Conciencia Digital

ISSN: 2600-5859
Vol. 7 No. 2, pp.44–66, April - June 2024

www.concienciadigital.org

Análisis jurídico para el planteamiento de reforma a la disposición que regula el delito de abuso sexual en la legislación penal ecuatoriana

Legal analysis for proposing reform to the provision regulating the crime of sexual abuse in Ecuadorian criminal legislation

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Scientific and Technological Research Article
Sent: 15/01/2024
Revised: 02/18/2024
Accepted: 04/03/2024
Published:05/04/2024
DOI:**https://doi.org/10.33262/concienciadigital.v7i2.2972**

Please quote: Soto Palacios, LV, & Trelles Vicuña, DF (2024). Legal analysis for the proposal of reform to the provision that regulates the crime of sexual abuse in Ecuadorian criminal legislation. ConcienciaDigital, 7(2), 44-66.https://doi.org/10.33262/concienciadigital.v7i2.2972

DIGITAL CONSCIOUSNESS,*and*It is a multidisciplinary, quarterly journal, which will be published electronically. Its mission is to contribute to the training of competent professionals with a humanistic and critical vision who are capable of presenting their research and scientific results to the same extent that their intervention promotes positive changes in society.https://concienciadigital.org
The journal is published by Editorial Ciencia Digital (a prestigious publisher registered with the Ecuadorian Book Chamber with membership number 663).www.celibro.org.ec

Conciencia Digital

ISSN: 2600-5859
Vol. 7 No. 2, pp.44–66, April - June 2024

www.concienciadigital.org

Palabras claves:
Abuso sexual, injusto penal, desigualdad, asimetría, proporcionalidad.

Resumen

Introducción: El análisis jurídico del artículo 170 del Código Orgánico Integral Penal se centra en las circunstancias que rodean la aplicación de la disposición penal en casos de abuso sexual, particularmente observando el rango temporal establecido para la imposición de penas privativas de libertad en situaciones concretas. Este estudio busca comprender y evaluar la aplicación práctica de esta disposición en el sistema legal. **Objetivo:** El objetivo de esta investigación es analizar y proponer reformas al artículo 170 del Código Orgánico Integral Penal para establecer una nueva graduación de las penas privativas de libertad en casos de abuso sexual. Se busca reducir el rango mínimo de estas penas sin afectar el acceso de las víctimas a la justicia, garantizando una sanción proporcional a la gravedad del delito. **Metodología:** Este trabajo de investigación adopta un enfoque cualitativo, basado en fundamentación teórica y revisión bibliográfica para comprender en profundidad el contexto legal y las implicaciones de las reformas propuestas. Se utiliza el método analítico-sintético, que involucra el desarrollo del pensamiento crítico para analizar y sintetizar información relevante. Además, se emplea el método histórico-lógico para estudiar la evolución de las circunstancias que rodean el delito de abuso sexual a lo largo del tiempo. **Resultados:** La reforma propuesta resulta en una nueva graduación de los rangos de las penas privativas de libertad para el delito de abuso sexual, con una reducción en el rango mínimo de estas penas. Sin embargo, esta modificación no afecta el acceso de las víctimas a la justicia ni su derecho a obtener una reparación integral. Se garantiza que las penas impuestas sean proporcionales a la gravedad del delito, manteniendo un equilibrio entre la protección de los derechos de las víctimas y la justicia para los acusados. **Conclusión:** La propuesta de reforma al artículo 170 del Código Orgánico Integral Penal busca mejorar la efectividad y proporcionalidad de las penas en casos de abuso sexual. Esta reforma, al reducir el rango mínimo de las penas privativas de libertad, busca asegurar una respuesta legal más equitativa y justa, sin comprometer el acceso de las víctimas a la justicia ni la gravedad del castigo para los delitos más severos. **Área de**

ISSN: 2600-5859
Vol. 7 No. 2, pp.44–66, April - June 2024

estudio general: Derecho Procesal Penal**. Área de estudio específica:** Derecho Procesal Penal y Litigación Oral**.**

Keywords:
Sexual abuse, criminal injustice, inequality, asymmetry, proportionality.

