

'IT DOESN'T MEET THE REQUIREMENTS OF VIOLENCE OR INTIMIDATION'. A DISCURSIVE STUDY OF JUDGMENTS OF SEXUAL ABUSE

«NO CONCURREN LOS REQUISITOS DE VIOLENCIA O INTIMIDACIÓN». ANÁLISIS DISCURSIVO DE SENTENCIAS DE ABUSO SEXUAL

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Abstract

This study delves into the main discourses found in five sexual abuse judgments, in different Spanish Courts. The analysis employs Feminist Critical Discourse Analysis in order to explore the topic of sexual violence, its understanding, and the dominant discourses revealed in these judgments of sexual abuse, and to investigate the way rape cases are treated discursively in Court from a feminist perspective. The dominant discourses found have been those of sexuality; inaction of the survivor; and lack of violence and/or intimidation. Unravelling these hidden ideologies and relationships of power is crucial to give us a better awareness of the dominant ideas surrounding violence against women.

Keywords: Feminist Critical Discourse Analysis; Sexual abuse; Violence; Sexual violence; Rape.

Resumen

Este estudio explora los principales discursos encontrados en cinco sentencias de abuso sexual, en diferentes tribunales de justicia

españoles. Mediante el Análisis crítico del discurso con perspectiva feminista se revisa cómo se comprende la violencia sexual y los discursos dominantes en las sentencias de abuso sexual. También investiga, desde una perspectiva feminista, cómo se tratan los casos de violación en los tribunales. Los discursos dominantes encontrados han sido los relativos a sexualidad, inacción de la superviviente y falta de violencia y/o intimidación. Para comprender mejor las ideas dominantes en torno a la violencia contra las mujeres, es crucial desvelar estas ideologías ocultas y sus relaciones de poder implícitas.

Palabras clave: Análisis crítico del discurso con perspectiva feminista; abuso sexual; violencia; violencia sexual; violación.

1. INTRODUCTION

Sexual self-determination is a key concept, a fundamental right, and it is dissipated through rape. When a woman is violated, her right and her dignity are stripped from her. Rape is not just physical violence towards the body, it is violence over the self, over the right to decide upon one's own body and beyond.

Several scholars have studied discourse on sexual assault in judicial processes (Coates et al., 1994; Ehrlich, 1998, 2001, 2014, 2019; Mooney, 2006, 2007). Judicial practice is made up of discourse (Coates et al., 1994); therefore, there is a very intimate relationship between the discourse and the discourses used in judicial practice and their judicial and social implications. Judgments, jurisprudence and the versions of the reality narrated in a judgment are formed by discourse. The representation of reality goes beyond the courtroom, reaching society in general, condemning or justifying survivors, rapists and the sexual assault.

Brownmiller (1975) warns of the abuse of power implicit in any sexual assault; an abuse which is clearly present at the time of the assault, and which can also occur throughout the trial process and in the judgment due to the implicit power imbalance between the victim and the officials involved in the trial (i.e. judges, lawyers, etc.). Survivors of sexual assault are re-victimised throughout the trial process, which can in turn be more damaging than the assault itself. This is what Lees (1996) calls «judicial rape» (p. 36). Survivors are encouraged to report sexual assault; however,

from the moment the process of reporting begins, the woman is subjected to a series of procedures that can lead to further hidden aggressions «under the name of justice» (Lees, 1996, p. 36). It is generally understood that the role of the judicial system in society is to protect and defend victims. The approach of this analysis is to explore to what extent this protection is given to victims in practise. Depending on the outcome of the trial, certain behaviours relating to the assault and the representation of what constitutes male and female sexuality will be either legitimised or punished (Ehrlich, 2001). The legitimisation of aggressive behaviours implies that certain dominant ideologies remain unchallenged in the legal context, cross the boundaries of the judicial process and reach out to society at large, where they are perpetuated. Therefore, we can understand that these aggressive behaviours originate from both the society and the judicial system. Campos (2011) and Facio (2006, as cited in Goncalves & Cabral, 2019, p. 155) state that «law is a system that insists on the ontological separation of masculine and feminine, and produces gendered subjects along an axis of differentiated domination». This vision is produced and reproduced in the legal and judicial system from the moment that certain gendered representations are defended.

The main aim of this study is to disclose, from a Feminist Critical Discourse Analysis perspective (henceforth FCDA), the main discourses found in 5 judgments of sexual abuse cases in the *Audiencias Provinciales* (henceforth Provincial Courts) of different provinces of Spain from 01/01/2020 to 22/07/2020 (i.e. discourses of lack of violence and/or intimidation; sexuality; and inaction of the survivor). This study tries to shed light over the debate whether sexual abuse, understood as penetration without consent, is intimidating or violent per se or not.

It is important to establish from the outset that, in this study, we refer to the victim of sexual assault as either a «victim» or a «survivor» without distinction and not as a «complainant», since, although the latter term implies the legal situation, it does not fully reflect the victimisation resulting from the legal process. This position is also supported in the research of authors such as Smith & Skinner (2017).

In the following sections, firstly we discuss some theoretical considerations, such as violence against women, sexual violence and the judicial system, and Feminist Critical Discourse Analysis; secondly, we present

the context of the written judgments which will be analysed in this paper. Thirdly, the analysis of the data is conducted; and lastly, there is a final discussion of the results, and conclusions.

