

THE DECRIMINALIZATION OF SENTIMENTAL ABORTION IN THE PERUVIAN PENAL CODE 2024 DUE TO VIOLATION OF FUNDAMENTAL RIGHTS OF WOMEN

LA DECRIMINALIZACIÓN DEL ABORTO SENTIMENTAL EN EL CÓDIGO PENAL PERUANO 2024 POR VULNERACIÓN A DERECHOS FUNDAMENTALES EN MUJERES

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ABSTRACT

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justice.

In Peru, women who were sexually violated, and want to have a normal abortion, are prevented by the Peruvian state, charging it as a sentimental abortion, which generates a violation of their fundamental rights. The main objective of this research is to analyze the need for the decriminalization of sentimental abortion in Peru. The quantitative-descriptive method was used, with a cross-sectional and exploratory non-experimental design. The population is made up of 40 lawyers specializing in criminal law from the Judicial Branch of the judicial district of Lambayeque, the sampling was by convenience and the sample was made up of 12 lawyers specializing in Criminal Law. The type of research was: descriptive. The data collection technique was the questionnaire and the survey. And the instruments used were reference sheets, textual and paraphrasing. Regarding the results, it was possible to verify that the criminal type of sentimental abortion can be decriminalized because, according to those surveyed, it transgresses the fundamental rights of the pregnant woman, as the doctrine also mentions the principle of proportionality, which allows more weight to be given to the defense of the rights of the sexually violated woman than that of the conceived. In conclusion, the Peruvian state should speak out and enunciate the law that decriminalizes the criminal type of abortion in the Peruvian penal code, that is, that it be decriminalized from the Peruvian penal code in its article 120, paragraph 1. This type of abortion being thus legal by practicing, and prevents more women victims of sexual abuse from seeing their personal and family development frustrated.

RESUMEN

Palabras clave:

aborto sentimental,
decriminalizar, violación sexual,
justicia.

En el Perú, las mujeres que fueron violentadas sexualmente, y quieren abortar de forma normal, el estado peruano les impide, imputándosele como un aborto sentimental, la cual genera vulneración a sus derechos fundamentales. La presente investigación tiene como objetivo principal analizar la necesidad de la descriminalización del aborto sentimental en el Perú. Se utilizó el método cuantitativo-descriptivo, con un diseño no experimental

transversal y exploratorio. La población está constituida por 40 abogados especialistas de derecho penal del Poder Judicial del distrito judicial de Lambayeque, el muestreo fue por conveniencia y la muestra estuvo conformada por 12 abogados especialistas en Derecho Penal. El tipo de investigación fue: descriptivo. La técnica de recolección de datos fueron el fichaje y la encuesta. Y los instrumentos empleados fueron las fichas de referencias, textuales y de parafraseo. En cuanto a los resultados de pudo verificar que se puede descriminalizar el tipo penal de aborto sentimental porque ella según los encuestados, transgrede los derechos fundamentales de la embarazada, como también la doctrina menciona al principio de proporcionalidad, que permite ponderar más la defensa de los derechos de la mujer violentada sexualmente que la del concebido. Concluyendo el estado peruano debería pronunciarse y enunciar la ley que se descriminalice el tipo penal de aborto en el código penal peruano, es decir, que se despenalice del código penal peruano en su artículo 120º, inciso 1. Siendo así legal este tipo de aborto practicando, y evita que más mujeres víctimas de abuso sexual vean frustrado su desarrollo personal y familiar.

Introduction

The decriminalization of abortion in the case of pregnancy resulting from rape is one of the most critical and pertinent issues currently being studied in Latin America, from a variety of political, legal and public health perspectives (Bergallo, Jaramillo, & Vaggione, 2018).

In our criminal law, abortion is considered a crime against life, body and health, in all its forms, except therapeutic abortion. However, the controversial aspect of this crime is abortion for rape, in which the woman who authorizes the abortion is punished with a minimum penalty of up to three months' imprisonment. In practice, this has not been effective in addressing the current problem of pregnant rape victims and protecting their fundamental rights to exercise self-determination over their bodies (Valdivia, 2021).

The issue of abortion is highly debated due to its possible sanction, as is the case in most developed countries. In Latin America, several groups are working to declassify this practice from criminal records. According to their arguments, it is unacceptable that a woman who puts herself in danger by entering a clinic for a risky clandestine abortion should have an additional evil imposed on her as a punishment (García, Huamán, & Palomino, 2021) it is also believed that, in abortion cases, the woman receiving the prison sentence suffers significant harm as a result of the uprooting that can occur in the environment (Torres, 2022).

