

## Linguistic Representation of Violence in Judicial Opinions in Malaysia

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### ABSTRACT

Violent behaviour is understood as being a social and unilateral action initiated by one party. It is social in nature as it occurs within an interpersonal context and unilateral per se because it involves action taken by one individual against the well-being of another. Judges use strategic discursive strategies to describe the accounts of the crime in their judicial decisions. This research aims to investigate the language used by judges to describe the accounts of rape in selected appellate judgments of sexual violence cases in Malaysia. Specifically, it aims to investigate the discursive strategies adopted by judges to reformulate the description of the crime. The findings revealed that violent, disapproving, sexual, and ambiguous terms were adopted. It was also revealed that the crime is often characterized as a non-coerced and mutually-consented behaviour rather than a criminal act. This results in minimizing the level of violence, the mitigation of offender's responsibility, and the relegation of victim's experience to the background. Another significant finding from this study is the issue of judges' 'interpretative repertoires' in describing cases of sexual violence. We recommend for future studies to include a bigger sample size, as well as to study whether different rape categories namely acquaintance rape, incestuous rape, and stranger rape would reveal distinctive terms used for the respective rape types.

**Keywords:** judicial opinions; sexual violence; language and violence; discourse analysis; legal discourse

### INTRODUCTION

This study aims to explore the views of the Malaysian judges regarding rape and victims of rape through linguistic analysis of rape appeal judgments. The idea for this study came from a 2017 parliamentary debate on the Sexual Offences Against Children Bill 2017. Datuk Shabudin Yahaya, the Tasik Gelugor Member of Parliament who was also a former sharia judge, suggested that there was nothing wrong for rape victims to marry their rapists (See, 2018). He even claimed that girls as young as nine years old would be physically and spiritually ready for marriage (Ghazali, 2017). According to him, if the rape victims are married to their rapists, the victims' future would not be as bleak, as they would *at least* have a husband, and this would serve as a solution to the growing social problems. This view,

coming from an individual who had previously served as a member of the judiciary, is quite alarming. How do judges actually view rape victims and offenders? How do they represent the crime in their written opinions? These are the questions that motivated us to conduct this study.

For legal institutions, language plays an important role in the daily operations as most events take place either in the form of spoken (e.g. lawyer-client interviews, hearing and trials) or written (e.g. creation of legal texts and written laws) discourse. Language constructs the law (Gibbons, 2003) and it functions as the ‘medium, process, and product in the various areas where legal texts, spoken or written, are generated in the service of regulating behaviour’ (Maley, 1994, p. 11). Legal discourse is viewed as a discourse of power, as it is understood that those who are members of the legal institution have more access to the language of the law, and thus more right to speak and control the discursive activity in the courtroom.

One avenue of understanding the interplay between language and the law is to conduct analysis on legal discourse. In recent years, there have been a growing number of research on legal discourse, including the analysis of courtroom interaction (Matoesian, 1993; Maley, 1994; Bogoch, 1999), courtroom interpretation (Berk-Seligson, 2012), police interviews (Heydon, 2005), child-witness interview (La Rooy, Heydon, Korkman, & Myklebust, 2016), lawyer-client interaction (Bogoch & Danet, 1984; Gnisci & Bakeman, 2007), and opening and closing submissions by lawyers (Haynes, 2017).

Apart from the above-mentioned studies, research on written judicial decision is also gaining significance in the study on legal discourse (Coates, Bavelas & Gibson, 1994; Figueiredo, 1998; Bavelas & Coates, 2001; MacMartin & Wood, 2005; Charalambous, 2015). The reason for this is because the written judicial decision represents the current legal practice besides setting the precedence to shape future law and society (Coates, Bavelas & Gibson, 1994). Moreover, research on written judicial opinions allows the link between language, power and ideology to be investigated further. Despite claims by members of the legal profession that the adversarial system is able to materialize abstract ideas such as justice and impartiality in an objective manner, it is important to take into account that they can also be influenced by personal ideologies that might result in unintended promotion of injustice and oppression in the courtrooms (Philips, 1998). Although judges are viewed as the authoritative figures in producing sound judgments according to the law, they are also human beings with varying opinions and personal social prejudices and stereotypes (Figueiredo, 1998). These human factors will cast an influence when the judges construct legal reasoning.

Legal discourse research, especially on the study of judicial opinions, is slowly gaining attention in the Asian region. One such study by Noraini Ibrahim and Abdul Hadi Awang (2011), which investigated judicial disagreements or dissenting opinions of selected Malaysian judicial opinions in civil trials. The findings noted that judges used linguistic markers to show stance and attitude in addition to the use of modal verbs. Han (2011) examined the discursive behaviours of judicial opinions through the use of genre and critical discourse analysis methodology. The study investigated the discursive construction, particularly on the use of meta discourse in Chinese civil judgments. The main driving factor of the study was to discover whether the judges in China will adopt a more transparent nature when producing written judgments. Apart from the study by Han (2011), David, Saeipoor and Ali (2016) also conducted a genre analysis study with a focus on rape appeal judgments in Malaysia. Figueiredo (2002) suggests that one method of investigating the use and misuse of language regarding power over the body is through the research of judicial discourse on sexual crimes. Judicial discourse is highly relevant in researching language usage in this matter because judges often have varying opinions despite the claim that the judiciary is an impartial and non-ideological institution (Figueiredo 1998). Studies have found that judges

have different opinions which are influenced by their underlying beliefs regarding personal or social prejudices and stereotypes (Charalambous, 2015).

