

IDENTITIES AND GENDER IN THE DISCOURSE OF RAPE TRIALS

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It is only by critically analysing the details of the language and discursive processes inherent within the legal text that the preconstructions, preferred meanings, rhetorical and ideological dimensions generally of legal discourse can be rationally challenged ... In reading the law, it is constantly necessary to remember the compositional, stylistic and semantic mechanisms which allow legal discourse to deny its historical and social genesis. (Goodrich 87:204)

1. Introduction

Following the ideas of Foucault, Norman Fairclough argues that “discourse is socially constitutive” (1992:64). For Fairclough, as for other critical linguists, discourse not only reflects and represents society, it also signifies, constructs and constitutes society. One of the constructive effects of discourse can be seen in the creation and modification of social identities. Discourse helps to construct both social identities (or subject positions) and social relationships. This role of discourse corresponds to what Fairclough (ibid) calls the ‘identity’ and the ‘relational’ functions of language. The identity function refers to the ways social identities are constructed in discourse; the

relational function refers to the ways discourse establishes and organises relationships among its participants. Fairclough goes on to say that discourse not only constructs social identities, but also contributes to processes of cultural change, in which social identities are rearticulated, reconstructed and redefined. In this paper, I will present a theoretical discussion on how a specific kind of official discourse, the discourse of the English criminal justice system, helps to shape the identities of the three main participants of a rape trial: the judge (usually a man), the defendant (a man) and the complainant (a woman). To do that, I will look at the discourse of the criminal justice system from an interdisciplinary perspective: I will deal with concepts and constructs not only from critical discourse analysis, but also from gender theories and legal theories.

Our diverse social experiences and our historical and cultural positions exert a great influence on the way we are, the way we think and behave. That is why many areas of social studies are currently using the notion of the 'social construction of subjects'. Kress (1989) argues that the term 'subject', borrowed from psychoanalysis, coupled with the metaphor of 'construction', represents a useful expression to discuss the social creation of linguistic subjects. Apart from looking at individuals from a social perspective, the notion of the 'constructed subject' brings into play the presence of power relations in society, and consequently in discourse (Kress *ibid*).

Fairclough (1995) prefers to use the terms 'subject' and 'client' to refer to the parties in a verbal interaction, rather than the more commonly used term 'participant'. This division applies very well to the type of interaction I am interested in, i.e. that between a judge (or judges), a man accused of rape (the defendant) and a rape victim (the complainant). Following this classification, judges can be seen as *subjects* in the trial, i.e. their institutional roles and identities have been acquired in a specific acquisition period, and maintained as permanent attributes. The defendant and the complainant, on the other hand, are *clients* in the trial, i.e. they are outsiders who are taking part in a specific interaction according to rules determined by the legal institution, but without a defined acquisition period or long term maintenance of attributes. The choice of the term 'subject' over 'participant' is not trivial, and has to do with the interplay between discourse and the formation of social identities, or 'subject positions'. Fairclough explains that (1995:39):

The term 'participant' tends to imply an essential, integral 'individual' who 'participates' in various institutionally defined types of interaction without that individuality being in any way shaped or modified thereby. In preferring 'subject', I am emphasising that discourse makes people, as well as people make discourse.

In order to contextualize my comments on the role of legal discourse in the construction of identities, I will start this paper with a section on legal discourse, its characteristics, and its link with power. Next, I will discuss in more detail the subject positions of judges, defendants (men) and complainants

(women) in a rape trial. My aim in this third section is to consider how judges, defendants and complainants come to acquire their identities; to do so, I will also discuss some of the common-sensical notions that underlie the discourse of rape trials, and what effect these ideological assumptions have on the way men and women see themselves and gender relations. Finally, I will present some concluding remarks.

Even though I will constantly refer to concepts such as ‘law’, ‘legal discourse’, ‘legal culture’, ‘legal system’, ‘criminal justice system’, etc., my perspective in this work is basically that of critical discourse analysis. Thus, I see legal discourse as a culture, a semiotic code, inserted into the social world, and I am interested in its linguistic and ideological aspects, rather than in its legal details. My discussion will rest on a view of legal discourse as social practice, and it will explore the influences of legal discourse on the lives of individuals and on the construction of social identities and social relations; its regulative social, cultural and political functions; and the meanings it privileges, constructs and disseminates.

2. Legal discourse: power and control through language

Critical linguists believe that social practices and discursive practices are mutually supportive, i.e., language is both the basis and the recipient of wider discursive, social and ideological processes. Due to this interdependence between discourse and society, social institutions rely profoundly upon the medium of language. Language plays a particularly important role in law, as most legal events (interviews between lawyers and clients, the creation of legal texts and written laws, hearings, trials, etc.) are basically linguistic.

The interplay between law and language is probably as old as the appearance of the first organised human communities. Even before the creation of codified laws, language was already used to express the notion that each individual, as a member of a community, had rights and obligations. Basic legal concepts, such as ‘guilt’ and ‘murder’, existed in language before being codified in laws. In this sense, therefore, we can say that language constructs law (Gibbons 1994). As Maley (1994:11) comments, “the greater part of [the different legal processes] are realised primarily through language. Language is medium, process and product in the various arenas where legal texts, spoken or written, are generated in the service of regulating behaviour.”

