

A Critical Analysis of Gender Neutrality in Relation to the Sexual Offences Act 2003

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Abstract

Legal definitions of rape are impacted by gender stereotyping. For example, the current legal definition of rape in England and Wales recognises only men as perpetrators and excludes forced to penetrate cases perpetrated by women against men. Existing literature indicates that this is due to widely held gender stereotypes in society and law. This article explores whether a gendered approach in law affects people in society and how widely held societal attitudes regarding gender influences the law. It is suggested that forced to penetrate cases should be recognised as rape in order to erase unnecessary stereotypes about men that impact how society and the law perceive men as victims. Thus, there is a need for a gender-neutral approach to be applied to the law in England and Wales, as is accepted in other jurisdictions such as Canada.

Keywords: Rape; Forced to Penetrate; Gender Stereotypes; Men; Women; Victims

1. Introduction

For several decades and throughout multiple jurisdictions, the offence of rape has been the subject of an ongoing process of 'evaluation and reform'.¹ The most recent addition to this process in England and Wales is the publication of the Home Office consultation paper,² resulting in the Sexual Offences Act 2003. One of the fundamental objectives of the Sexual Offences Act 2003 was to enshrine gender neutrality across the range of sexual offences. Gender neutrality is the concept that people should not be categorised based on their sex or gender by legislation, language, or other social institutions. This goal was explicitly stated by The Sexual Offences Review team in *Setting the Boundaries* as it said: 'in order to deliver effective

¹ Philip Rumney, 'The Review of Sex Offences and Rape Law Reform: Another False Dawn?' (2001) 64(6) *Modern Law Review* 890.

² Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (Vol 1, 2000).

protection to all, the law needs to be framed on the basis that offenders and victims can be of either sex'.³

To begin, it should be emphasised that the Sexual Offences Act 2003 has made headway in ensuring that sexual offences are gender neutral, for example by including oral penetration and surgically repaired genitalia in the definition of rape.⁴ At the same time however, the offence remains inherently gendered. Victims can be of any sex, but offenders can only be male as the offence of rape requires penile penetration. Thus, if women had sexual relations with men who did not consent, it would not be deemed to be rape but rather a Section 4 offence which is 'causing a person to engage in sexual activity without consent'.⁵ Nevertheless, The Sexual Offences Review team proclaimed that they have 'recommended offences that are gender neutral in their application, unless there was a good reason to do otherwise'.⁶

This article demonstrates that there was no compelling reason to reject a gender-neutral rape offence. The Sexual Offences Act 2003 is not a perfect system to 'protect individuals from abuse'.⁷ This is because it perpetuates gender stereotypes which continue to disregard men as victims. Only by changing beliefs and attitudes about gender norms and roles can the Sexual Offences Act 2003 undergo an essential transformation. As a result, it is argued that legislative reform is required to achieve the specific aims and eradicate the gender bias that exists within the system.

2. The Legal Definition and Sentencing of Rape in England and Wales

The legal definition of rape is defined in the Sexual Offences Act 2003 as 'a person commits an offence if... he intentionally penetrates the vagina, anus or mouth of another with his penis'⁸ without the consent of the victim,⁹ and that the individual does not reasonably believe that the victim consents.¹⁰ The aim of the Sexual Offences Act 2003 was to widen the definition in terms of gender neutrality. Nonetheless, it

³ Home Office (n 2).

⁴ Home Office (n 2) para 2.8.5.

⁵ Sexual Offences Act 2003 (SOA 2003).

⁶ Home Office (n 2).

⁷ Home Office (n 2) para 0.3.

⁸ SOA 2003 (n 5) s1(1)(a).

⁹ SOA 2003 (n 5) s1(1)(b).

