

Legal Codification without Justice: Causes and Manifestations of Impunity in Latin American Cases of Femicide

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Abstract: In the last decade, Latin American states introduced a new norm into the international legal landscape through the criminalisation of gender-related killings, also known as femicide. However, when dealing with the human rights violation in domestic legal systems, impunity remains a persistent issue preventing victims' justice. But, where does impunity come from and what shape(s) does it take? Scholarly knowledge of the specific causes and manifestations is still in its early development stages. In this article, we therefore study the nexus between femicide and impunity under the application of socio-ecological systems theory. Our aim is to define, conceptualise and show where impunity for femicide is to be found by reviewing secondary research from a selection of Latin American countries.

A. Introduction

"For six years I have suffered not only the murder and loss of my daughter [...] the ordeal of dealing with the authorities and the judicial system only increased my pain because of the impunity and the corruption in these institutions."

- mother of femicide victim Mariana Lima, Mexico¹

Impunity is a socio-legal fact that is bound to cross the investigation process of any human rights researcher irrespective of their regional or thematic orientation. However, when monitoring incidents of rights violations and evaluating the enforcement of accordant domestic procedures in Latin America,² the term is likely to make an appearance sooner

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1 UN Women, The long road to justice prosecuting femicide in Mexico, 2017, <https://www.unwomen.org/en/news/stories/2017/11/feature-prosecuting-femicide-in-mexico> (last accessed 5 May 2021).

2 In this paper, the term *Latin America* is applied in reference to the 20 original members of the Organization of American States (1948) with Latin origins. These are: Argentina, Bolivia, Brazil,

rather than later. Although most states in the region have accepted international human rights standards and incorporated them into their domestic legal systems, compliance is far from achieved. Also known as the Latin American citizenship gap,³ we refer to the paradoxical situation wherein the region functions as a vocal human rights advocate, yet simultaneously remains its own worst enemy by perpetually failing to uphold the core principles of freedom, liberty and justice in practice. The visible consequence is a democratic deficit exemplified by “significant gaps between the theoretical ideal prescribed by the law and the reality citizens experience in their everyday lives”.⁴

Groups of laws particularly prone to impunity are those dedicated to violence against women (VAW). Here, a lack of enforcement of relevant legal provisions constitutes the universal norm rather than the exception.⁵ In General Assembly Resolution 70/176, the United Nations (UN) posit that, “violence against women and girls is among the least prosecuted and punished crimes in the world,” noting as well the “high level of impunity with regard to gender-related killing[s].”⁶ In Latin America, the Inter-American Commission on Human Rights criticises “gaps and irregularities in the investigation of cases involving violence against women,” which “thwart the prosecution of such cases and the eventual punishment of the crimes committed.”⁷ The fact that even the most serious women’s rights violation – *femicide* – does not merit an adequate response by judicial systems speaks volumes for the long road ahead in combatting gender-based violence (GBV).⁸ In 21st century Latin America, men commonly go unpunished or receive verdicts of extenuating circumstances resulting in lighter prison sentences or probation for gender-related killings. The tolerance

Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

3 Alison Brysk, Democratic Reform and Injustice in Latin America: The Citizenship Gap between Law and Society, *The Whitehead Journal of Diplomacy and International Relations* 9 (2008), pp. 55-69.

4 Santiago Boira/Laura Isabella Brunke, Femicide, Judicial Proceedings and the Culture of Impunity in Ecuador, in: ACUNS (Ed.), *Femicide, State Accountability and Punishment*, Vienna 2018, p. 29.

5 Rashida Manjoo, Foreword, United Nations High Commissioner for Human Rights, Latin American Model Protocol for the investigation of gender-related killings of women (femicide/femicide), 2014, p. xi et seq. <http://lac.unwomen.org/en/digiteca/publicaciones/2014/10/modelo-de-protocolo> (last accessed 28 March 2021).

6 United Nations, General Assembly Resolution 70/176 “Taking action against gender-related killing of women and girls,” 17 December 2015, UN General Assembly.

7 IACHR, Access to Justice for Women Victims of Violence in the Americas, Organization of American States, Washington D.C. 2007. There is a lack of reliable quantitative data on impunity for femicide. We therefore restrict our evidence to qualitative assessments by authoritative institutions within the United Nations and Inter-American system.

8 The concept of *femicide* is originally defined as ‘the misogynist killing of women by men’ (Jill Radford/Diana Russell, *Femicide: The Politics of Woman Killing*, New York 1992, p. xi). In Latin American domestic legal systems, the alternative term *feminicide* is also applied (*Marcela Lagarde, Del femicidio al feminicidio, Desde el Jardín de Freud, Revista de psicoanálisis* 6 (2006), pp. 216-225).

of this situation partly explains why femicides are proliferating at alarming rates. If the state does not appropriately sanction murder, it may encourage others to commit the crime. But how is this possible despite positive changes in legal codification and social awareness? What structures and processes enable impunity for femicides? And how is impunity manifested in the different stages of the criminal investigation and judicial proceedings?

Our research aim is to define, conceptualise and show where impunity for femicide is to be found. For this, a critical distinction needs to be drawn between different types of impunity. According to international legal theory, the impossibility of justice can occur ‘de jure’ (legal domain) — when existing legislation or the absence thereof prevents the adequate prosecution of criminal acts — or ‘de facto’ (social domain) — when the failure to prosecute crimes as the law demands derives from unofficial practices such as corrupt and incompetent criminal justice systems. When applied to Latin America, “the problem is not so much that inadequate laws are in force, although some instances of this are obviously present, but rather that admirable legal frameworks are not abided by or they are applied in a selective fashion.”⁹ In other words, what we previously described as democratic deficits are, in fact, *democratic deficits in function*, resulting in a legal status of second-class citizenship for women.¹⁰ This enigma has long fascinated researchers across disciplines. Yet, in order to begin the discussion on impunity, which the field of femicide research is increasingly interested in, it is imperative to deconstruct the multifaceted causes and manifestations.

B. Impunity for Femicide

I. The Concept of Impunity

Impunity is commonly framed as the antonym of accountability. Paradoxically, our understanding of impunity as a term of its own is rather limited. There is no consensus on a certain theoretical approximation, which defines its scope and clearly elaborates upon the array of causes and manifestations. We are challenged by an ambiguous socio-legal term that all actors agree must be combatted but without universal consensus about what it means in origin, form and scale. Hence, impunity is comparable to the similarly vague, but self-evident, concept of time.¹¹ Viñuales elaborates, “Impunity, much like accountability, is a term with a distinct meaning. Yet it is rare to find either phrase adequately defined

9 Armin von Bogdandy/Eduardo Ferrer Mac-Gregor/Mariela Morales Antoniazzi/Flavia Piovesan (Eds.), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*, Oxford 2017, p. 10. See further Michelle Carrigan/Myrna Dawson, Problem Representations of Femicide/Femicide Legislation in Latin America, *International Journal for Crime, Justice and Social Democracy* 9 (2020), pp. 1-19 for an analysis on legal issues (de jure) with femicide legislation in Latin America.

