

FACULTY OF LAW

Degree in Law

**ANALYSIS OF THE DIFFICULT DEMARCA-
TION BETWEEN THE INTIMIDATION OF SE-
XUAL ASSAULT AND THE PREVALENCE OF SE-
XUAL ABUSE**

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ABSTRACT: This paper studies the crimes of sexual abuse and sexual aggression. To do so, both concepts have been analysed in a general way, referring not only to the Spanish Code, as well as their different variants and differences, but also to existing European regulations, in order to compare them and draw conclusions. In addition, a jurisprudential analysis has been carried out regarding both crimes, taking into account different factors such as minority of age, co-perpetration, the relationship between the aggressor and the victim, and making reference to the case of "La Manada", due to its great media impact in the country. Finally, the Preliminary Draft Organic Law on the Comprehensive Guarantee of Sexual Freedom and its possible effectiveness in tackling the fine line between the two crimes has been analysed.

KEY WORDS: crimes against sexual freedom, sexual aggression, sexual abuse, sexual indemnity, victim, consent, violence, intimidation, jurisprudence, preliminary draft law.

RESUMEN: En el presente trabajo se realiza un estudio de los delitos de abuso y agresión sexual. Para ello, se han analizado ambos conceptos de forma general, haciendo referencia no solo al Código Penal, además de sus diferentes variantes y diferencias, sino también a la normativa europea existente, para poder compararlos y poder extraer conclusiones. Además, se ha llevado a cabo un análisis jurisprudencial respecto a ambos delitos, teniendo en cuenta diferentes factores como son la minoría de edad, la coautoría, la diferencia de edad entre la víctima y el agresor, y haciendo referencia al caso de "La Manada", debido a su gran impacto mediático en el país. Por último, se ha analizado el Anteproyecto de Ley y su posible eficacia para poder hacer frente a la delgada línea entre ambos delitos.

PALABRAS CLAVE: delitos contra la libertad sexual, agresión sexual, abuso sexual, indemnidad sexual, víctima, consentimiento, violencia, intimidación, prevalimiento, jurisprudencia, anteproyecto de ley.

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1. INTRODUCTION

Characterized by a high percentage of victimization of women, due to the existence of roles and stereotypes in our society, the crime of rape is one of the most historically punished sexual crimes.

Its regulation, both at international and national level, is constantly evolving, as it is a typical conduct that is deeply related to the progressive process of awareness of the deconstruction of the patriarchal system, which has a profound impact on collective social sensitivity.

The main objective of this work is to shed light on the wide-ranging doctrinal and jurisprudential debate generated around the consideration of violence and intimidation as defining elements of this crime, and its imprecise delimitation between the concepts of intimidation and sexual abuse with prevalence.

Case law is a clear example of the existing and blurred line between both precepts. To this end, various rulings from different courts will be presented in order to highlight this problem, which is still in force.

All this raises the need to reform the Penal Code, which has been in force since 1985 and, as society moves forward, it might be necessary to modify some precepts, including the crimes of sexual freedom that we are dealing with here, in order that the society, and women in particular, feel protected.

That is why, reference is made to the Draft Bill of the Organic Law of Integral Guarantee against Sexual Freedom, approved in March 2020 by the Ministry of Equality. This draft bill is currently still in progress and its entry into force would mean an important modification of the Criminal Code in terms of crimes against sexual freedom.

Finally, the conclusions drawn from the research will be presented.

2. THE LEGAL FRAMEWORK IN EUROPE

I consider it important to refer to the European situation with regard to these offences, in order to have a more general view on the criminalisation of sexual acts, before analysing the Spanish national panorama.

In the European region, international legal mechanisms have relatively recently incorporated lack of consent as a central element in rape. On the one hand, the Committee of Ministers of the Council of Europe already noted in 2002 that member states, through their national legislation, should criminalize any sexual act committed without consent, even if the victim shows no signs of resisting.¹

On the other hand, in connection with the decision in *M.C. v. Bulgaria*², the European Court of Human Rights held in 2003 that the decisive factor in the crime of rape was the lack of consent.³

Similarly, the aforementioned Court specified that it is no longer necessary to prove the victim's active physical resistance, but that it is sufficient to establish lack of consent, which can be deduced from the context in which the facts are framed. It also indicated that requiring proof of physical resistance in sexual crimes opens the possibility of leaving certain types of rape unpunished, thus jeopardizing the effective protection of the victim's sexual autonomy.⁴

This decision took a step forward in determining what conduct constitutes rape and promoted a gender-sensitive application of the law.⁵

¹ Recommendation Rec (2002) 5 adopted by the Committee of Ministers of the Council of Europe on 30 April 2002, p. 11

² A 14-year-old girl alleged that she had been raped twice in two consecutive days. After lodging the complaint, the Bulgarian authorities decided to close the case because they found no evidence of force, threats or resistance on the part of the minor.

³ *Ibidem*, paragraph n. 166.

⁴ Judgment of the European Court of Human Rights of 4 December 2003 No. 39279/98, (*M.C. v. Bulgaria*) ECHR 2203 XII, paragraph n. 166.

⁵ “*M.C. v. Bulgaria*”, *Women's Link Worldwide*, 2003. Available in: <https://www.womenslinkworldwide.org/observatorio/base-de-datos/m-c-v-bulgaria>

The Council of Europe Convention on preventing and combating violence against women and domestic violence (also known as the Istanbul Convention) is of particular interest as it is the only European international treaty that specifically addresses violence against women, its prevention and prosecution.

This Convention, which was ratified by 34 countries⁶ of the European community and entered into force in Spain on 1 August 2014, recognizes and includes sexual violence among the different forms of gender-based violence in its article 3:

*"(a) 'Violence against women' shall mean a violation of human rights and a form of discrimination against women, and shall mean all acts of gender-based violence that involve or are likely to involve harm or suffering to women of a physical, sexual, psychological or economic nature, including threats of such acts, coercion or arbitrary deprivation of liberty, in public or private life."*⁷

In addition, the Istanbul Convention also places the absence of consent in the main focus, leaving aside the means of commission used for that purpose⁸. The Convention states that "consent must be given voluntarily as a manifestation of the individual's free will considered in the context of the surrounding conditions"⁹.

Article 36 of the Convention - under the heading "Sexual violence, including rape" - stipulates that:

"Parties shall adopt such legislative or other measures as may be necessary to establish as criminal offences, when committed intentionally:

⁶ To date, the Convention has been ratified by: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Sweden and Switzerland. Council of Europe. Chart of signatures and ratifications of Treaty 210.

⁷ The Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, May 2011. Article 3.

⁸ This is without prejudice to whether any of the means of commission is accompanied by any of the aggravating circumstances in Article 46 of the Convention.

⁹ The Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, May 2011. Article 36.2.

- a. *non-consensual vaginal, anal or oral penetration, of a sexual nature, of the body of another person with any part of the body or with an object;*
 - b. *other non-consensual acts of a sexual nature upon another person;*
 - c. *compelling another person to engage in non-consensual acts of a sexual nature with another person.*
2. *Consent must be given voluntarily as a manifestation of the individual's free will considered in the context of the surrounding conditions.*
 3. *Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to former or current spouses or partners, in accordance with their domestic law.*

Nevertheless, not all countries that have ratified the Convention have fully incorporated it into their national legislation, including the lack of consent as a defining element of the crime of rape and ruling out the use of violence or threats as necessary requirements, as is the case in Spain.

However, Ireland, Belgium, Cyprus, Iceland, Luxembourg, Portugal and Sweden are examples of countries that do link the commission of rape to the lack of express sexual consent¹⁰. More specifically, Ireland and Belgium define rape as "sexual intercourse without consent", since 1981 and 1989, respectively.¹¹

I think it is important to point out the fact that several countries consider that the determining factor in a sexual assault is the lack of consent because it makes us question whether this should also be the case in Spain and whether our laws are outdated or not.

¹⁰ "Europe: Right to be free from rape, overview of legislation and state of plan in Europe and international human rights standards". *Amnesty International*, 2018. p. 9. In: <https://www.amnesty.org/en/documents/eu-r01/9452/2018/en/>

¹¹ *Ibidem*, pp. 9 and 11.

3. REGULATION OF SEXUAL OFFENSES IN THE SPANISH CRIMINAL CODE

The Spanish Penal Code of 1995 regulates sexual offences in Title VIII of Book II, under the title "Crimes against sexual freedom and indemnity". Although the title contains seven chapters, the crimes we are concerned with are typified in the first two. We find, on the one hand, sexual assault in Title I, from articles 178 to 180 CC; and the crimes of sexual abuse, on the other hand, in the following chapter, articles 181 and 182 CC.

