

Vulnerability: Implications for Medical Expertise and Criminal Justice

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ABSTRACT

This article discusses the extension of the term "vulnerability" used in article 217-A of the Brazilian Penal Code, as well as its understanding by the Justice, in order to better fit the penal type. Therefore, based on Skinner's method of operationalizing psychological terms, a new concept was proposed that would allow the formulation of a new expression (term) that better represents what is exposed in that typified crime, in addition to resulting in an adequate differentiation. In crimes of violation (213 CPB) and violation of violation (215 CPB). It was a qualitative literary review research by means of deduction and which was justified by the relevance and topicality of the theme. The main objective was to demonstrate the extension of the term "vulnerability" for purposes of operational analysis (conceptualization).

Keywords: Vulnerability, Operational analysis, Sexual crimes, Justice

INTRODUCTION

In view of the growing number of sexual crimes against sexual dignity and freedom, there is also a greater demand for research on certain terms used by legal practitioners, especially with regard to the medical expert branch, since medical experts will be those professionals with the capacity to carry out the examination of the body of crime and who, through their reports, will subsidize the Court with material data so that each case is judged.

In this sense, and taking into account the "João de Deus case"¹¹, the term "vulnerability" seen in article 217-A of the Brazilian Penal Code [1] proved to be confused as to the extent of what it intends to express and, therefore, it generated the need for its exploration, especially through Behavior Analysis, since it involves the occurrence of behaviors that will put a victim under such a condition of fragility.

The term "vulnerability" is used in the wording of article 217-A without expressing its legal significance. It is necessary to ask, therefore, who would be the vulnerable individuals and based on objective criteria they should be considered as such. Therefore, the objective of this work is to carry out a revision of the word with a view to its legal application during the medical-legal expert verifications. What has been noted, from the literary reviews carried out, is that the concept of "vulnerability" is more suited to social plans and for the purposes of consumer protection and the

attainment of benefits (high- cost drugs and the achievement of continuous provision benefits – BPC LOAS – for example) than the physical and / or mental vulnerability pointed out by the criminal legal device under study.

The main theoretical reference was Skinner [2], being the precursor of Radical Behaviorism who, through applied science, demonstrated the importance of this analytical method. Other literatures were used, focusing on legal dictates about sexual crimes.

DEVELOPMENT

Article 217-A of the Brazilian Penal Code – CPB [1], in the wording included by Law 12,015 / 2009, typifies the crime of Rape of the vulnerable through the following dictates:

Rape of the vulnerable (Included by Law No. 12,015, 2009) Art. 217-A. Having a carnal conjunction or performing another libidinous act under the age of 14 (fourteen) years old: (Included by Law No. 12,015, 2009) Penalty - imprisonment, from 8 (eight) to 15 (fifteen) years. (Included by Law No. 12,015, 2009).

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¹¹It is worth mentioning that this is a public domain case widely publicized by the media and, therefore, dispenses with the criterion of secrecy.

§1 The same penalty applies to anyone who practices the actions described in the caput with someone who, due to mental illness or disability, does not have the necessary discernment to perform the act, or who, for any other reason, cannot offer resistance. (Included by Law No. 12,015, 2009)

§2 (VETOED) (Included by Law No. 12,015, 2009)

§3 if the conduct results in a bodily injury of a serious nature: (Included by Law No. 12,015, 2009). Penalty - imprisonment, from 10 (ten) to 20 (twenty) years. (Included by Law No. 12,015, 2009)

§4 If the conduct results in death: (Included by Law No. 12,015, 2009) Penalty - imprisonment, from 12 (twelve) to 30 (thirty) years. (Included by Law No. 12,015, 2009)

§5 The penalties provided for in the caput and in §§ 1, 3 and 4 of these articles apply regardless of the victim's consent or the fact that she has had sexual relations prior to the crime. (Included by Law No. 13,718, of 2018) (Brazil, 1940)