¹⁰ SOA 2003 (n 5) s1(1)(c).

maintained the criterion that rape may only be committed by penile penetration, implying that women cannot rape men or other women unless the individual has a surgically reconstructed penis.¹¹

Although the purpose of the Sexual Offences Act 2003 was to avoid gendered definitions, it is evident that rape is still a gendered offence because it requires penile penetration. Parliament and The Sexual Offences Review team have been reluctant to recognise women as rape offenders because they have consciously decided that rape can only occur through penile penetration.¹² The White Paper published in preparation of the Sexual Offences Act 2003 proposed an explanation for the new rape offence. It emphasised that rape should only be defined as 'non-consensual penile penetration' as it reflects the anatomical differences between men and women, indicating that only men can commit rape.¹³

Arguably, penile penetration can be seen as a unique act due to its specific characteristics and potential consequences. This act carries the potential for various physical effects, including pregnancy and transmission of diseases. However, concerning the question of pregnancy, it may be claimed that if the law now recognises that non-consensual penile-anal intercourse involving men constitutes rape, the pregnancy argument would be rendered completely ineffective.¹⁴ It is also proposed that the inclusion of oral sex in the definition of rape undermines the justification that rape is a unique act because it carries the risk of pregnancy.¹⁵ According to The Sexual Offences Review team, oral penetration reflects the gravity of rape, as 'forced oral sex is as horrible, as demeaning and as traumatising as other forms of forced penile penetration'.¹⁶ While this is correct and has been praised by scholars, this is a moot point because oral intercourse does not result in pregnancy.¹⁷

Concerning disease transmission, The Sexual Offences Review team could not explain why this is a significant aspect.¹⁸ They only stated that disease transmission

¹¹ SOA 2003 (n 5) s76(3).

¹² Home Office (n 2) para 2.8.4.

¹³ Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offence* (Cm 5668, 2002) para 42.

¹⁴ Rumney (n1) 897.

¹⁵ *Ibid.*

¹⁶ Home Office (n 2) para 2.8.5.

¹⁷ Damian Warburton, 'The Rape of a Label: Why Would it be Wrong to Follow Canada in Having a Single Offence of Unlawful Sexual Assault' (2004) 68 *Journal of Criminal Law* 533.

¹⁸ Rumney (n 1) 897.

is greater in rape as it involves penile penetration. However, The Sexual Offences Review team presented no proof of this and continually failed to recognise the overall harm caused by rape which is the violation of a person's integrity that may be perpetrated by men or women.¹⁹ Instead, under the language of the Sexual Offences Act 2003, rape is overemphasised as a sexual act, causing harm that can result from penetrative intercourse.

The distinction between causing a person to engage in sexual activity without consent and rape is not only due to anatomical difference between men and women but also reflects the proposition that, on average, men are physically stronger than women.²⁰ This is an age-old assumption that has continued to fuel gender stereotyping. For example, men are thought to be powerful and avoid weakness whereas women are assumed to be emotional and weak. In effect, it might be assumed that men could dominate women if they chose not to engage in sexual activity due to the physical disparities between the sexes. Consequently, if sexual intercourse occurred, men must have consented²¹ because it is physically impossible for men to be raped as women lack the physical strength to overpower men.²² Nevertheless, although scientifically, on average, men are physically stronger than women, this is not always the case. A specific man may be physically weaker than a particular physically stronger woman whom he is forced to penetrate.²³ There are also times when a man is too inebriated or when he is unconscious in which case, even if he had greater physical strength, it would be impossible to utilise.²⁴ Nonetheless, even if men have greater physical strength, it is incorrect to assume that they can never be raped because of it.

Arguably, the notion that physical differences between men and women make it impossible for women to rape men is based on a gender stereotype.²⁵ It is an unfair justification for the distinction between rape and causing a person to engage in sexual

¹⁹ Rumney (n 1) 898.

²⁰ Natasha Mckeever, 'Can a Woman Rape a Man and Why Does it Matter?' (2019) 13 Criminal Law and Philosophy 604.

²¹ Ibid.

²² Phillip Rumney and Martin Morgan-Taylor, 'Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two' (1997) 330 Anglo-Am L Rev 332.

²³ Mckeever (n 20) 604.

²⁴ Ibid.

²⁵ Ibid.

activity without consent.²⁶ The justification presented demonstrates that society and the law have constructed the domination of men over women. Arguably, it not only validates the patriarchal view that women are the less significant gender, but it continues to disregard the idea that men can be viewed as victims of rape because they are perceived to be physically stronger than women, asserting their power in an act of penile penetration.²⁷ However, men have every right not to consent to sex just as much as women do, but this is not reflected in the law. The law has not made it possible for women to rape men. If women were to have sex with men who did not consent, this would not be considered rape. For example, women may perform a violent sexual attack on men in order to obtain sexual intercourse, or they may have sex with men who are too inebriated to consent; nonetheless, this may be classified as a Section 4 offence rather than rape.

