

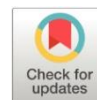


Las relaciones de poder: Su necesidad como elemento constitutivo del delito de femicidio en el Ecuador

Power relations: Their necessity as a constituent element of the crime of femicide in Ecuador

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Summary

Introducción: Esta investigación se centra en determinar la necesidad y la corrección de incluir el concepto de "relaciones de poder" en la tipificación del delito de femicidio en Ecuador. Dado que, desde su tipificación, y especialmente en la actualidad, el tratamiento de estos casos ha generado diversos cuestionamientos. **Objetivo:** El objetivo principal de este estudio es evaluar si las "relaciones de poder" son necesarias y adecuadas en la tipificación del delito de femicidio en Ecuador. Se busca analizar la comprensión y aplicación de este concepto en el marco legal, así como identificar posibles ambigüedades que puedan surgir en su interpretación. **Metodología:** Se empleó un enfoque cualitativo para llevar a cabo este estudio. Se realizó un análisis exhaustivo de la doctrina jurídica relacionada, se exploraron perspectivas de legislación comparada y se examinó un caso judicial ecuatoriano de conmoción social. Además, se obtuvo la opinión de expertos en la materia a través de entrevistas a un fiscal y un juez. **Resultados:** Se determinó que las "relaciones de poder" son efectivamente importantes en la tipificación del delito de femicidio en Ecuador. Sin embargo, se evidenció que este concepto no ha sido suficientemente desarrollado y su uso ha generado cierta ambigüedad en el tipo penal, lo que complica la actuación de los sujetos procesales y operadores de justicia en los procesos judiciales. **Conclusión:** La falta de desarrollo normativo en torno al concepto de "relaciones de poder" en la tipificación del delito de femicidio en Ecuador ha generado dificultades en su interpretación y aplicación práctica. Por tanto, es necesario que el legislativo realice un análisis exhaustivo del tipo penal y proceda a un desarrollo normativo que permita una interpretación clara y una aplicación concisa de este concepto en la legislación penal ecuatoriana. **Área de estudio general:** Derecho Procesal Penal y Litigación Oral. **Área de estudio específica:** Derecho Penal y Violencia de Género

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Murder, homicide, death, crime, criminal law.

Abstract

Introduction: This research focuses on determining the need and correctness of including the concept of "power relations" in the criminalization of the crime of femicide in Ecuador. Given that since its criminalization, and especially at present, the treatment of these cases has generated various questions. **Objective:** The main

objective of this study is to evaluate whether "power relations" are necessary and adequate in the criminalization of femicide in Ecuador. It seeks to analyze the understanding and application of this concept in the legal framework, as well as to identify possible ambiguities that may arise in its interpretation. Methodology: A qualitative approach was used to carry out this study. An exhaustive analysis of the related legal doctrine was carried out, legislation comparative perspectives were explored and an Ecuadorian judicial case of social commotion was examined. In addition, the opinion of experts in the field was obtained through interviews with a prosecutor and a judge. Results: It was determined that "power relations" are indeed important in the criminalization of femicide in Ecuador. However, it was found that this concept has not been sufficiently developed and its use has generated a certain ambiguity in the criminal definition, which complicates the actions of those involved in the prosecution and operators of justice in judicial proceedings. Conclusion: The lack of normative development of the concept of "power relations" in the definition of the crime of femicide in Ecuador has generated difficulties in its interpretation and practical application. Therefore, it is necessary for the legislature to conduct an exhaustive analysis of the criminal offense and proceed to a normative development that allows for a clear interpretation and a concise application of this concept in Ecuadorian criminal legislation.

Introduction

The topic of this research article is the so-called power relations that are established within the classification of the crime of Femicide in the Comprehensive Organic Penal Code (2014) (hereinafter COIP), and the need for the presence of those in said classification. This term has been defined in the Comprehensive Organic Law to Prevent and Eradicate Violence Against Women (2018) as:

Actions, omissions and social, political, economic, cultural or symbolic practices that determine the imposition of the will of one person or group over that of another, from a relationship of domination or subordination, which implies the asymmetric distribution of power and access and control of material and immaterial resources between men and women. (art.4)

In Ecuador, femicide has become one of the most controversial classified crimes at a social level, starting from its recognition as an autonomous criminal type and including the way in which the norm has been written in the legislation, both from the term used to identify it within the norm and even more so with the elements established as necessary to constitute the criminal offense as described.

However, despite all that, the application of this norm within our legislation can be considered one of the greatest achievements achieved by the feminist movement in our country, since it has been established as a tool or a response to violence in against women and the countless violent deaths of women, due to the fact of being women or due to their gender status.

The present investigation will contribute to the formation of a solid criterion regarding whether or not the presence of power relations is necessary in the classification of the crime of femicide, making it dependent on preserving the way in which we currently find the figure of femicide. or carry out a possible reform in its classification.

For this, the research problem focuses on to what extent is the presence of “power relations” necessary in the classification of the crime of femicide in Ecuador? Around this, the general objective of the investigation arises, to analyze the power relations in the crime of femicide through doctrine, judicial cases and comparative law, in order to determine to what extent its presence is necessary in the criminal type.

To achieve this, first the antecedents of femicide in the Ecuadorian legal system will be theoretically based, then the way to resolve cases judged as femicide will be identified according to comparative law and national judicial cases in order to also determine the advantages or disadvantages of the relations of power are included in the classification of the crime of femicide.

Theoretical framework

Background

Femicide is the result of one of the most serious and oldest social problems that have existed throughout history and that, despite its antiquity, has not been able to be completely solved to this day: gender violence. In Ecuador, in 2014 with the entry into force of the Comprehensive Organic Penal Code, a renewed catalog of crimes materialized, one of the most controversial and expected, the crime of femicide.

However, to achieve the recognition and classification of this crime as one of the most serious in Ecuadorian legislation, much more has been necessary than just the entry into force of a new criminal law. Although the crime of femicide can be considered a new one because its antecedents are not very old, it is necessary to address both its universal

origins and its first recognitions in Ecuador, since the classification of femicide has been the result of an endless fight to eradicate gender violence.

