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Violation Of The Principle Of Legality In The Crime Of Femicide, Superior Court Of Justice Of Santa, Chimbote, 2020 – 2021

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Abstract

The objective of this article is to determine whether the principle of legality is violated in the crime of femicide, taking into consideration the criminal proceedings before the Superior Court of Justice of Santa, Chimbote, during the years 2020 and 2021.

To this end, it has been considered important to develop the criminal offence of femicide in Peruvian regulations, and the crime studied and its evidentiary difficulty have also been analyzed. Similarly, scope has been provided on the jurisprudence and jurisdictional plenums related to the crime in question and finally the existence of the violation of the principle of legality in criminal proceedings on the crime of femicide in the jurisdiction of the Judicial District of Santa Claus will be demonstrated.

Keywords: Violation, Principle of legality, crime of femicide.

INTRODUCTION:

In recent years, violence against women has become a problem that has been constantly increasing in Peru. One of the most worrying figures of this violence is femicide, a behavior that has been contemplated in the Penal Code through article 108-B.

However, the criminal definition of femicide in Peru has generated a series of different opinions in doctrine and jurisprudence, referring to the fact that there are typical deficiencies in the occurrence of the crime of femicide in the sense of the difficulty of interpreting evidence of the circumstance of: "killing a woman because of her condition as such".

The problematic reality lies in the current context, where we perceive manifestations of violence against women, which not only transgress their physical and psychological integrity, but could also be considered a serious risk to their lives. The death of several of them occurred in contexts of domestic violence. However, what generates greater alarm and concern is that, in certain cases, the victims who requested help did not receive the necessary assistance from the state authorities, which ultimately led to a fatal result. According to information released by the Ministry of Justice and Human Rights, in 2016, the Public Prosecutor's Office warned of 100 cases of femicide and the National Police of Peru registered 146,261 complaints of family violence against women (Ministry of Justice and Human Rights, 2017 p.7).

The criminal offence of femicide was contemplated in the Peruvian substantive code, after various groups organized through the Ministry of Women and different activities in the country requested the incorporation of the aforementioned crime, which happened through the enactment of Law No. 29819, on December 27, 2011; later modified in 2013, through Law No. 30068 – being classified as an independent crime and finally, in 2017, through Legislative Decree No. 1323, it was typified in accordance with the current wording.

However, compliance with the social and legal requirement in the country, materialized in the description of the crime of femicide, has not had a peaceful development in terms of its concrete

application, in the jurisprudential sphere, this is manifested in the fact that, in various judgments, the evidentiary and dogmatic difficulty of specifying "the existence of conduct that has killed a woman because of her condition as such" has been mentioned.

Thus, a sustainable criticism is observed regarding the exhaustiveness of the criminal type of the crime of femicide in Peru. In this sense, this crime would affect criminal legality, this being a fundamental principle of criminal law, there is then a controversy, because as we have been able to observe from what has been collected in doctrine and jurisprudence there are typical deficiencies in the description of the crime of femicide in the sense of the difficulty of evidentiary interpretation of the circumstance of: "To kill a woman because of her condition as such". If there are discrepancies in the regulation of the crime of femicide, it must be clarified to what extent the principle of legality would be affected, more specifically: exhaustiveness of the criminal law.

Now, this article is theoretically justified because we will provide doctrine specifying that the wording of article 108-B of the Peruvian penal code, affects the principle of legality in its aspect: "exhaustiveness of the criminal law" in that there is no doctrinal or jurisprudential clarity regarding the typical circumstance: killing a woman because of her condition as such." Methodologically, it is justified because through its development the explanatory design will be used, as well as the method of analysis and synthesis, following the logical model of legal contrast, with reality the problematic reality will be analyzed, with the statement of the problem and hypothesis with a priori answer to the question posed.

How is the principle of legality violated in the crime of femicide, taking into account the criminal proceedings before the Superior Court of Justice of Santa, Chimbote, during the years 2021 and 2022?

In this direction, it has been considered as a general objective, to determine if the principle of legality is violated in the crime of femicide, taking into consideration the criminal proceedings before the Superior Court of Justice of Santa, Chimbote, during the years 2021 and 2022.

