals, while reaffirming some colonial rationalities. This chapter confirms that these exclusionary constructions not only confine feminist action to the boundaries of criminal justice but are also likely to hinder access to justice for women on the ground. The conclusion is that the penal construction of women and the family in the post-neoliberal context resonates significantly with early Republican narratives on family protection, and also with the reframing of feminist demands performed in the 1990s. Feminists have only been able to succeed in legal reform when they do not frontally challenge normative representations of women’s sexuality. At the same time, leftist political actors do not perceive significant contradictions between their redistributive agenda and penal expansion. Colonial rationalities travel through rights-based framings, shaping the scope, nature, and outcome of feminist-promoted penal reform.

To substantiate my contentions, I will first describe the political context; then I will outline the main arguments presented by a sector of feminists to defend the use of the penalty and contrast them with the critiques made by another sector. Through a close examination of documents produced by government agencies and feminist ad-hoc alliances, as well as testimonies gathered from fieldwork interviews, I show how a rights-based

framework informed feminist discourse on penalty, and how the legislature, once more, reframed feminist demands. By scrutinising the negotiations preceding the Penal Code, I demonstrate that albeit feminists have had opportunities to impact on public policy, extrinsic factors have also determined the content of the final outcomes. Most importantly, the available legal fields or “grids of intelligibility” (Drakopoulou, 2000a; Foucault, 2003; Oksala, 2004; Rouse, 2005) are the main factor that affects the ways in which feminists express their demands. In other words, considering the displacements of alternative understandings of justice that I have detailed in the previous chapters, alongside the prevalence of rights-based discourses since the 1990s, feminists did not have many other options available to articulate their demands. Besides domestic violence, the treatment of femicide and abortion further reveals how hegemonic discourses narrow feminist possibilities to communicate their demands. Coloniality, in this case, operates through the dominance of an interpretive schema which displaces non-hegemonic legal knowledges.

In sum, I demonstrate that rights-based penalty the field of intelligibility that makes communication between feminists and their political interlocutors possible. Criminal justice has prevailed not only as a feminist strategy but more broadly as a grid of intelligibility for VAW and women’s rights. At the same time, it did not offer answers to questions regarding women’s access to justice, prevention and protection, selective criminalisation, gendered and racialised constructions of women and the family, and the social conflict that potentially arises from increased incarceration.



## 2 FEMINIST NETWORKS IN THE POST-NEOLIBERAL CONTEXT

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The constitutional shift of 2008 brought numerous reforms to the entire legal system: one corpus that had been deemed obsolete was the Penal Code. To provide a general map of the reforms I analyse in this chapter, Table 10 below condenses the main feminist interventions in the 2014 reform: various forms of domestic violence were incorporated and “femicide”, an entirely new category, was introduced. By contrast, the decriminalisation of abortion and the penalisation of patrimonial violence were unsuccessful.

*Table 10: Main feminist interventions in the 2014 Penal Code*

<b>Criminal offence</b>	<b>Proposal</b>	<b>Outcome</b>
<b>Violence against women and the nuclear family (domestic violence)</b>	-Convert various forms of domestic VAW (physical and emotional abuse) from misdemeanours to crimes.	-Successful creation of two new criminal categories: physical and psychological violence.
<b>Patrimonial violence</b>	-Create the criminal category of “patrimonial violence” as a form of domestic violence through which women’s access to money and other resources is restricted.	-Unsuccessful.
<b>Abortion</b>	-Decriminalise abortion when pregnancy results from rape.	-Unsuccessful.
<b>Femicide</b>	-Create the criminal categories “femicide” and “feminicide” to tackle gender-based killings of women from both an individual and a state responsibility perspective.	-Successful creation of “femicide” as the killing of a woman for being a woman. - “Feminicide” proposal is unsuccessful.

Through the 2000s, fully criminalising VAW had gradually become a commitment of the Ecuadorian state. As explained in Chapter 3, Act 103 treated domestic violence as a misdemeanour, and there were no other applicable legal bodies at the time. The government thus began to take steps toward improving the management of VAW. For instance, the 2007 “National Plan for the Eradication of Gender Violence Against Children, Adolescents and Women” (*Plan Nacional para la Erradicación de la Violencia de Género Hacia Niñez, Adolescencia y Mujeres*) declared the elimination of gender violence a state policy goal for the first time in history. Also, official documents such as Ecuador’s 2010 Report for the Beijing +15 Review, recognised that VAW had not yet been fully criminalised (Gobierno de la República del Ecuador, 2009). Moreover, in 2013, the Judiciary Council created 28 “Specialised Judicial Units for Violence Against Women and the Family” (*Unidades Judiciales Especializadas de Violencia contra la Mujer y Familia*), which replaced the Commissariats that had operated since 1994. These Units came about as part of a broader process of judiciary reform initiated after a national referendum approving a reconfiguration of the judicial system. One of the changes was the elimination of the judicial attributions of all commissariats, which included the specialised commissariats for women and the family. As explained in Chapter 3, these sui generis offices used to be administrative units ascribed to the Ministry of Government, which had at the same time attributions to administer justice. The judicial reform eliminated this hybridity and, by the new Constitution, assigned jurisdiction exclusively to Courts, which resulted in the creation of the new specialised Units. However, after the reform of 2014, the actual attributions of the Units significantly diminished, as I explain in detail below.

Women's organisations had for some time been discussing the full criminalisation of domestic violence. Those closer to the ruling party were the ones who had more chances to propose reforms. In the 1990s, many feminists were NGO-based; after 2008, however, a significant number of feminists, including many young ones, had joined the post-neoliberal project and were incorporated to the reformed state agencies. When the legislature debated the new Penal Code, various feminist lawmakers were supporters of the "Citizen's Revolution".<sup>83</sup> For their part, NGOs had fewer opportunities to impact on public policy directly, especially if compared to the 1990s and early 2000s. CONAMU, usually a bridge between civil society and the state, had been dissolved and replaced with a transitory commission of lesser rank and attributions.<sup>84</sup> In this respect, a feminist municipal official commented: "the government has its own women's movement [...]. CONAMU used to be connected to the women's movements, but not anymore, now the regime has its own movement aligned with its own postulates" (personal communication, February 15, 2015). In fact, the advent of the Citizen's Revolution entailed a decline of a sector of the women's movement —the one linked to the NGO's— and the strengthening of the feminist groups that aligned with the governing regime.

For some time, during 2012, women's organisations engaged in debates and dialogues with the legislature, particularly the Parliamentary Group for Women's Rights (*Grupo Parlamentario por los Derechos de las Mujeres*). There were key topics on which the

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<sup>83</sup> Through the course of the two years during which the Penal Code was crafted, another electoral process took place, to some extent changing the layout of the National Assembly as some smaller movements dissociated from the ruling coalition. However, many feminists who were still affiliated to the ruling party were re-elected and continued to promote the penal reform.

<sup>84</sup> Initially known as the "Transition Commission to the Women's and Gender Equality Council"; currently called "National Council for Gender Equality".

NGO-based movement could not agree with the officialists. One of these was the full criminalisation of domestic violence, that is, its conversion from a misdemeanour into a serious criminal offence, which would entail harsher penalties, but also its subjection to the general penal code, as opposed to a specialised body of law. The divisions between state and non-state groups in a context of increased tension between the government and the social movements (Lind & Keating, 2013; Ramírez Gallegos, 2010), was reflected in fragmentations within the feminist networks. For instance, most interviewees drew a line between the “*históricas*” (veteran activists of the women’s movement) and the new generation of feminists. This distinction coincided to a great extent with a differentiation between “officialists” and “non-officialists”, that is, between the “insiders” who supported the Citizen’s Revolution, and the “outsiders” who were not committed to it, even if some still occupied bureaucratic posts granted through previous political processes. Broadly speaking, the older feminists were associated with the NGOs, and many younger ones with the government.

The 2012 First Debate Report (FDR) from the Justice Commission of the National Assembly registers meetings between lawmakers and representatives of women’s shelters and organisations such as CEPAM and Fundación María Guare. The objective was to discuss domestic violence, femicide, abortion, and sexual violence (Comisión Especializada Permanente de Justicia y Estructura del Estado, 2012a). Disagreements were manifest from the beginning: when asked about their relationship with activists and organisations, four out of six of the interviewed assembly members mentioned their duty to respond to the needs of their constituency as a reason why they could not attend to some specific petitions of the women's movement. They interpreted the lack of dialogue between officialists and non-

officialists as a failure of women's organisations to understand the broader commitments of the assembly members. Paola Pabón, officialist and a member of the Parliamentary Group for Women's Rights, considered that being an assembly member involves making decisions as feminists, but it also requires taking into account the orientation of the leftist political programme as a whole. "[There is] a confusion between roles, [...] and the [women's] movement does not understand our role as legislators" (personal communication, May 7, 2015). Gina Godoy, also officialist and key actor in drafting the domestic violence provisions, affirmed:

[...] the relationship with the organised women sometimes did not flow in the way that perhaps they or we as lawmakers wanted. Because it turns out that, as a lawmaker, I do not only have to work on and look at a single topic, but also at the entire legislative production [...]. I also have a responsibility as a political actor within the functions that I deploy as a legislator and toward my constituency (personal communication, April 22, 2015).

In the same vein, Rosana Alvarado, officialist and Vice-President of the National Assembly at the time of the interview, considered that one problem of the women's movement was that it had become "mono-thematic", meaning that activists failed to acknowledge the problems that affect the broader Ecuadorian population:

I believe that this has been a mistake of the feminist movement... of some of the feminist movements, to think that feminism is limited to sexual and reproductive rights. That is a fundamental and determinant part of feminism, of course, but it is not just that. It is [about] combating all the inequalities and all the violence, and one of the harshest violence against women is poverty (personal communication, April 21, 2015).

This quote resonates with the feminist narratives mentioned in the Introduction and Chapter 1, which have critiqued mainstream feminism for neglecting issues of social redistribution. As Diego Vintimilla, also officialist, stated:

[...] there are intransigent stances. I do not mean that they are intransigent in their radicalism, but rather that they isolate themselves in the logic of vindicating women's rights because they are women. [It is] like they are detached from the other components of social life, detached from [the fact] that in Ecuador other issues of rich women, of poor women, of exploitation, operate. [...] I do put much emphasis on the economic aspect as one of the central elements that enable or perpetuate schemes of domination between men and women (personal interview, April 19, 2015).

Thus, officialist lawmakers broadly coincided in depicting the NGO-based women's movement as a corporate group of sorts. Although they did not dismiss the movement's

claims, they did portray them as narrow, to the extent to which they focused only on “particular interests” and allegedly failed to address widespread socio-economic inequalities. Officialists often framed the women’s movement’s petitions as an upper-middle-class agenda which was not crucial to economic redistribution. The latter was, by contrast, prioritised by the feminists of the Citizen’s Revolution. While there is no evidence that NGO-based feminists were not concerned with social redistribution (some of them are historical leftist leaders), it was implied that NGOs were linked to the neoliberal past and the development models that the Citizen’s Revolution explicitly rejected.

Regarding VAW, the officialist plan was to incorporate all the infractions into the general penal code rather than create a new specialised law, which had instead been the women’s movement’s aspiration. Correspondingly, the NGOs expressed scepticism regarding the officialist plan. It was the NGO-based, middle class, professional feminists who did not support full criminalisation. Such layout contrasts with the governance/carceral feminism’s depiction of carceral strategies as an effect of the decline of redistributive feminist goals. In Ecuador, the feminists of the Citizen’s Revolution, that is, those who prioritised social redistribution and explicitly rejected neoliberalism, defended the criminalisation process the most. Furthermore, they disregarded some of the recommendations of the NGO-based movement.

For their part, NGO staff members confirmed that their observations were pushed aside because the regime’s project had taken priority over the feminist cause:

[...] what [the officialist feminists] have told us is that they prioritised the political project... however, then, what is a political project without

women, without the women's agenda? I mean, this cannot be a dichotomy: either the project or the feminist agenda" (*histórica* feminist activist, personal communication, April 15, 2015).

This does not mean, however, that non-officialists opposed the criminalisation of VAW altogether. In fact, a majority of feminists agreed that criminalisation is indispensable in anti-VAW policy, while a rights-based framing remained constant across feminist clusters as I show in the next section.

### 3 FROM LEFT TO RIGHTS: DEFENDING THE PENAL MANAGEMENT OF VAW

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This section will set out the arguments Ecuadorian feminists utilised to defend the criminalisation of VAW in the 2012-2014 reform process. The arguments stemmed from varied sources such as feminist theories, international human rights, constitutional law, national laws, and public policy documents. Overall, officialists did not identify incompatibilities between the goals of the Citizen's Revolution and criminalisation strategies, mostly coinciding in this way with the non-officialists regarding their reliance on penalty. In Chapter 4, I demonstrated how human rights can reconcile penalty with democracy and facilitate the representation of penal strategies as progressive, in detriment of indigenous justice. The expansion of criminal law can be portrayed as reasonable and



even desirable when rights-based principles establish the rules that limit the penal system. These limits are projected as the “remedy” that solves the tension between the application of penal force and a potential violation of human rights through state coercion. In general, penalising VAW was justified not only because its purpose is to protect women’s human rights, but also due to the limits that human rights impose on the state.

In relation to human rights, the main claim underpinning the demand to criminalise VAW is ensuring a life free of violence, which is, in turn, constitutive of the human right to personal integrity (Article 66. N. 3 of the Constitution). The Constitution proclaims that protecting human rights is one of the state’s fundamental duties (Article 3. N. 1), which also facilitates the rationalisation of penal expansion. This connection is reflected in laws and public policy instruments such as the National Plan for the Eradication of Gender Violence, which refers to the right to personal integrity as the constitutional foundation of all strategies to counteract VAW. The plan links human rights to the state’s obligation to “prevent, eliminate and *sanction* violence against young boys, girls, adolescents and adult women” (Presidencia de la República del Ecuador, 2007, p. 2, emphasis added). In the same manner, the National Plan for Living Well 2013-2017 (*Plan Nacional para el Buen Vivir*), which establishes the guidelines of the country’s public policy, includes the eradication of gendered violence and gender-based discrimination in Objective 2. It associates this objective with the “dissemination, awareness, promotion and respect of human rights, with emphasis on the rights of boys and girls, adolescents, youths, older adults, women, LGBTI persons and disabled persons”. This rights-based rationale then connects to the need to “prevent impunity in matters of violence” (Secretaría Nacional de Planificación y Desarrollo, 2013, 2.5h).

The regime has thus presented penal initiatives as evidence of its commitment to protecting women's rights. For instance, Paola Pabón, who presided the Parliamentary Group for Women's Rights, said: "the penal field in this case, with these great achievements that we have made, can become an instrument to defend the lives of women, because when we talk about violence we are talking about life" (personal interview, May, 2015). Importantly, penal expansion has been presented as a form of compliance with international human rights conventions. As officialist assembly member Rosana Alvarado recognised:

[...] right now we are *expanding criminal law*. [...] Everything that refers to discrimination, to hate crimes, to crimes against humanity, starts to be integrated into the national legislation although it used to be only a matter of international agreements and treaties [...]. Therefore, this is a criminal law that has grown, that is growing, and from that point of view I would say, feminism also must use that criminal law (personal communication, April 23, 2015, emphasis added).

Alvarado explicitly connected international human rights to national criminal law. Again, although the Constitution of 1998 has been deemed neoliberal, the rights-based paradigm that crossed over into the 2008 Constitution was not regarded as vested with any contradictory implications. Furthermore, it allowed feminists to present their arguments as based on "objective" principles, and to respond to ongoing accusations that their

contentions are merely ideological.<sup>85</sup> One public prosecutor, for example, said about her discovery of human rights: “[...] now I [have started] to understand feminism as a human right, not *only* as women’s issues or as a radical stance” (personal interview, April 18, 2015, emphasis added). A public servant at a ministry similarly argued: “Not everybody is open to debate [VAW] from the *objectivity* of human rights. They mix up what is [subjectively] right and what is wrong, and I think that this is where we usually get lost in the debate” (personal interview, April 17, 2015, emphasis added). A former staff member of a prominent NGO referred to the perceived neutrality and broadness of international human rights:

The issue of violence has already crossed *beyond* the haven of feminism. [...] the international treaties defined what we are saying when we talk about violence against women. [...] These terms as I said have overpassed the feminist stronghold and are instead being used in diverse fields, in scholarship, laws, the Constitution itself (personal communication, March 12, 2015, emphasis added).