10 Brysk, note 3, p. 55 et seq.

11 Mary Margaret Penrose, Impunity- Inertia, Inaction, and Invalidity: A Literature Review, *Boston University International Law Journal* 17 (1999), pp. 269-310.

in a particular work. Rather, these terms have become so ubiquitous that their respective meanings are deemed obvious.”¹² Indeed, most dictionaries define impunity simply as ‘exemption from punishment.’ In international human rights law, we find more depth. The most authoritative conceptualisation stems from former UN Special Rapporteur on the question of Impunity of Perpetrators of Violations of Human Rights, Louis Joinet, and is set forth in the Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. The concept is encapsulated as:

“the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”¹³

What we need to turn to, then, is the polity vested with the mandate to bring criminals to account, namely *the state*. More concretely put, the origins for impunity must be found with “those individuals who shape and conceptualise, and those who implement and apply the law [...] in the three state powers — executive, legislative and judiciary.”¹⁴ Criminal law and human rights law depend on the modern state which has monopolised the use of force (and punishment). The extent of state responsibility for crimes committed by non-state actors is stipulated under the principle of due diligence. The legal norm establishes the duty to prevent and investigate acts of violence, punish perpetrators and provide redress and justice measures for victims. To this end, “[state] responsibility extends, among other things, to enacting whatever necessary criminal, civil and administrative regulations within their national legislation to prevent, punish and eradicate violence against women.”¹⁵ In Criminology, socially harmful behaviours by states that violate fundamental human rights are referred to as *state crimes*. The term is applied to acts ranging from crimes against humanity, genocide and war crimes to bribery, corruption and discrimination.¹⁶ Green and Ward’s classical deviance-based definition views state crimes as “illegal or deviant activities perpetrated by, or with the complicity of, state agencies.”¹⁷ Their conceptualisation

12 Jorge Viñuales, Impunity: Elements for an Empirical Concept, *Law and Inequality* 25 (2007), p. 116.

13 United Nations, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

14 Kai Ambos, Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina, *Human Rights Law Journal* 18 (1997), p. 12.

15 Organization of American States (OAS), Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls (Femicide/Feminicide), 2018, <https://www.oas.org/en/mesecvi/docs/LeyModeloFemicidio-EN.pdf> (last accessed 20 March 2021).

16 Jeffrey Ian Ross, Varieties of state crime and its control, New York 2000, Introduction.

17 Penny Green/Tony Ward, Introduction, *The British Journal of Criminology* 45 (2005), p. 431.

distinguishes between state-initiated and state-facilitated crimes, in other words, *commission* (less common) or *omission* (more common).¹⁸ In the academic world, rational-choice theory is the preferred explanatory framework. The primary motive for criminal behaviour is self-interest. Individuals or groups use institutions instrumentally to maximise their interest, which is either done to further their own policy goals¹⁹ or the interests of pro-violation constituencies (such as elite groups controlling the state). Many notable more recent contributions on the subject come from outside the discipline of Criminology. Dedicated to the study of law, society and social institutions, Legal Sociology introduces ideational (or constructivist) accounts to the compliance debate. While the validity of rational-choice arguments is acknowledged, the analytical focus is on the normative context in which (state) crimes occur, namely “informal social and moral standards and rules which regulate the group and individual behaviour.”²⁰ In light of the formal criminalisation of femicide and the continued issue of limited justice, sociological perspectives make an important contribution by revealing that “social actors are governed less by formal laws than by patterns of behaviour which have accrued normative, if not obligatory force.”²¹ In sum, state crime scholars have furthered our understanding of justice systems by examining individual perpetrators, as much as societal context, institutional failures and structural discrimination against particularly vulnerable groups, making state crime theory highly relevant to the study of femicide.

II. The Latin American Legal Framework for Femicide

In the Inter-American system for the protection of human rights, the Bélem do Pará Convention (1994) is the single most ratified legal instrument. Under Article 7, member states have the procedural duty to adopt legislative measures of a criminal nature:

“[...] 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; 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; establish the necessary legal and administrative

18 David Kauzlarich/Christopher Mullins/Rick Matthews, A Complicity Continuum of State Crime, *Contemporary Justice Review* 6 (2003), p. 246.

19 Gregg Barak, Crime, criminology and human rights: Toward an understanding of state criminality, in: Kenneth Tunnell (Ed.), *Political crime in contemporary America: A critical approach*, New York 1993, pp. 207–230; Kauzlarich *et al.*, note 18, pp. 241–254; Ross, note 16.

20 Robert Weisberg, Norms and Criminal Law and the Norms of Criminal Law Scholarship, *Journal of Criminal Law and Criminology* 93 (2003), p. 467.

21 *Ibid.*, p. 468.

mechanisms to ensure women subjected to violence have effective access to restitution, reparations or other just and effective remedies.”²²

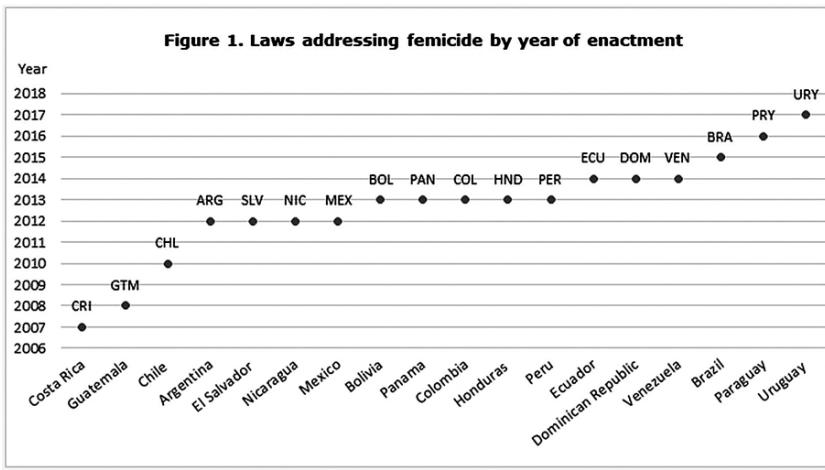
Latin American states have been more than reluctant, to say the least, to translate these international obligations into domestic practice. The nexus between femicide and impunity was formally acknowledged when the Committee of Experts of the Follow-up Mechanism to the Convention (MESECVI) issued an official Declaration on Femicide (2008). The Committee lamented that, “most femicides go unpunished” notwithstanding abundant jurisprudence over VAW issues by the Inter-American Court on Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACHR).²³ In 2009, the first legal precedent within the Inter-American system in relation to a case of femicide occurred in the landmark judgement Gonzalez, Monreal and Monárez v. Mexico (also known as the “Cotton Field” case). Fifteen years after the ratification of the Convention, the IACtHR declared the Mexican State guilty of breaching international human rights law. It warned that, “judicial ineffectiveness when dealing with individual cases of violence against women encourages an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women is tolerated and accepted as part of daily life.”²⁴ The Court’s ruling provides evidence of a widespread practice of investigative and legal misconduct.

Between 2007 and 2017 an overwhelming majority of Latin American countries responded to the problem and incorporated *femicide, feminicide or aggravated homicide on the basis of gender* as an independent criminal category into their penal codes (Figure 1). Coupled with a trend towards second generation laws, Latin American countries now demonstrate the (by international law required) elementary or advanced legislative architecture on a domestic level.

22 OAS, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Bélem do Pará”), 9 June 1994.

23 MESECVI/OAS, (Follow-up Mechanism to the Belém do Pará Convention), Declaration on Femicide, Washington D.C. 2008, p. 7.