Since language is instrumental to the control and regulation of human behaviour, we can also trace a parallel between language and power. Power, in the context of CDA, is understood as “the ability of people and institutions to control the behaviour and material lives of others. It is obviously a transitive concept entailing an asymmetrical relationship: X is more powerful than/has power over Y” (Fowler 1985:61).

For Fowler, social control is exercised through two linguistic processes: *directive* and *constitutive practices*. Directive practices include manipulative speech acts such as commands, requests, proclamations, naming patterns, etc. Constitutive practices are involved in the social creation of reality, i.e.,

linguistic practices that construct institutions, roles and statuses to preserve the hierarchic structure of society, giving privileged opportunities to the ruling classes and keeping other less powerful social groups in a state of “voluntary or involuntary subservience” (Fowler 1985:64). Legal discourse involves both kinds of linguistic practices. In this paper, however, I will be more interested in the *constitutive practices*, those that help to shape identities in legal discourse, and to distribute power unequally among its participants.

The most marked influence of language in the maintenance of power differentials can be seen in the imposition of ideology in official and public institutions. According to Althusser, the existing power structure is mainly maintained by “ideological state apparatuses”, such as the church, the law, education, coupled with “repressive state apparatuses”, which include the police and the armed forces (in Fowler 1985:67). The function of ideological state apparatuses is to maintain and legitimise the existence and behaviour of the ruling classes, and they do that, as Fowler puts it, by bathing society in official discourse: “by constructing and reiterating certain selected signs, [ideological/official discourse] insists upon a set of concepts that make up a certain reality - one that is favourable to the groups for whom the ideology is constructed” (ibid:68). The legal system, which encompasses both an ideological (law) and a repressive state apparatus (the police), is particularly oppressive and powerful.

One of the basic premises of CDA is that linguistic practices both reflect and construct ideological assumptions. The term ‘ideology’ here refers to “the common-sensical assumptions which help to legitimise existing social relations and differences in power” (Wallace 1992:61). The continuous speaking and writing of a value-laden discourse type, such as the discourse of the criminal justice system, constructs and reconstructs the particular beliefs of the legal institution, and helps to maintain the roles and status of its members. On top of that, access and control over discourse determine which social roles hold more or less power (van Dijk 1996). Thus, the specificity of the legal language, and the restrictions as to whom may speak it, serve as a means by which “the inner coherence of the group is maintained and its boundaries are clearly defined (outsiders do not use the characteristic forms)” (Fowler 1985:66).¹

Legal discourse can be seen as a discourse of power, both in its own right, as an example of an official, public discourse, and also in the allocation of rights to speak among its participants. In view of that, it is important to consider how, and from where, legal discourse derives its power. Power is achieved in discourse through the ideological naturalisation of both directive and constitutive practices: these two kinds of practices construct reality and social relations in such a way that they seem natural, unchallengeable. In a legal interaction (e.g. a trial) subjects (judges) and clients (defendants/complainants) speak different languages “because they occupy different worlds, and in order that they should occupy different worlds” (Fowler 1985:67).

In short, power relations, be they explicit or symbolic, are the backbone of most legal processes, especially those that take place in the courtroom. Concerning this specific legal arena, Maley says that “semiotically, the strongest meanings communicated by the physical setting of the [court]room and behaviour of those in it are those of hierarchical power” (1992:32). In general terms, those who have, as a result of their role, more access to the language of the law, and more right to speak and control the discourse and the topics in the courtroom, have consequently more power. Legal power, therefore, implies linguistic power, i.e., familiarity with, access to and control over discourse.

In the last two or three centuries law has almost reached the status of a positivist science: “precise, certain, predictable, repetitious and also more importantly, alien to any specific context” (Goodrich *ibid*:175). The discourse of the law owes many of its characteristics to Positivism²: an aura of universality, rationality, precision, and the notion that it expresses the crystallisation of ‘the truth’.

Peter Goodrich is an English jurist who defends a social approach to legal discourse. According to him, traditional legal culture is controlled by “the positivistic view that law is an internally defined ‘system’ of notional meanings or of specifically legal values, that it is a technical language and is, by and large, unproblematically, univocal in its application” (1987:1). However, this view leaves out the social aspects of law and legal discourse, the fact that law is a “specific, socio-linguistically defined, speech community and usage” (Goodrich *ibid*:1), and that legal discourse belongs to a particular group or class and expresses relations of power over individuals and power over meaning.

Goodrich claims that law as discourse is characterised by two simultaneous processes: an appropriation and privileging of certain legal meanings or ideologies (*modes of inclusion*) and a rejection of alternative, competing or threatening meanings or ideologies (*modes of exclusion*)³. The interplay between modes of inclusion and modes of exclusion results in the univocality of legal discourse, i.e., the discourse of law belongs to a particular group or class, that of legal practitioners, and expresses relations of power of individuals and power over meaning.

Another important characteristic of legal discourse is its status as ‘knowledge’. Knowledge and power are intimately linked; from the very dawn of civilisation knowledge has been in the hands of restricted communities of power. Legal knowledge, including the mastery of legal language, is no exception: in Western societies knowledge has always been produced and kept within the boundaries of institutions financed and controlled by religious and secular power (Goodrich 1987).