As we see, penal mechanisms are successfully substantiated using human rights and constitutional principles, regardless of the actor’s position within the political spectrum. Human rights are constructed as non-ideological means to reach objective goals. Also, while the rights-based narrative is prevalent, feminists do not often mention punishment as a goal

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<sup>85</sup> For instance, president Rafael Correa has expressed his opposition to “fundamentalist gender ideologies” in his “Citizen’s Outreach” weekly talks (video clip available at <https://www.youtube.com/watch?v=KtA6VUQD4Js> as of August 2016).

they aspire to achieve. In the words of a judge at a specialised court for violence against women and the family: “from a doctrinal perspective, [criminal law] has one purpose: to *protect* legal goods” (personal communication, April 16, 2015, emphasis added). The protection of fundamental human rights is thus the primary objective:

When [a right] is violated within a context of family violence, a context of gender violence with the exercise of power, we are talking about human rights. It is not like a crime against property; it is not like a crime against state security. Here, we are speaking about legal goods protected as human rights. Moreover, their penal prosecution is necessary (judge at a specialised court for women and the family, personal communication, April 16, 2015).

Again, objectivity, neutrality, systematisation, and optimisation were frequently called upon to justify penalisation. One recurrent argument was the advantage of agglutinating dispersed penal provisions in a single body of law. All the interviewed officialist assembly members made this point, which the FDR reflected. The assumption is that it is preferable to group legal provisions in one major codification rather than create specialised legislation on diverse issues. In other words, separately addressing women's rights would be disorderly and non-technical. Officialist assembly member Gina Godoy commented that the demand of women's organisations to preserve Act 103 became an irreconcilable disagreement as, in her opinion, it was imperative to “leave behind that dispersion of the juridical apparatus whereby we have thousands and thousands of laws [...]. All the

behaviours that had a penal sanction, therefore, would have to be in [the new penal code]” (personal communication, April 22, 2015). Conversely, several non-officialist feminists considered that protecting women’s rights had become more difficult due to the regime’s tendency to create comprehensive policies and eliminate specialised state agencies and laws. One activist who had worked at the defunct CONAMU considered that “from the present dogma [...] of state management, there cannot be specialised laws. Everything is aggregated and homogenised under the concept of a modern, efficient and rational state” (video call interview, March 2015).

Concerns with efficiency and technicality were also present in narratives that framed penalisation as a way to facilitate statistical data collection because only by creating a specific criminal category, it becomes possible to differentiate it from other crimes and measure its incidence. Many lawmakers described penalty as a means to make VAW quantifiable: if one can only count that which is unambiguously defined, criminalisation understood as the accurate description of an unacceptable conduct, is a precondition to generate crime statistics. The availability of quantitative information to portray VAW as a “real” social problem again facilitated the onset of a public policy response. In the case of the Ecuadorian women’s movement, technical knowledge and statistics have often been key to support legal reform demands. As shown in Chapter 3, statistics have served the purpose of demonstrating that social reality requires a penal response, and penalty, in turn, enables more precise statistics. The tendency is noticeable in public policy more generally: The National Plan to Eradicate Gender Violence repeatedly appeals to statistics and definitions produced by the World’s Health Organisation to describe the magnitude of VAW. Likewise, most interviewees cited the National Survey of Family Relations and Gender

Violence Against Women (INEC, 2012) to explain why penalisation was needed, and to confirm that domestic violence is prevalent:

[...] the national government carried out a survey through the INEC which in a way allows us to make gender violence visible by revealing statistics and numbers for each province. This allows, *beyond* the historical struggle of the women's movement, to locate the reality of violence, to formalise it with state data (Ministry public official, personal communication, April 17, 2015, emphasis added).

As we see, feminist legal discourse is widely informed by “the ‘rational’ arguments of bio-political knowledge” (Bell, 2002, p. 128). Criminalisation is framed not only as the fulfilment of a constitutional mandate and a way to comply with human rights treaties; it is also posited as a material response to a tangible problem, which in turn is expected to produce measurable solutions. The demands related to femicide and abortion (discussed in detail in Section 6), also relied extensively on statistical information to urge the state to act. One recurring contention was that in criminalising femicide, in naming and categorising the killing of women, there would be a mechanism to comprehend the phenomenon in quantitative terms. To Diego Vintimilla, member of the Parliamentary Group for Women's Rights:

Regarding femicide [...], I believe that the penal code does not eliminate the possibility that there be women who are assassinated because they are women. But it does make a difference in being able to count, being able to have a registry of this, right? I sometimes say that it would sound too crude to say, “we know how many women have died”, but it is even more crude to say, “we do not know how many women have been killed” (personal communication, April 19, 2015).

In the same line of reasoning, a public official from a prefecture considered:

[...] incorporating femicide, in the end, allows us not to have a hidden number, it lets us identify key issues. It also lets us have statistics and put an end to the theme of “crimes of passion” and talk about family violence, femicide, terms that are pertinent. Moreover, [it enables us] to have real data (personal communication, April 16, 2015).

As we see, the main factors that played a role in the construction of penalty as a field of intelligibility and thereby as a central strategy to tackle VAW include:

- An understanding of VAW as a human rights violation.
- The construction of criminal justice as a path to channel this recognition.
- The mainstreaming of the association between rights and penalty.

- The adoption of rights-based penalty in the Constitution and public policy.
- The prevalence of a technical perspective on the management of social problems.

These factors surpass feminism and the political orientation of the actors who propose penal reform: the idea that criminalisation possesses a power that cannot fall behind was internalised by insiders and outsiders of the post-neoliberal project. María Paula Romo, non-officialist assembly member, eloquently synthesised the situation: “the idea that we had to penalise, that the protection of a right is linked to the penalisation of an act, is too deep-rooted to question, right?” (personal communication, April 22, 2015). In sum, the production of penalty as a self-limited, democratic, human-rights-based, technical tool for the management of social problems, allowed feminists to defend criminalisation without manifesting a specific political position, and without perceiving penalty as particularly problematic. Nonetheless, this is not to say that feminists inadvertently promoted criminal law without awareness of its potential disadvantages, as shown in the next section.

## 4 DOMESTIC VIOLENCE: JUSTIFIED AMBIVALENCE TOWARDS PENALTY

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Domestic violence was at the centre of feminist discussions and disagreements throughout the reform process. While interviewees predominantly agreed that criminalising VAW was necessary, there were confrontations regarding the specific ways in which the legal provisions would operate. Concretely, the idea that VAW requires a specialised



procedure that enables swift protective measures was always essential in the proposals presented by non-state feminists, while the officialists supported the integration of domestic violence into the general penal code.

As soon as the draft bill was disseminated, some *históricas* who had promoted the reforms of the 1980s and 1990s promptly expressed concerns. My fieldwork revealed a key pattern: the *históricas*, despite their NGO-based training, were less inclined to invoke rights-based penal doctrines than their younger counterparts. In fact, some of them publicly expressed scepticism regarding rights-based penalty. For instance, in an interview published by a national newspaper, veteran feminist lawyer Anunziatta Valdez opined that including domestic violence in the Penal Code was a regression when it came to protecting women from abusive relationships. When the interviewer suggested that the new code would “guarantee a better due process” she replied: “there are social problems that cannot be treated with criteria such as the ones that the Penal Code attempts to impose, because they are the result of unequal power relations. *Due process does not work here*” (El Universo, 2012a, para. 6, emphasis added).

Valdez is a prominent feminist in the history of the women’s movement. Through the 1980s and 1990s, she promoted the creation of the specialised commissariats and the enactment of Act 103. She has represented Ecuador at international organisations. Also, her activist work has been based mostly in NGOs and her private professional practice. This profile, which coincides with what could be described as “governance feminist”, would suggest that Valdez and other upper middle-class professionals would be the ones to lead the campaigns for full criminalisation, insisting on introducing “exemplary” punishment. I have singled out Valdez because she publicly addressed the issue, but most of the feminist

*históricas* I interviewed had very similar concerns. In sum, I could not identify a carceral narrative within the NGO-based women's movement. At the same time, they relied less than officialist feminists on the rights-based penal framework. Furthermore, before the approval of the code, feminist groups mainly integrated by *históricas* circulated working documents expressing their concerns.<sup>86</sup> One of these, signed by notable feminists who had been involved in drafting Act 103, contended that the ordinary penal code should not regulate VAW. The document contested the officialist stance that it is optimal to integrate all criminal laws in one major codification:

[...] there are regulations such as those pertaining to underage offenders or to violence against women and the family, which have an *eminently protective character* [...] and cannot be adapted to the integrative structure of the Penal Code, as this responds to a rigid model which requires the presence of a plaintiff and a defendant (various authors, personal communication, October 8, 2012, emphasis added).

As mentioned above, the *históricas* had anticipated the loss of the pre-emptive measures that Act 103 established, and manifested a profound concern with the decline of prevention. In fact, specific references to punishment or incarceration were rare. Per the same document, the adversarial system, that is, the general criminal process, was not

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<sup>86</sup> Most of these working documents circulated in the form of personal email messages amongst feminist activists and organisations' mailing lists, to which I had access at the time.

considered as preventative as Act 103, whereby protection measures could become effective even before initiating a formal lawsuit. In fact, the procedures of Act 103 were part of an older prosecutorial model known as “inquisitorial system” which gave the acting judge investigative attributions. Conversely, the adversarial process, also known as “accusatory system”, emphasises a transparent confrontation between plaintiff and defendant, centring the figure of the public prosecutor and disallowing judicial intervention during the inquest.<sup>87</sup> For these reasons, precautionary measures, within the accusatory system, are subject to formal justification: the model presupposes the launch of a legal process before the judge can issue most ordinances. In this sense, while the purpose of the special measures of Act 103 was to halt an urgent situation of violence and prevent its aggravation, the aim of the ordinary precautionary measures is primarily to ensure the completion of the trial.

Non-officialists insisted that domestic violence presents particularities which require special treatment. The Minority Report (MR) presented in 2012 to the National Assembly reflects these views. María Paula Romo, a non-officialist assembly member who identifies herself as a feminist and leftist, signed the report.<sup>88</sup> Several interviewees confirmed that the document had incorporated the input of various non-state organisations. The MR advocated for a moderate penal intervention and deemed the official draft bill an expression of “penal populism” and “penal demagogy”. It claimed that the draft bill aimed at gaining notoriety through penal responses that were neither “technical” nor addressed the roots of social

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<sup>87</sup> For a comparative review of the two models and an analysis of the adoption of the accusatory system in Latin America, see Langer, 2007.

<sup>88</sup> Romo was founder of a small leftist political movement (*Ruptura de los 25*) which initially supported the Citizen’s Revolution. She was elected assembly member as candidate for the officialist party (*Alianza País*, AP). Her movement withdrew from the alliance later on, when Correa proposed to reconfigure the judiciary and called a popular referendum to the effect. Ever since, Romo has actively been part of the opposition.

violence, but rather appealed to public opinion and the scare of delinquency to obtain electoral profit. About domestic violence specifically, the MR stated:

If the intention is to facilitate women's access to justice, a penal procedure with the intervention of public prosecutors, judges and public defenders is clearly more difficult than the one that is prescribed today in Act 103. If a better access to protection measures is sought for, this will also be more intricate if a public prosecutor is to request them and a judge to grant them; today the intervention of the commissariats is immediate. We should also ask ourselves [...] whether the intention of those who file a complaint is to obtain the deprivation of liberty for their relatives or partners, or conversely, to have a tool that enables them to maintain a less unequal and violent relationship (Romo, 2012).

The excerpt confirms the emphasis placed on prevention and protection over punishment. The report affirmed that incarcerating the offender is not necessarily a priority for women who suffer abuse, which was backed up with data from the National Survey on Family Relations and Gender Violence Against Women, which indicates that 88% of abused women do not intend to leave the aggressor (INEC, 2012). The data was interpreted in the MR as a sign that most women would not choose to pursue the incarceration of their intimate partner. In the experience of activists and NGO staff, incarceration could even worsen women's situation: for instance, imprisonment could prevent the offender from working and, consequently, from providing child support and other pensions. The MR thus

acknowledged that imprisonment could bring adverse consequences, and a swift intervention of the justice system to assist women was deemed more important and effective than initiating a criminal prosecution. The MR concluded, as most non-officialist interviewees, that Act 103 should remain in force, notwithstanding the possibility of optimising it. A veteran activist who had organised meetings between organisations and assembly members said: “in the light of experience, we wanted Act 103 to be the first lifeline, but also to make [VAW] visible so as to protect the life and rights of women” (personal interview, April 15, 2015).

Besides the rationalities explained above, there is another key issue which further demonstrates that penalty is not necessarily connected to neoliberal agendas. The NGO-based movement presented a proposal to criminalise “patrimonial violence” as a form of domestic VAW, which was positively received by the officialist feminists in the legislature. “Economic abuse” had been identified in the 2012 INEC survey as a distinctive type of violence whereby the aggressor restricts a woman’s access to money and other vital resources (INEC, 2012). A communication issued by CEPAM circulated amongst organisations and activists. It read: “This form of violence, because it is not categorised as a criminal offence, almost always goes undetected, which naturalises it and contributes to perpetuate and maintain an unequal historical relationship between men and women” (personal communication, October 8, 2013). Patrimonial violence was defined in a document prepared by officialist Gina Godoy, which circulated through feminist mailing lists. According to the email, the punishable conduct would consist of “damaging, misplacing, destroying, controlling, robbing or retaining personal documents, patrimonial rights, financial resources, personal property or real state which is shared by the nuclear family or

partnership” (personal communication, September 18, 2012). These efforts to criminalise patrimonial violence suggest that penalty is considered instrumental to address other forms of imbalance besides sexualised violence, including economic inequality. The idea of patrimonial violence as a crime clearly contradicts the literature’s contention that feminist appeals to criminalisation are connected to a structuralist view of sexual violence which side-lines issues of social redistribution. Quite the contrary, penalty was used to attempt to tackle economic inequality. The proposed category remained outside the code for reasons that were unclear to most interviewees, which deepened their sense of dissatisfaction. However, the working documents show that, contrary to the opinion of the officialists, the non-officialists were indeed concerned with matters of social redistribution and not exclusively sexual violence and reproductive rights. Both groups, as we see, resorted to criminal law as a strategy to fix different types of hardships suffered by Ecuadorian women.

Over time, the dialogues between the organisations and the legislature diminished. Gina Godoy, who led the drafting of the domestic violence provisions, admitted that at a certain point it was not possible to discuss the details of the reform anymore. She recognised that not many non-officialists agreed with the proposal, particularly regarding the criminalisation of psychological violence, as I detail below. As for the demand to retain Act 103, Godoy observed that this would not have been a viable course of action because the Act relied on older procedural rules which the new penal code would override anyway.<sup>89</sup> In her view: “in front of these explanations there was no understanding, there was simply a

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<sup>89</sup> Albeit it is true that the family violence infractions regulated by Act 103 were mostly processed through the rules for misdemeanours established in the old Penal Code, the rules to prosecute psychological violence were unique and established by Act 103 itself, meaning that preserving that law would also have retained the abbreviated procedure for psychological violence.

demand that Act 103 be preserved, period” (personal communication, April 22, 2015). She further explained that she chose to go ahead, amongst other factors, due to the perceived risk that if the draft were not presented swiftly, the National Assembly would move forward, leaving VAW out of the code:

[...] the Penal Code had a rhythm in which the gas pedal was pressed down, it was going to go, and if I was not on board, the issue [of VAW] was going to be left outside. It would have been worse if violence against women was not criminalised at all and therefore not penalised. So, there was a breakup [with the women’s movement], and I started to walk on... well, with those who wanted to walk with me, who were very few (personal communication, April 22, 2015).