24 IACtHR, Case of González et al. (“Cotton Field”) v. Mexico, Judgment of November 16, 2009, para. 388.



Source: OECD (2020)²⁵

From a purely theoretical angle, both elements reflect the political will of governments to comply with their human rights obligations. In light of the fact that no other region in the world has typified femicide as an independent criminal offence, the existence of a category of its own catapults Latin American states, at least in terms of legal codification, to the forefront of tackling femicide and nurturing political debate. The problem, however, is that as progressive as these laws are on paper, little has changed in practice. So, what benefit do they provide as instruments of justice when disrespected by law enforcement officers? What more than a political farce or a means to limit the outcry of human rights advocates do they constitute? Our critique is that we have merely progressed from a situation of '*no gender-specific laws and limited justice*' to a situation of '*gender-specific laws and limited justice*.' International and regional institutions, especially those pertaining to the Organization of American States (OAS), maintain that short-comings and irregularities are still the norm in the investigation and prosecution of femicides, involving the full scale of law enforcement officers. The prominent pattern in all Latin American countries invalidates the individual case argument and indicates a collective state failure to uphold fundamental human rights.²⁶

- 25 Organisation for Economic Co-operation and Development (OECD), Addressing femicide in the context of rampant violence against women in Latin America, 2020, <https://www.oecd.org/gender/data/addressing-femicide-in-the-context-of-rampant-violence-against-women-in-latin-america.htm> (last accessed 28 March 2021).
- 26 We assume that the politics of human rights cases and ordinary criminal cases are the same because the crime of femicide is committed by individual nonstate actors (criminal law), however, responsibility for impunity is to be attributed to the state (international law).

III. The Impunity-Femicide Nexus: What do we know so far?

Contemporary research on impunity in cases of femicide is conducted almost exclusively in and on Latin America. Scholarship can broadly be grouped into two clusters: *Historical impunity* and *general impunity*. The distinction between these research fields is not always clear. For example, patriarchal ideologies have long been regarded as criminological forces of state crimes.²⁷ As femicide research is grounded in feminist theory, structural gender inequality is a central theme in both clusters. In an analogous manner, the state is seen as a primary enabler of GBV, using the language of *state terror* as a specific Latin American characteristic. The first cluster is best understood by the region's historically difficult relationship with impunity following internal armed conflict. During the Cold War, regional proxy wars resulted in crimes against humanity and genocide. Authoritarian regimes practiced 'politics' in accordance with a conservative tradition of patriarchal power and violence. Within a militarised modus operandi, the aspect of sexual violence against women was a dominant feature. Upon the return to democracy in the late 20th century, transitional justice mechanisms, such as national truth commissions and tribunals, largely ignored gender-based forms of violence women had experienced. Academic discussion about the subject of historical impunity for these crimes is scarce.²⁸ Feminist scholarship argues that a vigorous patriarchal masculinity can prevail through long periods of time.²⁹ Therefore, legacies of state terror build the historical fundament for understanding contemporary violent phenomena, such as femicide. Sanford's field work in Guatemala is an excellent exemplar of this research strand. Sanford argues that Guatemala moved 'from genocide to femicide' and conceptualises femicide as the "lived [outcome] of a society where the genocidaires have never been brought to justice and impunity reigns more than a decade after the signing of peace accords."³⁰ The State continues to enforce a tradition of terror to demonstrate power. However, these historical-political arguments only serve as partial explanatory factors for today's multiple forms of impunity for femicide. It is important to remember that, at the time, the idea of *women's rights as human rights* was novel. In fact, human rights were a revolutionary development in international law altogether. Most women's rights as we know and cherish them today were not formally anchored in domestic law and amnesties (and state terror) were often legal under national law (*impunity de jure*). If the most recent wave of feminist legislation has taught us anything, it is that

27 *Laura Caulfield/Nancy Wonders*, Personal and political: Violence against women and the role of the state, in: Kenneth Tunnell, (Ed.) note 19, pp. 79–100.

28 See further *Nancy Hollander*, The Gendering of Human Rights and the Latin American Terrorist State, *Feminist Studies* 22 (1996), pp. 41–80; *Brysk*, note 3, pp. 55–69; *Victoria Sanford*, From Genocide to Femicide: Impunity and Human Rights in Twenty-First-Century Guatemala, *Journal of Human Rights* 7 (2008), pp. 104–122; *Mariana Joffily*, Sexual Violence in the Military Dictatorships of Latin America: Who Wants to Know? *SUR* 24 (2016), pp. 165–176; *Rosa-Linda Fregoso/Cynthia Bejarano* (Eds.), *Terrorizing Women: Femicide in the Americas*, Durham 2010.

29 See further *Vicenç Fisas*, *Cultura de Paz y Gestión de Conflictos*, Barcelona 1998, chapter XI.

30 *Sanford*, note 28, p. 104.

today's primary problem is *impunity de facto*. The contemporary situation, thus, merits the consideration of additional factors, especially in overall less violent environments, where the rule of law is not fundamentally contested or tainted by a pervasive pattern of historical impunity.

The second strand of research dives deeper into the patriarchal status quo in modern Latin American societies. From a socio-legal perspective, it applies a feminist lens to expose gendered power structures as a violation of human rights. Scholars have offered powerful accounts of causes and manifestations of impunity (mostly in single country contexts), thereby paving the way for a profound understanding of the role of the state within it.³¹ Lagarde's scholarship on Mexico has influenced an entirely new way of thinking about femicide. The legal scholar coined the alternative term '*femicide*' to capture the specific Latin American reality where the murder of women and girls is systematically tolerated by the state and characterised by impunity. In other words, impunity is a crucial element of femicide, not an attendant phenomenon, and belongs in its definition. Lagarde and others³² frame impunity as a problem of omission, negligence or complicity between the state and perpetrators (thereby establishing a link to state crime theory). Institutional violence is broadly explained by the 'acceptance of inequalities, discrimination and violence as normal.' Its origins are found in patriarchal and paternalistic conventions.³³

While there have been advances in the study of impunity for femicide over the past decade or so, the theme has yet to develop into a central sub-field of femicide studies. Both, underresearched and undertheorised, impunity needs to be studied in a systematic theoretical and empirical fashion. In our view, the most problematic aspect is that nearly all work is done on extreme cases with high levels of violence and (organised) crime, such as Mexico and Central American countries. Moreover, there is a gap of studies examining the

31 Lagarde, note 8, pp. 216–225; Natalie Velasco, The Guatemalan Femicide: An Epidemic of Impunity, *Law and Business Review of the Americas* 14 (2008), pp. 397-424; Cecilia Menjivar/Shannon Walsh, Subverting Justice: Socio-legal Determinants of Impunity for Violence against Women in Guatemala, *Laws* 5 (2016), pp. 1–20; Menjivar/Walsh, The Architecture of Feminicide: The State, Inequalities, and Everyday Gender Violence in Honduras, *Latin American Research Review* 52 (2017), pp. 221-240; Walsh/Menjivar, What Guarantees Do We Have - Legal Tolls and Persistent Impunity for Feminicide in Guatemala, *Latin American Politics and Society* 58 (2016), pp. 31-55; Walsh/Menjivar, Impunity and Multisided Violence in the Lives of Women in Latin America: El Salvador in Comparative Perspective, *Current Sociology* 64 (2016), pp. 586-602; Julia Monárez, Violencia extrema y existencia precaria en Ciudad Juárez, *Frontera Norte* 24 (2012), pp. 191-199; Monárez, Feminicide: Impunity for the Perpetrators and Injustice for the Victims, in: Kerry Carrington/Russell Hogg/John Scott et al. (Eds.) *The Palgrave Handbook of Criminology and the Global South*, London 2018, pp. 913-929; Paulina García-Del Moral, Practicing Accountability, Challenging Gendered State Resistance: Feminist Legislators and Feminicidio in Mexico, *Gender & Society* 34 (2020), pp. 844-868.