Whereas, as specific objectives, the following have been indicated: To explain the crime of femicide regulated in article 108 B of the Penal Code; to explain the crime of femicide and its evidentiary interpretative difficulty; to analyze femicide sentences of the Superior Court of Justice of Santa in the city of Chimbote in the period 2021 - 2022, to specify the existence of difficulties in interpreting the crime of femicide; and, to determine if there is a violation of the principle of legality in the crime of femicide.

CONTENTS:

2.1. The Crime of Femicide in Peru.

On December 27, 2011, Law No. 29819 was published in El Peruano, which amended Article 107 of the Penal Code and contemplated the crime of femicide, prescribing: "Anyone who, knowingly, kills his ascendant, descendant, natural or adoptive, or who is or has been his spouse, his cohabitant, or who is maintaining or has maintained a similar relationship will be punished with a prison sentence of not less than fifteen years." However, the activist groups highlighted the lack of distinction between a homicidal subject, who was attributed with taking the life of his victim, if despite making such a difference (parricide or femicide), the criminal sanction was the same. In this regard, the non-correlation of the criminal sanction was criticized when the agent who committed the crime had the status of spouse or cohabitant, or whoever had been and out of revenge, mistrust, or any excuse ended up ending the life of his ex-partner.

Faced with such positions, the Congress of the Republic, on July 18, 2013, published Law No. 30068, a law that incorporated Article 108-A into the Criminal Code and amended Articles 107, 46-B and 46-C of the Criminal Code and Article 46 of the Criminal Enforcement Code, in order to prevent and suppress cases of femicide; however, this modification was not conclusive, since, on May 7, 2015, Law No. 30323 was issued, which incorporated Article 108 – B, a criminal offense that prescribes:

> Anyone who kills a woman because of her status as such, in any of the following contexts, shall be punished with imprisonment of not less than fifteen years:
>
> 1. Family violence;
>
> 2. Coercion, harassment or sexual harassment;
>
> 3. Abuse of power, trust or any other position or relationship that confers authority on the agent;
>
> 4. Any form of discrimination against women, regardless of whether there is or has been a conjugal or cohabitation relationship with the agent.
>
> The penalty of imprisonment shall be not less than twenty-five years, when any of the following aggravating circumstances occur:
>
> 1. If the victim was a minor;
>
> 2. If the victim was pregnant;
>
> 3. Whether the victim was under the care or responsibility of the agent;
>
> 4. If the victim was previously subjected to rape or acts of mutilation;
>
> 5. If at the time the crime was committed, the victim suffered from any type of disability;
>
> 6. If the victim was subjected for the purpose of human trafficking;
>
> 7. When any of the aggravating circumstances established in Article 108 have occurred.
>
> The penalty shall be life imprisonment when two or more aggravating circumstances are present. In the event that the agent has children with the victim, he will also be punished with the penalty of disqualification provided for in paragraph 5 of article 36."
>
> Finally, it is necessary to specify that the typified crime is configured when a person, regardless of sex or the affective or not bond with the victim, kills a woman, in her capacity as such, as long as this violent act occurs within the circumstances described in Article 108 of the Criminal Code as the result of family violence. employment, sexual or other form of discrimination.

It should be noted that, in the aforementioned legal text, most of its paragraphs mention a private femicide, but the commitment of the State and its lack of diligence in the investigation or the omission and negligence of the authorities responsible for the prevention and eradication of these acts of violence against women are not manifested.

However, the censure that can be made of the aforementioned norm is that, by prescribing "he who kills a woman because of her condition as such", the question arises: what does the legislator want to tell us? For this reason, when faced with the crime, legal operators cannot determine

precisely whether it is femicide or another criminal type, such as homicide, aggravated homicide or parricide.

2.2. Analysis of the Crime of Femicide and its evidentiary difficulty:

Since its incorporation into the Penal Code, there have been many interpretations of the aforementioned crime, in the first place, it was understood that this gender violence was basically referred to killing a woman, as mentioned in the same legal text, that is, one committed a homicide against a woman, and we were in the case of femicide, then it was interpreted that the legal text brought with it the phrase *"because of her condition as such"* that is, because of the fact that she is a woman, this brought with it several problems, such as numeral 1) of the legal text, which says "family violence", that is, in case there is family violence, it must be understood that there is such a contempt for this gender in the sense of killing her for being a woman, or rather it was a death as a result of the impact of violence on a family nucleus.

