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### ABSTRACT

The article addresses the theme of rape culture from a socio-historical, legal, and human perspective, in the Brazilian context at the beginning of the twenty-first century. It analyzes the historical and social process of the formation of this culture, and its current legal reflexes in Brazil having as references

the recognition and institution of Human Rights, either by international conventions or by the current Federal Constitution. The objective is to list how national legislation typifies the practice of rape. The research problem is why the practices of rape constitute an act of violence, an attack on the sexual dignity of the victims. Rape is configured as a practice of violence, defined as an action that attacks the physical and psychological integrity of the person, the violation of the human dignity of someone (CHAUÍ, 1997) and the sexual dignity of the individual (BRASIL, 2013; 1996). To carry out the research and the textual elaboration, the deductive approach method was followed, the methods of documentary and bibliographic procedure, configuring an activity of a basic nature and data treatment qualitatively, with explanatory purposes. The phenomenon of rape, manifested in a culture, is a violent practice that attacks human dignity, and sexual dignity. Human practice opposes the current legal order, as well as the declarations coming from the United Nations, which recognize and seek to protect and guarantee the physical and mental integrity of all individuals due to the defense of human dignity.

**Keywords:** The crime of rape, Human dignity, Sexual dignity, Human rights, Violence.

## 1 INTRODUCTION

In contemporary society there is still the presence of numerous cases of sexual violence and rape crimes, mainly committed against women. According to Cuche (2002), one should seek investigation of our behaviors, because they do not come only from human naturalness, but also come from the culture in force in today's societies.

Rape culture is characterized as one that has been present in societies for a long time, causing women to be seen as weaker poles than men, with "less human capacity" and, for such reasons, must follow the wills, and desires of the male sex, that is, the one that oppresses them. Thus, the existence of the crime of rape is linked to the idea that it constitutes an act of male right and power.

In the crimes of rape, there is an immense relativization of the violence suffered because often the victims are blamed for "provoking" their abusers, wearing short clothes, or their stay in dark places,

alone. This victim-blaming behavior is unacceptable, after all, such a crime should be seen as a serious crime socially and, therefore, in any other crime of this typology.

It can be affirmed that the theme under analysis has social and scientific relevance because it reflects on behaviors arising from a long historical process of humanity. The behaviors rooted in the social body exert great influences in the creation of new rights, possible for the future because culture is a prominent element when it comes to the application of new rights considered habitual in everyday life. Thus, the culture of rape still exerts influence in the present day by the recurrent cases, notified or not.

First, an analysis of rape culture is carried out, in a historical, social context. Subsequently, this conduct is analyzed from the legal perspective, in the current molds, as well as an analysis of the legislation consistent with the theme established throughout the evolution of the law. In the third part of the work, the theme of the article is approached, having as a conceptual reference the human rights instituted and consolidated in the second half of the twentieth century, in international conventions and national legislation. Both topics were developed through bibliographic and documentary research, following the deductive approach to the theme.

## **2 RAPE CULTURE: A HISTORICAL AND SOCIAL ANALYSIS**

As part of the historical course of humanity, <sup>1</sup>gender inequality was present, generated impacts in several aspects, and was analyzed by several philosophers already in antiquity, and remaining present in the analyses of various thinkers. In this sense, it is characterized in the work of Rousseau (2008), the distinction between the spaces destined for each genre. Thus, the public space would be reserved for men and the private, that is, the home (*oikos*), destined for women, configuring the clearest division structured in the broad distribution of tasks among the members of society.

According to Soares (1999, p. 125), the concept of violence against women can be characterized as "[...] a masculine violence that is exercised against women by the need of men to control them and to exercise their power over them." In this way, these forms of violence are affected mainly as a result of the patriarchal system that still exists in the contemporary context.