In Peru, all types of abortion are criminalized, except for one, therapeutic abortion. However, there is a type of abortion that even legislators have criminalized and that deserves its rapid decriminalization, since it is violating the fundamental rights of women who were sexually violated, so having a child against their will would violate many constitutional rights. Therefore, thanks to the doctrinal principles of criminal law, we can mention that the Peruvian state has little or no concern to at least put public policies to eradicate violent acts and even worse not to legalize an abortion that clearly transgresses fundamental rights of women. The main objective of this research is to analyze the need to decriminalize sentimental abortion in Peru, since it violates the right to sexual and reproductive freedom, among other fundamental rights of women. Since it is up to her to decide whether or not to interrupt her gestational state as a result of rape, being illegal still only causes women to go to clandestine centers to expose their lives to abortion.

In our country, as in other Latin American countries, there are different perspectives on the nature of the fetus and, therefore, on the legal right protected. The personality of the fetus is constitutionally recognized and in accordance with the Penal Code regulates it, being a subject of law from birth (Belan, Nalvarte, & Chambilla, 2024).

Abortion for sentimental reasons is prohibited in Peru, according to article 120 of the Penal Code, paragraph 1. "If the pregnancy is the result of rape outside marriage or non-consensual artificial insemination occurring outside marriage, it shall be punishable by a term of imprisonment not exceeding three months." (Salinas, 2019).

Obviously, there are many reasons why a woman decides to voluntarily terminate her pregnancy covertly. However, the most important reason, which should not be ignored and which seeks the understanding of both society and the State, is that this constitutes a violation of their sexual freedom, which should not be punished by our criminal law. It also seeks to ensure that all women have access to this right without discrimination, so that they can pursue their life projects in a common and harmonious manner.

There is evidence of a high rate of clandestine early terminations caused by aggression, and in general terms, this hostility begins with psychological violence.

Therefore, the non-decriminalization of abortion in cases of sexual violence revolves around the general right of women and the well-being of conception, which also causes a cooperative connection with psychological violence... (Burga, 2021).

Deliberate interference with pregnancy is designed to defend the sexual and regenerative privileges of women who are in a developmental phase due to sexual assault, through the right to opportunity and conceptive independence they have, also ensuring the security of their main fundamental rights, and thus keeping them away from any obstruction by the State (Mateo, 2021).

The elimination of fetal extraction in cases of rape has a significant impact on the dignity of women, as it has been shown that its practice is often completely justified, as long as the strict medical and legal obstacles that still do not allow and eliminate the guilty idea of early extraction are overcome. As a result, the essential freedoms of women who have survived sexual abuse are adversely impacted (Reyes, 2020).

In order to consider the protected rights of women who have survived rape, Article 120°, paragraph 1 of the Peruvian penal code is examined as an exemption from inapplicability. On the other hand, it was shown that when abortion is caused by sexual violence, the right to abortion should be granted on an individual basis to respect women's dignity and freedom (Rivas, 2021).

According to Valdivia (2021), the elimination of the crime of sentimental abortion has a significant impact on the decrease of voluntary abortion. As a result, we have been able to infer that the main effect that such decriminalization would have would be the reduction of mortality associated with unsafe abortion, which was shared by 90% of the judicial operators.

As for the legal basis for banning sentimental abortion, freedom is a fundamental and necessary value for the democratic system. Moreover, it is an essential subjective right that translates into a series of "specific freedoms" recognized in the Constitution and in the International Covenants on Human Rights. Guevara (2020) affirmed that sexual rights is a fundamental right when it comes to sexual and reproductive rights, and that it implies a responsible, full and safe sexual life, free from disease, injury, coercion and violence. Regardless of their reproductive status, this right applies to each and every one.

Cáceres and Gorbeña (2017). affirmed that human dignity is a constitutional principle of human rights recognized by the Constitution. Therefore, in this understanding of human dignity, a person must be respected and valued both by him/herself and by others. This implies that all people should be equal and enjoy the fundamental rights to which they are entitled. According to Mesías (2017) the fundamental basis of the system of rights and guarantees established in the Constitution is dignity. The legal system is considered as a fundamental basis from which "the other rights recognized in the magna attica acquired legal effectiveness".