Thus, sociologist Diana Russell is considered the pioneer in the use of the term femicide and its conceptualization, who, during the First International Tribunal on Crimes against Women held in 1976, made public the use of the term femicide for the first time. . Since then there have been infinite publications made on the subject, deepening it and expanding its scope. (Escobar, 2021)

Since that crucial moment, the constant and serious social problem generated by violence against women has been the fundamental pillar for the persistent development and search for solutions for the eradication of this type of crime. Thus, once again and in a more focused way, Russell appears along with Radford, who in 1992 define it as “the misogynistic murder of women by men” (p. 16).

Regarding this reality, upon arriving in Latin America there is the first major change in the use of the term, which when translated verbatim results in femicide, but due to this inclusion and attention to the responsibility of the State, it was decided to convert it and determine instead the use of the term feminicide, thus creating the possible answer to an almost undecidable social problem. (Saccomano, 2017)

Although the arrival of the term femicide / feminicide to Latin America was considered by feminist groups and women's rights defenders to be of great relevance to the social problem developed by gender violence, it was not until the occurrence of a true milestone. historic event that occurred in Mexico that began to consider the existence of a serious and real problem triggered by gender violence, this was the so-called Cotton Field Case resolved by the Inter-American Court of Human Rights (IAC Court) in 2009.

Broadly speaking, this case consisted of declaring responsibility and condemning the Mexican State for the disappearance and violent death of three young people, of whom when their bodies were found it was evident that “they were subject to particular cruelty on the part of the perpetrators of the homicides.” ” (Inter-American Court of Human Rights, 2009, para. 210). Violence which meant that the crime had been committed with the intention of causing extreme pain and suffering to the victims, which included their rape.

Due to all the circumstances surrounding this case and the great commotion caused by the non-compliance and lack of diligence on the part of the Mexican State with a problem as serious as gender violence, this case has materialized as emblematic for Latin America, becoming as a reference for other states, since the violation of the right to life, personal integrity and personal freedom, rights recognized in the American Convention and the Belém do Pará Convention, was declared. (Inter-American Court of Human Rights, 2009)

Currently, in Ecuador it is possible to identify several events that, although individually they may seem small at first glance, together they have meant the creation of a specific criminal type, with which it has already been possible to treat one of the most extreme results within the country. that can arise from gender violence, the violent death of women treated through the figure of femicide in the Comprehensive Organic Penal Code (2014).

Within a short timeline, according to what Hidalgo and Medina (2023) state, it is stated that one of the first situations that marked a starting point would have been the establishment of certain policies called development and protection in the 1990s, policies within which this violence was conceptualized exclusively as intrafamilial. Which means that, at that time, the gender condition was not yet considered, but rather it was only about acts carried out in a strictly family environment.

Likewise, and taking into account the constant development of the protection of rights at the international level, the same authors state that as an organization designed for the defense of women's rights, the first Women and Family Police Stations were created in 1994. , and almost immediately the Law against violence against women and the family was enacted in 1995 (Hidalgo & Medina, 2023). As is evident, little by little institutions and legal norms were created through which, in some way, greater protection could be provided to women who suffered from gender violence at that time, although this was considered only at the intra-family level.

However, it was not until 2007 that, through an Executive Decree, “The eradication of gender violence against children, adolescents and women” was established as a State policy (Hidalgo & Medina, 2023, page 48). It is precisely in this same year that the formulation of the “National Plan for the Eradication of Gender Violence” took place (Hidalgo & Medina, 2023, page 48).

Definition

An important point to highlight at this time is that, in our legislation, the term that has been used to classify the crime for which a woman is killed is femicide. However, in other legislations this is not the same term used, since for countries like Colombia or Peru this crime is called “feminicide”, which, as already indicated, does not only imply a change of term, but also involves to the legal consequence of each word. Despite that, this research focuses on what is closest to the term femicide, currently used in the COIP.

To begin, the definition given by the Dictionary of the Spanish Language (Royal Spanish Academy) will be used, which states that femicide constitutes the “murder of a woman at

the hands of a man due to machismo or misogyny”, understanding misogyny as a type of rejection towards women, this definition brings us a little closer to what gender issues imply in this crime.

In this same sense, it is also possible to find a slightly more complete definition in this regard, since the Pan-Hispanic Dictionary of Legal Spanish (Royal Spanish Academy) defines femicide as:

Crime consisting of causing the death of a woman in special circumstances such as the existence of a relationship, one of trust with the victim, a work relationship, a teaching relationship, or one of subordination or superiority, for sexual satisfaction or to cover up rape or for any motive generated by reason. of her condition as a woman or in a context of unequal power relations. (Royal Spanish Academy)

Unlike the first, this definition already provides more important elements to be highlighted since it is no longer based solely on the rejection of women, but rather implies “the existence of a relationship,” which can be developed between the victim and her perpetrator. in different areas, but in this case it is characterized by the possible existence of subordination or inequality based on which the victim is subjected.

On the part of the doctrine, Bejarano states (as cited by Garcés, Del Pozo & Lozano, 2022) that they are “murders carried out by men motivated by a sense of having the right to it or superiority over women for pleasure or sadistic desires towards them.” , or by the assumption of superiority over women” (p. 188). From this definition, the characteristic of superiority or belonging over women can be clearly evidenced, thus highlighting once again the existence of gender violence.

On the other hand, Soria and Redrobán (2023) expose femicide as:

The murder of a woman for reasons of her gender, among the risk factors, violence is the most significant, hatred, control, contempt, the classification of women as a man's property and feelings of domination are also considered. . (p. 184)

From a slightly different angle is also the definition given by the pioneer in the use of the term Diana Russell (as cited by Garcés, Del Pozo & Lozano, 2022) who “referred to femicide as the murder of women in a general way, that is, committed by persons unknown to the victim” (p. 188). This definition involves something much more global and generic, since it broadly states that the death of a woman by any person, whether known or not, whether or not there is a link, will constitute femicide.

Already entering the context of Ecuadorian regulations, the current criminal law also exposes the elements that make up the crime of femicide, being that in art. 141 of the Comprehensive Organic Penal Code (2014), the crime of femicide is classified as follows: “The person who, as a result of power relations manifested in any type of violence, kills a woman for the fact of being a woman or because of their gender.”