Thus, the word “vulnerability” is restricted to children under 14 years of age, in addition to those people who, due to mental illness or disability, are alienated and, therefore, unable to discriminate between right and wrong and, by extension, of self-determination in relation to sexual behaviors that may be practiced with them. Another point made by the criminal type exposed is that the consent of the victim and / or the condition that she has had sexual intercourse prior to the fact would not relieve the perpetrator of the responsibility for the criminal behavior. However, even in spite of all the orientations of the article under study, the Criminal Justice is faced with different conditions in which there is a need to differentiate between what is and is not under the semantic shadow of that word. In this sense, we can exemplify with situations in which people psychically weakened by “non-mental” illnesses (cancer, for example), marital conditions, social events and / or financial shortages – without affecting their ability to consent or to discern and / or self-determination – they find themselves sexually approached by people who make use of such fragility to obtain behaviors capable of leading to the satisfaction of their lustfulness. Are these also situations in which the vulnerability was prevailing and allowing the inability to consent? If so, should what is now called Sexual Rape through Fraud² be interpreted as Rape of the Vulnerable? Or even more, would many of those

² Sexual rape through fraud (Wording given by Law No. 12,015, 2009) Art. 215. Having a carnal conjunction or performing another libidinous act with someone, by means of fraud or other means that prevent or hinder the victim's free expression of will: (Wording given by Law No. 12,015, 2009) Art.

Penalty - imprisonment, from 2 (two) to 6 (six) years. (Wording given by Law No. 12,015, of 2009) Single paragraph. If the crime is committed for the purpose of obtaining an economic advantage, a fine is also imposed. (Wording given by Law No. 12,015, 2009) (Brazil, 1940)

crimes framed in article 213³ CPB [1] come to be seen equally as Rape of the vulnerable? The repercussion of this could be seen immediately with a sentence whose dosimetry of the penalty would be relevantly influenced by the consequent “interpretative migration” of the penal type. In view of the above, the term “vulnerability” needs to be better clarified so that injustices are not committed with victims or aggressors. Let us begin, therefore, with its definitions according to some doctrines. According to the informal electronic dictionary [3], Vulnerability is the characteristic of who or what is vulnerable, that is, fragile, delicate and weak. Vulnerability is a peculiarity that indicates a state of weakness, which can refer both to people's behavior, such as objects, situations, ideas and so on. (www.significados.com.br/vulnerabilidade/, with emphasis by the author).

That is, the behavioral weakness could be included there and, therefore, being able to change the perception of reality and, as such, it can function as an establishing operation (reason) of the behavior-response that may occur. However, what would be the extent of this “weakening” condition? According to Moraes & Monteiro [4]. In view of this scenario, Article 8 of the Universal Declaration on Bioethics and Human Rights (DUBDH) provides: Human vulnerability must be taken into account in the application and advancement of scientific knowledge, medical practices and associated technologies. Individuals and groups of specific vulnerability must be protected and the individual integrity of each individual must be respected¹.

“Vulnerability” is a Latin term that derives from *vulnerabilis*, which means “something that causes injury”². It is, in this context, the susceptibility to be injured, injured. In the philosophical vocabulary it is a human condition inherent to its existence in its finitude and fragility, in such a way that it cannot be overcome or eliminated. When recognizing themselves as vulnerable, people understand the vulnerability of the other, as well as the need for care, responsibility and solidarity, and not the exploitation of this condition by others³. (Moraes & Monteiro, 2017).

³Rape

Art. 213. To embarrass someone, through violence or a serious threat, to have carnal conjunction or to practice or allow another libidinous act to be practiced with it:

Penalty - imprisonment, from 6 (six) to 10 (ten) years. (Wording given by Law No. 12,015, of 2009)

§ 1 If the conduct results in a serious bodily injury or if the victim is under 18 (eighteen) or over 14 (fourteen) years old: (Included by Law No. 12,015, 2009)

Penalty - imprisonment, from 8 (eight) to 12 (twelve) years. (Included by Law No. 12,015, 2009)

§ 2 If the conduct results in death: (Included by Law No. 12,015, 2009)

Penalty - imprisonment, from 12 (twelve) to 30 (thirty) years (Included by Law No. 12,015, 2009) (Brazil, 1940)

Perhaps this definition should be the one that best supported the operational analysis of the term “vulnerability”. However, by linking it to “susceptibility to be injured or injured” and, at the same time, with a situation of fragility, it may also generate misunderstandings when used in the field of crimes against sexual dignity and dignity.