We will now proceed to analyze the objective type of both crimes, since sexual aggression and sexual abuse are the sexual crimes with the most recognised facts registered in Spain¹² (see Annex I), as well as being a matter that causes a great social and psychological impact on its victims. We will also see that there is a broad doctrinal and jurisprudential debate generated not only around the consideration of violence and intimidation as defining elements of the crime of rape, but also in relation to the interpretative conflict raised by the concepts of intimidation and prevalence within these crimes.

3.1. The protected legal right

The protected legal right in sexual nature crimes in the Spanish Criminal Code are both sexual freedom and sexual indemnity.

Sexual freedom is understood as "a person's right to self-determination in the area of his or her sexuality"¹³. That is, it is the right of each individual to freely choose his or her sexual condition. This capacity for self-determination empowers individuals to respect both their own sexual freedom and that of others.

¹² In 2019, of the known facts of sexual offences, they accounted for 78%. Ministry of Interior, Report on crimes against sexual freedom and indemnity in Spain, 2019, p. 5.

¹³ Real Academia Española. "Libertad Sexual". *Diccionario de la lengua española* (23a ed.). From: <https://dpej.rae.es/lema/libertad-sexual>

According to WHO¹⁴, "sexual health is a state of physical, mental and social well-being in relation to sexuality. It requires a positive and respectful approach to sexuality and sexual relationships, and the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.

The concept of sexual indemnity refers to the "manifestation of the dignity of the human person and the right that every human being has to a free development of his or her personality, without traumatic interventions in his or her intimate sphere by third parties, which can generate indelible marks in the psyche of the person for life".¹⁵

In Title VIII of the Code there are also other crimes that cannot be explained as crimes against sexual freedom. This is especially the case with sexual offences involving minors or persons with disabilities in need of special protection (sexual abuse, offences of "obscene" exhibitionism and dissemination of pornography among minors or persons with disabilities in need of special protection, and those relating to prostitution and corruption of minors or persons with disabilities in need of special protection).

If there is one thing that characterizes people in this situation (e.g. under sixteen, profoundly oligophrenic, etc.), it is that they lack autonomy in determining their sexual behavior.

Currently, in our cultural sphere, there is a kind of unwritten consensus on the "intangibility" or "indemnity" that should be granted to these persons with regard to the sexuality of third parties. More than the freedom of the minor or the person with disabilities, which obviously does not exist in these cases, the aim is, in the case of the minor, to protect their future freedom, or rather, the normal evolution and development of their personality, so that when they become adults they can freely decide their sexual behavior; and, in the case of the person with disabilities, to prevent them from being used as a sexual object by third parties who take advantage of their situation to satisfy their sexual desires.

¹⁴ World's Health Organization

¹⁵ MARTÍ FERRER, C. "Garantía del principio de contradicción ante la imposibilidad de declarar la víctima de delito contra la indemnidad sexual". Noticias jurídicas. 2018. Available in: <https://noticias.juridicas.com/conocimiento/articulos-doctrinales/12691-garantia-del-principio-de-contradiccion-ante-la-imposibilidad-de-declarar-la-victima-de-delito-contra-la-indemnidad-sexual/>

The special problem with these offences is precisely that it is no longer possible to speak of "sexual freedom" as a specifically protected legal right in them, given that the passive subjects on which they fall are persons who lack this freedom, either temporarily, in the case of minors, or definitively, in the case of persons with disabilities who need special protection.

The concept of sexual indemnity refers to the "manifestation of the dignity of the human person and the right that every human being has to a free development of his or her personality, without traumatic interventions in his or her intimate sphere by third parties, which can generate indelible marks in the psyche of the person for life".¹⁶

Therefore, we see how sexual indemnity is intended to protect all those minors or incapable persons who have not developed their own sexual personality, while the term sexual freedom is more suited to sexual offences against persons of legal age or against those who are considered to have reached the full development of their sexual personality.

Ultimately, what both precepts seek to protect is that no one's personal sphere, in terms of sexual integrity, is harmed.

3.2. Sexual aggression

As already mentioned in the previous section, Chapter I of Title VIII punishes those acts that violate sexual freedom in which violence or intimidation has been involved, and whose conduct may consist of basic sexual aggression or qualified by consisting of carnal access, introduction of objects, oral or anal penetration or other types of conduct.

Within Chapter I of the Title that concerns us, we therefore find the basic type of sexual aggression in Article 178 PC, the aggravating type of the previous one in Article 179 PC, and five aggravating circumstances of the previous articles in Article 180 PC.

¹⁶ MARTÍ FERRER, C., "Garantía del principio de contradicción...", *op. cit.*

3.2.1. The basic offence of Article 178 PC

Article 178 PC covers a basic offence consisting of an act that infringes sexual freedom without carnal access or the introduction of bodily members or objects.

It should be noted that the concept of "attack against sexual freedom" is not expressly specified, so the conducts that would fall under this term are not determined. However, most of the doctrine understands that the conducts must involve physical or bodily contact between the victim and the active subject.¹⁷

It should be clarified that the perpetrator of the offence under this article must not have any intention of performing the act by means of carnal access, whether vaginal, anal or oral, or the introduction of bodily members or objects, since in that case we would be dealing with a case of the aggravated subtype of sexual aggression.¹⁸

In short, it can be deduced that the execution of this offence must be carried out with the use of violence or intimidation, or both together, without the existence of any of the circumstances set out in Article 179 of the Criminal Code. Furthermore, the execution of the criminalized action must be carried out without the consent of the victim.

3.2.2. The aggravated type of Article 179 PC

Article 179 PC includes an aggravated offence, constituting the crime of rape consisting of the conduct of carnal access via the vagina, anus or mouth; introduction of bodily members via the vagina or anus; and introduction of objects via the vagina or anus.

¹⁷ LIBANO BERISTAIN, A., "Los delitos contra la libertad e indemnidad sexual: agresión, abuso y acoso sexual. En LIBANO BERISTAIN, A., *Los delitos semipúblicos y privados: aspectos sustantivos y procesales (adaptado a la reforma del código penal introducida por la ley orgánica 5/2010)*., Ed. J.M. Bosch, Barcelona, 2009, pp. 104-105.

¹⁸ LUZÓN CUESTA, J.M., "Delitos contra la libertad e indemnidad sexuales". In LUZÓN CUESTA, J.M., *Compendio de derecho penal: Parte especial (18a ed.)*., Ed. Dykinson, Madrid, 2011, p. 89.

As far as carnal, oral or anal access is concerned, it will require the introduction of the member or object into one of these cavities, and following the same criterion set out in relation to vaginal penetration, the conduct will be consummated from the very moment when it is introduced through the anal orifice, or when it has been introduced into the mouth, going beyond the lip line but not beyond the teeth.¹⁹

It should be made clear that the concept of "carnal access" does not only imply "carnal access", but also "making oneself accessible". Therefore, as far as the subjects are concerned, they can be any person, male or female. In other words, sexual aggression by women on women, women on men, men on men and men on women is possible, despite the fact that it has been demonstrated that the greatest number of victims are women²⁰ (see Annex II).

3.2.3. The aggravated subtypes of Article 180 PC

Article 180 PC regulates the following aggravated subtypes, which refer to circumstances involving greater violence or intimidation:

- a) The use of violence or intimidation of a particularly degrading or humiliating nature. (art. 180.1 PC).
- b) The carrying out of the act by the joint action of two or more active subjects. (art. 180.2 PC).
- c) The special vulnerability of the passive subject, due to age, illness, disability or situation. (art. 180.3 PC).
- d) The concurrence of a relationship of superiority or kinship between the victim and the aggressor. (art. 180.4 PC)

¹⁹ *Delitos sexuales*, Walters Kluwer, Madrid, 2019. p. 125.

²⁰ Ministry of Interior (2019). Report on offences against sexual freedom and sexual indemnity, p. 16. Available in: http://www.interior.gob.es/documents/642317/12812393/Informe_delitos_libertad_indemnidad_sexual_Espa%C3%B1a_2019_126210034.pdf/af914177-ccc7-4d6f-800b-e00637e87548

e) The use of dangerous means, such as weapons, when they are likely to cause death or any of the injuries foreseen in the Code. (art. 180.5 PC)

The article further specifies that "if two or more of the above circumstances are present, the penalties provided for in this article shall be imposed in the upper half".

All sexual assaults have in common the element of bodily contact or indecent touching as long as it has sexual significance.