As we see, contingent factors also affected the outcome: time became a constraint due to the Executive’s pressure to approve the new code, which made it difficult to coordinate meetings with all the women’s organisations that requested them. Dialogues were also hindered by what many activists identified as a centralised governance, which slowed down the consideration of proposals from different parts of the country. A public official at a provincial prefecture considered that “everything is centralised”. She narrated that the organisations had held many meetings in their localities, but she wondered: “how do you pass on the proposal? How do you attain a voice in these spaces where the decisions are ultimately made?” (personal communication, February 27, 2015). Similarly, a municipal official from outside the capital summarised the situation as follows:

Many of the things that were debated here were not incorporated at the national level [...]. I believe that this struggle to assert who has power and who is closest to power... to say who is most influential, is also a weighty issue, and many things that were historical [feminist] mottos were not acknowledged through those processes (personal communication, April 17, 2015).

According to a *histórica* from the south of the country, feminists carried out considerable work. “[We travelled] to Quito, spoke at the assembly, discussed with the [legislative] commissions... one and a thousand formalities, lobbying, public pronouncements in the media” and preparing “texts, explanatory documents, legal backups, statistics, and so on”, but ultimately, “none of those were considered, and of course Act 103 was repealed and we were left with a code that really is a setback” (personal communication, April 15, 2015). Some non-officialist feminists even believed that the greater part of the code had been drafted at the juridical office of the presidency and that the legislative debates were less influential than the Executive regarding the outcome. The different positions on domestic violence were condensed clearly by María Paula Romo, who at the time was a non-officialist assembly member:

[...] the women’s movement was not as enthusiastic about full penalisation [...]. I think that there was much awareness in the organisations



that there was a setback in [relation to] what had been achieved with the commissariats. [...] And so the strongest proponents of penalisation, of criminalisation, of [domestic violence] not being a misdemeanour but a crime, were the assembly members who define themselves as feminists. This was not an agenda of the women's organisations (personal communication, April 22, 2015).

This revealing testimony, alongside the other pieces of evidence I have presented, allow me to recap and highlight some important points. Thus far, many of my findings have appeared to echo other researcher's contentions regarding the punitive nature of mainstream feminist discourses, which coincided with the rise of new governance networks, the implementation of neoliberal policy, and a focus on individual rights. However, as I have moved on to analyse the post-neoliberal period in Ecuador, it has become apparent that, although so many pieces in the political chessboard shifted, penalty did not. Romo's quote clearly describes a perception of the leftist officialists as "punitive", and the NGO-based feminists as more prudent and aware of penalty's double-edged sword. In this way, we have arrived at the next key question that this project asks: how has the post-neoliberal shift impacted on feminist uses of penalty? Counterintuitively, what we see is a new generation of leftist feminists boosting penalty and rights-based discourses. This is accompanied by rationalities such as integration, unification, measurability and efficiency to optimise social redistribution. At the same time, the NGO-based feminists argued that principles such as due process *are not relevant* when it comes to gendered violence, insisting that the general penal system is not the best way to respond to the lived realities of women. Such an

affirmation was never made by the younger leftist feminists I interviewed. If we attempt to explain these new political configurations through the carceral/governance feminism conceptual framework, we will face a very puzzling landscape, which in fact contradicts current accounts of the relationship between feminism and criminal justice.

Also, my findings suggest that the reasons why we should care about penal expansion may be different from those exposed in the governance/carceral feminism literature. The thesis has already acknowledged the oppressive situations endured by imprisoned populations, but now I am referring concretely to the last of my research questions, that is, what are the potential effects of penal expansion on those women who attempt to access justice.

#### **4.1 UNINTENDED CONSEQUENCES: DECLINE IN PROTECTION AND ACCESS TO JUSTICE**

Carol Smart (1989, 1995) argued that different laws can have different effects depending on who attempts to use them and to what purpose. The development of criminal law is indeed an uneven process, and it only reveals its real potential when law is interpreted and applied by judicial and social control apparatuses. Although there are currently no thorough reports on the implementation of the new VAW provisions, according to many feminists who work assisting violence survivors, several of the anticipated detrimental effects materialised.

As noted in Chapter 4, Article 81 of the Constitution prescribes special and expeditious procedures for violence against vulnerable persons, including family violence, sexual offences, and hate crimes. In practice, this mandate has only been fulfilled in part. As shown in Table 11, only physical violence was actually assigned a special procedure — when

the resulting injuries cause less than three days of inability to work, that is, when it constitutes a misdemeanour. All the remaining domestic violence offences are common crimes under the general criminal procedure.

*Table 11: Domestic violence against women in the 2014 Penal Code*

Infraction	Procedure
<p><u>Art. 156.-</u> Physical violence against women or members of the nuclear family. - The person who, as a manifestation of violence against women or members of the nuclear family, causes injury, will be sanctioned with the same penalties prescribed for the physical injury offence, increased by a third.</p>	<p>Ordinary penal procedure (outline):  <u>Art. 580.-</u>            Preliminary investigation  <u>Art. 589.-</u>            1. Investigation (up to 90 days).            2. Assessment and preparatory stage (up to 20 days from the moment the public prosecutor requests the trial).            3. Trial (oral hearing).</p>
<p><u>Art. 157.-</u> Psychological violence against women or members of the nuclear family. - The person who, as a manifestation of violence against women or members of the nuclear family, causes mental health damage through acts of disturbance, threats, manipulation, blackmail, humiliation, isolation, surveillance, harassment, or control of beliefs, decisions or actions, will be sanctioned in the following way:</p> <ol style="list-style-type: none"> <li>1. If a minor damage is caused, which affects any of the dimensions of the integral functioning of the person, in the cognitive, affective, somatic, behavioural or relational areas, without causing an impediment in the performance of their daily activities, [the perpetrator] will be sanctioned with imprisonment from 30 to 60 days.</li> <li>2. If there is moderate impairment in any of the areas of personal, labour, academic, family or social functioning, causing harm to the fulfilment of daily tasks and therefore requiring specialised mental health</li> </ol>	<p>Ordinary penal procedure (above).</p>

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treatment, [the perpetrator] will be sanctioned with a penalty of six months to one year.

3. If severe psychological damage is caused, which even with specialised intervention has not been possible to revert, [the perpetrator] will be sanctioned with imprisonment from one to three years.

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Art. 158.- Sexual violence against women or members of the nuclear family. - The person who, as a manifestation of violence against women or a member of the nuclear family, forces another and compels them to have sexual relations or other analogous practices, will be sanctioned with the penalties prescribed for the offences against sexual and reproductive integrity.

Ordinary penal procedure (above).

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Specialised procedure (outline):

Art. 643.-

1. The competent authorities are the specialised judges for violence against women or members of the nuclear family; in districts where such courts do not exist, civil judges for family, women, children and adolescents, and misdemeanour judges, are competent.

2. If the judge determines that the act of violence is constitutive of a crime, she shall decline competence notwithstanding the issuing of protection measures and will send out the record to the public prosecutor. The protection measures will be valid until the competent judge modifies or revokes them.

[...]

5. When a judge hears about the commitment of a domestic violence misdemeanour, she shall immediately issue one or more protection measures; receive the testimony of the complainant and witnesses and order expert examinations and other evidentiary procedures.

6. The judge shall determine a child support

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Art. 159.- Violence against women or members of the nuclear family [misdemeanour]. - The person who harms, hurts or hits the woman or members of the nuclear family, causing injuries or inability that does not exceed three days, will be sanctioned with imprisonment of seven to thirty days.

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pension for the duration of the protection measures.

7. The judge shall monitor the enforcement of the protection measures, resorting to the National Police when necessary.

In cases of non-compliance regarding protection measures or the child support pension, the offender will be criminally liable.

[...]

10. Forced entry into a home can be ordered following the Penal Code's rules when the victim needs to be rescued, to remove the aggressor from home, to enforce the protection measures or in the case of flagrante delicto.

11. The hearing to judge the misdemeanour shall take place in 10 days counted from the date when the aggressor is notified of the complaint. This hearing cannot be delayed unless petitioned by both parties and for one occasion only.

12. The hearing cannot be carried out without the presence of the offender or his attorney. In the case of absence, the judge will order the arrest of the offender for 24 hours to ensure appearance before the court.

[...]

17. The judge shall make a decision during this hearing.

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According to many interviewees, ever since the Code started to operate, difficulties arose. Given that the Code fully criminalised most forms of VAW, and the specialised courts for women and the family are misdemeanour courts, they have jurisdiction to prosecute merely one infraction: physical violence misdemeanours (see Table 12, Art 159). When

judging misdemeanours, the Courts are enabled to emit immediate protection measures and apply the expeditious procedure established in Article 643 of the code (see Table 12), which is similar to Act 103's. This procedure appears to work reasonably well. A pro-bono advocate who assists survivors commented that the processes do not usually take a long time, as "the judge carries out the procedure in an expedited manner, and so there are immediate [protection] measures" (personal communication, May 4, 2015).

However, all other forms of VAW, as full criminal offences, are subject to the general rules and tribunals. Thus, women are often unable to access immediate protection when the aggression qualifies as a crime. In other words, it is easier to obtain protection for a minor offence than for a serious crime. This paradox is most alarming in psychological violence, which is considered a prevalent form of VAW (INEC, 2012). In the new code, as shown in Table 11, psychological violence is a form of emotional abuse which causes "mental health damage through acts of disturbance, threats, manipulation, blackmail, humiliation, isolation, surveillance, harassment, or control of beliefs, decisions or actions". The article then describes the different degrees of mental damage per which the sanction is to be determined.

As shown in Table 12, there are several difficulties to access justice in psychological violence, such as the concentration of the judicial headquarters at urban centres, the complication of the requirements to obtain protection, the difficulties to provide quantifiable evidence for the various degrees of mental damage established in the Code, and more generally, the procedural delays caused by submitting psychological violence to the general penal process.

*Table 12: Comparison of procedural rules in psychological violence*

Legal aspect	Act 103	2014 Penal Code
<b>Competent authority</b>	Specialised commissariats for women and the family.	Ordinary criminal courts for forms of VAW categorised as criminal offences.
<b>Requirements to obtain protection measures</b>	<u>Art. 13.-</u> Could be issued by the authority as soon as a complaint was presented, no further requirements.	<u>Art. 520.- 2</u> Can be issued by the judge at the substantiated request of a public prosecutor.
<b>Available measures</b>	<u>Art. 13.-</u> -Issuing a restraining order. -Ordering the aggressor to leave the shared home. -Prohibiting the aggressor from approaching the complainant in her study or workplace. -Prohibiting the aggressor from contacting the complainant. -Preventing the aggressor from intimidating the complainant. -Restoring the complainant to her home. -Conferring child custody to the person that is considered most suitable, when necessary. -Ordering therapeutic treatment for the parties when necessary.	<u>Art. 522.-</u> (Relevant precautionary measures to ensure the defendant's appearance in court) -House arrest. -Electronic surveillance device. <u>Art. 558.-</u> (Relevant protection measures for the victim) -Banning the defendant from approaching certain places. -Prohibiting the defendant from contacting the victim. -Prohibiting the defendant from intimidating the victim. -Issuing a restraining order. -Ordering the defendant to leave the shared home. -Restoring the victim to her home. -Depriving the defendant from child custody when necessary. -Ordering therapeutic treatment for the parties and children involved when necessary. -Establishing a child support pension when necessary.
<b>Proof of psychological damage</b>	-Not required to obtain protection. -All legal means of evidence permitted to prove the assault.	- "Sufficient merits" necessary for the public prosecutor to request a protection measure from the judge.

-No need to prove the degree of damage caused by the assault to impose a penalty.	-Need to prove the existence and degree of psychological damage for the offence to be punishable.
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Since psychological violence is now a criminal offence in full, ordinary judges are obliged to observe the general penal guarantees established in the code. In this way, given that a complaint per se does not undermine the presumption of innocence, judicial orders cannot be issued unless there are reasons to presume that the crime has been committed, that judicial action is required to ensure the defendant's appearance before court, and that the complainant is in “actual” danger. If a public prosecutor presents such evidence, precautionary measures may be issued by the judge (see Table 12, Arts. 522 and 558), otherwise —as is more frequently the case due to the concealed nature of domestic abuse—, the complainant can be refused protection. One public prosecutor wondered: “in the case of psychological violence, how do I demonstrate in front of the judge that this person is in need of a protective measure? [...]. I have had many cases of persons who come [to report] psychological violence who have the psychological test done, and the result is that there is no damage” (personal interview, April 18, 2015). Likewise, a practising lawyer explained:

When it comes to psychological abuse [the record] is sent to the public prosecutor, it is no longer part of the [specialised] courts, and then the problem is terrible because the process is delayed. The protection measures are not immediate; agility is lost (personal communication, May 4, 2015).



This means, for instance, that a person who suffers a violent attack with consequences which prevent her from working for over a week, may not be able to obtain immediate protection, while someone who has experienced a “minor” physical injury could gain such protection. Additionally, feminist lawyers emphasised the significance of the immediate restraining orders for women who need an urgent mechanism to alleviate imminent violence:

For many women [the restraining order], was enough to stop violence to an extent. It was a small weapon to tell the aggressor to be warned, maybe persuade him somehow... that is an idea that women have, to control violence in that way, right? (*histórica* feminist activist, personal communication, April 15, 2015).

The throwback in prevention has been criticised by feminist activists, judges, attorneys, and prosecutors, such that the National Judiciary Council issued several resolutions —which some dubbed “band-aids”— to elucidate the problems. Resolution 154 of 2014 delivered the protocols for the management of VAW in an extensive technical document that details the roles and attributions of all judicial workers at the specialised courts, clarifying how to handle the protection measures (Consejo de la Judicatura, 2014a). Because dissimilar practices were being carried out at different courthouses, the Council devised a “trick”. It mandated that the specialised judges first hear all complaints, proceed to issue protection measures while the complaint is still technically under their jurisdiction, and only then decline jurisdiction in favour of the public prosecutor if the infraction is a

crime. Similarly, Resolution 172 of 2014 regulated the judicial proceedings for domestic violence, reminding public prosecutors that they can request protection for alleged victims by any means, including phone calls, emails and faxes (as opposed to the formal written petitions they usually send). It also clarifies that it is not necessary to carry out a hearing before issuing the measures, and confirms that judges can emit them during the preliminary investigation (Consejo de la Judicatura, 2014b).<sup>90</sup>

While these administrative resolutions to an extent ameliorated the hurdles in processing VAW, there are outstanding difficulties. A public prosecutor in one of the main cities affirmed: “Since Resolution 172 was published, we have had around 572 judicial disqualifications of psychological violence from the [specialised] courts. Only about 2 cases have thrived” (personal interview, April 18, 2015). One fundamental problem is that the code grades the seriousness of psychological violence using a scale of “mental health damage”, based on the degree of disability caused by the aggression. Experts in psychology have to determine the seriousness of the disability following very similar rules to the ones that are used to assess a physical injury. Therefore, under the penal principle of legality (no criminal offence exists unless a behaviour is duly categorised as such), the crime of psychological violence only materialises when it produces measurable damage. Conversely, under Act 103, the action on its own was considered an infraction, regardless of its effects.

In practice, it is extremely difficult to demonstrate how much damage has been inflicted through psychological violence, especially considering that the unit of

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<sup>90</sup> This clarification related to a recurring problem: as a specialised judge explained, from a strictly procedural perspective, the Penal Code only allows precautionary measures in penal processes that have formally commenced, that is, from the investigation stage onwards. For this reason, some judges were denying the protection measures that were requested by public prosecutors as soon as a complaint was presented.

measurement is the type and intensity of psychological therapy required for the survivor to recover fully. One specialised psychologist told me: “the woman practically has to demonstrate that she is [...] incapacitated to go on with her daily life, for [psychological violence] to be considered a crime” (video call interview, March 2015). The same professional observed that even if the damage is successfully measured, it is difficult to prove a causal link between damage and the specific episodes of violence that are being judged. Judges and advocates often request to be informed of other pre-existent conditions that could have impacted a person’s mental health: “the difficulty is not so much to prove that there is psychological violence, but that the psychological impairment is a consequence of the aggression”, the participant said.