Injury would, in the general understanding, be more affected to the physical plane than to the injury of the condition of consenting and it is this nuclear verb (consenting) that would be generating conflicts, since for the legal aspect – check §4 of article 217-A CPB [1] – consent or not would be a key element in the elucidation of this debate.

Carmo & Guizardi [5] greatly aggravate this understanding by informing us that, the concept of vulnerability denotes the multidetermination of its genesis, not strictly conditioned to the absence or precarious access to income, but also linked to the weaknesses of affective-relational bonds and unequal access to public goods and services⁹. (Carmo & Guizardi, 2018).

When referring to causal multidetermination, these authors let us know that “vulnerability” is not strictly a psychological term, in the way that several terms were defined and studied by Skinner [2] and translated by Hélio José Guilhardi and Patricia Piazzon Queiroz in 1961, but rather generic and applicable to the most diverse dimensions of human life. The “affective-relational” dimension indicated by the authors would be just one of them.

With this, it would be opportune the operational analysis of the term so that a meaning / concept pertinent to the world of laws – especially at the penal level – would become clearer and, consequently, be better elaborated and, thus, generate less interference when the procedural analyzes and the delivery of sentences.

These same authors [5] come to our aid when they teach that, conformed in the discourse matrix of Bioethics, the concept of vulnerability as a condition inherent to human beings³⁴, naturally in need of help³⁹, refers to the state of being / being in danger or exposed to potential damage due to a fragility linked to individual existence, riddled with contradictions^{34, 40}. (Carmo & Guizardi, 2018).

In this tuning fork, “being or being in danger or exposed to potential damage resulting from a fragility” would be more understandable, although the term “vulnerability” is still kept in a very broad condition from the point of view of its meaning.

According to Skinner [2], We are taught that a concept must be defined “in terms of” certain operations; what propositions should “be based on” operations; that a term only means something when there are “concrete criteria for

its applicability”; that operationalism consists of “referring any concept by its definition to ... concrete operations ...”; and so on. (Skinner, 1945).

According to Adorno [6], The term vulnerability carries with it the idea of trying to understand first a whole set of elements that characterize the living conditions and the possibilities of a person or a group - the network of available services, such as schools and health units, health programs. culture, leisure and professional training, that is, the actions of the State that promote justice and citizenship among them – and assess the extent to which these people have access to all of this. It represents, therefore, not only a new way of expressing an old problem, but mainly a search to end old prejudices and allow the construction of a new mentality, a new way of perceiving and treating social groups and assessing their living conditions, social protection and security. It is a search for change in the way of looking at the target populations of social programs (Adorno, 2001, p.12).

Thus, it is noted, through the reviews carried out, the real need to operationalize the term so that misinterpretations will not be committed, especially because the adoption of a misconception allows the alteration of a meaning capable of compromising the application of the law. In cases where there is legal involvement and that refer to the analysis of a certain article, specifically from our penal system.

Let us begin, with regard to the operationalization of the term, by the concept of what may be the “operationalization” of a term. According to Bachrach [7], “it is a rule of clarity”. Therefore, every concept must be clear so that mistakes are not made from failures in the definition of a term.

Through all of the foregoing, we return to the point where the use of a term should not be generic when used specifically for a particular purpose, especially when such an end refers to the condition of “psychological term” which, if misused, can cause distortions judgment at the legal level.

“Vulnerability” must, therefore, be seen as a significant term of an establishing operation, capable of generating responses in the individual located in the vulnerable condition referred to in article 217-A CPB [1] and, more punctually, with full possibility of be extended to other articles in the penal code referring to the commission of crimes against sexual dignity and freedom.

Skinner [2] makes clear to us the view that a term is a construct that points to the meaning of a certain behavior and that such an “operation” needs to be justified from an event. When we say “house”, for example, we are using a construct (name given to the thing) that has as its founding event the building which, in turn, is another construct that does not necessarily imply a “home”. This confusion is what we want to avoid when a certain term is used and it

can have serious consequences, as possible when it comes to judging sexual crimes involving vulnerable people.

