The Concept of Rape in History

Women – and people considered weak and defenseless, such as children – have suffered violation all through history. Legislation on this form of violence has not always existed, as researcher Rafael Harrel explains in his analysis of the history of laws concerning this problem. In addition, Patricia Pedroza, feminist researcher on violence against women and children, presents a succinct presentation of the reactions this violence can cause in its victims.

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The definition of "rape" does not present conceptual difficulties of any great importance, at least at first glance. As everyone knows, it is a matter of forcing a person by way of threats or physical coercion to carry out a sexual act against their will.

The concept, nonetheless, is not as simple as it seems, because Western culture took several millennia to come to recognize it. It is not until the end of the eighteenth century or perhaps the beginning of the fourteenth-more precise definition of the date is not simple either-that there are laws against forced intercourse. Before this, according to the ancient Babylonian and Assyrian notion reiterated in the Bible, sexual violence was not seen as an act that merited punishment, rather it was proof of a woman's innocence.[1]

The problem arose from two opposing principles. One, applicable in the case of adultery, ordered the death of an unfaithful wife as well as her rapist or lover. The other was the deflowering of a virgin of marriageable age. In this case the young woman was judged innocent and her seducer was condemned to marry her, or if he was already married, to pay a high fine. The practice, common in the Near East, of celebrating the wedding when the bride was still a child, created another problem: how should the case be judged if the bride had relations with someone other than her husband before her marriage was actually consummated? Because she was formally married it should be considered adultery and as a consequence, she should be condemned to death. On the other hand, she was also a deflowered virgin, and in this case was presumed innocent and left free. The problem was overcome by focusing on whether the intercourse had been forced or not. If the plaintiff had employed violence, the young girl was innocent and should not be punished. In the opposite case, she was just as guilty as her lover and she should die. The man in either case received the same punishment the death sentence-because he was not sanctioned for the violence committed, but rather for having had sexual relations with a woman who was not his wife.[2]

The notion was applicable in such a specific case-the illicit deflowering of a virgin who was already married that other ancient peoples did not adopt it. Although the Greeks and Romans, as well as the Medieval Christians, punished the illicit deflowering of a virgin and the infidelity of a married woman, they did not pay any heed to violence. What was considered important was the loss of virginity or the dishonor of a husband, not how the event occured.

From the period of Augustus, however, a new crime became relevant: the abduction of the marriageable virgin or of the rich widow. The crime turned out to be important for the matter at hand because in this case violence was taken into account, only that it was understood as an offense to the home from where the woman had been abducted. It is not until the middle of the twelfth century, when Graciano compiled his Decree, when the notion was put forth that sexual possession that usually accompanied abduction was also an act of violence against the woman.

The so-called Laws of "Fuero Juzgo", which were based on the Liber Iudicorum promulgated in Toledo in the mid-seventh century and then underwent constant reforms until the beginning of the thirteenth century, were perhaps the first in consecrating the new concept by saying: "When a man commits fornication or adultery by force with a free woman, if the man is free he shall receive one hundred lashings and be given as a servant to the woman whom he took by force; and if he is a servant, he shall be burned at the stake". In the case of virgins still in the care of their parents, and perhaps to prevent all virgins who wanted to marry

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from claiming to have been raped, they condemned the man to marry her only if the deflowering had been violent. But if she had given herself "to the man of her liking, he may take her as his wife if he should so desire; and if he does not, the blame falls on her, who committed adultery by her own choice".[3]

Unfortunately later Spanish legislation did not incorporate the new notion into its mandates. Although isolated principles from other judicial systems may be cited-in all cases invariably referring to the deflowering of a virgin-by the eighteenth century, an advance in the concept had to be made.

According to Medieval English law-which repeated the Biblical notion-the man who had relations with a virgin was obliged to marry her, independently of whether the act had been characterized by mutual agreement or violence. The situation seemed unfair to thefamous jurist William Blackstone, because "it placed the blame of a mutual error on only one of the transgressors". To consider that it was truly a matter of a crime, Blackstone demanded proof that the act had been carried out against the woman's will, conquering her resistance by force. Some of these proofs have already been noted in the Bible, but others, particularly the medical part, constituted a novelty. In spite of Blackstone's reservations, another new concept was that any woman, including a prostitute, could be raped.