In other words, the victim in this crime is the woman and the agent subject of this crime is any person who causes the death of a woman because of her condition as such, consequently, the conjecture of paragraph 1 of the criminal type "family violence", and alluding to the provisions of the Law on Family Violence, which considers that this originates between "ascendants, descendants, collateral relatives up to the fourth degree of consanguinity and second degree of affinity", that is, the daughter, nephew, cousin, can kill her mother, aunt, etc., therefore, such a crime would be applicable; thus revealing that this assumption is incongruous both in the legal and social spheres.

In this sense, it should be mentioned that those who kill their partner or ex-partner do not do so because they are women, but because on the contrary they do not tolerate the fact that they are left or that they have been betrayed, this allows us to infer that not all deaths that occur to the detriment of women are due to contempt or aversion to their gender, rather, it would be due to other motives where the active agent causes the death of a woman and that could be subsumed in other criminal offenses such as murder or homicide by violent emotion,

Currently, the controversy related to the expression *"because of her condition as such"* continues, and this fundamentally in the assumptions where there is no context of domestic violence, and perhaps specifying a correct meaning would be that of "killing a woman for the fact of being one".

This means that, in a context where the death of a woman is caused, by the fact of being one, highlighting models, it can be mentioned that when in a certain public merit competition to obtain a job, it turns out to be achieved by a woman, generating discontent, in the agent that finally leads to produce the death of the woman; or also in the assumption that a man considers himself superior to a woman and she does not reciprocate his feelings, such a situation would force him to take her life.

However, it seems that uncertainty persists, as these deaths against women continue to increase, as reported in the newspapers or the news.

2.3 Jurisprudence and Jurisdictional Plenums related to the Crime of Femicide:

The Supreme Court of Justice of the Republic, due to the difficulty of interpreting the crime of femicide, issued plenary agreement 1-2016/CJ-116, in which the particularities of the crime of femicide have been established, as well as with respect to the subjective element: killing because of its condition as such in its numeral 49 refers:

> It is noted that, with the purpose of giving specificity to femicide, of highlighting this attitude of undervaluation, contempt, discrimination by men towards women, this criminal type has been created. The political-criminal function of the subjective elements of the type is to restrict its scope of application, not to expand it.

However, the aforementioned plenary agreement states in paragraph 51 below:

> The motive can only be deduced from other objective criteria that preceded or accompanied the femicidal act. In this sense, the situational context in which the crime occurs is the one that can shed light on the relations of power, hierarchy, subordination or the underestimating attitude of men towards women. The death of the woman because of her condition as such could be considered as contingent and precedent indications of the indicated fact. From the capacity for performance that the understanding of the context has, it can be concluded that this subjective element of the type is nothing more than a symbolic gesture of the legislator to determine that he is legislating on the raison d'être of femicide.

What has been agreed ends up being logical and rationally correct because, as Hruschka (2005) states, malice cannot be proven, but only imputed because no one can know exactly the internal processes of a person, rather, this imputation is made with external objective elements.

Likewise, Cassation Judgment No. 1368-2017-Huaura, in its tenth consideration, specifies: In this direction, the element of the criminal offense: "one who kills a woman because of her condition as such", must be explained in the context cited in article 108-B (first paragraph) of the Substantive Code, which would evidence general contexts in which gender clichés design the behavior that women should have to behave in accordance with their gender.

Resolution No. 43, of file 1641-2015-93-0501-JR-PE-01, issued by the Superior Court of Justice of Ayacucho, known in the media as the judgment of the Arlett Vargas Case, stated in its legal grounds 7.1 paragraph 2:

> It is necessary to consider that the crime of femicide is intentional, which is why femicide can be produced through direct intent or eventual intent. This being the case, for the typical behavior of the man to be considered femicide, it will not be enough that he has known the objective elements of the criminal type (the condition of woman, the harmful sufficiency of the conduct, the probability of the death of the woman, the generation of a risk to the protected legal right), but on the contrary that the woman has also been killed "because of her condition as such". For the concurrence of the criminal offense in question, to the knowledge of the objective elements of the criminal type, a motive is added: the active subject causes her death motivated by the fact of being a woman, consequently, femicide would become a crime of transcendent internal tendency (p.68-69).