Arguably there is no difference between rape and a non-consensual sexual activity. Yet, rape, debatably, is seen to be more serious than a Section 4 offence. The introduction of two different offences has reinforced the primacy of penile penetration which may lead to men as victims being overlooked or even afraid to speak out. As a result of society's men-dominated attitudes towards sex, the law unquestionably underrepresents men as victims. While The Sexual Offences Review team suggested that 'our perception of the roles of men and women have changed',²⁸ it has been argued that the focus on penile penetration reflects society's understanding of rape as an offence committed by men on women or men.²⁹ As a result, without a definition that reflects society's understanding of the term, it would not be appropriate or understood.

However, to define rape solely by penile penetration upholds the phallus-obsessed view that society has regarding sex³⁰ and perpetuates a gender hierarchy in which men are superior to women, effectively disregarding any concept of victimisation for men. It demonstrates that traditional attitudes that exist in society and have become embedded in the law. That stereotypical assumptions about gender, based on anatomical and physical differences, have been used to try and justify an offence that

²⁶ Mckeever (n 20) 599.

²⁷ Jonas Ekblom, 'Power, Penises and Penetration – Is Sex Really all About it?' (2 July 2018) <<https://www.jonasekblom.com/articles/power-dynamics-in-bed>> accessed 12 February 2022.

²⁸ Home Office (n 2) para 1.1.4.

²⁹ Home Office (n 2) para 2.8.5.

³⁰ Mckeever (n 20) 602.

is unfair to men.³¹ Rewriting laws in gender-neutral language may encourage the notion that rape is an act of violence, not sex, and that both men and women can be victims and perpetrators. This may be more beneficial to society today.

The gendered disparity between cases of rape and non-consensual penetration can also be seen in sentencing. The Sentencing Council produced sentencing guidelines on sexual offences. The guidelines can be used as a framework to determine how offences will be treated, with the idea that a longer sentence equals a more serious offence in terms of harm and culpability.³²

For the offence of rape, the guidelines assess the extent of harm inflicted on a victim. For example, as previously discussed, the guidelines for rape pertain to the offence causing pregnancy or a sexually transmitted disease. For the most serious degree of rape, category 1 states that ‘the extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors may elevate to category 1’.³³ For the least serious rape offences, category 3(a) sets out a sentence of seven years imprisonment and a sentencing range of six to nine years custody. Furthermore, a category 3(b) offence presents the lowest harm and culpability of rape with a beginning point of 5 years imprisonment and a sentencing range of 4 - 7 years custody.³⁴ To decide where an offence falls within the sentence range, there are aggravating and mitigating factors. For example, ejaculation is an aggravating factor for rape.³⁵

As discussed above, the offence of rape does not include men being forced to penetrate. Subsequently, forced to penetrate cases fall under the Section 4 offence of ‘causing a person to engage in sexual activity without consent’.³⁶ The Section 4 offence exists in an aggravated form when penetration is involved. This is punishable with a sentence of life imprisonment, similar to the maximum sentence of rape.

³¹ Ibid.

³² Jeremy Robson, Lucy Newman and Andrew O’Hagan, ‘Redrawing the Boundaries: The Adequacy of the Sexual Offences Act in Addressing Female Sexual Offending’ (2021) 85(4) *Journal of Criminal Law* 253.

³³ Sentencing Council, ‘Sentencing Guidelines – Rape.’

<<https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/>> accessed 12th December 2023.

³⁴ Ibid.

³⁵ Ibid.

³⁶ SOA 2003 (n 5).

However, there is also a non-aggravated form whereby it is 10 years custody.³⁷ However, while the Section 4 offence was meant to encompass victims of forced to penetrate cases in which women compel men to penetrate them with their penis, the sentencing guidelines notably omit any reference to instances of men being forced to penetrate. Instead, when assessing the extent of harm inflicted on a victim, the Section 4 offence guidelines mention ‘penetration using large or dangerous object(s)’ and ‘pregnancy or STI as a consequence of offence’.³⁸ The lack of a ‘baseline harm assumed for female instigated rape’³⁹ has the potential to create difficulties in evaluating the severity of the offence in relation to the sentencing threshold. Without clear guidance and in the absence of specific factors related to men being forced to penetrate, judges might have no option but to classify forced to penetrate cases as offences with the lowest degree of harm and culpability. This classification would result in a lower sentence that would not reflect the gravity of the offence.