Abstract

Introduction: The legal analysis of article 170 of the Organic Comprehensive Penal Code focuses on the circumstances surrounding the application of the penal provision in cases of sexual abuse, particularly observing the temporal range established for the imposition of custodial sentences in specific situations. This study seeks to understand and evaluate the practical application of this provision in the legal system. Objective: The objective of this research is to analyze and propose reforms to article 170 of the Organic Comprehensive Penal Code to establish a new graduation of custodial sentences in cases of sexual abuse. The aim is to reduce the minimum range of these penalties without affecting the victims' access to justice, guaranteeing a sanction proportional to the seriousness of the crime. Methodology: This research adopts a qualitative approach, based on theoretical foundations and literature review to understand in depth the legal context and the implications of the proposed reforms. The analytical-synthetic method is used, which involves the development of critical thinking to analyze and synthesize relevant information. In addition, the historical-logical method is used to study the evolution of the circumstances of the proposed reforms. Results: The proposed reform results in a new graduation of the ranges of custodial sentences for the crime of sexual abuse, with a reduction in the minimum range of these sentences. However, this modification does not affect the victims' access to justice or their right to obtain full reparation. It ensures that the penalties imposed are proportional to the seriousness of the crime, maintaining a balance between the protection of victims' rights and justice for the accused. Conclusion: The proposed reform to article 170 of the Organic Comprehensive Penal Code seeks to improve the effectiveness and proportionality of penalties in cases of sexual abuse. This reform, by reducing the minimum range of custodial sentences, seeks to ensure a more equitable and fair legal response, without compromising victims' access to justice or the severity of punishment for the most severe crimes.

Introduction

The crime of sexual abuse is considered an aggression against the integrity of the body of human beings who, at some point, suffer the consequences of reprehensible behavior that violates protected legal rights such as sexual freedom and the right to live a life free of violence.

The importance and legal contribution of the analysis of the content of article 170 of the Comprehensive Organic Criminal Code lies in proposing a change in the time range established for this penalty, achieving a gradualness within which punishable conduct can be properly adjusted, in order to be able to apply it according to the legal foundations and achieve equity and proportionality in its application. This is achieved with a fair assessment of the different acts that are classified as sexual abuse; that is, assessing them in terms of the level of damage they cause to the victim and applying a graduated penalty.

The delimitation of the statement of the research problem in this academic article is: Under what legal assessment criteria could the criminal type related to sexual abuse be reformed, in order to guarantee the principle of proportionality in the sanction according to the factual elements constituting each specific case?

The general objective will be to analyze the conduct of the aggressor and the circumstances surrounding this type of crime. With this examination, a reform in the established criminal type can be defined, with legal arguments for it, to demonstrate why the current penalty is excessive for some cases of sexual abuse and as a final result offer that proportionality in the application of the sentence, which ensures equitable justice, between the level of damage caused and the prison sentence to be imposed.

The unlawful act, the subject of this analysis, includes acts that go beyond the will of the victim, which seek a preamble with the aim of preparing a scenario for maintaining a sexual relationship, but there are also acts that exclusively seek a lustful touching of the victim, without expecting to go beyond this act. One of the basic principles of criminal law is proportionality; the factual act or misconduct must be symmetrical with the penalty to be imposed. This punishment is carried out by a judgment of reproach, after the evidentiary stage in the respective trial.

For these legal scenarios, described previously, the same prison sentence is graduated, situations that, although they are reprehensible for society; however, when applying the penalty provided for in our legislation, the range of time established as penalties for this crime is considered disproportionate and from the compilation of legal criteria obtained in the interviews carried out, it has been considered that there should be variation in the minimum range of the times of the established penalties, in order to sanction with proportional justice, conducts that are not so serious within this infraction, to avoid that

this penal article is very rigorous, for cases that do not deeply affect the protected legal asset and that are pigeonholed within this type of crime.

Theoretical framework

Sexual abuse

The overstepping of boundaries that a person exerts on the body of another and that as a result of this excessive action with libidinous ends, the dignity of the person is affected, causing humiliation, exercise of power or a neutralization of the victim, there does not even have to be penetration into the body of the victim of some object or virile member, otherwise we would already be outside the sphere of sexual abuse; it is also considered that, given the diversity of situations that originate in this sphere, there may or may not be violence in an act of sexual abuse.

On the other hand, there are very broad definitions of what is classified as sexual abuse, as stated by the Inter-American Court of Human Rights in the Resolution of the Case Rosendo Cantú and others vs. Mexico (2010):

> It has been previously considered that sexual violence is defined as actions of a sexual nature committed against a person without his or her consent, which, in addition to comprising the physical invasion of the human body, may include acts that do not involve penetration or even any physical contact. In particular, rape constitutes a paradigmatic form of violence against women, the consequences of which even transcend the person of the victim. (Paragraph 109)

This concept openly describes what should be understood as sexual violence, because it also includes moments when there is no physical contact with the victim and only lustful attitudes from the aggressor can be considered sexual violence.

It must be acknowledged that defining a concept of sexual abuse is complex, since it involves determining the meaning and scope of the criminal type for these crimes, so it is valuable to examine criteria established in jurisprudence to give content to the conduct of sexual abuse. The analysis of these essential and common elements of this type of crime is essential to establish the limit of criminal intervention, since cases of low severity and little legal significance have been observed to meet the minimum requirements of objective content and potential harm to freedom and sexual indemnity (Pérez Alonso, 2019).

In the case at hand, from the analysis of the criminal type of sexual abuse crime described in Ecuadorian legislation, touching or friction on the victim's body for sexual purposes must definitely be verified, therefore, this is one of the various forms of sexual crimes that are classified in the criminal law.

