

CLADEM The administration of justice, from a women's human rights perspective

To: Ms. Régine Gachoud, Committee on the Elimination of Discrimination Against Women
Topic: Contribution to the General Debate on Access to Justice¹
February, 2013

The Committee for Latin America and the Caribbean for the Defense of Women's Rights (CLADEM) is a feminist articulation of individuals and organizations dedicated to the promotion and defense of human rights of women in fourteen countries in the region. To contribute to the general discussion on Access to Justice that the CEDAW Committee held on 18 February, CLADEM issued a call to its members to send their contributions. As this contribution consists of two cases: Uruguay and Guatemala ye analysis about access to justice for women and traditional systems.

Access difficulties women face in accessing justice despite being a legally recognized in national constitutions, this is still not a reality for women. Discretion, lack of budget, lack of awareness among public officials, lack of repair and rehabilitation of the damage, and the lack of punishment are several institutional obstacles must be reversed for women to access justice.

1. Traditional systems and access to justice for women

In the case of some countries like Bolivia are recognizing traditional justice systems in their constitutions, based on the principles of cultural diversity, legal pluralism and intercultural interpretation accorded the same status to peasant indigenous justice to the ordinary courts, to Unlike others, as well as Peru, where indigenous community justice and is considered special jurisdiction. In this framework the critical path of access to justice for indigenous women and / or Amazon that mostly use indigenous justice systems / community, complementarity and harmony become ideals when it comes to protecting the rights of women.

In access to justice for women victims of violence does not happen often in these communities because violence is naturalized or not perceived as a problem relevant towards collective problems they face, which makes access to justice always linked cultural factors, sexual violence if there is rejection and stigma in the community for women that complaint, privileging the "social peace" over individual rights.

The error culturally conditioned on sexual offenses applied in communities is an obstacle in access to justice, disclaims responsibility declaring his innocence, in supporting gender prejudices and stereotypes culturally rooted in patriarchal society and giving more benefits men to believe they have a right to the body of women which is reinforced by the indifference or the underpinnings of the authorities administering justice. For the existence of under-and information system to indicate missing or ineffective those who come into the system and what are the reasons for this is the high

¹ This document was prepared with contributions from: Elisa Portillo Najera de Cladem Guatemala; Ana Lima de Cladem Uruguay y Veronica Aparcana de la Oficina Regional.

percentage of undocumented women in rural areas, in that sense should be killed is not known or nor cause their deaths are recorded.

Other access difficulties are identified recurrence in the use of reconciliation in the form of complete assemblies and processes in the field of violence against women. There is an under-representation of women in the administrative justice in communities, which is usually conducted by men.

Poverty rates are higher in indigenous women's economic dependence you reinforce asymmetrical power relations, it inhibits the complaint, should make the ordinary courts is not possible to sustain over time, due to high costs: there is a need move to other territories, legal defense expenses, costs of court fees, which in some cases may be relieved but after long and cumbersome process.

Distances are symbolic and material state with communities, this creates a difficulty in accessing justice, distrust of the actions of the authorities, ignorance of how the ordinary justice system, the lacking human, technical obstacles that state actors come to communities in a timely manner, producing not only delay in the administration of justice but in the evidentiary material loss in some cases and in others the absence of physical evidence, scientific and psychological by the lack of trained staff perform them. The marked multiple discrimination -gender, ethnicity, and economic status- is anchored in the civilian justice system.

There is a need to institutionalize a coordinated and information exchange between systems of justice with a well-defined treatment skills and intercultural dialogue through a gender and human rights.

Recommendations

- Gender awareness through comprehensive state campaign broadcast around the country and taking into consideration the language and culture of the various groups.
- Institutional reform of universities, for all races, especially races in Social and Political Sciences, Law, Medicine, including respect for human rights and gender.
- In the Judicial Councils or bodies responsible for the election of judges / prosecutors pieces and apply a degree of knowledge of human rights and gender discrimination, as a variable to consider in choosing, promotion and continuity of the judiciary.
- Training programs with a gender perspective to personal health, education and justice for prevention and victim assistance.
- Review treatment protocols for victims of violence in line with CEDAW.
- Reform national legislation providing for the possibility of conciliation in cases of violence against women, imposing sanctions against those who promote them when it was repealed.
- Avoid ineffective protection measures, such as declarative mere cessation of violence, which allow a greater number of femicide.
- Repairs according to economic damage in many cases the repairs are illusory and show a disregard for the seriousness of the violations.

