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Women's Access to Criminal Justice on the San Diego-Tijuana Border

The Context: Violence, Impunity, And Women's Re-victimization

The San Diego-Tijuana bi-national area is an urban space that makes the border expand or retreat, an idea that Maringo Camacho calls an “elastic border.”¹ This strip is a “shared, interdependent transborder reality.”² The continual dynamics and interaction between both sides is due to multiple factors,³ like commuting workers or national and transnational mobility phenomena like migration.

Gender violence is a serious, common, complex structural problem that has an impact on all spheres of women's lives. On the Mexican side, it has been worsened by the high levels of violence in the country overall and by the perception that Tijuana “is an exceptional space,” a city with flexible rules that operates in different dimensions.⁴ In San Diego, this violence continues to be invisible in certain social sectors. All this makes it systematically impossible for women to enjoy all the human rights recognized under international law.

In this context, one of the most frequent problems is the impunity permeating existing institutions for the administration of justice, categorically violating women's right to justice in accordance with parameters consisting of an equality- and a human-rights-based approach. It is common in this region for the phenomenon to be minimized, which makes for re-victimization and the violence escalating toward what has been called “femicide violence.”

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The Legal Framework: Hyper-regulation, Fragmentation, and the Role of Criminal Law

The possibility of accessing the appropriate jurisdictional bodies to ensure a legitimate interest is recognized as the right to access to justice; this is pluri-dimensional: it covers the justiciability, availability, access, good quality, the supply of legal resources for victims, and the accountability of justice systems.⁵ This fundamental prerogative is laid out in Article 17 of Mexico's Constitution and recognized by several international instruments signed by Mexico; the Preamble of the United States Constitution states that it is written and ordained to “establish Justice” for its inhabitants.

Article 1, Section 28 of the Constitution of the state of California stipulates that the rights of the victim to justice shall be preserved and protected.

On a regional level, Article 8 of the American Convention on Human Rights also cites the right to access to justice. However, this instrument is not binding for the

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United States since it is not part of the inter-American system for the protection of human rights. This means that the legislative impact in the San Diego-Tijuana area is complicated. The local, national, regional, and international legal framework is excessive, and its competency is different on either side of the border. Mexico, for example, accumulated a total of 140 international recommendations from 2000 to 2006 on women’s rights issues alone; of those, 63 involved femicide.

Criminal legislation is also different on the two sides of the border. California’s Criminal Code does not include the crime of femicide; its Article 187 only deals generally with homicide. However, it should be mentioned that Article 189 describes first-degree murder, taking into consideration factors such as torture, any other kind of deliberate harm, premeditation, and rape, among other issues to determine whether it has been committed. If the offense is classified as first-degree murder, Article 190.03 stipulates that a hate crime will be punished with life in prison without the right to parole.

Femicide is mentioned by the Baja California state Criminal Code. Article 129 states that a femicide has occurred when one or more women have been killed due to their gender. The penalty is 20 to 50 years in prison, plus a fine of up to the equivalent of 500 times the daily minimum wage.

In Mexico, the June 18, 2008 reform of the criminal code establishes the new adversarial accusatory criminal justice system. The changes in procedures aimed to ensure guarantees. However, the legal rigor in determining what is necessary to bring charges against a detainee, the burden of proof laid on the accusing party (the victim), a bad interpretation of the recognition of a series of the accused’s procedural rights (due process), and judges’ lack of knowledge about the gender perspective, among other issues, have made it possible for re-victimization and impunity to continue.

In the end, the creation of Centers for Justice for Women and classifying as specific offenses family violence,

femicide, political violence against women, etc., have not been enough for women to live in peace and exercise their rights.

In San Diego, the Violence against Women Act of 1994 (VAWA) and its reauthorized 2013 version are in force. The law deals with the investigation and trial of violent crimes against women, imposing automatic, obligatory restitution by convicted perpetrators, and allows for bringing a civil suit in cases in which district attorneys opt not to prosecute. It also authorizes funds for shelters for battered women and rape-prevention training.⁶

The enforcement of this law is limited, however. Among the problems with VAWA are the need for trustworthy, complete indicators of domestic violence and an analysis of the important data for decision-making, since agencies need to know more about the characteristics of perpetrators and victims to be able to channel resources appropriately, etc. Thus, despite the complex interaction in this bi-national area, the security challenges are examined in an isolated and unilateral fashion.

CEDAW General Recommendation 33

The international community has adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its protocol. As a specialized body, the CEDAW Committee calls on the states to take harmonizing measures that should be implemented nationwide. The convention and its protocol are obligatory for the Mexican government since it signed the former and recognized the competency of the latter; this is not the case of the United States, which only signed the convention.