There have been a number of studies conducted in the areas of language and the representation of social actors, especially in cases of gendered crimes in the media (Adampa, 1999; Tranchese & Zollo, 2013; Tehseem, 2016; Alkaff & McLellan, 2018). The general outcomes of these research were almost similar, in which female victims were relegated as a passive actor and placed at the receiving end of the action of the offender (Adampa, 1999; Tehseem, 2016). As a result of that, the offenders' responsibility for the crime was minimized (Tranchese & Zollo, 2013). In this study, we aim to investigate the language used by the text producer (the judges) in the representation of sexual violence in appellate judgments in Malaysia.

## LITERATURE REVIEW

The treatment of rape victims has often been regarded as an area that is subjected to unfairness and even stereotyping. According to Ehrlich (2007), the 'cultural sense-making framework' that judges adopt in interpreting behaviours of rape victims influences the decision regarding the issue of consent. In analyzing three different judicial decisions from a single rape case, Ehrlich (2007) found that the trial judge and the Alberta Court of Appeal acquitted the defendant from the rape charge as they believed the victim implicitly consented to sex when she did not show any physical resistance to the offender. The cultural assumption of 'submission and compliance' on the part of the victim was understood as an appropriate behaviour of femininity, which is then categorized and interpreted as 'normative heterosexual sex' (Ehrlich, 2007, p. 472). This notion of sexual passivity and implied consent was not shared by the Supreme Court of Canada as it acknowledged the victim's necessity to withhold resistance out of fear. Furthermore, the language that was used to describe the victim's behaviour to the defendant was not taken as implied consent or as the language of compliance and submission. As a result of this, the acquittal was overturned and the defendant was charged and sentenced for rape.

A number of studies on judicial opinions on crimes involving sexual violence on women and children have been reported in the literature (Bavelas and Coates, 2001; MacMartin & Wood, 2005; Wood & MacMartin, 2007; Charalambous, 2015). An example is a study on 74 Canadian judicial sentencing decisions of child sexual abuse cases between 1993-1997 (MacMartin & Wood, 2005). This study focused on the judge's formulation of motives for the offender in committing the crime and it was found that judges frequently employed sex-based explanations. Consequently, the explanations discursively normalized the criminal behaviours of the offenders on trial. Wood and MacMartin (2007) also conducted another study to investigate judges' formulation and reformulation of offenders' remorse through the use of selected discursive devices and fact construction method. Bavelas and Coates (2001) argued that some of the languages used in legal judgments concerning sexual offence can connote mutuality, consent, and designate remorse, thereby reducing the aggravating aspects of the crime.

Estrich (1987) argued that the law prosecutes offenders and protects victims' rights differently. In her book, *Real Rape*, she informed that the legal system shows more empathy for the victims of stranger-rape cases. Stranger-rape cases refer to rape in which the offender is a stranger to the victim, wearing a mask and bearing a weapon, "jumping from the bushes", and attacking the unsuspecting woman. If the offender happened to be an acquaintance of the victim, in which no weapon was used and no physical injuries were found, then very likely the legal system will not be as sympathetic towards the rape victims compared to stranger-rape cases. The offenders would also less likely to be prosecuted or convicted. An example of