During the legal period of slavery in Brazil, sexual abuse was as frequent as the physical punishments with which slaves were punished daily. The property situation was evidenced in the domination of the master over his slaves, demonstrating the superiority and total control over the body

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<sup>1</sup> It assumes the theory that the inequalities of gender, ethnicity, and economic, among others, existing among humans are not something natural nor present in the entire history of humanity, as an inexorable process and as a result of a mark of the human condition. Authors such as Eisler (2008), Franco (2001), and Morin (2013) defend the thesis that the existing inequalities between women and men are cultural constructs, engendered in certain periods of humanity.

of the black woman, not only in the services performed but also in the sexual control of the same, writes Davis (2016). Sexual coercion

[...] it was an essential dimension of the social relations between the master and the slave. In other words, the right claimed by the owners and their agents over the slaves' bodies was a direct expression of their supposed property right over black people as a whole. The license to rape emanated from cruel economic domination and was facilitated by it, as a grotesque mark of slavery. (DAVIS, 2016, p.12).

In addition to the slavery regime, patriarchy exerted great influence on social life and laws until the new Civil Code of 2002 came into force. Thus, at that time, before marriage, the woman was the property of her father, and after the marriage was set up, the ownership over her was passed on to her husband. Thus, in every aspect of her life, she needed the consent of approval from a male figure.

Thus, this social structure generated consequences regarding the participation of women in jobs outside the home, as well as in the value attributed to their work, impacting the receipt of lower wages compared to men, even performing the same function competently.

In this sense, equality between men and women presents a much more favorable stage today than that found a few years ago, and the principle of equality<sup>2</sup> is guaranteed in the Brazilian Magna Carta (BRAZIL, 1988) Such advances were only achieved with the feminist movements that gained strength over the years and resisted in the face of the harsh criticism they received. Under this bias, it is believed that the struggle of women for more space in society began with bourgeois women, who aimed at greater access to education since it was a benefit that only the male sex could enjoy, argues Duarte (2003).

The crime of rape should not be seen only as disrespect for human dignity and neglect of fundamental rights. Rape, under historical and social analysis, should be seen primarily as a man's way of demonstrating his dominance over the female sex.

The effective social repression of female pleasure also contributed to the rise of rape culture. This repression favored the thought that women's pleasure was something immoral, perverse, and impure. Only the man would have the right to enjoy pleasure through the female body, leaving evidence that the premise existing at the time was that the woman's body had only two functions: to serve as an object of pleasure and to generate offspring.

The men of the patriarchal world must be sexually free – and even libertine – because of their position of superiority and independence. They must therefore be rigid, manly, and domineering. In turn, women are left with the need to protect their sexual morality, acting in an effectively modest way. Their dress, their dialogues, and their behavior must be clothed

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<sup>2</sup> The Principle of Equality is found in Article 5, *caput*, of the Federal Constitution: "All are equal before the law without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security, and property [...]." (BRAZIL, 1988).

with the caution necessary to give rise to respect for the social body. Your body is not considered your property, but the true object of society's control. (LIMA, 2012, p. 09).

A part of society still tends to try to find clues that blame the rape victim herself, putting excuses on the clothes the woman was wearing, the expression she made, or even that she was wanting to be the victim of a rape.

Rape is justified in different ways in different cultures. Often, the argument of "consent" is used: raped women consented to the attack or asked for it, by wearing short, collared clothes, perfume and flashy makeup. It is ignored, with such an argument, that women in the habit of a nun or burqa are also raped. The idea that the "woman wanted" allows us to trivialize rape, to relativize it, in many cases, and even to find it exciting. (VILHENA; ZAMORA, 2004, p. 3).

It is observed that there is a rape culture of great relevance rooted in the social body. Allied with the sexist thoughts that have accompanied individuals for a long time, it is seen that many still try to normalize this behavior. Therefore, the deconstruction of this culture is too necessary for the construction of a truly egalitarian and harmonious society.

### **3 THE TYPIIFICATION OF THE CRIME OF RAPE IN CURRENT BRAZILIAN LEGISLATION**

As provided for mostly in the doctrine and according to Busato (2020), the meaning of Criminal Law is in guaranteeing and preserving individual and collective legal assets. This norm defines legal well as something liquid and not specified, because, while the initial criminal theory treated the legal good as something linked to the material sense – life, property – the new Criminal Law, being considered modern, has, in addition to this material sphere, also understand the most complex relations, such as the environment, legal relations and the capital market or popular economies (BUSATO, 2020).

