



Subjectivising objectivity: Criminalisation of street sexual harassment in Spain

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Abstract:

Conditioning women's lives from an early age, street harassment constitutes a form of sexual violence that is part of the system of patriarchal terror. Nonetheless, this practice is normalised and disguised as compliments by a large portion of society. Fortunately, the feminist movement has recently raised consciousness about the seriousness of this act. In the Spanish legal context, where street harassment was not regulated but permitted until this year, this awareness has derived into the criminalisation of this practice. The provision requires an "objectively humiliating, hostile or intimidating situation" for the existence of the crime. This work notes that the prerequisite of objectivity reproduces the fantasy that the law is neutral and the judge will be able to impartially apply it to objective facts, as well as objectivity reinforces the abstraction of the case in relation to its structural context. Besides, objectivity has the power to constitute itself as the reference point and hence any form of dissident epistemology is perceived as a mere marginal viewpoint. However, this article argues neutrality is driven by socially constructed power relations and makes those with power the standard. That is, objectivity is subjective, and concretely in this case, it is a masked masculine subjectivity. As a result, the criminalisation of street sexual harassment in the Spanish legislation appears unsatisfactory and originally flawed. Consequently, it is peremptory to design a feminist strategy that problematises the most basic principles and presuppositions of current law in order to understand how the legal response is presented as the only useful tool for women's liberation while in fact it can also be an obstacle.

Keywords:

Legal feminism, sexual violence, street sexual harassment, criminal law, objectivity.

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Resumen:

Condicionando la vida de las mujeres desde una edad temprana, el acoso callejero constituye una de las formas de violencia sexual que componen el sistema de terror patriarcal. Sin embargo, esta práctica se normaliza y disfraza de piropos por una gran parte de la sociedad. Afortunadamente, el movimiento feminista ha conseguido aumentar la concienciación sobre la gravedad de este acto. En el contexto legal español, donde hasta este año el acoso callejero no estaba regulado sino permitido, esta sensibilización ha derivado en la criminalización de esta práctica. La disposición exige una "situación objetivamente humillante, hostil o intimidatoria" para la existencia del delito. Este trabajo advierte que dicho requisito de objetividad reproduce la fantasía de que la ley es neutral y el juez podrá aplicarla imparcialmente a hechos objetivos, así como la objetividad refuerza la abstracción del caso en relación a su contexto estructural. Además, la objetividad tiene el poder de constituirse como el punto de referencia y por tanto cualquier forma de epistemología disidente se percibe como un mero punto de vista marginal. Sin embargo, este artículo argumenta que la neutralidad se fundamenta sobre las relaciones de poder construidas socialmente y convierte a los que tienen poder en la norma. Es decir, la objetividad es subjetiva y, concretamente en este caso, es una subjetividad masculina encubierta. Como resultado, la criminalización del acoso sexual callejero en la legislación española resulta insatisfactoria y originalmente viciada. Consecuentemente, resulta perentorio diseñar una estrategia feminista que problematice los principios y premisas más básicas del derecho actual con el objetivo de entender cómo la respuesta legal se presenta como la única herramienta útil para la liberación de las mujeres cuando en realidad también puede ser un obstáculo.

Palabras clave:

Feminismo jurídico, violencia sexual, acoso sexual callejero, derecho penal, objetividad.

1. INTRODUCTION: A HYPER-SEXUALISED AND SUB-HUMAN BEING

In this paper, my aim is to put into question the role the “objectivity” requirement plays in the criminalisation of street sexual harassment in the very recent Spanish law for the integral guarantee of sexual freedom. From a wide perspective, according to Stop Street Harassment’s description in 2015 (Brunsdon 2018, p. 40), this practice encompasses gestures, public masturbation, persistent requests, following and leering and sexist slurs (the so-called “cat-calling” and “wolf-whistling” could be also included within it). Street sexual harassment against women¹ is a very common form of violence that explicitly manifests the strong discomfort that their free presence in the public sphere generates. Consequently, girls and women start learning and internalising a repetitive message coming from their