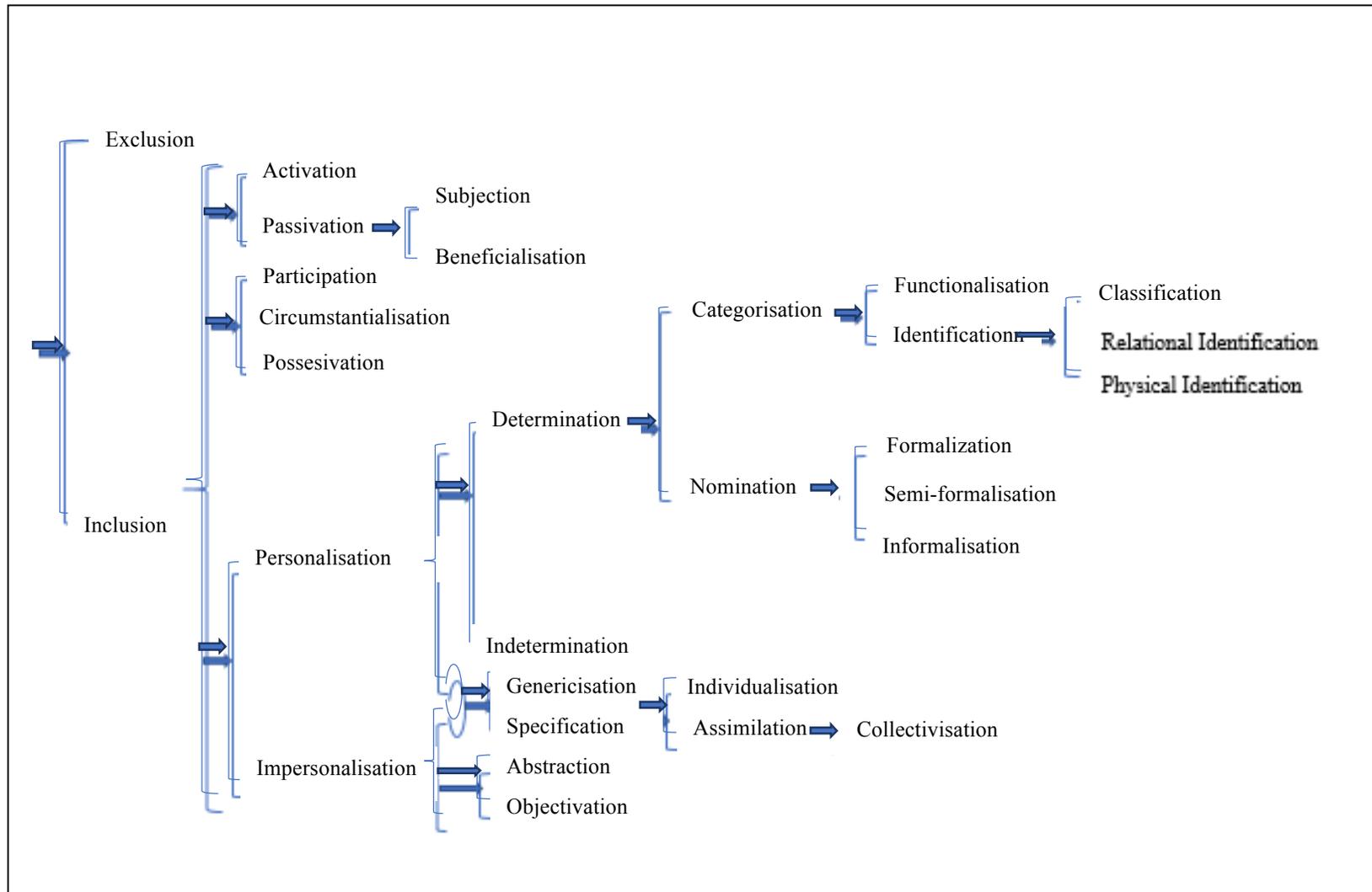
this is a study by Charalambous (2015) which investigates the languages used to reflect the judges' attitudes on the seriousness or non-seriousness of sex crimes in Cyprus. It was found that the judges' characterizations of victims' identities and reformulations of the rape changed the role of a rape victim into a consenting individual. In an example, a victim of rape was labelled as a 'cabaret artiste from the Philippines'. This indirectly painted a negative image on the victim. While it was stated clearly that she was crying and begging the two rapists not to harm her, the court reformulated her narrative from being raped to being involved in a consensual intercourse (Charalambous, 2015). It is obvious how judges' interpretation of these actions are manifested in the language used to describe the crime. This is similar to what Coates, Bavelas and Gibson (1994) found in their study, in which their research was on judges' use of language to describe the sexual assault in their decisions. They reported that when describing stranger-rape, judges would employ language that showed violence and aggression; however, when the cases involved people who were familiar with each other, the language used would be similar to describing that of consensual sex. They further suggested that judges may have a very limited interpretative repertoires when they are describing sexual assault.

When it comes to the discussion concerning discourse and gender representation, the view on power and ideology are very much relevant and cannot be separated (Coates, 2004). Critical discourse analysis is very helpful to the studies of language and gender as it is concerned with power (Jule, 2008). Power can be manifested through language choice and that can propagate the meaning and values of power (Simpson, 1993). Language, according to Bustam and Citraesmana (2013), is a reflection of ideology and through the study of language, ideology can be identified through how one is marginalized in a discourse. Therefore, to understand how linguistic choices made can affect the ideological positions on social actors, it is necessary to adopt a critical method in discourse analysis. The model proposed by Van Leeuwen (1995, 2008) for the purpose of analyzing the representation of social actors has been adopted by a number of studies (Sunderland, 2000; Rasti & Sahragard, 2012). Sunderland (2000), for example, investigated the asymmetry of discourse in parentcraft texts. The findings of the analysis showed the recurring and non-recurring discursive presence of the *father/mother*. Rasti and Sahragard (2012) conducted a study to investigate how the main social actors involved in the issue of Iran's nuclear program were represented by *The Economist*, a Western newspaper, and found that the country's program was delegitimized.

