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Rape Law Reform in England and Wales

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1. Introduction

The beginning of the 21st Century has seen a major overhaul of the sexual offences legislation in England and Wales. Prior to this reform the law on sexual offences was based on legislation implemented in 1956[2], with some parts dating as far back as the 19th Century. It goes without saying that this legislation was grossly dated and unsuitable for the 21st Century. A number of important amendments had been made since the 1956 legislation, including the inclusion of marital rape and male rape in 1994[3]. However, these piecemeal changes resulted in very confusing laws, to the extent that many different Acts had to be accessed in order to decipher where the law stood on any given matter. The Home Office acknowledged that this had led to a *'patchwork quilt of provisions'* (Home Office, 2000, pg. iii). The previous law was also plagued by anomalies, inappropriate language[4] and discrimination, some of which may have been construed as violating human rights legislation.

Starting with a pledge by the newly elected 1997 Labour government to help victims of sexual offences obtain justice, a detailed and lengthy review process was initiated in 1999 (the Sexual Offences Review). This was followed by a Sexual Offences Bill and then, finally, the arrival of the Sexual Offences Act 2003, which came into force in May 2004. This article outlines the criticisms feminists have previously made about rape law in England and Wales and describes and evaluates as far as possible the new legislation as it relates to rape.

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[2] Sexual Offences Act 1956

[3] Criminal Justice and Public Order Act 1994

[4] For example the use of the term 'defective' for individuals with learning disabilities.

2. The attrition problem

The criticisms feminist academics and activists have highlighted in terms of rape law in England and Wales are similar to those described in other countries with adversarial legal systems. These include: the difficulties in proving non-consent; cross-examination; rape myths; the use of sexual history evidence in court; and the 1976 ruling in *Morgan*[5] that an 'mistaken' but 'honest' belief in consent should lead to an acquittal even if this belief in consent is not a 'reasonable' one. The incredibly high attrition rate for rape cases has been a major concern underpinning many of these criticisms and acted as a strong push factor towards the strengthening of the law on sexual offences. Quite simply, most rape victims who report the offence to the police will never even see their case reach court, never mind see the perpetrator convicted for rape.

Many studies have documented the high attrition rate and how it has increased over time. While more and more men are being reported to the police for rape, the proportion that are convicted for rape has been steadily falling since records began (Smith, 1989; Chambers and Miller, 1983; Lees and Gregory, 1993; Harris and Grace, 1999; HMCPSI and HMIC, 2002; Lea, Lanvers and Shaw, 2003). These studies show that the ratio of rape convictions to reported rapes has steadily fallen from one in three in 1977 to one in 20 in 2002 (Kelly, 2004). Comparative analysis has found that the high rape attrition rate is not confined to England and Wales but is echoed to different extents across Europe (Kelly and Regan, 2001). Bearing in mind that most rapes are not even reported to the police[6], this figure of only one in twenty is particularly concerning and has been the basis of much campaigning by activist groups. Moreover, Kelly (2002) warns that attrition may actually be even higher than

[5] Morgan v DPP [1976] AC 182

[6] Research on non-reporting in England and Wales vary depending on who is conducting the research and when the research was conducted. Recent governmental research found that two in ten women who have been raped reported the incident to the police (Myhill and Allen, 2002). However, dated non-governmental research suggested this may be even lower at one in ten women (Painter, 1991).

research has found because such studies do not take into account rapes that are reported to but not recorded by the police, or any convictions that are overturned on appeal. New research has found that around one in ten convicted rapists later have their convictions overturned or sentence reduced on appeal (Cook, 2004).