¹ It should be noted that the specific object of the present work is the street sexual harassment experienced by individuals who are socially perceived as women. However, it is also crucial to recall and recognise the brutal street harassment that is exercised against non-heterosexual, transgender and gender non-conforming people as a punishment and a corrective measure aimed at perpetuating gender normativity. Besides, it is essential to point out that this article does not attempt to universalise or homogenise the experience of women who are subjected to this type of violence. In this line, the significance of intersectionality in this matter should be considered; in an attempt to simplify, this could be understood as the interrelation of different social inequalities such as race, class, sexuality or disability that derive in more serious discriminations (Hill Collins and Bilge 2016, p. 103).

fellow men citizens from a very early age:² you are a hyper-sexualised and sub-human being whose body is potentially attackable. In fact, if a woman is “lucky enough” street sexual harassment will be the least serious thing that will happen to her in the public thoroughfare. Although this harassment does show the existing widespread objectification – and therefore de-humanization – of women’s bodies (Brunsdon 2018, p. 43), this is only a small part of a much more complex system called patriarchy.³

The configuration of social structures around patriarchal imaginaries is nowadays so evident that the human rights system recognises that historical power relations between men and women organise all spheres of current society and result in violence against women. Concretely, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) already in 1979 recognised that “a change in the traditional role of men as well as the role of women in society and in the family is needed” to eliminate existing discrimination against women.⁴ Despite this, the current Western legal system is not oriented towards the prohibition of this structural subordination of women, but its entire web revolves around the concept of “equal treatment” of men and women (Holtmaat 2010, p. 213), creating “the liberal fantasy of a fairer system” (Naffine 1994 in Loizidou 1999, pp. 288–289). As it will be further argued, the law does not understand gender as an oppressive structure, a fact that has catastrophic consequences for women’s struggles.

2. “AN OBJECTIVELY HUMILIATING, HOSTILE OR INTIMIDATING SITUATION”

In Spain, the analysis of street harassment Safer Cities for Girls (Plan International 2021, p. 4) concluded that almost 8 out of 10 women aged 15–25 in the cities of Barcelona, Madrid and Seville had experienced street harassment. Focusing on the country’s current legal context, the Spanish Parliament approved on 25 August 2022 a law aimed at comprehensively guaranteeing sexual freedom. The new legislation called Ley Orgánica 10/2022, de 6 de septiembre, de garantía integral de la libertad sexual – but popularly known as “Only yes means yes” law – envisages its entry into force 30 days after its publication on 7 September 2022⁵ and it boasts of being an achievement of the feminist movement. The document’s alleged intention is to fulfil the international obligations deriving from the Istanbul Convention and the previously mentioned CEDAW⁶ on the protection of women’s human rights to live free from sexual violence. In fact, the law refers to “human rights” up to fourteen times and its preamble asserts that sexual violence is one of the most common and hidden human rights violations, both in its physical and symbolic

² Globally, the majority of women experience their first incident of street harassment during puberty (Hollaback! and Cornell University 2014).

³ The concept of patriarchy is used in a general sense here to refer to the structure composed by power relations of men’s supremacy over women that unavoidably permeate relations between individuals.

⁴ Furthermore, the mentioned document in its Article 3 mandates all states shall endeavour in all spheres of public life to ensure the full development of women: “States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”.

⁵ Nonetheless, the first chapter of the Title IV, the Title VI and the Article 33.1.d) present a different *vacatio legis*.

⁶ Ratified by Spain in 2014, the Council of Europe Convention on preventing and combating violence against women and domestic violence, widely known as Istanbul Convention, recalling CEDAW among other international legal documents on human rights, asserts “women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage (...) which constitute a serious violation of the human rights of women and girls” (preamble).

expression, and that it disproportionately affects women and girls, but also boys. Among other remarkable measures,⁷ the fifth section of the fourth final provision introduces the criminalisation of street sexual harassment:

The same penalties⁸ will be imposed on those who address another person with expressions, behaviour or propositions of sexual nature creating to the victim an objectively humiliating, hostile or intimidating situation, without constituting other more serious offences. (LO 10/2022)⁹

In this way, the Spanish legislation widens the criminalisation of sexual harassment, since the previous wording offers legal protection only within the scope of an employment, teaching or service provision relationship. With this legal amendment those practices and behaviours of sexual nature would not have to occur in a specific space or relationship, but could occur in any public – e.g. street – or private space and still be considered a crime. Nonetheless, it is important to underline that this criminalisation has been framed in the Article 173 (4) within the Title VII about torture and other crimes against moral integrity, instead of in the Article 184 within the Chapter III called “sexual harassment”.