2. THEORETICAL FRAMEWORK

Here, the theoretical background of the study is established. This is achieved through two interrelated sections: a revision of the concept of violence against women, and a look at the relationship between sexual violence, power and the judicial system. Then, Critical Discourse Analysis (henceforth CDA) and FCDA approaches are reviewed.

2.1. Violence against women

The concept «violence against women» entails a broad and painful reality that is embedded in the rules accepted by society. Gender is one of the key variables in violence against women; this violence partly derives from socio-cultural constructions of gender. Here we situate ourselves in the variable of gender as a socio-cultural construction that is firmly established and delimited in the social patterns of different cultures, where any deviation from this understanding generates conflict and where these patterns are established in an attempt to maintain a social order that benefits a specific group and not the society at large.

The General Assembly of the United Nations (1993) defines violence against women as:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

This violence is a powerful tool of control used by the patriarchy towards the feminine gender. It constructs and maintains a certain social power structure (Casique & Ferreira, 2006; Patiño, 2013). Thus, we are not just looking at individual cases of assault but rather at the broader social structure (Patiño, 2013). According to Barloja (2018), we find ourselves immersed in «[a] social punitive system –by which women correct behaviour, shape their bodies, deny themselves spaces, control timetables, restrict movements and

gestures: this is the discipline of sexual terror diluted in every age» (p. 34). The limitations imposed by this discipline lead women to adopt measures to avoid possible aggression and violence. And if they are victim to either, there are also a series of behavioural expectations placed upon them by society, which are used to determine «what is right» and «what is wrong» when judging how credible an accusation is, so that indoctrinates what it has to be, evaluating the victim's behaviour.

2.2 Sexual violence, power and the judicial system

Conceptualising the crime is fundamental in order to understand the existing discourses in society and, thus, be aware of how it is seen in different social spheres. For this reason, we begin our approach to its definition by questioning what sexual violence is. It involves the abuse of power, by a person or a group of people to another individual, which compromises the victim's right to sexual self-determination. This physical violence is a way of maintaining and increasing power. It is often in the service of domination and gender control (Talbot, 2005). In the same vein, Brownmiller (1975) understands rape as a crime of power, rather than a crime focused on finding sexual pleasure.

Coates & Wade (2004), based on the Interactional and Discursive View of Violence and Resistance framework, define violence as consisting of the following main features:

- a) Violence is both social and unilateral, meaning that it involves at least two people, and the violence is inflicted one upon the other. It is unilateral, although, as the authors state, in legal judgments and the press, sexual violence is often represented as mutual, implying «that the victim is at least partly to blame» (p. 514) and concealing «the fact that violent behaviour is unilateral and solely the responsibility of the offender» (p. 514).
- b) Violence is deliberated by the aggressor, if not in the moments before the attack, then at some point whilst it is taking place.
- c) Resistance is ubiquitous, although it manifests itself in many different ways leading to different possible reactions to violence.

The process that the sexually assaulted woman goes through in Court can be as harmful as or even more traumatic than the sexual assault itself.

Particularly, when we consider that this second aggression is carried out within the Judicial System (Lees, 1996), which is supposedly a protective environment.

Coates et al. (1994) argue that «language and texts are central to the practice of law, which can be said to consist primarily on discourse» (p. 189). These laws are applied by judges and used by lawyers to frame and shape the situations experienced and the crimes committed. Judicial decisions are of great importance, not only at the individual level of each specific sentence, but also at a general level, since they may influence other judicial decisions. However, it is important to note that the Spanish legal system hinges upon written law, rather than upon judicial decisions and custom. The language used, and the discourses involved, redefine society and serve as public discourse, because «[l]anguage affects events and creates versions of reality» (Coates et al., 1994, p. 189).

In the Spanish legislation, specifically in the Organic Law 10/1995, of 23 November, of the Criminal Code, title VIII, first and second chapters (*Ley Orgánica, 10/1995, de 23 de noviembre, del Código Penal*) it is specified that the difference between sexual abuse (*abuso sexual*) and sexual assault (*agresión sexual*) is that, in the latter case, violence or intimidation is used. In Chapter I, Article 178, it defines sexual assault, as «attack[ing] the sexual freedom of another person, using violence or intimidation»¹. On the other hand, in Chapter II, Article 181.1, the crime of sexual abuse is defined as the one carried out by someone who «without violence or intimidation and without consent, performs acts that violate the sexual freedom or sexual indemnity of another person». Relevant to this study is the specification made in Article 181.2, which states that:

Non-consensual sexual abuse is considered to be that which is carried out on persons who experience sensory deprivation or whose mental disorder is abused, as well as that which is committed by overriding the will of the victim through the use of drugs, medicines or any other natural or chemical substance suitable for this purpose.

Here, we will select cases in which, as indicated by the law in Chapter II, Articles 179 and 181.2, «there is carnal access via the vagina, the anus or the

1. Translations from Spanish to English have been made by the author.

mouth, or the introduction of bodily members or objects» without consent, and we will look at the discourses used in cases where sexual abuse is the charge.