It is true, however, that there is no purely objective concept of sexual intercourse, although any act in which the genital organs are involved should generally be classified as such, especially if its purpose involves penetration. There is, therefore, no problem in considering carnal access by vaginal, anal or oral means, as well as the introduction of objects or bodily members by one of the first two means, which constitute the qualified offence of Article 179 PC.

However, when acts are not so clearly sexual in nature, their qualification on a purely objective level is more problematic; this is the case, for example, with kissing and touching of parts of the body other than the genital organs themselves.

In these cases, a certain transcendence and seriousness of the act and its implicit potential to affect the sexuality of others in a relevant way must also be required. In addition, local customs and mores, which make truly "shocking" acts appear normal in other areas and contexts, must also be taken into account.²¹

3.3. Sexual abuse

The crime of sexual abuse is regulated in Chapter II of Title VIII under the heading of "Sexual abuse", in articles 181 and 182 of the Penal Code. This offence is committed by committing an act that violates the sexual freedom of a person, regardless of sex, without the victim's consent and without the use of violence, force or intimidation. Article 181.1 PC punishes the perpetrator as responsible for sexual abuse with a prison sentence of one to three years or a fine of eighteen to twenty-four months.

²¹ MUÑOZ CONDE, F. y LÓPEZ PEREGRÍN, C. *Derecho penal. Parte especial*, 22. Edición, Valencia: Ed. Tirant lo Blanch, 2017, pp. 207-208.

In addition to the basic offence of Article 181.1 of the Criminal Code, this Chapter II criminalises:

- a) In Article 181.2 PC, sexual abuse without consent.
- b) Sexual abuse by prevalence, Article 181.3 PC.
- c) Fraudulent sexual abuse or abuse of position, article 182.1 PC.
- d) Sexual abuse with carnal access, or introduction of article 181.4 PC and article 182.2 PC.

4. DIFFERENCES BETWEEN SEXUAL AGGRESSION AND SEXUAL ABUSE

The absence of consent²² is the common element in both conducts, regardless of whether or not there is penetration. However, the Spanish Penal Code requires the concurrence of violence or intimidation in order to be able to call the attack on freedom with carnal access a sexual assault, unlike the crime of sexual abuse, which does not require either of these means of commission.

Whereas in the case of sexual assault, the typical action requires a violent or intimidating means to overcome the victim's unwillingness and thus achieve non-consensual sexual intercourse, in the case of abuse, it is the achievement of sexual intercourse without the support of a free act by the person who only apparently consents without exercising his or her real freedom that is punished.

We will see, however, that the distinction is not so clear-cut between sexual assault with intimidation and sexual abuse with prevalence. To better understand this, I consider it necessary to analyse the concepts of violence, intimidation and abuse with prevalence one by one.

4.1. Violence

Violence is to be understood as "physical force applied by one person on another and which constitutes the means of commission of some crimes, such as crimes against sexual freedom".²³

For the Supreme Court, physical violence in the crime of sexual assault is equated to the use of any physical means to bend the will of the victim, and it is not necessary for it to be irresistible, although it must involve an actual more or less violent aggression.

²² According to Cambridge Dictionary, "consent" means "permission or agreement", or "the state of agreeing with someone or something", taking into account that "agreeing" means "to have the same opinion", and "permission" means "to allow someone to do something".

²³ According to Real Academia Española. *Diccionario de la lengua española* (23a ed.).

As the judgment of the Supreme Court of 21 January 2016 recalls, "in the crimes of sexual assault it is necessary that there is a situation of physical or intimidating force that can be considered sufficient to bend the will of the passive subject. It is not necessary for this physical force to be irresistible, or invincible, or of unusual severity, as the victim cannot be required to put up resistance to the point of seriously endangering his life or physical integrity, but it is sufficient that it is suitable according to the characteristics of the case".

To this, the Judgment of 18 July 2017 of the same Court adds that "the criminal type only requires violence by the accused and makes no mention of the resistance that the victim should put up and much less the degree or entity of such resistance against the physical force used by the aggressor. Therefore, it is sufficient that in the face of the victim's manifest and explicit opposition, the agent persists in his intentions, overcoming this opposition and resistance by force, even passive, because it is essential that the aggressor acts against the victim's will".²⁴

There is no need, thus, for continued resistance on the part of the passive subject who can, as soon as the acts of violence begin, tolerate (not consent to) the sexual assault in order to avoid greater evils. Of course, there must be an appropriate relationship between the violence used and the sexual assault.²⁵

The theory of adequacy supports the idea that the cause will only be relevant if it is adequate to produce the result. Therefore, according to this theory, there must be a causal link between the use of violence and the sexual assault committed in order for the acts to be considered to have been committed through the use of violence.

²⁴ DE VICENTE MARTÍNEZ, R., "El delito de violación: problemas que plantea su vigente redacción". En FARALDO CABANA, P., & ALCALÉ SÁNCHEZ, M. (Dir.) / RODRÍGUEZ LÓPEZ, S., & FUENTES LOUREIRO, M. A. (Coords.), *La Manada. Un antes y un después en la regulación de los delitos sexuales en España*, Ed. Tirant lo Blanch, Valencia, 2018, p. 208.

²⁵ MUÑOZ CONDE, F y LÓPEZ PEREGRÍN, C., *op. cit.*, p. 208.

4.2. Intimidation

Taking into account that the definition of “intimidation” is “the action of frightening of threatening someone, usually in order to persuade them to do something that you want them to do”, it is understood that, in contrast to violence, it is more difficult to define the cases in which there is intimidation, as its application depends on the interpretation of the Judges and Magistrates, considering that there is no express definition of this concept in the legal text and, therefore, it is a subjective concept.

There is a blurred line between "intimidation" and "prevalence" and this has made it confusing on several occasions to classify some acts within one type of criminal offence or another. Later on, case law will be analysed in order to clarify both concepts in more detail.

The jurisprudence of the Supreme Court defines it as "psychological constraint, consisting of the threat or announcement of a serious, future and credible evil, if the victim does not agree to participate in a certain sexual action"²⁶, or ““the threat by word or deed to cause unjust harm that instils fear in the passive subject"²⁷

According to MUÑOZ CONDE, "intimidation is equivalent to threatening"²⁸. However, this author considers that not just any threat is valid, but that it must have a certain gravity. Moreover, as in the case of violence, the aggression must be related to privacy.

In sexual assaults, following MUÑOZ CONDE, the age of the passive subject and the social or family context surrounding him/her are therefore decisive factors in asses-

26 AMER MARTIN, A. “La sentencia de 'La Manada' y la intimidación según el Tribunal Supremo”. Noticias jurídicas. 2018. Available in: <https://noticias.juridicas.com/conocimiento/articulos-doctrinales/12981-la-sentencia-de-la-manada-y-la-intimidacion-segun-el-tribunal-supremo/>

27 MONGE FERNÁNDEZ, A., “Los delitos de agresiones y abusos sexuales a la luz del caso “La Manada” (“Sólo sí es sí””. En MONGE FERNÁNDEZ, A. (Dir.) / PARRILLA VERGARA, J. (Coord.), *Mujer y Derecho Penal ¿Necesidad de una reforma desde una perspectiva de género?*. Ed. J.B. Bosch., Barcelona, 2019, p. 349.

28 MUÑOZ CONDE, F y LÓPEZ PEREGRÍN, C., *op. cit.*, p. 208.

sing to what extent the intimidation can be of a sufficient degree to constitute the type of one of these crimes.²⁹

Therefore, when determining whether or not there has been intimidation, both the environment and the social and family situation of the victim must also be analysed. However, this is still a subjective analysis which, depending on the judges and magistrates, can be determined in one way or another.

4.3. Prevalence

As a result of the above, it can be deduced that the distinction between the concepts of aggression and sexual abuse is clear, as the different conducts will be perfectly framed in one or the other depending on the concurrence of the elements of violence or intimidation, which delimit both concepts in a simple manner.

However, the reality is very different. It is true that violent assaults do not generate much doctrinal or jurisprudential debate, but the proximity between assaults involving intimidation and sexual abuse with prevalence make their differentiation extremely complex, which is the point of greatest rapprochement between both figures.³⁰

In order to understand this typical element, we observe in provision 181.1 of the Criminal Code that sexual abuse occurs when the sexual freedom or indemnity of a person is attacked "without violence or intimidation, and without consent". However, the text itself contemplates for this same offence the possibility of obtaining consent "by the perpetrator taking advantage of a situation of manifest superiority that restricts the victim's freedom", in the third paragraph of the aforementioned article.