Legal discourse, maybe more than other forms of knowledge, is deeply linked to the concept of ‘truth’. Legal practitioners (especially judges), in the positivist tradition, are not just ‘learned’ individuals but individuals who represent and practise a rational, objective and neutral discipline: the law.

Their word, both knowledgeable and ‘holly’, carries an enormous amount of power.

However, Western society at the end of the 20th century, far from being characterised by rational or logical social events, is going through a growing cultural, political and economic crisis (marked, among other things, by constant changes in social and cultural values, high unemployment, unequal access to wealth, education, etc.), which makes social relations particularly complex and diverse. How does the legal institution deal with this continuous process of social change? From the evidence of legal texts, it is possible to say that legal discourse strives to resist these changes, still constructing and defining law and legal practice as unitary, centralised, ordered, rational, logical and coherent.

Language plays a major role in maintaining the unity of the legal system. For Goodrich (1987), this unity rests on features of the legal discourse, such as: the educational and hierarchical restrictions as to who has access to legal language, who can be defined as a legal ‘speaker’; and the valorisation of certain kinds of settings, texts, vocabularies and syntactical structures over others as more ‘appropriate’ for legal communication.

Philosophical Positivism has armed legal discourse with its rhetoric of universals, and with the self-protective doctrines of unity, coherence, logic, objectivity, and truth (Goodrich 1987). The ideological advantages of Positivism are that it constructs a social order based on hierarchy (the sources of law) and authority (judicial practice). Therefore, as Goodrich points out, “the choice to pursue [the positivist] project is a *political* one” (ibid:211). In theoretical terms, the positivist project defines legal knowledge and legal discourse as the study of ideal states of affairs, ignoring the historical and social construction of reality and human relations.

The practices, the practitioners and the discourse of law both represent and contribute to keeping alive patterns of social, economic and gender inequalities. In R. M. Unger’s words, legal regulation “assigns fixed roles to people according to the position that they hold within a predetermined set of social or gender contrasts” (in Goodrich 1987:131). The next section of this paper will deal with the fixed institutional and social roles which are assigned to the main participants of a rape trial: the judge, the defendant and the complainant.

3. Identities in discourse

3.1. Judges

In order to act within an institutional domain, we are expected to be subjects formed by/within the ideologies, rules and boundaries of that institution. These constraints will influence not only our identity, but also the way we interact with ourselves, our peers and ‘outsiders’.

In the judicial context, legal education is perhaps the first step in the process of acquiring an institutional identity. And the identities of legal

practitioners tend to present a great deal of homogeneity. If we consider the restrictions and the highly competitive mode of entrance into law school, we can begin to visualise a certain uniformity among future professionals. And entry is just a preliminary stage in a long process. As Goodrich argues, “entry into law school is the start of an extremely lengthy process of socialisation into the techniques and language of an authoritarian hierarchy” (1987:172).

To start discussing the process of identity formation of English judges (especially High Court ones), I must ‘begin at the beginning’, i.e., how legal practitioners come to be High Court judges. In England, judges are selected from the ranks of barristers of between fifteen and twenty years of practice. The judges who preside over the Courts of Appeal, for instance, are appointed by the Lord Chancellor, who is a member of the cabinet. Since these judges are chosen by a member of the government, after consultation with the Prime-Minister, we can ask ourselves to what extent an active political life and involvement with the government of the day can influence the appointment and the decisions of an English High Court judge. Referring to the selection of judges, J.A.G. Griffith contends that “ability by itself is not enough. Unorthodoxy in political opinion is a certain disqualification for appointment” (1977:209).

It is also interesting to look at the social and academic background of English judges. Surveys covering the period from the 1880s to the 1970s show that most members of the senior English judiciary come from the upper and upper middle classes and have been educated in public schools and Oxbridge. Concerning their ages, English judges are usually appointed at about 52 or 53. Appeal judges, given the system of promotion, are considerably older: their average age is between 65 and 68 (Griffith 1977:25-7).

The English judicial profession is also very homogeneous in terms of gender. In 1983 there were only three women High Court judges out of a total of 77, and 10 women circuit judges out of a total of 339. According to Polly Pattullo, the “typical profile of all those High Court judges appointed between 1980 and 1982 is of a 55-year-old white male, educated at one of the top public schools and Oxbridge and an experienced barrister and QC [Queen’s Counsel]” (1983:6).

Considering the judges’ homogeneous social background, age and gender, it is not surprising to find that judicial decisions in political or moral cases tend to show a great deal of consistency. In the mid-seventies, for instance, English judicial decisions on political cases spread “from that part of the centre which is shared by right-wing Labour, Liberal and ‘progressive’ Conservative opinion to that part of the right which is associated with traditional Toryism - but not beyond into the reaches of the far right” (Griffith 1977:31). Keeping in mind that until very recently British government was still Conservative, we could argue that the profile of judicial opinion in the England of the 1990s is probably not very different from that of the 1970s.

