



Legal analysis of crimes against freedom and sexual integrity: rape and other related crimes

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Abstract

The purpose of this work was to analyze from the focus of formal illegality by the protected legal object such as crimes against sexual and reproductive integrity. Its denomination deepens the concept of modesty and sexual freedom. These crimes are related to other legal figures, among which are: abortion, personal injury, rape, domestic or intra-family violence, human trafficking; reprehensible behaviors developed in this study. The simplest way to protect the legal right that the legislator intends to protect is the right that every person with the capacity to carry out an intimate relationship has. In rape there is no consent, the active subject performs the erotic act without the consent of the offended party. Hence, the circumstances determined in article 164 and following of the Ecuadorian Comprehensive Criminal Organic Code, follow the pattern; that is, force or intimidation in the act, by which it becomes evident that there is no approval in the victim. The results show

that there is criminal regulation within the framework of sexual protection, because of the different cases associated with the crime, where the victims are mostly minors or women. Being that its offenders represent a high degree of danger. As a corollary when handling the criminal figure that is typified in this title, we must take into account the legal scope of sexuality based on respect for the freedom of others.

Keywords

rape, sexual crimes, violence, intimidation, active subject.

Introduction

This work has its epicenter in crimes against freedom and sexual integrity as a form of greater abundance for its legal object with unobjectionable value even when casuistic, taxed in the unification of criteria when the time comes for a judicial pronouncement of the defendant of Autos around a crime of public action and therefore prosecutable ex officio to the detriment of a cast of victims susceptible to affectation to the detriment of One of the most precious legal assets of the national legislative function is the violation of crimes against sexual and reproductive integrity.

According to Dávila Castillo et al. (2022), a neutrosophic study of bullying due to parental sexual identity can help to understand the complex nature of crimes against freedom and sexual integrity. Meanwhile, Guerrón and Almeida Montenegro (2019) highlight the use of the Iadov method in measuring the implementation of a program for sexual abuse prevention in Ecuador. Similarly, Guaman Chacha et al. (2019) propose a neutrosophic model for the analysis of administrative offenses on sexual abuse in the Ecuadorian educational system. These studies provide valuable insights and tools for legal analysis of rape and other related crimes, which can contribute to the development of effective legal measures to prevent and address such offenses.

In the same sense and direction, an important empirical approach is offered around the different stages of affectation always marked by the high volitional degree displayed by the conduct of the commissioner, accused, implicated, victimizer or judicializable, to the detriment of a victim with affectation that integrates par excellence in addition to sexual, physical and psychological.

Next, certain referential and argumental positions are confronted at the level of primary and secondary sources of reliable information in the construction of the state of the art at the level of doctrine, normative bodies and jurisprudence. Thus, the study is empowered from the lens of the formal illegality of the protected legal good on sexual and reproductive freedom. Aspect that plays a preponderant role as a legal object of crime, an integral part of the basic super structures of criminal types. It should be noted that it constitutes the last reason for the Criminal Law (Luzón Cuesta, 1997).

It is argued that serious violence is not required, nor is mild violence sufficient; only the suitability of that violence is required to overcome, in a specific case, the resistance of the victim (Villacampa, 2020).

To the pre-existing gap in society due to the multiplicity of criminogenic factors versus the volitional result of the crime and the different theories, a theoretical approach is established to the study of sexual violence against women, seen as a complex social phenomenon inserted in several contexts or development areas, such as the economic; the cultural; the historical; the legal; the judicial and the statistical due to its degree of closeness to criminology. Hence, criminological and victimological theories entail a plurality of approaches to the budding topic, by virtue of revealing a legal profile that contributes to evidencing the fragility of the normative system between women and integral protection as the formal social control that must prevail in the construct of formal illegality insofar as it concerns the legal right protected by the State in the exercise of *Ius puniendi*.

The referent Gil (2022), argues that since the first century the most influential religion even though it has lost certain features due to the exacerbated mutation of other tendencies is Christianity, since it dominates the so-called Secular States (...) "in a society conducive to defending multiculturalism" (...) (p. 201).