Also, it is necessary to note that in Spain crimes of sexual abuse and rape are dealt differently depending on whether they are perpetrated by partners or ex-partners (in which case they are protected under the framework of the Law against Gender Violence), or whether they are perpetrated by strangers (being prosecuted under the Criminal Code, without being understood as a crime of Gender Violence and without the specific protection it provides for its victims). This differentiation is fundamental when analysing the judicial process relating to the case of rape by one or more strangers.

Currently, there is a proposed legislative change to the Criminal Code in the regulation of the crimes of sexual assault and sexual abuse in Spain. The *Ministerio de Igualdad* (2020), in the draft of the Organic Law on the Comprehensive Guarantee of Sexual Freedom (*Anteproyecto de Ley Orgánica de Garantía Integral de la Libertad Sexual*) has among its aims, to regulate sexual crimes in relation to consent and not based on whether there was violence or intimidation. To this end, it proposes eliminating the term «sexual abuse» and only using «sexual assault», with aggravating circumstances depending on the aggression. Therefore, the punishment is worse depending on the extent of violence used. What defines the crime is not the violence of the aggressor, but the consent of the survivor. However, despite the proposed change, we must always consider the existing variability in the application of a law. Kennedy (2016) differentiates between law as legal norms to be applied in each specific case, and «law in action» (p. 24), meaning how a case is judged and how the rules are applied to a given conduct.

The judicial system, in the eyes of Kennedy (2016), is not efficient in resolving sexual assault cases, because, as he states «[O]ften victims of sexual abuse simply cannot prove it in court» (p. 26), because the survivor has to show that she has been sexually aggressed. Also, «the legal system does not provide [...] speedy, efficient or humane justice» (p. 27). This inefficiency makes the process extremely difficult for the victim and burdens her with a number of expectations which stem from the myths surrounding rape. However, in the face of this inefficiency, it is not only the victim who suffers the consequences of what Lees (1996) already called «judicial rape»

(p. 36), but society in general and the female gender in particular. Criminal behaviour and the way it is prosecuted does not remain an isolated case but inevitably has a wider impact on society. It conditions how other cases of sexual assault are dealt with, how the crime is understood in a particular community, and how laws about the crime itself are written and modified. Therefore, we are not dealing with a static consequence, but rather a dynamic one that modifies its most immediate environment, as well as a future one.

As Brownmiller (1975) states, «[w]omen are trained to be rape victims. [...] We hear the whispers when we are children: *girls* get raped. [...] The message becomes clear. Rape has something to do with our sex» (p. 309). Not only were we warned about the danger of rape in Brownmiller's time; this idea is still present today in the way we raise women and girls. The fear of the possibility of this crime surrounds any girl and any woman. Unfortunately, it is indeed a reality. When it comes to sexual violence, the extent to which this power is used over the will of other human beings is multiplied. Rape implies violence, but in certain countries, the crime is not seen in the legislation as violent per se. This is the case in Spain, where penetration without consent is not considered to be in itself a violent act, although nowadays the intention to modify the legislation is on the table.

2.3 Feminist Critical Discourse Analysis

This study will analyse, from the FCDA's perspective, the discursive representation of the abuse in a series of written judgments for sexual abuse. As Kress (1990) states, the focus of Critical Discourse Analysis (henceforth CDA) is on language as «a type of social practice» (p. 85). Fairclough (1989) describes discourse as a specific way of representing the world, taking into account its physical, social and psychological perspective. The aim, as stated by Van Dijk (2003), is not only to describe discourses, but rather to reveal these underlying power relations and to compromise the established status quo. To this end, «CDA [...] explicitly takes sides, and hopes to contribute effectively to the resistance against social inequality» (Van Dijk, 2003, p. 23), an inequality that is intended to be revealed. Therefore, the commitment of CDA is «analysing opaque as well as transparent structural relationships of

dominance, discrimination, power and control as manifested in language» (Wodak, 2001, p. 2).

In this case, we frame the research in a feminist perspective. Lazar (2014) warns that certain social practices are «deeply gendered» (p. 184); that is, patriarchy as an ideological system (Lazar, 2005) determines the ideologies of society in general. Therefore, it is reflected in the way society is managed, and reaches all institutions. The judicial system is not exempt from this patriarchal ideology present in our daily life, nor are trials for sexual assault. From here the survivor can suffer a second aggression, this time judicial, which uses a misogynist and rationalist perspective to dismantle her rights. CDA does not analyse reality from a feminist perspective per se, therefore we need feminism. FCDA aims to «critiqu[e] discourses which sustain a patriarchal social order: that is, relations of power that systematically privilege men as a social group and disadvantage, exclude and disempower women as a social group» (Lazar, 2005, p. 5), thus generating unequal power relations and assumptions that favour a single social group. FCDA aspires to reveal the sexist ideologies that favour these unequal power relations, as a means of «resistance and change» (Lazar, 2014, p. 184). The objective is to achieve emancipation through the transformation of society (Lazar, 2005). But Lazar (2007) warns us that it is necessary:

[t]o locate everything in discourse and overlook experiential and material aspects of identity and power relations. That is, instead of viewing discourse as one element of social practices, the inclination has been to view discourse as wholly constitutive of the social. (pp. 150-151)

To reveal the unequal power relations and the identity marked by the norms implicitly delimited in the structure of society, we need to consider the sexist and patriarchal social practices in which the discourse is framed. FCDA also analyses the context, where the discourse is produced and in its concrete circumstances. Therefore, «[t]he emphasis shifts from the internal issues of the individual to the field of interaction, and to the institutional» (West et al., 2000, pp. 203-204).

