Assessing the feminist views of rape law essay

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Feminists have argued that criminal law has proven inadequate in its application of equality in relation to violence within the home and outside of it. Their criticism stems from the private and public distinction of violence within law as Barnett highlights the liberal approach to violence is traditionally viewed as a domestic, private family matter that is " not the business of the law"[1]; Wacks illustrates in his Short Introduction to philosophy of Law (2006) that " crimes of domestic violence normally occur within the home into which the law is often reluctant to intrude"[2]thus claiming that wives and partners of violent males have very little protection from criminal law.

The main criticism of the law for feminists lies in the disparity between low levels of prosecution of male perpetrators of violence and the treatment of women who are victims. As the findings of the Fawcett Society Commission[3], concluded that even where a victim of domestic violence is prepared to take action and co-operate in a prosecution, often the victim later refuses to provide evidence against the violent partner[4]. Barnett comments " to pursue criminal proceedings is ineffective as the majority of defendants in domestic violence cases are given non-custodial sentances or very short sentances[5], only to return to and inflict more violence as a form of revenge"[6].

For feminists the main criticisms regarding criminal law are those in relation to rape and domestic violence as they inter link with one another. Celia Wells in her article Impact of Feminist Thinking on Criminal Law comments that " a vignette of current concerns suggests that much has changed in the last few decades in relation to domestic violence and rape"[7]. The Home Office have

set up a ministerial group on domestic violence[8]. Harriet Harman[9]emphasises the importance the government attaches to effectively tackling the crime of rape[10].

Feminist Views of rape

The law on rape is one of the most contentious issues, since feminists argue that gender-bias is both open and hidden, within this area of criminal law. Much of the criticism made by feminists focuses around the difficulties in proving the non-consent element of rape, cross examination, rape myths, the use of sexual history evidence in court and the ruling of DPP v Morgan[11].

One of the most influential ideas in the feminist discussion of rape is that sex and rape are more alike than different. MacKinnon comments that " the line between rape and intercourse commonly centres on some measure of the woman's will..."[12].

Sara Hinchliffe[13]also confirmed the radical argument that rape and sex are similar; in her article published in the independent she comments that " this notion has become increasingly popular among feminists and also appears to be increasingly in favour with official political and legal circles"[14].

Lorraine Kelly and Jill Radford, both radical feminists, claim that the law's distinction between rape and sex is problematic since it " suggests that a clear distinction can be drawn between violence and non-violence and thereby between abusive and ' normal' men" (Hinchliffe, 2000: 61)[15].

Feminists such as Professor Sue Lees[16]argue that “ the law should promote ‘ communicative’ sex – and that it should penalise the non-communicative sex”. She argues that “ calling rape violence fails to address the coercive nature of some male sexual behaviour” (1997: 96)[17].

Garvey comments that feminist legal theorists claim that cultural prejudices regarding female sexual behaviour and norms of femininity distort the sense of rape prosecutions. As Ellis in 1948 described “ men and women’s delights of sex in very different way; whereas men ‘ delight in domination’, women ‘ delight in roughness, violence and pain” (2005: 19)[18].

Although Berrington and Jones have commented that feminists argue such notion’s perpetrates the culture of violence as ‘ normal’, which contributes to the notion of sexual assault as being normalised” (2002: 311)[19]

Sue Lees comments that the much-reported experience of rape victims is that it is they, rather than the accused, who are on trial. As she states “ women that give evidence in court describe the process as being ‘ as traumatic as the rape itself” (2002: ix)[20].

Celia Wells comments that “ both the process by which R. v R came to be considered by the House of Lords (a concerted strategy by prosecutors) and the outcome of the case, could be seen as evidence of the success of feminist arguments” (2004: 93)[21].

The actus reus of rape originally defined within the Sexual Offences Act 1956 was ‘ unlawful sexual intercourse with a woman’. The 1976 amendment of the act was incorporated as an extenuation to this definition the term ‘

without her consent’. Therefore in R. v R[22]the husband claimed that he was not guilty of raping his wife although she did not consent to sexual intercourse the act within itself was not unlawful under the working definition of the SOA 1976 amendment Act.

Prior to the judgement of R v R a husband could not be convicted of raping his wife as he had marital immunity in the words of Sir Matthew Hale 1736[23].

Westmarland comments that rape within marriage became illegal within common law[24]and statute[25]; as a result of over 100 years of feminist campaigning on relation to the law’s gender bias, when the word ‘ unlawful’[26]was removed from the definition of the actus reus of the Sexual Offences Act 1956 as amended 1976[27]by virtue of the criminal Justice and Public order Act (2004: 6)[28].

In the feminist critical writings on the law on rape, the problem of consent in relation to mens rea has been central. This problem has several dimensions, but there are two important points to concentrate on here, part of the definition of rape is sex with one of the parties withholding consent.

It was ruled in R. v Olugboja (1982), a case in which two women were terrorised into submission, that consent was no defence to rape. This was a clarification of the law that meant in effect that it was actual consent under duress of threats that was no defence, that submission did not imply consent and that the prosecution did not have to prove that the victim physically resisted.

On the question of whether the defendant ‘ believed’ that the woman was consenting when she clearly was not, however, recent law has been much more problematic.