Regardless of whether the committee’s recommendations are mandatory or not, it is important to implement CEDAW General Recommendation 33 about the access of women to justice. This is precisely the document that goes into detail about the obligations of signatory states with regard to this fundamental right.

In the border area under consideration, certain sectors are more vulnerable to gender-based violent crime and femicide: migrant, young, poor, illiterate, and/or indigenous women. Using an intersectional paradigm, the CEDAW Committee has recognized this situation as follows: “Women belonging to such groups often do not report violations of their rights to the authorities for fear that they

will be humiliated, stigmatized, arrested, deported, tortured, or have other forms of violence inflicted upon them, including by law enforcement officials.”⁷

Thus, many women are vulnerable to violence, marginalization, objectification, and even death. This lack of guarantees for exercising their rights, as well as government inaction, translate into different forms of violence and lead to perpetrators not being punished or sanctioned in any way. It should be underlined that the impunity index in Tijuana alone is 78.08 percent.⁸

During the pre-trial stage, government bodies involved in the administration of justice use different tactics to prevent women victims from accessing justice. For example, in cases in which a complaint has been lodged (when the issue is violence) or when investigation follows *ex officio* (in the case of femicide), the authorities do not arrest the suspect and file away the investigation results due to a lack of evidence, or they simply decide not to bring charges.

In the case of the United States, the document “When Men Murder Women. An Analysis of 2014 Homicide Data” states that in 2014, 1 613 women were murdered by men.⁹ The rate is higher among African-American women. This study could not determine what the murder rate for Hispanic women is since these victims are not identified in the data bases. This “little detail” shows the level of exclusion and discrimination that permeates U.S. society, where 55.2 million people are Latinos, that is, 17 percent of the country’s total, most of whom (63 percent) are of Mexican origin.

As a result, many women who are victims of a crime in this bi-national area do not have the right for their complaints to be taken to the legal system, do not have the legal means to ensure that the authorities in charge offer them due process, and cannot enjoy the rights stipulated by law; this means that comprehensive restitution and effective legal protection are not available to them.

Conclusion

In a bi-national scenario in which a complex symbiosis of gender violence occurs, a comprehensive trans-border agreement to guarantee the viability and effectiveness of the prerogative of women victims’ access to justice is needed. This constitutes the substantial core of women’s

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human rights because it counters impunity and inequality. This kind of agreement would make visible and empower this sector of the population by safeguarding its guarantees and protection. Along this same line of thinking, harmonization, implementation, and monitoring of General Recommendation 33 by institutional means is fundamental to make it possible for them to obtain justice.

These citizens suffer from discrimination by reason of their gender, and in some cases, among other obstacles, they do not even have translators nor can they pay the fees involved in the process. Therefore, the demands of the inhabitants of this border area are a quality justice system, efficiency, and sensitivity to gender issues. **NM**

Notes

- 1 Jorge Marengo Camacho, “Fronteras elásticas, hegemónicas y teoría del discurso: la frontera sur de México,” *Revista CIDOB d’Afers Internacionals* no. 111 (2015), p. 9.
- 2 José Ángel Gurriá, “La región transfronteriza de Tijuana-San Diego como motor de emprendimiento e innovación,” speech by the OCDE general secretary at the “Tijuana innovadora” forum held in Tijuana, Mexico, November 10, 2016.
- 3 Tito Alegría, “Metrópolis transfronteriza. Revisión de la hipótesis y evidencias de Tijuana, México y San Diego, Estados Unidos,” in Alejandro Mercado Celis, *EURE* vol. 37, no. 164 (April 2011), pp. 163-165.
- 4 Interview with Norma Iglesias as part of the “Social Violence in Tijuana” project, implemented by Conavim, IncideSocial, and El Colegio de México (2009).
- 5 Committee on the Elimination of Discrimination against Women (CEDAW), “General Recommendation on Women’s Access to Justice,” United Nations, July 23, 2015, p. 3, https://tbinternet.ohchr.org/Treaties/cedaw/Shared%20Documents/1_Global/cedaw_c_gc_33_7767_E.pdf.
- 6 Faith Trust Institute, “Working Together to End Sexual & Domestic Violence,” <http://www.ncdsv.org/images/historyofvawa.pdf>, accessed March 10, 2018, p. 1.
- 7 Committee on the Elimination of Discrimination against Women (CEDAW), *op. cit.*, p. 4.
- 8 Saúl D. Martínez, “Es BC tercero en impunidad en todo el país,” *Frontera Info*, April 5, 2018, <http://www.frontera.info/EdicionEnLinea/Notas/Noticias/05042018/1324740-Es-BC-tercero-en-impunidad-en-todo-el-Pais.html>.
- 9 Violence Policy Center, “When Men Murder Women. An Analysis of 2014 Homicide Data,” 2016, <http://www.vpc.org/studies/wmmw2016.pdf>.