Thus, following Lazar (2005), we subscribe to the object of criticising those discourses that in one way or another feed into and maintain the patriarchal social order. We have to work for a more humanist and feminist vision that reflects a fair society, without gender defining or interfering in

any relationship, in who we are, in our future projections, in how we must behave or in the roles we must play. From this perspective, this would be a powerful strategy to end the gender patterns that condition how we behave according to certain roles, and the consequences of deviations.

Fairclough (1989) indicates that CDA aims to study any language level, even if it mainly focuses on grammatical aspects. Walsh (2001) states that FCDA seeks «to connect the detailed analysis of spoken, written and visual texts and intertexts to an analysis of the hegemonic ideologies that operate at the institutional and societal levels of discourse» (as cited in Mills & Mullany, 2011, p. 79). The analysis of micro and macro structures is key, and has the following aims:

- To detect the dominant discourses
- To locate the different identities represented through discourse (roles)
- To locate and analyse the grammatical characteristics (which include mode and lexical analysis) represented by these discourses and identities

In this application of FCDA, we began identifying the main discourses in the five written judgments, and then analysing them at a textual level, focusing overall on lexical choices and syntax. Then, exploring the macro structures at play, the ideological implications of these lexical and syntactical choices have been discussed.

3 METHODOLOGY

The written judgments analysed have been selected from the official database **CENDOJ** (Judicial Documentation Centre, *Consejo General del Poder Judicial*), a portal where all Spanish judgments, from the different Courts, are published and stored. This database is open to the general public.

The selection procedure of the judgments has followed different steps: the search focused, initially, on all those that contained the search terms «sexual abuse» in the Provincial Courts, which are the highest Judicial Courts in each of the different Spanish provinces. These Courts judge criminal and civil matters and may consist of two or more Sections per Provincial Court, formed by a President and, generally, two or more judges, in which

case the President of the Provincial Court shall preside over one of the Sections. Each Section normally specialises in either criminal or in civil matters. The rationale behind focusing on Provincial Courts is that cases of sexual abuse and rape are judged by these Courts when the perpetrator is sentenced to more than nine months imprisonment. Our aim is to analyse rape cases that have been judged as «sexual abuse» and therefore, because of length of the penalty of this crime, the Provincial Courts are the courts that deal with these crimes.

In order to select the cases for this study, the following search criteria were used in the CENDOJ database: a) Jurisdiction = Criminal; b) Type of decision = sentence; c) Type of body = Provincial Court; d) Localization = all the provinces in Spain; e) Time frame = 01/01/2020 to 22/07/2020; f) Keywords = sexual abuse.

There were 512 cases recovered. From there, the selection criteria were narrowed, focusing on the cases pronounced as guilty, and where the victim was over the age of 18. This left a corpus of five judgments (Case 1 = SAP M 43/2020, 11th of February 2020; Case 2 = SAP M 128/2020, 24th of February 2020; Case 3 = SAP M 250/2020, 28th of May 2020; Case 4 = SAP LU 105/2020, 22nd of June 2020; Case 5 = SAP B 167/2020, 03rd of March 2020), which included the descriptions of the assaults and the judges' reasons for their decisions. In all cases, the defendants were men, and the survivors were women. Each case was judged by a different Provincial Court. A brief summary of each case with relevant information such as the prior relationship between defendant and victim, and a description of the case, can be found in the following table:

Table 1
Main information on the judgments

	Case 1	Case 2	Case 3	Case 4	Case 5
Relationship of the accused to the survivor	Strangers	Not indicated in the judgment	Acquaintance	Acquaintance	Strangers
Brief description of the sexual assault	Sexual assault from stranger to woman getting into what apparently was an Uber	Sexual assault in the room of the survivor when she was asleep. When she woke up, the aggressor left	Sexual assault in a park when the survivor and a friend are sleeping	Acquaintance sexual abuse, perpetrated after meeting the survivor in a bar	Sexual abuse, perpetrated by a stranger in the surroundings of a club

In the Spanish legal system, the body of the written judgments are divided in four different sections: a) Pleas of fact, where the pleas of the prosecution and the defense are transcribed; b) Proven facts, where the judge or judges give account of what happened, after assessing the evidence, according to their criteria; c) Legal basis, which includes the detailed reasons and explanations for their decision; d) Decision. The analysis is centered on sections b) and c), where the abuses are described and analysed by the judges. The «authors» of the text of the judgments are the judges that form the Court.

4 RESEARCH QUESTION

The aim of this essay is to disclose the main discourses in five sexual abuse judgments (i.e. discourses of lack of violence and/or intimidation; sexuality; and inaction of the survivor), to investigate the linguistic and discursive strategies used to construct these discourses. Therefore, the research question that we aim to answer on this study is: What are the main discourses in judgments of sexual abuse?

5 ANALYSIS AND DISCUSSION

The focus of this analysis is on the communicative event (i.e. the discourse practice and the text). To begin with, the main discourses revealed in the judgments are identified, and then analysed at a textual, discursive and social practice level; finally, their ideological implications are discussed. Following the analysis, the main discursive features that suggest sexuality; inaction of the survivor; and violence and/or intimidation have been identified. All these discourses are linked, as we will see, by the so-called «lack of violence and/or intimidation» required in the law to understand the crime as a sexual abuse rather than a rape.

