# Planning for a Post Neoliberal Future

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Silvana Tapia Tapia, *Feminism and Penal Expansion: The Role of Rights Based Criminal Law in Post-Neoliberal Ecuador*, Feminist Legal Studies (2018).

In her summer 2018 article in *Feminist Legal Studies*, Silvana Tapia Tapia takes a close look at a fundamental concern for many contemporary feminists – the ways in which penal expansion under neoliberalism was a "feminist-sponsored" reform project, one which feminist movements took up while ignoring, neglecting or rejecting more redistributive efforts. Tapia Tapia's exploration takes place in Ecuador, in 2012 – and Ecuador, part of Latin America's "pink tide,"[1] explicitly rejected neoliberalism in 2007. The Ecuadorian constitution of 2008 had "unprecedented constitutional provisions." One of these, "Sumak Kawsay, the indigenous approach to community life, as a fundamental principle" could support alternatives to carcerality in Andean justice, among other "counter hegemonic" possibilities. In this "post-neoliberal" environment, Tapia Tapia asks, what is the relationship of feminist interventions in criminal law to feminist alignment with redistributive claims in law and politics?

Beginning with a discussion of current scholarship on "carceral feminism" and "governance feminism," Tapia Tapia outlines the argument that penal expansion operates to shift resources away from redistribution, that it has become transnational via human rights based discourses, and that it is fundamentally punitive. She reads scholars like Elizabeth Bernstein, Janet Halley and Prabha Kotiswaran as positing a link between carceral feminism and a neoliberal form of feminism, but in reading the Ecuadorian "post-neoliberal" context, she finds that "many feminists demanding criminalization are strongly committed to a redistributive agenda." (P. 6.) Why and how, Tapia Tapia asks, do Ecuadorian feminists who are operating in a post-neoliberal context, and a context in which the constitutional framework embraces a plurality of sources of law ("Andean Constitutionalism"), continue to support criminalization?

The remainder of the article unpacks the positioning of Ecuadorian feminists, through a multimethod qualitative approach, including documentation and interviews with women who were involved in debate over 2012 draft bill that increased maximum penalties, increased most sentences, and created more than 70 new offences. This method allows an effective close read of how these narratives placed redistribution and gender equality in conversation. The details of the answer to Tapia Tapia's research question are important and interesting. They offer insight into the challenge of moving from one paradigm to another in our thinking, and the pressures which lead valiant, if potentially fundamentally misguided, efforts to render various policy programs compatible. In this case, human rights serves as the bridge that both grounds feminist demands for protection against VAW, and serves to render criminalisation "minimally problematic" or even "benign." (P. 9.)

The 1998 constitution of Ecuador, while neoliberal in frame, honoured many feminist demands in the rights paradigm, beyond criminalisation to gender quotas and sexual reproductive rights. The 2008 Constitution was pathbreaking in its incorporation of indigenous justice – but it also kept the human rights framework, which was seen by mainstream human rights advocates as good for the protection of women. It required the state to protect personal integrity and pointed to the right to a life free of violence. These became, though there were other avenues of possibility, requirements to carry out penal prosecution. Provisions that widened access to justice and minimize revictimization "framed the

protection of women mainly as a set of legal conditions that enable penal litigation and promote the use of the criminal justice apparatus." (P. 9.) Penal regulation is thus rights based.

At the same time, feminist organizations and scholars in Ecuador invoked rights to limit the state's penal power. A constitutional principle linked the state's obligations to protect the rights of "victims . . . the prosecuted and . . . those deprived of their freedom." (P. 7.) Tapia Tapia posits that in fact "[a]ppeals to criminalization (feminist or not) are always already legitimized at the highest level of the legal system within progressive orders: they are rational responses to violations of human rights." (P. 8.) But she laments the ways the "virality" of criminalization in this order "displaces non-hegemonic legalities . . . a crucial element of the new constitution's emancipatory horizon." (P. 9.) Satisfied that criminal justice is not a big problem, feminists have not taken up these possibilities.

Tapia Tapia's 2012-2014 fieldwork in Ecuador puts rights-based frameworks at the heart of "side-lining alternative knowledges and strategies." (P. 9.) Instead, her potentially startling conclusion is that "penality has entered leftist feminist discourse and has been articulated into the post-neoliberal project as a non-problematic, even redistributive device." (P. 9.) In part this happened because part of the goal of feminist organizations involved in the creation of the 2008 Constitutions was to defend the gender provisions in the 1998 Constitution, not "reimagine gender-state relations." (P. 9.) Mainstream women's organizations both endorsed the redistributive project and dropped Indigenous approaches to gender justice in favour of human rights discourses. Differentiating between the younger feminists who had joined the government (oficialistas) and the mainly older feminists in the NGO arena (opositoras), Tapia Tapia notes while opositoras were concerned that full criminalization in the VAW context did not facilitate women's access to justice, nor did it align with what survivors of VAW wanted, "other possible approaches" were completely disregarded by opositoras and oficialistas both.

She argues that non-Indigenous feminist organizations were ill-equipped to pick up the opportunities in the 2008 Constitution for alternative approaches to violence, alternatives to incarceration. Instead, they returned to a narrative based on rights, one that used a technical system to render the violation of women's rights (femicide) visible, one that was compatible with incarceration, and one which bypassed the possibility of building new state responses to violence against women through reviving and creating practices based in Andean justice. This attachment to transnational narratives of rights did not hamper feminist endorsement of the state's redistributive projects – and indeed in some ways feminists understood the criminalization of patriarchal violence as a tool to "tackle gender-based economic inequalities." (P. 18.) There was no "practicable field of intelligibility" available to do otherwise.

Aside from the decoupling of neoliberal thought and carceral feminism that Tapia Tapia's work illustrates, her work offers an important thought, one that could be helpful regardless of your particular politics or focus. This is the critical nature of an available "practicable field of intelligibility" in those moments where change becomes possible. In the context she explores, developing the practicable field of intelligibility could have involved listening to Indigenous teachings, learning about and developing understandings of violence and inequality that are not rights based, focusing on access to justice and imagining and adapting social institutions – other than the prison – which could operate to provide freedom from violence for women. For those interested in anti-carceral feminism and hoping for a post-neoliberal era, this article is a cautionary tale which pushes us to focus, now, on preparing for the future.

1. The "pink tide" was a trend towards the election of Left wing governments usually seen as starting in the late 1990s and ending in the early 2010s. These governments were seen as not left wing enough to be called "red." See P. 2 n. 3.

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