According to the thought of Fayet (2011), the purpose of the current Criminal Law is the protection of socially relevant legal assets. This represents, in the public sphere of criminal law, a satisfactory factor of human needs to the detriment of harmonious and peaceful coexistence among the citizens who are located in the social body.

The crime of rape is related to the violation of several conjugated legal assets, which, in their infractions, impute normative violation. According to Bitencourt (2011), the most important legal assets protected in sexual crimes are individual and sexual freedom, sexual dignity, health and life. To this end, it is understood the need to understand the Brazilian legislation about the above.

The norms of the Brazilian legal system, throughout its history, have undergone numerous changes, as social thoughts and behaviors have changed in the temporal course. The new laws were

and are adapted according to the changing need to accompany the way to better regulate conviviality in society.

It is observed the retraction of the female sex, in several Brazilian legislations that succeeded each other in time, thus treating this class as inferior and, even, submissive to the opposite sex, as provided for in the Civil Code of 1916, in article 242.

Art. 242 - A woman may not, without the consent of her husband:  
I. To perform acts that he could not without the consent of the woman  
II. To dispose of, or encumber of real lien, the real estate of its private domain, whatever the regime of the assets.  
III. To dispose of their real rights in the property of others.  
[...] (BRAZIL, 1916).

Analogous to this, rape is expressly correlated with the submission of the female gender. Even in the case of a crime, without a definition of the passive agent, since it can be any individual, however, in this scenario, mostly, the victims of rape are women. (OLIVE TREE; RESENDE, 2020).

In current Brazilian legislation, rape or sexual violence are considered complex crimes, because there are pluralities of legal assets that suffer violations. Thus, Decree-Law No. 2,848, of December 7, 1940, provides in its title VI – crimes against sexual Dignity, chapter I – crimes against sexual freedom, article 213, brings the definition of rape as "[...] to compel someone, utilizing violence or grave threat, to have carnal conjunction or to practice or allow another libidinous act to be performed with him." (BRAZIL, 1940).

Law No. 12,015 of 2009 enshrined this definition for the crime of rape. Thus, the crime is constituted not only in the embarrassment through violence or the serious threat to the carnal practice, but also makes explicit the act of embarrassing, the abuser towards the victim, in the idea of practicing libidinous acts with her (BRASIL, 2009). This rule repealed Article 214 of the Penal Code, which regulated this term as a crime of indecent assault (BRASIL, 1940).

According to the Penal Code, the appropriate sanction for such an offense is included in the imprisonment of the defendant found guilty, that is, his deprivation of liberty for a period to be determined by the circumstances according to the criminal act if the criminal act occurred. This temporal variation for the execution of a sentence can vary from 6 to 30 years (BRASIL, 1940).

In the same line of reasoning, the aforementioned Code continues, the aggravating and mitigating circumstances of punishment that infer directly in the decision issued at the end of the final judgment, these being provided for as a result of articles 61 to 66 of the current Penal Code.

According to Estefam (2016), the aforementioned Code stipulates punitive gradations before the vehemence of the intent to the protected legal good and, in the case of the crime of rape, this premise could not be different. Moreover, the same author argues, the nuclear conduct contained in

the act of rape is associated with the nuclear behaviors of compelling, forcing, imposing, and compelling, making the victim perform or submit to the aggressor against his own will. To this end, as the author states, the dissent from the taxable person must thus be implicit in the relationship.

Moreover, to typify, scrutinize, delimit, and sanction to address the topic, Law No. 13,718 of 2018 enters into force, stipulating in its article *First Caput*:

[...] This Law typifies the crimes of sexual harassment and disclosure of a rape scene, makes public unconditional the nature of the criminal prosecution of crimes against sexual freedom and sexual crimes against the vulnerable, establishes causes of the increase of penalty for these crimes, and defines as causes of the increase of penalty the collective rape and corrective rape. (BRAZIL, 2018).