In the same way, according to Supreme Court Judgment n. 542/2013, of 20 May, "the referred prevalence must be understood as any state or situation that grants the active subject a privileged position with respect to the passive subject of which the former

²⁹ MUÑOZ CONDE, F y LÓPEZ PEREGRÍN, C., *op. cit.*, p. 209.

³⁰ ALTUZARRA ALONSO, I. "El delito de violación en el Código Penal español: análisis de la difícil delimitación entre la intimidación de la agresión sexual y el prevalimiento del abuso sexual. Revisión a la luz de la normativa internacional", *Estudios de Deusto*, 2020. p. 20.

not only takes advantage, but is aware that it confers a situation of superiority, to sexually abuse the victim, who in this way does not give her consent freely, but vitiated, coerced or pressured by such a situation".

Thus, in order for sexual abuse by prevalence to occur, the jurisprudence³¹ demands three requirements: "(1) A situation of superiority, which must be manifest. 2. That this situation influences, by restricting it, the victim's freedom. 3. That the agent of the act, aware of the situation of superiority and of its inhibiting effects on the victim's freedom of decision, takes advantage of the same situation to obtain the consent, thus vitiated, to sexual intercourse".³²

However, there is a doctrinal line that defends the possibility of the concurrence of "second degree" intimidation compatible with sexual abuse by prevalence, of a lower intensity or severity than that required in the case of sexual aggression.³³

³¹ Judgement of the Supreme Court no. 1518/2001, of 14 September.

³² FARALDO CABANA, P. "¿Intimidación o prevalimiento? La sentencia de La Manada y los delitos sexuales en España". Available in: <https://www.criminaljusticenetwork.eu/it/post/intimidacion-o-prevalimiento-la-sentencia-de-la-manada-y-los-delitos-sexuales-en-espana>

³³ CUERDA ARNAU, M.L. "Agresión y abuso sexual: Violencia o intimidación vs. Consentimiento viciado". En FARALDO CABANA, P. y ACALE SÁNCHEZ, M. (Dirs.). *La manada. Un antes y un después en la regulación de los delitos sexuales en España*. Valencia: Ed. Tirant lo Blanch, 2018. pp. 124, 125.

5. SEXUAL ASSAULT BY INTIMIDATION AND SEXUAL ABUSE WITH PREVALENCE

5.1. The thin line between sexual assault with intimidation and sexual abuse with prevalence

Once the concepts have been analysed, reference should be made to the differences that separate sexual aggression and sexual abuse by prevalence, from articles 179 and 181.3 of the Penal Code.

Once the concepts have been analysed, we can see that consent is a key aspect for differentiating between the prevalence of intimidation. In principle, the differentiation between both figures seems clear: when the act is carried out with violence or intimidation and against the consent of the victim, it is aggression, and if the act is carried out without violence or intimidation and without consent, it is sexual abuse.

However, as mentioned above, the difficulty arises when discerning whether it is sexual abuse with prevalence or intimidatory sexual aggression, as they are extremely close figures, due to the fact that Article 181.3 of the Criminal Code does not limit the sources originating from the situation of superiority of the perpetrator. Thus, both criminal offences revolve around the concept of intimidation.

Although intimidation is present in both criminal offences, according to case law, in the case of sexual abuse with prevalence, this intimidation must be "inferior, or "of the second degree".

Therefore, when applying one article or the other, the level of intensity of the intimidation used by the aggressor must be taken into account, which is very difficult to stipulate and, therefore, often gives rise to discrepancies.

We can see how the Supreme Court has mentioned this conflict on several occasions³⁴: "the dividing line between intimidation and prevalence may be difficult to per-

³⁴ Supreme Court Judgments n° 769/205, of 15 December, and n° 1030/2010, of 2 of December, among others.

ceive in borderline cases, as is the difference between consent curtailed by the threat of harm and flawed consent that corresponds to the type of abuse, where the victim also feels intimidated to some extent”.

However, in order to resolve these cases the Supreme Court Judgement No 182/1999 of 10 February 1999 states that in case of doubt "the solution most favorable to the offender must be applied, convicting for sexual abuse and not for sexual assault".

5.2. Distinction of both offences in recent jurisprudence in the light of different situations

In the following, I believe it is appropriate to proceed to the jurisprudential analysis in relation to sexual aggression by intimidation and sexual abuse with prevalence since.

As we have seen, the current legislation dealing with this matter is theoretically clear but in practice it is tremendously complex so that, based on the law, two paths can be taken in such a way that the same proven facts could lead to different solutions, both being adequately grounded.

Following an exhaustive search of case law, the following are judgments that reflect the interpretative problem posed by the concepts of intimidation and prevalence, as they are cases with very similar proven facts but which, nevertheless, contain very different rulings.

To carry out the research, the "CENDOJ" (Judicial Documentation Centre) website was used. In order to obtain the search results, the date of the rulings was limited from January 2018 to June 2021; the criminal section was selected as "jurisdiction", "sentences" were selected as type of ruling and the concepts "sexual abuse with prevalence of minors", "sexual assault on minors", "group sexual assault", "environmental intimidation", "180.3", " were searched for. More than 900 results were obtained from this research, from which the most illustrative judgments were extracted, in relation to:

- a) minors;

- b) co-authorship;
- c) relationship between the victim and the aggressor; and
- d) the case of "la Manada".

With this in mind, sentences will be presented in which facts or situations are reflected and the confusion of the Courts is clear when it comes to classifying the facts as sexual aggression or sexual abuse by prevalence.

5.2.1. Minors

The criminal approach to cases of sexual crimes against underaged persons must be based on the idea that minors need special protection in accordance with their status as children.

When analysing how case law criminalises sexual offences in cases in which the victims are under 16 years of age, an age from which the law grants broad but not complete operability to consent in sexual matters,³⁵ it is notorious that the majority of cases are punished as sexual abuse and not as rape.

However, despite the fact that the majority of sentences criminalise it as sexual abuse with prevalence, there are also sentences that consider that the minor's age constitutes a situation of intimidation of which the aggressors take advantage and, therefore, punish it as sexual aggression.

That said, two judgments on very similar facts have been analysed below, the first ruling that it was continuous sexual abuse, and the second ruling that it was a crime of sexual assault.

We see how both Judgment no. 8839/2020 of the High Court of Justice of Catalonia and Judgment no. 1037/2021 of the Supreme Court 1 take the age of the victims into

³⁵ DE LA ROSA CORTINA, J.M., *Bien Jurídico Protegido y Delitos Contra la Libertad e Indemnidad Sexual*, Ed. Tirant lo Blanch, Valencia, 2013. p. 60.

account and make reference to it on several occasions but, nevertheless, the rulings are different.

The judgment of the High Court of Catalonia responds to the appeal lodged against the judgment handed down on 9 July 2020 by the Barcelona Provincial Court for a continuous offence of sexual assault, in which it was declared that the accused Epifanio maintained a friendly relationship with Guadalupe, so that when he had to stay in Barcelona he resided at the home of the accused.

In December 2017, Guadalupe's daughter, 14-year-old Emilia, who was visiting from Switzerland, stayed at the same address to spend the holidays close to her father. In this way, the minor spent the night in a separate room, where the granddaughters of the accused, Marcelina and Marisa, were also staying.

Taking advantage of this situation, the accused entered the room where Emilia was sleeping on two different days of the week corresponding to the Christmas holidays, at night, and, after holding her arms, performed acts of a sexual nature on her body, even though he was aware that the minor was trying to avoid it. The accused pulled down the victim's pyjama trousers, although she initially managed to pull them up, but eventually the accused overcame her opposition by spreading her legs and inserting two fingers into her vagina and making massaging movements.

In addition, the accused also licked her vagina and breasts. Finally, he kissed her by inserting his tongue into her mouth and left the room, but not before telling Emilia not to say anything about what had happened to anyone. On both occasions when the sexual acts took place, the dynamics and contents were the same.

In the summer of 2018, from the first week of July onwards, the same situation was repeated: Emilia's father lived in the defendant's house and Emilia stayed in the same house, with her own room, during her summer holidays and in order to be close to her father.

Repeating the situation, the accused also repeated the same acts on 9 July, entering Emilia's room at night and carrying out the same actions: pulling down her pyjama

trousers, inserting two fingers into her vagina, licking and kissing her vagina and breasts, and finally leaving the room after kissing her and inserting his tongue in her mouth.