3. The reform process

The Sex Offences Review began in 1999 and aimed to achieve *'protection, fairness and justice'* within the Home Office's overall aim of creating a *'safe, just and tolerant society'* (Home Office, 2000b)[7]. The review's terms of reference were:

> *'To review the sex offences in the common and statute law of England and Wales, and make recommendations that will:*
> - *provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable, from abuse and exploitation;*
> - *enable abusers to be appropriately punished; and*
> - *be fair and non-discriminatory in accordance with the ECHR and Human Rights Act.'*

This third point is likely to have been an important factor in why the Government felt the pressing need for legislative reform; in October 2000 the Human Rights Act 1998 came into force and thereby incorporated the rights guaranteed by the European Convention of Human Rights (ECHR) into the domestic law of England and Wales. Although the Human Rights Act 1998 did not actually give citizens any 'new' rights it gave judges the power to make a statement of incompatibility if a piece of legislation failed to respect an individual's human rights. Moreover, the European Court of Human Rights has in the past held states accountable for violations of human rights where they failed to enact appropriate rape legislation[8].

[7] This is part of an overall Labour strategy to put support victims of crime and bring more criminals to justice. (c.f. 'Justice for All'; 'Speaking up for Justice'; the Criminal Justice Act 2003, and plans for a new Victims and Witnesses Bill in the future)

[8] In X and Y v The Netherlands in 1985 the Netherlands was held to have violated the rights of a mentally handicapped 16 year old girl because of a loophole in the law which meant that she was not able to make a rape complaint. In M.C. v Bulgaria in 2003 Bulgaria was held to have violated the rights of a girl because she could not prove non-consent because the legal definition of non-consent required force to be used and she was not physically restrained during the rapes.

An internal steering group and external reference group were set up as part of the review; the latter including established feminist academics[9], representatives from feminist organizations working with victims of rape[10] and feminists campaigning for rape law reform[11]. Intentionally or unintentionally, the review was therefore guided by a strong feminist influence.

Two lengthy documents were then produced, consisting of literature reviews, reports from consultation seminars and recommendations (Home Office 2000a, 2000b) and from this review, the white paper 'Protecting the Public' was published (Home Office, 2002) setting out the Government's proposals. In the foreword by Home Secretary David Blunkett, he described the existing law on sexual offences using words such as *'archaic'*, *'incoherent'* and *'discriminatory'*.

The Sexual Offences Bill was introduced in January 2003 into the House of Lords, where some amendments were made. The Bill was passed to the House of Commons in June 2003 where it was reviewed by a Home Affairs Committee. In July 2003 this review was published, along with oral and written evidence submitted as part of an inquiry into specific sections of the Bill (House of Commons Home Affairs Committee, 2003). The Sexual Offences Bill was given Royal Assent on the 20th November 2003 and became the Sexual Offences Act 2003 with effect from May 2004. This replaced the Sexual Offences Act 1956 and its various amendments. It is widely acknowledged that the new Act represents the largest overhaul of sexual offences in over a century (Editorial, Criminal Law Review, 2003).

4. The Sexual Offences Act 2004

[9] Including Professor Jennifer Temkin and Professor Liz Kelly
[10] Rape Crisis Federation
[11] Campaign to End Rape

In order to secure a conviction for rape it is necessary to prove beyond reasonable doubt not only that the defendant committed an act that meets the legal definition of rape but also that the defendant knew that the victim was not consenting. These are known as the *actus reus* (the guilty act) and the *mens rea* (the guilty mind, or criminal intent). These two aspects of rape are now described in turn in terms of the reforms that have taken place.

4.1 The *actus reus* (guilty act)

The *actus reus* of rape within the Sexual Offences Act 1956 was simply defined as unlawful sexual intercourse with a woman, which was amended in 1976[12] to unlawful sexual intercourse with a woman without her consent. The 1990s saw two major changes relating to the *actus reus* of rape. In 1991, after over 100 years of feminist campaigning rape within marriage became illegal within the common law system and this was placed into statute in the Criminal Justice and Public Order Act 1994 when the word 'unlawful' was removed from the definition. It had previously been judged in common law that married women had no capability or authority to 'not consent':

> '*The sexual communication between them is by virtue of the irrevocable privilege conferred once for all on the husband at the time of the marriage …'* (R v Clarence, 1888).
> *'But the husband cannot be guilty of rape committed by himself upon his lawful wife, for their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.'* (Sir Matthew Hale, 1736 History of the Pleas of the Crown)