32 Fregoso/Bejarano, note 28.

33 Lagarde, Preface: Feminist Keys for Understanding Femicide, Theoretical, Political and Legal Construction, in: Fregoso/Bejarano (Eds.), note 28, p. xii; Bejarano, (Re)Living Femicide through Social Control: The Regulation of Life and Bodies through fear and (in)formal social control, *FIAR* 8 (2015), pp. 67-91.

situation since the newest wave of femicide legislation (2007-2017) which introduced new causes for impunity.

C. Theoretical Framework: The Socio-Ecological Model

We firmly believe that issues of impunity are hardly isolated acts of violation. To move scholarly knowledge forward, it is imperative to frame impunity holistically and to expose the multiple normative, factual and structural causes, both unconscious and deliberate in nature. We seek to advance the discussion by means of a multi-level analysis. Our choice of theoretical framework is ecological systems theory with origins in the discipline of Development Psychology.³⁴ Adapted by sociologists to broaden the model's scope beyond human development and understand variables of social, institutional and cultural life, (socio-) ecological models are now a dominant approach in the study of VAW.³⁵ These models assume that neither individual, nor collective behaviour, occur in a social vacuum; instead, individual, institutional and socio-cultural factors are interlinked. We operationalise the model in the following way to fit our target phenomenon:

- **Macrosystem:** The macrosystem is a social and cultural milieu which consists of values, beliefs, customs and attitudes. More elegantly put, “the symbolic sphere of our existence [...] that can be used to justify or legitimise direct or structural violence.”³⁶ Embedded into the deepest structures of civilisations, Pierre Bourdieu and Jean-Claude Passeron capture these notions as *symbolic violence*,³⁷ whereas Galtung prefers the term *cultural violence*.³⁸ In their function as normative cognitive frameworks which define what is perceived as natural in a given society, they inform popular thought and dictate the administration of justice.
- **Exosystem:** The exosystem functions as an intermediate space, connecting socio-cultural norms (macrosystem) with the principal environments where social interaction occurs (micro- and mesosystem). It hosts structures and processes that are largely independent from the individual, meaning the latter is not an active participant per se. Nonetheless, the individual is affected by the positive or negative consequences of the exosystem, as it is the place where the state response to human rights abuse is regulated (e.g. legal system, public policies).

34 *Urie Bronfenbrenner*, Ecology of the family as a context for human development: Research perspective, *Developmental Psychology* 22 (1986), pp. 723–742.

35 *Consuelo Corradi/Chaima Marcuello-Servós/Boira/Shalva Weil*, Theories of Femicide and Their Significance for Social Research, *Current Sociology* 64 (2016), pp. 975-995.

36 *Johan Galtung*, Cultural violence, *Journal of Peace Research* 27 (1990), p. 291.

37 *Pierre Bourdieu/Jean-Claude Passeron*, *La Reproducción. Elementos para una teoría del sistema de enseñanza*, Barcelona 2001, pp. 15-85.

38 *Galtung*, note 36, p. 291.

- **Meso- and Microsystem:** The microsystem refers to an individual's immediate surroundings, where the most important social relationships are formed (such as parents, siblings, friends). Individuals participate in more than one microsystem simultaneously. The mesosystem is the space for interactions between two or more microsystems, namely extra-familial groups and institutions (e.g. local church, neighbourhood, school, workplace).

D. Data and Methods

Our research departs from the premise that impunity is an overused (and abused) term that lacks a rigorous conceptual definition in the study of femicide (and by extension VAW). Therefore, the research goal is to define, conceptualise and show where impunity for femicide is to be found. Our conceptual methodology adds supplementary value to the research field by linking secondary research across disciplines and bringing in new theoretical perspectives to elucidate the target phenomenon from a socio-legal angle. In the pursuit of a holistic argument about what causes impunity and what its building blocks are, we employ socio-ecological theory to outline nuanced conceptual distinctions in different stages of the criminal justice response. We, then, visually illustrate the links between these different dimensions.

The data collection process relied on two approaches. First, we examined peer-reviewed empirical contributions from multiple academic disciplines available through Scopus and SciELO databases. We limited our search to scientific articles containing the terms '*impunity and femicide*' or '*impunity and feminicide*' in English, Spanish and Portuguese language. Few data sets containing rigorous empirical data were accessible in the public domain. We found mostly single-case studies of which a majority dealt with Ecuador, Mexico, Guatemala, Honduras and Argentina. Some covered multiple dimensions of impunity, others were restricted to one or more focal aspects. Our second dataset were formal reports on country-specific and general observations published by international and regional organisations belonging to the Inter-American and UN system, as well as self-evaluation reports of their national criminal justice systems by government entities and external analyses by independent research institutes. The rationale for including manifold secondary data from different Latin American states was motivated by an intellectual curiosity to fathom the 'big picture' with respect to how *de facto* impunity manifests and operates in the region. We hope that our femicide-specific characterisation will stimulate more empirical research and hypothesis testing. Our findings are thus preliminary and to be understood as a 'roadmap' for delineating impunity in a research field that is currently in its early development stages.

E. Problems in the Criminal Justice Response to Femicide

In the preceding parts of this article, we substantiated the nexus between femicide and impunity and identified state behaviour as an explicit part of the problem. In the following,

we introduce a classification according to distant (macro), intermediate (exo) and proximate (micro/meso) factors present in a flawed criminal justice response to femicide.

I. Macrosystem

1. Cultural and Religious Norms

The first layer of influence hosts the distant causes of impunity: concepts of power and violence introduced by cultural and religious dogmas. In Latin America, different gender-discriminatory doctrines prosper despite political systems organised as liberal democracies. The primary concern is with patriarchy (more broadly) and machismo (more specifically). While the former refers to a worldwide system of social organisation in which men hold positions of power and women are subordinated, machismo is a Latin American byproduct of patriarchy and a social behaviour pattern. As a cultural ideology, machismo proposes a strict gendered conduct. Its origins stem from, "a blend of ideas deriving from indigenous cultures, the Spanish Colonial Church and imported patriarchal ideas of a more 'Western' variety."³⁹ The machista world view is centred around the image of strong men. An exaggerated masculinity (hyper masculinity) declares men the sole breadwinners; proud, assertive and violent. Directly related to the machismo concept of male superiority is the female analogue Marianismo.⁴⁰ The Catholic dogma hovers over Latin American societies since the violent epoch of the Spanish and Portuguese conquest. Inspired by the religious figure of Virgin Mary, Marianismo advocates female innocence, sacrifice and inferiority exemplified by submission to male violence. As a normative reference — in some societies more, in others less pronounced — harmful machista attitudes are reflected in social, political and economic life. For example, a study by Oxfam shows that 86 percent of Latin American youth believe that no one — including the State — should intervene in fights between couples.⁴¹

Indigenous communities are also not exempt from patriarchal hierarchies and harmful gender relations. VAW, including femicide, is common and precedes Spanish and Portuguese colonisation.⁴² In some countries, femicide rates are even higher in indigenous

39 *Jo Fisher, Mothers of the Disappeared*, Boston 1989, p. 5.

40 *Marta Rondon, From Marianism to terrorism: the many faces of violence against women in Latin America*, Archives of Women's Mental Health 6 (2003), pp. 157-163; *Evelyn Stevens, Marianismo: The other face of machismo in Latin America*, in: Ann Pescatello (Ed.), *Female and Male in Latin America*, Pittsburgh 1973, pp. 89-101.

41 Oxfam, *Breaking the mould: Changing belief systems and gender norms to eliminate violence against women*, 2018, p. 17; <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620524/rr-breaking-the-mould-250718-summ-en.pdf> (last accessed 19 August 2020).