The advanced notions of the English jurist met with good fortune, and throughout the nineteenth century the majority of European countries incorporated them into their legislation. The concept obviously suffered from serious defects and limitations: the victim was necessarily a woman and the victimizer had to be a man; husbands were excluded because "they had the right" to have sexual relations with their wives; the burden of proof remained the responsibility of the victim and the "violence", also referring to threats, was reduced to whatever evidence doctors could discover.

As might be supposed, they found then, just as today, very little evidence. Of one hundred and fifty women who presented charges of rape in 1989 in Mexico City, 146, or that is 97.33 percent, did not present visible signs of physical violence. The majority, terrified at the time of the attack, remained paralyzed and did not put up any resistance.[4]

The Question in the 19th Century

Something similar must have happened in the nineteenth century. When confronted with the lack of physical "evidence", doctors then concluded that most of the accusations lacked proof. There were some who demanded changes in legislation to make it more severe. Rape, it was said, had to be exercised directly on the body of the woman and she had to put up constant and strong resistance. The logical result was a marked decline in the number of those who were sentenced for rape. If the annual average around 1875 in France was 1006, by the beginning of the next century, after uninterrupted declines, the courts found only 440 guilty.

Women organizing against violence. Photo by Patricia Aridjis.

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In the first half of this century, attitudes toward rape had not changed much, but by the end of World War II women's political rights were finally recognized and little by little they conquered new areas. The efforts of numerous feminist groups, the growing participation of women in public circles and the changes that occurred in the socalled "sexual revolution" broke the barriers that many men would have preferred to have kept hidden. Rape was one of them.

Today-and note that this is for the first time in Western history-there is a new, more severe attitude toward the rapist. The whole world is no longer ready to coincide with the confortable macho notion-predominant until a couple of decades ago-that the woman, rather than the victim, was deep down the cause of the aggression and she should be considered as the provoker or inciter. Perhaps more importantly, today rape is viewed as a social problem that merits urgent attention.

This fact has given rise at the same time to an important change in the concept of rape so that it is not seen so much as a "sexual" crime, as a form of aggression, an act of violence intended to humiliate and subjugate a person. It is a violation of the very right of all human beings to make use of their body and to freely decide their sexual conduct.

The survival of a great number of traditional notions has obstructed complete legal acceptance of the new concept, but there are many legal systems in which the change is already clearly marked.

One of them is the increasingly firm conviction that the husband who exercises his "sexual rights" by means of rape is also a rapist. In almost all traditional legislations this notion is rejected by defining rape as "forced intercourse with a woman carried out by a man who is not her husband"-as is stated in the criminal codes of all states that make up the United States of America.[5]

Woman's right to choose, a conflict for Catholics. Photo by Patricia Aridjis.

Comparing Countries

The situation was not very different in Mexico and Argentina before the middle of the century. The Mexican Supreme Court of Justice, for example, declared in the mid-1930's that if a husband exercised "moderate" violence and did not intend to do anything "against nature"-such as anal intercourse or oral sex-it could not exactly be considered a rape. The doctrine, fortunately, has been changing and today the general principle is accepted and admitted in all modern legal systems, that it is illegitimate to exercise or demand a right by violent means, so that it turns out that the husband who exercises violence on his wife commits the crime of rape. Addressing this principle, Scandinavian countries recently modified their criminal legislation to sanction conjugal rape.

Another change that has been developing is that the victim does not necessarily have to be a woman and a man may also be raped. There are traditional legislations, noteworthy among which is legislation in the United States, that preserved untouched the old religious notion that homosexual intercourse is such an abominable crime that, although it be imposed by means of violence, in some way both parties are responsible. As a consequence, they treat it as an independent crime, calling it "sodomy" or "grave attempted crime against modesty", expressions that in any case tend to cover many other sexual conducts branded as "abnormal".[6]

Prostitutes and wives also suffer rape. Photo by Patricia Aridjis.