Legislative background of sexual abuse in Ecuadorian criminal legislation

Prior to the reforms that unified the substantive and procedural laws in the Ecuadorian Penal Code, there was a confusing treatment for the crime of sexual abuse, between sexual harassment and indecent assault. In the previous legislation we find what is currently defined as sexual abuse, in Chapter II of indecent assault, rape and statutory rape; therefore, the Penal Code (1971) provided the following: "Anyone who subjects a person under eighteen years of age or with a disability to perform sexual acts without carnal access shall be punished with ordinary major imprisonment of four to eight years." (p. 64). As can be seen, this article was incomplete, since it did not provide protection for victims who are adults and do not have disabilities.

Even in the previous criminal legislation, emphasis was placed on a different charge, when the sexual act does not amount to rape in cases of homosexuality, as established by Art. 516 of the Penal Code (1971):

> In cases of homosexuality that do not constitute rape, the two couriers will be punished with a maximum imprisonment of four to eight years. When homosexuality is committed by the father or another ascendant against the son or another descendant, the penalty will be maximum imprisonment of eight to twelve years and deprivation of the rights and prerogatives that the Civil Code grants over the person and property of the son.

The treatment that the legislator previously established for the crime of sexual abuse was retrograde, with norms that excluded human behavior that also violates the legal right protected by sexual abuse and with prejudiced and discriminatory concepts, from the point of view of the legal, social and academic training for the time when those laws were drafted.

Until mid-2013, the Judiciary did not have jurisdiction to hear criminal offences against women and the family. For this purpose, there were the so-called Women's Police Stations, considered an entity of the Ministry of Government, dedicated to issuing assistance certificates, the processing of which often did not lead to a favourable administrative resolution for women, who were, in the majority, the human group affected by violence.

Whereas, for crimes such as sexual abuse, there was no specialized justice system, as they were handled by criminal courts. It was only on July 15, 2013 that the Judicial Units for Violence against Women and the Family were created and exercised jurisdiction at the national level to judge violations for injuries that do not exceed three days of incapacity and psychological violence, also considered a violation at that time, by Resolution No. 77-2013 of the Plenary Session of the Judiciary Council (2013): "The following Judicial

Units for Violence against Women and the Family are hereby created, made up of first-level judges."

Subsequently, additional powers are granted to these Judicial Units, and it is provided in accordance with Resolution No. 141-2021 of the Plenary Session of the Judiciary Council (2021): "To know and substantiate crimes against sexual and reproductive integrity classified and sanctioned in articles 164 to 174 of the Comprehensive Organic Criminal Code", that is, specialized justice is sought for crimes of injury, psychological violence, femicide and of course the crime of sexual abuse, classified within crimes against sexual integrity, which is the central theme of this academic work.

It is of paramount importance to cite the current regulation for the criminal type of sexual abuse, which is currently regulated in article 170 of the Comprehensive Organic Criminal Code (2014):

> Any person who, against the will of another, performs upon that person or forces that person to perform upon themselves or another person, an act of a sexual nature, without penetration or carnal access, shall be punished with a prison sentence of three to five years.
>
> When the victim is under fourteen years of age or has a disability; when the person does not have the capacity to understand the meaning of the act or for any reason cannot resist it; or if the victim, as a consequence of the offence, suffers a physical injury or permanent psychological damage or contracts a serious or fatal illness, the victim shall be punished with a prison sentence of seven to ten years.
>
> If the victim is under six years of age, the offence will be punishable by imprisonment of ten to thirteen years.

The maximum penalty established in the preceding paragraphs shall be imposed when said sexual abuse is intentionally recorded or transmitted live by the aggressor, by any digital means, electronic device or through any of the information and communication technologies.

Likewise, the maximum of the penalties established in the preceding paragraphs, when in addition to the recording or transmission of this sexual abuse with any digital means, electronic device or through any of the information and communication technologies, the victim is physically attacked, and said attack is also recorded or transmitted.

Looking at the substantive text of this rule, it is considered that, although the legislator has been interested in regulating sexual abuse in a more appropriate manner, which, in the previous Penal Code, we have that, currently the criminal type is described in a generalized manner in the conduct that entails this crime, since the parameters that are

considered fundamental to be able to correctly regulate this criminal action have been omitted to be taken into account.

Definition of acts of a sexual nature according to the COIP

It is considered that it broadens the vision of what can be considered within acts of a sexual nature, which Álvarez Medina & Bergallo (2020) exposes:

> The vast majority of legal norms exude a conception of the body as a support for individuality or a component of subjectivity. This second version of the body, which I will call "the body as subjectivity," is realized through a wide range of human rights, among which the right to life, physical and psychological integrity, the right to privacy and the right to equality stand out. Although implemented through legal formulas that evoke a kind of ownership of the body (such as the idea that each person is the owner of his or her body), this conception does not suppose a power over the body, similar to that over a house or a car, but rather refers to an old maxim of the liberal tradition of rights: each individual is capable of self-government. (p. 249)

Therefore, there are acts that would be classified within the concept of sexual abuse, such as, for example, touching lips with lips to kiss a person, which in many cases can be considered as part of courtship to woo a person for the purposes of courtship, which is entirely likely to occur in society, but when there is no will of the person who receives it, it is a reprehensible act and a matter of legal analysis; however, it is considered excessive to apply a sentence of three to five years in prison, as determined by Ecuadorian legislation.