This is how it raises a brief historical evolution of the crime of rape for being the most damaging to freedom and sexual integrity in the following terms, due to its origin since time immemorial, its traces can be found in the Bible, Old Testament, through the book of Deuteronomy, Chapter 22, verses ranging from 25 to 27 inclusive, which consecrates the following tenor:

(...) but if a man finds the young bride in the field and that man forces her, sleeping with her, only the man who slept with her will die; but to the young woman he will do nothing; there is no guilt of death in it; for as when someone rises up against his neighbor and takes his life, so it is in this case. For he found her in the field; The desperate young woman gave voices and there was no one to free her.

When examining the text cited, it can be observed that the reprehensible conduct of rape is attributed as a perpetrator to the man and victim to the woman, an aspect that has as an essential requirement, the intention or fraud on the part of the aggressor against his victim; it is observed that the passive subject of this criminal figure is focused on women, There is an unheard request for help, repelling or resistance to suffer an attack, in addition to the application of a death penalty for the aggressor.

Thus, in Title V of the crimes against special obligations of the Code of Canon Law (1991), it contemplates the following:

The cleric who commits a crime with violence or public threats against the sixth commandment of the Decalogue with a minor who has not reached the age of sixteen, must be punished with just penalties, not excluding expulsion from the clerical state when the case so requires.

With regard to Canon Law outlined above, it is noted that the sixth commandment refers to Article 1.395, a precept that refers to not committing

impure acts. Consequently, if it is raised to the definition of impure acts, in the entry impure acts are considered: (...) "insult, adultery, impurity, and fornication" further defines fornication as the union between an unmarried man and woman, premarital encounters, and sexual acts between fiancés or lovers. Similarly, statutory rape and rape of defenseless persons are established, as well as pedophilia as the sexual abuse and exploitation of minors, for the purposes of lust, otherwise, with respect to incest it is manifest that it is the carnal union between members of the same family.

From the precedingcapitas it is detracted that when talking about impure acts we are in the presence of the crime of rape, without prejudice to the difference that this legislation makes between the different ways in which the budding crime is configured, so it will depend on who is the active and passive subject (criminal couple). That is, if there is a parental relationship between the victim and the perpetrator, example: father and daughter, there is the crime of incest; in case the victim is a minor, the figure is pedophilia, focused on the sexual disorder, since it manifests itself by being physically attracted to children of the same or different sex (Crespo-Berti, 2016).

However, in Canon Law rape was only considered a crime when the victim was a virgin, known as "*virginis defloratio*", and who had not given consent in addition to being a virgin.

In reference to Indian Law: this established strong penalties for the rapist, including whipping, capital punishment, or burning, despite the fact that the crime is not properly structured as in other legislations.

This is how one of the most importantWelsh instruments of the Hispanic period on the continent emerges ; The Seven Games; Law III, Title XX, of heading VII, which regulated the Violation as follows:

Stealing some ome (Sic) some woman of good reputation, or virgin, or married, or religious, or lying with any of them by force, if it were proven to her, in judgment, she must die, in addition, all her goods must be from the woman she wanted stolen, or forced. Be it so, if after that she pleased, she wishes to marry the one who stole her, or forced there being no other husband. Then, the property of the forcer must be the father's, or the mother of the forced woman, if she does not consent to the force, nor to the marriage.

It should be noted that, if by the act of the rapist he provoked consent in it, then he owedall the goods of the forcer to the King's chamber.

Continuing with this historical account in reference to the criminal figure of delitor rape, in Roman Criminal Law this illicit conduct dealt with injuries to the juridical good (freedom) and were understood in the concept of force "vis". Hewrote that violently stealing someone's freedom, above all, abducting him against his will, as well as stupping him, were facts that although the victim was not free individuals, fell under the action, not of the Plotia law, but of the most severe of the Julias on coercion. Statutory rape was punishable precisely by capital punishment (Mommsen, 2013).

What is new for the moment is that in Rome this crime of force "vis" could be committed on both men and women. Then other sexual figures are formed, but rape remained within the crime "vis" until it was equated in its seriousness to the crime of robbery and homicide, while in Ancient Greece it was penalized first with pecuniary sanction and then with death penalty; while in Egyptian law it was punished with the castration of the perpetrator, in reference to the old Spanish Law, the Legislation of the Partidas punished in Law 3a. Title 20, item 7, "Whoever robs or forces an honest woman, whether widow or religious maiden, must die for it", while García Goyena criticizes for the years 1843 that two different figures such as kidnapping and rape are immersed in the same law.