In the COIP's classification of the crime of femicide, one can perceive the presence of some elements that have already been evident in some of the previous definitions, with the most common being gender issues and violence. However, a point to highlight for this particular investigation is an element that forms a substantial part of the criminal offense, these are the so-called power relations, since the aforementioned article clearly says that the death of the woman must be the result of these relations. of power.

All the aforementioned definitions have referred to issues related to gender, violence, conditions of superiority and even the exercise of power over the person of women. But there is one in particular, that of Diana Russell, for whom it is not even necessary for the victim to know her perpetrator, but the simple fact of killing her will constitute the crime of femicide.

At this point and although it may seem peculiar, the Ecuadorian legal system is one of the few, if not the only one, that includes in its classification what is known as “power relations” as a constitutive element of the criminal offense. This, together with other elements, gives this type of crime its differentiation from many others in which the lives of women are also attacked.

Regarding this, it is quite accurate to bring what Pozo Enríquez said (as cited by Zambrano, Triviño, Rivera & Lemos, 2021):

In Ecuador, it can be identified that femicide constitutes a concept still in the process of construction, as its appearance and management in the national legal sphere is relatively new, it does not have a clear differentiation system compared to the deaths of women caused without gender motivation. , since there are deaths that, despite being identified as violent or despite having been perpetrated by men, do not record precedents of domination or patterns of discrimination. (p. 6)

As the author expresses it well, in our legal field and legislative development we still need a little more specialization to correctly classify each crime, in such a way that, when adapting the criminal type to a specific behavior, the differentiation becomes easier. between each type of crime and thus the appropriate legal consequence is applied for the indicated conduct.

Power relationships

As has already been stated, power relations are one of the most important elements that are part of the criminal offense and that must be duly proven and verified in order to qualify the facts of a specific case as femicide. This element is what means that not every death of a woman is considered a femicide, but rather it must contain certain characteristics to be treated as such. To understand its scope, some definitions will be briefly reviewed.

As initially stated, according to the Law to Prevent and Eradicate Violence against Women (2018), power relations are defined as:

Actions, omissions and social, political, economic, cultural or symbolic practices that determine the imposition of the will of one person or group over that of another, from a relationship of domination or subordination, which implies the asymmetric distribution of power and access and control of material and immaterial resources between men and women. (art. 4)

The aforementioned norm belongs to one of the laws created, as Diego Palacios (2021) refers, to fill some legal gaps that originated with the classification of the crime of femicide in the Comprehensive Organic Penal Code, since as stated at the beginning, in order to determine that the facts of a case constitute the crime of femicide, it is essential to prove this circumstance, for which it is essential to understand it.

The definition given by the Law to Prevent and Eradicate Violence against Women (2018) is quite clear and provides a good approach to what the existence of power relations means, consisting of the existence of a relationship based on domination. from one person to another, in this specific case, the subordinate person is the woman, thus exercising control over her. On many occasions this is reflected in economic issues, where the woman does not exercise economic activity, which is why her partner abuses and takes advantage of this situation of vulnerability.

These power relations must be duly proven in court to be able to constitute the crime of femicide, but at first glance they appear to be something very subjective and constitute something somewhat complicated to prove and attest to. For this element to be validly considered, it must meet some characteristics by virtue of which there can no longer be any doubt of its existence.

In this context, as stated by Diana Mite (2021), these “must be tangible, concrete and represent control or dominance over women” (p. 16). They must be manifested in concrete facts and actions visible to the outside, something that can be perceived by those who are not subject to them. However, there is still a fairly high level of subjectivity when trying to establish that a certain type of behavior constitutes an act of exercising power over women.

This subjectivity is more marked in what was said by Weber and Foucault (as cited by Diana Mita, 2021), since they state that “it is understood as the capacity of a subject to influence, condition, determine or force, in the thought and behavior of others”. This ability to influence another is understood to come from issues, on the one hand, although they may be physical, on the other hand, a little more psychological issues are also involved; It is the fact that women do not have the capacity to act to escape this circle of violence.

These relationships can also be observed in many other aspects and attitudes, because as has been stated, “When a woman is killed for reasons of jealousy, a possible power relationship is analyzed; which is the bond between man and woman, but as long as there is that affective, emotional relationship, etc. (Alban & Bermudez, 2023, p. 222). It is evident that sentimental issues can also affect and create a power relationship in which, as is often expressed in common terms, under the pretext of love such dependency is created until reprehensible acts are carried out against their partners.

Thus, these power relations, due to their mere characteristics, have a fairly high evidentiary level of complexity, since their subjectivity can cause us to not have true certainty about whether they exist or do not exist in a specific case. The existence of previous violence reflected in complaints, police reports or even testimonies from close people are fundamental for this evidentiary exercise.

However, as the author states, “although in most cases the loved one reports a history of violence, this evidence is rarely valid to demonstrate that death is the result of power relations, inequality and violence.” ” (Viera, 2023, page 107). In the reality of the facts, many times this is not enough and it is at this point where the question arises as to whether it is really necessary to have power relations as a constitutive element of the criminal type of femicide?

It is quite notable that this is a substantial element that must be duly proven in court, without which no person could be tried for the crime of femicide, therefore, for many social currents, this only hinders justice and causes impunity. . But when considering what the opposite consequence would be of leaving the criminal type free so that, when judging the death of a woman, no more proof is needed than that, that the act was perpetrated against a woman.

Criminal law is of ultima ratio, so the crime of femicide, being the greatest act of violence against a woman, constitutes one of the crimes classified with one of the most serious sanctions in Ecuadorian criminal law. However, the purpose of our penal system is also social rehabilitation and at the same time the comprehensive reparation of the victim, a situation that unfortunately is not always verified.

As the authors state, “the crime of femicide carries with it a factual assumption and a legal consequence, which is reflected through the application of custodial sentences as punishment but not as a compensatory and protective penalty towards the victims” (Briones, 2022). Achieving this sentence for the perpetrator of the crime becomes nothing more than punishment, but for the victim, this process is nothing more than an ordeal in obtaining evidentiary elements to avoid allowing impunity to fall on their case.