The criminalisation of marital rape was controversial within legal circles. This is because when it was criminalized in 1991 it was seen as being criminalized by judge-made law rather than the elected government. The case in question was *R v R*[13] where it was alleged a husband had attempted to have sexual intercourse with his estranged wife without her consent and physically assaulted her by squeezing her neck with both hands. In this case the issue was not whether he had attempted to

[12] Sexual Offences Amendment Act 1976
[13] R v R [1991] 1 All England Law Reports, 747

force his wife to have sexual intercourse without her consent, but rather whether this fell under the legal definition of 'unlawful' sexual intercourse. Relying upon Hale's now infamous statement (cited above) the defence argued that because the acts were against his wife this could not be classed as unlawful.

In considering this defence, Mr Justice Owen argued that Hale's statement could not longer be seen as valid because it was *'a statement made in general terms at a time when marriage was indissolvable'*. However, this dismissal of Hale appeared to relate more to the fact that there was physical force used in the attempted rape than the lack of consent *per se*:

> *'I am asked to accept that there is a presumption or an implied consent by the wife to sexual intercourse with her husband; with that, I do not find it difficult to agree. However, I find it hard to believe … that it was ever the common law that a husband was in effect entitled to beat his wife into submission to sexual intercourse … If it was, it is a very sad commentary on the law and a very sad commentary on the judges in whose breasts the law is said to reside. However, I will nevertheless accept that there is such an implicit consent as to sexual intercourse which requires my consideration as to whether this accused may be convicted for rape.'*

Mr Justice Owen ruled that the act could be classed as attempted rape and sentenced the defendant to three years imprisonment. The defendant appealed, arguing that Mr Justice Owen had been wrong to rule that rape within marriage was against the law when the marriage had not been revoked.

The appeal was dismissed unanimously at the Court of Appeal[14], where Lord Lane dismissed Sir Matthew Hale's statement as being a *'statement of the common law at that epoch'*, where *'the common law rule no longer remotely represents what is the true position of a wife in present-day society'*. The Court of Appeal concluded:

> *'We take the view that the time has now arrived when the law should declare a rapist a rapist subject to the criminal law, irrespective of his relationship with his victim.'*

[14] R v R [1991] 2 All English Law Reports 257

This judgement was later upheld on appeal to the House of Lords[15] and at the European Court of Human Rights[16].

The second of the two previously mentioned changes was also made within the 1994 Act when it was acknowledged that a man could be a victim of rape and the *actus reus* of rape was amended to cover vaginal or anal intercourse against a woman or another man without their consent. Although other parts of the Sexual Offences Act 1956 were revised between 1995 and 2003, the *actus reus* of rape retained its definition as in the Criminal Justice and Public Order Act 1994 until the new definition in the Sexual Offences Act 2003.

The Sexual Offences Act 2003 defines the *actus reus* of rape as penile penetration of the vagina, anus or mouth of another person without their consent. Therefore, in terms of its *actus reus*, rape has slowly changed over nearly half a century from unlawful sexual intercourse with a woman to penile penetration of the vagina, anus or mouth of another person without their consent. The widening of the *actus reus* to include penile penetration of the mouth is based on arguments made in the Sexual Offences Review that other forms of penetration (for example: penile penetration of the mouth, or vaginal or anal penetration with an object or another part of the body) should be treated just as seriously as penile penetration of the vagina or anus. It was decided that rape should be extended to include penile penetration of the mouth, on the basis that *'… forced oral sex is as horrible, as demeaning and as traumatising as other forms of penile penetration'* (Home Office, 2000a, pg. 15)[17]. This means that it remains a gender-specific offence with regard to the perpetrator (i.e. the act requires

[15] R v R [1991] 4 All England Law Reports 481
[16] CR and SW v UK
[17] Previously, penile penetration of the mouth was classed as indecent assault, which covered a wide range of sexual offences against both adults and children with a maximum penalty of ten years imprisonment, compared to the maximum penalty of life for rape or attempted rape.

a penis) but a gender-neutral offence with regard to the victim. A new offence of assault by penetration was introduced to cover penetration by objects other than a penis, as with rape carrying the maximum sentence of life imprisonment[18].