2. The case of Guatemala

2.1. Issue

Justice is a value far greater than the written law and encompasses many aspects. For women, especially in Guatemala, in “theory” the right to have access to justice is recognized and protected by the State in the Constitution of the Republic and developed in other legislation. Why was there a

need to put in writing the recognition of such a right? If this is part of *ius natural* principle, inalienable to human beings. The reason might have to do with the fact that in practice it has not been accessible to all, especially for women in certain parts of the Globe. A right of such magnitude is still unattainable, and this enjoyment can make the difference between life and death, which is the case for women in Guatemala².

Guatemala is a party State of the Convention on the elimination of all forms of discrimination against women, CEDAW. The ratification of CEDAW has been an important milestone in the evolution of the status of women. With this ratification, the women's movement has demanded the State to overcome gaps of inequalities that women are subjected to, including the access to justice, for the sole reason of having been born a woman. The CEDAW has been the tool for the process recognizing through legislation women's human rights. But the implementation and enforcement of such laws in Guatemala are still in gray areas, discretion prevails in the courts.

A, *de iure*, recognition of equality for women in the party State's Constitution has not guaranteed the success of overcoming the overall discrimination against women. For change to come, women's human rights need to be rooted in the recognition in the **culture**, the set of values of the party State, and violence against women should not be acceptable condoned or tolerated by silence, under any circumstance. This is the case for Guatemala and which is resulting in an increase of femicides.

The CEDAW's provisions have been invoked by the women's movement to attain important legislative advancements on women's human rights in many areas of their lives. Notwithstanding, many of these "triumphs" were short lived and reduced to intentions, primarily because the focus of the party States, in many cases, has not been sustained by budget allocation, the WILL and conviction of government officials to enforce the legislation and the implementation.

There has not been a "*de facto*" success of the recognition of women's human rights, eradication of discrimination against women is a process that has been slow in some party States such as Guatemala. All though legislation has been issued and is in effect, the patriarchy swindles its way through the application of the law and uses any legalist tactic to sustain its hierarchy.

State's machinery, of the justice system, in many counties including Guatemala have invoked and justified its bias verdicts against women's rights under the principle of "judicial independence" to favor impunity and neglect the spirit of the legislation, which is in many cases if not all inspired basically on the CEDAW.

2.2. Barriers to Access to Justice

Guatemala, a middle income country located in Central America made up of a population of approximately 14 million³ is one of the most dangerous places in the world to be a woman, femicide rates are on a constant rise. The women's movement under the CEDAW has demanded the State to comply to its obligations and eliminate all forms of discrimination including violence against women. That is how the approval of the Law against Femicide and other forms of violence against women came to be in the year 2008.

² 580 women died in femicides, in the year 2012. There are many inconsistencies in the exact numbers due to unregistration and unavailability of the information. The cited information was provided by the INACIF, National Institute Forensic Sciences.

³ Proyección de Población 2011, Republica de Guatemala. Instituto Nacional de Estadística INE.

This important advancement, together with the modification and repeal of discriminatory legislation, has resulted in rising expectations of women to have access to justice, but due to some legalistic barriers that will be presented in the following paragraphs, the legislative efforts have not been enough, not even so to guarantee the right to a life free from violence to some women, who were victims of femicides.

Despite the important steps taken by the approval of the law, currently in effect⁴, the lives of women are on a constant threat. There are important factors that contribute to this problem. To begin, it is a well known fact that the patriarchy is entrenched in the “machista” culture in Guatemala, discrimination against women is the basis of it. The culture has not been targeted and more so, the justice system has not rehabilitated the victims and perpetrators.