3. Forced to Penetrate

Weare examines the lived experiences of men who have been forced to penetrate. She contends that, because of the parallels of the two offences, such as ‘aggressive strategies and physical and emotional harms’⁴⁰ as well as the risk of sexually transmitted diseases and pregnancy,⁴¹ forced to penetrate cases should be legally recognised as a rape offence. This would also reflect men’s understanding of their experiences. Weare notes that over 30% of men identified their experience as rape, indicating an inconsistency between the legal definition and men’s understanding of rape. Therefore, including forced to penetrate cases within the definition of rape ensures that all victims, regardless of gender, receive the same degree of protection.⁴²

³⁷ Sentencing Council, ‘Sentencing Guidelines – Causing a Person to engage in Sexual Activity without Consent’ <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/causing-a-person-to-engage-in-sexual-activity-without-consent/>> accessed 12 December 2023.

³⁸ *Ibid.*

³⁹ Robson, Newman and O’Hagan (n 32).

⁴⁰ Siobhan Weare, ‘Oh You’re a Guy, how Could you be Raped by a Woman, that Makes no Sense: Towards a Case for Legally Recognising and Labelling “Forced-to-Penetrate” Cases as Rape’ (2018) 14 (1) *International Journal of Law in Context* 110.

⁴¹ Robson, Newman and O’Hagan (n 32).

⁴² Weare (n 40).

The Sexual Offences Review team indicated that they did consider the evidence surrounding forced to penetrate cases. However, even though they 'found a little anecdotal evidence [, they] did not discover sufficient to convince [them] that this was the equivalent of rape'.⁴³ According to the evidence, the Section 4 offence was 'rarely charged' with just 36 offenders sentenced between 2010 and 2012.⁴⁴ As a result, it can be argued that this offence is not widely occurring or prevalent in nature, implying that it occurs only seldom within the court system. With the evidence present, it is no surprise that The Sexual Offences Review team decided against implementing a gender-neutral rape offence. However, to acquire a full understanding of the issue, it is critical to investigate the reasons behind the low number of charges, something that The Sexual Offences Review team may have overlooked.

For example, the small percentage of offenders sentenced for the Section 4 offence may imply a potential underreporting or under-recognition of such instances. Weare revealed that most men did not report their experience of being forced to penetrate to the police; this is confirmed by the 1.7% reporting rate, which is exceptionally low. There are a 'number of factors which are inhibiting victims from pursuing criminal allegations'.⁴⁵ For example, as discussed above, widespread myths maintain that women cannot rape men because men are stronger and more powerful. Consequently, men 'internalise [gender stereotypes] and doubt the validity of their feelings around the experiences'.⁴⁶ However, The Sexual Offences Review team indicates how detrimental these offences are to men, just as they are to women.⁴⁷ Yet, as discussed above, the Section 4 offence does not reflect the severity of the crime. It de-emphasises the act.

Additionally, the similarities between rape and forced to penetrate cases undermine the need to distinguishing between them. Both offences include non-consensual penile penetration as well as potential physical and mental effects on the victim.⁴⁸ As

⁴³ Home Office (n 2) para 2.8.2.

⁴⁴ Sentencing Council, 'Sexual Offences - Response to Consultation' (December 2013) 22 <https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Response_to_Consultation_web1.pdf> accessed 20 February 2022.

⁴⁵ Robson, Newman and O'Hagan (n 32).

⁴⁶ Siobhan Weare, Joel Porter and Eleanor Evans 'Forced-to-Penetrate Cases: Lived Experiences of Men' (The Law School, Lancaster University, 2017) <<http://wp.lancs.ac.uk/forced-to-penetrate-cases/>> accessed 10 March 2022.

⁴⁷ Home Office (n 2).

⁴⁸ Weare (n 40).

a result, a gender-neutral rape offence that explicitly captures offending by women in forced to penetrate cases would recognise all victim's experiences. In addition, the sentencing guidelines would reflect the act and include a baseline harm assumed for forced sexual intercourse. This would express the gravity of the act while also affirming the dignity of victims. This has significant implications for how society interprets violations of consent to both men and women and reflects the harm that it can cause to either gender. Although this suggestion does not aim to erase all prejudices about men, it does indicate a stance in which men and women are on equal footing.