42 OHCHR, *Latin American Model Protocol for the investigation of gender-related killings of women (femicide/feminicide)*, 2014, p. 50 et seq., <http://lac.unwomen.org/en/digiteca/publicaciones/2014/10/modelo-de-protocolo> (last accessed 20 September 2021).

than in non-indigenous areas.⁴³ However, our intention by highlighting the indigenous case is not to discuss demographic rates of femicide — a complex endeavour which demands the consideration of intersectional forms of discrimination and conflict — but to draw attention to context-specific normative influences on how criminal accountability is dealt with. Today, indigenous concepts of justice remain rather distinct from the Western tradition of international law. Human rights standards are perceived as external norms or even a colonialist imposition.⁴⁴ In Latin America, there are many examples where this has resulted in parallel systems of governance. We discuss this phenomenon and its relationship to impunity in the following parts.

2. Violent relicts from conflict and war

The subconsciousness of individuals is further mediated by historical macrosystemic influences. In situations of endemic armed dispute, femicides occur in an environment where impunity constitutes the norm for the entire spectrum of human rights violations.⁴⁵ This, in turn, leads to a state of normalisation and often paralyses societies. VAW becomes an issue of low public concern. Impunity for gender-based crimes committed during times of conflict and war can have a long-lasting effect on countries.⁴⁶ Research shows that authoritarian regimes in Latin America reinforced a ‘violent patriarchy’.⁴⁷ The Guatemalan, Honduran, El Salvadoran and Peruvian dictatorships are emblematic of a misogynist military tradition which was continued in the new democracies. But also in clandestine centres in Argentina, Chile and Brazil, repressors committed sexual violence against female prisoners in addition to other forms of torture also experienced by male prisoners, which societies still have not come to terms with. Perhaps, the most symbolic case is the victimisation of the former President of Brazil, Dilma Rousseff. As a militant, Rousseff was, “incarcerated in a military prison, stripped naked, bound upside down, and administered electric shocks to her breasts, inner thighs, and head.”⁴⁸ Not even in her later public function as President was Rousseff able to secure justice in the face of an ultra-conservative Congress with military affiliation. Brazil remains a country deeply affected by its darkest chapter in recent history. Without the explicit addressing of crimes of sexual violence and the subsequent correction of societal attitudes away from a culture of violence, democratisation is incomplete, and women’s rights are limited for generations to come.

43 *Sonia Frías*, Femicide and Feminicide in Mexico: Patterns and Trends in Indigenous and Non-Indigenous Regions, *Feminist Criminology* (2021), pp. 1–21.

44 *Jack Donnelly*, *Universal Human Rights in Theory and Practice*, Ithaca 2013, p. 117.

45 *Carmen Marciales Montenegro*, Violencia sexual en el conflicto armado colombiano: racismo estructural y violencia basada en género, *Revista Via Iuris* 19 (2015), pp. 69–90.

46 *Fregoso/Bejarano*, note 28, p. 14.

47 *Hollander*, note 28, p. 46.

48 *Stephen Rabe*, Cold War Memories: Latin America versus The United States, *Análisis Político* 26 (2013), p. 7.

The imminent problem, then, becomes socio-political organisation. As suggested by Taylor and Jasinski, “oppressive views of women are not only culturally sanctioned but also embedded in and expressed through all social institutions.”⁴⁹ After all, these institutions are made up of thousands of individual persons who form a greater entity called the state. Thus, macrosystemic factors enter the exosystem through the medium of individuals in their capacity as state agents. They are aided by ordinary civilians who both consciously and unconsciously participate in the violent status quo.

II. Exosystem

1. Gender biases

Within the ideational domain, the most discussed explanation of state failure to comply with femicide legislation is evidence of a gender bias in the different agencies involved in the criminal justice process. Gender biases in law are not specific to femicide. As a cornerstone of patriarchy, the law was written by men for men and traditionally denied women full legal membership in public life, both *de jure* and *de facto*.⁵⁰ Contemporary cases of femicide must be read with this historical context of female exclusion and discrimination in mind and confirm the enduring necessity of feminist jurisprudence. Concerns about an institutional gender bias are primarily found with respect to the police and judiciary, but also health and social services. In the criminal investigation stages, the gender bias manifests in the form of disbelief and victim-blaming. Internalised patriarchal norms negatively impact upon complaints when the credibility of the victim is questioned in the interrogation process (e.g. asking about the woman’s clothes or actions in the context of male violence). The Director of the National Bureau of Criminal Investigation of Honduras, for example, is cited: “Women walk in places where they should not go”⁵¹ — a common guilt attribution towards women known in victimology as *revictimisation*. Revictimisation breaks trust in the authorities and is a strong explanatory factor as to why victims’ families drop cases in the investigation stages. In other instances, empirical findings from Argentina and Mexico confirm that the police do not competently investigate the validity of testimonies by intimate (male) partners. A man’s word is accepted as burden of proof in investigations of

49 Rae Taylor/Jana Jasinski, Femicide and the Feminist Perspective, *Homicide Studies* 15 (2011), p. 342.

50 Hilary Charlesworth/Christine Chinkin/Shelley Wright, Feminist Approaches to International Law, *The American Journal of International Law* 85 (1991), pp. 613-645; Carol Smart, Feminism and the Power of Law, London 1989; Catharine MacKinnon, Toward a Feminist Theory of the State, Cambridge 1989.

51 Blanca Guevara, Red de mujeres contra la violencia de Choluteca, in: Centro de Derechos de Mujeres (Ed.), *Memoria Foro Femicidios: Análisis desde el Movimiento Feminista de Honduras*, Tegucigalpa 2014, p. 26.

apparent suicides or disappearances.⁵² Non-compliance with *ex officio* and due diligence principles effectively turns public officials into accomplices and substantiates Lagarde's state complicity argument.

Moving from the police to the judicial sector, the gender bias crystallises in the treatment of cases by prosecutors and legal experts in their investigative capacities, as well as in court rooms. For instance, "judges often blame female victims, assuming that the woman may have instigated the murder, and use this as an additional reason not to consider the murder or to dismiss the case."⁵³ In addition, the cognitive frame of femicide as a 'crime of passion' (*crimen passionale*) romanticises murder. In machismo culture, passion is considered a defining Latin character trait and traditionally serves to excuse male violence against women in court by comparing it to a psychological state of delirium.⁵⁴ Since 2015, the *violent emotion argument* has been publicly challenged by the transnational social movement Ni Una Menos. Although now an outlawed legal concept, conservative judges across the region still sometimes view femicide committed because of 'violent emotion' (such as jealousy) as a crime that, "should not be met with additional penalties, resulting in cases being charged as simple homicide — which carries a lighter sentence — or outright dismissed."⁵⁵ More subtly, the gender bias becomes evident in the selective application or rejection of femicide legislation. In Guatemala, studies show that "judges use laws other than those created to address violence against women in order to justify lack of enforcement."⁵⁶ The refusal to apply femicide provisions is grounded in a conflict with principles of equality under the law, implying that female and male homicide victimisations should not be distinguished under any circumstances.

2. Technical deficiencies

A gender perspective in homicide investigations highlights the element of GBV. It ensures that gender-related killings are correctly identified and appropriately penalised. However, it is premature to connect the absence of a gender perspective exclusively to patriarchal thought. Capacity deficits deriving from the failure to provide specialised training to public

⁵² Ana Fernández, Femicidios: La ferocidad del patriarcado, *Nomadias* 16 (2012), pp. 47-73; Fernández, Gender violence: femicides in Argentina. *Interdisciplinary Journal of Family Studies* 17 (2012), pp. 42-48; Frias, note 43, pp. 1-21.