Therefore, more specific definitions of sexual acts should be proposed in the COIP, but since this issue is so subjective, it is most appropriate to propose a new graduation in the range of custodial sentences.

Principle of proportionality applied to cases of sexual abuse

It is considered of sufficient help to understand the importance of having rules proportional to the factual act committed, as stated by Carbonell (2006):

> The reservation of the Criminal Code would have, in summary, the effect of forcing the legislator to systematize the penal provisions within a single normative body, would prevent its easy reform and would allow to have a penal regulation much more adequate to the principle of proportionality, since having all the penal types and their sanctions in a single order would make it much more obvious to make the comparison to determine whether or not there is proportionality in said provisions. (p. 8)

It is recognized that, although what is sought is legal certainty in the criminal field to avoid reforms, it is known in practice that, despite the existence of established criminal regulations, errors will be found in the same along the way of its application, such as violations of the principle of proportionality of the established penalty, which is a premise of conscious analysis by those who are in the legislative field, so that the laws enacted do not in any way harm the administrators, whatever their position within a legal process.

It is necessary to analyze the proportionality of the penalty imposed according to the magnitude of the damage caused, as Rojas (2015) states:

> The scale given by the penal codes gives rise to various criteria that serve to rank the value of legal assets: 1) The greater the punitive sanction, the greater the value of the legal asset. 2) The lower the punitive sanction, the lower the value of the legal asset. (p. 95)

Analyzing Art. 170 of the Comprehensive Organic Criminal Code (2014), the action or conduct described is that of "performing acts of a sexual nature, without carnal penetration"; this regulation, in a few words, implies a whole universe of possibilities, within which there is from a simple touching or rubbing, to the most cruel abusive and violent act to try to have sexual relations, without reaching rape. These very different actions are established within the same minimum range of three years of time for the sanctioning penalty; without any difference for greater or lesser consequences, resulting in disproportionate, asymmetrical; showing an inequality in the application of the same penalty for these unequal behaviors. Therefore, it is necessary to plan a reform in the range of the imposed penalty.

Protected Legal Assets that are violated in sexual abuse

In order to analyze a possible penal reform to the provision that regulates the crime of sexual abuse, it is necessary to examine the level at which the protected legal assets are affected, to propose the differentiation of the various acts of a sexual nature and to observe whether there is equity between the factual event that occurred and the respective penalty.

In the event of an act of sexual abuse, sexual freedom is affected, which refers to the autonomous decision of each person to choose when, how and with whom to have sexual intimacy, choosing the type of expressions of that nature and the conditions under which they are carried out.

In the chapter on the Rights of Freedom, we have the provisions of Art. 66, numeral 9 of the Constitution of the Republic of Ecuador (2008):

> People are recognized and guaranteed: The right to make free, informed, voluntary and responsible decisions about their sexuality and their sexual life and

> orientation. The State will promote access to the necessary means for these decisions to be made in safe conditions.

This constitutional guarantee is clear and explanatory of the conditions under which a person can access situations regarding his or her sexuality, perfectly identifiable scenarios in which a single expression of "I don't want to" is enough to stop and leave everything, without causing any overstepping of the boundaries in the person that indicates his or her refusal to continue with a sexual event. However, there are instantaneous acts, in which the abuse occurs and ends at that precise moment, without giving rise to a reaction from the abused person.

The Ecuadorian State contemplates, through its supreme law, the right to live a life free of violence, which lies in an intrinsic circumstance of the human being, to exist in peace and well-being, without situations that threaten their physical, psychological and sexual integrity.

Likewise, in the same chapter of the Rights of Freedom, the mandate of Art 66, numeral 3, literal b) of the Constitution of the Republic of Ecuador (2008) is stated:

> The following rights are recognized and guaranteed to persons: b) A life free of violence in the public and private spheres. The State shall adopt the necessary measures to prevent, eliminate and punish all forms of violence, especially that exercised against women, girls, boys and adolescents, older adults, persons with disabilities and against any person in a disadvantaged or vulnerable situation; identical measures shall be taken against violence, slavery and sexual exploitation.

In criminal matters, the State provides protection to vulnerable people in the event of an episode of sexual abuse, based on the young age of the victims, being under the influence of substances or threats from the person who perpetrates these criminal acts.

