



**DUE PROCESS FOR THE CRIME OF FEMICIDE IN THE SUPERIOR
COURT OF JUSTICE**

**DEVIDO PROCESSO PARA O CRIME DE FEMICÍDIO NO TRIBUNAL
SUPERIOR DE JUSTIÇA**

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ABSTRACT

Due process is fundamental in determining the sentence for crimes such as femicide. The Superior Court of Justice is one of the entities responsible for ensuring compliance with due process. Therefore, it is important to determine the violation of due process in this institution. Through the cases that have been studied, it has been demonstrated that the preparatory investigation stage ends with very few elements to be taken into account. This represents a certain vacuum in that the attempt on a woman's life cannot be criminalized. In other words, terms such as homicide and aggravated homicide are not taken into account. This scenario is due to inefficiency in the investigation sector and the lack of specialized legal operators.

Keywords: Femicide; Due Process; Stages of the Criminal Process.

RESUMO

O devido processo é fundamental para determinar a sentença por crimes como o femicídio. O Superior Tribunal de Justiça é uma das entidades encarregadas de





assegurar o cumprimento do devido processo. Por este motivo, é importante determinar a violação do devido processo nesta instituição. Através dos casos estudados, foi demonstrado que a fase de investigação preparatória termina com muito poucos elementos a serem levados em conta. Isto representa um certo vazio na medida em que o atentado contra a vida de uma mulher não pode ser criminalizado. Em outras palavras, termos como homicídio e homicídio agravado não são levados em conta. Este cenário é devido à ineficiência no setor de investigação e à falta de operadores jurídicos especializados.

Palavras-chave: Femicídio, Devido Processo, Etapas do Processo Criminal.

1 INTRODUCTION

Femicide is a problem that remains in different societies and will continue to exist as long as machismo and economic dependence do not leave the roots of beliefs, especially those of men. The world still presents evidence that women are in a vulnerable state because they do not have rights that support them, being exposed to practices such as auctioning or slavery. Peru is no exception in this type of context, because the media is responsible for reporting an approximate number of women who are murdered by their partners or in other contexts.

The Superior Court of Justice of Puente Piedra - Ventanilla reports a high level of crime. In spite of this, the cases do not conclude in a just result, because the errors in the typifications of the crime of femicide directly affect due process. As part of such shortcomings, the context required by article 108 B of the Criminal Code and the guidelines of Plenary Agreement 1-2016/CJ-116 are not taken into account.

Considering this reality, it is necessary to look at the number of professionals specialized and prepared to work with women victims of aggression or violence. The Women's Emergency Centers (Ministry of Women and Vulnerable Populations) and the Public Defense for Victims are entities that require constantly trained personnel so that the women who receive their services do not end up being part of the registry of femicides.

After describing the context and considering the institutions involved in due process, especially in criminal proceedings of femicide, it is essential to know the particularities of this crime.





2 FEMICIDE

The National Observatory of Violence against Women and members of the family group (2018) defines femicide as a criminal act of malice by the agent, taking into account that there is a will to kill a woman in whatever condition she is in. This crime can be executed by one or several individuals. Plenary Agreement 1-2016 specifies that the active subject in the crime will always be a male, attributing to him the responsibility of killing a woman because of her condition, in any context in which she is found (Supreme Court of Justice of the Republic, 2016).

Femicide is composed of five determining characteristics. The first is called crime against women, which is understood as a result of low awareness in people and gaps in public sector infrastructure in institutions that provide security and protection to the population (Gandhi & al., 2018).

The second characteristic refers to the types of femicide, which require the condition of the perpetrator of the crime. That is, whether it is partners, coworkers or acquaintances who kill the woman, femicide is classified as intimate, non-intimate and by connection (Reátegui, 2019). The third mentions the types of violence, which is learned within a society and is classified as sexual, economic, psychological and physical, with an impact on men (Tuna & Tan, 2020).

The fourth characteristic is the theory of the crime, which is essential to understand in order to establish what should be punished (Santillán et al., 2018). Meanwhile, the fifth characteristic is relevance, which requires the analysis of the existing reality. In countries such as France, crimes against women are very common and cannot yet be eradicated due to the absence of laws or regulations that are valid for all women, regardless of their socioeconomic status (Pannetier et al., 2020).