⁵³ Claudia Hermannsdorfer, Declaration of Claudia Hermannsdorfer, Expert on Women's Rights in Honduras, University of California Hastings College of the Law (2012), p. 25; see Argentinian case of Lucia Perez (Mar del Plata).

⁵⁴ Kristin Ruggiero, Passion, Perversity, and the Pace of Justice in Argentina at the Turn of the Last Century, in: Ricardo Salvatore/Carlos Aguirre/Gilbert M. Joseph, (Eds.), *Crime and Punishment in Latin America. Law and society since late colonial times*, Durham 2001, p. 222.

⁵⁵ Menjivar/Walsh, The Architecture of Feminicide, note 31, p. 232; see also Ombudsman Office of Peru, *Feminicidio intimo en el Peru: Análisis de Expedientes Judiciales* (2012-2015), Informe Defensorial No. 173, 2015.

⁵⁶ Menjivar/Walsh, Subverting Justice, note 31, p. 1.

officials on how to conduct investigations equally increase the likelihood for impunity. When evidence is overlooked or wrongly processed it can lead to impunity or the classification of femicide as general homicide, which can carry lower penalties. In Mexico, for example, “in almost 95 percent of the country’s municipalities, the police forces are not trained in the basics such as securing and preserving crime scenes.”⁵⁷ Other technical issues include evidence that is lost due to mismanagement in the chain of custody or a lack of coordination between the Public Prosecutor’s Office, forensic experts and detectives.⁵⁸ In court, additional deficits are identified which are connected to the specific nature of femicide as a hate crime based on gender and the general challenge to prove intent or motivation in these types of cases. Judges who have not received training on the new femicide legislation often hesitate or resist to apply the procedural clauses as sanctions over general homicide are difficult to substantiate. Linguistic ambiguity coupled with a lack of understanding have led to acquittals or homicide convictions without a gender perspective.⁵⁹

The obstruction of justice is also caused by complex bureaucracies. When femicide cases are not dealt with in a timely and efficient manner by competent state agents, the oral hearing stage is delayed.⁶⁰ Data from the Argentinian Prosecutor’s Office show that it can take up to three years for a femicide case to move from the investigation stage to the verdict.⁶¹ However, this initial figure calculated in relation to the country’s 50 first femicide sentences can be expected to be corrected upwards as ongoing cases indicate four years in pre-trial stage.⁶² With respect to the nexus between femicide and impunity, time becomes a risk factor. Physical evidence might be lost in the chain of custody, memories fade or witnesses disappear. Walsh and Menjívar,⁶³ therefore, frame bureaucracy as a ‘legal toll,’ which is “imposed on victims’ families and contribute[s] to impunity through undermining victims’ attempts to navigate the justice system.” Lest we forget, prolonged legal proceedings implicate a simultaneous halt in the reparatory healing of families or survivors.

57 Animal Politico, To Murder in Mexico: Impunity Guaranteed, 2019, <https://www.animalpolitico.com/kill-murder-mexico/homicides-unpunished-mexico.php> (last accessed 22 March 2021).

58 Ibid.

59 Fernando Ramirez, Para el juez Ramirez la aplicacion de la ESI bajaria la cantidad de femicidios, 2018, <https://comercioyjusticia.info/blog/profesionales/para-el-juez-ramirez-la-aplicacion-de-la-esi-bajaria-la-cantidad-de-femicidios> (last accessed 25 March 2021); evidence from the Ombudsman Office of Peru, note 55, supports this finding.

60 IACHR, Annual Report of the Inter-American Commission on Human Rights 2010, Inter-American Commission on Human Rights, Washington D.C. 2011, para 369.

61 UFEM, Analisis de las primeras 50 sentencias por femicidio del pais, Ministerio Publico Fiscal, Argentinian Republic 2017, p. 28.

62 See femicide case of Maria Emma Córdoba and attempted femicide case of Ana Laura González committed in July 2017 in La Plata, Argentina and set to begin oral proceedings no earlier than December 2021.

63 Walsh/Menjívar, What Guarantees Do We Have, note 31, p. 31.

Finally, if we are to measure impunity against the standards articulated in international and regional law, then reparations constitute a defining element of justice. In the last decade, the rights of victims of crime have been strengthened in the region. The most prominent law in this regard is Mexico's General Law on Victims (Ley General de Víctimas). Femicide is included in its scope of application. Therefore, women who experience an attempted femicide (direct victims) or family members of murdered women (indirect victims) are legally entitled not only to truth and justice, but also reparations. Nonetheless, there is a documented lack of implementation. According to the OAS, "not one State reported the existence of compensatory judgments or measures providing financial relief to survivors of violence or their heirs." Some country reports we were able to access, however, contradict this claim and indicate small efforts to provide reparations.⁶⁴

3. Socioeconomic resources

On the state level, the impact of the variable economic resources on impunity is reflected in underfunded public agencies with low investigative capacities, susceptibility to bribery, insufficient institutional infrastructure and limited protection mechanisms to guarantee the physical safety and livelihood of witnesses or plaintiffs.⁶⁵ Empirical data from Mexico paints a dire reality. For example, each district attorney has less than two criminal investigators available for homicides. With a total of 6237 unresolved homicides between 2010 and 2016, each detective, therefore, would have to investigate approximately 64 cases simultaneously to prevent impunity. Forensic capacities are a second issue. In the Mexican State of Puebla, there are a documented 116 cases annually assigned to each forensic pathologist — an impossible workload to shoulder.⁶⁶ The prosecution of femicides might also fail for other reasons as homicide departments often lack basic facilities such as morgues or laboratories to analyse forensic evidence. If no forensic analysis is conducted, it is impossible to verify the identity of the perpetrator. Impunity, therefore, becomes the only outcome.

Besides public resources, there is the social level where privilege operates. Latin American societies are highly polarised in terms of education, income and social status, which causes insurmountable inequalities. Marginalised groups, such as women, Afro-descendants and indigenous peoples, are particularly affected by poverty and structural discrimination. Both impede justice by locating femicide victims and their next of kin at a disadvantage

64 OAS, Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls (Femicide/Feminicide) <https://www.oas.org/en/mesecvi/docs/LeyModeloFemicidio-EN.pdf> (last accessed 20 March 2021), p. 8; UFEM study, note 61, p. 32: 3/50 sentences included financial compensation; Ombudsman Office of Peru, note 55, p. 199.

65 Witness protection programmes, detention measures for perpetrators or financial assistance to pursue justice.

66 Animal Politico, note 57.

with respect to the opportunity to take legal action.⁶⁷ Even though in many Latin American countries free legal aid exists on paper, it normally requires a privately hired lawyer to have competent representation. Family members or witnesses might be forced to risk their financial security by taking unpaid leave from work and paying for accommodation in places where state institutions are based. This is an effort not all are willing or able to make.⁶⁸ According to Brinks,⁶⁹ we are confronted with obstacles "before which one must surrender some toll or be refused passage." Moreover, illegal acts involving financial resources and social capital in the form of status and connections, such as bribery or witness-buying, hold immense power over the outcome of the criminal justice process and strong-arm the defendant over the plaintiff.⁷⁰ Helmke and Levitsky,⁷¹ therefore, understand such practices as *informal institutions* or a set of "socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels." Upon relating this to Bourdieu's famous concept of the *habitus*, we observe that the *habitus* is not necessarily mental, but can be corporeal as well.⁷² That is to say, "noncompliant characters do not perceive their practices as criminal behavior or even as disturbances of public order."⁷³ Whether deliberate or unconscious, an intersectional perspective on impunity reveals that criminal justice systems are not only gendered, but also classed.⁷⁴

4. Limited territorial governance

In Latin America, there are territorial areas which are *de jure* under state jurisdiction, yet *de facto* difficult to control. When administrative structures are not in place or do not function effectively because they have been corrupted by organised crime, democracy and human rights are at stake. In Ciudad Juarez, Mexico, Monárrez observes that "the two founding cornerstones of the nation-state have collapsed. The territory is a battlefield controlled

67 Boira/Brunke, note 4, p. 32.

68 Walsh/Menjivar, What Guarantees Do We Have, note 31, p. 47.

69 Daniel Brinks, The Judicial Response to Killings in Latin America: Inequality and the Rule of Law, New York 2008, p. 20.