In the meantime, the highest juridical principle applies, the defense of the dignity of the human person. Thus, in the same perspective, sexual dignity is understood in the conformation of human sensuality, without hindrances or controversies before others, provided that this occurs without any degree of violence or related to any type, individual or third, of threat aimed at sexual violence.

Given the existing reality<sup>3</sup>, it is necessary for a public policy that provides care to victims of sexual violence to minimize the future consequences derived from the violation suffered. In this sense, Law No. 12,845 of 2013 establishes that hospital entities linked to the Unified Health System (SUS) perform emergency services to individuals injured by sexual violence, without the need to prove the abuse suffered. Here the word of the victim is a sufficient factor for their priority and free care (BRASIL, 1990).

In this way, it is observed the culture of rape present in the contemporary social reality, because the legislation, here can be understood as Law, is nothing more than a cultural reflection of the social reality, for such, if there is a crime, there will be a norm that disciplines it. Thus, as Durkheim uttered " [...] these practices are nothing but consolidated social life" (DURKHEIM, 1983, p. 65). But not eternal and not unquestionable.

#### **4 HUMAN RIGHTS AND THEIR IMPACT ON RAPE CULTURE**

The world-historical line pointed to events that made possible the evolution of social, cultural, and economic relations so that they culminated in the generation of civil rights. Thus, as the main focus of this title, Human Rights are the collaboration of great historical facts in which humanity fought for its rights and, above all, for its dignity. Three main historical moments are pointed out to prove the support of the process of construction of human rights, which are: the English Revolution, the Independence of the Thirteen American Colonies, which culminated in the elaboration of the

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<sup>3</sup> Data on the situation of violence in Brazil, including those against women, are released annually by the Brazilian Forum on Public Security, the Brazilian Yearbook of Public Security.

Constitution of the United States, and the French Revolution, responsible for the Declaration of the Rights of Man and of the Citizen, of 1789, and for the origin of the Constitution of France (ARAKAKI; VIERO, 2018, p. 23).

These historical and political factors were essential in the elaboration of the Universal Declaration of Human Rights, through the Charter of the United Nations, with an international reference "[...] intended to provide the legal basis for the permanent joint action of States in defense of world peace" (DALLARI, 1993, p. 178), culminating in the current Universal Declaration of Human Rights in 1948, after the Second World War, due to the barbarities that occurred during Nazism (ARAKAKI; VIERO, 2018, p. 24).

In the understanding of Arakaki and Viero,

[...] Human rights are rights closely related to the existence of humanity, that is, they are rights inherent to the person, a priori rights, having their validity independent of the experience of individuals or their evaluative consciousness. [...] In this sense, we have as one of the most important positive documents for the protection of humanity, under the inspiration of the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), of 1948. (2018, p. 204).

It thus becomes evident that the principle of dignity is a key point of the Declaration, as it aims to ensure the inherent and inalienable rights of individuals and humanity. It stands out from the Universal Declaration of Human Rights:

Considering that the peoples of the United Nations have reaffirmed, in the Charter of the UN, their faith in fundamental human rights, in the dignity and worth of the human being, and the equality of rights between men and women, and that they have decided to promote social progress and better living conditions in broader freedom, (UN, 1948, p. 3).

Because of the above, any form of violation of human rights in legal matters is repudiated. However, it is well known that rape culture is a violation of human rights and that it persists in contemporary times. To this end, Coletivo Não me Kahlo (2016, p.165) affirms that rape culture is a culture of violence against women. Thus, it is concluded that every form of violence against women violates the principle of the dignity of the human person and, therefore, the human rights of women.

Violence is a relative human phenomenon for which there is no unity of understanding, given the cultural and historical singularities. However, it is assumed the understanding of violence produced by Chauí (1997, p. 336-337), which defines it

[...] as the exercise of physical force and psychic coercion to force someone to do something contrary to himself, contrary to his interests and desires, contrary to his body and his conscience, causing him profound and irreparable damage such as death, madness, self-aggression, or aggression to others. [...]. Violence is the violation of one's physical and mental integrity, of one's human dignity. That is why murder, torture, injustice, lying, rape, slander, bad faith, and theft are considered violence, immorality, and crime.