On 27 July 2018, the accused persuaded Emilia to accompany him to his van, which was parked in an underground car park near her home, and there, in the back seats, he pulled up her T-shirt to lick and kiss her breasts and to kiss her.

As a result of the events described and the situation created by the defendant, Emilia suffered anxiety attacks and anguish, especially in the summer of 2018, as well as difficulties in falling asleep, all of which affected her family and social relationships and her school performance.

The SCJ ruled that the appeal lodged against the judgment of 9 July 2020, handed down by the Barcelona Provincial Court, was dismissed. Therefore, it agrees with the judgment of the Audiencia, which concludes that this is a continuous offence of sexual assault.

On the other hand, judgment no. 1037/2021 of the Supreme Court deals with a factual scenario in which the defendant, Apolonio, husband of Ms. Coral since 2013, moved to Spain in February 2017, and came to reside together with Ms. Coral and their daughter born from a previous relationship, Inmaculada, born in 2005.

In the summer of 2016, during one of the visits that Ms. Coral and her daughter Inmaculada made to the accused in Manasas (USA), the accused, taking advantage of both their cohabitation and the trust that the sentimental relationship between him and the minor's mother entailed, as well as the age difference between them, moved by a libidinous spirit and with the aim of violating their sexual indemnity, taking advantage of the fact that Ms. Coral was not present, taking advantage of the fact that the minor was lying on the bed, the accused began to touch her breasts and genital area, and the fact that she was lying on the bed, the accused began to touch her breasts and genital area. Coral was not present, taking advantage of the fact that the minor was lying on the bed, the accused began to touch her breasts and genital area.

Since August 2017, on unspecified dates and on repeated occasions, and always meeting with Ms. Coral's daughter at the family home and in her absence, and guided by a libidinous spirit and with the aim of attacking her sexual indemnity, taking advantage of the fear he instilled in her by telling her not to say anything to her mother, since if she did so he would be put in prison, together with the access he had to her due to the fact that they lived under the same roof and the difference in age between them, as well as the fact that he was her stepfather and the care he took of Inmaculada when she was not at home, he managed to overcome the weak opposition of the minor, who tried to move away from the defendant when he grabbed her by the waist, taking her to the bedroom, where, after lying her on the bed, he removed her trousers and panties and, while holding her arms to prevent her from moving, he penetrated her vaginally.

In the first instance, the Audiencia sentenced Apolonio to a continuous crime of sexual assault on a minor under 16 years of age with penetration of article 183.1, .2, .3, and 4 d) of the Penal Code. However, the Civil and Criminal Division of the High Court of Justice of Catalonia passed sentence, condemning Mr. Apolonio as the author of a continuous crime of sexual abuse with prevalence of articles 183.1.3 and 4 d) and article 74 of the Penal Code, ruling out sexual aggression, as there was no violence or intimidation according to these, making reference to various sentences, which state that the situation of superiority inherent to prevalence restricts the victim's freedom without the need for threatening acts.

The Supreme Court states that "in the present case, as analysed in the lower court ruling, the defendant's actions reveal a manifest situation of superiority which he abused or took advantage of over his victim, derived not only from their obvious age difference, but also from his personal ascendancy over her, first as his mother's partner and then as her husband, acting as her sister's father, as can be seen from the account of the proven facts".

The Supreme Court declared that this was a case of abuse by prevalence, that is, it considered that the victim was in an obvious situation of inferiority which the accused took advantage of. However, it did not consider that there was sufficient intimidation to qualify the acts as sexual assault.

Therefore, we see how the Supreme Court, among other circumstances, takes into account the fact that the victim is a minor when it says "the Court also takes into account the young age of the minor when the events occurred - from 11 to 12 years old -, as indicated by the lower court, these are circumstances that clearly show a high degree of culpability that justifies, in strict terms of retribution and proportionality, setting the highest reproach foreseen for the type of crime applied".

Thus, the Court, in addition to appreciating the position of superiority in which the accused found himself, as the sentimental partner of the victim's mother and the authority he had at home as the father of her sister, makes it clear that age is an issue to be taken into account when it comes to classifying a crime as sexual abuse by prevalence.

Consequently, we see that both judgments interpret and consider the element of "age" differently. This is yet another clear example of the lack of accuracy of the offense of "prevalence" that exists in the current Penal Code. Not only because of the confusion that this crime generates with respect to the crime of sexual aggression, but also because of the imprecision that exists regarding what should be understood as a "situation of superiority".³⁶

From these two cases we can conclude that, despite the fact that the facts are similar, the elements of violence and intimidation generate many doubts when determining the verdict in crimes of sexual freedom. Furthermore, we see that the fact that the victim is under 16 years of age, although it is a circumstance that is taken into account by the courts, is not definitive, despite the fact that the majority of the doctrine classifies this type of crime as abuse by prevalence.

From my point of view, the minor's age is a very important factor that should be always taken into consideration, since under these conditions it is much easier to influence the victim, as the victim is more vulnerable due to their young age and their lack of experience. What is more, in my view it also should be considered as an intimidating circumstance.

³⁶ CALVO ATENCIA, S. "El Entramado Interpretativo-Conceptual de la Intimidación y el Prevalimiento en los Delitos de Abuso y Agresión Sexual.", UPV/ EHU, 2020. p. 47.

In addition, the fact of the lack of maturity in this aspect makes it easier for the perpetrator to restrict the victim's freedom, which has an impact on the victim's decision-making capacity. That's why, I think that the difference of both victim's and aggressor's ages should also be taken into consideration because the victim's freedom to make decisions is definitely affected by it, and this should be punished in the harshest possible way.

5.2.2. Co-authorship

Similarly, we also find discrepancies between judgments in cases where there is more than one perpetrator. In fact, there is no precise indicator that indicates when co-perpetration constitutes a situation of superiority and, therefore, prevalence, and when the plurality of aggressors means that the acts are committed with intimidation, and therefore constitute a crime of sexual assault.

As a consequence of this, I consider it necessary to analyse judgments 133/2020 of 9 March of the Provincial Court of Santander and Supreme Court judgment n°. 229/2021 of 20 January.

The judgment of the Provincial Court of Santander states that, on the night of 13 October 2017, Isidro and Justino met María in a nightclub, initiating contact with her that continued for the following hours, going together to another establishment, from which they left at around 9.30 am. When the three of them arrived near the hostel, Isidro and Justino invited María to go up to the room, to which she agreed.

At one point, Isidro and Justino began to touch her libidinally, Isidro touching her legs at the same time that Justino touched her breasts. María tried to push them away with her hands, telling them "you're stupid, leave me alone", repeatedly telling them that she wanted to go home.

At that moment, Isidro grabbed her by the waist and threw her on the bed, placing Justino on top of her and preventing her from moving, proceeding between the two of them to undress her even though she kept telling them to leave her alone, Isidro placed

himself on her chest, grabbing her neck tightly, pulling up her clothes and introducing his penis into her mouth, forcing her to perform fellatio, while Justino, after undressing her from the waist down, spread her legs and penetrated her vaginally.

After that, they turned her around and exchanged positions, penetrating her both vaginally and orally, performing these acts in spite of María's refusal, who at one point, given the turn of events, became paralyzed and stopped resisting. Finally, she hurriedly got dressed and surreptitiously left the hostel.

The Provincial Court considers that the facts described are typically framed in two crimes of sexual assault. It also states that "with the two men, who were older than her and in good physical condition, standing on top of her, in the attitudes described, an intimidation was also created from which an obvious coercion of her will was derived, which was totally annulled as the victim described when she stated that she "surrendered", "closed her eyes" and "waited for them to finish", adopting an attitude of submission, not of consent, which was obvious to them, who necessarily had to perceive it".

The sentence also points out the fact that in the so-called environmental intimidation there must be a conviction of all the participants who in a group execute the multiple sexual aggressions because the presence of another or other persons acting in collusion with the other who performs the forced sexual act is part of the intimidatory framework that overrides the victim's will to resist.

The Court considers that the situation described above contains in itself a strong intimidating content constituted by the plurality of interveners, which diminished the victim's capacity to respond.

This ruling mentions, among others, Supreme Court Judgment nº 786/2017 of 30 November, which states that "co-perpetration would be based not so much on the prior agreement, but fundamentally on effective collaboration for the desired anti-judicial objective, which is evidenced in an increase in the disvalue of the action and the result, since on the one hand, the presence of the co-perpetrators implies a marked superiority and greater impunity or at least assurance of criminal intent for the perpetrators, and a correlative intensification of the intimidation suffered by the victim, the presence of the

co-perpetrators implies a marked superiority and greater impunity or at least assurance of the criminal design for the perpetrators, and a correlative intensification of the intimidation suffered by the victim with an effective reduction of any capacity to respond, giving rise to a qualitative increase in the seriousness of the situation.”