70 Boira/Nury Rivera, Estrellas en el Cielo. Femicidio y Violencia contra la Mujer en el Altiplano Ecuatoriano, Ibarra 2016; Brinks, note 69.

71 Gretchen Helmke/Stephen Levitsky, Informal Institutions and Democracy: Lessons from Latin America, Baltimore 2006, p. 5.

72 Jacques Bouveresse, Rules, Dispositions and the *Habitus*, in: Richard Shustermann (Ed.), Bourdieu: A Critical Reader, Oxford 2000, p. 53.

73 Mauricio Garcia Villegas, Disobeying the Law: The Culture of Non-Compliance with Rules in Latin America, Wisconsin International Law Journal 29 (2012), p. 283.

74 Rachel Sieder/Maria Teresa Sierra, Indigenous Women's Access to Justice in Latin America, CMI Working Paper (2) 2010, pp. 1-41; Dolores Figueroa Romero, Políticas de Feminicidio en México: Perspectivas interseccionales de mujeres indígenas para reconsiderar su definición teórica-legal y las metodología de recolección de datos, Journal of International Women's Studies 8 (2019), pp. 64-86.

by organised and everyday crime.”⁷⁵ Likewise, Carey and Torres⁷⁶ examine the loss of sovereign territory to paramilitary and other extra-legal actors in Guatemala and highlight their ability to roam freely in vast parts of the country enforcing strict patriarchal cults of masculinity. Other examples of criminal, often transnational, non-state actors are the Mara 18 and MS-13 street gangs in Central America’s Northern Triangle or the Colombian guerrilla groups Revolutionary Armed Forces of Colombia (FARC) and National Liberation Front (ELN), but also to a lesser extent, the dominance of narco-structures in the Brazilian favelas. Considering the extent to which the state has been corrupted by organised crime and the oftentimes high levels of militarisation which provide fruitful ground for gender-based violence, Lagarde⁷⁷ and others argue in favour of a language of *terrorism* or *low-intensity warfare waged on women’s bodies*.⁷⁸ The systematic repression of citizen rights and culture of fear results in societies that do not report crime. Hence, femicides do not reach the investigation stage and impunity is inevitable.

Latin American countries are also characterised by large underdeveloped rural areas, where government facilities are not accessible. It follows that where the State is not present, state law is seldom implemented. Instead, alternative ideas of punishment for criminal behaviour may prevail and include physical violence.⁷⁹ Many of these parallel governance structures have indigenous roots. Some are even formally recognised as semi-autonomous justice systems as a result of indigenous activism. In the Andean region, for example, plurinational societies make a cultural compromise between traditional indigenous and Western value systems upon which the modern human rights regime is founded. States have established alternative jurisdictions in their Constitution to guarantee the right to self-determination.⁸⁰ The fact that indigenous women can consult either regular or native sources of justice offers both benefits and challenges. While a pluricultural approach must be applauded with respect to, *inter alia*, linguistic and cultural accessibility or freedom from ethnic discrimination, a patriarchal mindset, impartiality and a lack of formal legal training remain challenges.⁸¹ Coupled with the promotion of native concepts of justice

75 Monárrez, *Violencia extrema y existencia precaria en Ciudad Juárez*, note 31, p. 197.

76 David Carey/Gabriela Torres, *Precursors to Femicide: Guatemalan Women in a Vortex of Violence*, *Latin American Research Review* 45 (2010), pp. 142-164.

77 Lagarde, *Preface*, note 33.

78 Fregoso/Bejarano, note 28, p. 1.

79 Boira/Pablo Carbajosa/Raquel Mendez, *Fear, conformity and silence. Intimate partner violence in rural areas of Ecuador*, *Psychosocial Intervention* 25 (2016), pp. 9–17.

80 The Ecuadorian Constitution stipulates the right of indigenous authorities to apply their own standards of justice “on the basis of their ancestral traditions and their own system of law, within their own territories” provided that these are not in conflict with the Constitution (regular jurisdiction) and international human rights law. The Bolivian Constitution grants similar jurisdictional functions to indigenous nations and peoples, albeit with a less explicit emphasis on international human rights.

81 Sieder/Sierra, note 74, p. 17; GIZ, *Impunidad ante la violencia hacia las mujeres indígenas en el acceso a las justicias*, Estudio de casos del Pueblo Saraguro, Quito 2012.

which, above all, emphasise reparation, the Western procedure of arrest, trial and (prison) sentencing cannot be guaranteed. While this is not necessarily impunity *per se* as there is no ‘impossibility of justice’, it does result in a lack of implementation of femicide legislation, which is based on the legal standards of the regular jurisdiction. Therefore, parallel systems of justice – whether formalised or not – cause tensions with international law and are a cause for much larger debates between cultural relativism and universal human rights theory.⁸² Independently thereof, the indigenous case forces us to explore philosophical questions on the meanings of justice to different cultural groups and how to reconcile these in post-colonial environments.

III. Micro- and Mesosystem

The microsystem is the part that is closest to the individual experience. It is where most of the time is spent. Besides personal consequences distantly triggered by exosystemic factors, the microsystem adds influences exerted by an individual’s immediate social circle. A multitude of actors (including parents, siblings, neighbours, teachers, peers) can either be supportive or counterproductive in the pursuit of justice, meaning that third parties can provide comfort in times of need as much as they can practice victim-blaming or excuse male violence. A particular problem in cases of femicide is the overlap between microsystems of the victim’s family on the one side and those of the aggressor on the other (mesosystem). It is not uncommon for plaintiff and defendant to be members of the same church or to share circles of friends and work environments. When a member of the community is accused of murder, negative external intervention takes the form of emotional pressure and threats. The likelihood for intervention increases in small towns or villages. VAW survivors in Ecuador have been observed to cite the phrase “there is no hell like a small town,” alluding to the social pressure they experience in their communities.⁸³ Data from the World Bank⁸⁴ confirms the problem of inter-community pressure. In the microsystem, reporting a crime is not only an uncomfortable act, but it can also be a high-risk factor for retaliation. The State of Honduras has admitted problems with respect to physical threats, “by the suspect, relatives or legal representatives to withdraw the complaint and stop the proceedings, and there is no mechanism in place to guarantee the personal safety of the victim or their next of kin.”⁸⁵ Restrictions on an individual’s sense of physical security cause fear. Fear often leads to silence, which – in cases where testimonies are important pieces of evidence – results

82 *Donnelly*, note 44, p. 93-118.

83 *Boira/Lucia Tomas-Aragones/Rivera*, Intimate Partner Violence and Femicide in Ecuador. Qualitative Sociology Review, 8 (2017), p. 37.