3. WHAT IS “AN OBJECTIVELY HUMILIATING, HOSTILE OR INTIMIDATING SITUATION”?

In the first place, talking about criminalisation should not be thought as a neutral or unbiased fact since, as Wegerstad (2021, p. 69) cites Lacey’s words (2009, p. 942), it encompasses certain “ideologies, ambitions and interests underlying criminal legislation” as well as it implies “the contours of criminal law doctrine and of criminal legislation”. Furthermore, in an attempt to critically reflect on this specific legal reform, the present work draws special attention to the expression objectively employed in the cited provision.¹⁰ This leads to pose the following questions: How does the requirement for objectivity affect the criminalisation of street harassment? Is the criminal system’s presumption of objectivity beneficial in meeting the needs of the women who have been subjected to this form of sexual violence?

Firstly, and given that it clearly inherits its wording structure, this new provision appears to follow the command established by Article 40 of the Istanbul Convention, which defines sexual harassment and mandates states parties to punish it.¹¹ Nonetheless, it is remarkable

⁷For instance, the document is also very noteworthy for introducing a reform of the regulation of the crime of rape. For some comments and reflections on this and other issues tackled by the norm, see Faraldo (2020, 2022).

⁸The penalties of the previous paragraph are the permanent localisation for a period from five to thirty days, always at a different domicile far from that of the victim, or community service for a period from five to thirty days, or a fine from one to four months, the latter only in cases where the circumstances set out in Article 84 (2) of the Penal Code are met.

⁹Translation by the author, original text in Spanish: “Las mismas penas se impondrán a quienes se dirijan a otra persona con expresiones, comportamientos o proposiciones de carácter sexual que creen a la víctima una situación objetivamente humillante, hostil o intimidatoria, sin llegar a constituir otros delitos de mayor gravedad”.

¹⁰This utterance also appears in the wording of Article 184 “sexual harassment” of the Criminal Code currently in force and only applicable for employment, teaching or service provision spaces. Therefore, some of the reflections of this paper can also be extrapolated to the mentioned provision.

¹¹The Article 40 dictates state parties to “take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of

that the Spanish law departs from the supranational convention when adding the requirement of objectivity, which is no small matter. It is also important to stress that this expression is followed by the locution humiliating, hostile or intimidating situation, since the strong connection of these words to the subject's way of thinking or feeling leads to question the mere possibility that humiliation, hostility or intimidation can even be objectivised. That is, the use of objectivity is even more complex in this specific case because it refers to subjective terms.

Even though it claims to be feminist, by using that locution the legal amendment perpetuates the myth of objectivity in law, a chimera that was exposed and criticised by legal feminism already in the 20th century (e.g., MacKinnon 1989 cited in Scales 2006, pp. 86-88). In fact, the purported objectivity and neutrality of the law has been questioned by legal feminism's classical arguments since its emergence in 1970s, when the North American feminist movement began to delve into the most basic presuppositions of modern law (Scales 2006). Recalling those assertions, the existence of objectivity itself should not be left unquestioned.

The legal provision object of this study, based on a solid legal formalism, expressly presupposes the more than questionable idea that there is "a single underlying reality, rather than a reality split by the divergent meanings inequality produces" (MacKinnon 1989, p.180). That is, it reproduces the impression that the law is neutral and the judge will be able to impartially apply it to objective facts in order to conclude the existence or not of street sexual harassment. Reinforcing this, the legal reform, making use of this consciously chosen language, produces two important effects; (1) neutralization - not only being gender neutral but also through passive and impersonal compositions - and (2) universalization - using the so-called "juridical future" in order to create an idea of generality and omnitemporality, as well as to take for granted the pre-existence of an ethical agreement (Bourdieu 1987, p. 820). Nonetheless, taking Heiselberg's assumption that, contrary to the classical objectivity-subjectivity division, the individual and the external world are inevitably interrelated and the observer unavoidably modifies the observed reality (Scales 2006, p. 87), analysing a specific case would mean changing it. Therefore, objective facts would not exist. This is also reinforced by Durkheim's idea (1982, p. 45) that the reality existing outside individuals is possessed by and conformed to the specific collective ways of acting and thinking.