In this study, the framework suggested by Van Leeuwen (1995) will be adopted to understand the language used by judges in representing the crime of rape and the relevant social actors. Our emphasis will be on two specific items of the framework, namely inclusion/exclusion and activation/passivation of social actors. The items in the framework are; *Inclusion / Exclusion*: where social actors can be either included or excluded in the discourse, *Activation/Passivation*: where social actors can be represented as dynamic forces in an activity (activated) or undergoing an activity (passivated), *Functionalization/Identification*: where an actor can be referred to in terms of what they do (functionalization) or defined in terms of what they are (identification), *Impersonalization/Personalization*: there are two sub-categories under *impersonalization* which are *abstraction* (representation of quality assigned to actors) and *objectivation* (reference to a place or thing closely associated to actors), while *personalization* is the representational choices to personalize social actors through *categorization* and *nomination*. *Categorization* is used to represent actors through their characteristics or group membership rather than their unique identity. It is further divided into *functionalization* (a reference to what someone does) and *identification* (how social actors are defined in terms of what they, more or less permanently, or unavoidably, are) (Van Leeuwen, 2008, p. 55). *Identification* is

sub-divided into *classification* (references to major categories which are used to differentiate classes of people, for ex. age, gender, race and etc.), *relational identification* (a reference to personal and kinship relations) and *physical identification* (physical characteristics). *Nominations* refer to references to an actor's unique identity and it is further divided into three categories: *formal* (surname or with honorifics), *semi-formal* (given name and surname), and *informal* (the given name only). *Genericisation* is used to classify actors either as classes or as specific individuals while *indetermination* is used when actors are categorised as unspecified individuals or groups. Social actors who are referred to as individuals are classified under *individualisation* and actors referred to as groups are termed as *collectivisation*. The framework is described in figure 1.

FIGURE 1. Van Leeuwen's analytical framework



By adopting this framework, this study will generate important information in several aspects. First, it will provide valuable insights into the linguistic choice of judges in cases of rape appeals in Malaysia. As Malaysia is a multiethnic, multilingual, and a Muslim-majority country, this study can improve the understanding of the view of our society on sex and sexuality issues, especially when they are discussed in the legal context, as these issues are often considered as taboo topics in Malaysia (Makol-Abdul, Nurullah, Imam & Rahman, 2009). Secondly, this study will investigate whether Malaysian judges have appropriate interpretative repertoire in discussing cases involving sexual violence.

## METHODOLOGY

The main purpose of this study is to identify the different terms of how sexual violence is represented by the judiciary. The database consisted decisions of sexual violence cases in Malaysia from 1984 to 2013 that were available through LexisNexis, a computerized database for legal sources which is available and accessible online. The following procedure is used to carry out the search in the online database and subsequently the process of analysis. The keyword 'rape' is used to locate all relevant decisions and any duplicates or unreported decisions were set aside. After a comprehensive search was conducted and all relevant judgments were identified, they were printed out to facilitate the next process of careful reading and identification of terms. Since the samples of opinion were small, we were able to perform the analysis manually. Another alternative of doing the analysis is by using any Computer-Assisted Qualitative Data Analysis Software (CAQDAS) tools such as Atlas.ti and NVivo.

The first step of analysis is to locate descriptions of the rape itself and any other descriptions related to the rape. In order to decide on the type of categorization, we gathered insights from Bavelas and Coates's (2001) study. Based on their research in investigating the language used by judges in several sexual assault trial judgments in Canada, they found that the terms used can be grouped into five different categories; sexual terms (eg. "he kissed her", "they had sex on the bed"), violent terms ("he was violating her", "the attack"), terms that involved physical descriptions (eg. "his left arm was under her gown", "putting his tongue in her mouth"), disapproving terms (eg. "perversion", "act of depravity") and oxymorons (eg. "had intercourse with her against her will", "forced her to kiss him"). In addition, data analysis in the present study also involved characterization of terms, which was done by referring to dictionary definitions and connotations of the words used.

Through the analysis, three categories of rape can be identified; namely acquaintance rape, incestuous rape, and stranger rape. However, it is worth mentioning that the aim of this analysis is to identify the terms used in all the judicial opinions regardless of the rape category. There were 17 judicial opinions identified for the analysis in this study. From the 17 opinions, 10 cases were acquaintance rape, 5 cases were incestuous rape, and 2 were stranger rape cases. Acquaintance rape is defined as the type of rape that happens between offenders and victims who know each other. Incestuous rape is defined as rape that happens between individuals with familial bond who are not permitted to marry, as shown in a few of the analyzed cases in our study, whereby the offenders were the father, stepfather or uncle to the victims. The final rape category is stranger rape. This rape occurs when the victim is sexually assaulted by those who are not known to them. Based on the 17 cases, the age range of the offenders was between 18 to 27 years old while for the victims, it ranged from 10 to 19 years old. However, the age of offenders and victims were not documented in some of the decisions.