In the event of a violation of these legal rights, the level of damage caused must be analyzed in order to apply a proportional penalty, with the assistance of other branches of science, as considered in one of the rulings of the National Court of Justice (2015):

> Forensic and psychological tests are the appropriate means to prove the violence inflicted on the victim (physical or psychological) and from them the subsequent consequences can be established, which can manifest themselves in somatic disorders, anguish, depression, anxiety and behaviors that are not appropriate within the cultural and social environment in which the aggrieved person lives, in short, they affect all aspects of his or her life. (p. 10)

Technical expert reports carried out with professional responsibility are of fundamental importance to the Judge, since, in order to apply a sentence, they will help to assess the

fact submitted to his knowledge, also with the assessment of auxiliary branches such as forensic medicine and psychology, which will measure the level of damage caused. This aspect is relevant to analyze, in order to assess the harmful consequences of committing a crime of sexual abuse, in order to apply the prison sentence according to the range of penalties and the regulated characteristics.

Therefore, with the help of other branches of science, it is established that a judge will be able to more accurately apply a fair penalty, since, having acts of lesser and greater degree of affectation for the protected legal asset, a change in the gradualness of the currently established penalty will help to establish proportional penalties for each specific case.

Criteria to justify a reform in the prison sentence imposed for sexual abuse

Observation of human behavior in the crime of sexual abuse

The Branch of Criminology is, as expressed by Pablos de Molina (1989):

> Empirical and interdisciplinary science, which deals with crime, the offender, the victim and the social control of criminal behavior; and which attempts to provide valid, reliable information on the genesis and dynamics of the criminal problem and its variables; on programs and strategies for effective crime prevention; and on positive intervention techniques for criminals. (p. 80)

The examination of the behaviors that are considered to constitute the crime of sexual abuse is essential to understand its causes, particularities and consequences, as well as to develop effective prevention strategies and normative regulation that are more closely aligned with the cases that occur in practical life, in order to propose a reform to the currently established criminal type.

There are events that go beyond the victim's wishes, seeking a preamble in order to prepare a scenario for a sexual relationship, for which the abused person's trust and attention have been previously sought, taking advantage of the closeness that they have with them; but there are also events that only seek to touch the victim, even if it is the result of an impulse from the abuser.

The doctrinal contribution cited below objectively explains the error committed when describing the conduct of sexual abuse, as it is currently regulated, as set out in the Manual of Ecuadorian Criminal Law by Albán Gómez, (2015):

> The indecent assault, excluded from the legislation, had a different character: sexual acts carried out by the active subject “on the person of another” were punished, that is, on the body of the victim, without going as far as carnal access (physical contact, touching, and even the question of whether giving a kiss could be criminal). Strictly speaking, the possible acts of the active subject are not

> provided for in the current legal description, which punishes subjecting the victim to perform sexual acts. (p. 462)

According to the provisions of Art. 170 of the COIP, contact is criminally relevant, therefore, in order to justify a reform to the aforementioned article, it has been observed that the dynamics of this crime sometimes have very serious connotations, but there are other cases where their connotation is milder and it is precisely because of these actions of lesser impact, that a change in the range of the penalty established for this crime is proposed, which would not imply an affectation of the victim's right to access justice, obtaining a balanced sentence and comprehensive reparation that the person seeking justice must comply with, since, when assessing the general context of the crime, the following parameters will have to be observed:

Gender perspective

Definitely, the emergence of this perspective in favor of obtaining equal rights for the female gender, due to the widespread abuses against women or people who identify with this quality, who constitute the sector most affected by sexual abuse, due to the exercise of power, dependence, subordination and discrimination taken advantage of by the perpetrator, so this vision must be applied to assess the level of damage caused, and apply the penalty within the established range.

Thus, we have what Silva Rosales (2004) states:

> Within the gender perspective we seek gender equity; that is, we need to achieve equality of opportunity, respecting the biological differences between both sexes, because we know that respect implies the social valuation of the masculine and the feminine. Let us remember that the concepts of masculinity and femininity have been constructed by human groups based on biological differences, attributing symbolic characteristics, such as crying, bravery, submission, etc. (as I had already commented previously), thus giving different valuations to women and men, resulting in inequitable social systems in most societies. (p. 17)

Applying the gender perspective in trials for sexual abuse cases does not imply that this represents a disadvantage for the person being prosecuted, but rather, on the contrary, what is sought is justice and equity when deciding, in order to sanction the factual act committed, according to the magnitude of the damage caused; thus, there will be cases in which not all the components that qualify an event with a high level of damage for the victim are verified, such as crying, submission, psychological burden, suffering in the victim, discriminatory treatment and humiliation; and on the other hand, there will be scenarios that contain these aspects. Therefore, the analysis with a gender perspective will

be substantial and from which the imposition of the time of the sanction to be applied will be justifiably derived.

Age and gender of the victim and the perpetrator

In conclusion, the most vulnerable group for this type of crime are adolescents, boys and girls, although the latter are more vulnerable in a considerably high percentage, and it is precisely because of their young age that they have easier access to the abuser, since they have control of the circumstances surrounding this criminal act.