The principle of proportionality is a constitutional principle whose purpose is to measure and control the interference of the punitive power of the State in the fundamental rights of the human person so that it meets certain criteria of adequacy, coherence, necessity and balance between the lawful purpose. Which is pursued with such interference and the affected legal goods, being that this should be compatible with (Pérez & Cabrejo, 2021).

Therefore, the Principle of Proportionality is essential to assess the constitutionality of the rights in dispute in the event that the public authorities attempt to limit a fundamental right.

The objectives of this article are: to analyze the need to decriminalize sentimental abortion in the Peruvian Penal Code 2024; to determine the violation of women's right to

freedom due to sentimental abortion; to evaluate the transgression of women's right to dignity due to rape; to demonstrate the principle of proportionality as a doctrinal basis for decriminalizing abortion due to rape.

Method

The design was non-experimental, exploratory and descriptive, so that this type of study is not constructed on situations that are fictitious, but rather on situations that already exist, and that are not intentionally provoked by the researcher. In this type of research, phenomena are observed as they occur in reality, which is achieved without deliberately manipulating variables (Arispe, 2020).

In this study its approach became quantitative, being the method to be used in this article, from which quantitative data are collected and analyzed in the variables and where the properties and quantitative phenomena are studied, being helped by a measurement instrument (Arias, 2021).

According to Robles (2019) population is that grouping of subjects that may share similar functions. For the present research, the population was comprised of 12 teachers from the Judicial Branch of Lambayeque, who were involved through non-probabilistic convenience sampling, due to their easy accessibility, coming from this institution.

The instrument used to measure the objectives in the form of questions was the questionnaire, where, according to the author Saras (2023) became a list of questions or items to be processed and analyzed. It will have 4 items, which will be answered by legal operators of criminal law.

The survey was processed by means of descriptive and inferential analysis, using the IBM SPSS version 25 tool. This will be expressed in tables describing the perceptions in percentages of the respondents in order to have a numerical count of the questions asked.

Results

After analyzing the literature from the different bibliographic sources, we proceeded to demonstrate how the type of sentimental abortion still has a negative impact in our country, and for this we had to develop a series of objectives which correspond to the questions that we set out, all with the aim that the findings correspond to each objective set out in the introduction.

The following are the percentage levels for each of the questions, which were then analyzed according to the order of their objectives:

Table 1

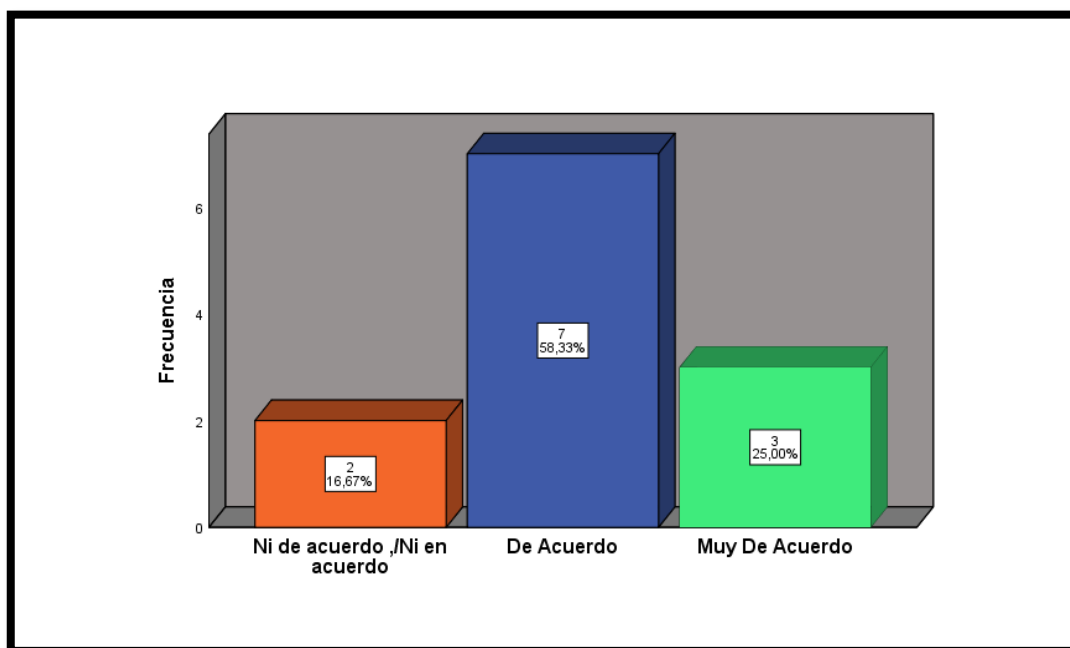
Need for decriminalization of sentimental abortion in the Peruvian penal code 2024