However, it is important to remember that judges, as human beings, also vary in their opinions and decisions, being influenced both by personal and social prejudices and stereotypes. The premises that underlie their discourse, and the authoritarian and gender-biased ideologies from which such premises are drawn, are many times inarticulate and unknown to them on a conscious level. Fairclough draws an interesting distinction between personal values and beliefs, which exist on a conscious level, and ideological concepts, which are generally unconscious. He says that “[discourse] subjects ... are typically unaware of the ideological dimensions of the subject positions they occupy. This means of course that they are in no reasonable sense ‘committed’ to them, and it underlines the point that ideologies are not to be equated with views and beliefs” (1995:42). The discourse of the criminal justice system, for instance, looks very insensitive to women’s perspectives and points of view. However, this insensitivity is probably based more on unconscious assumptions about gender relations and gender roles than on an intentional wish to oppress.

Even though it may be argued, from a critical perspective, that the discourse of law expresses patterns of discrimination against minority groups (e.g. blacks, the poor, women, gays), there is a widespread notion that judicial decisions are neutral and rational, and that the judiciary decides disputes based on the law and on impartiality. It is important to highlight this feature of judicial discourse because neutrality here goes beyond impartiality: it also means that judges should produce judgements without touching into matters that are not strictly related to the case before them (Griffith 1977). According to the principle of neutrality, social issues related to particular cases should not interfere with or influence legal decisions. Judges are constructed both by folk and official discourses as mere arbiters in conflicts between individuals or between individuals and the State, with no personal or political agendas. However, as Griffith argues, “neither impartiality nor independence necessarily involves neutrality. Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions” (ibid:190).³

Common law and common sense are intricably linked. Common law systems, such as the British one, describe professional adjudicators (i.e. judges) as especially prepared to decide between conflicting versions of reality for two basic reasons: first because they can rely on a body of previous decisions (precedent); and second because they are especially trained and possess a superior knowledge both of the law and of human nature (common sense). Burton and Carlen (1977), drawing on the work of some famous common sense theorists such as Durkheim and Popper, offer interesting insights about the link between common sense and common law. Durkheim, for instance, believed that professional groups, due to their place in a hierarchy of knowledge, were best equipped for the (moral) interpretation of social rules. This belief seems to find echo in the legal culture, which sees judges

as “subjects whose privileged ... common-sense makes official adjudication possible” (Burton and Carlen 1979:59).

Theorists like Durkheim and Popper believed that only groups who had a privileged knowledge could produce rules capable of distinguishing between true and false beliefs about the world. These groups could not produce the ‘Truth’, due to their essentially imperfect human nature, but could create verisimilitude, i.e, the professional adjudicator (e.g. a judge), would be able to create, through his/her decisions, truth-like objects (implied here is the idea of of a judge’s objectivity, neutrality, rationality, fairness, etc.). In Burton and Carlen’s words (1979:61):

[Verisimilitude] is to be apprehended through rules which decide the degree of correspondence between the theory (or abstract concept) and the real world. The fit between this unknowable ‘real world’ and the rules which mediate it is guaranteed by the superior techniques available to those whose training (scientific or legal) increases their innate human aptitude for reproducing already-known representations of the ideal.

Given their homogeneous social background and professional experiences, English High Court judges are exposed to practically the same ideologies, values and beliefs, and produce a very similar discourse, which they frequently claim to represent the ‘public interest’. This phrase is often present in judgements of political cases. The notion of ‘public interest’ invoked by many judges involves the maintenance of a social, cultural and class structure which is the basis of their lives and identities. According to Griffith, the English judicial conception of public interest “is threefold. It concerns, first, the interests of the State (*including its moral welfare*) and the preservation of law and order, broadly interpreted; secondly, the protection of property rights; and thirdly the promotion of certain political views normally associated with the Conservative party”. (1977:195 - my emphasis).

Questions of moral behaviour, such as the ones raised in a rape trial, may be decided on the basis of this notion of public interest. Nevertheless, the concept of public interest might clash violently with the notion of personal rights in political or controversial cases⁴. Griffith (ibid) traces a very revealing link between the protection of personal rights and a structure of power. He argues that personal rights [such as the sexual rights conquered by women in the last thirty years - sex before marriage, contraceptive devices, abortion, etc.], are not rights but claims which have to be constantly reinforced and protected. But the enlargement of a person’s freedom and liberties means the shrinking of official or institutional power. When asked to protect such rights (a woman’s right to say no, to go out alone, to dress as she wishes without being sexually molested), the judiciary is in fact *weakening* male and institutional power. It is no surprise, thus, that judges are reluctant to protect certain personal rights: their institutional function, after all, is not to boost personal liberty but to preserve the status quo.

The very notion of ‘public interest’ can be easily manipulated by official discourses. Judges, for instance, might claim that they are guided by the

public interest, and are acting for the whole society. However, the notion of 'the whole society' implies a social homogeneity among social groups and social institutions which we know does not exist. It is not uncommon to see public institutions such as the criminal justice system working to protect the stability and privileges of political and economic power groups, while claiming to act for the whole abstracted society.

In broad terms, judicial discourse represents the establishment and strives to keep things as they are. Having said that, I want to point out that to argue that the judicial discourse works to protect the existing social order does not mean that all judges are impervious to cultural, moral and social changes. Judges can present in their discourse traces of social/cultural changes. However, judicial attitudes will always change belatedly, if at all. As I said before, the main function of judicial discourse is to maintain the status quo, not to challenge it. Referring to the ideologies that shape English judicial discourse, Griffith (1977:214) says that:

Law and order, the established distribution of power both public and private, the conventional and agreed view amongst those who exercise political and economic power, the fears and prejudices of the middle and upper classes, these are the forces which the judges are expected to uphold and do uphold.