Furthermore, there are instances of physical violence which are not “severe” enough to cause measurable injury and therefore fall out of the scope of protection even though they may signal the escalation of violence and thus require the implementation of pre-emptive measures. Day to day mistreatments, hostility, insults, humiliations, and other forms of abuse that Act 103 tackled as misdemeanours, are now framed as full crimes and consequently subject to the longer general procedure. Importantly, within the logic of the penal system, compensations are subject to the quantification of injury and, while it is true that civil reparations for “*daño moral*”<sup>91</sup> (non-material damage) could apply for emotional abuse, this alternative interrogates the very idea that there was a need to criminalise in the first place.

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<sup>91</sup> *Daño moral* or non-material damage, is a civil law category in the Continental system, which refers to a harm caused as result of a traumatic experience which does not produce patrimonial or physical consequences, which in turn diminishes a person’s capacity to carry on with her daily life activities (Mosset, 1998).

All these impediments, acknowledged through the issuing of administrative measures to address urgent problems, further expound the limitations of penalty. Within this framework, VAW is intelligible only when it is quantifiable. Quantification serves the purpose of justifying sanctions, moving violence out of the realm of justice and into the realm of positive “truth” (Oksala, 2013). In other words, the political component of the offence, which is what feminists have historically stressed, is displaced. To qualify as an offence, damage needs to be susceptible of assessment through criteria established by law and technical disciplines, which assume that experts can measure emotional harm. Put in a different way, the inscription of psychological violence in the punitive logic of the code reaffirms a positivistic form of knowledge that privileges measurability and scientific certainty. The dominance of quantification suggests that the “coloniality of knowledge” (Santos, 2007a; Mignolo, 2011) is operating. The construction of psychological violence as a form of domestic VAW in the 2014 Penal Code clearly reveals, not only how the lawmakers overlooked the decolonial constitutional notions that are meant to inform the entire legal system, but also how penal rationalities displace feminist knowledge. The construction of verifiable truth dominates over notions such as “gendered violence” which, to feminists, is what justifies the creation of an autonomous offence, differentiated from ordinary injuries or “insults”. It may seem obvious, but had it been the intention of feminists to treat psychological violence within abusive relationships in the same way the Code treats other forms of emotional aggression, they would not have proposed specialised legislation. In fact, given the current legislation on psychological violence, it would be more convenient to report an incident as ordinary verbal abuse, because it would be treated as a general misdemeanour and would not require to prove any degree of damage (although it would require witnesses). The manifestations of coloniality as the displacement of alternative

knowledges and subordination of certain subjectivities, is also manifest in other articles of the code, as I show below.

## 5 RACE, POVERTY, FAMILY: THE COLONIALITY OF THE PENAL SYSTEM

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Although my fieldwork data reveals that most feminist arguments opposing the criminalisation of VAW revolved around procedural rules, I did speak to some participants who objected to the use of criminal justice as such. These participants identified several paradoxes in penalty, even when it is rights-based or takes the form of specialised justice. Arguments revolved mainly around themes which many feminist critiques of penalty (such as the ones outlined in Chapter 1) have addressed. They include, for example, that justice is more accessible for women who are relatively privileged; that criminalisation is based on and affirms gendered constructions of women and the family; and that criminal law selectively prosecutes those who fit certain stereotypes (Howe, 1994; 2009; Law, 2014; Smart, 1989; 1995; Snider, 1994; 1998; Sudbury 2002; 2005). Some participants, mainly specialised judges at courts for women and the family, cited the work of Costa Rican feminist Alda Facio Montejo. In one of her most popular texts, Facio Montejo (1992) proposes a methodology to analyse legal phenomena from a feminist perspective. The central idea of the text is that legal doctrine (*doctrina jurídica*) excludes and subordinates women; therefore, it is necessary to be prepared to recognise whenever a legal provision is “othering” a woman through the male paradigm. This methodology was quoted by some

feminist judges who used it to identify the diverse effects that law has on women from different classes, races, sexual orientations, with disabilities, etc.

In fact, researchers have shown that, in Ecuador, subordinated groups including women and racial minorities have limited access to political power and the management of economic resources (Fernández-Rasines, 2001). For example, one pro-bono advocate I interviewed noted that “people come from Molleturo, from Cumbe [two rural localities], and they say, ‘I have to walk about an hour to the bus stop’” (personal interview, May 4, 2015). In effect, the highest levels of poverty in the country concentrate in rural areas; and most impoverished people are women, Indigenous, and Afro-descendant (Mideiros, 2012).

As for domestic violence, it affects mostly women who identify as indigenous and Afro-descendant, followed by montubias, whites, and finally mestizas. Also, violence affects mostly women who have had less access to formal education (INEC, 2012). The association between this information and critiques of the penal system as selectively oppressive were not widespread, though. As a judge noted referring to fellow feminists involved in discussing the Code:

There have not been many voices which question the reinforcement of repressive ideas and mechanisms in the current Penal Code. Sometimes, because we have attained a part of our demands, we leave these profound issues outside of the analysis. We are content that femicide, family violence, have been categorised as offences, that sanctions have increased and so on. [...] I do not mean that no penal reform should be made. It should be made, but with this precaution (personal interview, April, 2015).

Feminists who acknowledged that penal strategies could have oppressive effects, insisted that criminal law seldom responds to the lived realities of women, particularly those who are not urban, middle-class, white, or mestizas. Some mentioned that penal provisions have at times fallen short, perhaps because the mainstream movement has not always established dialogues with the grassroots. A veteran activist from the South of the country considered that it had been a mistake to “try to impose one agenda as the agenda of the women’s movement, with not everyone having been part”. In a statement that resonates with critical accounts of “NGOization” and transnational feminism (Alvarez, 1999; 2000; Mendoza, 2002), she added: “Maybe the level of articulation with rural women has basically occurred through development projects, which in this case in a way reproduces the same logics of society” (personal communication, April 15, 2015). As a historical (non-officialist) leftist leader, this participant was critical of the development projects commonly associated with neoliberalism, particularly in rural Ecuador. Examples include PROGENIAL, the Program for Gender Innovation in Latin America (*Programa de Género e Innovación para América Latina*, a gender mainstreaming project) and PRODEPINE, the Indigenous and Afro-Ecuadorian People’s Development Project (*Proyecto de desarrollo de los pueblos indígenas y Afroecuatorianos*), which some critics have regarded as interventions of the World Bank in Ecuador to the purpose of harnessing the country’s social movements (Dávalos, 2014). The interviewee conceded that indigenous and peasant women do not see the mainstream women’s movement as their own. Even though women’s organisations have carried out considerable work in rural sectors, she explained, this has often produced hierarchical

relationships whereby the activists do not share rural women's spaces but rather attempt to "drag" them into their logic and know-hows.

In agreement, former assembly member Mónica Chuji —who was the first woman to stand for election to the presidency of the CONAIE—, opined that organised indigenous women do not usually identify themselves as feminists. Rather, they see themselves as advocates of indigenous rights more broadly. "It seems important to us that the women's movement speaks not only about The Woman or a prototype of a woman, but of women, of those diversities, different realities, and certain different demands" (personal interview, April 17, 2015). Chuji recognised that it was difficult to introduce VAW in the indigenous agenda because, on the one hand, the broader indigenous movement does not usually focus on women's issues separately. On the other hand, even though some indigenous women have recently formed groups to convey women's demands specifically (for instance, the Provincial Network of Kichwa Women's Organisations of Chimborazo, which participated in the constitutional reform of 2008), the penalisation of VAW has not been a priority. Chuji pointed out that in line with their community-centred conceptions of justice, VAW is acknowledged as a problem only when it undermines participation in communal life, because then it entails a weakening of the community.<sup>92</sup> As a result, VAW is not often discussed by the movement. To Chuji, discussing individual criminal categories such as domestic violence and femicide has not been at the forefront of the debates, due to the "individual" nature of these infractions; instead, the indigenous organisations have focused

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<sup>92</sup> Some studies have suggested that in Andean indigenous communities, domestic violence is usually managed within the family, and when disputes reach the level of the community authority, conciliation between the parties is the usual resolution mechanism (Franco & Gonzáles, 2009).



on protesting the articles which they regard as damaging for the indigenous movement as a whole, such as the criminalisation of political resistance and social protest.<sup>93</sup> Moreover, indigenous women who suffer domestic abuse do not commonly turn to the state justice apparatus:

Indigenous women rarely, almost never go to denounce violence in the urban centres, to the ordinary justice. [...] And it is difficult for them to go to the cities due to economic issues, to lack of information, due to the language, because they do not know the procedures, how to carry them out. Because they do not know the consequences, they also think: 'Well, if he goes to jail, then I will not have a spouse anymore. Moreover, if he gets out [of jail] he will treat me even worse' (Chuji, personal communication, April 17, 2015).

The narrative resonates with the historical mistrust of indigenous people regarding state justice, which I described in Chapter 2. Indigenous women have historically regarded the state as potentially oppressive, which has also played a role in the preservation of semi-autonomous communities and customary legal regimes. The narrative redirects us to studies that have demonstrated that the adoption of a rights consciousness requires

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<sup>93</sup> In 2015, the CONAIE presented a claim of unconstitutionality against Article 283 of the new Penal Code, which establishes "attack or resistance to public authority" as a criminal offence. In the view of indigenous leaders, resistance to the decisions of public authorities is a constitutional right and therefore should not be criminalised (El Universo, 2012b).

experiences with the legal system to reinforce “rights-defined” subjectivities (Friederic, 2013; Merry, 2003b). For a person to turn to the legal system for help, previous favourable encounters with agents such as the police, prosecutors, attorneys and judges, are necessary. While activists may be enthusiastic about introducing the language of rights, as I mentioned in the Introduction, this language is not necessarily meaningful for the entire population, which again points to coloniality. Very often, as Merry contends, “taking on a rights-defined self in relation to a partner requires a substantial identity change” (2003b, p. 345). María Alexandra Ocles, an assembly member who has steered several Afro-Ecuadorian women’s organisations, made comparable claims: from her perspective, the discussion of the Penal Code emerged from “the vision of the middle-class women who are involved in the [women’s] movement”. She thought that the legislative debates should have been more inclusive of the grassroots: “I believe that this is one of the actions that still needs to be undertaken, especially with women in popular sectors, with indigenous, Afro or *montubia*<sup>94</sup> women” (personal communication, April 27, 2015). Chuji and Ocles’ appreciations that indigenous and Afro-descendant women do not commonly resort to state justice reveals a colonial gap between the legal representation of an adequate response to violence and the actual dynamics of women’s subordination. For women to be “accepted” and “humanised” by state justice, they ought to adopt behaviours which are often alien, such as projecting themselves as victims and their partners as “criminals”. While some of the interviewed activists referred to this process as “*empoderamiento*” (empowering), we know from

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<sup>94</sup> The term “*montubio*” refers to indigenous mestizo peoples of coastal Ecuador. The Council for the Development of Montubio Peoples of the Ecuadorian Coast and Subtropical Zones of the Coastline Zone (*Consejo de Desarrollo del Pueblo Montubio de la Costa Ecuatoriana y Zonas Subtropicales de la Región Litoral*, CODEPMOC) is the state organism that specialises in designing public policy affecting *montubios*.

ethnographic research that acquiring a new rights-based subjectivity can be overwhelming for many women (Friederic, 2013; Merry, 2003b).

Some feminists at the judiciary also shared the idea that criminal law reflects social privilege. A judge from a specialised court for violence against women and the family opined that the legislation is “designed for a woman from a certain social class, with a certain education level [...]. It was probably conceived for a woman like the one who drafted the criminal offence” (personal communication, April 16, 2015). Many feminists who have experience in assisting domestic violence survivors referred to economic conditions as obstacles to access justice. While in principle access to justice is free of charge, interviewees pointed out that there are expenditures such as transportation or document photocopying, which cannot always be covered, especially by women who live far from the urban centres. Travelling long distances can take the larger part of a day, so attending hearings and following up a process will usually require childcare provision, which is not publicly provided. Also, despite the existence of public attorneys and pro-bono advocates, demand often exceeds availability; consequently, many women would have to pay for private legal services to effectively initiate and advance a lawsuit. Although research has revealed that as more persons learn about human rights, access to justice for women has improved to an extent; it has also been suggested that rights-based discourses produce contradictory effects on social relations and rates of violence (Friederic, 2013). Social and economic discrepancies between rights-based subjectivities and pre-existing understandings of the self, are not necessarily overcome just because a new law has been enacted. In other words, what a person needs to be, to fit the legal “mould”, is not necessarily what a person wants to be.

On the other side, penalty also stigmatises disenfranchised groups by classifying certain men as violent and prejudging them as potential aggressors. A judge at a civil court for children, adolescents, women and the family, considered that penal law is “discriminatory” since it “ends up criminalising poverty and certain people of a certain ethnicity” (personal communication, April 14, 2015). Sure enough, this problem was manifest in Article 643.- N.14 of the Code, which read: “The certificates of good repute or professional competence presented by the alleged offender, shall be assessed by the judge” (Código Orgánico Integral Penal, 2014). Many women’s organisations objected to this provision. As affirmed in the 2014 Shadow Report:

[...] public conduct may not show any indications of [the aggressor’s] behaviour within the home or the intimate relationship. What is more, if judiciary operators and administrators do not have any training in human rights, gender, and violence, these ‘certificates’ will surely reinforce the position of power of the abusers in relation to their victims, putting the victims at a greater risk” (Coalición Nacional de Mujeres, 2014, p. 12).

In response, some assembly members justified the provision by arguing that it was aligned with the principles of due process. Officialist Gina Godoy stated: “[...] providing evidence in the penal process is subject to principles. For instance, the principle of pertinence, which indicates that evidence should refer, directly or indirectly, to the facts and circumstances related to the perpetration of the infraction” (Godoy, 2014, p. 18). Of course,

this claim prompted questions as to why it was necessary to mention good repute specifically if a general principle for the presentation of evidence was already in place.

As shown in Chapter 2, feminist historians have long studied the colonial production of family norms which underlie historical family protection policies (Clark, 2001; Dore, 2000b; Guy, 2000a; Rodríguez, 2000; Varley, 2000). As was the case with the early criminalisation of inebriation, the provision above reinforced a representation of masculinity based on the model of the responsible, honourable family man (Tinsman, 2001). As I explained in the Introduction and Chapter 1, coloniality produces whiteness as “ethnic capital” and darker skin as devalued stigma, which has historically determined a person’s access to resources and social status (García Linera, 2012). An attest of “good repute” is unlikely to be obtained by unemployed, impoverished or otherwise marginalised individuals, who in Ecuador are often non-white (Gallardo & Núñez, 2006).

Fortunately, in September of 2015, the article was repealed by a reformatory law. Nonetheless, its initial approval points at the continued displacement of feminist conceptualisations of gendered violence during penal reform processes alongside the reaffirmation of colonial subjectivities. This problem is also evident in the language utilised during the reform process. In a quandary that resembled the procedure to define “family violence” back in 1995, an early draft of the Penal code referred to domestic violence merely as “family violence” (*violencia intrafamiliar*) (Comisión Especializada Permanente de Justicia y Estructura del Estado, 2012b). The offence was later renamed “violence against women *and* the nuclear family” at the insistence of women’s organisations. The conflation of issues that affect women and those about the family troubles many feminists; as a municipal public official observed:

[...] we come from a familial conception whereby women are associated with motherhood and children. Of course, some say it is “family violence” because violence is exerted within the family nucleus. [...] But I think that it has been very difficult for the women’s movement to posit the term “violence against women”, as there is a lot of dismissal [of the problem] (personal communication, February 13, 2015).