In any case, in the Ecuadorian legal system the fact that femicide has been classified as a crime is already a great advance, which, as has already been said, has been harshly criticized both from the term used to the writing of the text. same. This same circumstance is what attracts the thought of whether the elements that have been included in its text are the most appropriate to achieve the purpose of the criminal law, or a change is necessary that guarantees true justice for the victims.

Femicide in other legislations

As previously indicated, the arrival of the term femicide / feminicide to Latin America has meant the possibility of finding an answer to the constant fight against gender violence and the consequences that may arise from it, the most serious being death of the woman. In this context, and in contrast to what has been stated about the Ecuadorian field, it is essential to make a small approximation to the normative reality of other legislations that, although they seek similar purposes, are not equal when the subject is legislated.

Chili

In the Chilean Penal Code (1874), it was through Law No. 20,480, promulgated on December 14, 2010, which established that:

Whoever, knowing the relationships that bind them, kills their father, mother or child, any other of their ascendants or descendants or whoever is or has been their spouse or cohabitant, will be punished, as a parricide, with the penalty of imprisonment. higher in its maximum degree to qualified life imprisonment. If the victim of the crime described in the preceding paragraph is or has been the spouse or cohabitant of its perpetrator, the crime will be called femicide. (Penal Code of Chile, 1874, art. 390)

In this context, Law No. 20,480 modified two legal bodies, the Penal Code (1874) and Law No. 20,066 on Domestic Violence, giving way to the creation and establishment of femicide in its criminal regulations. It is important to understand that, unlike Ecuadorian criminal regulations, in Chile an autonomous crime called femicide was not created as such, but instead the circumstances under which patricide would be called femicide were established. (Library of the National Congress of Chile)

However, it was only in 2020 that with the promulgation of Law No. 21,212, another modification was made to the Chilean criminal law, through which the term femicide was expanded and redefined, establishing that:

The man who kills a woman who is or has been his spouse or cohabitant, or with whom he has or has had a child in common, will be punished with the maximum degree of life imprisonment.

The same penalty will be imposed on a man who kills a woman because he has or has had a romantic or sexual relationship with her without cohabitation. (Penal Code of Chile, 1874, art. 390)

From this point of view and in consideration of the main topic of this research, it can be seen that in Chile femicide is treated based on the pre-existence of a sentimental or marital relationship by virtue of which, without it, no could speak of the existence of a femicide. Having previously defined what power relations are, it can be concluded from this regulation that they are not contemplated and their presence is not necessary for the crime of femicide to be constituted. In this sense and as Esther Pineda (2021) points out,

The crime, by being limited exclusively to the private and marital sphere, contributes to permitting, making invisible and naturalizing impunity in the multiple cases of femicides perpetrated outside the domestic sphere; as well as those committed by male relatives, acquaintances or strangers with whom the victim did not have a romantic, sexual, marital or cohabitation relationship. (pp. 55-56)

The criticism made by the author makes it a little easier to identify the true difference between Ecuadorian criminal regulations and Chilean criminal regulations since, in the latter, only the domestic or sentimental sphere of a relationship is contemplated, and does not take into consideration those environments in which, although sentimental or emotional issues are not involved, it is possible to demonstrate the subjugation of the woman towards another person and that by virtue of this subjugation the crime of femicide is perpetrated.

Colombia

In the Colombian country, the recognition of femicide was carried out through the promulgation of Law 1761 on July 6, 2015, known as the Rosa Elvira Cely Law, this fact being the turning point for the classification of the crime of femicide since in its case, she was “raped, tortured and brutally murdered on May 24, 2012 by a former classmate in an important park in Bogotá” (BBC News Mundo, 2023) and due to the constant and tireless struggle of social groups, mainly feminists, against gender violence, it was possible to achieve the regulation of the crime.

Thus, Law 1761 (2015) established the creation of art. 104A in Law 599 of 2000 in which it provides:

ARTICLE 104 A. Femicide. Whoever causes the death of a woman, due to her condition of being a woman or for reasons of her gender identity or where any of the following circumstances has occurred or preceded, will incur a prison sentence of two hundred fifty (250) months to five hundred (500) months. months. (art. 2)

In the Colombian law, it is possible to identify at first glance the substantial element of the crime, which has been perpetrated against a woman due to the fact that she is a woman or because of her gender, but when continuing to read the law, the conjunction is found. disjunctive “or”, which admits the existence of other conditions or circumstances under which the death of a woman can be considered femicide. These conditions consist of six literals:

to). Having or having had a family, intimate or cohabitation relationship with the victim, friendship, companionship or work and being the perpetrator of a cycle of physical, sexual, psychological or patrimonial violence that preceded the crime against her. b). Exercising acts of gender or sexual instrumentalization on the body and life of women or actions of oppression and domination over their vital decisions and their sexuality. c). Committing the crime by taking advantage of the power relations exercised over women, expressed in personal, economic, sexual, military, political or sociocultural hierarchy. d). Committing the crime to generate terror or humiliation to whoever is considered an enemy. and). That there is a history or indication of any type of violence or threat in the domestic, family, work or school environment by the active subject against the victim or of gender violence committed by the perpetrator against the victim, regardless of whether the act whether it has been reported or not. F). That the victim has been held incommunicado or deprived of his freedom of movement, regardless of the time prior to his death. (Congress of Colombia, 2015)

When analyzing the literals brought from the Colombian norm, the difference with the Ecuadorian regulations becomes noticeable and evident since, in Colombia, the development of the circumstances under which an action can be appropriate to the criminal type of femicide have been vastly and conveniently developed in such a way. So, in the judgment of a specific case it is possible that adapting the conduct is a little easier by being clear in which cases it is and in which cases it is not a femicide.

Something to highlight is that, in a certain way, the Colombian norm deals with the element on which this investigation focuses, since in literal "c" of the norm it talks about power relations. But in this case the treatment of the term is totally different from the way it is done in the Ecuadorian criminal law since it is widely specified and announced in

which areas a power relationship can develop. Furthermore, since it is part as only one of the several literals that make up the norm, power relations no longer form a necessary and obligatory element to be verified to constitute the crime of femicide in Colombia.