The tendency today differs in legal use and no one speaks of "forced sodomy," but rather simply of "rape", coinciding with those legal systems that do not limit the definition of this latter term only to cases in which the victim is a woman.[7] This conceptual change, although it may seem irrelevant, has permitted the observation that rapes with men as victims have grown in recent years, at least in terms of the number of charges presented, which have increased at a higher rate than the number of reported female rape victims.[8]

To accept that men can also be raped does not present serious conceptual problems, above all because the old unconscious prejudice remains unaltered. That is, in the exercise of sexuality, the one who penetrates is the active subject and the penetrated, by definition, is the passive one. Based on this notion and the complementary idea that rape is a "forced penetration", the range of conduct that is considered punishable has been broadened.

Thus there are legal systems that include, whether directly in their laws or via legal interpretations, not only vaginal intercourse and anal intercourse, but also forced oral sex-"fellatio". These systems come to equate rape with the introduction of objects or instruments other than the male sexual organ, with the understanding, of course, that the act occurs against the will of the person.[9]

Now, rape is not seen so much as a sexual crime, as much as a form of aggression, an act of violence intended to humiliate and subjugate a person

The last point reveals a tendency that is still in the process of formation. When the penis ceases to be the only instrument with which a person may be sexually assaulted, nothing prevents abandoning the notion that a woman may actively participate in a rape only as an accomplice, which has been an assumption up until now. Although it may be extraordinarily infrequent and even retaining the understanding of rape as a "forced penetration", it is obvious that there is nothing that prevents a woman from penetrating another person with some object, an act that would convert her into the principal subject of the crime and not a mere accomplice.

The true problem, however, arises from an act no longer so infrequent that it forces us to critically reassess the old model of rape as "forced penetration." In a sample obtained in 1984 in Mexico City, we discovered that in 293 cases of female rape victims, ten women had helped or assisted the rapists. In three cases the particpation of women accomplices was reduced to giving the victim the impression that she was safe and that the men accompanying them were "good people". In the seven other cases, however, the women "accomplices" actively participated in the rape, whether caressing the victim, practising oral sex-cunnilingus-or demanding that she perform a similar act. It will be admitted, I hope, that

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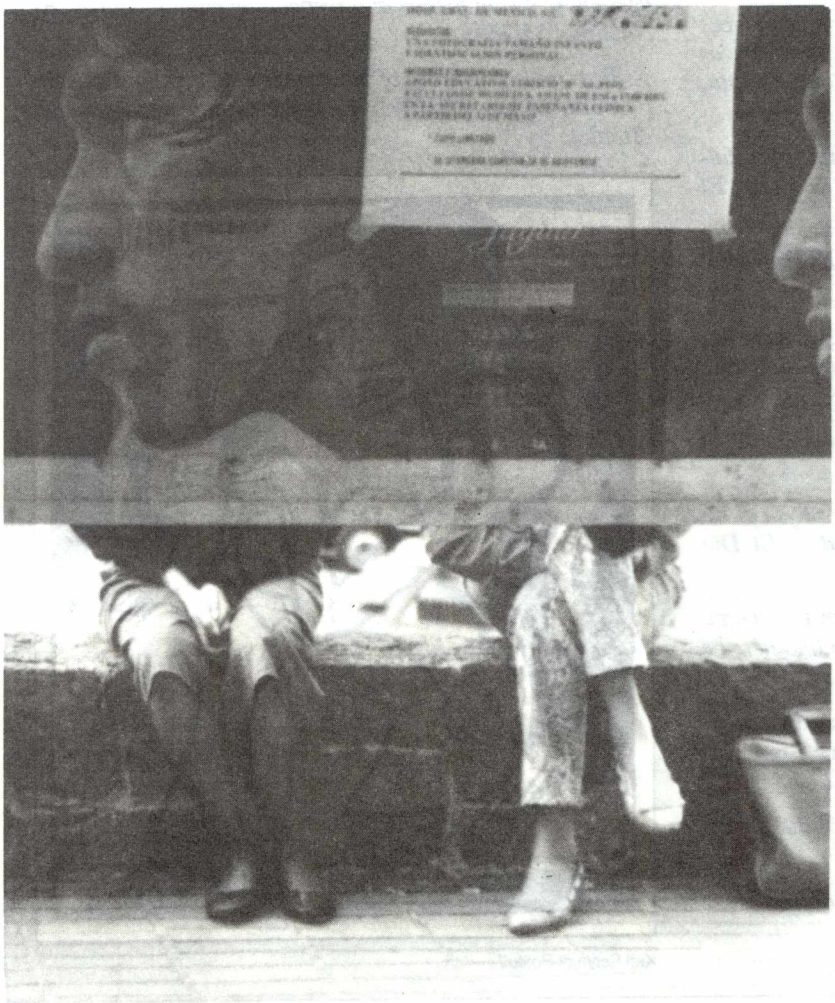
to force a person to practice cunnilingus against one's will is no less humiliating or degrading that other sexual acts, and if the door is opened to oral sex to consider fellatio, there is no reason to exclude cunnilingus.