The victimizer uses various strategies, which are premeditated, with the aim of convincing with threats, deception, offering something that interests the victim, even seduction, or they can do it through force, using tactics that make the victim remain silent and sometimes they want to make it look like a secret game between them (Acuña Navas, 2014).

The perpetrators are mostly men, approximately forty-four percent are minors, and there are few female cases; the abuse is usually committed in the victim's own home, or even in the abuser's home, taking advantage of visits or the close relationship between them (Cortés Arboleda, Cantón Duarte, & Cantón Cortés, 2011).

In this regard, it is important to assess the age difference between the victim and the perpetrator in order to apply a fair penalty, since there will be cases of victims and perpetrators of the same age, in other cases there will be a large age difference, which makes a minor victim more vulnerable and in the same way there will be cases where the age difference is intermediate.

Context and scenario in which the factual event of sexual abuse takes place

In order to apply a penalty, it is essential to analyze the type of scenario and context in which a sexual abuse crime takes place. That is to say, in order to punish the person who perpetrates this crime, their intentionality must be analyzed, observing the type of space they used to violate the rights of another person. Thus, it is considered essential to differentiate an open scene from a closed scene, where the sexual abuse took place.

The contribution of the concept of crime scene types is available, as set forth by the Attorney General's Office of the Republic of El Salvador & Justice Education Society, Canada (2002):

> Open scene: Characterized by being located outdoors and exposed to the elements of the environment and people. Public roads, parks, stadiums, beaches, vacant lots, etc. Closed scene: This is the place where the crime occurred, which is generally delimited by walls and under a roof. E.g. houses, stores, motels, etc. Mixed scene: This is the one that presents related evidence, in a closed place and another open

> place, and which correspond to the same event. E.g. Interior and patio of a house. (p. 19)

By virtue of the cited reference, the judges will have to analyze the type of place and the circumstances surrounding the factual event, in order to establish the intention of the perpetrator to commit the crime of sexual abuse, since, in a closed scene, it is considered that the intimacy of four walls can generate a scenario for touching the victim that leads to the intention of having sexual relations, of course, the event will remain there, without reaching a crime of greater consequence, in the case at hand.

When faced with an open scene, one could infer another type of situation, such as that only the victim was touched, without the intention of moving on to anything more, of course analyzing with all possible legal assessment criteria, to establish the seriousness or damage to the legal asset protected by sexual abuse. In the case of a mixed scene, all the details of the crime situation must also be considered.

All this with the aim of imposing a custodial sentence that is fair and proportional to the crime committed, so that, with a fair sentence, the victim of the crime can be compensated, and even the convicted person himself, with a resolution in accordance with his conduct, can consciously accept it and comply with it voluntarily.

Violation of human dignity

In the event of sexual abuse, this factor must be analyzed, because at the time of committing it, the modesty of each person is also being violated, who suffers this action on the part of people who make up society, which implies that the respect and consideration that people have intrinsically has been violated, by the fact of being people, knowing that this is part of their rights and freedoms, regardless of the characteristics of any kind that individuals have.

Thus, we have what Álvarez Medina and Bergallo (2020) refer to:

> The idea of dignity has not always been understood in the same way, and today there are still divergences regarding its meaning. From the first glance at the idea of dignity, some essential dualities are apparent. On the one hand, the declarations of rights speak to us of the inherent dignity of human beings, but at the same time they urge us to do everything possible to guarantee the dignity of all people. (p. 35)

Dignity in its highest expression is respect for all the conditions of a human being's life. This situation is of vital importance for the constitutional legal system of a country, in which the State is the guarantor of this right, which will allow its inhabitants to live in tranquility, punishing any person who destroys this well-being.

All the legal assessment criteria set out above, such as observations with a gender perspective, analysis of the age of the people involved, study of the context and scenario of the punishable act and the assessment of the lack of human dignity, constitute a basic guide that will limit arbitrariness and subjectivity in the application of a penalty, studying in depth each of the circumstances surrounding the act, with the assessment judgments set out, in this way the judge will have to deliberate with all the elements already provided as evidence within the criminal process, in order to apply a sentence proportional and adjusted to the veracity of the facts, a fair sentence for the procedural parties.

In order to truly comply with what has been stated, we have the ranges or time periods of the prison sentences, which will guide the judges to impose the fairest possible sentence.

Methodology

This study adopted a qualitative approach based on theoretical foundations and an exhaustive bibliographic review. An in-depth descriptive analysis was carried out, using as reference doctrinaires and treatise writers who have addressed the research problem.

The analytical-synthetic method was applied through critical thinking to analyze the crime of sexual abuse in Ecuadorian criminal legislation. The data and information obtained during the observation of the topic raised for this academic article were evaluated, understanding it in its less obvious aspects to reach conclusions based on the depth of its components.