The second part of the *actus reus* relates to a lack of consent. There are generally three lines of defence used in rape cases; that intercourse never took place, that it took place but not by the accused or that it took place but that the victim consented to it or that the accused believed that the victim consented to it (Baird, 1999). Baird (1999) highlights that there are very few rape cases that are 'whodunnits', and the defence that sexual intercourse never took place is also rare. These defences are likely to have become even less common since developments in DNA testing (Lees, 1996). The issue of consent is therefore what many rape defence arguments focus on, and one of the aims of the review of sexual offences was to 'clarify the law on consent'[19].

The root of the 'consent' problem lies with the requirement of the prosecution to prove the absence of consent (rather than requiring the defence to prove that they had taken steps to ascertain consent), and in many ways this problem is unique to rape cases. If, for example, a person reported that their car had been stolen it would not be necessary to prove that it had been taken without their consent. Similarly, if an individual were physically assaulted, for example punched in the face, they would rarely be asked if they agreed to be punched in the face. A further problem in rape cases is that the only direct witness is likely to be the rape victim, which means that cases often come down to one person's word against the other. If the defendant says that the victim consented and the victim says she did not consent then it is

[18] If rape had been extended to include penetration by objects other than the penis then women could technically commit rape and this may have raised issues under the Human Rights Act 1998 (Temkin, 2000a).
[19] This was the title of Chapter Two in the Protecting the Public white paper.

difficult to validate either person's statement of the act[20]. Because of the nature of sexual offending it is unlikely there would be a third party available to directly corroborate either statement.

The Sexual Offences (Amendment) Act 1976 was the first to use the term 'consent' in statute – previously it had been force that was named as the relevant factor. However, consent had been an issue within common law since 1845 in *Camplin* in which the woman was drugged with alcohol and it was ruled that, although no force had been used, it was clear that the act was against the woman's will and that she could not have consented to it. Since then, there have been other cases where consent is automatically deemed to be absent[21], which Temkin (2000) refers to as the 'category approach'. The case of *Olugboja*[22] in 1981 however, appears to have changed the standards needed to show non-consent. In this case it was ruled that consent was a state of mind and that the jury should be directed to make up their own minds as to whether consent was present based on the victim's state of mind at the time of the rape. This appears to overturn the legal standards that had been developed using the 'category approach'. However, this is unclear and Temkin (2000) described the situation as having a 'threefold uncertainty'. The first element of uncertainty was because there was no statutory definition of consent. Secondly, the *Olugboja* decision individualised cases regarding consent hence moved away from the idea of a legal standard of non-consent. Finally, there was uncertainty regarding whether or not *Olugboja* had replaced the previous common law 'category approach'.

[20] Until 1995 Judges were required to give the 'corroboration warning' in their summing up - by warning the jury that it is unsafe to convict a man of rape purely on the woman's uncorroborated evidence. Sexual offences were one of only two trials in which this warning was deemed necessary (the other being child witnesses).
[21] In brief, where force, threats, or the fear of force was evident, if the victim was asleep or intoxicated, where fraud is involved, including the impersonation of the victim's husband.
[22] [1981] 3 All ER 443.

The Sexual Offences Act 2003 addressed these uncertainties by defining consent as 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice' (section 74) and by returning to the category approach by listing the categories in statute. However, the 2003 Act differentiates between six categories where consent is presumed to be absent, unless there is sufficient evidence to the contrary to raise an issue that the defendant reasonably believed that the victim consented, and two categories where consent is conclusively presumed to be absent. This means that the issue of consent still, to some extent, relies upon the mental state of the defendant, even in cases such as where the victim was asleep, experiencing violence from the defendant, or unlawfully detained[23], although the burden of proof is reversed in these situations with the defendant required to demonstrate the steps he took to ascertain consent.