In the legal plan under study, “vulnerability” could take on several meanings and reframings, sometimes quite far from what is attempted to be expressed. It is precisely the “correct sense” of the term that which is attempted to be achieved when talking about “vulnerability” in the context of Article 217-A of the Penal Code [1].

Apparently from the reviews undertaken, behaviors (verbal or not) can occur as responses to private stimuli that are not always properly translated publicly through verbal behaviors [2].

For example, in the specific case in which the medium João de Deus (Abadiânia-Go) is denounced by more than three hundred women [8], which in most cases are exposed in the media, are people who, saying they are weakened by some condition (spiritual, illness, social conflicts, etc.), reported the inability to react – lack of condition to emit behavior of refusal – in face of the acts he allegedly performed in the sexual sphere.

Without entering into the merit of the accused's guilt or innocence, such conflicts experienced by each of those women were hitherto restricted to the level of private stimuli⁴ and, with the demands that arose, were brought up and expressed in terms of verbal behaviors. What was then a private event became public.

The big question to be asked, legally, is whether the alleged weaknesses should be seen as vulnerabilities or not, since this would completely change the magistrate's interpretation of the criminal type in which each case would fit.

Are such weaknesses matched in meaning to vulnerability? Wouldn't they? If so, would they place all complaints at the same level of interpretation in relation to article 217-A CPB [1] and, therefore, as being rape for vulnerable people? If not, would the alleged author have used fraudulent mechanisms to ensure that his lustful intentions were satisfied (sexual violation through fraud)? Or are they typical cases of rape in which the resistance to consent has been overcome by other means not comparable to vulnerability and / or fragility?

⁴ Private events are defined by Skinner as stimuli and responses directly accessible only to the individual to whom they relate (Skinner, 1945, 1953/1965, 1969, 1974). No special nature needs to be assumed; no appeal to metaphysics is necessary to explain them. As behavioral phenomena, stimuli and private responses are endowed with a physical nature and can be interpreted with the same concepts with which public phenomena are interpreted. The inaccessibility to public observation, which gives specificity to private events, can be momentary and circumstantial. Indirectly, those events can be made public with the participant's report, produced by contingencies available to the verbal community.^[12]

According to Francislanda Rodrigues Penha⁵, in an informal academic debate, “if a stone can be sacred, why wouldn't the human body or the semen itself be? What is more, in the relationship regarding the case of João de Deus, the figure of a spiritual leader would be involved who has authority over the sacred. Would frailty in the face of a serious illness and the expectation of achieving a cure act in establishing the condition of vulnerability?” Given the above, we have to consider that academic debates are always at risk of belonging to proselytism. If such debates are not supported by the scientific production of knowledge, they may fall into the abyss of hypothetical or invented constructs as pointed out by Smith [9] and Fryling & Hayes [10] and thus become part of the world of common sense, in a position opposite to knowledge. scientific, as Lucie points out [11].

For scientific knowledge, there is no sacred. Neither inanimate objects, let alone parts of the human body. In the case of parts of the human body, there is still an aggravating factor, which is the possibility of interaction between people, that is, interactions between behaviors that are susceptible to consequences. Such sensitivity to the consequences is of great relevance, as they direct behaviors [13].

Therefore, there is social interaction and in such social interactions, parts of the body are only necessary conditions, but not sufficient for them to occur. Historically, parts of the body have always performed charming functions for the least aware. Currently, such enchantment occurs in relation to the brain [14,15].

With all of the above, descriptions in search of an operational definition of vulnerability inevitably lead us to two other questions:

- A. Which behavior controllers would lead several women to denounce alleged abuses⁶ suffered, some of them for several years?
- B. And what would be the role of a “first report” for other complaints to arise? Supplemental stimulation⁷?

⁵ Francislanda Rodrigues Penha is a journalist, master in Communication and law student at the Faculty of Law of the Federal University of Goiás (class 2017-1).

⁶ By using the terms “supposed” or “alleged” we are not disparaging the victims' reports, but only performing the task of maintaining the presumed innocence of the accused until everything is duly and legally clarified.