In addition to these characteristics, there is the social relevance, since the authorities of the entities responsible for ensuring the safety of women normalize social violence, without considering that it causes a large number of deaths of women (Tiscareño & Miranda, 2020). In this sense, more work is required in femicide prevention programs, without waiting until the number is exaggerated to act on it. This implies that such





prevention should be related to social indicators in each of the stages of life (Sanz-Barbero et al., 2019).

Another aspect to monitor and try to eradicate is cyberstalking against women. Abuse in social networks or poor control of access to personal information causes criminals or psychologically unfit people to subject women to their conditions. A series of events in this context can generate death in them (Oduaran & Okorie, 2016).

2.2 DUE PROCESS

Due process is understood as the right of the litigants to have access to the justice system, to free criminal law and to the action of authorities according to the legal system in the criminal process. All this, without violating any of the rights of the parties involved, because to do otherwise would mean a nullity in the course (Neyra, 2010).

The first characteristic of due process is the preliminary investigation. This represents the first phase in the new Criminal Procedure Code. During this stage, a citizen can report a crime to the Peruvian National Police, and the representative of the Prosecutor's Office performs the urgent acts in order to evidence a criminal event. In this phase, also, the elements of conviction are collected to work on the theory of the case and thus decide to charge or dismiss the case (Pastor, 2016).

The second characteristic covers the intermediate stage, where the process is sanitized and the judge in charge of this is the preparatory investigation judge. In addition, this authority will make a formal and substantial control, admit the evidence and analyze the dismissal, if necessary (Neyra, 2010). The third characteristic is the oral trial, when the parties present their theory of the case, taking into account the following steps: opening arguments, evidentiary activity and closing arguments (Almanza, 2015).

The fourth characteristic refers to the sentence, issued by the judge as a final judicial resolution. That is to say, the process is finalized with the acquittal or conviction of the accused. The two times that are contemplated are the end of the process and if it is final it is irrevocable, it is always on the merits (Art. 338-339) (San Martín, 2018). The indicators that are taken into account for voting for a sentence are the existence of the





attributed fact, the responsibility of the perpetrator, the legal qualification of the crime, the penalty and the civil reparation.

2.3 STUDY SCENARIO

The institutions considered in this study are the Superior Court of Justice of Puente Piedra - Ventanilla and the Public Prosecutor's District of Northwest Lima. Both entities are in charge of protecting due process. The former is responsible for administering justice in Peru by order of the Political Constitution of Peru. The second one is in charge of gathering evidence and typifying crimes. It is important to highlight that both, as well as others involved, have the condition of being autonomous in political, administrative, economic and disciplinary matters.

2.3.1 Participants

The intervening actors are authors such as judges of the Superior Court of Justice of Puente Piedra - Ventanilla, prosecutors of the Public Prosecutor's Office of the Northeastern District of Lima and public defenders of the District Public Defense Office of Ventanilla. In other words, a total of five lawyers were interviewed, three of them deputy prosecutors from the Specialized Prosecutor's Office for Violence against Women and Family Members of the Northeast Lima Prosecutor's District and two criminal public defenders from the District Public Defense Office of Ventanilla.

2.4 DATA COLLECTED FROM PARTICIPANT INTERVIEWS

The objective in formulating the interview questions was to determine whether due process is violated in criminal proceedings for crimes such as femicide, in the context of the Superior Court of Justice of Puente Piedra - Ventanilla, 2019. In this sense, it was possible to collect the answers of those involved.

- **Legal opinion regarding the possible violation of the due process of law**





Two defense attorneys and one prosecutor (2020) stated that there is a need to respect equality of arms or conditions. In this regard, they clarify that (on many occasions) those in charge of defending the accused do not have the resources for sponsorship. In addition, the defenders' workload makes their performance inefficient. Also, the incorrect classification of the crime of femicide prevents the execution of due process.

On the other hand, two other prosecutors affirm that due process does exist in the entity, as they demonstrate respect for the constitutional principle, considering their functions established by law.

- **Reasons that may affect due process**

All prosecutors and one public defender (2020) indicate that one of the main reasons for the lack of due process is the lack of preparation and specialization of the representatives of the Public Prosecutor's Office. Without such preparation, objectivity cannot prevail. On the other hand, only one defender states that the reason for the problem is the erroneous classification of the act in question, since it is not possible to prosecute for assault on a woman and femicide on equal terms.