5.1 Discourse of sexuality

Scholars such as Coates et al. (1994), Coates & Wade (2004), and Ehrlich (2001) have found in previous research that in certain cases of acquaintance rape, the language used to describe the crime is quite like the language used in reference to consensual and pleasurable sexual relations.

In the analysed corpus² there are analogies as well in the lexis and sentence structures used by the judges to describe the sexual abuses.

Extract 1 (case 1)

Moved by the desire to satisfy *his lubricious desires* and taking advantage of the fact that Rocío, due to her earlier alcohol intake, had a diminished capacity to react *to any type of aggression*, he made a first stop inside a tunnel to help her vomit and took the opportunity to kiss her on the mouth without her consent. [emphasis added]

In the previous extract, «lubricious desires» (*lúbricos deseos*) imply sexual urge by the rapist, and, as Coates et al. (1994) assert, the assault is then attributed to the sexual appetite of the defendant, rather than to a violent act. Even if after, it is mentioned that due her alcohol intake she wouldn't have been able to react to «any type of aggression», the will of the rapist is presented with the language of sexuality. This terminology is widely used in the different cases that were selected for the corpus; for example, in case

2. All the following extracts from the corpus have been translated from Spanish to English by the author.

3, it is mentioned that the compliant wanted «to satisfy his lustful desires» (*satisfacer sus deseos lascivos*), and in case 5 «satisfy his libidinous instincts» (*satisfacer sus instintos libidinosos*). When the aggression is presented with these terms, it is located in the domain of sexuality. Rape is not by any means a sexual act or encounter, but a crime of power over the victim, «a crime against sexual self-determination» (Sanyal, 2019, p. 91).

Extract 2 (case 2)

[T]he defendant carried out *fondling* over Teresa's body in a way that *clearly had a sexual meaning*, given the areas in which the said *fondling* was carried out, the accused even penetrated Teresa vaginally with his penis. [emphasis added]

Here, the reference to sexuality is clear, where the non-consensual touching of the survivor is described as «clearly [having] a sexual meaning» (*de evidente significado sexual*). Due to the nominalization of the action of «fondling» (*tocamientos*), even when it is specified that the touching was conducted by the accused, the action is blurred. As a result, the direct agency of the perpetrator is somehow eluded. And, again, the body is objectified and disassociated from the victim: «the areas in which the said fondling was carried out» (*las zonas sobre las que llevó a cabo dichos tocamientos*).

In case 4, there are also references to sexuality when describing the crime.

Extract 3 (case 4)

Ms. Mari Jose kept telling him to stop because she didn't want to, he pulled down her trousers and her underwear –a thong– and then (and without any resistance from Mrs. Mari Jose, because she was afraid, and very scared), he penetrated her vaginally; when the accused *consummated the sexual act*. [emphasis added]

Extract 4 (case 4)

The accused admitted that he had been in the vicinity of the Club Carpas Bora Bora that day and it is clear that *he had full sexual relations with the victim*. [emphasis added]

In extracts 3 and 4, presenting a rape as «full sexual relations» (*relaciones sexuales completas*) or «sexual act» (*acto sexual*) equates once more rape with consensual sexual relations, distorting the aggression of forced penetration. The construction of the sentence in extract 4 implies that this was

a consensual act, rather than rape: «He had full sexual relations with the victim» (*mantuvo relaciones sexuales completas con la víctima*). It is presented as a joint activity, were the preposition «with» of the sentence «he had full sexual relations with the victim» shows consensual sex together, one with the other, rather than a forced sexual abuse, where the defendant raped the survivor. Here the premise that rape is not a sexual relationship is obviated, equating rape with a sexual relationship, with mutuality and, therefore, with the lack of violence. «[T]he attribution of sexual assault as synonymous with sexual activity conceals violence by casting the assault as a need fulfilment and reduces the offender's responsibility by making him a participant in a non-violent, mutual act» (Coates & Wade, 2004, p. 508). As a result, the crime of rape is framed in a more benign situation and this blurs the line between rape and consensual sex. The consequence of this blurred reality is that each label carries with it a host of implications. In this case, the hidden ideology behind this labelling is that sexual assault is different from any other kind of violence.

5.2 Discourse of inaction of the survivor

In the cases that form the corpus, some of the descriptions of the survivors cast them in a merely inactive role which results in them being almost erased from the narration of the crime. There are different arguments given in the judgments (and in the law) to justify the survivor's inaction: alcohol, use of drugs, fear, lack of possibility to escape, being unconscious. In the following extracts the focus is on the apparent inaction of the survivors (i.e. absence of verbal or physical opposition).

In case 1, the actions perpetrated by the rapist are described throughout the judgment, with no mention of the actions and feelings of the survivor.