Like Act 103, despite the reference to “the woman”, the provision is universal and allows a range of individuals to activate the judiciary, regardless of their gender. Domestic violence offences are not linked in any way to gender, or to the theme of “asymmetric power relations” that is usually present in feminist discourse. Thus, *force* is represented as the problem instead of political subordination, which is the target at which feminists aim specifically. Of course, the mere mention of unequal power relations in a criminal category would not on its own ensure an optimal justice administration, but the provisions themselves already establish the limits of what the law can do: it can recognise illegitimate force in intimate relationships, but it cannot identify power imbalances. In the Penal Code, protected subjects are the functioning members of the family in a violence-free environment. The harmonious family is the norm, while violence at domestic spaces signals deviation — despite reports that the family is one of the most violent social spaces (Ecuador Inmediato, 2015). Being an aggressor of the family or a victim of one’s own kin is thus projected as aberrant, risky, dangerous to society. This way to represent the problem is not

new of course; as we know, it resonates with both the postcolonial family narratives analysed in Chapter 2, as well as the family-protection logic underlying Act 103.

## 6 PENALTY BEYOND DOMESTIC VIOLENCE: ADVANCEMENTS, SETBACKS, AND "CONSOLATION PRIZES"

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Having reviewed the arguments posited by feminists to support and interrogate criminalisation, and having shown that a penal approach was predominant, this section will examine the repercussions that penalty has had beyond domestic violence. To this effect, I scrutinise the negotiations surrounding two additional demands: to create “femicide” and to decriminalise abortion in cases of rape. During the negotiations of the penal code, normative constructions of women and the family determined how the legislature received feminist demands. In this way, while domestic violence was successfully criminalised, abortion remained a crime. In Latin America, prevailing discourses depict abortion as sinful, as a threat to the family, and an action performed by deviant women (Htun, 2003; Kulczycki, 2011). This rationality is comparable to the one by which domestic violence was criminalised, because in both cases there is a component whereby the normative family obtains protection. Nevertheless, each event was divergently regarded by feminists as “success” or “failure” without making any connections between them. In this section, I demonstrate that the discourses underlying each of these outcomes are inter-linked; they responded to similar constructions of women and the family, which I have examined in this

thesis through the history of domestic violence. I also show how rights-based discourses have contributed to justify penalisation but have done little to displace the narratives that produce abortion as a crime. Just like the drive to criminalise domestic violence and femicide, the idea that abortion should remain a crime is not limited to the conservative right-wing, suggesting that coloniality is embedded in rights-based penal constructions of women, which have not been displaced by the post-neoliberal project.

## 6.1 FEMICIDE

Diana Russell and Jill Radford first introduced the term “femicide” during the first International Tribunal on Crimes Against Women, in Brussels, 1976. Latin American feminists have recently developed the concept further: Marcela Lagarde translated it as “*feminicidio*” (femicide) to sound more like “*genocidio*” (genocide) in Spanish, and thus make a clearer reference to the political nature of the phenomenon. She successfully promoted its categorisation as a criminal offence in Mexico, after the heartbreaking murders of hundreds of women in Ciudad Juárez and other locations in that country. The Inter-American Court of Human Rights, as mentioned in Chapter 3, has incorporated the term to its case law through the “Cotton field case”<sup>95</sup> of Ciudad Juárez. Femicide is defined as the systematic murder of women within a context of gendered violence (Gargallo, 2006). The term has particular connotations in Latin America because it has been a recurrent phenomenon in countries like El Salvador, Guatemala, Honduras, Nicaragua, and Panama

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<sup>95</sup> For more details on the Inter-American Human Rights System and gender violence see Tojo, 2011.



(CLADEM, 2007). Moreover, a pattern has been identified whereby femicide affects mostly impoverished non-white women (Lagarde, 2006).

In Ecuador, the disappointment elicited by domestic violence and abortion was somewhat eased after femicide was approved. As an offence introduced in the national legislation for the first time, it was regarded by *históricas* and younger ones, officialists and non-officialists, as an advancement in the field of women's rights. Gina Godoy recalled that she had attended public events in which "organisations which work for women's right to a life free of violence" requested that "femicide be categorised as a criminal offence, independently from homicide or murder" (personal communication, April 22, 2015). Accordingly, the MR presented to the National Assembly stated:

Albeit in the current legislation we already find hate crimes, it is an advancement that femicide is incorporated as a criminal category, as it is being done in other [country's] legislations. The change in name, or its specification, will not necessarily result in an immediate decrease [of killings], but it is very important because it allows us to make the problem visible (Romo, 2012, p. 21).

Rosana Alvarado, Vice-President of the National Assembly, also considered that the creation of femicide was a significant accomplishment:

The topic of femicide, I think, was an important achievement [...]. It is true, it is an aggravated murder, but the aggravation must hit [social] conscience in such a way that it becomes known that the magnitude of this aggravated murder [makes it a] femicide. It is the death of a woman [...] caused because the existence of that gendered condition is not tolerated (personal communication, April 23, 2016).

In Alvarado's opinion, the fact that some public figures had referred to the new offence as a "passing fancy" —which was confirmed by other interviewees— was due to the persistence of conservative views on gender. She narrated that the Mayor of Guayaquil, a right-wing politician linked to the neoliberal period,<sup>96</sup> had qualified femicide as a "fad": "The 'feudal lord', we already know what his policy on human rights has been", she commented. As we see, she characterised indifference toward, or rejection of criminalisation as a typically conservative stance; that is, officialists never regarded the use of criminal law as a potentially regressive strategy:

Well, you already have sentences for femicide. To me, that is the most powerful message of all... that is, there already are persons who have been sanctioned for femicide, there are investigations of femicide, very

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<sup>96</sup> Jaime Nebot Saadi, current Mayor of Guayaquil, is a veteran Ecuadorian Politician, member of the Social Christian Party (*Partido Social Cristiano*) who served as Governor of Guayas during the presidency of León Febres-Cordero. Febres-Cordero is in turn an icon of the neoliberal period. During his mandate, several forced disappearances of individuals deemed "subversive" (mostly related to the urban guerrilla known as *Alfaro Vive Carajo!*) occurred, and Nebot has been accused of being aware of these irregular procedures.

severe penalties for the killers too [...]. It seems to me that in front of this, the history of women regarding criminal law is no longer the same (personal interview, May 23, 2015).

In effect, all interviewees agreed that criminalising femicide was crucial. The main rationale across state and non-state networks was that femicide would make gendered killings visible. Also, as shown in Section 3 above, incorporating femicide as a specific offence was meant to provide accurate quantitative data on the incidence of gendered crimes. Nevertheless, some feminists also acknowledged the limitations of the strategy. One prominent *histórica* opined:

Of course, there are many good things [in the new Penal Code]; the category of femicide was incorporated, which has the advantage... perhaps the only advantage of making the violent deaths of women by their partners or former partners, visible. In this way, a greater social awareness is possible, and maybe more... some more interest from the judge to address the case. However, that is all, because the sanction is not augmented by even one hour [...]. I mean, I have heard many interviews with assembly members who say that now with femicide the men who kill women are going to have a more severe sanction; this is not true, it is just like any other murder, the same sanction. The only thing that is now possible is to say, 'let us see; there are these many femicides' (personal communication, April 13, 2015).

The quote above illustrates the multiple rationales for criminalisation beyond punishment and deterrence. In the participant's view, the main advantage of creating the offence was its symbolic significance; the fact that the sanction was not more severe than for common murder, was indicative of an under-recognition of the *severity* of VAW. What she stressed, rather than punishment, was the need to communicate what is distinctive about the killing of women in a context of gendered violence, and a primary means to do this is quantification. It is important stress then, that femicide was not ultimately defined as feminists had envisioned. As noted in Chapter 3, the views of Latin American scholars and activists (e.g. Lagarde, 2010) have influenced Ecuador's women's movement together with the sentences of the Inter-American Court of Human Rights, particularly the Cotton Field Case. The latter recognises that certain deaths of women are the result of systemic political violence. In this context, some Ecuadorian feminists proposed to create "feminicide" (*feminicidio*), that is, the killing of a woman not only as result of interpersonal violence but also as consequence of the state's negligence, including the occasions when the state itself exerts violence. However, as the *históricas* noted, femicide was ultimately categorised as an offence akin to aggravated murder: "Art. 141.- The person who, as a result of power relations manifested in any type of violence, kills a woman for being a woman or due to her gender condition, will be sanctioned with imprisonment of twenty-two to twenty-six years" (Código Orgánico Integral Penal, 2014). A veteran activist for sexual and reproductive rights observed:

There was also a difficulty in the discussion because it is either femicide or feminicide. If it is femicide, it is a crime only; if it is feminicide, it is the state against women. That, for instance, did not pass, and it is symptomatic that [the government] does not want to take responsibility for the deaths of women (personal communication, April 20, 2015).

Likewise, another prominent *histórica* who participated in the discussions said:

[Femicide] was only in part an advance, because the definition of femicide is when there are [unequal] power relations within the couple and death is caused, but there is no state responsibility. In other countries, it is established that feminicide involves state [accountability] due to [its] negligence, when a timely response is not given; when the complaints of violence against women are not adequately dealt with, and they ultimately result in femicide. We have had several cases like that, so there is a state responsibility, but this is not recognised (personal communication, April 16, 2015).

Additionally, while there was a broad agreement regarding the symbolic value of femicide, views on its political costs were less enthusiastic. Some observed that the incorporation of femicide allowed assembly members and the central government to allege that many petitions of the women's movement had been accepted, and press activists to

settle on the other topics for fear of losing said achievements. Some speculated that femicide might have been approved only to defuse the situation after the controversies (especially regarding the decriminalisation of abortion, addressed in the next section). Maria Paula Romo described the approval of femicide as “one of the Trojan horses of all the setbacks in the Penal Code” (personal interview, April 2, 2015). In agreement, one *histórica* wondered if state officials deliberately sought to compensate and “satisfy all these women who after all even voted for the government and were eager for a change in that area”. She suggested that perhaps the legislators thought that they were reassuring the women’s movement because “abortion is banished, but we are including femicide and elevating domestic violence to the category of criminal offence” (personal interview, April 15, 2015).

Some non-officialists referred to femicide as a “consolation prize”. A non-officialist municipal official said: [...] this may be a subjective impression... that categorising femicide is a sort of consolation prize for not decriminalising abortion even in cases of rape and due to [the disagreements in] the issues of [domestic] violence.” She added, “Femicide is a demand of the women’s movement, that is true, but it is not like in our country there has been a national debate about the content and scope of this criminal offence”. María Paula Romo used similar expressions: “Domestic violence and femicide were the consolation prize for women, while, for instance, the issue of decriminalising abortion after rape was politically sacrificed, including the assembly members [who presented the motion] themselves” (personal communication, April 24, 2015). Femicide, in this way, confirms that despite penalisation VAW is still largely understood as a “private” matter that pertains to interpersonal relationships and to the realm of domesticity. It is not recognised as the result

of power imbalances in which the state's action or inaction can play a role. As Romo reckoned:

[...] it seems that femicide and domestic violence gave [the government] a political asset. Moreover, I think that [these offences] ended up in the code for that reason. Because they respond to a conception, *their* conception of maximal criminal law, and because it gives them a political asset in a code in which the other areas of the women's agenda were dead (personal interview, April 24, 2015, emphasis in original record).

What we can deduct from the experience of femicide, is that, again, criminalising a conduct is relatively easy as long as it does not constitute a threat to dominant norms. It remains unclear why and how, but the truth is that, ultimately, the legislature did not recognise the political components of femicide such as the racialised and gendered connotations of the phenomenon which have been stressed by scholars and activists in the region.

## 6.2 ABORTION

Many feminist campaigners perceived the controversy surrounding abortion as unfavourable for the negotiation of all the other demands. Together with counteracting domestic violence, decriminalising abortion has been a historical priority for the women's movement; but unlike domestic violence, abortion has invariably been taboo and therefore seldom addressed in public debates or legal reform processes. As noted in Chapter 2,

abortion had intentionally been left outside of the 1980s women's meetings to discuss penal reforms because it was deemed too controversial. Decriminalisation was later insinuated but excluded from the constitutional reforms of 1998 and 2008 (Lind, 2012; Lind & Keating, 2013; Valladares, 2003). A veteran activist in the field of women's sexual health commented that in 1998 the expression "reproductive rights" had been excluded from the Constitution because some considered it a "window towards abortion" (personal communication, April 20, 2015).

In 2008, despite having allies in the Constituent Assembly, and although the state was declared secular, women's organisations were unable to block the conservative lobbies. Article 45 of the Constitution (successfully promoted by Catholic sectors), virtually excludes the possibility of decriminalising abortion in full, as it consecrates the "protection of life from the moment of conception", a mandate that had never been explicit in a Constitution before.<sup>97</sup> Also, the Executive's stance on the issue is widely known to be akin to the Catholic Church (RTVE, 2008), and therefore averse to decriminalisation. One *histórica* who worked as an adviser for the Executive confirmed that "[the President] had and still has a moralist and religious stance on [sexual and reproductive rights], especially [on] the topic of abortion". The participant stressed that the Executive regarded the women's agenda as an uncomfortable topic: "he told one comrade [from the women's movement] to take charge because he was tired of women's issues. To him, women are an issue, a problematic issue" (public official at a prefecture, personal communication, April 16, 2015).

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<sup>97</sup> By Art. 45 of the Constitution of the Republic "Girls, boys and adolescents will have the rights that are common to human beings, besides those which are specific for their age. The state shall recognise and guarantee life, including care and protection *from the moment of conception*".



During the legislative debates, abortion elicited a controversy that was widely covered by the media: the women's movement demanded legalisation whenever pregnancy results from rape, and not only when the affected woman is "mentally disabled", as is currently established in Article 150. One *histórica* who led the campaigns recalled:

[...] we did everything. We brought in the UN Health Rapporteur. He sent a letter warning about the risk of introducing articles protecting the unborn. [...] That week the young ones planned an action... With official numbers, documents, videos. We even managed to film Colombian magistrates saying why they had decriminalised abortion in Colombia (personal communication, April 20, 2015).

Furthermore, the organisations had commissioned a survey per which 65% of respondents agreed that abortion should be legal in cases of rape (YoSoy65.com, 2014). With this backdrop, officialist Paola Pabón presented a motion after reaching agreements with women's collectives, in a climate that promised the support of fellow assembly members and the wider society. She urged the legislators to vote following their conscience and beliefs rather than the coalition's official stance. However, this triggered the Executive's reaction: disciplinary measures for her and other feminist lawmakers who supported the motion were announced, deeming them disloyal and stating that the President would resign if decriminalisation were approved (El Comercio, 2013). The proposal was withdrawn first thing the next morning as the debate continued. Pabón then publicly addressed the President:

[...] we are the ones who defend the rights of women, we defend equal marriage, we believe in the rights of nature [...]. Comrade President, with the immense affection that we have for you, we tell you that, this time, you are mistaken. However, for the unity of this bloc [...] I withdraw the motion in order not to make a rupture visible (Asamblea Nacional del Ecuador, 2013).

The quote reveals how Pabón established a connection between decolonial constitutional innovations such as the rights of Pachamama, and claims in the field of gender, including same-sex marriage and legal abortion. She positioned herself as a supporter of a project that had promised to be inclusive but now appeared to be incompatible with certain items of the women's agenda. The situation illustrates that neither the decolonial constitutional principles nor the rights-based discourse were sufficient to displace the penal construction of women's sexuality regarding pregnancy, motherhood, and domesticity. If challenging the religious and moral narratives that have historically produced abortion as a crime was not attainable through any of the discourses available to feminists, how was it possible for the criminalisation demands to be successful? One feminist public prosecutor emphatically asked: "Ultimately, if the conditions are given, why does a law not pass?" (personal communication, April 18, 2015).

As shown in Chapters 2 and 3, protecting women from abuse in domestic spaces is not only compatible with colonial constructions of the family; it has also been regarded as a necessary measure to preserve the integrity of the family. The coloniality of the family has

travelled across time, through discourses such as the national identity approaches of the 19th century, the UN and OAS' approach to VAW in the 1990s, and even the scientific and managerial perspectives of contemporary governance. In this respect, officialist Diego Vintimilla observed: "And of course [the failure to decriminalise abortion] is a contradictory phenomenon, because while femicide was being categorised as a crime, for instance, the topic of abortion had a political element that turned out to be highly critical" (personal communication, April 19, 2015).