Supreme Court Judgment n° 1291/2005 of 8 November stipulates that "in these cases the intimidating effect can be produced by the simple presence or concurrence of several people, different from the one who materially consummates the violation, since the existence of the group can produce in the person attacked a state of environmental intimidation”.

Secondly, it is worth mentioning the Supreme Court Judgment n° 229/2021, of 20 January, which contains the following proven facts:

Marco, Abel and Adolfo were on 7 February 2016 celebrating the carnival festivities outside the defendant Alfonso's vehicle. At around 00.30 hours they met Ascensión, a minor, who was alone because her friends had left and on hearing "what am I doing, I've been left alone", the 3 defendants approached her and invited her to come with them.

She consented and, upon entering the vehicle, the defendants placed the minor face up in the front seats and Adolfo and Abel began to kiss her, and to touch her genitals under her underwear, on two occasions inserting their finger into her vagina, while she was forcibly restrained, at the same time as she told them to stop, that she did not like what was happening.

The defendants then moved the minor to the back seats, and the minor found that the doors were locked and that she could not get out. Adolfo sat next to her and began kissing the minor, touching her breasts and asking her to perform fellatio, which she refused.

Faced with her refusal, Adolfo asked his friends to leave him alone with her. The defendant led the minor to a dark area, and once there, he pulled down his trousers and after placing the girl on his knees, he forced her to perform fellatio on him, grabbing her

head tightly and moving her towards his punishment, until he forced the minor to consent by inserting his penis into her mouth, without allowing her to get up.

After the friends returned and Adolfo forced the victim into the back of the vehicle, the victim managed to open the door and flee in a careless manner.

The 4th Section of the Provincial Court of Valencia decided to convict the three defendants as responsible for a crime of sexual abuse with prevalence. The Civil and Criminal Division of the High Court of Justice of Valencia, on 4 February 2019, partially upheld the appeal lodged by the parties and reduced the prison sentences from 7 to 6 years for Abel, from 6 to 5 years for Marco, and from 10 to 9 years for Adolfo. The Supreme Court, for its part, ruled that the cassation appeal lodged against the High Court of Justice's judgment was not admissible, considering that there was no room for intimidation.

We see, therefore, that the facts described in both sentences are very similar, since in both cases the acts are carried out by more than one person, in both cases the defendants are physically superior to the victims, as well as occurring in places where it is difficult for the victims to get out.

However, judging by these two cases, we can see once again that intimidation is an element that generates many doubts when judging a case of a crime against sexual freedom.

In the first judgment we have analysed, mention is made of the fact that the fact that there are co-participants implies a situation of superiority and an intensification of the intimidation suffered by the victim, which is why it is considered that one of the requirements of sexual aggression is met. In the second case, however, in the opinion of the Supreme Court, it is a case of sexual abuse as there is no such state of environmental intimidation.

From my point of view, co-perpetration undoubtedly increases the intimidation of the victim as it diminishes not only the victim's ability to avoid the aggression, but it

also makes it easier for the aggressors to act since they are in the majority against the vulnerable victim.

I also consider that the psychological consequences of a group sexual assault can be even more serious than those of a sexual assault committed by a single perpetrator, and this should definitely be punished.

5.2.3. Relationship between the victim and the aggressor

As in the case of minority, the majority jurisprudence considers that the fact that the victim and the aggressor are related constitutes a relationship of superiority that gives rise to sexual abuse, although there are cases in which courts have considered this as a cause of intimidation.

Judgement no. 798/2020 of the Provincial Court of Almería relates the events that took place from the time Rosaura was 7 years old, in 1999, when her brother "taking advantage of the difference in age with the victim, 8 years old, and the relationship of superiority and kinship as he was her older brother", touched her all over her body, without penetrating her.

However, from 2004 until 2009, the accused, in a libidinous spirit and continuously and repeatedly throughout these years, sought out moments to be alone with the minor and, above all, when he arrived at night, he would get into his sister's bed, starting to touch her all over her body and then inserting his penis into her vagina.

The Court considers that the facts constitute the crime of rape as "there is intimidation with a clear libidinous intent to bend the will of the minor and thus achieve the performance of sexual acts, touching and vaginal penetration. This aggression is aggravated by the prevalence of kinship, as the accused is the victim's brother".

The existence of sexual abuse alone is ruled out, as it is clear, according to the Chamber, of the existence of an intimidating situation, since "the accused not only told the victim that no one would believe her and that she would have problems with her relative".

Therefore, the Provincial Court of Almería sentenced Sixto to fourteen years, three months and one day in prison as the perpetrator of a continuous crime of sexual assault.

On the other hand, unlike the previous judgment, Judgment no. 188/2021 of the Provincial Court of Bilbao covers the facts of which Serafina was a victim since 2015, when she began to live in Bilbao with her parents.

A few weeks after starting to live with her parents, her father, taking advantage of his status as a father and the superiority that this gave him, began to touch her breasts and vaginal area, for which he took advantage of different moments during their cohabitation, urging her not to say anything to her mother.

The following year, in the summer of 2016, in her father's bedroom, he took advantage of the fact that there was no one else in the house and, in the same spirit, took off her trousers, opened her legs and penetrated her vaginally. Serafina opposed her father's action, despite which he succeeded in his aim.

From that day on, this non-consensual action took place on countless occasions, until Serafina was taken in by the Diputación when she filed a complaint against her father.

The Provincial Court of Bilbao handed down a sentence and sentenced the accused to 12 years' imprisonment for a continuous crime of sexual abuse with carnal access, with prevalence of kinship. The sentence states that "the prevalence of the kinship situation is evident; Juan Ignacio was the father of Serafina, who was 10 years old when the abuse began".

Judging by these two cases, violence or intimidation is an element that generates many doubts when judging a case of a crime against sexual freedom, given that, as we

have seen, the first of the judgments mentions that violence or intimidation can take different forms, among which is "kinship", a fact that the second judgment does not consider to be intimidating.

5.3.4. "La Manada" case

In 2016, a case occurred that marked a turning point in the history of sexual crimes in Spain. Although sexual assaults are not a new phenomenon born out of this case, it was at that moment that public awareness of its magnitude was born.

The events took place on the night of 7 July 2016 in Pamplona, where an 18-year-old girl was left alone and sat on a bench to decide what to do. On that same bench sat a boy, who along with 5 other friends, offered to accompany the girl to her car to rest.

At around 3 o'clock in the morning, the 6 left the Plaza where they were and, on the way to the car, one of the boys stopped at the door of a hotel asking if they rented the room by the hour "to fuck", and the worker replied that they did not.

Then the complainant and the prosecuted men continued on their way, during which she began to feel uncomfortable as one of them started to grab her shoulder and hip.

One of the boys, José Ángel, noticed that a woman was entering a doorway and, after having a brief conversation with her, pretending that he was staying there, he managed to enter and opened the door for the other members of the group.

In this situation, Ángel, who had been kissing the complainant, pulled her towards him while another one of them also grabbed his other hand and, pulling the complainant, they pulled him into the doorway.

Once inside, in a small, dark room, the accused surrounded the girl. They were five men of a much older age and of a strong build, before whom the complainant felt shocked and unable to react.

The defendants knew and took advantage of the situation in which the complainant was, of intense anxiety and uneasiness, to carry out various acts of a sexual nature with her, in a libidinous spirit, acting in agreement.

The 18-year-old girl was penetrated orally by all the defendants, vaginally by two of them on more than one occasion, and also anally, with two of them ejaculating and none of them using a condom. At the end of these acts, the defendants left in stages.

The judgment of the Provincial Court of Navarra, 2nd Section, 38/2018, of 20 March, sentenced five men, members of a Whatsapp group known as "La Manada", to 9 years of imprisonment and 15 years of distance and a post-penitentiary security measure of 5 years probation, as perpetrators of a continuous crime of sexual abuse with prevalence of situation of superiority committed in group against a young girl of 18 years (arts. 181.3 and 4 and 74 of the Spanish Penal Code).

The case of La Manada has sparked an enormous debate in Spanish society on the regulation of sexual crimes. The events referred to and their response caused a great commotion in the population, several mass demonstrations and intense feminist mobilizations took place in the wake of the events in Pamplona.