Level	F	%
Neither in agreement, /nor in agreement	2	16.67%
Agreed	7	58.33%
Strongly Agree	3	25%
Total	12	100%

Note. Results for sentimental abortion not to be illicit in Peru (2024)

Figure 1

Need to criminalize abortion sentimental



The results of Table 1 show that there is a need to decriminalize the penal type of sentimental abortion in the Peruvian penal code, since a majority of 58.33% mentioned that they agree, while 25% mentioned that they strongly agree and 16.67% mentioned that they neither agree nor agree.

Table 2

Infringement of a woman's right to liberty due to sentimental abortion

Level	F	%
Neither in agreement, /nor in agreement	3	25.0%
Agreed	8	66.67%
Strongly Agree	1	8.33%
Total	12	100%

Note. Respondents' assessment of whether there is a violation of a woman's right to freedom due to sentimental abortions (2024)

Figure 2
Sentimental abortion and violation of a woman's right to liberty

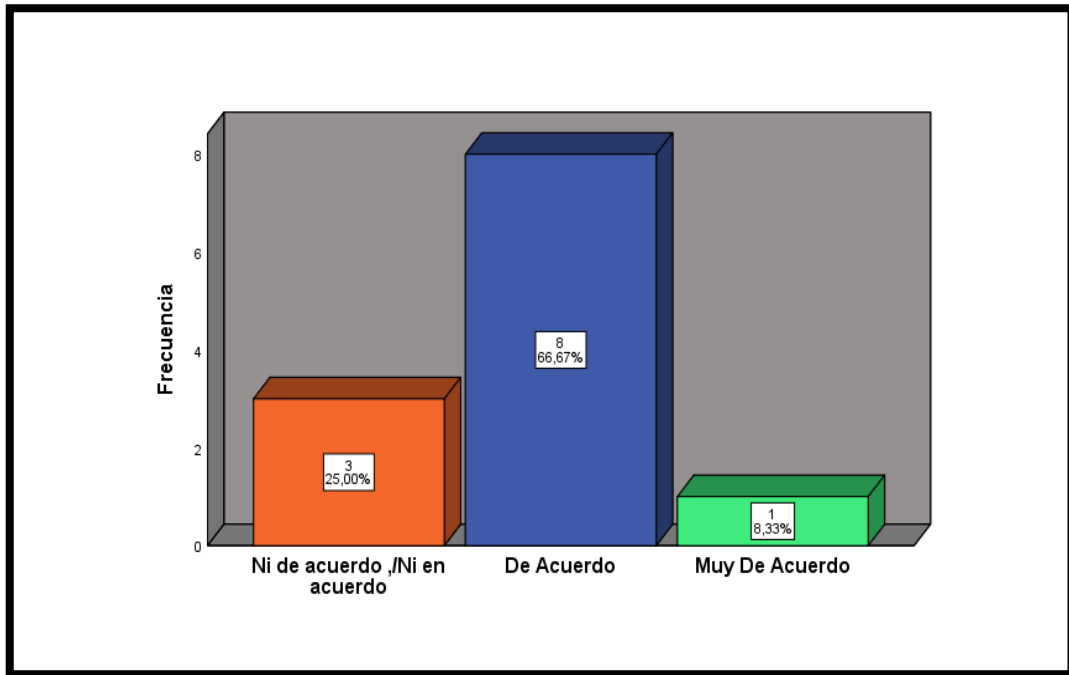


Table 2 shows that of the respondents to whom the questionnaire instrument was applied, 66.7% agreed, 25% neither agreed nor disagreed, and 8.33% mentioned that they strongly agreed, which shows that most of them agreed.