Costa Rica

In this country, the classification of the crime of femicide occurred with the promulgation of Law 8589, which decreed the Penalization of Violence against women in 2007. This law decreed that “a prison sentence of twenty to thirty-five years to anyone who kills a woman with whom he maintains a marriage relationship, whether in a de facto union declared or not” (art. 21). When analyzing this norm, it is notable that it is the shortest classification of femicide, in terms of wording, compared to those already analyzed, including the Ecuadorian one. In this case, the rule refers only to those cases in which there is a formal relationship and no other additional aspect is contemplated.

According to what Pineda (2021) said, despite this apparent early classification, it was not until 2012 that the systematization of femicides in Costa Rica was established, an action based on which they are published year after year. by the Observatory of Gender Violence Against Women and Access to Justice of the Judicial Branch of the Republic.

With this systematization, statistics have been created regarding the crime of femicide, and the organization in charge of its publication has incorporated two types of femicide called legal and expanded. When referring to legal femicide, this is directly linked to what is typified in art. 21 of Law 8589 previously transcribed. On the other hand, expanded femicide refers to:

Violent deaths of women, by gender, where there was no marriage or common-law relationship, for example, murders perpetrated during courtship, after a divorce, after the cessation of a de facto union and those that occur in the public, following a sexual attack, among others. (Pineda, 2021, page 68)

With this second section established by the observatory, the scope of application of femicide can be expanded, since in this case we are no longer talking only about relationships established formally by marriage or de facto union, in this case it is also contemplated dating relationships and those relationships legally established but dissolved, leaving open the possibility that a former partner could commit the crime of femicide. In addition, it includes those that occurred publicly or that have been triggered by other factors such as a sexual attack.

However, and despite all these considerations both in its classification and in the complements made by the aforementioned observatory, it has not been possible to verify the existence of the so-called power relations in its regulations, therefore, evidently in this country it is not possible either. It is necessary that within a trial the existence of power

relations between the victim and the perpetrator be proven, on the contrary, the possibility is taken into account that just by maintaining a romantic relationship with a woman the crime of femicide would already be configured.

Analysis of an Ecuadorian case

Since the classification of the crime of femicide with the entry into force of the Comprehensive Organic Penal Code (2014), there have been numerous and constantly increasing cases classified as femicide in Ecuador. Many of them have gone unnoticed and have not caused a major stir in Ecuadorian society, however, there are a few who, due to the circumstances surrounding the crime committed, have managed to cause a great social impact at a national and even international level.

Within the present investigation, one of the most controversial cases has been taken for analysis and has caused the greatest social commotion in recent years, not only because of the crime itself, but also because of the circumstances in which it took place and the intervening subjects of that. This corresponds to the already sentenced case of femicide of María Belén Bernal perpetrated by her spouse Germán Fernando Cáceres Salto in the month of September 2022.

- Facts of the case

In the city of Quito, in the early morning of September 11, 2022, lawyer María Belén Bernal went to the General Alberto Enríquez Gallo Police Higher School, to block number three of said unit called Castillo de Grayskull, room 34, in where his spouse, Germán Fernando Cáceres Salto, who was an instructor at the institution, was located. It is then that, after having a strong argument between the couple, Mr. Cáceres proceeded to strangle Bernal using a martial arts key, causing his death by asphyxiation.

Consequently, Cáceres would have taken his wife's body from the police station where she was, to transfer it and bury it on Cerro Casitagua, where it was found 10 days later. After the fact, Cáceres would take his motorcycle to flee and take refuge in the neighboring country of Colombia where he adopted a false identity. However, after the constant search and maximum dissemination of the case, he was identified and captured on December 30, 2022.

- Claims of the parties

As in all litigation, different criteria were established that were based on conflicting interests, by virtue of which, this case revolved around two theories of the case, one defended by the prosecution and the private accusation of the victim; and another on behalf of the defendant.

Victim: on behalf of the prosecution and the accusation, the theory was used in which the events described were consistent with the criminal type of femicide, since it was stated that:

Germán Cáceres took advantage of the vulnerability factors that María Belén Bernal had, who had emotional dependence on her husband, who during their marriage was humiliated and physically and psychologically attacked, she had the battered woman syndrome, which she did not report. It could put Germán's job in the police at risk. (María Belén Bernal Sentence, 2023, page 59)

This argument, presented by the victim's private prosecution in the closing argument, clearly presents the reasons why the existence of the crime of femicide is considered. There is talk of humiliation, physical and psychological attacks and emotional dependence, which shows the state of vulnerability of the victim, alleging in this case the existence of a power relationship and that, therefore, the sanction that must be imposed will be that of the crime of femicide.

Prosecuted: Cáceres's defense used the theory that, since the power relations required by the criminal offense do not exist, one cannot speak of a femicide and that the act perpetrated was only the response to an impulse for what that it would be a homicide. The defense alleged that: “María Belén Bernal had control of the relationship, she was the one who generated the most income, she felt in a power relationship” (Sentence María Belén Bernal, 2023, page 60). It was supported by the economic issue. Bernal considers that she was the one in charge in the relationship.

It was also maintained that “Germán was the one who suffered gender violence from his wife, he found himself a victim of the circle of violence, he remained in a state of resilience and normalized the violence against him” (Sentence María Belén Bernal, 2023, page . 60). These arguments attempt to counteract the theory proposed by the victim, eliminating the existence of a power relationship; and, therefore, ruling out the configuration of the crime of femicide, the request being that, if he is punished for her actions, but through the figure of pre-intentional homicide.

- Legal problem of the case

At this point it is clear what the legal problem of the present litigation consists of, since the positions of the parties were sufficiently clear when presenting their arguments, and it is the job of the court that resolves to determine whether, in this case and in accordance with the provisions of the art. 141 of the COIP, the death of María Belén Bernal was the result of the pre-existence of a power relationship with her victimizer Germán Cáceres.