What appears even more problematic is the fact that this illusion of objectivity has the power to constitute itself as the reference point in a way that it is placed on a higher level than subjectivity (Scales 2006, p. 87).¹² As a result, any form of dissident epistemology or hermeneutics that does not conform to this "objective" framework is perceived as a mere marginal viewpoint. According to some postmodern theories, this power allows objectivity to determine what is subjective, and extensively, what is rational and what is irrational, what is natural and what is unnatural, etc. (Scales 2006, p. 88). Consequently, by using the term "objectivity" in the referred legal precept the lawmaker is creating a whole binary universe in which the judicial decision will be neutral, rational and natural and therefore fair enough to be accepted without much resistance. Hence, anything that does not conform to these

violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction".

¹² Understanding this encouraged the evolution of part of the feminist thinking from the liberal perspective that desperately looked into the entrance to the public realm to a more radical feminist branch aimed at the transformation of that sphere (Scales 2006, p. 87).

judicial parameters is marginal. In other words, it creates a dichotomy in which anything that is not a humiliating, hostile or intimidating situation in the law's perspective does not present the entity to be reprehensible. As a result, this misleading idea of impartiality finally determines which types of conduct deserve legal coverage and which have to be endured by women.

4. A SUBJECTIVELY HUMILIATING, HOSTILE OR INTIMIDATING SITUATION

Once it is clear that purported objectivity is an illusion that serves the aim of neutralising and legitimising the norm, it is very relevant to disentangle objectivity in order to find the subjectivity that underlies it. In this line, the author Ann Scales (2006, p. 84) asserts that this perception of abstraction and neutrality is in fact driven by socially constructed power relations and facilitates the domestication of our own thinking. Put differently, rational and natural meanings are products of operations of power, which favour some practices over others (Weedon and Hallak 2021, p.439). Objectivity makes those with power the standard of what is human; it takes “the particular for the universal and essential and the present for the eternal” (Gould 1976, p. 21 cited in Scales 2006, p. 86). With regard to power relations between men and women, MacKinnon (1989, p. 116) asserted humanity had been “painted” by men in a way that women were no more than the “glorified masculine subjectivity”. According to her, as a result, the masculine point of view is the “point-of-viewlessness” since its supremacy symbolises the paradigm of order and its control means the legitimacy (MacKinnon 1989, p. 116). Metonymically, masculinity equals humanity and appears as the “qualities inherent in a world out there” (Scales 2006, p. 86). Taking these thoughts, it could be understood that what law presents as objective is in fact a masked masculine subjectivity that is taken as a standard or reference. Consequently, the construction of knowledge about if a specific behaviour of sexual nature constitutes a humiliating, hostile or intimidating situation, which supposedly derives from objectivity, could in reality be a reflection of the masculine perception.

Following this, the masculine collective imagination, and thus the hegemonic one, still continues to be full of stereotypes about women. In fact, the law itself recognises in the explanatory memorandum that sexual violence is an issue that exists within an ingrained sexual culture that exhibits discriminatory patterns. All this inevitably affects judges and legal reasoning, which are not alien to the society around them,¹³ although they claim to convey the opposite. In the case of street sexual harassment, the underlying patriarchal idea tells that the bodies that are read as women essentially fulfil a decorative public function and have men's sexual stimulation as their main objective, thus any reference to their ornamental or aesthetic aspect is an acknowledgement of their worth as women. As a consequence, street sexual harassment does not enjoy the awareness that other acts as rape do, and it is normalised and disguised as praises by a large portion of society. This insufficient consciousness is demonstrated by its under-recognition in the law (Brunsdon 2018, p. 40). Concerning this, the well-known #MeToo feminist movement has been a decisive factor in the raise of consciousness about the seriousness of sexual harassment. Indeed, Brunsdon (2018, p. 40) describes it as a mobiliser of consciences that puts trust in the strength of the storytelling to counteract the prevailing masculine viewpoint. According to Wegerstad (2021, p. 61), this social digital campaign was also able to question criminal