3.2. Women as complainants or rape victims

One of the issues involved in a rape trial is that of violence against women. We have come to see the social phenomenon of violence as something quite common, almost as part of our everyday lives. This process of naturalisation and trivialisation of violence is to a great extent a discursive phenomenon; sexual crimes, for instance, are daily described, discussed and explored in the discourse of the media, of religion, of science, and of law. As a result of this social and discursive trivialisation of violence, many women are led to see their violation as unimportant or their own fault, and end up believing they should not 'fuss' over it. That is what Ruth Hall observed in her contact with sexually assaulted women at the Women Against Rape (WAR) centre in London. In her words (1985:23):

Women's view of what has happened to us, and of who is to blame, is coloured by what others may think, and by how it would be seen in the courts or in law. If we were raped in a situation seen as 'risky', or if no 'force' was used, or if the rapist was a friend, or a boyfriend, it is hard to challenge the judgement that we have no right to complain.

The above quotation touches on several ideological assumptions about female sexual behaviour that underlie both the laws on rape and the discourse of rape trials. One of these assumptions is that many times women are the real 'causers' of sexual attacks. Official discourses, be them from the centre or from the right, seem to naturalise the folk idea that women 'provoke' men, giving them opportunities and excuses for rape. A good example is this comment taken from "The Report of a Howard League Working Party on Unlawful Sex" (1985:48 - my emphasis):

The commonest sequence of events in these rape cases [non-brutal rapes] was of a young couple meeting and drinking together in a bar or disco, then going off somewhere together, *thereby giving the male opportunity to insist on intercourse, by forcing if necessary*.

Notice the link of cause and effect, expressed by the adverb *thereby*, between the woman's behaviour (going somewhere not public with a man) and the consequent male insistence on sex. This fits the description of 'imprudent' female behaviour depicted in "Principles of Sentencing", a book which is almost a 'bible' for English judicial decisions (Thomas 1979:113 - my emphasis):

Conduct on the part of the victim which increases the risk of rape, such as willing participation in minor sexual activity or (to a lesser extent) *imprudent behaviour* such as accepting a lift in a car from strangers, is usually treated as reason for some reduction in the sentence.

This judicial attitude towards women victims of sexual crimes is called 'victim blaming' (Radford 1987) or 'character-assassination' (Liebes-Plesner 1984): the courts many times see cases of sexual assault against women as non-criminal or at least as understandable, especially when the woman's behaviour is considered 'imprudent', or when she is labelled 'promiscuous'. In such cases, it can be the woman's actions and behaviour, rather than the offender's, that is judged.

Even this superficial analysis indicates that in discourse of rape cases there is a great emphasis on, and concern with, sexuality, especially female sexuality. Law sees the body and its activities as an area of legal jurisdiction. From the time of the appearance of the first codified laws until today, the female body (particularly in its sexual and reproductive capacities) has been seen as an object of legal regulation, control and punishment (Smart 1989). Several legal and social researchers have contended that the discourse of law constructs the female body as diseased, hysterical, or immoral. Susan Edwards (1981), for instance, argues that the discourse of rape trials is ripe with notions about female passivity, women as victims, and female culpability. Edwards says that women *are* their sex for legal discourse. In other words, for the legal culture sexuality is the main trait, the one that constructs, defines and shapes a woman's identity. This is done by constructing a specific feature of the woman's behaviour (e.g. her sexual history) as dominant, therefore giving it 'master status' (Liebes-Plesner 1984). Other characteristics are either made to fit into this dominant one ('auxiliary traits') or, if conflicting, are downplayed. The discourse of rape trials constantly invokes images of motherhood, chastity, promiscuity, the 'bad girl', the 'unfaithful wife', the virgin, the 'lost' woman, etc., creating a portrait of women which is flat and uni-dimensional. According to Liebes-Plesner's (1984:186), this narrow depiction of women is by no means uncommon:

Society does not perceive that the personality of a woman can combine different characteristics. Rather than being perceived as an integrated personality which incorporates both maternal love and passion, a woman is

categorized one-dimensionally. She is either good or bad, motherly or sexual, Madonna or prostitute, innocent and pure or scheming and seductive. This split image is expressed in all forms of popular culture.

Discourse plays an important role in achieving control over sexuality. In his work *The History of Sexuality* (1979), Foucault argues that legal prohibitions, exclusions and limitations on sexuality are linked to particular discursive practices. According to him, it is by establishing prohibitions and regulations on sexuality within legal and medical discursive practices, among others, that control over female sexual behaviour is achieved (in Edwards 1981:13).

The stereotypical representations of gender roles and gender relations found in the family discourse, the media discourse, the school discourse, etc., are not contradicted in the discourse of the criminal justice system; rather, they gather support and strength in texts from rape trials. Even when the rapist is convicted the discourse of the criminal justice system does not really challenge gender and sexual inequalities. Feminist theories see the violent (and sometimes criminal) behaviour of men towards women within a context of unequal power relations between the genders.