The women's movement regarded the abortion controversy as a sign of stagnation in the field of sexual and reproductive rights, and as loss of a historical opportunity. Also, the "surrender" of the feminist assembly members was interpreted by some as disloyalty:

[...] we would have expected that the assembly members who championed the feminist proposal [to decriminalise abortion] would continue to do so until the end. I do not know if maybe it is romantic to say until death... What death? Political death. They would have died politically but [...] the feminist demands would have lived (feminist judge, personal communication, April 14, 2015).

Nonetheless, many acknowledged that Pabón and the legislators who supported her, were cornered. It was recognised that they endured political violence from the Executive's inner circle in the form of threats and marginalisation (campaigner for the decriminalisation of abortion, personal communication, April 20, 2015). Ultimately,

assembly members Paola Pabón, Gina Godoy, and Soledad Buendía were sanctioned by their party with a month of suspension (La Hora, 2013). Feminists saw this as evidence of gendered political violence: “I felt punished myself when I saw it... that is, what it is like to silence a woman, to silence a movement, to silence the historical voice of women who demanded the decriminalisation of abortion” (judge at a court for women, children and adolescents, personal communication, April 14, 2015).

Facing this, many believed that bringing forward abortion had not been a good strategy because the resulting controversy blocked further discussions of the other demands, including an adequate provision for domestic violence. One prominent *histórica* observed that the feminist legislators had been “frightened” by the sanctions, which left the women’s movement without a suited intermediary at the Assembly:

No one would meet us; I took some actions even knowing that [the draft-bill] was already in the hands of the Executive. There were Citizen’s Outreach sessions in Babahoyo, and we went there with a group of women to deliver a [domestic violence] proposal... it was not allowed. I talked to the Attorney General, the Prosecutor General, people who were associated with the government to grant us at least one meeting with Alexis Mera [the legal secretary of the Presidency], but it never happened, and that is how it turned out (personal communication, April 13, 2015).

Although abortion has long been a crime, prosecutorial actions had seldom been undertaken. Regrettably, now they are. María Paula Romo commented: “In Ecuador, we had never had an incarcerated or sentenced woman due to abortion. Since the controversy, we have 58 women who are convicted or prosecuted for abortion, and this is a result of that discourse” (personal interview, April 24, 2015). In fact, the Public Prosecutor has registered 130 abortion reports since 2013; 74 of these were still ongoing lawsuits by 2015 (El Comercio, 2016a).

All these narratives of success and failure regarding the penal treatment of feminist demands reveal a parallel in the ways in which criminal law constructs domestic violence, femicide, and abortion. Rights-based discourses, whereby legal goods are perceived as most soundly protected when the offending behaviours are most strongly punished, have functioned in both cases to sustain penal continuity. A scrutiny of these developments reveals how difficult it is to obtain legal change when it challenges dominant constructions of women and the family. However, none of the interviewed feminists connected “failed abortion” with “successful femicide”. Nobody discussed the commonalities between domestic violence narratives and abortion in depth, although, as I have shown, the construction of women as reproductive vessels and family guardians is related to both “failure” and “success”. In sum, feminists have not thoroughly evaluated the fruits yielded by the human rights discourse.

## 7 “WE DO NOT HAVE ANOTHER WAY”

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Although my fieldwork revealed that many feminists were aware of the limitations of penalty and recognised that it could aggravate women’s situation in some cases, there were no positions frontally proposing a displacement of criminal justice. Rather, most narratives reflected a degree of trust in the ability of law to correct itself through a progressive incorporation of human rights principles. As one *histórica* put it:

[...] sometimes the great excuse is that penal policy is not adequate for prevention... then we say, therefore, it is about the integral protection of rights. Because penal policy can effectively play a role if you have systems of integral protection of rights which oversee prevention, assistance to victims, at the rural level, with multiple services (*histórica* feminist activist, personal communication, March 16, 2015).

Albeit many feminists pointed to the potential detrimental effects of penalisation, the difficulties encountered when the time came to imagine alternative responses to gendered violence were evident, as virtually none of the participants suggested options outside of the criminal justice system. A judge at a civil court for children, adolescents, women and the family recounted: “Assembly members have not even proposed to make other reforms, for instance in the civil field” (personal communication, April 14, 2015). Interviewees indeed struggled to imagine non-penal pathways. When asked about the

possibility of separating the penal system from the legal protection of women, assembly member Rosana Alvarado hesitated but ultimately affirmed:

[Criminal law] is an instrument. Yes, yes, that is... look, I was going to say... but without it, I mean, without this instrument, what do you have left? Given the advances of society, given the maturity with which we act as humanity, as a reflection, I could say that we still do not have another way that is not criminal law to at least contribute to insisting that certain conducts are felonies (personal interview, April 23, 2015).

Similarly, a judge at a specialised court for violence against women and the family recognised that after imposing a sanction “there is no institution that can take care of restoring the rights of women and children”. Although in her view the problem was related to the fact that state responses are “excessively centred on the penal system”, she still affirmed:

[...] the sanction is necessary, it is necessary because he who commits an infraction, whether it is a misdemeanour or a crime, is a delinquent. Moreover, he should be treated as a delinquent if this comes to be proven and the presumption of innocence is overthrown (personal communication, April 16, 2015).

Likewise, a non-officialist municipal official stated: “[...] in the logic of a penal state... a repressive state, [the legislation] is read as ‘the more I care about a legal good, the more penalties I impose to the infractions against that legal good’”. She then added: “[...] if there is no sanction... and I do not like the sanction of criminal law... but if there is none, what message are we passing on to the aggressors? That nothing happens here” (personal communication, February 13, 2015). To not criminalise, as we see, was consistently equated to leaving women’s rights unprotected. Furthermore, suggesting to implement a non-penal solution has sometimes been regarded as regressive. Romo reminisced that she had proposed “rapid exits” for VAW cases; that is, the possibility of ending a criminal process early if the parties reach an agreement. This idea had caused outrage amongst campaigners of the women’s movement, as most consider that settlements in these cases only serve the purpose of perpetuating power imbalances.<sup>98</sup> In her words:

When I suggested that [rapid exits] could be a good proposal, there was a comrade who told me that the problem is that powerful women are allies of the aggressors [...]. A response to violence that was not punishment was not possible under any circumstance. Therefore, my approach to the issue was an absolute minority; I accepted the opinion of the women’s organisations and we explicitly excluded rapid exists from gender violence (personal communication, April 24, 2015).

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<sup>98</sup> For a discussion of feminist stances on consent in domestic violence settlements see Hunter, 2007.



These examples show how feminists question criminal law but at the same time cannot do without it. Their demand to preserve Act 103 was not grounded on a rejection of penalty nor accompanied by recommendations of non-penal alternatives. What feminists put forward afterwards was a petition to create *another* specialised (penal) law that could enable an expeditious procedure —even if that entailed “skipping” some principles and guarantees that are inescapable through general penal law. This possibility is in fact included in the constitutional framework for VAW which, as mentioned above, includes a mandate prescribing a specialised regime for vulnerable victims of crime.

Against this background, subsequent discussions have continued to revolve around proposals to enact a new law for VAW, or to at least strengthen Act 103. The *históricas* proposed that the legislature upgrade Act 103 into an organic law,<sup>99</sup> “to make its provisions of equal hierarchy as those of the Penal Code, and for its application not to be obstructed” (various authors, personal communication, October 8, 2012). After the enactment of the Code, feminist alliances have continued to promote such a project, confirming that penalty is considered a neutral tool, susceptible to transformation and improvement.

The tensions and disagreements generated by this reform process not only reveal the existence of a variety of feminist stances but also unveil that legal reform is politically constrained. Feminists, in saying that VAW requires special treatment, acknowledge the oppressive effects of state laws, which means that they do not fully accept that a basic cornerstone of legal systems is uniformity in the application of rules. This ambivalence

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<sup>99</sup> In the Ecuadorian system, organic laws are hierarchically superior and therefore prevail over ordinary laws. Organic laws regulate the organisation and operation of state agencies, the exercise of constitutional rights and guarantees, the functioning of local governments, the political party system, and electoral procedures (Article 133 of the Constitution).

requires Ecuadorian feminists to delve more into the reasons why penalty still occupies such a central space. These reflections are connected to the political costs of legal achievements and to how feminists see themselves within the political spectrum. María Paula Romo formulated a thoughtful reflection in this sense:

[...] this demand of maximal penal intervention which we usually attribute to politicians, to representatives, to legislators... we cannot lose sight that it probably does not originate in their will, their conviction, but the pressure of the political game. [...] It is not that right-wing parties are punitive; society is punitive, it is fascinated by the Penal Code, by punishment, they ask you for it (personal communication, April 24, 2015).

Romo, a self-identified leftist, disputed the idea that only the right-wing endorses a retributive criminal law while the left-wing always aligns with penal minimalism or abolitionism. As a non-officialist, she tried to elucidate why progressives have promoted penal expansion time after time. In her view, penal expansion is not only related to political ideology but also to dominant ideas about crime, violence, and the power of legal solutions. Penal expansion is a result of what the larger society wants, what “people ask for”, and this validation, at times, reconciles leftist feminists with the paradoxes of penalty. Insisting on how penalty traverses the political spectrum, Romo added: “we are fascinated by the development of criminal law, by the creation of criminal offences, and this is equally shared by men, women, feminists, non-feminists, left-wingers, right-wingers...”. Like her, a feminist judge reflected: “possibly without realising it we are reinforcing the idea of giving people

what people ask for. For instance, facing insecurity, more criminal law” (judge at a civil court for children, adolescents, women and the family, personal communication, April 14, 2015). Even officialist feminist Gina Godoy agreed: "If we are going to tell people that we know that imprisoning persons is not the solution, what are we going to give them, right? And sometimes you fall into that sort of perverse game whereby you have to choose according to what people ask for” (personal communication, April 22, 2015).

Bearing in mind that in addition to being “politically cost-effective”, criminalisation per se does not require complex state actions such as budget allocation,<sup>100</sup> (Corrigan, 2013; Gotell, 1998), it is not difficult to understand why it is the preferred state response. Despite the existence of perspectives on criminalisation which support penalty to different degrees, criminal justice prevails not only as a feminist strategy but more broadly as a field of intelligibility for many political demands. However, penalty still does not offer answers to critical questions regarding access to justice, prevention of and protection from abuse, selective criminalisation, gendered and racialised constructions of women and the family, and the social conflict that potentially arises from increased incarceration.

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<sup>100</sup> Although the National Plan for Living Well 2013-2017 (Secretaría Nacional de Planificación y Desarrollo, 2013) develops the public funds policy and one of the Plan’s objectives is related to gender equality, it is not granted that public institutions will fund projects, as there is no explicit mandate to allocate funds to prevent and alleviate VAW. Therefore, resources have to be allocated by the institutions that benefit from the general budget lines. In short, the way in which resources are channelled is subordinated to the priorities of each state office.

## 8 CONCLUDING REMARKS

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This chapter has covered a penal reform process in which feminist networks participated extensively and scrutinised the discourses that sustain the use of criminal justice as a preferred strategy to address VAW. I have highlighted the availability of a rights-based penal framework and the advent of the post-neoliberal political project as factors that impacted on feminist legal strategies.

In Ecuador, feminist sectors supporting penalisation are not necessarily aligned with the political right, with conservatives, or with a neoliberal agenda, as existing literature has suggested. Many interviewees, inside and outside of the state agencies, identified themselves as feminists *and* leftists. Broadly, officialist feminists tended to prioritise the larger political programme, emphasising social redistribution, while non-officialists focused mainly on topics such as reproductive rights, sexual violence, domestic violence, and abortion. The negotiation process revealed that feminists in the officialist left did not consider criminalisation to be at odds with their ideological stance. Furthermore, the position of non-officialists who interrogated penalisation was regarded by the officialists as narrow or even oblivious to widespread economic inequalities. At the same time, the women's movement's agenda was not considered essential for the redistributive project. In this way, officialists justified the postponement of the women's agenda in the name of a more urgent objective. While the officialist legislators did not explicitly connect the regime's redistributive goals to criminalisation, they did justify the postponement of some of the women's movement's demands which decentred penalty, as necessary to prioritise the

Citizens Revolution. As we see, penalty is not only a resource for all political actors at opposite ends of the political spectrum; it has come to be incorporated as a suitable tool for progressive programmes. This shift has in concrete resulted in a deeper criminalisation process: preserving Act 103 would likely have been a less punitive outcome than full criminalisation.

If we compare the penal reform analysed in this chapter with the processes that took place in the 1990s and early 2000s, many similarities become apparent. For instance, it has been relatively easy to penalise VAW, but abortion has remained a criminal offence throughout history. The downfall in such crucial demand again illustrates that the notion of “governance feminism” is not entirely applicable to Ecuadorian feminist networks; even those feminists who currently appear to be “walking the halls of power” have been politically marginalised when their stance has challenged normative constructions of womanhood.

Coloniality traverses the patterns of management of VAW across different historical and political contexts. While the Constitution of 1998 is considered neoliberal, the post-neoliberal constitution uses the same frameworks in matters of penalty and rights, and it still is the bastion of the Citizen’s Revolution. My point is not that the 2008 Constitution is a mere reproduction of the 1998 model; as manifested in the Introduction, I acknowledge that the new Constitution did challenge neoliberalism. My point, precisely, is that neoliberalism is not the only problem in this context. If a given discourse, in this case human rights, is present in both the neoliberal and the post-neoliberal constitution, something deeper sustains the continuity. Through coloniality, the issue becomes clearer: what is constant is a displacement of the knowledges and subjectivities that endanger normative constructions of law, race, gender, and class, which often occurs through discourses that

are regarded as politically neutral. Indigenous justice threatens the formal penal system as the genuine guardian of human rights; feminist claims that femicide is the result of state negligence threatens the normative construction of intimate relationships; the demand to decriminalise abortion threatens women's submission to normative womanhood.

Again, it is not the objective of this analysis to determine to what extent the Citizen's Revolution has been "truly leftist". Rather, what I reveal is that progressive political actors frequently accept hegemonic discourses without situating them historically and politically, that is, without recognising their coloniality. If women's subordination is only intelligible through the discourse of family protection, which is also a rationality that prevents other projects, such as the decriminalisation of abortion, from thriving, the success of the reform has come at a very high cost. Certain feminist projects have passed because to an extent they converged with dominant discourses that continue to reproduce coloniality. Moreover, rights-based penalty allows progressive actors to reconcile their sense of justice with the coercive nature of the penal system, and to adjudicate its subordinating effects to mere procedural issues which are deemed susceptible of improvement through further legal reform. Most feminists do not regard penalty as inherently oppressive; it is only being "misused".

Although some scholars have argued that Ecuadorian and Latin American feminists are "feeding" the punitive agenda and distancing themselves from a rights-based perspective (Paladines, 2014), this chapter has confirmed that the rights-based approach is largely what enables feminists to rationalise and justify criminalisation. An implied equation between criminalisation and the recognition/protection of rights sustains penalty. Women's human rights appeal to objectivity and universality, allowing political actors to

frame the law, even in its coercive expressions, as an instrument that is always suited to reach equality. Penalty has not, however, remained unchallenged. The chapter has shown that feminists are not uncritically promoting criminalisation. Many, particularly those who have experience in assisting violence survivors, acknowledge the limitations of penalty. They prioritise prevention and protection and recognise the difficulties that criminal justice presents to women on the ground. It is also widely acknowledged that incarceration would not directly translate into a decrease of VAW. Rather than being a deliberate goal of the women's movement, imprisonment is embedded in the broader logic of rights-based penalty, which constitutes the practical framework to which not only feminists but progressive actors more broadly, resort to making their injuries visible. The limitations of the penal apparatus, I shall insist, come out as failures in the application of rules rather than moral or ideological contradictions. The betterment of procedural rules is presented as part of the strategy, leading to further demands for legal reform. Also, as some feminists have highlighted, penalty is not only central to how social movements denounce political violence; it is also a means for the broader society to express rejection. "What people ask for" is, after all, the effect of the discursive resources that predominate at a certain point in history.