However, at the time of the Spanish codification, by the years of 1822 the crime of rape had not been removed from abduction, nor from indecent assault, by virtue of the fact that the term "abuse" or "abusing dishonestly" even that of "lying". An example of this, according to article 666, of the Spanish Public Code and complementary legislation (2021): "If the defendant dishonestly abuses the stolen person in any of the cases of the preceding articles against her will, he will suffer". In both article 678 *ejusdem*, it contemplates that: "Whoever commits this crime against any other person who is not a public woman known as such, will suffer", as it is observed there is an explicit reference that the sex of the victim is indifferent.

On the other hand, in the American continent, it was necessary to enter the original peoples, where sanctions were established ranging from burying alive their aggressor, as was the case of the Guna peoples in Panama; while the Incas in Peru, distinguished who were victims, that is, if the passive subject belonged to the nobility the rapist was punished with the death penalty; however, if the victim was a plebeian woman, then the perpetrator was punished with death if he reoffended. In this order of ideas to the meeting of cultures, as it has been called today to the colonizing period by the Spaniards to America, it has that, at the time of importing their laws, the *Fuero Juzgo*, the *Fuero Viejo de Castilla*, also contemplated rape as a crime, whose penalty was death for the rapist without caring about the ancestry of the victim.

Keep in mind that this crime was committed by the people who were victorious over the dominated people. The victorious soldiers personified in women constituted for the then *vejamen*, they were known as war crimes; aspect that prevails today. At present, this criminal offence is part of International Humanitarian Law. The interesting thing about these annotations wielded, allow to point out as possible victims only women to be unable to apply to the man, identical was, in reference to the perpetrator who could only be a man never a woman, it should be noted that this criminal figure has currently changed, since both the victim and the perpetrator can be anyone, without distinction of age, sex, cultural, social or economic status.

The outline of the study includes the introductory framework and framework containing definitions according to doctrine and law, historical background;

typology of the crime of rape and other sexual crimes. Results and discussion; the conclusions and; The second-hand technical bibliographic references.

Methodology

To fulfill the aforementioned purpose, the research was based mainly on obtaining empirical data through documentary work, so the four-litative approach was resorted to based on the descriptive type that according to Briones (2002): (...) "Synchronic or transversal investigations are distinguished, which refer to the object of research in the same period of time" (...) (p. 37). Cohort studies made up of subjects who have one or more common traits belong to this type.

For this purpose, the investigative action ultimately energized to address the dual aspect between the facts and their interpretation, whose result showed the delimitation of the epistemological model of what happens in the field of sexual crimes, which allowed the collection and analysis in the processing of the data obtained. This is how the research methods and techniques used were determined from the general objective:

1. Interview with the expert in Roman Law, who responded to PhD Bartolomé Gil Osuna, professor of the Pontifical Catholic of Ecuador, Ibarra headquarters.
2. Analysis of documents: result achieved from the interview of the subject based on his legal profile as an expert in Roman Law.
3. Observation of the participant: documentary analysis.

The observation developed was structured by determining the indicators in advance; Systematic, covering the second semester of the year 20 22; participant, the researcher was in direct contact with the object of study and field by observing the object in its natural conditions.

From the theoretical level:

1. Historical-logical, which made it possible to study the process under study, its characterization and the determination of essential aspects.
2. Analysis – synthesis of the profile about the training of the interviewed subject, breaking it down into its essential parts to subsequently reach conclusions about it.
3. Deduction, used or in the processing of both theoretical and empirical information; which allowed to arrive at generalizations from the general (Crespo-Berti, 2019).

Results

This is how the results of the research carried out to achieve the integration of a better understanding of the *tópico*, it was necessary to go to the etymological origins of the term rape, which are found in the Latin word *violatio-onis*, which alludes to action and effect of violating. Such a descriptor has in turn has two approaches, one that is equivalent to acting contrary to the existing norms in

society, whether legal, moral or religious; the other is to make someone from the sexual point of view, do something they do not want, specifically to have sexual relations against their will. Professor Muñoz Conde & García (2010), points out that "there is violence when applied vis absolute, or when physical violence is used with the threat that, the greater the resistance on the part of the victim, the greater the physical energy that his aggressor has to apply".