¹³An example of how sexist stereotypes over the sexes and sexuality have permeated Spanish courts in recent history is found in Ruiz-Rico 2011.

law's capacity to offer proper responses for individuals who have been subjected to sexual harassment and for reaching social justice. Moreover, #MeToo has been crucial to rethink the role of criminalisation as a key part of the feminist movement (Wegerstad 2021, p. 80).

Besides this, the mere intention of dealing with these situations in an objective way means that the survivor's lived experience of the specific event does not really matter; what really matters is the classification of the act itself, not the harm truly caused to the concrete person.¹⁴ Brunsdon (2018, p. 50) gives a significant example of this in relation to the Canadian legal system; in the case (*R v Burns*) the court observes that "[a]lthough the complainant justifiably felt upset and scared by the appellant's conduct, viewed objectively, we do not see it as rising to the level of a tool of intimidation designed to instil a sense of fear". The socialisation of women through the constant threat of sexual terror, which serves as a basic weapon for submission and places them in a state of continuous fear and intimidation (Brownmiller 1975, p. 15), implies that a woman may have a different perception of what makes a situation humiliating, hostile or intimidating.¹⁵ In this same line, referring to the author Liz Kelly and her work *Surviving sexual violence* (1988), Wegerstad (2021, p. 64) talks about the importance of locating street sexual harassment within a "continuum of sexual violence" exercised against women in a way that criminal law should be concerned with the "cumulative effects" that everyday assaults cause for women. That is, according to the idea of the continuum, sexual violence is a set of intrusions to women's lives that are sometimes difficult to distinguish from each other (Wegerstad 2021, p. 66), while in criminal law sexual violence is only located in specific situations and persons. In this line, in the Spanish legal modification an event has to have sufficient objective entity itself - according to the judge - to be reproachable or reparable whilst on many occasions what generates this harmful situation is the complex and constant system of sexual violence within which the concrete fact participates. The dynamic of modern criminal law is concerned with individual events and does not deal with the structural nature of the problems such as gendered power relations (Wegerstad 2021, p. 66). Due to this, the pretended neutrality of law could be again questioned. Bearing this in mind, when the mentioned legal provision talks about a specific event that is "objectively" humiliating, hostile or intimidating, it underlines the individualisation of a concrete situation taking it out of context and ignoring the continuous mechanism of sexual fear that in many cases is the one that indeed makes a situation intimidating for women. In line with this, Brownmiller (1975, p. 257), when talking about rape in her masterpiece *Against our will: men, women and rape* stated that "[a]s debatable as the case may appear when one tries to apply objective standards, it is the subjective behavioral factors that may determine a rape". Subjectivity never disappears.

Due to all this, it is crucial to depart from the idea of objectivity to embrace the possibilities that subjective viewpoints offer. Far from being new, this is what the feminist standpoint theory has been arguing for more than twenty years (e.g., Hartsock 1997, 1998, Hardling 2004); women, as marginalised individuals, can strongly contribute to the recognition of

¹⁴In another sense, since it is not an offence liable to prosecution *ex officio*, an action that is likely to create a situation which is considered "objectively" humiliating, hostile or intimidating but is not perceived as such by the concrete person would also result in criminal inaction.

¹⁵Likewise, the specific socialisation circumstances of each individual and their experiences of other discriminations based on social class, race, sexual orientation, non-normative gender expressions, etc. may vary a given situation and make it humiliating or intimidating for the person subjected to that violence.

existing problematic patterns in hegemonic powers and discourses. In a similar vein,¹⁶ Haraway energetically criticises the search for neutrality and advocates for situated knowledges, which implies a retrospective look at the origin of knowledge and an acknowledgement of the privilege partiality (Haraway 2004). From a more recent perspective, although the feminist critique towards the meaning of objectivity has taken different directions, feminist epistemology is always based on the creation and transmission of knowledge that recognises that gender is not a concrete theme but an interdisciplinary element organising relations between individuals (Campos 2008, Martínez *et al.* 2014, p. 8).