By overcoming the idea that "the rapist is the one who penetrates", substituting it with the much fairer idea that "the rapist is the one who forces another person to participate in any sexual conduct that he/she does not wish to particpate in", nothing prevents us from accepting that men can be raped by women.

When a woman or a group of women, which is more common, attack a man, tie him up and via masturbation bring him to an erection to then insert the penis into the vagina of one of the attackers, this is also "rape". Although very infrequent, this act is amply documented in anthropology, sexology and in criminology.

Accepting the idea that the one who penetrates may be the victim of rape, reveals a final fact. In punishing rape, what should be protected is not the right to "not be penetrated", but rather the right to say No. In positive terms: what is at stake is the right of all adults, no matter what sex, to make decisions for oneself, in any circumstance, regarding one's sexuality. To recognize this expressly will be one of the tasks that criminal legislation should address in the next millennium. ■



Untitled. Photo by Patricia Aridjis.

Footnotes

1. For reasons of space, I must omit most of the bibliographic references. The interested reader may find them in my book *Inventario de prejuicios: Violación, Mujer, Sexualidad* (Inventory of Prejudices: Rape, Woman Sexuality), that will be published by Editorial Posada, Mexico, this year. Many of the topics that I discuss here are dealt with in more detail.

2. The Bible preferred to base itself on a spatial notion: if the act took place in the city and the young woman did not cry out for help, she was guilty. If it happened in the countryside, where no one could hear her, she was innocent. See Deuteronomy 13: 2326.

3. Fuero Juzgo: Section V, Book III, Laws 14 and 17.

4. See Luis Rodríguez Manzanera et al.; *"Víctimas del delito de violación en el Distrito Federal"* (Victims of the crime of rape in Mexico City), mimeographed communication at the Third National Criminology Congress, San Luis Potosí, 1989, p.10.

5. See for example Section 264 of the Criminal Code of the State of California, or section 2010 of that of New York. If the husband helps, assists or forces another man to have carnal contact with his wife, however, he may be accused of rape (See People vs. Meli, 193 N.Y.S. 365 (1922); People vs. Chapman, 62 Michigan 289, 28 N.W. 896, 4 A.S.R 857).

6. The expression "attempted crime against modesty" is from the Brazilian Criminal Code now in force (Art. 214), and it includes any "libidinous act other than carnal conjuction" to which someone is forced-no matter what sex-by means of violence or serious threat. The sentence in this case is two to seven years in prison. For rape it is three to eight. "Sodomy" in U.S. legislation includes homosexual sex (Konnz versus People, 82 Colorado 589, 263p. 19), fallatio and cunnilingus (State versus Murphy, 136 La. 253,259, 66 so. 963) and animals and necrophilia (State versus Vicknair, 52 L. Ann., 28 So. 273, 1921). The punishments vary in different states of the union, but the average is 20 years in prison.

7. This is the regime that rules in Italy, and in Latin America, in Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Haiti, Panama, Paraguay, Mexico, Uruguay and Venezuela.

8. In 1980, of the total number of charges presented in Mexico City, 3.68 percent had men as victims. In 1989, the proportion had increased to 6.73 percent.

9. The reform promulgated in 1989 added to Article 265 of the criminal code in force in Mexico City a paragraph to this effect.