TABLE 1. Summary of cases used for the analysis

No.	Case	Category of rape	Offender	Victim
1.	Kee Lik Tian v PP [1984] 1 MLJ 306	Acquaintance	Age unknown (Family friend)	12-year-old (mentally challenged)
2.	Syed Abu Tahid a/l Mohamed Esmail v PP [1988] 3 MLJ 485	Acquaintance	Age unknown (Family friend)	13- year-old
3.	PP v Mohd Ali bin Abang Ros [1994] 2 MLJ 12	Acquaintance	Age unknown (Acquaintance)	Age unknown
4.	Mahendran a/k Manikam v PP [1997] 4 MLJ 273	Acquaintance	Age unknown (Sports teacher)	15-year-old
5.	PP v Mohd Ridzwan bin Md Borhan [2004] 5 MLJ 300	Acquaintance	Age unknown (Acquaintance)	18-year-old
6.	Ahmad Faizal Ali bin Aulad Ali & Ors v PP [2010] 2 MLJ 547	Acquaintance	18 year-old, 21 year-old and 20 year-old (Acquaintance)	19-year-old
7.	PP v Goh Kim Keat [2011] 7 MLJ 274	Acquaintance	Age unknown (Monk)	16-year-old
8.	Nor Afizal Azizan v PP [2012] 6 MLJ 171	Acquaintance	19 year-old (Acquaintance)	13 year-old
9.	PP v Mohd Musa bin Ahmad [2013] 8 MLJ 466	Acquaintance	Age unknown (Acquaintance)	14-year-old
10.	PP v Abdul Malik bin Abdullah [2013] 8 MLJ 466	Acquaintance	Age unknown (Yoga instructor)	15-year-old
11.	Yusaini bin Mat Adam v PP [1999] 3 MLJ 582	Incestuous	Age unknown (Stepfather)	10-year-old
12.	PP v Shari bin Mohd. Shariff [2005] 4 MLJ 763	Incestuous	Age unknown (Father)	12-year-old
13.	Azahan bin Mohd. Aminallah v PP [2005] 5 MLJ 334	Incestuous	Age unknown (Father)	15-year-old
14.	PP v William Ayau [2005] 4 MLJ 328	Incestuous	19-year-old (Uncle)	13-year-old
15.	Mohd. Zandere bin Arifin v PP [2006] 5 MLJ	Incestuous	Age unknown (Father)	13-year-old
16.	Bacik Abdul Rahman v PP [2004] 5 MLJ 89	Stranger	Age unknown (Stranger)	11 year-old
17.	Jamalludin Khadiron v PP [2004] 7 MLJ 280	Stranger	27-year-old (Stranger)	10-year-old

TABLE 2. Variations of language to represent rape

Category of terms	Examples	Case	Category of rape
Violent	“raped” (verb)	PP v Mohd Musa bin Ahmad	Acquaintance
		PP v Mohd Ali bin Abang Ros	Acquaintance
		Yusaini bin Mat Adam v PP	Incestuous
	“rape” (noun) “forcibly raped” “preyed upon” “abused body”	Jamalludin Khadiron v PP [2004]	Stranger
		Bacik Abdul Rahman v PP	Stranger
		Ahmad Faizal Ali bin Aulad Ali & Ors v PP	Acquaintance
		Ahmad Faizal Ali bin Aulad Ali & Ors v PP	Acquaintance
Morally/ Ethically disapproving	“the despicable and shameful crime” “a heinous crime” “contemptible act” “condemned act” “immoral act”	Jamalludin Khadiron v PP	Stranger
		PP v Goh Kim Keat	Acquaintance
		Kee Lik Tian v PP	Acquaintance
	“sexual intercourse”	Kee Lik Tian v PP	Acquaintance
Sexual		Syed Abu Tahid a/l Mohamed Esmail v PP	Acquaintance

		Mahendran a/l Manikam v PP	Acquaintance
		Mohd. Zandere bin Arifin v PP	Incestuous
	“acts of intercourse”	Azahan bin Mohd. Aminallah v PP	Incestuous
	“kissed and fondled”	PP v Mohd Ridzwan bin Md Borhan	Acquaintance
	“embraced and kissed”	PP v Mohd Ridzwan bin Md Borhan	Acquaintance
	“grope and fondle”	PP v William Ayau	Incestuous
Ambiguous	“the connection”	Mahendran a/l Manikam v PP	Acquaintance
	“the act”	Nor Afizal Azizan v PP	Acquaintance
	“the episode”	PP v Shari bin Mohd. Shariff	Incestuous

## RESULTS

The analysis generated four main categories of language terms commonly used to represent rape; namely violent, disapproving, sexual, and ambiguous terms.