- **Considerations on the criminalization of the crime of femicide**

Two of the prosecutors and one defense attorney (2020) state that there is a problem in the classification of the crime of femicide at the time of requesting the accusation by the Public Prosecutor's Office. This is evidenced by the incorrect legal qualification made by the poorly prepared members of the specialized Prosecutor's Office. Meanwhile, another of the prosecutors and a defense attorney specified that the crime in question is complete, due to the existence of other criminal offenses that could protect the protected legal right. In addition, they emphasize that the most important thing is to consider any attempt against the life of a woman as femicide.

- **Legal opinion on the correct typification of the crime of femicide.**





Three of the interviewees testified that it was not necessary to frame the criminal offense of femicide within an autonomous criminal offense. What was evident was an immediate and constant response to the media pressure exerted on the Legislative Branch. They also point out that it is discriminatory to punish a man with a higher penal level because he is a male, while the reality is different when the active subject is a woman.

On the contrary, two of the remaining interviewees clarify that there is a correct typification of the crime in question. As part of their argument, they bring to consideration that this is framed as an attack against women, but the Prosecutor's Office tends to exaggerate the fact due to the situation that is occurring in society.

- **Types of violence as pre-existing factors for committing femicide**

The majority of interviewees (2020) confirm that the types of violence apply as pre-existing factors to commit the crime of femicide. They specify that the cases reported for family violence are carried out in the same institution that should be protected by the State. In addition, there is a sociological and criminological factor in society.

As a contrary position, one of the defenders considers that the types of violence are not always part of the events prior to the femicide, because there are a series of events that depend on the human being, as part of the context in which they develop.

- **Requirements for filing the indictment at the intermediate stage of a criminal proceeding for femicide**

Regarding this point, all the interviewees (2020) refer that the requirements for such a requirement are the formal and substantial aspects. In other words, the prosecutors in charge must work on the theory of the case and be part of the whole process. Not only this, but also evaluate the elements of conviction that are necessary to avoid parameters in the testimonies or any other evidence.





- **Legal opinion on the element of conviction that proves the 'animus necandi' of the aggressor in the crime of femicide.**

In this regard, both prosecutors and defense attorneys (2020) agree that one of the elements of conviction is the generalized hatred against women. This can be demonstrated by taking into account the police and prosecutor's reports, prior to the act committed, and thus concluding that there is a repetitive behavior.

- **Consideration of psychiatric and psychological expertise of the aggressor in criminal proceedings for femicide.**

For the majority of prosecutors and defense attorneys (2020), this type of evidence does not prove the state of misogyny of the perpetrator. This means that such evidence does not determine the forms or circumstances in which the femicide was committed. Meanwhile, one of the prosecutors clarified that, if it is proven that the perpetrator of the crime has some pathology confirmed by the psychiatric expertise, it will be possible to establish whether his conduct is unimputable.

- **Evidence proving 'animus necandi' of the aggressor at oral trial**

Prosecutors and defense attorneys (2020) clarify that during the oral trial the 'animus necandi' is not perceived, since they cannot access the subconscious of the accused. However, one of the factors that can be evidenced is the repeated aggression towards the woman.

3 CONCLUSIONS





- According to the information collected and analyzed, it has been determined that due process is violated in criminal proceedings for the crime of femicide in the Superior Court of Justice of Ventanilla (2019). This is demonstrated by the deficiency in the principle of equality of arms for the accused party. The problem that aggravates this is the poor preparation of prosecutors that leads to a misinterpretation of the crime.
- In order for the Superior Court of Justice of Puente Piedra - Ventanilla to support a correct classification of the crime of femicide, it is required the accreditation of elements of conviction and/or scientific evidence to determine the responsibility of the person accused. This situation should also be reflected in previous entities such as the Prosecutor's District of Northwest Lima.
- Police and criminal complaints for psychological, physical, sexual and patrimonial violence are elements of conviction that demonstrate the 'animus necandi'. Other determining elements are the results of psychiatric and psychological tests of the accused.
- The Public Prosecutor's Office of Northwest Lima fails to demonstrate the subjective element that considers the misogyny, contempt and superiority of the perpetrator over the victim, who in this case is the woman.

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