For Barrera Domínguez (1994), there is rape when "The restriction of a person's sexual freedom is fulfilled through a display of energy by the agent on the victim, to break his opposition or resistance to carnal access and adds; This physical force requires that it be exercised directly on the victim." (p. 81).

The Legista Solórzano Niño (2009); defines rape as: "The penetration of the virile limb, through any of the natural orifices of the person, without his consent". (p. 77). Then the legendary Carrara (2000); It states that: "There is true violence in all those cases in which the contrary will of the victim was either rendered powerless by physical force, or subjugated by a moral force, consisting in the threat of grave evils." (p. 122).

In the same order Latorre (1995), states that : "Carnal access is synonymous with the introduction of the penis vaginally, anally or orally, that is, coupling of the genital organs of a man and a woman". (pp. 177-207). On the other hand, the jurist López Betancourt (2018), indicates "Rape is the imposition of copulation without consent by violent means, it is characterized by the total absence of the consent of the passive and the use of physical or moral force". (p. 305).

In relation to the subject, the criminal lawyer Cancino Moreno (1982), points out "Some doctrinants have stated that the crime of carnal rape can only be carried out by man, he is the only one who is in biological conditions to carry out access". (p. 409). While Grisanti Aveledo & Grisanti Franceschi (2021), delve into:

If the taxable person can be of either sex, it means that the carnal act would be executed according to or against nature; That is, the carnal town hall is admitted, according to nature between a man and a woman by the ordinary way, as the unnatural concubinage by the rectal route on a male or female passive subject. (pp. 410-411).

Based on these definitions, an account has been made of the concept given by international jurists, who propose different analyses regarding the term rape. In this regard, it can be observed that this concept has evolved over time, considering in ancient times that only the woman could be a victim of the crime of rape, together with the characteristics of the crime such as achieving carnal access without the consent of the person through violence and intimidation, note then that consent to this crime is denied by the victim, also call a passive subject, due to circumstances such as physical, psychological violence, many times it is not necessary to use any of them due to the conditions of the victim, so it must be attended to the conception of Master Maggiore (2000), when he argues that it is the one that is exercised on the body of a person using human force; this happens when the agent hits, He holds his hands and uses other material means such as:

ties, gags, among others, to overcome the resistance of the victim. Therefore, serious violence is not required, nor is mild violence sufficient; only one thing is required; the suitability of that violence to overcome, in a particular case, the resistance of the victim.

This real or possible resistance measures the suitability of violence, and if the patient did not resist being able to do so or resisted weakly to save the "honor of arms" or, worse still to excite the appetite of the aggressor, it will not be possible to speak of violence, the *vis grata puellis* (violence pleasant to girls), leaves the will unscathed (Muñoz Conde & García, 2010). It can be seen as a common denominator that all the aforementioned jurists agree that this crime violates the freedom to freely choose the person with whom one wishes at any given time, to have sexual relations.

Results and discussions

In an interview with Dr. Bartolomé Gil in response to the question about his knowledge of the crime of rape in Rome, he used the following laconism:

A historical retrospection on rape as an illicit act should be done taking into account the various evolutionary stages through which this legal institute crossed, pointing out that in the monarchical stage the protected legal good was the virginity of women, as well as the honor of relatives. The fantastic and legendary character that the legal literature, of the time, prints to many stories is evident, *verbi gratia*, the alleged rape of Rhea Silvia by Amulio or the intriguing rape of Lucrezia at the hands of Sextus Tarquino, who took advantage of the absence of her husband to commit such a nefarious crime, as the German historian Mommsen (1990) refers to them.

For the crime or delictum to be considered as such, in addition to being unlawful, it must be criminalized by law; so, as for its penology, during the Monarchy it was limited to the generic crime of libel (which in the Republican era was sanctioned in the Law of the XII Tables of 450 BC) and could not refer to a crime or injury to sexual freedom, because women had no decision-making power with whom to maintain their sexual relations.