5. CONCLUDING REMARKS

Growing up along with street sexual harassment and other mechanisms of oppression, women are constrained by a system of “sexual terrorism”¹⁷ that restricts their freedom of choice and movement as well as the perception of their own sexuality. Concretely, beyond the objectification and sexualisation of women’s bodies, street sexual harassment ensures that women do not perceive the public sphere as a safe place.

Fortunately or unfortunately, the criminal legal system is currently the principal mechanism to deal with and offer solutions to this frequent practice (Brunsdon 2018, p. 50). In this sense, when judging sexual offences, we have historically witnessed and currently continue to witness underlying sexual ideologies that intervene and influence in the practice of law (Edwards 1981), showing that law’s constructions of masculinity and femininity are not immune to structural inequalities (Bonet Esteva 2010, p. 30). Hence, it is essential to keep questioning the law’s potentialities to finish with this type of sexual violence. For this, it is firstly crucial to acknowledge and bear in mind the power of law in the construction of truth by “narrowing down the possible interpretations of behaviour” (Smart 1989, p. 34). In the Spanish case, street harassment was not even regulated but totally permitted until now, which means denying women such basic rights as freedom of movement, human dignity as well as moral and physical integrity. In fact, and despite the positive law’s symbolic effect,¹⁸ the proposed criminalisation of street sexual harassment in the national legislation appears originally flawed. By referring to objectivity, the legal reform builds a normative discourse that tells that every situation has a single valid reading that is common to all individuals and every interpretation that is out of it appears as irrational or unnatural and therefore not permissible. Thus, objectivity in this legal provision plays a significant role in reinforcing the acceptance and increasing the legitimacy the penal response already enjoys. This is compounded by the Enlightened origins of criminal law that did not pursue women’s guarantees and by the fact that until very recently these laws were entirely created by certain men and they reflected the duties and needs of women based on masculine preconceptions of women (Bonet Esteva 2010, p. 27).¹⁹ Hence, when addressing this legal amendment, it

¹⁶Initially, the standpoint theory and the situated knowledge approach were taken as almost contradictory, but over time numerous debates have recognised them as close positions (Martínez *et al.* 2014, p. 8).

¹⁷The term “sexual terrorism” in the study of street harassment is employed by Oshynko (2002). Nonetheless, some examples of earlier references to the concept of “sexual terrorism” are Sheffield (1987) and Kissling (1991).

¹⁸Citing Gotell (2015, p. 67), Wegerstad (2021, p. 63) recalls that the total lack of criminalisation of sexual violence would intensify the silence around it, as well as its systemic character.

¹⁹In fact, taking Spivak’s work *Can the subaltern speak?* (1988) it could be considered that, when following the hegemonic discourse, women also follow these masculine preconceptions to think of themselves due to “truth construction”.

is not irrelevant to firstly contextualise it within a purportedly neutral and rational but intrinsically masculine legal system. In this line, what law usually takes as objective and thus enjoys superiority is the masculine cis heteropatriarchal viewpoint, while on the other hand women's perspectives - although very disparate - appear subjective and consequently less valid. In other words, this illusion of objectivity, a prerequisite in this crime, ignores women's context of oppression and thus contributes to maintain the status quo of men's supremacy.

As a result, criminal law currently reproduces an androcentric culture (Bonet Esteva 2010, p. 27) and it is not effective to capture the needs of women, who are all more or less subjected to the system of sexual terror. Due to all this, it is peremptory to design a coordinated feminist strategy that problematises and transcends the most basic principles and presuppositions of current criminal law in order to understand how it is sometimes presented as the most useful tool for women's liberation when it can also become a trap and an obstacle to the achievement of the feminist movement's goals such as eliminating sexual violence.

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