- Motivation and decision of the Court

The evidentiary elements that were considered by the Criminal Court in charge of the Cáceres trial and based on which the existence of power relations between Bernal and Cáceres was determined were, among others, testimonies from people involved in María Belén Bernal's social circle. and expertise carried out by experts who diagnosed the existence of acts of violence and the subjugation of the victim.

There were four witnesses, including co-workers and the victim's mother, who were responsible for informing the court that for several years prior to Bernal's death, various acts of violence, both physical and psychological, had already become evident, which they positioned the victim in a vulnerable situation and therefore gave way to her perpetrator to exercise power and control over her.

Regarding the expertise carried out, one of the most important in this type of case is the psychological autopsy through which a study is carried out of the entire environment and life of the victim, before, during and after his death. The expert determined that the constant violent behavior perpetrated by Cáceres against Bernal put her in a state of vulnerability by virtue of which a very marked emotional dependence was created, due to which it was not possible for the victim to put an end to the attacks she suffered. by his spouse, a situation that was taken advantage of by him to exert systematic violence.

Another transcendental piece of evidence was the audio, video and related expert opinion on the transcription of linguistic operations of an audio file that was found stored on María Belén Bernal's cell phone, audio from which it emerged that the victim had recorded her death and that, even in the minutes before the incident, it was possible to demonstrate the power relationship exercised by her spouse by pronouncing several offenses and humiliating her until the last second of her life, since at the discretion of the court María Belén Bernal treated her spouse in a manner affectionate and affectionate, which was responded only with humiliation until finally killing him on the same act.

The evidence referred to together with the expertise to determine the possible violence suffered before, during and after the death of the victim clearly denoted the existence of both physical and psychological violence from a long time before the death and that, according to the audio transcription, This violence was even exercised up to the very moment in which death occurred.

Regarding everything analyzed, the Court stated that “These pieces of evidence of an absolutely incriminating nature allow us to logically and rationally infer that Germán Cáceres del Salto, acting with full conscience and will with his action (strangulation), took the life of his wife.” (María Belén Bernal Sentence, 2023, page 100), clearly denoting that all the evidence presented at trial was sufficient to determine that it was Cáceres who perpetrated the crime against his spouse. But even more important is what the Court states in later lines when it says that:

These events derived from the power relationship that Germán Cáceres exercised over his wife, since in the cohabitation relationship they maintained there was presence of systematic physical and psychological violence, dominance and control over her, given the emotional dependence that she had on him. to her husband, which was taken advantage of by him to have her subjected to a circle of violence that ended in the most extreme form of violence exercised by men against women in their desire to obtain power, domination or control. (María Belén Bernal Sentence, 2023, page 100)

In this way, the difference between the crime of femicide and other crimes in which the lives of women are also attacked can be better emphasized, since it has been a substantial element for the court to demonstrate the existence of a marked power relationship decanted from the physical and psychological violence exerted on the victim, violence from which he was never able to escape due to the development of a strong emotional dependence on his partner, which locked the victim in a circle of violence that ended in his death.

Methodology

This research, focused on the presence of power relations in the classification of the crime of femicide in Ecuador, adopted a qualitative approach. It was based on the review of doctrinal literature, analysis of judicial cases, comparative legislation and consultation of bibliographic sources such as Redalyc, Google Academic and Dialnet, among others.

The study was characterized by its descriptive-explanatory level. In descriptive terms, the theories issued by various authors regarding femicide and, especially, the role of power relations as a constitutive element of the crime in Ecuadorian regulations were considered. Regarding the explanation, the problem and the legal implications of various perspectives on the need for power relations in the classification of femicide were clearly identified.

The deductive-inductive method was applied, starting from general premises about femicide and power relations, and then delving into more specific and complete aspects. The comparative method was used to analyze and establish the characteristics of the legislation on femicide in different countries, comparing them with Ecuadorian norms.

Since a real Ecuadorian case was included in the research, the analytical-synthetic method was used to analyze the main elements of the case and synthesize the conclusions, identifying the legal problem, the positions of the parties and the criteria of the court. The main technique was the interview, carried out with a judge and a prosecutor, using a questionnaire as a data collection instrument.

Results

Interviews

In order to adopt a criterion more closely linked to the procedural reality of the cases submitted to trial for femicide, for this investigation two people have been taken as a sample who, almost daily and personally, know the way in which these cases are carried out, being that one of the judges that makes up the Criminal Court of the Cuenca Canton and a prosecutor belonging to the Gender Violence Prosecutor's Office of the same canton have been interviewed, who prior to the socialization of the topic and the purpose for which Their comments would be used, they gave their consent and responded to the following questions:

1. What do you think about the way in which the crime of femicide is classified in Ecuador?

Prosecutor: The crime of femicide here in Ecuador has some aspects that are missing so to speak, it is said that power relations have to exist, also the fact of being a woman, and both at the time of testing power relations and With the fact of being a woman we find inconveniences, because they constitute criteria that are very subjective in that, it is like getting into the psyche of the defendant or the accused to see what he was thinking at the time he committed the femicide, which acts carried out to consider that she killed him because she was a woman, then it becomes a very ambiguous concept when the judge wants to sentence.

The concept of femicide goes much further because it constitutes an undervaluation of the life of women in themselves, and this is already a concept that is stuck in everyone's heads because it is the way in which we have been raised and because it is said that Well, being a girl, a woman, like the patriarch, the man, the father, the one who plays that role, says that being a woman can hit and educate her that way. This brings the consequences of having domestic violence and that many times end in femicide, they would have to be much clearer concepts, not only because of the fact of being a woman or because power relations have been exercised, it would have to be a more typified classification. clearly indicating which points must be taken into account, a slightly clearer classification would be required.

Judge: The classification of the crime of femicide responds to a social construction, which responds to a serious and historical situation that humanity has suffered in which discrimination, cruel treatment and contempt for the figure of women has been made visible, and where the characteristics of machismo. This situation may be the origin of the classification of the criminal type, but this is completely different from me completely agreeing with the criminal type because other specific things must be observed.

For example, in our country the crime of murder contemplates within one of the circumstances constituting the offense the fact that a man kills his spouse or partner in a de facto union, the penalty for murder being the same as for femicide and it can even be seen that in the classification of femicide special aggravating factors for this crime and that in murder they constitute and modify the infraction, but they are general circumstances.