The historical-logical method was also used to study the succession of phenomena and circumstances over time. The behaviour of the phenomena related to the crime studied was analysed throughout history, which allowed predictions to be made about their future behaviour.

The dogmatic-legal method was used to interpret the law and identify circumstances that implied indeterminacy. From this, definitions were extracted in various aspects that contributed to solving the problem raised.

Research Techniques:

Interviews were conducted with judges from the Specialized Judicial Unit for Violence against Women, members of the family unit and offences against Sexual and Reproductive Integrity, prosecutors from the Gender Violence Unit, prosecutors and practicing lawyers. These interviews were conducted in a time and space-specific context to gather relevant information on the topic. The analysis of the interviews contributed to the final diagnosis and resolution of the hypothesis proposed for the academic article.

Research Instruments:

Various research techniques and instruments were used, such as data analysis, case studies, review and analysis of academic articles, current and non-current criminal laws, legal journals, digital and printed books, fourth-level thesis works, doctrine and sentences related to the topic of sexual abuse in criminal matters. These instruments made it possible to present results, affected rights and legal effects, which led to the proposal of a change in the legal provision examined.

Results

Proposed reform to Article 170 of the COIP

In this regard, Navarro Frías (2010) states: "The theory of legislation is the discipline that studies the form and content of the norms, in order to obtain criteria, guidelines and instructions for a more rational elaboration and configuration of the same" (p. 231).

In order to consolidate the proposal for a change in the penal provision that regulates sexual abuse, interviews have been conducted with judges, prosecutors and lawyers in free professional practice, with the purpose of investigating their consideration regarding the proportionality of the penalties currently established for this crime handled by each of them, within their respective professional role.

The results obtained show that eighty percent of the total number of respondents are closely familiar with these cases of violations against sexual integrity, specifically the crime under analysis, since they work in the field, in the capacities previously stated, they consider that the established penalties are high and that other types of acts of lesser harm could be regulated with lesser penalties, that the criminal type for sexual abuse is disproportionate and upsets the principle of proportionality that is the limit of the punitive power of the state and that a reform to this penalty would proceed.

The interviewed judges consider that the term "an act of a sexual nature" contained in Article 170, first paragraph, of the COIP, which is the action that must be carried out to classify a human act within this criminal type, is very extensive and generalized, which is why there is a sense of dissatisfaction when applying what the criminal law provides, since not all cases in this branch under study have the same connotation at the time they are committed.

The following cases were provided by the prosecutors interviewed, which reveals a profound difference between acts that are classified as sexual abuse, but are committed in different contexts, as follows:

- Person X is accused of committing sexual abuse because, on a city bus, when the driver stops suddenly, this person takes advantage of the moment when everyone is on top of each other, to touch the sexual part of a victim.
- Person Y is accused of committing sexual abuse for having placed a person against a wall on a street, at night, having lifted the victim's skirt and roughly touching her sexual parts under her underwear.

That, although these two circumstances are totally reprehensible, it is nevertheless considered that at the time of applying the penalty there must be a variation, according to the level of damage caused, for which reason it is proposed that, in the legislative power, a reform be carried out to rationalize the time range established for the respective penalty, reducing the current range, since, it is necessary to recognize the existence of forms of human action, not so harmful to the protected legal asset.

The interviewed freelance lawyer, who is in charge of representing the accused, indicates with an exemplified case that, due to the fact that the accused persons only touched the body of another person in a public place, they must face a very severe penalty, which he considers unfair to impose, because from the beginning of the legal process the weight of a minimum sentence of several years is already against them.

Twenty percent of those interviewed, who have the opinion of judges who hear cases of sexual abuse crimes, suggest that the sentence is linked to comprehensive reparation, it is a larger category that has several variables: rehabilitation, restitution, compensation, satisfaction and the guarantee of non-repetition, not only a guarantee to the direct victim, it has a lot to do with the message that the justice system can give in the face of sexual violence, which allows above all to protect potential crimes in the future. If we talk about proportionality, it must be generated together with the guarantee of non-repetition, and this guarantee is linked to the principle of positive general prevention. In order for the aggressors to abstain from any future action, this must also be read from a gender perspective. They would not agree with reform, because there are laws that aggravate sexual abuse, and this has to do with the high rate of acts committed. There is no suggestion of changing the range of the penalty, since the proportionality of the sentence is already given by the National Assembly.

It is indicated that the results of this research have been based on real and practical experiences in the field of the application of the penalty of deprivation of liberty, with the events of various kinds that have occurred in the area of sexual abuse, which have been known to the legal professionals interviewed, each of them from their professional point of view, according to the work carried out within criminal legal proceedings.

The investigation carried out found those who are in favor and those who are against a reform that reduces the penalty for events that slightly harm the legal asset protected for

this crime, however, the result was projected that, if it is appropriate to reduce the minimum range established for the first two paragraphs of Art. 170 of the COIP, thus, actions that are not so harmful will be adapted, but when actions that are seriously harmful to the victim occur, the maximum legal penalty will apply, after a fair process with all the opportunities for defense for both procedural parties.