Extract 5 (case 1)

[H]e returned to the driver's seat, *continuing with Rocío in the car* until an open space where he stopped and, getting out of the vehicle, he went to Rocío's seat, *opened the door*, turned her around and *took her by her legs, taking her legs out of the seat, pulling down her trousers and panties*. [emphasis added]

She is merely an inactive body, specific parts of a body, legs pulled out of a car: «taking her legs out of the seat» (*sacándolas [las piernas] fuera del asiento*), and a name, «Rocío». As Ventura (2016) states, «victims are reduced to parts touched by the other» (p. 7), thus, they are objectified (Smart, 1990; Ventura, 2016). This objectification can be observed in the other judgments analysed, such as case 2: «he carried out touching of Teresa's breasts and vagina, and introduced his penis into her vagina» (*llevó a cabo tocamientos sobre los pechos y la vagina de Teresa, e introdujo su pene en la vagina*), case 3: «he tried to touch her breasts» (*intentó tocarle los pechos*), and case 4: «the victim stated that when he was in the vehicle, the defendant began to touch her breasts and remove her clothes» (*la víctima manifestó cómo cuando se encontraba en el vehículo, el acusado, comenzó a tocarle los pechos y a quitarle la ropa*), where the survivors are merely parts of their body, mainly breasts, vaginas and legs. The legal narrative forces, in a way, this representation of the survivors as inactive bodies. In extract 5, the sentence «continuing with Rocío in the car» (*continuando con Rocío en el coche*) shows that the journey was taken together, when in fact he is restricting her freedom by taking her in a car against her will. Again, in the narrative there is an omission of the survivor's reaction. It is impossible to understand if she is aware of the situation, if she is awake at all and, overall, it is difficult to know how she is feeling. Feelings may not be facts, but they represent the impact of the violence and intimidation upon the survivor. Ventura (2016) points out that «rape victims speak about their emotional state, which is juridical irrelevant since is not regarded an objective evidence of the crime» (p. 6); however, in a rape case it is contradictory, because feelings are a way of measuring an intimidating situation. And it can determine whether or not the crime is interpreted as sexual assault rather than sexual abuse (as it has been understood due to the so-called lack of violence and intimidation). In extract 5, the roles are clearly defined, with the rapist as the «active doer», the one who acts: «opened the door, turned her around and took her by her legs, taking her legs out of the seat, pulling down her trousers» (*abrió la puerta, la giró y la cogió de las piernas sacándolas fuera del asiento, bajándole los pantalones*) and the survivor and her body stripped of agency or emotion, somehow reduced to a series of body parts.

However, as stated in extract 6, once the aggressor ends the assault, the survivor regains an active role, showing her fear when she is «asking for help» (*pidiendo auxilio*) and escaping: «Rocío got out of the vehicle» (*salió del vehículo*). It is in this moment when her feelings can be acknowledged, when she is more than a body or a name and capable of acting and feeling.

Extract 6 (case 1)

As Rocío did not have any cash, they [Rocío and the compliant] went to look for an ATM, *telling Rocío her address*, arriving at her mother's house where *Rocío got out of the vehicle asking for help*. [emphasis added]

This representational choice, the «inaction» of the survivor, plays an important role in all the corpus analysed, when the case is judged as sexual abuse rather than as sexual assault. Their behaviours are represented as inaction, resulting in their erasure. The crime is described through the perspective of the rapists. References to the erasure of the victims can be found in all the analysed judgments, as it can be seen in the following extracts.

Extract 7 (case 3)

Both *Ana María and Moisés fell asleep on a bench* [emphasis added], and in order to satisfy his lustful desires, the defendant approached Ana María, took off her trousers and knickers and penetrated her vaginally.

Extract 8 (case 2)

[T]aking advantage of the fact that *she was asleep* in one of the rooms in the house, he touched Teresa's breasts and vagina, and inserted his penis into her vagina, *then Teresa woke up, rebuking the accused*. [emphasis added]

Extract 9 (case 5)

She remembers that she was queuing to get into that establishment and *she doesn't remember anything else until she woke up* [emphasis added] around five o'clock in the morning.

In the previous extracts, the active role of the perpetrator vs. the inaction of the survivor is evident. Another technique to represent the inaction of the survivor is the lack of consciousness: «Ana María and Moisés fell asleep on a bench» (*tanto Ana María como Moisés se quedaron dormidos en un banco*); «she was asleep» (*estaba dormida*); «she doesn't remember anything else until she woke up» (*ya no recuerda nada más hasta que se despertó*). In a way, it resembles the story of Sleeping Beauty, where the woman falls sleep, unconscious, and the prince wakes her up with a (non-consensual) kiss. As

Brownmiller (1975) claims, «[t]he utter passivity of Red Riding Hood in the teeth of the wolf is outdone by Sleeping Beauty, who lay immobile for one hundred years before she was awakened by the kiss of the prince» (p. 310). Brownmiller (1975) points that these fairy tales are parables of rape, where passivity is the desired role in the victim, in the princess. The narrative does not leave the survivor any option, her role is passive, she is erased, the action, the «doer» is always the rapist or a third party.