Newburn and Stanko (1994), for instance, understand that “ ‘crime’ or ‘criminal behaviour’ is not a series of relatively unproblematic givens but, rather, a wide range of activities which all need to be understood within the context of gender relations” (ibid:4). Generally speaking, however, the criminal justice system does not share this position. Criminology, as a discipline, has been mostly concerned with the control of marginal and working-class men, individualising and pathologising male violence, as if members of other social groups or classes had no involvement with violence or criminality (Newburn and Stanko ibid). The objective of the discourse of rape cases is to evaluate, control and punish the behaviour of individual men and women; male violence, and male power over women as a whole, is boosted rather than weakened (Radford 1987).

Compared to social attitudes, legal attitudes can look quite outdated and conservative. This is due to the fact that social values and attitudes change faster than official discourses, especially the legal one. As Edwards says, “social attitudes to female sexual freedom might have changed - the girl next door can sleep with her boyfriend without much criticism - but if she is raped then the social construction of promiscuity is set in motion” (1981:69).

3.3. Men as defendants or rapists

I have argued that discourse is socially constitutive, constructing institutions, social relations and identities. In this section I will make some considerations on how discursive practices teach men to see sexual violence as trivial, normal, or at least acceptable. Sociologists have long noticed that

people who have performed acts defined socially or legally as ‘wrong’ can and do use discourse to present themselves as ‘normal’. In the context of rape, for instance, Diana Scully (1990) has investigated the ‘vocabulary of motives’ of rapists, i.e., the linguistic devices convicted rapists⁶ use to interpret and explain their acts, and to make them look socially and culturally acceptable.

During her research, Scully observed that among convicted rapists there were admitters and deniers. I will concentrate here on the latter kind. The ‘denier’ type admitted that rape is usually impermissible, but argued that, in their particular cases, there were justifications that made their behaviour appropriate, if not right. These justifications were constructed linguistically. Scully concluded that the mastery of a certain vocabulary seemed to be basic in the process of learning to accept, justify and carry out a rape. This use of discursive explanations and manipulations to make rape and other sex offences look normal is present not only in the discourse of rapists, but also in the discourse of the criminal justice system. Both rapists and legal practitioners (such as judges) build their explanations for rape based on knowledge acquired from society, a knowledge which expresses what our culture considers acceptable. This process of social and cultural acceptance of sexual violence is sometimes even acknowledged in official discourses. “The Report of a Howard League Working Party on Unlawful Sex”, for instance, concluded that (1985:49 - my emphasis):

The behaviour of young rapists is, to a certain extent, the product of their environment, the prevalent outlook towards women as sex objects rather than individuals and the conception of violence as an acceptable means of obtaining what one wants. Most rapists are not seen by themselves *or by others* as psychologically abnormal, at least not any more than the average thief or burglar. *People feel they understand these young men’s motives only too well.*

The convicted rapists studied by Scully relied on well-know stereotypes about women to justify their actions. In the deniers’ accounts, the victim and her behaviour were described in such a way that the rapes were made situationally acceptable. The most common stereotypes mentioned were: (1) women as seductresses, (2) women mean *yes* when they say *no*, (3) women eventually “relax and enjoy it”, and (4) nice girls don’t get raped (Scully 1990:102). These same stereotypes can be found in texts from rape trials. Here we can trace a parallel between the discourse of rapists and the judicial discourse on rape trials: both resort to the technique of ‘victim blaming’, that is, in both kinds of discourse the woman tends to be blamed for what happened to her (as the discourse of rape cases shares with the discourse of convicted rapists similar stereotypical ideas about female behaviour, we could say that it presents an almost fraternal critique of rapists). The following extracts, taken from rapists’ statements and from rape trials, illustrate some of the above stereotypes:

About saying ‘no’:

“Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn’t want it she only has to keep her legs shut and she would not get it without force and there would be marks of force being used” [from a rape case tried in Cambridge in 1982, in which the defendant was acquitted] (Pattullo 1983:20-1).

- “All women say ‘no’ when they mean ‘yes’ but it’s a societal ‘no’ so they won’t have to feel responsible later” [explanation of a 34-year-old men who abducted and raped a 15-year-old girl at knife point] (Scully 1990:104)

‘Nice girls don’t get raped’ or the myth of female culpability

“I am not saying that a girl hitching home late at night should not be protected by the law, but she was guilty of a great deal of contributory negligence” [from a 1982 rape case in which a man was fined two thousand pounds for raping a 17-year-old girl] (Pattullo *ibid*:21).

“What counsel for the appellant wished to do at the trial in this case ... was to seek to show that the complainant was promiscuous, that is to say, that not only had she had sexual experience with men to whom she was not married but that she had done so casually and with little discrimination. It was, of course, in any event fundamental to such a submission that there was a factual basis for suggesting sexual promiscuity in this case” [from an appeal in a 1988 rape trial in which the victim’s alleged promiscuity was used as evidence of consent] (Metcalf 1989:100).

- “To be honest, we [his family] knew she was a damn whore and whether she screwed 1 or 50 guys didn’t matter” [statement of a rapist who abducted his victim at knife point] (Scully *ibid*:108).