After analyzing the interviews conducted, an average has been drawn up between all the suggestions for sentence reform, even with those that do not suggest any change, and the proposal is made to reduce only the minimum range of sentences established in the first two paragraphs of the article that regulates sexual abuse and for the third paragraph no reform is proposed, since due to the age of the victim, which refers to children under six years of age, the range of the currently established sentence is considered adequate, since this is a very vulnerable sector to suffer this type of abuse and when dealing with this type of victims, no modification is proposed in the established penalty.

In order to achieve this rationalization of the penalty, after having justified the need for it, without considering the reduction of the maximum range of the established penalties, to guarantee a proportional sanction for serious crimes, the reform is concretized only in the reduction of the minimum range of the penalties currently imposed, therefore, the results indicate reform for the first two paragraphs, remaining as follows in article 170 of the COIP:

- For the first paragraph, which considers a penalty of 3 to 5 years, it is proposed that it be reformed from 1 to 5 years.
- For the second paragraph, which considers a penalty of 7 to 10 years, it is proposed to be reformed from 5 to 10 years.
- There is no proposal for reform regarding the third paragraph, which provides for a penalty of 10 to 13 years.

Conclusions

- After the COIP came into force, as it was in 2014, when its normative provisions were applied for the first time to criminal cases by the Judges, legal loopholes and/or very generalized concepts are sometimes observed in the criminal type of sexual abuse, which, given the universe of possibilities that result from the circumstances of the interaction of human beings in society, becomes an unjust and disproportionate law.
- A disproportionate and unfair sentence endorsed by the same penal norms generates distrust in the justice system of a country, since the person prosecuted and his family will feel the inequity committed by having applied a disproportionate sentence, not in accordance with the infraction committed, thus violating the human rights of the person deprived of liberty, since socially he will

also be condemned for the sole fact of having the same sentence of deprivation of liberty as someone who committed a much more serious act, within the same sphere of the crime of sexual abuse.

- It is necessary to work not only on punishability, but also on prevention campaigns for this type of crime, socializing respect, peace and social well-being, through intervention in different sectors of society such as neighborhoods, parishes, communities, educational units, sports venues, universities, companies, businesses, public transportation services, etc., in order to promote awareness and social change, in which respect is sought for the physical, psychological and sexual integrity of the inhabitants.
- It is necessary that there be awareness on the part of the legislators who regulate the norms of Ecuador, in forming commissions that are dedicated to being in direct contact with the society that is the user of the judicial system of the country, where an intervention is made from time to time and investigations are made with interviews in different provinces, among the victims and/or their relatives, procedural parties, legal defense, the Attorney General's Office and Judges, about the application of the penal norms, since, for cases that are not so serious, there are extremely severe penalties.
- Once the actual data on sexual abuse cases have been obtained, in which there are the respective final judgments, with the information on the considerations on the same, from all the actors in a criminal process, a Legislative Commission must analyze in a sort of comparison, to put on the scale cases with the same prison sentence, but with different circumstances of the criminal act judged and observe if the principle of proportionality is mainly fulfilled, that is, if there is conformity or satisfaction between the sentence imposed and the magnitude of the criminal act of sexual abuse sentenced, only then with this exercise, the proposed reform of art. 170 of the COIP, which was raised in this academic work, will be understood.
- The time that a convicted person has to serve in deprivation of liberty directly affects the financial part of the State that entails maintenance of the person deprived of his liberty, therefore, if we give a truly proportional penalty to the crime committed, the country will also not have expenses for guarding people in prison for long periods of time, in addition to the fact that, currently, there is a high probability that the integrity of the detainees will be attacked, due to the issue of the prison crisis that the country is experiencing, therefore, other forms of sanction could also be established, in addition to psychological intervention and innovative comprehensive reparation for the victim in order to prevent new criminal cases.
- Applying concepts related to gender perspective, analysis of the age of the parties involved, concepts of human dignity, examination of the scenario and context in

cases of sexual abuse does not mean that, for the accused, it is a deterioration or impairment of their rights; only a sanction that is as close as possible to justice and proportionality will be used and, on the contrary, applying the criterion of proportionality to legislate crimes does not mean failing to protect the rights of victims of sexual abuse.

- Reducing the time established in the minimum range of custodial sentences for this crime does not affect the victim's right to access the means of justice, to obtain a graduated sentence and to the full reparation that the sanctioned person must comply with, since, when assessing the general context of the crime, if it is a serious imputable act and with the corresponding analysis, it will imply a high sanction or penalty, but there will also be justice for cases that are not so serious with the application of a proportional sentence.

Conflict of interest

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

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ISSN: 2600-5859
Vol. 7 No. 2, pp.44–66, April - June 2024

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Conciencia Digital

ISSN: 2600-5859
Vol. 7 No. 2, pp.44–66, April - June 2024

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