As we have seen, the actions of the perpetrator are visible in the judgments analysed, but this fails to provide the whole picture of what the victim had to go through. The legislation mentions the lack of action that a victim can experience when being a victim of a rape, and the legal implications of this (i.e. the perceived «inaction», as a construct of the narrative, can result in the understanding that there was no violence or intimidation in the sexual assault, and in the erasure of the survivor's experience). The victim's behaviour is interpreted as proof of non-consent by judges, and it can be taken as «an indicator of a compliant victim» (Ventura, 2016, p. 4). But being an «inactive» victim has implications on the final judgment, and the crime can be judged as a milder one, a sexual abuse rather than a sexual assault. The consumption of alcohol holds a key role in the survivors' inaction, something which is in line with the following rape myth: «People who get voluntarily intoxicated are at least partly responsible for their rape» (Smith & Skinner, 2017, p. 3). As Mooney (2006) points to, «[i]n relation to women, their alcohol consumption is mitigating of the man's actions» (p. 50).

The use of alcohol and/or drugs can also have an impact on the rapist's side, as is reflected in the following extract:

Extract 10 (case 3)

The defendant, at the time of execution of the facts, had his intellectual and volitional faculties affected as a result of his previous intake of alcohol. [emphasis added]

This reference is seen as a justification of the crime committed by the accused, meaning that having «his intellectual and volitional faculties affected as a result of the previous alcoholic intake» (*tenía afectadas sus facultades intelectivas y volitivas como consecuencia de la previa ingesta alcohólica*) can explain the rape, or, at least, mitigate his actions. It is also necessary to reflect on the euphemism «the facts» used to describe the rape, which do not explain

at all the aggression suffered by the victim. In both cases, for the survivor and the rapist, the alcohol (and unconsciousness) plays a mitigating role in the crime, but, clearly, the most wounded party in this case is the victim, for the penalization that this portrayed inaction holds over her, and how these representational choices erase her.

5.3 Discourse of lack of violence and/or intimidation

Violence and intimidation are crucial factors in how rape cases are judged in the Spanish legal system. The lack of (physical) violence underpins the final judgement of the crime as an act of sexual abuse (i.e. intercourse without the victim's consent). The analysed rape cases have been judged as sexual abuse, meaning that there has been penetration without consent of the victim. However, these cases have not been judged as sexual assault due to the so-called lack of violence and/or intimidation. As a result, violence is only acknowledged when it leaves visible injuries. As Coates & Wade (2004) state, when the rape is characterized as non-violent, the offenders are not responsible for a violent crime, but a milder one: a sexual abuse. In the following extracts, we analyse discourses where the lack of violence and intimidation arise.

Extract 11 (case 2)

[T]aking advantage of the fact that she was asleep in one of the rooms in the house, he touched Teresa's breasts and vagina, and *introduced his penis into her vagina*. [emphasis added]

In this neutral description of the crime there is no hint of force, or of violation. The statement «[he] introduced his penis into her vagina» (*introdujo su pene en la vagina*) is the representation of the moment of the rape itself, without any reference to the fact that the forced «insertion», without consent, is a violent act, and not a neutral introduction of an object into a random, available and open receptacle. This representation constructs the vagina and the anus as always open. This is a recurring expression when referring to sexual assault, as found in case 1: «by introducing the penis twice, once through the vagina and once through the anus» (*introduciendo el pene en dos ocasiones, una por vía vaginal y otra por vía anal*) and in case 5: «he introduced his penis into the anus and vagina» (*le introdujo el pene en*

el ano y en la vagina). In cases 3 and 4 the verb used is «to penetrate»: «he penetrated her vaginally» (*la penetró vaginalmente*). As Mooney (2006) puts it, «[t]he violence of penetration is thus normalized» (p. 49), and in doing so penetration is differentiated from any other form of violence. It is presented as if certain parts of the body were capable of being penetrated by a penis without any force or violence when a sexual assault is taking place. This all ties in to the «inaction» of the victim, the «action» of the rapist, and the objectification of the vagina and the anus, separating them from the rest of the victim's body.

In case 4, the survivor finds herself trapped in a car with the perpetrator. She tries to escape, but he grabs her arm and pull her back inside, restricting her freedom. In this case, the victim is fully awake, and she shows her lack of consent in different ways, such as saying no, «telling [the compliant] to stop, that she didn't want to» (*diciéndole [...] que parara, que no quería*) and trying to escape from the car.

Extract 12 (case 4)

The accused, ignoring the express refusal of Mrs. Mari Jose, continued to take off her clothes from the waist down, –trousers and thong– *not being able to resist or scream*, (she tried but she could not) because she was very scared, *because of the fear she had, that she «gave up»* [...] penetrating her vaginally, adding the victim, that *«while he was doing it» she did nothing because she was scared, that she was telling him to stop, that she didn't want to*, but despite such a repeated refusal the accused consummated the act. [emphasis added]

The intimidating situation Mari José finds herself in, can be considered, in itself, violent (irrespective of the violence of the rape). However, the fact that the survivor was trying to escape from the vehicle was not enough for the judges to rule that she suffered violence and intimidation. Even though her reaction could be considered rational, in this case, she is still seen as belonging to a response of inaction: acknowledging that she was afraid but paralysed by this fear «not being able to resist or scream [...] because of the fear she had [...] she did nothing» (*no siendo capaz de resistirse ni gritar, [...] porque estaba muy asustada [...] no hizo nada*). As a result of the reading of the proven facts, the victim is made responsible for her actions in the legal basis, because these are understood as «without active resistance by her [the