⁷ Skinner ^[16], in his work “Verbal Behavior” explains to us that supplementary stimulation is any behavior capable of stimulating other already existing behavior in order to promote a “response-action”. For example, the presentation of a photo against a certain narrative could cause the speaker to change his version to suit the new situation posed. In the present case, the fact that an alleged victim reports sexual abuse could be acting as a supplementary stimulation for others to also report other sexual abuse committed by the same alleged aggressor.

It should not be forgotten that a serious threat would also weaken a victim or – as not foreseen in crimes of rape, sexual rape through fraud or rape of the vulnerable – also including situations in which psychoactive drugs can influence the outcome desired by the aggressor.

In this way, it is necessary to make the least misleading determination possible of what the word “vulnerability” would mean as a psychological term for the purpose of legal application. Although it is not an easy task, it is expected that the condition of vulnerable should be restricted to the criminal type listed in article 217-A CPB [1], not least because such a meaning will simply an aggravation of the penalty to be imposed on the offender. With this, it would be better to elaborate a psychological term with a more restricted meaning and that better express what is desired for the characterization of the crime of Rape of the vulnerable, taking into account the semantic range of “vulnerability” and, even, “fragility”.

Faced with the difficulty of finding a term that best represented the penal type, it was decided to first elaborate the operationalization of the term (concept or meaning) and only then to think about the term itself.

Here, for the sake of replicability, using Sidman [17], the following formula was reached regarding the term “vulnerability”:

Not being able, on its own or with the help of other people or institutions, to protect itself against sexual approaches that are not permissible or undue to the victim, including children under 14 years of age, as well as mentally alienated people of all kinds, those who are under the action of psychoactive drugs or who are blind, deaf-dumb or are in a state of senile dementia and / or coma. (The authors)

From this proposal, the understanding was reached that it was possible to better define the term “vulnerability”, according to legal interests. Such operationalization allowed, finally, that the expression “Rape of the vulnerable” could be maintained, only with a view focused exclusively on sexual crimes. Therefore, the operationalization of the term would be involving a specific concept of vulnerability, especially so that it would not be confused with other forms of vulnerability (immunological, for example).

Of course, different opinions will emerge in a Hegelian logic of circularity of thought, with the appearance of new proposals that are certainly better and more appropriate. However, it is believed that the provocation was made so that the discussion is, at least, initiated.

With the proposed expression (or term), it is considered that the cases of Rape – Article 213 CPB [1] – and Sexual Rape through fraud – Article 215 CPB [1] – have been properly delimited within their spheres of classification,

not leaving doubts as to the acts that characterize them. Perhaps what can cause some confusion is still the delimitation of ages in cases of children under 14 years old. Let's see what Kemmerich tells us [18]:

This is because the vulnerability of the minor does not stem solely from his sexual experience, but from his immaturity in the face of the sexual act and from his condition of giving valid consent.

[...]

(...) the child does not have the necessary discernment to consent to sexual practice.

[...]

Remaining proven that she has a degree of awareness to allow, in a valid way, the sexual practice, it is imperative that the typification of the rape of the vulnerable be ruled out, excluding the hypothesis from the judiciary the hypothesis, for example, of the person under the age of fourteen who maintains a healthy and consensual sexual relationship with her boyfriend (e) over eighteen years of age. (Kemmerich, 2016).

Well, the reduction of age for the purpose of classifying the fact should be the subject of other scientific and legal discussions, taking into account that it would be necessary to verify the ability to consent and not merely the age factor currently seen by the current legislation.

With this, it is hoped that the problem initially posed has been better clarified and that the proposal made allows for the minimization of the existing judicial mistakes.

FINAL CONSIDERATIONS

The research pointed to the real need to operationalize the term “vulnerable”, demonstrating the possibility of its inadequate interpretation by the law operators. Because it was originally generic, the word needed a delimitation exercise capable of directing its meaning to what actually occurs in relation to sexual crimes, that is, the behavior of an agent in relation to a victim, leading it to the condition of victim precisely because of specific weaknesses.

The operationalization of the term resulted in a specific meaning aimed at understanding what may be “Rape of the vulnerable”, differentiating it from other forms of sexual crimes, especially “Rape” and “Rape through fraud”.

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