In fact, the ruling of the Provincial Court of Navarre³⁷ provoked a popular outcry against a court decision the likes of which had never been seen before in Spain³⁸. There were massive demonstrations against the ruling and pronouncements of surprise and indignation from all kinds of commentators on radio, press and television, including re-

³⁷ Judgment of the Provincial Court of Navarre, Section 2, nº 38/2018, of 20 March

³⁸ Video. https://elpais.com/politica/2018/04/28/actualidad/1524927285_823116.html

representatives of the Public Prosecutor's Office³⁹, the judiciary⁴⁰ and academia. Feminist movements took to the streets chanting slogans such as "Sister, I believe you", "This is our pack", "Only yes is yes", "It's not abuse, it's rape".⁴¹

The cause of this indignation and concern among the population was the conviction for a continuous crime of sexual abuse with the prevalence of a situation of superiority, in the aggravated form of carnal access and similar conduct, and not for sexual aggression, also in its aggravated form. This is what both the Public Prosecutor's Office and the private prosecution were asking for and, apparently, what would have been "fairer" for the population.

Unlike the Provincial Court of Pamplona and the High Court of Justice of Navarre, the Supreme Court ratified that the events that took place in Pamplona amounted to a multiple sexual assault, with violence and intimidation and without any consent on the part of the victim.

The Supreme Court considers that there was an error of legal subsumption on the part of the lower court. According to the Court, there was no consent on the part of the victim; intimidation is clear from the proven facts, as the victim was completely annulled: "The sexual attack on a young girl, such as the victim, who was only 18 years old, and in a solitary, hidden, narrow place with no exit, to which she was taken by the arm by two of the defendants and surrounded by the rest, being approached by the defendants, and intoxicated, undoubtedly produced a state of intimidation, which although not invincible, was effective in achieving the end proposed by the defendants".

The Supreme Court understands that the intimidation caused the victim to adopt an attitude of submission, not consent, since "the victim's will was totally annulled and she was unable to react in any way since "the complainant" felt an intense anxiety and

³⁹ Video of the Prosecutor of the Delegated Chamber for Violence against Women in the Supreme Court. https://www.abc.es/sociedad/abci-fiscal-contra-violencia-sobre-mujer-manada-cometio-agresion-sexual-201804271301_video.html

⁴⁰ Video of the statements by the magistrate Joaquim Bosch. https://www.eldiario.es/opinion/zona-critica/claves-entender-sentencia-manada_129_2147397.html

⁴¹ FARALDO CABANA, P., *op. cit.*, p. 1

uneasiness, which caused her stupor and made her adopt an attitude of submission and passivity, determining her to do what the defendants told her to do, keeping her eyes closed most of the time”.⁴²

As we can see, in this case there are many circumstances that, in my opinion, constitute a situation of clear intimidation and not just prevalence, such as: the difference in age, co-perpetration, the solitude of the place, among other factors.

I therefore consider that the Supreme Court's decision was the most accurate one, and it should have been the one adopted from the beginning.

The disparity of rulings in the three judgements and the uproar to which this case gave rise led the governing bodies to consider the need to amend the Penal Code. The current regulation of crimes against sexual freedom has been in force since the approval of the 1995 Penal Code and, over the years, circumstances have arisen which, due to the age of the Penal Code, have cast doubt on the effectiveness of the current Spanish Code, especially in relation to the crimes we are analyzing.

⁴² Supreme Court Judgment nº 2200/2019, of 4 July

6. PRELIMINARY DRAFT ORGANIC LAW ON THE COMPREHENSIVE GUARANTEE OF SEXUAL FREEDOM

In order to avoid failures such as the "La Manada case", the Government decided to convene a group of specialists to revise the Penal Code and meet social demands, in the sense of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

It is a Preliminary Draft Organic Law on Integral Guarantee against Sexual Freedom, which was approved by the Council of Ministers on 3 March 2020.⁴³

"Who is silent does not admit", said the current Spanish Minister of Equality, Irene Montero, during one of her speeches. Hence, the future Comprehensive Organic Law on Sexual Freedom is known as the "only yes is yes" law, since, in the words of the Minister, "the key to the draft bill is that it puts consent at the centre".⁴⁴

The main measure of the proposal is the amendment of the Penal Code in order to remove the distinction between sexual assault and sexual abuse, as it states in the explanatory memorandum I: "as a relevant measure, the distinction between sexual assault and sexual abuse is removed, with all conduct that violates sexual freedom without the consent of the other person being considered sexual assault, thus complying with the obligations assumed by Spain since it ratified the Istanbul Convention in 2014".⁴⁵

In the Explanatory Memorandum, after stating that "sexual freedom becomes a legal right subject to comprehensive protection that is identified with the provision of free, revocable consent for specific practices", it is added that the Proposition "amends the Penal Code to eliminate the distinction between sexual assault and sexual abuse, and

⁴³ LÓPEZ TRUJILLO, N., "¿Qué propone la ley de libertad sexual del Ministerio de Igualdad? Preguntas y respuestas", *Newtral*, 2020, 6 de marzo. Retrieved on 23 May 2021, from: <https://www.newtral.es/que-propone-la-ley-de-libertad-sexual-del-ministerio-de-igualdad-preguntas-y-respuestas/20200306/>

⁴⁴ France24.com, "El silencio no es un sí: así es la Ley de Libertad Sexual que plantea España", 2021, 26 de febrero. Retrieved on 23 May 2021, from: <https://www.france24.com/es/europa/20210225-ley-consentimiento-libertad-sexual-espana>

⁴⁵ Draft Bill of the Organic Law on the Comprehensive Guarantee of Sexual Freedom, p. 15. Available in: <https://www.igualdad.gob.es/normativa/normativa-en-tramitacion/Documents/APLOGILSV2.pdf>

so all non-consensual physical sexual violence is now considered a crime of sexual aggression, with attenuated or aggravated types depending on the specific cases... As a relevant measure, the distinction between aggression and sexual abuse is eliminated, with all conduct that violates sexual freedom without the consent of the other person being considered sexual aggression. This comparison, in addition to attenuating evidentiary problems, avoids re-victimisation and secondary victimization".⁴⁶

Firstly, Article 178.1 stipulates that "anyone who performs any act that infringes on the sexual freedom of another person without that person's consent shall be punished by imprisonment for a term of one to five years for sexual assault".

It also clarifies, in section 2, that "for the purposes of the previous section, acts of sexual aggression are in any case considered to be sexual aggression when they are carried out using violence, intimidation, abuse of a situation of superiority or vulnerability of the victim or acting in a surprising manner, as well as those carried out on persons who are sensory deprived or whose mental disorder is abused and those carried out when the victim's will is nullified by having previously ingested drugs, medicines or any other natural or chemical substance suitable for this purpose".

Article 178 closes with a paragraph 3 where, "in view of the lesser seriousness of the act and taking into account all the concurrent circumstances, a prison sentence of a lesser degree or a fine of eighteen to twenty-four months may be imposed".

We see, therefore, that with this proposal, the existing problem between aggression and abuse with prevalence would be solved, since it would not be necessary to assess whether the acts were committed with intimidation or not, but it would be sufficient to know that the sexual acts were not consensual.

It also incorporates a number of new offences that were included in the Istanbul Convention, such as repeated harassment, or occasional harassment. In addition, it also

⁴⁶ DE VICENTE MARTÍNEZ, R., *op. cit.*, p. 183

considers "forced marriage", "genital mutilation", and "trafficking for the purpose of sexual exploitation" as sexual violence.⁴⁷

In February of this year, the Plenary of the General Council of the Judiciary approved the report on this draft bill, unanimously accepting the text of the report by the members, among whom were magistrates and lawyers.