Table 3
Violation of a woman's right to dignity as a result of rape

Level	F	%
Neither in agreement, /nor in agreement	2	16.67%
Agreed	7	58.33%
Strongly Agree	3	25.0%
Total	12	100%

Note. Evaluation of lawyers on the perception of rape cases and the affectation of women's right to dignity (2024)

Figure 3

Violation of the right to dignity of a sexually violated woman

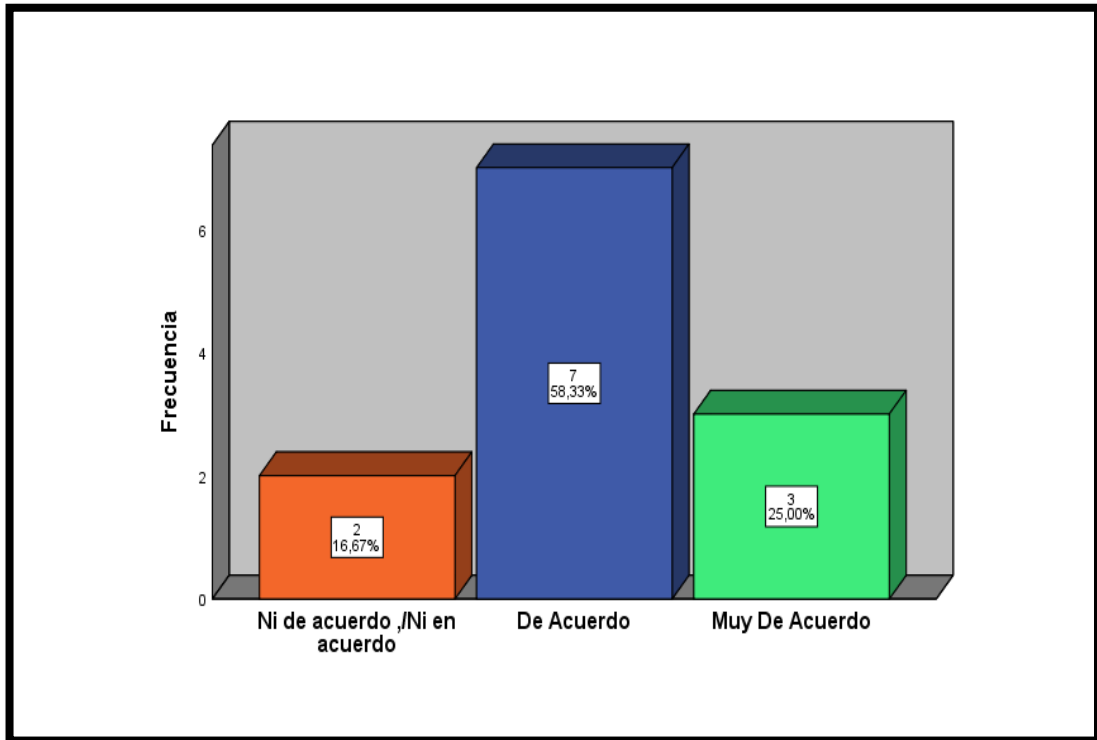


Table 3 shows that of the respondents to whom the questionnaire instrument was applied, those who answered whether sentimental abortion violates a woman's right to dignity, 58.33% said they agreed, 25% strongly agreed, and 16.67% said they neither agreed nor disagreed, which shows that most of them agreed.

Table 4

Demonstrate the principle of proportionality as a doctrinal basis for decriminalizing abortion for rape

Level	F	%
Neither in agreement, /nor in agreement	4	33.33%
Agreed	7	58.33%
Strongly Agree	1	8.33%
Total	12	100%

Note. Answers for the principle of proportionality to serve as doctrinal protection to decriminalize abortion for rape (2024)

Figure 4

Principle of proportionality and doctrine for non-criminalization of abortion due to rape