Diana Scully offers a sociological explanation for the apparent insensitivity of rapists towards their victims. She argues that rapists have difficulty in putting themselves in their victims’ shoes and understanding their perspectives. This lack of empathy is intimately related to how power is distributed between the genders. Powerful people (e.g. men and judges) have few reasons to put themselves into the position of less powerful ones. For the less powerful person, on the other hand, it is vital to learn to understand and anticipate the behaviour of others. For men, therefore, role-taking with women is not essential, while for women, role-taking with men “is a survival strategy” (Scully 1990:115-6).

4. Concluding remarks

My aim in this paper was to study legal discourse from the perspective of CDA, and to consider what effects the linguistic practices of the criminal justice system have on the social positions of judges, defendants and complainants, and on the way they relate with the world and with each other. According to Peter Goodrich, up to the present times law and legal

discourse have defined themselves “by means of a near total social amnesia” (1987:7-8), that is, legal practice and legal discourse have been put above social, political and economic issues. It is exactly to question the pseudo-impartiality of law that analysts such as Goodrich advocate a critical and interdisciplinary approach to legal texts. This paper has been informed by the view of legal discourse as social discourse, an approach that denies the univocality of the legal text and claims that it involves a dialogue between legal speaker, legal institution and various codes, contexts and audiences of the law. Another basic premise behind the present work is that there is a circular relationship between discourse and subjectivities, i.e., individual speakers/writers produce texts and talks but, as social agents, they are themselves created by discourse through their experiences of texts and talks.

The view of discourse as a social phenomenon, as instrumental to the construction and organisation of social institutions, leads us to conclude that linguistic structures can encode and reinforce inequalities of power. The analysis of the way the judicial system is structured, how judges are selected, what their backgrounds are, allows us understand the texts they produce or, to use Goodrich’s words, “to recover the before and after of legal utterance” (1987:7). By looking at legal discourse in its institutional context, a context marked by a hierarchical structure and power relations between discourse participants, we can begin to understand why legal discourse is so unilateral in its dealings with certain social groups, such as women, the poor, gays, etc., especially when members of these groups contravene their expected roles and modes of behaviour.

I have argued here that discourse is socially constitutive; this, however, does not mean that subjectivities are static: discourse helps to construct identities both in conventional and in creative ways (Fairclough 1992). Fairclough points out that, due to the heterogeneity of texts, there is an ongoing negotiation between identity and difference; texts express processes of articulation, desarticulation and rearticulation which upset social identities. However, even though identities might be constantly reshaped in post-modern times as a result of changing social, political, cultural or economic influences, relations of power and domination still mark many texts, and official discourses particularly still resort to processes of naturalization in order to present their views of the world as given and unproblematic.

Rape trials are good illustrations of how society sees gender relations, gender roles, and the social phenomenon of sexual violence against women. The discourse of most rape trials rests on the assumption that the causes for rape are individual rather than social, and should be searched for mostly in the behaviour of the rape victim. However, the problem of rape lies not only in the assaulted woman (her dress, her sexual behaviour, her profession, her looks, the place where she is, etc.) but mostly in the messages her aggressor has received from social discourses: we are talking about women and men who have been brought up in a society that allows and encourages powerful groups to show all kinds of abusive behaviour towards

less powerful ones. This line of reasoning can lead us to see rape not merely as a type of sexual crime, but as a form of power abuse, an exercise of male control over female behaviour, which is reproduced in the practices and in the discourse of law.

This link between sexual violence and forms of social and legal control is almost never explored, either by the criminal justice system or by society as a whole. Ruth Hall argues that “rape is, in theory, seen as a very serious crime, yet there is still a widespread view that rape is just an act of sex at the wrong time and place, and that unless there is lasting physical injury, a woman should be able to shrug the experience off” (Hall 85:138).

Only a small proportion of rapes are reported, and an even smaller number of the reported cases ever come to trial⁶. The ones which do, however, play an important symbolic role. Criminal trials are symbolic in the sense that their main actors, e.g. the defendant and the victim, represent social roles; the trial itself embodies the notions of a ‘good’ society (and a ‘just’ and ‘reliable’ criminal justice system) and the achievement of justice in individual cases (Bumiller 1991).⁷ This is due to a pervasive social notion that law always promotes justice. However, law is also a powerful creator and disseminator of different types of discrimination, such as gender discrimination. The feminist jurist Carol Smart is very sceptical about the ability of law to remedy social and political problems. She argues that law is seen by many people, including people in the women’s movement, as capable of providing individual solutions for fundamental social problems such as gender inequalities, class or ethnical problems. In her opinion, resorting to the law can be a misleading solution because “the legal ‘remedy’ individualises these social issues - giving the individual the impression that law can be used to resolve his, or less frequently hers, personal problem” (1989:104).

Legal rights and legal protection, for instance, do not apply to all women, but only to those women who fit the category of persons to whom those rights have been conceded. In their socialisation, in their exposure to social discourses, women are trained to fit into patterns of chastity, prudishness, discretion, deference, quietness, etc., as these features will earn them social and legal status. Breaking such patterns implies not only losing social value but, in extreme cases, losing the right to legal protection.