### VIOLENT TERMS

The first category of language used to describe the crime is the term ‘rape’. In several examples, the offender is activated and placed as the agent of the action of ‘rape’ and also as the subject in the nominalized ‘rape’. The positioning of the offender functions in addition to the use of the term ‘rape’ highlighted the coercive behaviour of the offender. As these decisions involve cases of rape, violent terms are expected to be used, as found in the excerpts below:

*The respondent had **raped** a 14 year-old girl who later gave birth to a baby.*  
 PP v Mohd Musa bin Ahmad [2013] 8 MLJ 466  
 (Acquaintance rape: offender-male acquaintance (age unknown)/victim (14 year-old))

*The first respondent took her to a house where he **raped** her.*  
 PP v Mohd Ali bin Abang Ros [1994] 2 MLJ 12  
 (Acquaintance rape: offender-male acquaintance (age unknown)/victim (age unknown))

*As the girl was about to leave the flat, the accused prevented her from doing so and then he **raped** her.*  
 Yusaini bin Mat Adam v PP [1999] 3 MLJ 582  
 (Incestuous rape: offender-stepfather (age unknown)/victim (10 year-old))

*Briefly stated, the appellant had **forcibly raped** a primary 6 school girl whom the appellant with his car had first knocked off her bicycle and then forcibly abducted her to the scene of the crime.”*  
 Bacik Abdul Rahman v PP [2004] 5 MLJ 89  
 (Stranger rape: offender-stranger (age unknown)/victim (11 year-old))

*Here, the appellant seemed to be a persistent offender in committing attempted **rape** on children.*  
 Jamalludin Khadiron v PP [2004] 7 MLJ 280  
 (Stranger rape: offender-stranger (27 year-old/victim 10 year-old))

*He was also charged with an offence of **raping** the said female minor.*  
 Syed Abu Tahid a/l Mohamed Esmail v PP [1988] 3 MLJ 485  
 (Acquaintance rape: offender-family friend (age unknown)/victim (13 year-old))

Another usage of terms that reflected the nature of rape to be a coerced action also appeared to be the choice of words preferred by the judges in the written decisions. The use of terms such as ‘preyed upon’ and ‘abused’ are words to show aggression against the victim.

When the position of the offender is *activated* in the sentence, it serves as a purpose to highlight the offender's action against the victim. The active position of the offender would make aggression even more prominent.

*The three appellants preyed upon a young innocent girl, who followed the second appellant to the house based on trust and friendship, and abused her body for their own selfish gratification, without regard to morality or conscience, or the fear of God.*

Ahmad Faizal Ali bin Aulad Ali & Ors v PP [2010] 2 MLJ 547  
(Acquaintance rape: offenders (18 year-old, 21 year-old and 20 year-old)/victim (19 year-old))

#### MORALLY/ETHICALLY DISAPPROVING TERMS

The second type of language term used by judges is the morally/ethically disapproving terms. Terms such as '*despicable and shameful crime*', '*heinous crime*', '*contemptible act*', '*a condemned act*', and '*immoral conduct*' as shown below are examples of how judges viewed the actions of the perpetrator as morally and ethically disapproving.

In the case of *Jamalludin Khadiron v PP*, the 10-year-old victim was placed as the recipient of an action described as '*despicable and shameful*' and also '*heinous*'. Despite the fact that the offender was foregrounded and described in a slightly positive tone as having concern over his mother, this description was overshadowed by his actions that were described in the negative. The selection of these disapproving terms might be driven by the fact that this was a stranger rape and the offender committed the crime while the victim was on her way home from school.

*While the appellant is concerned for his mother whom he has to take care of, this court cannot disregard the physiological trauma, embarrassment, and the despicable and shameful crime he has committed on an innocent child who was only 10 years old at the time of the commission of the offence.*

*She was brought to the bushes by the appellant and he committed a heinous crime on a child.*

*Jamalludin Khadiron v PP [2004] 7 MLJ 280  
(Stranger rape: offender-stranger (27 year-old)/victim (10 year-old))*

In the case of *PP v Goh Kim Keat*, the offender (a monk at the temple where the victim and her family visited to perform their prayers) was described as someone who was '*...entrusted with great faith and hope*' and '*... being medium between men and God...*' but he had clearly breached the trust of his worshippers. In the first example below, the offender was not mentioned in the decision but the action he performed on the victim was characterized as '*a contemptible act*'. In the subsequent examples, the focus was placed on the offender's action, based on the use of phrases such as '*the condemned act of the accused*' and '*immoral conduct*'.

*Such a contemptible act has caused the victim to endure much shame and humiliation.*

*The condemned act of the accused can never be accepted by any religion, customs, or belief.*

*Furthermore, it was committed by a person entrusted with great faith and hope, like the accused being 'medium between men and God' (according to the victim and her family's belief) who was in charge at the religious institution.*

*The big hope and trust confided in the accused by the victim and her family to lead them in prayer had been abused by the accused in a place they considered sacred. This place*

*should have been safe from such **immoral conduct** that would definitely cause embarrassment and disgrace to the integrity of the victim's whole family.*

PP v Goh Kim Keat [2011] 7 MLJ 274  
(Acquaintance rape: offender-monk (age unknown)/victim (16 year-old))

### SEXUAL TERMS

The next set of language used to represent rape is the use of sexual terms. Our study found that the vocabulary used to describe rape in some of the cases were more relatable to consensual act, rather than a forced act. Rape was misrepresented as sexual events when terms such as 'sex' and 'sexual intercourse' are used, even though the dictionary definition of these terms clearly emphasizes the mutuality of both parties.