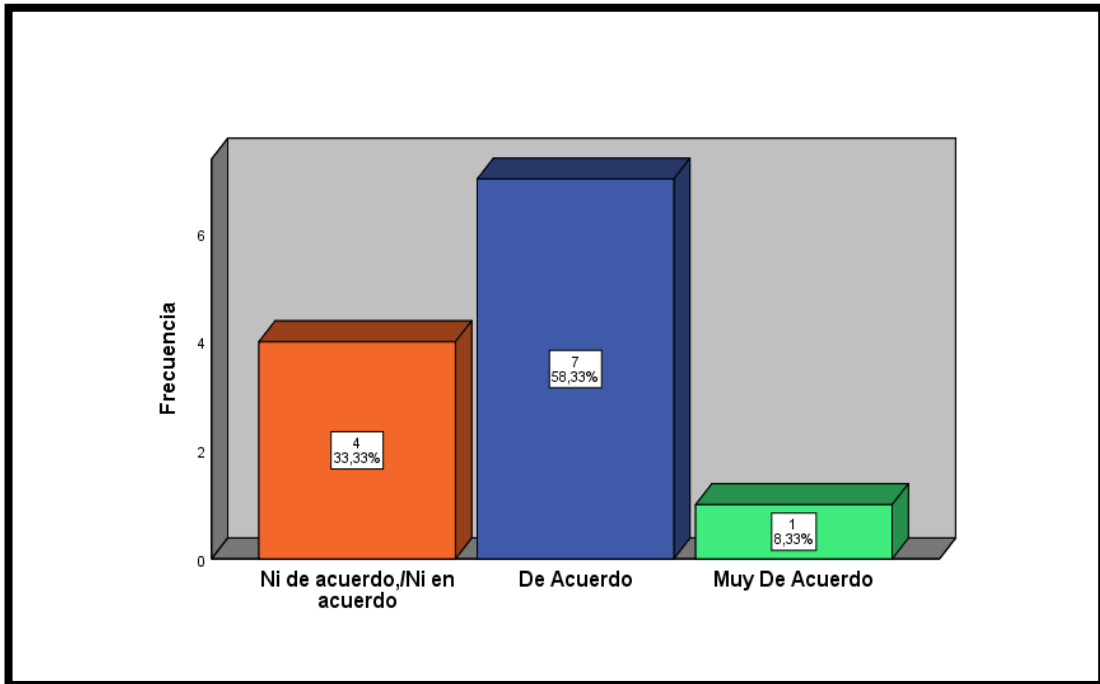


Table 4 shows the opinion of the legal operators as to whether the principle of proportionality serves as a doctrinal basis for not criminalizing abortion for rape, with 33.33% neither agreeing nor agreeing, 58.33% agreeing and 8.33% strongly disagreeing. This demonstrates that the vast majority of people argue that it is accepted that the principle of proportionality contributes a great deal to the doctrinal support that sentimental abortion is not illegal.

Discussion

Analyzing the need to decriminalize sentimental abortion in the Peruvian penal code 2024, according to the findings found in the survey applied in Table 1, the results showed the need to decriminalize the criminal type of sentimental abortion in the Peruvian penal code, since the majority of the common denominator of the respondents in percentage to 58.33% mentioned that they agree, taking into consideration that it is a type of abortion that has been wanted to be decriminalized for many years and it is still latent in the legal operators to pretend that it is the state who assumes the role of being able to decriminalize this criminal offense so that many women victims of sexual aggression can decide to have an abortion as a way that it is not clandestine and that it does not affect their lives.

Therefore, decriminalizing abortion, as mentioned by Bergallo et al. (2018) in the case of pregnancy resulting from rape, would be one of the most problematic issues worldwide, from the political, legal and public health context. In Latin American countries, they join efforts so that the states can make the practice of this type of abortion relict, not being reasonable to impose a woman who enters a clandestine health center to put her life at risk as such.

These results are related to what was mentioned by the author Rivas (2021), when he analyzed numeral 1 of article 120° of the Peruvian punitive code as an exemption of inapplicability, in order to consider the protected rights of women survivors of rape, and on the other hand, individually the right to abortion should be given, when it is caused by sexual violence, in order to respect the dignity and freedom of women. Also according to author Valdivia (2021), decriminalization of sentimental abortion has a significant impact on the reduction of voluntary abortions. As such, their research has shown that the main effect that such decriminalization would have is the reduction of mortality linked to unsafe abortion.

It can be corroborated in this objective, both in the results and the theory found that the criminal type of sentimental abortion can be decriminalized, since this problem would not only be occurring in our country, but also throughout Latin America, which is why the states should prioritize the physical and mental health of women who were sexually violated and who want to desist from having a child because of the psychological sequels that were left to them.