At the time of the Roman principality the determination of this illicit act of rape depended on the victim's ability to oppose or not the performance of the sexual act and, as can be inferred from the legal content of the Lex Iulia de Adulteris Coercendis (18 BC), its sanction derived from social aspects such as the fact that the victim was free or a slave. In the first case, capital punishment was applied; although a private libel action derived from the law could be exercised to demand payment for a pecuniae compensatio \u2012pecuniary compensation\u2012.

When referring to the procedure for prosecuting rape, recourse was had to the Lex Iulia, which prosecuted them through a public process of capital type, exclusive to Roman citizens, which carried the death penalty; which was appealable requesting the deportatio in insulam, among others.

During the period of domination, the treatment of this crime, like the vast majority of legal institutions, is greatly influenced by Christianity (313 AD) – which

saw with great concern the crimes against sexual freedom, very allowed in imperial Rome that lived a real sexual imbalance, as a result of power and oppression – that only considers legitimate the sexual relationship maintained with the wife and, as a consequence, improvements in the legal status of slaves and freedmen, who were sexual objects of their owners, as Ihering (2001) recalls. In addition, at this time this crime could be prosecuted through a process of criminal cognition – u2012cognitio criminis – under the principle of inquisition and carried with it the death penalty.

On the sexual customs of this time were propitiated by authors such as Livy, Valerius Maximus, Plutarch, Suetonius or Seneca, among others, which Rodríguez-Ortiz (1997) mentions. It is also of interest to know the opinion of Greco-Roman medicine on the non-consensual sexual act and its consequences, exposed by Galen or Rufus of Ephesus. Or the criterion of Christian apologists, on the legitimate ways of intimidating a man and a woman, as well as prohibited behaviors, among which they enunciated rape with serious legal and religious-moral penalties, among them, Tertullian, Prudentius, Augustine of Hippo or Cyprian, among others. (Personal communication on 23-10-2022).

Finds	Discussion
<p>The numbers of victims are higher than the complaints. The State does not do systematic work to determine the impact of sexual violence.</p> <p>The Ombudsman's Office has paid attention to the diatribe and indicates that every day a woman comes to denounce this type of crime, so this figure is increasing.</p>	<p>If the legislation is compared with the rest of Latin America and even with some countries in Europe, the penalties are more severe, compared to Latin American countries, where the penalty often does not exceed five years in prison and even with the application of the aggravating circumstances of law, sometimes only fines are imposed. So it is believed that this crime will not disappear, although the penalties continue to be increased. Nothing justifies the sexual outrage of children of 3, 5, 8 years or worse even when it results in their death. There must be a serious State policy in search of mitigating this crime.</p>

Finds	Discussion
<p>The most marked risk of sexual abuse is in the home, according to the analysis. Most of them are suffered by children, with an environment of social risk of disadvantaged strata with economic deprivation, of dysfunctional family circle; On many occasions the aggressor is the stepfather, biological father, uncle, person who should have given protection and care.</p>	<p>Crimes against sexual integrity not only violate a fundamental human right of transcendence for the psychosexual development of victims. Sexually abused people find it difficult to rebuild their sexual life, those affected express despite the therapies directed by the specialist, it is difficult to overcome it (sexual desire is lost, fear of being attacked so it costs them to lead their normal life and reincorporate in an integral and independent way to society and a peaceful social coexistence, You suffer from anxiety, sadness, melancholy, many times you think about suicide).</p>
<p>At present, in almost all countries it is a criminal offence of a public nature; operates ex officio which means that anyone can report the crime; By telephone calls, schools, health center, to name a few, no criminal complaint is required, to initiate the case, the victim can also file the complaint; If you are a minor, the indirect victim who would be your legal representative (father, mother, who has your guardianship) will do so.</p>	<p>By simply pointing out the offended person, the arrest of the aggressor operates immediately without prejudice to the presumption of innocence, so that anyone can be designated as his aggressor when in reality he is not, losing his freedom immediately, as a result of the reforms and provisions provided by the legislator in the search to curb the crime.</p>
<p>There has been a lack of the State designing an appropriate criminal policy that can reduce the rates of violence involved in this type of crime, so prevention measures are not aimed at reducing it. It is committed to the protection of women and the family, without obtaining the desired results.</p>	<p>Freedom and integrity and sexual dignity, constitute an authentic legal good protected by the State, so the administrators of justice when qualifying the infraction and applying the corresponding sanction, must take into account the high rates of this crime and the broad spectrum that is generated towards other crimes; the affectation to the victim and his environment, to try to remove the aggressor immediately the facts occur and; Avoid exposing the victim and their family at social risk.</p>