*Upon these facts, the learned President found PW3 (the victim) to be a reliable and credible witness..... And PW3's complaint to her that it was the accused who **had sex** with her.*

*It is sufficient to say that according to the prosecution, the Appellant went to the playground of the girl's school, on the date and at the time alleged in the charge, found her playing there and persuaded her to follow him to an oil palm plantation nearby where he **had sexual intercourse** with her."*

Kee Lik Tian v PP [1984] 1 MLJ 306  
(Acquaintance rape: offender-family friend (49 year-old)/victim (12 year-old mentally challenged))

*According to the girl's evidence, there were at least two occasions when she and the appellant **had sexual intercourse**.*

Syed Abu Tahid a/l Mohamed Esmail v PP [1988] 3 MLJ 485  
(Acquaintance rape: offender-family friend (age unknown)/victim (13 year-old))

*The learned judge made a finding that SP3 (the victim) had **had sexual intercourse** with the appellant thrice.*

Mahendran a/l Manikam v PP [1997] 4 MLJ 273  
(Acquaintance rape: offender-sports teacher (age unknown)/victim (15 year-old))

*The victim told the complainant that the baby boy was born as a result of **sexual intercourse** between her and her father (the appellant).*

Mohd. Zandere bin Arifin v PP [2006] 5 MLJ  
(Incestuous rape: offender-father (age unknown)/victim (13 year-old))

*So, here too, PW2's (the victim's) evidence as to the appellant's previous acts of **intercourse** with her was relevant, that is to say, admissible.*

Azahan bin Mohd. Aminallah v PP [2005] 5 MLJ 334  
(Incestuous rape: offender-father (age unknown)/victim (15 year-old))

Descriptions of the particular details of the rape can be seen as 'sexualized' and to a certain extent, might be quite similar to erotic literature (Coates et al., 1994). When the offender is placed in the subject position and portrayed as an active agent of the processes such as 'fondled', 'kissed', 'embraced', and 'kissed', it connotes a type of affectionate behaviour rather than a forced act. In the example below, there was some kind of resistance from the victim and it was duly documented in the judgment. However, when the terms 'embraced and kissed' were used in the same judgment, it might lead to the suggestion that there was consent from the victim and implied that no form of violence was committed.

*She stated that towards the end of the [sic] November 1993 school holidays, she worked for the appellant and during one night she spent in the shop, the appellant **fondled and kissed** her on the sofa.*

*In addition, she testified that at various times during the time the appellant was coaching the team, he had **kissed and fondled her**.*

*During those hours, the accused **embraced and kissed** the complainant, with whom he later had sexual intercourse, not once but twice, although the complainant alleged that she resisted and threatened to report to the police.”*

PP v Mohd Ridzwan bin Md Borhan [2004] 5 MLJ 300  
(Acquaintance rape: offender-male acquaintance (age unknown)/victim (18-year-old))

*He started to **grope and fondle** her breast and lifted her up and brought (her) to her brother’s bedroom.*

PP v William Ayau [2005] 4 MLJ 328  
(Incestuous rape: offender-uncle (19 year-old)/victim (13-year-old))

### AMBIGUOUS TERMS

The final type of language used by judges can be categorized under ‘ambiguous terms’. The decision to use the label ‘ambiguous’ is because the terms used neither fit under the categories of violent terms, disapproving terms nor do they belong to terms that connote consensual sex. Rather, the acts of sexual violation were reformulated to using a more neutral and general description of a behaviour. Through the means of adopting terms such as ‘*the connection*’, ‘*the act*’ and ‘*the episode*’ as shown in the examples below indirectly minimize the victim’s resistance and downplay the seriousness of the crime. But most importantly, the consequence of adopting these vague descriptors, in a way, was able to reduce the responsibility of the offender.

*While having **the connection**, the appellant told her that he loved her and that he wanted to divorce his wife to marry her and she said that she was willing to marry him.*

Mahendran a/l Manikam v PP [1997] 4 MLJ 273  
(Acquaintance rape: offender-sports teacher (age unknown)/victim (15 year-old))

*There was no conceivable force, duress or premeditation on the part of the appellant when committing **the act**.*

Nor Afizal Azizan v PP [2012] 6 MLJ 171  
(Acquaintance rape: offender-male acquaintance (19 year-old)/victim (13 year-old))

*On 3 August 2001, the accused repeated **the episode**, but this time the venue was the hall of the house, after which the complainant had escaped to the house of her mother’s adopted sister.*

PP v Shari bin Mohd. Shariff [2005] 4 MLJ 763  
(Incestuous rape: offender-father(age unknown)/victim (12-year-old))

### FINDINGS

From this study, the analysis showed that there is a tendency of judges to characterize rape as a non-coerced and a mutually consented action rather than a criminal act in their judiciary documents. The findings concurred with past studies, which reported how female victims were relegated as passive actor and placed at the receiving end of the action of the offender (Adampa, 1999; Tehseem, 2016). This can lead to several major consequences. Firstly, it resulted in the minimization of violence and the severity of the assault. Using sexual language for example to describe sexual violence can be misleading and may even result in the normalization of the criminal act (Bavelas & Coates, 2001). As reported by Transhese and Zollo (2013), the offenders’ responsibility for the crime was minimized. Worse still, it is feared that such a practice would make way into our daily discursive habits. The question

arises then as to how we would differentiate between a sexual assault and a consensual sexual behaviour.