The Peruvian state has for a long time regulated the penal type of abortion for sexual violation, which the legislator chose to put it this way to give it a less harmful semantics, when in reality it should have been called abortion for sexual violation and not “sentimental” as it is until today in the Peruvian penal code, implying that it would be minimizing the sexual violence that the woman had without her consent to procreate a fetus that was not by natural law of love or cohabitation with her partner or spouse. It is therefore crucial that legislators decriminalize this crime as a label of “criminal offense,” when it turns out that the only crime here is the violation of the rights of women who were sexually assaulted without their consent, and have to give birth normally as any person or woman who has a family, thus generating an exception to these cases. Consequently, they themselves would be violating the right to health, because many of them, as this conduct is punishable in our criminal law, seek clandestine centers to perform abortions and thus escape criminal liability, putting their health and even their lives at risk, and generating in the rape victim behaviors that she does not want to choose, but she has to do it to safeguard her dignity and integrity.

It was determined that the right to freedom of women is violated by sentimental abortion, where the common denominator of the results found in the respondents was 66.7%, who mentioned that they agreed, so with this suitable support from the majority of law operators who mentioned that they are accepting that if abortion for rape is still legal, it would have the effect of violating the freedom of women.

One of the many reasons that a woman may decide not to become pregnant is that she has been sexually assaulted, since it is obvious that a woman may decide to terminate her pregnancy, for which the state should not charge her because her psychological suffering as a person is at stake. Before them it is necessary to invoke the Peruvian Magna Carta, where freedom is a right inherent to the person and has the same degree as the right to life, resulting prudent to consider that for this type of affectation to the freedom of the sexually violated woman should be considered more than the life of the new being in formation.

Therefore, this second objective would be related to what Sanchez mentioned with respect to the legal grounds for decriminalizing sentimental abortion: freedom is an essential and indispensable value of the democratic system, and at the same time a fundamental subjective right, which translates into a set of “specific freedoms enshrined in the constitutional norms and in the International Covenants on Human Rights.” Guevara (2020) also mentioned that sexual rights are a fundamental right, which implies

a responsible, full, safe and free sexual life, i.e., women have the right to have freedom of action in their bodies.

Freedom in its different dimensions has a common goal, which is respect for the decision that a person makes for himself and for others, provided that the latter does not violate the rights of the community of persons and the state. For this reason, as long as a person becomes free in his personal decision about himself and as a unitary person, he should not have so much injury to get to impute a penalty, since in a state of law criminal or unlawful conduct should be considered for serious crimes that affect individuals or the community, we see daily robberies, deaths, extortion, illicit enrichment, embezzlement of money by public officials, extortion, illicit enrichment, embezzlement of money by public officials, in these examples cited we can assert that if there are reprehensible behaviors, but for a crime that was first a crime for the person who was sexually violated, you can not be charged with wanting to desist from having the fetus, when this "was sexually abused."

It is the state who finally has to put the weighting and study the issue of the many women who do not want to have the fetuses for reasons of sexual violence and come to weigh whether the right to life is absolute or relative, a question that the Constitutional Court has always mentioned in its many resolutions, which states that all rights are of equal importance, not even the right to life is an absolute right. Aware of this, for certain cases, the rights must be weighed and seen according to the circumstances and the aggravated person, to be able to accept that, for this type of problem, the woman who was sexually assaulted must opt for the right to freedom in being free to have or not the being that is forming inside her and that this "freedom to decide" is above the right to life of the conceived.

The transgression of the woman's right to dignity due to sexual violation was evaluated, being that the majority of lawyers to whom the survey was applied mention 58.33% who agree, knowing that dignity is the value of respect that emanates from the political constitution of Peru in its citizens, is that according to the statement of Salinas (2019), in maintaining that in this understanding of human dignity, a person must be respected and valued both by himself and by others. This makes the point that people should enjoy their rights in the same way as others and that they should never be violated or mistreated because dignity is the supreme goal of a society.

Therefore, the third objective of this research is related to that mentioned by Cáceres and Gorbeña (2017): "Human dignity is conceived as a constitutional principle of human rights, which is recognized by the Constitution". Likewise, Reyes (2020) mentions, the decriminalization of fetal extraction in cases of rape emphatically affects the dignity of women, as it has been shown how it tends to be absolutely reasonable, assuming that we overcome strict obstructions, clinical and legal obstructions that so far do not allow us to remove the guilty idea of early termination, thus influencing the key freedoms of women survivors of sexual abuse, who subsequently resort to illegal clinical foci, where there are experts who perform fetal extractions, thus generating more danger to their lives.