The discourse of a rape trial, rather than advancing female rights, can actually work to disempower women. One of the most perverse effects of discourses on rape is that they can exert a great influence on the way women see themselves, their attackers and the violence they have been exposed to. Different women might define their violation in different ways, especially when their cases do not fit the accepted stereotypes or the legal norms. Their own difficulty in acknowledging that what they went through *was* rape, added to feelings of shame and guilty, and to a well-founded fear of the handling of the criminal justice system, lead countless women not to report sexual attacks.

I have argued that legal discourse is a hierarchical discourse, marked by asymmetries of power and by patterns of discrimination, such as gender discrimination. However, considering how homogeneous the social background of most judges is, and how they are ideologically and discursively trained to occupy their social position, it would be naive to expect judges to act in novel, progressive and unconventional ways, or to produce a discourse that questions or challenges the established social order. Thus, this work does not intend to argue that judges *could or should* produce a radical discourse, but to demystify the common notion that judicial discourse is neutral and impartial in conflicts between those who challenge existing institutions (such as women who do not conform to their expected gender role) and those who control and protect these institutions (such as men in general and legal practitioners in particular).

NOTES

- 1 In his book *The Archaeology of Knowledge*, Michel Foucault raises several questions about the social authorship of specific linguistic practices; these questions apply very well to the distribution of the right to speak in legal discourse (in Goodrich 1987:145):

Who is speaking? Who, among the totality of speaking individuals, is accorded the right to use this sort of language? Who is qualified to do so? Who derives from it his own special quality, his prestige, and from whom, in return, does he receive if not the assurance, at least the presumption that what he says is true? What is the status of the individual who - alone - have the right, sanctioned by law and tradition, juridically defined or spontaneously accepted, to proffer such discourse?

- 2 **Positivism:** the doctrine formulated by Comte which asserts that the only true knowledge is scientific knowledge, i.e. knowledge which describes and explains the coexistence and succession of observable phenomena, including both physical and social phenomena. Positivism has two dimensions: one is methodological (as above), and the other is social and political, in that positive knowledge of social phenomena was expected to permit a new scientifically grounded intervention in politics and social affairs [e.g. legal disputes] which would transform social life (in Jary, D. and Jary, J. (1991). *Collins Dictionary of Sociology*. Glasgow: Harper-Collins Publishers. pp. 484-85).
- 3 A good illustration for this point is a study of litigant accounts carried out by Conley and O'Barr (in press). After analysing more than a 100 trials, they concluded that litigant accounts present two forms: *rule-oriented accounts* and *relational accounts*. In rule-oriented accounts the claim for legal protection is based on specific formal rules, obligations and duties (such as the ones found in contracts or laws), and only evidence related to the rules in question is presented. In relational accounts the claim for legal relief is

based on general rules of social conduct, i.e, the litigant presents him/herself as a good citizen, who fulfills his/her social obligations, being thus entitled to fair treatment (there is an emphasis on personal and social details). What Conley and O'Barr observed was that rule-oriented accounts, closer to the court's more limited and rule-centred agenda, were favoured over relational accounts, related to a social agenda considered irrelevant by the court. Rule-centred versions of events, by fitting in with the courts' ideologies, tend to be included in the legal discourse, while relational versions of events, which represent alternative, competing or threatening meanings or ideologies, tend to be left out.

- 4 A sexual crime, for instance, involves many social, political and economic issues, issues which are rarely, if ever, raised or mentioned in the discourse of rape trials. The findings a London survey on rape carried out by the WAR (Women Against Rape) group in the early 1980s indicated that, in the London area, rape and other sexual crimes were related to current questions and debates about transport, housing policy, welfare, women's financial dependence, the police and the law on rape (Hall 1985).
- 5 Two cases which occurred in England in the summer of 1996 serve as illustrations of the clash between private rights and notions of public interest and society's moral welfare: in the first, a women decided to abort one of her twin babies, claiming that she could not afford to have two children; in the second, a woman who was artificially impregnated conceived eight fetuses, and decided to carry the pregnancy to term, against medical advice, in order to sell the exclusive rights over her story to a tabloid paper (she eventually lost the babies). In both cases, public opinion was bitterly divided, and the media raised several moral issues in an attempt to influence the women's final decision, even though their choices were clearly a matter of private rights.
- 6 Many studies and official statistics show that most rape cases go unreported; the number of convicted rapists is rather small if compared with the estimated number of rapes (in Switzerland, for instance, approximately 2 per cent of the offenders are convicted, while 98 per cent go undetected). In view of that, the Swiss researcher Alberto Godenzi carried out an interesting investigation with non-detected rape offenders, a group he claims to be much more representative of rapists than the group of convicted offenders. For further information, see Godenzi 1994.
- 7 For further comments on the amount of rapists who are eventually convicted in the British criminal justice system, see Hall 1985, Smart 1989, and Sampson 1994.
- 8 Rape trials symbolise not only values such as 'justice for all' and a 'reliable' justice system, but also important social values concerning women, men and their relationships. The discourse of rape cases is an example of social values transformed into social action, and it has the power either to strengthen these values or subvert them (Conley and O'Barr in press). According to Liebes-Plesner, the stereotypes related to female social and sexual behaviour constructed during a rape trial (by defense lawyers, prosecutors or judges) "are perceived as fulfilling a social purpose parallel to that of myths and

folktales, confirming the notion that trials are moral lessons rather than an efficient way of solving disputes” (1984:173).

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