It is for this reason alone that the enforcement of the law has been greatly challenged. The courtrooms have become places where there is a reinforcement of a bias against women, even in the specialized courts. This has resulted in discrimination against woman, to access justice. Most of the government officials including judges, attorneys forensic experts, and the overall participants, in general, are not convinced that women are entitle to their human rights, including a life without violence, at the cost of modifying the male dominated culture, which translates in gaining control and autonomy for women.

How this comes to be, is that cases get trialed the verdicts come through, on paper they look promising because they read GULTY. Nevertheless, a legalistic interpretation and application of the law in the Accusatory System, which is the legal system in Guatemala, justified under the “*extrema ratio*” principle, supplies enough ground for commuting prison sentences. These are susceptible to be commuted through the payment of money, which is fixed by a court according to the financial status of the man found guilty. A man found guilty of violence against women can be let off from going to jail by paying the amount that ranges from 5 to 100 quetzales⁵ for a day of prison. This has been argued as LEGAL proceeding but in fact is anything but JUSTICE being served to women, it is a mockery of it.

The lack of accountability by government officials also influences it. There is no down side to this application of the law for the Judiciary Branch, the Public Defense Institute, nor for Public Ministry. The unreliable data produced in the Judicial Branch and Public Ministry does not evidence reality. In fact the data misconstrues the reality, because it is not indicating that the guilty sentences got commuted and that the money went to the treasury of the Judicial Branch, no cent was received by the woman survivor of violence. The only witnesses to this, are the women who in their attempt to change their situation, in many cases, suffer great retaliation from vindictive husbands, boyfriends, bosses, acquaintances, or any aggressor who carries out the greatest form of discrimination against women, the extreme form of violence, femicide, without any sign of repentance or remorse from the perpetrators. The main issue in these crimes, misogyny, which has its roots in discrimination against women, is not targeted; it is hidden and condoned by the State, a message implicitly sent with impunity.

The subtleties perceived, in a woman’s access to justice, in the legal proceedings carried out in domestic courts influence the prevalence of discrimination against them, and result in a having a spillover effect on the culture. As courts leave claims of women unsatisfied, by not awarding remedies or focus on the main issues that originated the violation of women’s human right, or

⁴ The Law against femicide and other forms of violence against women, Decree 22-2008.

⁵ A quetzal is the national currency of Guatemala, the exchange rate for today is Q.1.00 quetzal is \$ 0.13 cents of a dollar.

motivated violence against them, that is DISCRIMINATION, have resulted in a detriment to the recognition to women's right to equality before the law and recognition in the culture.

The administration of justice, depending on the lens it is viewed from varies. To some it is merely a fulfillment of requirements, set forth by legal formulas of interpretation and application of norms that take place in categorical syllogisms. To women access to justice goes beyond this, it represent the fulfillment of human rights that represent the difference between life and death, such as the access to health care after a sexual assault, alimony and child support, effective protective measures, and in many cases the right to life without violence.

The timing in the availability of making these rights effective is one of the greater challenges faced by State parties, because civil, criminal, and family proceedings tend to be lengthy and expensive. Due to this, in many cases, women are exposed to greater violence due to retaliation. This retaliation is extended in the culture, where women continue to be shone, expelled, or rejected by communities or a religious groups after having made public the need to change the male dominated patriarchal culture, demanding a the claim for justice, this has been the experience lived for Guatemalan women.

The façade of a access to justice for women, carried out under the domestic legal traditions, filled with legalistic jargon and requirements, where cases get argued, and the main issue is neglected, is a constant in the administration of justice in Guatemala, and this contributes to the persistent pattern of discrimination against women. Not holding accountable the responsible men for the violation of women's human rights is impeding that the femicides in Guatemala stop or at least reduce, because of the permissive culture reluctant to change.

The vehicle in which the domestic justice system addresses the proceedings, for example in Guatemala's tradition, the accusatory system (in criminal law), and a legacy of roman tradition (in the civil private law), which is an overall written, lengthy expensive privilege system, need to be modified in order to serve the purpose, for the access of justice to women. These legal procedural systems are key components to target, doing so the administration of justice can be equipped with the tools so justice can be accessible to woman from a human rights point of view.