As Baird states the general line of defence used in most rape cases is that the victim consented to the intercourse, or that the accused believed that the victim was consenting to the intercourse[29]. The issue of consent is then what many rape defence arguments are based upon. Therefore it is evident that clarification of this notion is required in order to remedy the deficit. The white paper, which followed the review of sexual offences, had a whole chapter dedicated to the clarification of consent[30].

Westmarland claims that the root of the problem in relation to consent lies in the burden placed on the prosecution to prove the absence of consent, rather than requiring the defendant to prove that they had taken the necessary steps as to ascertain consent. She comments that this is a unique concept which only applies to rape by illustrating examples such as theft and assault and comments that one would not have to prove in the absences of consent in these cases.

Another problem with consent that is highlighted by feminists is that since rape is a crime which is committed against an individual; it is difficult to prove consent as it is only the victim’s word against the accused or vice versa[31]therefore making it difficult to validate either person’s statement[32].

The issue of consent in relation to rape was established for the first time within statute in 1976 by virtue of the sexual offences amendment act 1976,

although its presence within common law can be dated back to 1845. The authority of Camplin[33]established that although no force was used it was clear that the act of intercourse was against the victim’s will and that she could not have consented to it.

As Jennifer Tempkin describes since Camplin there have been many other cases where consent is automatically deemed to be absent. In brief she provides the following example referred to as the ‘ category approach’; where there is force, or where force is evident, where the victim is asleep or intoxicated, where fraud is involved, including the impression of the victims’ husband (Temkin, 2000)[34].

The ruling in Olugboja[35]stated that consent was a state of mind, and that it is for the jury to make up their own mind as to whether consent was present based on the victim’s state of mind at the time of the alleged rape. Westmarland comments that this ruling appears to overturn the legal standards that had been developed using the ‘ category approach’ (2004: 8)[36].

However, Temkin has stated that “ the approach of Olugboja is unclear” and she describes 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 and thus moving away from the idea of a non-consent legal standard”. Finally she comments that “ there was uncertainty regarding whether or not Olugboja had replaced the previos common law category approach” (2004: 9)[37].

It is evident that the SOA 2003 has attempted to address the uncertainties regarding consent by virtue of section 74 by defining consent[38]and also by returning to the category approach and listing them within section 75 (2) of the offence.

However the 2003 Act differentiates between the six categories where consent is presumed to be absent. Unless there is sufficient evidence to the contrary to give raise to an issue the defendant reasonably believed that the victim consented, an 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[39], although the burden of proof is reversed in these situations with the defendant required to demonstrate the steps he took to ascertain consent.

In R v Dougal[40], Jennifer Temkin stated " under common law, a woman is not considered to have the ability to give consent to sex when incapacitated through alcohol". She also stated that the Sexual Offences Act 2003, a woman can only consent to sex when she has the freedom and capacity to do so. However, having sex with someone while under the influence of alcohol that one would normally not have sex with is still considered consentual.

Hinchliffe in her article, titles Rape and the shadow of a doubt published in The Independent commented that" one example of the type of reform likely

to emerge from the ongoing Home Office review is that the Morgan principle- the defence to rape of an " honest though mistaken" belief in consent-ought to go" (The Independent: 2000)[41].

Hinchliffe states " that feminists and critical lawyers have argues that Margan makes it easy for men to be acquitted when accused of rape".

Based on DPP v Morgan 1976[42], if a man commited the actus reus of rape, but honestly believed that the woman was consenting regardless of how unreasonable this belief is he could not be convicted of rape because of the lack of mens rea (Barnett, 1998)[43]. As Hinchliffe comments that " according to one critic, ' all the man has to say is ' I thought she wanted it' and the law may be lenient" (Hinchliffe, 2000)[44]. Temkin states that many feminists have referred to this as the ' mistaken belief' clause of informally as the ' rapists charter'[45].

Sheila Duncan comments that for many the Morgan principle priveledges men over women. " Concern has been expressed that what happens in the woman's mind[46]is disregarded by the Morgan mens rea requirement. Even if the jury believes that a woman did not consent to sex, if it also believes that the man did not intend to rape her, it must acquit him" (1996: 183)[47].

Westmarland highlights that " feminist activist groups have campaigned for many years for the reform of the ' mistaken belief' principle instead of being based on an honest belief they suggest that it should be based on some test of reasonableness or that the mistaken belief clause itself should be abolished altogether" (2004: 11)[48].

As predicted by Sara Hinchliffe there were many debates in relation to the Morgan principle of ‘ mistaken honest belief’ during the Home Office review of Sexual Offences in 1999.

Although Westmoreland commented that the respondents to the rape and sexual assault section at the time could not reach a clear agreement in relation to recommendation since a third of them argued that Morgan principle should change so that the belief must be both honest and reasonable (Home Office, 2000: VI)[49].

A postcard campaign to Jack Straw[50]was organised by the feminist activist group Campaign to End Rape, which called for a total dismissal of the Morgan ruling[51]. Westmarland distinguished that debate within the review was not whether Morgan should be changed per se but how it should be changed or replaced.

As a result of the incorporation of the Sexual Offences Act 2003 it is evident that The Home Office rape seminar and the Review’s External reference group agreed that the Morgan principle should change the mens rea element of rape has now been replaced with ‘ reasonable’ belief instead or ‘ honest mistaken belief’[52]. The White Paper[53]which proceeded the act stated that reasonable belief will be judged against the standard of an objective third party and in accordance to section 2 of the act.