Furthermore, the next consequence is that the use of non-violent terms will somehow transform an offender's criminal intent on a victim into a mutually-consented behaviour between two consenting individuals. This will indirectly reduce the offender's responsibility and lead to a lighter sentence. With reference to the cases analysed in this study, cases which used certain sexual terms in the judgments, for example the use of the term "**intercourse**" in Mahendran a/l Manikam v PP and Azahan bin Mohd. Aminallah v PP, "**kissed and fondled**" in PP v Mohd Ridzwan bin Md Borhan, and "**embraced and kissed**" in PP v Mohd Ridzwan bin Md Borhan all received final decisions which were in favour of the offenders.

Apart from that, the usage of terminology other than rape as a crime will also affect the victims as it does not represent the suffering of the victims. The trauma suffered by the victims of rape is deemed as unimportant and disregarded. When the traumatic experiences are described as "**acts of intercourse**", such as in the case of Azahan bin Mohd. Aminallah v PP, an incestuous rape of a 15-year-old by her own father, the linguistic term transformed her rape into a case of a forbidden love affair. In another example, characterizing violence using an ambiguous term such as "**the episode**" in another incestuous rape case (PP v Shari bin Mohd. Shariff) successfully dismissed the victim's experience as less important.

From the analysis, we observed a judgment whereby both violent language and sexual language were used in the reporting of the same case. This was in the case of Syed Abu Tahid a/l Mohamed Esmail v PP, an appeal case from an offender who was charged with raping (in addition to the kidnapping charge that the offender was sentenced to 4 years in prison) his 13-year-old acquaintance. The offender filed an appeal against the sentence. In the judgment, it was documented as "*he was also charged with an offence of **raping** the said female minor*". In here, the offender was activated as an agent who was "*charged of committing an offence of **raping***". However, in the subsequent sections of the judgment, the description took a surprising turn; "*According to the girl's evidence, there were at least two occasions when she and the appellant had **sexual intercourse***". In this sentence, the victim was placed as an active agent together with the offender for the verb '*had sexual intercourse*'. As such, she would be viewed as an active participant in the act of having sexual intercourse, rather than be regarded as a victim.

There are two considerations with regard to the discussion. Firstly, since all of the cases analyzed here are appeal cases, it is possible that the judges involved prepared the judgment by referring to the original court notes of the case. Hence, the report may be based on the observations of the presiding judge when the first trial took place. Secondly, the decision to use both violent and sexual languages to refer to both the offender and victim might indicate an issue with interpretative repertoire especially in the reporting of sexual crimes. This finding is echoed by Coates, Bavelas and Gibson (1994) in which their study suggested that the interpretative repertoires available to describe sexual assault were often limited only to the description of stranger rape and consensual sex (Coates, Bavelas and Gibson, 1994).

The limitation of this study was the small sample of judicial opinions. It would be interesting to know whether a bigger sample size would generate similar findings. For future research, we recommend a bigger sample that consist the three categories of rape identified in this study and to explore further on whether there are any similar or additional distinct terms used in each respective category.

## CONCLUSION

The present study investigated the judicial discursive behaviours especially from the aspect of the linguistic strategies adopted by judges to represent sexual violence in written judicial opinions. The findings showed four commonly used linguistic strategies; namely, terms which are violent, morally/ethically disapproving, sexual, or ambiguous. The results also revealed a strong tendency for judges to use non-sexual terms especially in cases involving stranger rape. The use of sexual term was more commonly found in acquaintance and incestuous rape cases, but not stranger rape. We believe that the decision to select the most appropriate language is very much dependent on the type of relationship between the offender and the victim and how that relationship is used to insinuate whether coercion exists during the crime. Another interesting finding from our analysis is the use of disapproving terms regarding breach of trust in two of the cases analyzed. It can be synthesized that the issue of morality and trust is one of the core views put forth in the decisions. Finally, the use of ambiguous terms functions to minimize the resistance of the victims, reduce offender responsibility as well as the severity of the crime.

Although Erlich (2007) suggests that judges adopt the ‘cultural sense-making framework’ in interpreting behaviours of rape victims, which influenced their decision regarding the issue of consent, the analysis lead us to conclude that the efforts by the judiciary system to serve justice especially to victims of rape require more improvement. It is undeniable that reading the physical and violent descriptions of the crime in the written decisions can be quite awkward, graphical and some might be even closely bordering pornographic narrative. Worse still, these terms that involved sexual, disapproving, and ambiguous languages will not be able to reflect the real experience of the victims. If this practice continues, victims of sexual violence may never get the justice that they deserve.

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