4.2 The *mens rea* (guilty mind)

This second part of the offence of rape – the *mens rea* – is based on the premise that an individual should not be punished for an act that they did not know they were committing at the time of the act. Although the *actus reus* and the *mens rea* are components of all crimes, the *mens rea* only becomes relevant when the conduct in question contains some level of ambiguity.

The need to prove both the *actus reus* and the *mens rea* is applicable to other crimes besides rape. The most regularly used example is the crime of trespass; it is against the law to trespass onto another's property, but a person cannot be convicted if they did not know they were trespassing (i.e. if private property was not clearly marked).

Whether or not a person intended to commit a crime is probably more central in rape cases than for other criminal offences when it comes to proving the 'guilty mind'.

[23] These are examples of the categories where non-consent is only *presumed.*

Previously, if a man committed the *actus reus* of rape – the guilty act, but he honestly believed that the woman was consenting regardless of how unreasonable that belief was, he can not be convicted of rape because the *mens rea*[24] – the guilty mind – was not present. This was known formally as the 'mistaken belief' clause and informally as the 'rapists charter' (Temkin, 1987) because it meant that a woman could be actively non-consenting, even shouting 'no' and struggling to free herself, and a man could still be acquitted of rape. It is a defence that is very difficult, if not impossible, to disprove because the defence relies upon what was going on the defendant's mind.

The 'mistaken belief' clause was first introduced in *Morgan*[25] in 1976 when a husband colluded in the raping of his wife by three of his friends. He allegedly told his friends that his wife would struggle and say 'no', as though she did not want to have intercourse with them, but that this 'turned her on' because she was 'kinky'. The accused men claimed that they honestly believed she was enjoying it and consenting and that they did not intend to rape her – in other words they never had a guilty mind. Although in the Morgan case the men were convicted, and the husband convicted of aiding and abetting, this case set a new precedent. The House of Lords ruled that if a man honestly believed that a woman consented, regardless of how unreasonable this belief was, he could not be found guilty of rape.

Feminist activist groups campaigned for many years that the mistaken belief defence should be based on some test of reasonableness or that the mistaken belief clause should be abolished altogether. These are issues that have been widely debated throughout the common-law world. In Australia this issue divided rape law reform campaigners into two groups; the 'subjectivists' who argued that the Morgan ruling should be upheld – i.e. if a man honestly believes that a woman consents to sexual

[24] When theorising around sexual difference, criminology and the law in 1980, Cousins sarcastically suggested that the term 'men's rea' might be a more appropriate term to use.
[25] [1976] AC 182

intercourse regardless of how unreasonable that belief is he should not be found guilty of rape, and the 'objectivists', who argue that the belief should be reasonable (Gans, 1997). In Victoria, Australia, the argument against the amendment or abolishment of the 'mistaken belief' defence was based upon data from an empirical study commissioned by the Law Reform Commission of Victoria. This research found that in an examination of 51 rape trials the 'mistaken belief' defence was used in 23 per cent of cases. Furthermore, it was found that acquittals were actually less likely in these cases (Law Reform Commission of Victoria, 1991a, 1991b). They concluded that although the adoption of objectivism would have some effect on the outcomes in rape trials, this impact would be very slight (Law Reform Commission of Victoria, 1991b). This opinion did not meet with universal agreement, and Gans (1997) argues that the methodology, and hence the findings, of this part of the research was fundamentally flawed, invalid and misleading. He criticises the research for not taking into account pre-trial decisions on attrition, and argues they should have included all reported rape cases when publicising the conviction rate rather than just those cases that got to court. Gans also argues the Victorian research ignored the role of the 'honest belief' within juror decision making and had vague coding categories around consent and honest belief. He suggests that, by re-coding the data, at least 74 per cent rather than 23 per cent of the trials actually had at least some element of the 'mistaken belief' defence and warns that while successful law reform should be based upon empirical research, caution should also be exercised.