Femicide, in my view, has serious situations because this figure has caused the State to fill out certain statistics regarding respect for the human rights of women and has caused, from my point of view, women in Ecuador to be born with a sentence of death for the fact of being a woman. I would almost dare to assure that since the COIP came into effect in 2014, the number of violent deaths of women in the category of femicide may have increased compared to before 2014, and this because our criminal law says that it has a preventive function, that is, punishing “x” for the death committed so that the rest of society realizes that they should not kill a woman, and that is not true because at the end of the day it is not known how many people can observe the example of “x” and make it their own, they are influenced in that criminally relevant conduct to commit it, an apology for the crime is created.

Yes, it is a criminal offense that must be observed and analyzed in the context of equality before the law; there is no adequate classification. The place that women want to give themselves has to be observed in a cultural and educational way and respect for the female figure must be taught from children. I don't really agree with the classification.

2. According to the work you do and the cases you have dealt with regarding femicide, what opinion do you have about “the power relations” in the crime of femicide?

Prosecutor: We could demonstrate power relations through psychological autopsies, which is an expertise in which we try to demonstrate the type of life that the victim led before her death, suddenly the changes in behavior that occurred after starting a relationship or The fact that these power relations have begun to occur, through an assessment of the social environment that is specifically carried out on family members, are the ways in which one seeks to demonstrate these power relations.

When talking about power relations, we talk about there being symmetry in terms of age, due to the very fact of being a woman when referring to the physical build, which are characteristics that can lead to the existence of these power relations, these power asymmetries. that can be used by the person processed. Power relations are the ways in which the defendant, in simple words, gains morale from the victim, works on him from the psychological level, reduces his self-esteem and in this way turns him into a person with terribly low self-esteem. low that many of the times, despite having means, despite

having a family support network, they consider themselves people who cannot get out of this.

From the psychological level, these power relationships are related to all this, to the psychological part of the victim, they seek to distance the victim from their family environment, they seek to isolate the victim and not have any exit network from the relationship to escape. to stay with the aggressor

Judge: Taking into account the restrictive interpretation established in the COIP and prevailing within the Ecuadorian legal system, the criminal offense must be observed literally as the norm says and the power relationship must exist. It seems to me that many times the prosecutor's office generates an accusation of femicide without finding a power relationship but due to the fact of being a woman, so for me it is important that a power relationship exists, because there may be a case like that of a man x who was the one who was in the house and did all the chores, and the wife was the one who went out as a high executive to work having a good income and a certain social position; In this case the husband ended up killing her because he found an intimate situation against her, he was accused of femicide, but the court decided that it was murder because there was no power relationship, this being what distinguishes it from other types of criminal offenses. .

If the power relationship were not included in the criminal offense, it would be necessary to repeal or remove from murder the paragraph that speaks of killing the spouse or partner in a de facto union. What really distinguishes femicide from murder in Ecuador is the power relationship and possibly in other legislations there will not be this figure of murder of the partner, woman, wife, spouse or cohabitant and therefore it is not necessary to establish the existence of a relationship of can.

For me, if it is necessary that there be a power relationship even though that is also debatable, because it is said to be a relationship of any kind, then the criminal type is very closed and does not expand on where the topic is going, because it forces me to investigate the fact. of being a woman or due to gender issues as long as there is a power relationship. But if I have nothing against women and nothing against gender, the issue remains isolated. I do believe that it is important that the power relationship be maintained in the criminal type.

3. The third question asked has been asked taking into account the environment in which each professional operates:

Prosecutor: What does the element of power relations imply or how do you prove it in a case of femicide?

Through testimonial evidence, because normally before there is a femicide there are already certain signs that warn of violence, suddenly the family realizes that the victim is

isolating himself, distancing himself, he no longer attends family gatherings or meetings with friends, there are many friends or even in the workplace who see that the way he dresses has changed or that he no longer answers the phone; In the testimonial evidence they help to demonstrate this type of actions or changes that occur in the victim.

There is also the psychological autopsy expertise carried out by three experts, a psychologist, a doctor and a social work expert; the three areas come together and make a single report. They are in charge of seeing all aspects of the victim's life before death, what it was like, the changes that existed, if there was physical violence, if there was isolation, and all these types of points that they take to carry out this expertise lead us to conclude that these power relations existed.

For example, in the social environment work they will say that suddenly there were risk factors, vulnerability factors such as the fact that she is a woman, does not have a family support network, is a single mother, does not have a steady job or income. All of this leads to the aggressor having power over the victim.

Judge: Environment of power relations What aspects do you consider to be the most important when carrying out a trial to declare criminal responsibility for the crime of femicide?

The evidence must be analyzed not only in the light of reason or common sense but must also be analyzed on the basis of what are the mechanisms that produced this crime and for that it is important to think if this power relationship has a precedent, if it is suddenly linked to the fact that the woman was economically subordinated, she did not work, she was dependent on her husband, that must deserve a precedent.

For this it is necessary to carry out a psychological autopsy where the intervention of three professionals is applied to do a kind of investigation based on concentric circles, this means what the previous life of this person was like, those who intervened in his life, and Even all the people around can contribute with information about what they saw, what their reactions were, she lived happily, she was sad, she depended on her husband and all that. For me, the testimony of people who have been close to the victim and the perpetrator is important, and it is also important to have expert evidence that shows what the victim's life history was in order to determine whether or not there was a power relationship. .

The testimonial evidence is the mother evidence, but it is linked to the expertise with which it is demonstrated that a sentimental bond is not necessary but rather that there are circumstances in which a condition of power or superiority is generated by which the victim must approach her. victimizer, and all this is accredited through the testimony of people who could have known the elements in which the systematic violence of certain

people against others was generated and with the expertise of the psychological autopsy where the life history of the person can be analyzed. the victim.

4. Do you have any comments or suggestions regarding the classification of the crime of femicide? What would you change, improve or maintain? And because?