The vast majority of the participants could not imagine strategies to counteract VAW outside penalty without feeling that this would be a dismissal of gendered violence. Importantly, many feminists consider that resorting to non-penal instruments to tackle violence—or even to so-called penal "shortcuts" such as settlements between the parties—would make women's injuries invisible again, relegating them to the private sphere and sending out a message that VAW does not constitute a violation of fundamental rights. It

would, in short, be a regression. These concerns are justified to a large extent. Undeniably, the recognition of domestic violence as an infraction resulted in the creation of useful legal tools such as the restraining orders. However, the value of those restraining orders, as feminist themselves recognise, was at the level of prevention, not punishment. The impossibility to do without penalty reveals feminists' deep sense of injury and their reliance on criminal law is profoundly attached to its power to bring things into existence, to communicate, to make things visible. Feminist penalty in Ecuador is not symptomatic of neoliberalisation; it is more an expression of what Wendy Brown (1995) referred to as "wounded attachments", the continued desire to have one's pain recognised, even at the cost of reaffirming it.



# CONCLUSIONS

[...] possibly [hope lies] not [in] the state-based feminists or the NGO-based feminists, but other feminists from a different perspective. For example, the women who are organising to defend the water; that is, peasant women, women from the countryside. They are not “classic feminists”, they do not fit within the parameters of certain feminisms, but they fit in another type of feminism, feminisms that are organised from the grassroots.

(feminist judge, personal communication, April 14, 2015).

By the time I write these words, the “*El machismo es violencia*” videos have long ceased to be broadcast. No campaign has replaced them. The state’s gender office is now a discrete, austere agency, functioning in a small building in northern Quito. When I visited the place during fieldwork, I noted that part of the extensive bibliographic materials previously made available by CONAMU had been stashed away. Perhaps, I thought, they have just moved in. After all, it took a few years to complete the institutional transition from CONAMU to the Citizen’s Revolution gender equality bureau. I hope the resources are publicly available soon.

Few sentences have been issued for the criminal offence of psychological VAW since the Penal Code came into force. As predicted by many women’s organisations, it is difficult for a lawsuit to thrive under the new procedure. During the first year of enforcement, there were around 20 000 lawsuits for psychological violence, but only 10 sentences (El Telégrafo, 2016). The Judiciary Council itself recently proposed that the offence be treated as a

misdemeanour again (El Comercio, 2016b), but the Penal Code has not yet been reformed. Since 2014, there have been 44 sentences for femicide. 15 femicides have been reported, also, since the start of 2017; which is twice as many than the previous year during the same period (El Universo, 2017). Just like lawmakers said, now that femicide exists in the penal code, we can measure it: we know that during 2014, 54% of the violent deaths of women were femicides (Ministerio del Interior, 2014). I can only hope that one day we will be able to say that the rates have gone down. In spite of all, most feminists think that the specialised courts for women and the family, which manage the misdemeanours, function reasonably well: the ones in Cuenca, one of the main cities, are often singled out for their efficiency and speed, and for the knowledge possessed by the specialised judges.

Last time I was in Ecuador, in June of 2016, I found out that around 74 women were, according to the official sources, being prosecuted for abortion (El Comercio, 2016a). Some women's organisations say the real number is as high as 140 (El País, 2016). Although abortion has been a criminal offence since the early republican years, it had rarely been used to prosecute any women, and I never knew of anyone sent to prison for this offence until now. Some women are being sent to jail as a "preventive" measure, before trial, without even having time to recover from the pregnancy termination (El País, 2016). Activists have told me that the prosecution often is initiated after the medical staff from a public health service give notice to the police.

Politically, Latin America is changing. Post-neoliberalism is in crisis (López Segre, 2016). Argentina and Brazil are no longer considered "pink tide", and the future of the other leftist governments is uncertain. Many Ecuadorians think that the post-neoliberal phase is coming to an end. Many are also tired of the Citizen's Revolution's faces and slogans and

demand a change. Unfortunately, the alternative has neoliberalism written on its face proudly, as a flag of freedom. The Citizen's Revolution won the most recent election in 2017 (without Correa), but unlike past processes, it did so by a very small percentage over the right-wing's candidate. I believe one reason why the project is worn out has been its lack of self-criticism and capacity to reinvent itself, to rethink the programme and its tools. To question taken for granted frameworks, even human rights.

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## 1 METHODOLOGY AS A CONTRIBUTION: A SOCIO-LEGAL APPROACH TO ECUADORIAN PENALTY

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Above, I have painted a “quantitative picture” of VAW in Ecuador as an exercise to show how a hegemonic language is used to communicate the injustices that we experience. Within my analytical framework, I highlighted the coloniality of knowledge as a determinant factor underlying the strategies available to feminists. For example, measuring and quantifying are practices that construct the meaning of VAW; they make VAW come into legal existence by enabling its categorisation as a crime. Given that it has been difficult for feminists to convincingly “prove” the need for public policy on VAW, numbers have been very helpful in this sense. Numbers, measurements, and technical documents function at the same time as reassurance that a claim is objective and neutral. In the same way, technicalities occupy a large space in the discourse of human rights. Indeed, numbers are the one thing that traditional Ecuadorian legal scholarship, in my experience, values from

sociological approaches to law. However, now I also know the stories behind the numbers. Moreover, I consider that my methodological approach has thrown light into many previously overlooked dimensions of Ecuadorian feminist politics.

Although it has expanded in recent years (García Villegas & Rodríguez-Garavito, 2003), critical/empirical legal research is still very limited in Latin America and nearly inexistent in Ecuador. In fact, it is not possible to speak of a tradition of interdisciplinary studies on law in the region. While scholars have carried out important work in history, anthropology, philosophy, and sociology, there are still very few studies that approach the Ecuadorian politics of gender from a socio-legal perspective, combining an interdisciplinary methodology and a critical focus. My own undergraduate and postgraduate education did not offer me the tools to approach any empirical or critical work. As a former student and lecturer at an Ecuadorian university, I can attest that this continues to be the case in most Law Schools around the country. Also, much legal research in Latin America is very descriptive (Garth, 2016); and when it does adopt an empirical approach, it frequently has the sole objective of providing statistics and guidelines to reform concrete policies, often based on comparisons with “ideal” models from Europe and the US (Rodríguez-Garavito, 2015).

In this context, I consider this project’s methodology to be itself a contribution to the literature on Latin American women’s movements and their relationship with the law. The method has reached beyond the narrow understandings of law that we have inherited from legal positivism and has included in its range of vision, social norms, power relations and dominant forms of knowledge which are often overlooked in traditional research. I employed a multi-method qualitative approach, combining document analysis, interviews,

and fieldwork, to overcome some of the limitations that persist in Latin American penal scholarship, which has often relied exclusively on the doctrinal study of legislation and jurisprudence. In many ways, my project occupies a middle-ground space between theoretical and policy-oriented studies, using critique as an initial step to provide future directions in the research of criminal law and the politics of gender.

### **1.1 A RECAP OF THE PROJECT'S RESEARCH QUESTIONS AND MAIN FINDINGS**

With the methodology outlined above, I addressed this project's central questions, which I recall below to make the methodological contribution clearer:

- How has penalty come to be central in feminist strategies on violence against women in Ecuador? How is penalty being justified as a solution to VAW?
- Once feminists propose penal reform, how are their demands incorporated into the penal legislation on VAW?
- How has the implementation of a redistributive and decolonial project in Ecuador impacted on feminist uses of penalty?
- What are the potential effects of penal expansion on women's access to justice?

Accordingly, my methodology allowed me to make the following main findings:

- Penalty can thrive through redistributive agendas and progressive-emancipatory discourses, even decolonial ones.
- Non-feminist discourses are key contributors to the inscription and reinscription of VAW within penalty, including human rights and rights-based criminal justice.
- Ecuadorian feminists see in criminal law a symbolic value without which they cannot envision an effective way to express the wrongness of VAW.
- Feminists equate the protection of women's human rights with the criminalisation of the conducts that violate said rights.
- The potentially problematic extended use of penalty is reconciled with human rights principles to solve the tensions that emerge between penal strategies and coercive mechanisms.
- On the ground, penalty is not problematic only because it reproduces the forms of oppression that characterise neoliberalism. Penalty is also a vehicle of coloniality and the penal logic hinders women's access to justice on the ground.

As we see, in answering these questions, this project has considered the discourses that enable penal expansion across the political spectrum in Ecuador. I proposed to complicate existing analytical frameworks: instead of developing another critique of neoliberalism and the co-optation of feminism, I scrutinised the interpretive schemas through which Ecuadorian feminists make sense of penal reform, presenting it as adequate to defend women's rights. My approach involved examining law as a discourse, analysing legislative processes, and acknowledging that they are political transactions informed by hegemonic

knowledges. This approach exposed the power relations present in law-making processes, and the drawbacks of penalty in the prevention of VAW. In this way, I revealed that there is more than neoliberal pervasiveness behind recurrent appeals to criminalisation, such as colonial patterns of thought and action.

My methodology has thus contributed to bridging the gap between critical theories and empirical research, reflecting on the notions of coloniality of knowledge and gender. This analytical language enabled me to explain how the processes of making and implementing criminal law in Ecuador construct subordinated subjectivities and narrow the options we have as feminists to communicate our emancipatory demands. I have shown dominant legal discourses in operation and revealed how they dismantle and displace alternative legal knowledge, shaping the fields of meaning that social movements can use to communicate with their political intermediaries and counterparts. In this way, I have also provided some empirical clues regarding broader questions about the “inefficiency” of law in Latin America, as well as the limitations of “legal pluralism”, which Latin American socio-legal scholarship has frequently addressed (García Villegas & Rodríguez-Garavito, 2003). I have confirmed, for instance, that inefficiency in the case of domestic violence is often derived from the gaps between the logic of penal procedures and women’s lived realities. I have also unveiled that there are many impediments to the implementation of our constitutionally recognised legal pluralism. With this backdrop, I explain the relevance of my findings in relation to the research questions.

## 2. A DECOLONIAL FEMINIST CRITIQUE OF RIGHTS-BASED PENALITY: THE PROJECT'S KEY FINDINGS

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The main contribution made by this thesis is the identification of “rights-based penalty” as a discourse used to address VAW. In my analysis, I have not assumed that penalty is necessarily a neoliberal asset or that carcerality is driven by the market-oriented practices of neoliberalism only. Instead, I focused on the ways in which colonial narratives and particular styles of rights-based discourses have shaped the women’s movement approach to VAW and the responses they obtained in the field of penalty. In critiquing rights-based penalty, I have taken several risks. This interrogation would most likely be unwelcome by my Ecuadorian progressive colleagues, and I understand why. I am aware that perhaps a rights-based penalty is the best that we have at the moment. But precisely because we consider it one of our best weapons, we need to assess the effects it is producing in each particular case. Regarding VAW, we need to be aware that each time we (rightly) emphasise the importance of penal guarantees and insist on the observation of human rights, we are also re-legitimising criminal justice and reaffirming it as the only possible way to respond to gender violence. The “constitutionalisation” of criminal law is recreating penalty as a set of mechanisms that are not only legally but also morally defensible within leftist discourses. These “ideologies of legitimation” (Díaz, 2001), which include the perceived neutrality of human rights, have been crucial for the continuity of penalty despite the political shifts in the country. The post-neoliberal Constitution, although portrayed as minimalist in what pertains to criminal justice, has in practice permitted the



expansion of penalty as a system that not only punishes rights violations but is meant to deploy human rights principles, thus acquiring renewed validity as an instrument to achieve the highest ends of the democratic state.

However, criminal justice, as I have shown, is not an adequate response in the case of VAW in Ecuador. At times, it has caused more harm than good. For instance, I have demonstrated that the principles of the ordinary penal process seldom respond to the lived realities of VAW survivors, especially marginalised women, and also, I have shown that penalty prevents us from thinking otherwise, from imagining other ways to tackle the political imbalances underpinning VAW. The value of my findings, in this sense, resides in that it enriches current understandings of the relationship between feminism, criminal justice, and the effects of the former on the lives of women. Also, this thesis has contributed to widening the conversations about the investments that feminists make in legal reform projects more generally. In post-neoliberal Ecuador, rights have functioned as tools to voice emancipatory projects, but their connection to penalty has at the same time facilitated the expansion of criminal law even outside a neoliberal agenda. We could posit similar questions in other areas of law: to what extent are our achievements producing unintended consequences?

In criminal law, one main issue is that rights-based penalty can be deceiving. It can make us think that we are talking about rights when we speak of coercion and punishment. It can make us believe that we have become aware of the horrors of penalty, while we are at the same time affirming that the penal apparatus *can* be benign without fundamentally modifying its structures, assumptions, and principles. Penalty prevents us from walking

further. I believe I have made some important discoveries that can help us loosen those constraints. To such effect, below, I summarise and recap this project's key findings.

## **2.1. BEYOND NEOLIBERALISM: THE COLONIALITY OF HUMAN RIGHTS AND CRIMINAL LAW**

This project has contrasted scholarly work which delves into the relationship between penal expansion and late-capitalist/neoliberal trends, and between the former and feminist politics. As I have shown, there are few accounts of VAW that expound the relationship between rights-based discourses and penal expansion from a decolonial perspective. I thus confronted this literature with my research questions, which stem from a context where neoliberalism and coloniality have been challenged. I also showed that the scholarly response in the region has been revolving around the idea of building a new, more just criminal law that ceases to be oppressive by observing constitutional guarantees to limit coercive power and ensure the protection of human rights. My interrogation to the literature can be summarised as follows: if neoliberalism is associated with the expansion of carcerality through feminism, and if (as the proponents of rights-based penalty argue) strengthening human rights is meant to palliate this expansion, how can an increased penalty be accounted for in a context where neoliberalism has been challenged and human rights have been incorporated?

This project identified various links between current rights-based penal discourses and lingering colonial rationalities. Albeit the post-neoliberal project introduced indigenous tenets into the Constitution, *Sumak Kawsay* has not traversed Ecuadorian legislation and policy. Unfortunately, in VAW, the post-neoliberal Constitution has not significantly disrupted coloniality nor penalty. Rather, we have seen a continued displacement of non-dominant knowledges, a reproduction of some gendered and racialised subjectivities

through the law, and a reformulation of criminal law, which is now presented as guarantee-oriented and human rights-compliant. Criminal procedure, in particular, is meant to be thoroughly based on due process and human rights. In this manner, penalty has been smoothly incorporated into a post-neoliberal and decolonial project. Furthermore, the potential oppressive effects of relying mainly on criminal justice have been masked.

The coloniality of current legal discourses is also related to the ways in which law defines who is a rights-bearer and what a right is. Coloniality is present in the values consecrated by the law and builds the legal subjectivities it protects or punishes accordingly. Some patterns resonate with one another in each of the historical moments that this thesis analysed. Although often in a covert manner, provisions on VAW have always been mediated by gender and race. From the criminalisation of alcoholism alongside a discourse that condemned “racial poisons”, to the acceptance of certificates of “good repute” in the 2014 penal code, domestic violence provisions reinforce ideals of whiteness, respectability, responsibility, and “non-violent” patriarchy. The norms of acceptable femininity and masculinity, which are associated with skin colour and class, have been affirmed and reaffirmed through law. Moreover, colonial rationalities have at times contributed to the acceptance of certain feminist proposals *due* to the fact that they coincided in some ways with the family-oriented discourse that the legislature predominantly defended.

The penal regulation of domesticity is still inscribed within the norms of the ideal bourgeois family, a paradigm whereby women are expected to be good mothers, and men only deserve punishment if they cannot prove that they are “respectable”. The definition of domestic violence encapsulates the offensive conduct within the boundaries of normative domesticity, and although legal definitions include unmarried intimate partners, it would

not be possible use the penal code to address other forms of gendered violence that may take place in non-traditional relationships. For example, the law is blind to the violence inflicted by employers upon domestic workers, by pimps and johns upon sex workers, or even between casual partners, roommates, and friends. The “protected legal good” is still clearly the family and not women’s right to live free of violence and discrimination, which is, conversely, the main rationality driving feminists.