In England and Wales no empirical research has ever addressed this subject, and it is therefore impossible to know the scale of the problem here[26]. In the Sexual Offences Review there was much debate about the mistaken belief defence, but no clear agreement was reached as to what should be recommended. Around a third of the respondents to the rape and sexual assault section of the Review argued that

[26] i.e. what proportion of acquittals rely upon the mistaken belief in consent defence

Morgan should be changed so that a belief must be both honest and reasonable (Home Office, 2000a). Alongside these responses, a postcard campaign to Jack Straw (then the Home Secretary) was organised by the feminist activist group Campaign to End Rape, which called for a total dismissal of the Morgan ruling. The debate within the review was not whether Morgan should be changed *per se* (the Home Office rape seminar and the Review's External Reference group agreed that it should be changed), but rather how it should be changed, and what, if anything should replace it.

After much debate, the Sexual Offences Act 2003 defined the *mens rea* of rape as if 'A does not reasonably believe that B consents' (section 1c). Whether or not the belief is classed as reasonable is determined after regarding all the circumstances, including any steps A may have taken to ascertain whether B consents. It is too early to consider what impact this may have had, and the lack of any baseline figures makes evaluation difficult unless this were to be conducted retrospectively or using interviews with lawyers.

5. Conclusions

The reformed rape law, as of May 2004 can thereby be summarised as if 'A' intentionally penetrates the vagina, anus or mouth of 'B' with his penis, and if 'B' does not consent to the penetration and 'A' does not reasonably believe that 'B' consents (paraphrased from section 1 of the Sexual Offences Act 2003).

Although there were piecemeal reforms made between 1956 and 2003, none of these had any impact on the continued decrease in the conviction rate. It is too soon to know how the 2003 Act will be interpreted and what, if any, impact it will have. Although consent has now been defined in statute, this does not solve many of the issues relating to consent. It remains a problem that the law equates passivity or non-

resistance with consent (Henning, 1997), especially when there is no evidence of physical violence or if the victim had consented in the past (Harris and Weiss, 1995). The re-wording of the *mens rea* so that the belief in consent must be reasonable is a significant step forwards, however it is too early to know how 'reasonable' will be interpreted in case law (i.e. reasonable to who? under what circumstances?).

There was some scepticism relating to what impact the Sexual Offences Act 2003 would have even during the consultation stages. In 2001, for example, Rumney warned that the review might lead to *'another false dawn'* (pg. 890) because of its sole focus on the black letter law. In other words, it is unlikely that men will 'decide not to rape' simply because the laws have been slightly strengthened. Similarly, the high attrition rate is not solely related to how rape is defined in law, so the impact here may also be marginal. Goldberg-Ambrose (1992) suggests that law reform should focus on the trial process, particularly on how rules of evidence and the ways in which rape cases are constructed relate to social perceptions of gender, coercion and sexuality. This suggests that it may be necessary to look further than the 'black letter law' towards the trial process in an attempt to explain why the problems around the prosecution of rape persist. Although campaigning for rape law reform is important it may not be enough. This has been acknowledged by feminists for some time; for example, in 1984 Jeffreys and Radford argued that reforms can only ever be effectively implemented alongside a transformation of men's attitudes. In its most simple terms, it is likely that laws are easier to change than prejudiced attitudes (Gaines, 1997).

Although there remain many issues relating to the prosecution of rape defendants, few feminists in England and Wales will deny that the reformed rape law represents a huge step forwards. The same can be said for the other sexual offence laws that were reformed and with regard to the new offences that the legislation created.

Decades of previously dismissed feminist campaigning have now come to fruition and the new legislation tempts 'told you so' type comments in some places. The major achievements of the legislation can be held as being: the retention of rape as a gendered offence in terms of its perpetration; the need for an 'honest' belief in consent to also be 'reasonable'; and a complete revision of what it means to truly consent. However, it is highly unlikely that a new law alone will see an end to the problems women who are raped face within the criminal justice system and it is important that monitoring of the new Act begins and is made publicly available as soon as possible.

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