survivor]». According to the rational perspective, a credible survivor of rape must actively try to avoid the assault. Here the discourse of «self-empowerment» is visible, giving her the option to resist and to avoid a sexual assault (Frazier & Falmagne, 2014, p. 480). The actions of resisting and screaming are presented as expected in the case of sexual abuse/assault, as reasonable potential reactions which are in line with how the victim should behave. Although she tried to refuse and resist, unfortunately, this was not deemed enough to consider her response to be active resistance. These expectations are aligned with the rape myth that blames the victim: «if the victim/survivor does not scream, fight or get injured then it is not rape» (Smith & Skinner, 2017, p. 3). Consequently, the conclusion in case 4 is that «by not meeting the requirements of violence or intimidation, plus without active resistance by her [the survivor]» (*al no concurrir los requisitos de violencia o intimidación [...] sin resistencia activa por esta*), the crime of rape is presented as non-violent or intimidating, and, thus, condemned as sexual abuse rather than rape. The adjective «active» divides the reactions into two possible options: active and passive. Even without understanding the violence involved in the abuse, the line that differentiates active resistance from passive reaction is too thin. If a survivor is trying to escape, the attacker grabs her and restricts her movements, how can her reaction be considered passive?

In the analysed cases, the only acknowledgment of violence is physical force that leaves visible injuries. Passivity of the survivor (as it is understood in the legislation) is penalized, because rape is not considered as a violent crime per se.

6 CONCLUSIONS

The aim of this research has been to explore the dominant discourses in five sexual abuse sentences, in different Spanish Courts, from a Feminist Critical Discourse Analysis perspective. It raises the question whether sexual abuse, understood as penetration without consent, is intimidating and violent or not. In Spanish legislation there are two different types of crimes: sexual abuse (*abuso sexual*, which can involve non-consensual penetration without violence and/or intimidation for the survivor) and sexual assault (*agresión sexual*, non-consensual penetration with violence and/or intimidation). Each

crime holds a different sentence, the former being a milder one than the latter. Under this legislative regime, rape is not considered in itself is a violent crime. The motivation for this research comes from the interest of the researcher in how the crime of rape is discursively represented in law and in society. It is necessary to explore how rape can be categorized as inherently non-violent in the absence of physical (external) violence. This stance has been challenged by other criminal justice systems, such as in Canada, where penetration without consent, is criminalized as inherently violent.

After analysing the five judgments of sexual abuse, the dominant discourses detected have been those of sexuality; inaction and erasure of the survivor; and lack of violence and/or intimidation. All are linked with the so-called clause «lack of violence and/or intimidation» required by the law to understand the crime as a sexual abuse rather than a sexual assault. It places the crime in different interpretive frames, such as the one of consensual relations or what is deemed appropriate behaviour of resistance on the part of the survivor.

The judges found the perpetrators guilty of sexual abuse but failed to see evidence of violence or intimidation to categorize the crimes as sexual assault. The assumption that sexual penetration without consent is not violent per se is reflected in the law, in these judgments and in society, where the main evidence required to understand the assault as violent is a victim's physical injuries. In this way, the violence of non-consensual penetration is differentiated from other types of violence. To some extent, this mindset blames the victims for their «inactive» behaviour, and it is reflected in the different sections of the judgment. The inaction attributed to the victim, in most of the cases analysed, is justified by the consumption of alcohol, a determining factor of the sentences dealt with. On the one hand, a reaction from the survivor is expected, and when this is not the case, the victim's «inaction» is justified with external motives. These reasons fail to consider the victim's emotional response and feelings both at the time and in the aftermath of the attack (ironically however this is something that normally is consistently raised throughout the cross-examination in rape cases as a justification for their reaction). Consequently, the violence of the aggressor's acts is diminished. The victims, in the description of the facts, are mainly represented as inactive bodies or as parts of a body, and the rape on certain

occasions is sexualized due to the lexis and sentence structures used to describe the crime. Therefore, the «inaction» of the survivor, the lack of physical resistance, may lead to a perceived lack of violence, something that from a judicial perspective damages the victim, due to the categorization of the crime suffered as a milder one.

The semantic distinction made by the law, where the relevant factor is physical violence, should be reconsidered when defining what should be condemned as violent sexual conduct. This perception tends to (re)victimize the victim, indicating that there are different types of sexual assaults, as the Spanish jurisprudence labels violence: «real» assaults vs. «unreal» assaults. This distinction in the law blurs the line between being raped or not being raped, with implications for the victims and for society as a whole. The understanding of what constitutes violence and how a sexual assault, such as those analysed in this paper, does not involve force, implies that these actions are not punished as violent acts. There is a disconnect in how sexual violence is defined and a need to change the way in which sexual abuse is understood, so that it is considered to be a violent crime in itself.

This analysis demonstrates that the definition in the law of two different crimes (i.e. sexual abuse and sexual assault) results in discursive strategies to categorise the victim into one or the other of these categories. In doing so, the criminal justice system in Spain fails to deliver survivors the protection they deserve. Through discursive strategies, the inherently violent experience of the victim is minimized or, even, erased. The relevance of this research comes from the belief that the criminal justice system has the obligation to protect victims. There has been a proposal from the Spanish Government to change the law, but as Henderson (2007) critiques, reforms only come in the aftermath of the cases discussed in this study. The change in legislation is not only imperative judicially, but to influence societal change and help prevent rapes before they occur.

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