Indeed, Article 1 of the Universal Declaration of Human Rights states that "All people are born free and equal in dignity and rights. They are endowed with reason and conscience and must act towards one another in a spirit of fraternity" (UN, 1948, p. 4), making explicit the recognition and institution of the right to equality among all people.

According to Piovesan (2018, p. 387), "[...] the Universal Declaration and the Covenants invoke the first phase of the protection of human rights, characterized by the emphasis on general, generic and abstract protection, under the motto of formal equality and the prohibition of discrimination." It becomes ineffective only on the abstract level, thus hindering the search for justice and dignity for women. The woman, when violated, turns to the State in search of refuge and is again violated by the lack of applicability of her rights when it is not adequately attended to, or when the public power does not perfectibility this human right.

Faced with such a situation, is clear the need to realize the rights established in the Declaration of 1948. Piovesan (2018, p. 387), elucidates the idea of the second phase of protection, which occurs through the "[...] specification of the subject of law, which will be marked by specific and special protection, based on treaties that aim to eliminate all forms of discrimination that disproportionately affect certain groups."

Concerning the second phase of protection, as an important step in the recognition of the appreciation of the dignity of women, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was created in 1979<sup>4</sup>. In force since 1981, it is the first international treaty that broadly presents women's rights. In the first place, the affirmation of the dignity of women and equality of sex is highlighted, according to the excerpt from the full text: "Whereas the Charter of the United Nations reaffirms faith in the fundamental rights of man, in the dignity and worth of the person and the equal rights of man and woman" (UN, 1979, p.19). It also raises important issues such as the social participation of women due to the maxim of gender inequality, a fact that is often a mitigating factor for the maintenance of rape culture, it is stated in "[...] that discrimination against women [...] hinders the participation of women, under the same conditions as men, in the political, social, economic and cultural life of their country." (UN, 1979, p.19).

The text of this International Organization proposes that "[...] that to achieve full equality between man and woman it is necessary to modify the traditional role of both men and women in society and the family" (UN, 1979, p.20). In this context, it is clear that culture is sustained by traditions, beliefs, and theories, perpetuated throughout history. Thus, from the reduction of gender inequalities, men and women will take different roles in society and the family, aiming at the maintenance of human dignity and the principle of equality.

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<sup>4</sup> Acronym in the English language.

About the terms agreed, it is important to clarify that the Convention is inspired by the Convention International on the Elimination of All Forms of Racial Discrimination (UN, 1965), in particular, its article 1, which gives meaning to the expression of "[...] violence against women" and article 4, paragraph 1, addresses the possibility of affirmative action by States, as special and temporary measures aimed at accelerating de facto equality between men and women, in which it combines the racial perspective with that of gender, argues Piovesan (2018, p. 389).

In this context, the prediction of affirmative action for women is based on "[...] compensatory measures to remedy the historical disadvantages, alleviating the conditions resulting from a discriminatory past," understands Piovesan (2018, p. 436), referring, once again, to the patriarchy that directly influenced the role of women in society over the centuries.

Subsequently, the Declaration on the Elimination of Violence Against Women was proclaimed by the United Nations General Assembly, in 1979. The objective is to combat violence against women aiming at the conquest and enjoyment, with full enjoyment, of the rights and principles.

It is clear that this Declaration effectively highlights the problem of violence against women. Thus, it is clear in her text that gender inequality has manifested itself historically, subjecting women to the situation of inferiority and, therefore, subordination to men.

*Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to the domination and discrimination of women by men and impeded the full progress of women, and that violence against women constitutes one of the fundamental social mechanisms through which women are forced to assume a position of subordination to men, (UN, 1993, p. 1).*

This Declaration makes clear the desire for the achievement of equality, which is expressed socially, economically and culturally of women in society. Article 1, in particular, introduces the key idea of the Declaration, which typifies the concept of "violence against women" in the following terms:

*[...] means any act of gender-based violence which results, or may result, in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, which occurs either in public or private life. (UN, 1993, p. 2).*

For its part, Article 4 of the Declaration on the Elimination of Violence Against Women states that "States must condemn and eliminate violence against women, and may not invoke customs, traditions or issues of a religious nature to remove their obligations concerning the elimination of violence" (UN, 1993, p. 3). In this context, it goes against the violence of rape, since rape culture is sustained by justifications concerning customs, traditions or religious issues.

Given the importance of the above-mentioned international treaties, it is necessary to present the Convention of Belém do Pará of 1996, within the scope of the American Continent. This Convention equips the inter-American system to resolve the impasse of violence against women in the

Americas. It reiterates, once again, the international treaties that deal with human rights and adopt mechanisms to prevent, punish and eradicate violence against women, in addition to fighting for the maintenance of the dignity and equality of women (BRASIL, 1996).

Finally, it is inferred that the Universal Declaration of Human Rights enabled the creation and implementation of treaties that protect women's rights. It is well known that the principle most guarded by the international order is that of the dignity of the human person and that it must be conquered daily and, therefore, every form of violence, oppression and omission is repudiated. In this sense, it is necessary to remember that it is not because rape is a crime and a form of violence against women, contrary to the precepts of human rights, that rape culture ceases to exist.

## 5 CONCLUSION

In this article, it was evidenced, through the historical and bibliographical analysis, the main aspects of the crime of rape and the whole culture behind this conduct, of relevant both for the personal understanding of the subject, and for the professional vision of a qualified jurist, so that the best means are adopted to mitigate the occurrence of rapes in the social body.

It can be affirmed that the historical analysis during the evolution of society brings benefits for the better understanding of the continuity of this barbaric crime, which brings immeasurable damage to the lives of the victims. Thus, concerning the procedures adopted to better judge this type of act, it is asserted that knowing in the background the psychic reason and the feelings that motivated such a crime makes it possible to judge the judicial processes more efficiently and beneficially to citizens. Thus, such offenses would not occur again.

In this sense, it is emphasized that the belief that the female sex was inferior happened throughout the evolution of society and also of the Law, given that social behaviors are great creators of legislation, as seen in numerous summaries and jurisprudence. In this way, it is undeniable that until the present day, the impacts of culture transmitted from generation to generation are noticed. Therefore, reflection on this fact is necessary to mitigate its occurrences and to break the premise that women are in a position below the masculine.

Within the normative area, there is the presence of several norms that legislate to assist and provide services to the victims of this crime, or rather, of this socially imposed culture. Thus, it is perceived that even in the extensive and punitive normative existence, there are still records of multiple cases day by day, which makes us reflect on the extent to which the law imposes the idea of "wrong" or gives the feeling of social repudiation. It is notorious for the need for change of thought in society, although we already have great advances in this area today, there is still much to do. The law is nothing

more than a social reflection and, for this, society must change to generate reflective changes in the Law.

To conclude, it is evident that the Universal Declaration of Human Rights is a document that enables the guarantee of fundamental rights and principles in the international order. To this end, the most relevant point concerns the principle of human dignity, which is violated when it comes to the culture of rape and, in general, the culture of violence against women. For this study, it is noted that, from the Human Rights, rights were conquered, in the background, for portions of society that, during the centuries, suffered discrimination, inequality and omission, for example, is the case of women.

Thus, as seen, treaties and conventions, of an international and national order, were standardized for the protection of women's rights and principles. By themselves, such documents have great potential to eradicate violence against women and, in particular, rape culture. However, it is well known that we live in a patriarchal society that rejects a change of thought that places women in a place of equality before men. Thus, these documents do not gain the importance they have in front of society, hindering the struggle for justice and equality of women. However, it takes a greater and mutual force of all citizens for the aforementioned documents to gain their due value and for the patriarchal mentality to be mitigated.

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