The stability of government agencies created for the advancement of women in the State party, created under the CEDAW, are in turmoil in Guatemala, which is no surprise that FEMICIDES are also in a constant rise. These agencies at the time being are being downsized and dismantled, and closed and by the political party which is in office, in the Executive Branch. The Secretariat of Women, SEPREM, has been denouncing of being unconstitutional, and a claim of unconstitutionality was presented by the government to the Highest Court. The verdict is still pening to be issued.

The National Coordinator for the Prevention of Domestic Violence and Violence against Women ("*Coordinadora Nacional Para la Prevención de Violencia Intrafamiliar y Contra la Mujer,*") or "CONAPREVI" is no longer working.

The legal instruction that created the DEMI ("*Defensoría de la Mujer Indígena*"), Indigenous Women Defensory has just been amended with the debilitating proposes, and this is just a quick overview of how the institutionalization, which took decades of lobbied, by Women's NGOs in a matter of weeks are disappearing. The message delivered by the government to the general public is self evident. It is also speaking to women's human rights movement practitioners to step away and stop tampering with the culture, which is of a patriarchal legacy, they are reluctant to NOT "allow" women gain the control of their lives.

Recommendations

- **Registration of Court decisions and verification of their execution.** Granting viable, effective, efficient and prompt remedies to women seeking justice in any given circumstance (civil, family, criminal arena, etc) will serve the individual as well as help transform the culture. Not delaying or waiting for violations of women's human rights to turn or escalate into the violence, a message is being sent out, which can impact positively the lives of women. By courts following through and guaranteeing that justice be served, through carrying out a court resolution sends a message that a woman's life is of worth and not expendable. And even though the life worth of a woman is not in the value given by government officials, this might be a step up in guaranteeing a life and the transformation of the culture. It also serves as a means to follow up on the criteria which the administration of justice in any given field of law is being implemented. It may also serve as a tool to record good practices, and evaluate the how other remedies are impacting the lives of women. The registry needs the inclusion of RELIABLE qualitative and quantitative data, constantly updated, and evaluated. Containing indicators of women of specific groups (rural, migrant, disabilities, among others).
- **Rehabilitation programmers.** Address in sentences dispositions that will tackle the main issue in question, which is in a nut shell, discrimination against women, that has prevail due to a permissive patriarchal culture. This can be accomplished only by the creation of rehabilitation programmers for women and perpetrators⁶. The consequences of violations of women's human rights, aside from the legalistic paradigm disclosed in a sentence, and need to target and acknowledge by the responsible party. Otherwise the punishment alone will not be efficient, for there is no recognition of the wrongdoing and the reparation. This is among the reasons that the retaliation takes place, because the silence has hampered the access to justice to women and façade it without transforming the male dominated culture in States such as in Guatemala.
- **Accountability and respect to women's rights through the establishment of codes of ethics.** The administration of justice encompasses the whole apparatus of the party State's machinery available for this purpose. Having this been said, in order to fulfill the access to justice for women, from a non discriminatory spectrum, all of the involved partakers should be held accountable in the proceedings. This could be accomplished through issuance of Codes of Ethics in the institutions such as the Public Defense, Public Ministries, Courts in General, etc.
- **Sustainability of government agencies for women, independent from political links.** These offices need to be autonomous and serve to make policies in executive, judicial, and legislative branches, because the State's machinery needs to be evolved in making justice accessible to women which requires an expertise.

⁶ Although it has been included in CEDAW General Recommendation No. 19 (11th session, 1992) Violence against women, and recognized in some domestic legislations, such as the Law to prevent, punish and eradicate interfamily violence, Decree 97-96 which is the case in Guatemala, it is not carried out in practice, due to lack of programs for women because of poor budget allocation and, another obstacle is not focusing on the need to address new masculinities.