Thus, the imprecision of the criminal law is noticed, which would contravene the principle of legality and would lead to different interpretations of the typical elements that make up the crime of femicide by the magistrates of the Judicial Branch.

2.4 Violation of the Principle of Legality with respect to the Crime of Femicide:

The defects of the legislative technique pointed out in relation to the legal type would imply the risk that article 108-B will not be fully complied with, because the procedural difficulties that arise to prove the subjective element of the type may lead to its inapplicability. This may be favored by

the tendency of certain magistrates not to impose the serious penalties provided by the legislator for femicide and to prefer to treat the case as a less serious figure of homicide.

The alternative is that in order to apply Article 108-B, it is considered sufficient that the agent is aware that his or her relations with the victim are necessarily conditioned by the "structural violence against women", inherent in our unjust and discriminatory social system imposed by men. This would result in an ideological mutilation of the legal type by eliminating one of its elements, which would entail a disregard of the *principle of legality* to the detriment of the accused.

Finally, it could also be argued that in the case one of the circumstances listed in the same provision occurs, it entails that the agent has killed the woman "because of her condition as such". In other words, it would be sufficient to prove, for example, that the perpetrator violently abused his spouse (art. 108-B.1) to admit that he committed femicide, but what type of abuse: exceptional or continuous?

In addition, it is worth asking whether the circumstance "abuse of power, trust or any other position or relationship that confers authority on the agent" constitutes a description or exemplification of "structural violence against women". This would mean that it would include the other circumstances mentioned in the same provision and that, therefore, they should be considered as examples of the domination of the victim by the murderer. This defect in legislative technique would reveal, on the one hand, the conceptual confusion of the drafters of the legal type and, on the other, the uselessness of having established as an element of the incrimination the circumstance of "because of his condition as such". If the objective was to simplify the understanding of the provision and, therefore, its effective application, the result has not been obtained. To defend the opposite implies excessively broadening and accentuating criminal repression.

CONCLUSIONS:

Based on the analysis carried out, we can conclude that:

1. The crime of femicide was contemplated for the first time by Law No. 29819, which amended article 107 of the Criminal Code, which prescribes the crime of parricide, and included as a third paragraph the following: "If the victim of the crime described is or has been the spouse or cohabitant of the perpetrator, or was linked to him by a similar relationship, the crime will be called femicide." Subsequently, through Law No. 30068, published on July 18, 2013, this paragraph was deleted and Article 108-B was incorporated into the Penal Code, which currently regulates the crime of femicide as an autonomous criminal offense and punishes anyone who kills a woman because of her status as such.

2. The crime of femicide, since its integration into the Substantive Code, has motivated many interpretations, since it was understood that this gender violence was basically referred to in killing a woman, as specified by the same legal norm, that is, one committed a homicide against a woman, and we were in the case of femicide. Then it was interpreted that the legal text brought with it the phrase *"because of her condition as such"*, which would imply, by the fact of being a woman, that brought with it several problems, such as numeral 1) of the legal text, which says "family violence", that is, in case there is family violence, it should be understood that there is such a contempt for this gender in the sense of killing her for being a woman, or it was rather a death as a result of the impact of violence on a family nucleus.

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3. In relation to the breakdown, it is revealed the need to consolidate the jurisprudential doctrine of the crime of femicide, compatible with ground number three, of article four hundred and twenty-nine, of the Code of Criminal Procedure, on the proper interpretation of criminal law, specifically, the assessment of the element "condition of such"; therefore, it would be violated, the principle of legality.

4. The defects of the legislative technique in the giving of the criminal type provided for in Article 108-B, would imply that it is not fully complied with, since it would give rise to the generation of intra-process obstacles, at the time when it is a matter of proving the subjective element. It is thus revealed that, as Article 108-B is drafted, the term "by virtue of its condition as such" would transgress the principle of legality, in that it would mutilate the legal text and consequently one of its normative elements. Even more so, if one takes into account that criminal law is not the appropriate field to elucidate conflicts of an ideological, political, moral or intellectual order. In this sense, the training and awareness of judges, prosecutors, police and lawyers are decisive factors.

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