Dignity is a fundamental right that has always been contemplated in the constitution as the supreme goal of society and the state. It is therefore contradictory that at the present time it has not been possible to legalize the penal type of sentimental abortion, there being a contradiction between what is mentioned in the Constitution and the penal code. Therefore, the state should be concerned about the problems that this type of crime is still illegal, such as women who have been raped going to unhealthy places, thus putting their health at risk. Therefore, this analysis defends the position of justifying

the elimination or early extraction of the fetus in cases of impact on the dignity of women, where it is precisely in the case of sexual violations committed against them, and this is related to what was mentioned by (Reyes, 2020), when he mentioned that there is justification for abortion whenever the dignity of women is seriously violated.

In order to demonstrate the principle of proportionality as a doctrinal basis for decriminalizing abortion for rape, a survey was conducted in which this fourth objective yielded 58.33% of lawyers agreeing, which is clear evidence that the majority of legal operators are aware that the principle of proportionality serves to weigh the most important right to be protected, the most important of which is that of the mother. For this reason, this objective would be related to that mentioned by Pérez and Cabrejo (2021). The principle of proportionality is a principle of constitutional nature that aims to measure and control the interference of the punitive power of the State on the fundamental rights of the human person so that this interference responds to certain criteria of adequacy, coherence, necessity and balance between the lawful purpose pursued with such interference and the legal assets affected, being that this should be compatible with the rules of a constitutional nature.

The principle of proportionality is a source of criminal law which comes to weigh the right that is more important to protect, which is why legislators at some point may see the dilemma that exists in being able to protect the right of the sexually violated woman or the right to life of the fetus. Therefore, this principle derived from the doctrine will serve to weigh more important rights such as dignity, freedom, reproductive sexuality and psychological and mental health of women against the right to life of the conceived child, which is why it is necessary that in future research it will serve as a legal basis to carry out the legalization of sentimental abortion.

Conclusions

Analyzing the need to decriminalize the criminal type of sentimental abortion in the Peruvian penal code 2024, from the finding allowed in the first objective we can say that the legal operators could realize that the question clearly formulated is suitable to support that as soon as possible the Peruvian state should decriminalize the criminal type of abortion in paragraph 1 of Article 120 of the Peruvian penal code, since this type of abortion is only violating fundamental rights in sexually violated women, so we want its prompt decriminalization. Therefore, in our country there is an urgent need for legislators to enact the decriminalization of the criminal offense of sentimental abortion, since this seems to give it a less harmful figure that should be called abortion due to sexual violence. This suggests that the congressmen who dictate the laws in the congress do not care about the psychological pictures that a sexually violated woman experienced, when she evokes the hard moments she had to live, and the state far from compensating this damage by abolishing this criminal offense, continues to have it to this day under the figure of sentimental abortion.

We came to determine the violation of women's right to freedom due to sentimental abortion, by which we saw that the majority of legal operators agreed that this type of abortion, which is still regulated in our criminal legal system, violates a fundamental right to freedom regulated in our political constitution, since it transgresses the right to decide what is best for a woman to decide about her body, in order to protect her integrity and emotional health. As a result, the right to freedom to choose an abortion

in cases of sexual abuse committed against women should not be imputable, since the right to freedom is as important as the right to life.

Regarding the right of the woman's dignity that is violated due to rape, the majority of lawyers to whom the survey was applied mentioned 58.33% agree, being evident favoritism that its regulation even in the Peruvian penal code is only causing transgression to dignity, since when suffering a rape, she has to live with the conceived that she carries in her womb, causing devastating psychological sensations knowing that it is only a product of sexual violence, however, for the Peruvian state, having an abortion will change the woman into a criminal offender, not realizing the legislators that this type of abortion only undermines the protection of women in terms of the right to their dignity regulated in our constitution, being the political constitution the pillar where our rights as guarantees rest, the state must ensure the respect and protection of these rights because this is what our constitution emanates from.

The principle of proportionality has great doctrinal repercussions in order to decriminalize the type of sentimental abortion, since it helps to weigh which right should take precedence, the right of the mother in terms of her reproductive health, dignity, emotional and psychological health or the right of the conceived in terms of her life. Therefore, it is clear that the principle of proportionality makes us understand that the fundamental rights of the woman victim of rape are above the rights of the child. Thus, this doctrinal position must be analyzed by legislators in order to attribute that the injury must be imputed as long as it affects the interests of persons or society, not always resulting in the imputation of crimes that it is known that first were the subjects who were violated against their will and also that the many rights violated by a sexually assaulted woman are in a higher hierarchy than those of a conceived child.

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