3. The case of Uruguay

2.1. National Legal Framework

According to the National Legal Framework of Uruguay, the Constitution protects the fundamental rights inherent in the human personality in its Articles 7, 72 and 332; Article 8 enshrines the principle of equality of all citizens before the law. In relation to the universal international system, the Convention on the Elimination of All Forms of Discrimination against Women, has clearly defined the scope of women's human rights and the measures to be included in the theory and practice of human rights. It was ratified by Uruguay in 1981 (Law No. 15,164) and later its Optional Protocol (Law No. 17,388), so its application is mandatory.

In that sense, the general recommendations of the Committee, especially Recommendation No. 19, are of extreme importance as to justify the protection of women, the judicial decisions that safeguard their rights and in general with regards to all those areas where the rights of women are threaten or violated by the State or individuals, with the correlative obligation of the State to act with due diligence.

With the promulgation of the Law No. 17,514 in 2002 - after 20 years - the mandate to adopt domestic legislation to prevent, punish and eradicate domestic violence was fulfilled.

2.2. Recommendations made to Uruguay in 2008

The Committee on the Elimination of Discrimination against Women, in relation to the Uruguayan Government response to consecutive reports in 2002 and 2008 expressed the following " (.....) encouraged the Uruguayan Government to study the effects and effectiveness of its mechanisms against domestic violence and to establish a system for a regular collection of statistics on domestic violence, disaggregated by sex, type of violence and relationship of the perpetrators in relation to the victims. The State party should establish shelters and crisis centers for women victims of violence and ensure that if a victim accepts reconciliation with the perpetrator, counseling services are provided to him and the victim, monitoring the situation to prevent further abuse. It should provide training and awareness programs for the judiciary, officials in charge of law enforcement as well as legal and health professionals. The Committee further encourages the State party to strengthen its collaboration with the civil society and NGOs in relation to violence against women. " And following its previous recommendation (A/57/38, Part I, para. 193), the Committee "urges the State party to take urgent measures to eliminate stereotypes existing in the Uruguayan society, particularly strengthening its awareness campaigns directed to professionals from the media and the educational systems, by extending them to those responsible of law enforcement and judicial officials".

2.3. Contributions

In the present contribution, and in relation to the Committee's concept paper, we focus on judicial practices in relation to violence and the existing protection measures for women.

An illustrative fact of the situation faced by women is the number of women killed as a result of the violence perpetrated by their husbands, ex-husbands, partners, boyfriends, ex-boyfriends, cohabitants and former cohabitants: 30 women up to November 25th, 2012, and in many cases with imposed restrictive measures.

In the 2000-2010 period, 74% of the female homicides occurred in situations of domestic violence according to the report by the Centro de Archivo y Acceso a la Informacion Publica(CAINFO) and the Uruguayan Network against Domestic and Sexual Violence presented in March 2012. In July 2012, more than 100 civil society organizations, including Cladem Uruguay, responding to a call by the Organization of Mujer Ahora/ Women Now, signed a petition addressed to the Supreme Court of Uruguay (SCJ). We said that Uruguay " (...) assumed the obligation to ensure access to justice through the design and implementation of a judicial interim order, protective, simple, fast and accessible, capable of functioning as a suitable and effective remedy for the prevention, early detection, treatment and eradication of situations of violence against women. It is this obligation that it was intended to comply in part by the adoption in of the Law No. 17,514 in 2002, addressing situations of domestic violence. " Apart from the judicial practices identified in the law, it was requested that the SCJ issued an agreed internal mechanism (in the form of instructions to female and male judges) to properly apply the law referred to in harmony with CEDAW among other legal instruments.

In an unprecedented decision, on November 26th, 2012, the SCJ issued the Agreement No. 7755 incorporating all the proposals of the petition, recommending female and male judges to eradicate practices that are contrary to law, establishing the specific situations of the reported cases.