In this way, the continuity of penalty is attached to a discourse that inextricably associates the protection of rights with the penalisation of the conducts that violate them. In addition, penalty had already been legitimised and linked to the protection of the family since the early republican years. These are colonial discourses not only because they reproduce colonial subjectivities, but also, as I have shown clearly in Chapter 4, because they displace alternative ways to understand justice, such as those which centre the community, relationality and interdependence. Dominant rights-based frameworks currently subordinate the decolonial notions introduced in the new Constitution. At the same time, as many feminist critics have argued, penalty tends to hinder non-penal strategies to address VAW. In Ecuador, for instance, there are not enough state-funded services to assist survivors of domestic violence, including housing, healthcare, food, childcare, and the prevention of further abuse. This discussion seldom takes place at public fora. In fact, almost none of the leftist feminists I interviewed referred to the issue. The ones who identify the problem are mainly those working at NGO-funded women’s shelters. Therefore, I largely agree with Corrigan’s (2006) contention that penal reform on gendered violence may not have the effect of increasing carcerality, but it often plays a significant role in displacing feminist conceptualisations of VAW. Feminist strategies are constrained by a

dynamics whereby legal achievements often come at the cost of tolerating exclusionary representations of gender, race, and the family, while the legal protection obtained in return has become less and less accessible. The decolonial and post-neoliberal notions introduced by the 2008 Constitution remain underexplored in large part due to the discursive dominance of rights-based penalty as a universal field of intelligibility which determines that feminist demands continue to be inscribed in the formations of criminal law.

## **2.2. POST-NEOLIBERAL PENALTY: THE OTHER PATHWAYS OF PENAL EXPANSION**

Another crucial contribution of this thesis is the identification of the mechanisms by which penalty travels through progressive discourses which promote social redistribution. As I explained in the Introduction, considering the significance of neoliberalism in Latin America, we can speak about the Citizen's Revolution as a post-neoliberal process. This thesis throws light into how representations of human rights can remain strongly reliant on criminal justice beyond neoliberalism. It has shown how human rights and penalty converge as fields of meaning to which an enormous symbolic value is attributed, making them the preferred frameworks to communicate the wrongness of gendered violence even after neoliberalism has been explicitly challenged. The case of Ecuador reveals that a redistributive agenda is not necessarily disruptive of penal expansion and that feminist criminalisation demands are not solely the effect of assimilation by neoliberal agendas. I have demonstrated that penalty can thrive outside the neoliberal cost-benefit logic, and that leftist feminists who prioritise social redistribution can advocate criminalisation strategies. In Ecuador, penalty has been used not only to criminalise sexualised violence but even to promote economic equality between men and women, through the unsuccessful proposal to penalise "patrimonial violence".

Again, the association between rights and penalty does not have its deeper roots in neoliberalism. Concretely, I showed in Chapter 2 that moderating violence at “private” spaces through penal provisions was a state practice before the emergence of the organised women’s movements and the framing of VAW as a gender issue. It is true that neoliberal policy has contributed to the expansion of penalty as a technology that intends to contain social violence without performing social redistribution, even making it a commercial, profitable industry. Nevertheless, the thesis has shown that the colonial roots of penalty in Latin America are so deep that challenging neoliberalism alone does not suffice to displace penalty. Furthermore, the task of challenging penalty is most intricate because it entails challenging the notion of rights. If penalising equates protecting rights, what are we left with if we do not have penalty? What are the options, what is the other path? If challenging penalty is hard for feminists, challenging rights, I would say, is virtually impossible, because “rights talk” has borne fruits, it has facilitated change, such as the creation of the first “law of our own” (Act 103). However, we may have attributed too much to international human rights whilst overlooking how national laws reframed and continue to shape our legal reform achievements. That is the “rights trap”: human rights are not a strategy, they have become a mandate, a universal and totalising discourse that shapes our thoughts and feelings as feminists, not only our tactics.

It seems —although it is outside the scope of this project—, that the prevalence of rights-based discourses is also attached to the left’s perceived need to reaffirm their moral commitment to the protection of individual freedoms, lest citizens compare them to authoritarian regimes of the past or present. In fact, it is not uncommon to hear the Ecuadorian opposition trying to “scare” citizens by saying that Ecuador will become

Venezuela or Cuba (El Comercio, 2017). As Meister and Douzinas have suggested, the prevalence of rights is frequently linked to their utilisation as symbolic insurance against authoritarianism. Rights-based penalty, as I demonstrated in Chapter 4, is in this way closely attached to the notion of democracy. The (sometimes justified) fear of “leftist authoritarianism” was also evident in repeated feminist narratives regarding the fear of roll-back under Correa. For example, during the Constituent Assembly of 2008, feminists’ main objective was to protect the achievements of 1998 at all costs. They feared a setback, not only based on Correa’s overt Catholicism but also, perhaps, because they dreaded a loss of focus on individual rights.

### **2.3. FEET ON THE GROUND: THE INADEQUACY OF THE ADVERSARIAL PENAL LOGIC**

An important empirical finding made by this project is the marginalisation of the survivors of domestic violence who attempt to access the criminal justice apparatus and then encounter a complex system that is difficult to navigate, regardless of its alleged human rights orientation. Impoverished women lack the means to reach the ordinary penal tribunals and, also, the restraining orders that used to be relatively easy to obtain, are now only attainable after a long process which often requires the intervention of private attorneys. Women’s experiences of abuse are increasingly doubted and subjected to technical measurements that even experts find difficult to apply to a phenomenon as complex as psychological violence.

The ordinary penal procedure is thus not adequate to address gendered violence in this case. Domestic violence in particular has very specific characteristics, as it usually occurs between intimate partners or among close family members, and it reoccurs through relatively long periods. This specificity is difficult to grasp through the adversarial penal

model, which treats offences as “one-off” occurrences. It also constructs the parties as adversaries with mutually exclusive rights and submits women to scrutinies which more often than not discredit their experiences. To comply with penal guarantees, the procedural truth needs to be established through a causal link between the “one-off” event and measurable damage, and this is often impossible to demonstrate. Here, again, we see the operations of coloniality; scientific knowledge and the idea that gradations, numbers, and statistics are the most efficient way to determine the “truth”, have displaced other possible criteria to understand the experiences of women. In fact, under Act 103, “proving” the existence of harm and injury was not a requirement to obtain preventive protection. Now, the objective to establish the procedural truth has largely displaced the urgency of prevention. The principles on which penalty is built make feminist priorities secondary. It is critical that effective preventive measures are put in place again.

#### **2.4. FEMINISTS POLITICS ON VIOLENCE AGAINST WOMEN: CARCERAL FEMINISM IN QUESTION**

Importantly, this thesis has from the beginning questioned the existence of a feminist carceral project as such. As I explained in the Introduction, given that there has not been a significant rise in incarceration rates as a result of the penalisation of VAW, I approached the phenomenon of penalty as a set of dynamics produced by deeper and broader discourses that revolve around the penal complex. Also, after completing my research, I did not find that carceral punishment is per se the main goal pursued by feminists. As noted in Chapters 3 and 5, Ecuadorian feminists are for the most part invested in mechanisms that can prevent violence as well as alleviate situations of imminent abuse. When Ecuadorian feminists talk about criminalisation, they seldom mention the prison. Instead, they speak about manifesting the wrongness of gendered violence, protecting



women, and recognising their human rights. As I have stressed, there is an implicit connection between the legislative act of penalisation and the social recognition of the injuries caused to a subordinate group. What seem to be the obvious limitations of this approach (for instance, that there are no conclusive empirical associations between penalisation and a more effective protection of rights), are virtually overlooked due to the power of human rights and the symbolic value attributed to criminal law as an encoder of political and social messages. Without the communicative function of criminal law as a field of intelligibility, it is improbable that feminists would have deployed penalty in the way they have.

Moreover, governance feminism also seems unlikely in Post-Neoliberal Ecuador. As Joanne Conaghan (2009) has commented, “in Halley’s world, feminism is the orthodoxy”, it has become the “authority to be resisted, the normative ordering from which to break free” (p. 305). My thesis has shown that feminism is far from the norm in Ecuador. Moreover, across history, there have been marked limitations to the topics that feminists were able to debate publicly. More recently, it is apparent that the women’s movement is not stable, despite the existence of state offices and NGOs dedicated to women’s issues. Many feminists think that the post-neoliberal turn expedited the fragmentations of their networks. All these barriers show that we cannot take feminists for granted as influential political actors. Not even at a time when women are occupying the presidency of the legislature, and a decolonial/post-neoliberal Constitution has been enacted. It has not been possible to advance proposals such as the decriminalisation of abortion, the recognition of patrimonial violence, or state accountability for feminicides. The reconfiguration of Ecuadorian feminist networks under Correa is itself a phenomenon which would deserve an

entire research project to understand adequately; however, my fieldwork revealed that the sector of the women's movement which emerged during the 1990s, often referred to as the "*históricas*" (which would in principle fit under the label of "governance feminism") has considerably lost its negotiating power, as it is often regarded as an opposer of the Citizen's Revolution. The movement has even been portrayed as corporatist by a new generation of leftist feminists. What is more surprising, given the claims from the governance/carceral feminism literature, is the fact that socialist feminists were the ones who mainly promoted penalisation, while the NGO-based feminists had many objections on the matter. This thesis thus deeply challenged the assumption that governance and carceral feminism are global.

In any case, if we were to apply the "carceral" label to all the agencies which resort to criminal law, many activist groups, civil society organisations, and the state, would have to bear that rubric. Demanding a punitive response to issues that are identified as violations of fundamental rights has become nearly an automatic reaction from both civil society and governing agencies. Although the provisions designed to curb VAW were first drafted and promoted by the women's movement during the 1990s, it was the National Congress through the reassessment of the draft bill, who played a key role in enclosing VAW within penalty. The feminist lawyers who authored the proposal had originally envisioned civil procedures and non-carceral sanctions. My point is that non-feminist discourses have been key contributors to the inscription and reinscription of VAW within penalty. This finding is crucial: the suggestion that it is necessary to detach from feminism to detach from both neoliberal assimilation and carceral expansion is deeply questioned. In "taking a break from feminism" (Halley, 2008), we would likely be excluding gender from our analyses, and at the same time, we would not necessarily be challenging penalty, because its logic is deeper and

broader than feminist governance. It is, in fact, profoundly colonial. The idea of a carceral feminism appears to promote a distancing from feminism as a political stance, which in scenarios like Ecuador, would not result in any social justice advancement. Taking the situation to an extreme, dissociating from penalty would entail dissociating from most progressive activist networks.

This project is thus a reflection on our possibilities to think and feel, to express and enact our resistance as feminists. Through this thesis, I wanted to be able to hope that we can think otherwise about violence, about gender, about intimate relationships, about justice. I have been able to discover that we do not need to take a break from feminism, but maybe we do need to take a break from rights. Even if it is to retrieve them shortly after, we have to question them and strip them naked of their universalism. Above all, we do need to take a break from penalty as a universal frame to address VAW if we want human rights to be truly emancipatory.

## **2.5. A FINAL REFLECTION ON COLONIALITY AND RACE**

Unearthing race as a discourse that has historically shaped Ecuadorian law has perhaps been the greatest challenge in this process. Racism is, in my experience, very well concealed. Most Ecuadorians do not usually acknowledge it or name it; maybe they assume that it has been solved through the legal recognition of indigenous rights or through the common claim that after all we are all mestizos to some extent. These are reasons why it has been a demanding task to “prove” racism through documentary and testimonial evidence, although it is there, all the time. As a privileged mestiza who is writing in English and from outside of Ecuador, but who has also many times felt guilty and excluded for not having lighter skin, I worried that my account of race would not be just to the persons who

endure the harshest oppressions for not being white. I have, nonetheless, found comfort in a feminist ethics that values the researcher's experience and position beyond her sources, which allowed me to identify the many discourses which point at the problems of race and coloniality, and of gender and penalty, as structural, historical, and legal. Of course, I shall acknowledge again that a methodological limitation of this project is that it analyses the discourses of a privileged sector. It is evident, from Chapter 2, that the most well-known voices are those of whites and mestizas. For example, I focused on the texts of Zoila Rendón, a woman from a privileged class, because her work was one of the very few, from that period, that referred to criminal law. Even Nela Martínez, the notable communist leader, was born to a hacienda-owning family. I did point out that indigenous women like Dolores Cacuangó and Tránsito Amaguaña were the protagonists of some of the most important struggles for social justice in the history of the country. But they were not speaking about criminal law, and this needs to be understood and stressed: being able to speak about state law as an asset, about coercive power and its efficiency, about what one expects criminal justice to do, is in many ways a racialised privilege. This privilege is evident across the rest of the chapters: we see in Chapter 3 an emerging women's movement initially put together by university students and later consolidated by NGO-based upper-middle-class professionals who brought international development projects to popular neighbourhoods and rural communities. This thesis therefore contributes to expose, in a self-reflective way, the racial and colonial implications of feminist investments in legal reform, including the imposition of priorities by some privileged women.

### 3. FUTURE DIRECTIONS

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While recapping this project's findings, I have used expressions such as "initial step" to refer to the resulting critique. I have also acknowledged the emancipatory potential of rights and considered that we need to know the downsides of our tools if we want to use them strategically, critically, ethically, and effectively. For me, it has been an enormous challenge to scrutinise a stance on criminal law that is defended by many remarkable scholars in my country, who I honestly respect. And so, further questions emerge from the findings that this project offers, and there are outstanding issues to explore which could not be covered exhaustively due to space limitations. However, this is an opportunity to point out at the future directions of my research.

Questions remain regarding the use of criminal law in areas outside VAW. I have mentioned abortion at various points in this thesis because many Latin American countries still consider it a criminal offence (Fernández Anderson, 2013; Htun, 2003), and therefore do not have policies to grant safe pregnancy termination. The continued failure to decriminalise abortion contrasts with the repeated success in criminalising VAW. However, I have not been able to unfold the topic further, despite the array of information that emerged from fieldwork. While the difficulties to decriminalise abortion have been studied by feminists who have critiqued its religious and moral underpinnings, they have not yet said much about how the validation of penalty in other areas may be contributing to the persistence of family-protection ideologies, which in turn block other parts of the feminist agenda, including the goals regarding abortion. In addition, it is necessary to understand in

more depth how popular, peasant, indigenous, and Afro organisations have received the mainstream movement's law-centred agenda. Some of this research has been carried out already through anthropological accounts of legislative impact on rural communities (Friederic, 2008; 2013), but additional work is needed, specifically on the interactions between different strands of the women's movement.

I have also referred to the limitations of the new constitutional framework and the post-neoliberal policies that were expected to stem from it. I have shown how in the area of VAW, Sumak Kawsay has not transformed much. But research still needs to be conducted in other areas, including development itself as the most visible context on which Sumak Kawsay has impacted; and the effects that this new framing is having in gender politics still needs to be assessed. We need to think further about the frameworks which force us to discard alternative ways of talking about a problem.

There is another related point that I have not fully developed here, and it is the existence of feminist collectives which are striving to apply alternative understandings of law and justice to their political practice. During fieldwork, I encountered a small group of feminist abolitionists who had for some time been asking questions that turned out to be related to this thesis. For instance, they had had internal debates to decide whether or not to support feminist collectives which were campaigning to obtain a femicide sentence against a man who had killed a young woman in a hotel room. They questioned their stance as abolitionists who were mobilising to denounce the abuse that women suffer in prison, feeling troubled to support the same mechanism in other circumstances. When we talked, they seemed to be feeling as alone in their inner struggles as I sometimes did through the

different stages of my research, particularly when I had to justify my critique of human rights in front of my feminist and non-feminist colleagues.

I have affirmed several times that this project is meant to commence “a decolonial feminist critique of rights-based penalty”. I have only placed some early stones for what could be a broad feminist project in law. There are many tools we can employ to think through the contradictions of criminal law. Sumak Kawsay is only one of them; one of many possible conceptions of justice which rely on the collective much more than on the individual, and highlight interdependence, relationality and mutual recognition rather than individual liability alone. The potential of these alternatives remains underexplored, but it has been necessary to question what we do not usually challenge, to show the urgent need to be more adventurous in our legal thinking.

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