With regard to the budgets that emerge from the table above, for greater completeness is adopted González de la Vega (1997), who affirms that there is carnal rape when: "The restriction of the sexual freedom of a person is fulfilled through a display of energy of the agent on the victim, to break his opposition or resistance to carnal access, That physical force requires that it be exercised directly on the victim." (p. 56).

Meanwhile, for Tocora (2009), "Sexual crimes constitute a set of behaviors that affect human rights of transcendence for the psychosexual development of every human being." (p. 77) . But beyond the right to freedom and sexual integrity; among the collateral illicit behaviors in addition to rape, arise (a) statutory rape; (b) non-consensual insemination; (c) the forced reduction of reproductive capacity; (d) sexual co-dress; (e) distribution of pornographic material to children and adolescents; (f) three persons; (g) sexual abuse; (h) corruption of minors; (i) child pornography; (j) pimping (Grisanti Aveledo, 1988).

In relation to the age groups of minors and the Argentine criminal lawyer Soler (1992) in agreement with Suárez, et al. (2002), masterfully delve into; "The action of corrupting has an essentially psychological and moral sense, so that the action that leaves a deep mark on the psyche of the victim, twisting the natural, biological and healthy sense of sexuality, is said to be corrupting. The corrupting action leaves a psychic mark of a distorting or perverse character, disturbing, in short, that development that the law protects in its aspect of sexual health. (p. 37).

This is how sexual relations fluctuate without the consent of the person and in an aggressive or violent way; but, it can also occur in those cases in which a person forces another to have sexual relations with him in a violent way; that is, this criminal figure entails the following aspects: that it can be done by any person, female or male, adult or minor, the victim can be a woman, a girl or an adolescent, a boy or an adolescent, a man, an elderly, regardless of age, since at any time a person can become a passive subject or victim of that criminal figure, sexual access is made with aggression, Physical, violent, psychological or intimidating violence, the victim has not given consent to the perpetrator to approach and have sexual relations with her.

In the concept set out above , the elements of the crime of rape are observed, such as: lack of consent (force or threat) and intimidation. In this order of ideas for the crime to be considered as an infraction of the criminal law, it is essential that both elements are present; in no case does the victim consent to the abuse of the victim; Likewise, for the abuse to materialize, it must be exercised on the aggrieved person (Pabón Parra, 2011).

This crime generally, except in those cases in which the victim has been selected at random, involves a breach of trust on the part of the aggressor with respect to his victim, since it is common for both the victim and the perpetrator to know each other, this occurs especially in those cases in which the victim is a minor (Sáenz, 2020).

That is why it must be taken into account that the rapist or perpetrator responds, most of the time, to a person in whom a trust has been placed, as is the case of a teacher, spiritual guide (priest, pastor, among others), a relative (uncle, aunt, father, grandfather, mother, stepfather, brother, cousin or relative), a neighbor, a friend, the driver of a school bus; That is, anyone with whom you talk with any frequency can be a rapist.

Conclusion

The personal integrity of the human being refers to the freedom of his organism, both in the physical, moral and psychological spheres, but an essential component of his personality is undoubtedly the sexual and reproductive integrity that has been consecrated as a fundamental right, due to its relationship with the normal existence of the individual.

This is how the prevention of sexual abuse in minors is decisive. Such violations constitute a serious violation of basic rights and physical integrity, which can have profound immediate and long-term health consequences. Efforts to combat child sexual abuse should be a priority issue in public health planning, as well as in the judicial, education, and social services sectors.

Finally, sexual integrity must be understood as the right of every person not to be discriminated against by another through actions that involve sexual assault and that injure the freedom that each human being is entitled to exercise with respect to determining the exercise of their sexuality, without involving violence, with respect to the sexual practice that the person is free to perform in accordance with his freedom and the limits imposed by the legal norm.

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