The report includes the conclusions included in the proposal, and points out that "with regard to crimes against sexual freedom, the current Penal Code is already based on the idea of consent, although it does not include a definition of the concept, and considers punishable any act of a sexual nature carried out without the free consent of the passive subject, whether in the form of aggression or sexual abuse, either because there is no such consent or because it is vitiated consent".⁴⁸

The text considers unnecessary the definition of consent that the draft bill introduces in Article 177.1. of the Criminal Code, according to which "consent shall be understood not to exist when the victim has not freely manifested by external, conclusive and unequivocal acts, in accordance with the circumstances, his or her express will to participate in the act".⁴⁹

In relation to the absorption of the offence of sexual abuse into the offence of sexual assault, the report considers that this could have a disprotective effect on the victims, since for the perpetrator of the offence it will not have greater consequences to use a more harmful means of commission than another of greater intensity. To avoid this problem, it is considered necessary to provide for an aggravated form of sexual assault

⁴⁷ MENDOZA, R., "8M. Anteproyecto de Ley Orgánica de Garantía Integral de Libertad Sexual: ¿Avance para los derechos de las mujeres?", 8 de marzo de 2020. Retrieved on 24 May 2021, from: <https://abogadas.-coop/8m-anteproyecto-de-ley-organica-de-garantia-integral-de-la-libertad-sexual-avance-para-los-derechos-de-las-mujeres/>

⁴⁸ "El CGPJ aprueba el informe al anteproyecto de Ley Orgánica de Garantía Integral de Libertad Sexual", Poder Judicial España, 2021, 25 de febrero. Retrieved on 23 May 2021, from: <https://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/El-CGPJ-aprueba-el-informe-al-anteproyecto-de-Ley-Organica-de-Garantia-Integral-de-la-Libertad-Sexual>

⁴⁹ *Ibidem*.

when there is a particularly harmful means of commission (clearly, with threats, with violence), imposing the penalty in the upper half of the sentence.⁵⁰

The opposite could also be the case, as there is a risk of punishing with great severity conduct that is less harmful. Despite the fact that Article 178.3 incorporates an optional attenuated type that allows the judge to impose a less severe penalty in view of the "lesser nature of the act", the text indicates that this concept is imprecise and lacks specificity, leaving a very wide margin for interpretation that could compromise the constitutional principle of criminal legality.

The Government Delegate against Gender Violence, Victoria Rosell, assured on 12 May 2021 that the Organic Law on Guarantees of Sexual Freedom would be sent "imminently" to the Council within 30 days.⁵¹

The government delegate pointed out on several occasions that, following the reports that the Public Prosecutor's Office and the General Council of the Judiciary made on this regulation, they are making changes to the law, so that the regulation "arrives in the best possible conditions" if it is processed by urgent procedure, as the Ministry intends.

They also expect the "only yes is yes" law to be ready "in less than 30 days" to "enter Congress", although the delegate acknowledged that the deadlines do not depend either on Rosell herself or on the government.

To this end, it should be noted that the draft bill has made considerable progress, and now depends on obtaining an absolute majority of votes in favor in the Lower House for its approval, as it is an Organic Law.⁵²

⁵⁰ *Ibidem*.

⁵¹ "Igualdad prevé que su ley del "solo sí es sí" llegue al Congreso en un mes.", *InfoLibre*, 2021, 12 de mayo. Available in: https://www.infolibre.es/noticias/politica/2021/05/12/igualdad_preve_enviar_ley_del_solo_si_si_congreso_mes_120438_1012.html

⁵² LÓPEZ TRUJILLO, N., "¿Qué propone...?", *op. cit.*

7. CONCLUSIONS

Several conclusions can be drawn from this work.

Firstly, we have seen how our existing criminal law does not guarantee maximum protection and security for citizens, and especially for women. The fact that the crime of sexual abuse and the crime of sexual assault are differentiated by the existence of such abstract concepts as intimidation and violence continues to cause problems today and women's sexual freedom continues to be undermined.

In this line, I believe that the Preliminary Draft Organic Law on the Comprehensive Guarantee of Sexual Freedom is not only appropriate, but also necessary, as it would eliminate any confusion between the crime of sexual assault with intimidation and the crime of sexual abuse with prevalence, which, as we have seen, give rise to different criminal consequences for the active subjects.

Furthermore, the reform of the Criminal Code would help to achieve and guarantee the needs of today's society and would be a major step towards gender equality.

As if that were not enough, inferring rape to a criminal offence that has as its object non-consensual carnal access would imply the incorporation of international norms in relation to this crime, which places consent as the central axis of attacks against sexual freedom, without assessing whether the acts were committed with intimidation and violence or not.

However, from my point of view, this new reform of the Criminal Code could give rise to a new problem since, according to the Draft Bill, "only yes is yes" and, in addition to having only the testimonies of the victim and the aggressor, I believe that determining whether the victim really gave express consent could be very difficult.

To conclude, the need to attend the current social demands and comply with international recommendations and agreements leads to the unitary qualification of rape for all sexual relations that are not freely consented to, achieved by different means of commission. In this way, the current problem existing in relation to the subtle dividing line between sexual aggression with intimidation and sexual abuse with prevalence

would be resolved.

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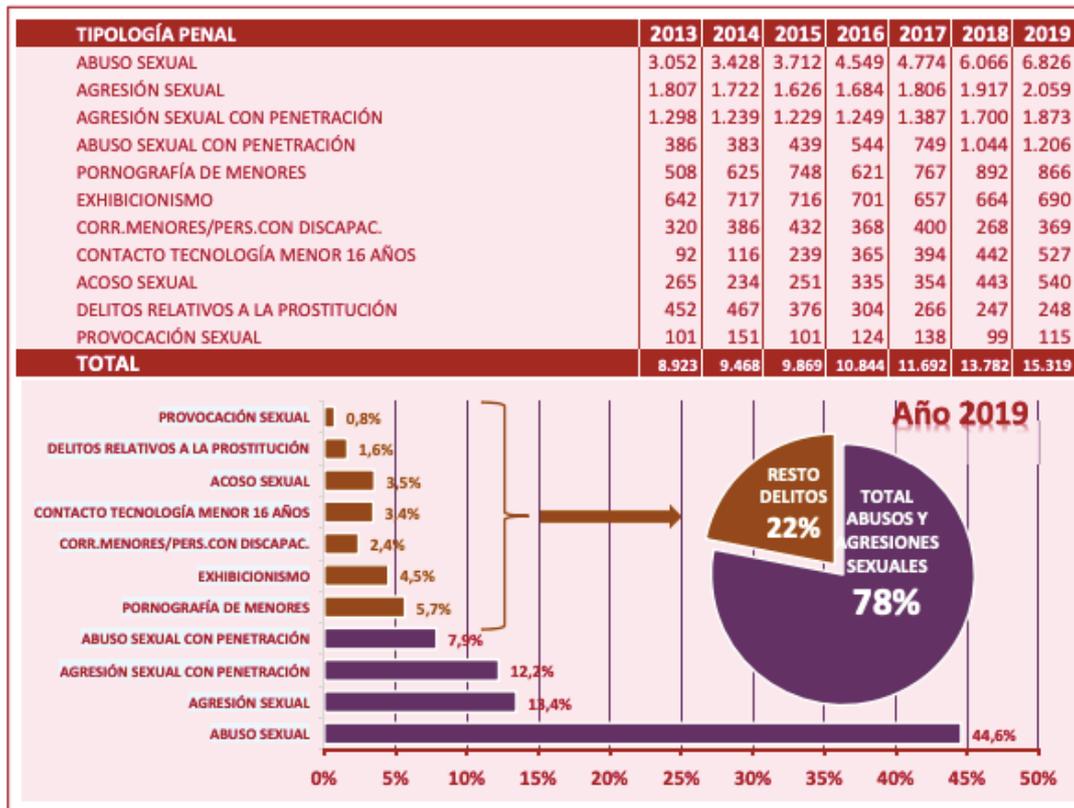
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11. ANNEXES

Annex I

Graph showing the number of known incidents of sexual assault and sexual abuse with and without penetration in Spain in 2019:



Source: Report on crimes against sexual freedom and indemnity. Ministry of the Interior.

Annex II

Graph showing the number of victims of the various existing criminal typologies, in relation to sex in 2019.

3 Perfil de la VÍCTIMA: tipología delictiva, sexo y edad

>> Victimizaciones registradas según sexo **Año 2019**

TIPOLOGÍA PENAL	Masculino	Femenino	Desconocido	Total
ABUSO SEXUAL	1.039	6.368	6	7.413
AGRESIÓN SEXUAL	180	1.918	1	2.099
AGRESIÓN SEXUAL CON PENETRACIÓN	135	1.609	1	1.745
ABUSO SEXUAL CON PENETRACIÓN	174	1.104	0	1.278
EXHIBICIONISMO	217	628	2	847
ACOSO SEXUAL	55	523	1	579
CONTACTO TECNOLOGÍA MENOR 16 AÑOS	148	417	0	565
CORRUPCIÓN MENORES/INCAPACITADOS	195	279	3	477
DELITOS RELATIVOS A LA PROSTITUCIÓN	25	318	3	346
PORNOGRAFÍA DE MENORES	96	129	2	227
PROVOCACIÓN SEXUAL	42	88	0	130
TOTAL VICTIMIZACIONES	2.306	13.381	19	15.706

Source: Report on crimes against sexual freedom and indemnity. Ministry of the Interior.