Prosecutor: Regarding the classification, if it would change a little the way in which femicide is worded, in terms of power relations, in terms of the fact of being a woman, they constitute a very vague form that at the moment when trying to prove perhaps It does not monopolize or does not cover all the situations in which a woman can die.

Unfortunately our judges, our justice operators, still do not act with a gender perspective, so that is why it is important that the classification of femicide is extremely clear. Do not leave these loose ends of what these power relations are, because when one goes to court to want to test these power relations and the fact of being a woman is difficult for us, it is extremely difficult to make the judges understand the way in which they occur and why if it meets the requirements to be a femicide, then suddenly there could be a modification, at this moment I am not clear how but it should be a much clearer classification in terms of these aspects .

Judge: First of all, I believe that the crime of femicide should be eliminated, I think that there are crimes against life that can even be aggravated, I believe that the crime of femicide responds to a very respectable ideological current of course, because many times they have said that What happened before was that violence against women was kept silent, and that may be true, but when femicide becomes a type of criminal offense that seeks to make it all femicide, then unfortunately we neglect specific things, making it necessary to fill out a statistic. a correct imputation is avoided by also preventing a correct conviction.

If the crime of femicide is maintained, because it responds to social demands and the need to make abuse against women visible, I believe that equality before the law should be established, which must be understood in that not only femicide exists but also a crime of murder that is related to the fact of those cases that become known where the woman has the power of the relationship and kills the man.

This is because the Constitution says that the Ecuadorian state is a constitutional state of rights and justice, it says that the procedural system is a means for the realization of justice, this procedural system must look with the same lenses at all those who participate within the society, men or women must be equal before the law, sanctions must be equal before the law, criminally relevant behaviors must be equal before the law, it cannot be said that there is equality for some things and not for others. It seems to me that the State, through the legislative power, must generate certain changes in the legislative structure.

The optimal thing would also be to be able to expand the criminal offense by establishing this power relationship against a woman in any circumstance, since as it is typified it is too limited since it has to necessarily link two things, the existence of a power relationship and the fact of being a woman or because of their gender.

Analysis of the results

A generalized criterion that has been evidenced in this research is that the classification of the crime of femicide meets the social need to make visible the violence to which women have been subjected for a long time. However, femicide and the way in which it has been decided to respond to this social problem has not been the most appropriate, since there are many criticisms that revolve around the elements that make up the criminal offense.

Power relations are a transcendental element that must be observed from two points of view in a process, first from the perspective of the evidentiary contribution when it is desired to demonstrate that a behavior constitutes a femicide, and then from the point of view of the assessment and the trial, when it is determined whether or not the specific case constitutes the crime of femicide. In this aspect, both professionals have agreed that both tasks are complex, precisely because of the way in which the crime has been classified.

Another important issue on which professionals have agreed is regarding the evidentiary elements and the aspects that are observed in them to prove/determine the existence of the crime of femicide. Both professionals have clearly referred to the testimony of people who make up the victim's social circle prior to death, and much more importantly when referring to the expertise of the psychological autopsy, in which, with the intervention of the areas of psychology, medicine and social work, the life of the victim is studied and it is determined whether or not power relations actually existed.

Finally, and as expected, to the question about whether they would make any change in the classification of the crime of femicide, both professionals have been quite clear and forceful in their answers considering, on the one hand, even its elimination, or failing that with the need to create equal conditions for men or women, criminal types for each gender. What both professionals have agreed on is that, regarding power relations, it is necessary to make a broader and clearer wording of the standard so that, when applying it, it is much easier, thus avoiding making mistakes that could eventually fall into injustice or impunity.

So from everything obtained from the different sources of information, it can be determined that “power relations” are a necessary element in the criminal type, since this helps to differentiate the criminal type of femicide from other crimes in which it is also

involved. it threatens life, however, it is necessary for this classification to be expanded and more detailed regarding this concept. Well, as the interviewees have mentioned, the criminal type is very closed, so much so that, on occasions, even if it could be verified that, if it is a femicide, obtaining the evidentiary elements to link power relations with gender issues is very complicated.

Conclusions

- Although violence against women is a long-standing social problem, the term "femicide" is a relatively modern concept, first introduced in 1976 by Diana Russell. Since then, various considerations have been made on the topic and different approaches have been adopted in the legislation that has incorporated this figure. In Ecuador, although the first attempts to recognize femicide date back to 1990, the crime only materialized in 2014 with the entry into force of the Comprehensive Organic Penal Code, which has given rise to a series of criteria and conflicts around the criminal type. .
- The inclusion of power relations in the classification of femicide has been one of the most debated aspects among justice operators, legal experts and social groups. This element is fundamental to determine the existence or not of the crime of femicide in Ecuador. Power relations imply the submission of the victim, which allows the victim to dominate and control her integrity, keeping her in a position of inferiority from which, due to her psychological conditioning, she cannot escape on her own.
- Although in Ecuador power relations are the main element in the classification of the crime of femicide, it has been observed that in other legislations this consideration is not shared in the same way. For example, in Colombia, although the term "power relations" is referred to, its meaning and legal consequence differ, since it is developed in a different area. In contrast, in countries like Chile and Costa Rica, the term is not even mentioned or considered necessary to constitute the crime.
- The judging of cases that attempt to fit the criminal category of femicide requires special treatment. As was evident in the case of María Belén Bernal, it was necessary to provide ample evidence that demonstrated not only the commission of the crime by her spouse, but also the years of abuse, offenses and humiliations suffered by María Belén Bernal, even until her death. The evidence revealed the existence of a clear power relationship, based on the systematic violence to which the victim was subjected for years, until culminating in her tragic outcome.
- Finally, the interviews carried out with the criminal court judge and the gender violence prosecutor corroborated the dissatisfaction with the wording of the criminal type of femicide in the Comprehensive Organic Penal Code (2014). The

ambiguity generated by including only the term "power relationship" makes the application of the criminal offense difficult, both in the evidence phase and in the trial. This underlines the need to reform the classification of the crime, avoiding ambiguities and seeking to include elements that clarify when we are faced with a case of femicide, without limiting ourselves only to mentioning power relations, but establishing its scope and real scope.

Conflict of interests

There is no conflict of interest in relation to the article presented.

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