84 World Bank, Crime and Violence in Central America Volume II, 2010, p. 6, http://siteresources.worldbank.org/INTLAC/Resources/Eng_Volume_II_Crime_and_Violence_Central_America.pdf (last accessed 1 May 2019).

85 IACHR, note 60, para 369.

in the escape from criminal accountability in the pre-investigation, investigation, arrest or prosecution stages.

IV. Findings: Conceptualising Impunity for Femicide

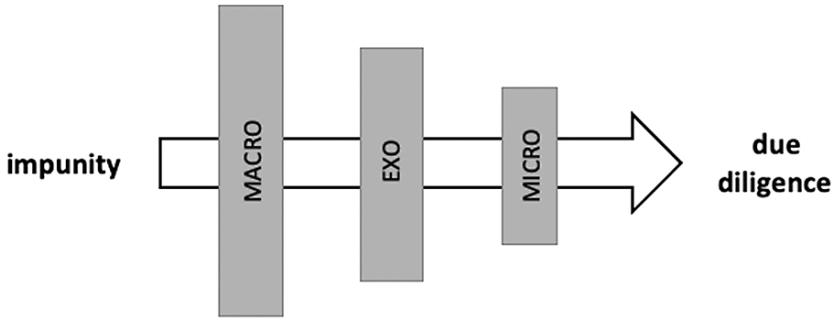
It should be evident by now that impunity for the crime of femicide is multidimensional. A tripartite perspective can dismantle its complexity: *individual*, *institutional* and *socio-cultural*. From the individual perspective, impunity is the exemption from criminal punishment for (direct) perpetrators as traditionally understood in criminal law. From the institutional perspective, it is the complicity of the state either by action or inaction. From the socio-cultural perspective, impunity is strengthened or weakened by the symbolic context of the target state. Regardless of the perspective applied, the concept of impunity can be operationalised as the state's failure to comply to the full extent with due diligence obligations under international law, ultimately resulting in the lack of or inappropriate penalty for the aggressor(s) and reparation. By way of logical conclusion, impunity must be categorised as a state crime. Manifestations are mediated by macro-, exo-, meso- and microsystemic factors which interfere in the direct aftermath of the crime all the way through the various stages of the criminal justice response. In line with this finding, we need to view the causes of impunity on a spectrum, including pre-investigation, investigation, arrest, prosecution, judgment, punishment and, the overlooked yet defining element of, reparations. The phenomenon manifests in the forms of:

- **Pre-investigation:** femicides unreported and investigation stage not reached
- **Investigation:** case mishandled by authorities and/or dropped by victims' representatives or authorities before arrest stage reached
- **Arrest:** case mishandled by authorities and/or dropped by victims' representatives or authorities before prosecution stage reached
- **Prosecution:** case mishandled by authorities and dropped before trial stage reached
- **Judgment:** verdict of acquittal/mitigating circumstances, use of alternative laws (resulting in lower penalties), lack of (appropriate) reparations
- **Punishment:** early prison release
- **Reparations:** lack of or partial enforcement

Concerning the causes, the socio-ecological perspective on impunity illustrates how the different systems interact with each other. Each of the macro-, exo- and microsystemic factors contributes to a particular or several manifestation(s) of impunity. Hence, the latter cannot be explained by merely one system or systemic factor. In their holistic strength, these forces serve as an explanation for the discrepancy between the theoretical ideal (rule

of law) and social reality (impunity).⁸⁶ Latin American states are dealing with (and losing to) a web of interconnected barriers to justice, making it mandatory for them to employ a multi-level approach in the solution-finding process. Granted the multitude of variables impacting negatively upon the criminal justice process, it appears an almost insurmountable challenge to eradicate impunity once and for all.

Table 1: Socioecological Model of Interaction between Impunity and Due Diligence



As illustrated in Table 1, we categorise overarching macrosystemic influences as the first and by far greatest barrier to a diligent state. This is due to their ideological strength as norms of behaviour with a cascading influence on the exo-, micro- and mesosystems. Compliance with the law, in turn, can be enhanced by counteracting negative macrosystemic influences and investing in sustainable, long-term measures directed at changes in socio-cultural norms. As a second barrier to justice, exosystemic factors obstruct the lawful prosecution of femicides on an intermediate level. To combat exosystemic influences, Latin American states must implement the *Latin American Model Protocol for the investigation of gender-related killings of women (femicide/feminicide)*. Most importantly, monitoring and sanction mechanisms need to be strengthened to reinforce normative changes. This is important as we have previously argued that the habitus of criminal behaviour may occur by action, omission or negligence, both consciously and unconsciously. Misconduct, therefore, operates in a similar fashion to impunity: if not sanctioned, it can (but must not) reproduce violence. Internal disciplinary action may contribute to compliant behaviour in the exosystem, as individuals withdraw from participation in an illegal code of conduct following the referral for criminal accountability against themselves or others. In this sense, the microsystem becomes the most proximate and smallest barrier to justice. It is comparatively less complicated to influence the individual as opposed to a group of individuals who interact in a mesosystem of peer-pressure and retaliation with others. The more structures and processes Latin American states address by means of specific public policies in all four systems, the higher the likelihood for diligent governance.

86 The composition of influences differs between countries and within different parts of one, yet there are shared commonalities in the region which merely vary in their weight of influence.

F. Conclusion

This article set out to respond to recent developments on femicide, namely the legal codification of the crime by an overwhelming number of Latin American states. Introducing a new norm into the global legal landscape, so we argued, led to an evident improvement on issues of impunity *de jure*. However, a concern to human rights scholars remains that admirable legal frameworks have neither led to a significant reduction in femicides, nor the effective prosecution of violations. Inequality before the law, hence, exacerbates a pertinent problem in Latin American judiciaries. Women are subjected to violence twice: During the act of physical aggression and during the pursuit of justice, where they or their next of kin do not find the services to which they are entitled. Revictimisation constitutes a form of double injustice and feeds into a cycle of violence.

In the attempt to expose the factors interfering with criminal accountability for the crime of femicide, we departed from an analytical framework which views impunity as a complex socio-legal fact. In their construction as complementary forces, multiple systems of influence in the macro-, exo-, meso- and microsystem create cumulative deficiencies in the treatment of femicide cases. This, in turn, makes it nearly impossible to break the pattern of impunity. In theory, the presence of one factor is sufficient to endanger a rights claim.⁸⁷ Despite this disillusioning awareness, the socio-ecological deconstruction of impunity holds power in its strength to guide public policy. Our findings give weight to the need for a multi-level approach, which includes all segments of society in the fight for gender equality. Not only must we not, but we simply cannot afford to leave men and boys out of the discussion, precisely because many of them occupy (or go on to occupy) crucial public functions within the state apparatus. The multi-sectoral strengthening of Latin American criminal justice systems by means of monitoring and sanctioning — all the while providing capacity training to address issues of competency and impartiality — is essential to end, or at a bare minimum limit, impunity *de facto*. By the same token, it is our only hope to transform impunity into a regional exception rather than the chronic historical norm.

87 While our research is intended to be as comprehensive as possible, we acknowledge the existence of additional causes and manifestations of impunity, especially those still severely under-researched. The body of knowledge could (and should) be expanded by directing future research towards recent case law on the inclusion of transgender persons in femicide provisions (see Vicky Hernandez et al. v Honduras, IACtHR 2021) and respective implications for impunity *de jure* and *de facto*. Suicide cases of (presumed or sentenced) femicidas are another phenomenon worth following in some countries.