2.4. Denounced alleged malpractices.

I. Violation of the guiding principle of preventing secondary victimization (Article 18 of Law 17,514 prohibits confrontation or that the victim and the perpetrator appear together). This prohibition is absolute in cases of child victims. Confrontations or joint hearings have been detected

II. Violation of Articles 9 and 10 of Law No. 17,514; protective measures must immediately be decreed and ordered every time it is established that a right inherent to a human being has been violated or threatened. They are meant for the protection of life, the physical and emotional integrity of the victim, her liberty and personal security as well as the economic assistance and the patrimonial integrity of the family nucleus. The law sets out a limited number of measures to comply with the protective measure and entitles the Court to adopt other similar measures.

There have been detected decisions providing no leave, and generalized resolutions (preventing us to know the reason and argument that motivate them), such as ' we call for the parties to avoid conflict 'or' call the parties to maintain family harmony ',or the used of expressions like ' severe warnings', which are a widely and commonly used. The resolutions are insufficient to protect the victim and also conceptualize domestic violence as a conflict between equals. This is a practice that seriously impedes access to justice generating feelings of distrust, insecurity and vulnerability in the justice system.

III. Reciprocal protection measures. Under the argument of looking for a better protection of women reciprocal measures are imposed. This is probably one of the worst practices that demonstrate the absence of a clear concept of what is violence against women, placing them on an equal standard with the aggressors.

IV. Breach of precautionary measures. The provisions of Art. 11 of the law that orders the arrest of the offender if he does not comply with the measures have not been implemented. The judges consider that the measure is unconstitutional. However, they do not fulfill their obligation to request the SCJ for a ruling on the matter, turning this right into an abuse. In cases of repeated and systematic violations, the special Domestic Violence Courts order the perpetrator to fulfill the orders or then be accused of criminal contempt. In situations when the courts with criminal jurisdiction decide to prosecute for the offense of contempt, they substitute the punishment of

prison with that of the prohibition of approaching the victim. Thus, this is the same decision at the end, forcing women to go through another Tribunal disregarding the principle of non -victimization.

V. Monitoring Measures. Under the law it should be appointed a person who will supervise the measure in the resolution itself. This is not done.

VI. Resolutions by phone. Resolutions by phone are accepted by the police. It confuses the speed with the adoption of the measure itself, in other words, the form of communication and the resolution itself. Due to the lack of registration, when trying to report the lack of compliance, there is no basis for doing so.

VII. Multiple processes. In cases where violence is perpetrated against women and against children (boys and girls), teenagers, members of the same family, it has been detected that parallel processes are opened, lacking a comprehensive concept of integral protection. Even in the audiences or hearings for women, no women are confronted with the aggressors, but in the audiences for children, joint appearances occur, as if the provisions of the law against violence domestic are not applicable in these cases.

VIII. Failure to notify the commission of criminal events constituting violence and an alleged crime to the criminal authorities.

IX. What we call the “ordinarización” of the judicial process. The law intends to be a speedy process directed exclusively to protect. The judicial practice shows repeated calls for prior hearings with the consequent loss of time and discouragement of the victims.

X Information. Despite the successive recommendations of the Committee to the Uruguayan State to disaggregate the manifestations of violence, this has not yet been made effective. The information produced only for the capital, Montevideo, emphasizes on numbers, audiences, and lacks of indicators to visualize and design further strategies.

XI. Recorded data on causes of domestic violence. The law is public in nature. This is the case of inalienable rights so, it is clear that in cases where agreements are established between victims and victimizers, or they do not attend the hearings, the process must not be filed or the measures must not be removed.

XII. - Hearing of the assessment. The law imposes a hearing to assess the situation after the intervention composed by a multidisciplinary team. This is not done.

Conclusions

In this scenario, the Agreement promulgated by the SCJ and the adoption of a Protocol for action to sort people location mechanisms (electronic bracelets) constitute progress. However, and within days of its submission to the judges specialized in violence, it was said in open court that they will not comply with the said agreement.

So this opens a new phase in which we will monitor its compliance. It's the first time that under a constitutional provision (art. 30) is requested a statement of this kind. In a public ceremony on November 25th, the SCJ presented the Agreement in response to the request of expert organizations in the defense of women human rights. It also announced, as part of its policy, the implementation of the requested statistics.