4. Canada's Sexual Offences Legislation

This has been achieved in Canada. Early reform approaches in Canada included downplaying the sexual component of the crime and instead characterising rape as an act of violence. This is reflected in Bill C-127⁴⁹ which modified the Criminal Code's rape and sexual indecent assault laws. It implemented a gender-neutral, three-tier sexual assault law. Based on the amount of violence used, the three tiers are: basic sexual assault,⁵⁰ sexual assault with a weapon or threat of violence to a third party or causing bodily harm,⁵¹ and aggravated sexual assault.⁵²

Prior to Bill C-127, rape was defined as

sexual intercourse by a male person with a female person who is not his wife without her consent, or with her consent if the consent was extorted by threats of fear or bodily harm, is obtained by personating her husband, or by false representations of the nature and quality of the act.⁵³

The previous legal definition can be interpreted as connotatively accentuating 'the act of sexual penetration',⁵⁴ favouring men's position on the underlying nature of sexual offences.⁵⁵ This is comparable to the current definition of rape in England and Wales. Introducing a generic sexual assault provision that defined rape as an act of violence

⁴⁹ An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person, Bill (1983) C-127.

⁵⁰ Criminal Code, RSC 1985, c. C-46, s 271.

⁵¹ Criminal Code (n 50) s 272.

⁵² Criminal Code (n 50) s 273.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

eliminated the law's inherent gender bias.⁵⁶ As a result, the new law assists in prosecuting all offenders and protecting all victims.⁵⁷

However, the law gave rise to issues described as the 'gender disguise argument'.⁵⁸ Statistically, primarily women are victims of rape.⁵⁹ In addition, women are limited by their potential victimisation. Novotny states 'that awareness [of potential rape] does not follow men down a dark street in the same way' as women.⁶⁰ Based on this reality, there are concerns that a gender neutral rape definition would deprioritise female victims, resulting in detrimental consequences for women.⁶¹

However, these concerns perpetuate the unequal power relations between men and women, maintaining the perception of women as vulnerable victims and men as perpetrators. 'Gender-neutral reforms are not designed to make gender irrelevant in our understanding of sexual violence'.⁶² While it is true that women are disproportionately affected by sexual violence,⁶³ it is crucial to understand that men can also be victims of rape and to move away from the 'classic male versus female paradigm'.⁶⁴ Gender neutrality is neither undermining nor harming women's substantive equality.⁶⁵ It simply recognises that men can also be victims of rape. The above argument ignores the broader implications of promoting gender neutrality and thus it is critical to promote a comprehensive understanding of rape in order to support all victims, dispel gendered stereotypes and rape myths, and work towards rape prevention. It can even be argued that Canada's new gender-neutral law gave men and women the ability to situate themselves in criminal sexual encounters in ways that defy traditional gender norms,⁶⁶ challenging the stereotypical status of women as vulnerable and powerless and men as aggressive and dominant.

⁵⁶ Danette C Cashman, 'Negotiating Gender: A Comparison of Rape Laws in Canada, Finland, and Pakistan' (2000) 9 *Dalhousie Journal of Legal Studies* 126.

⁵⁷ Law Reform Commission of Canada, *Criminal Law: Sexual Offences*, Eighth Annual Report (1978).

⁵⁸ Philip Rumney, 'In Defence of Gender Neutrality Within Rape' (2007) 6(1) *Seattle Journal for Social Justice* 494.

⁵⁹ Patricia Novotny, 'Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?' (2002) 1 *Seattle Journal for Social Injustice* 750.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Rumney (58) 497.

⁶³ *Ibid.*

⁶⁴ Novotny (59) 748.

⁶⁵ Rumney (58) 499.

⁶⁶ Novotny (59) 748.

*R v Chase*⁶⁷ highlights issues related to the interpretation of the new law, specifically the term “sexual”. It might be interpreted as masking significant gender concerns. In this case, the Defendant snatched the Complainant’s arms and shoulders and grabbed her breasts.⁶⁸ The Complainant also testified at trial that the Defendant attempted but failed to seize her ‘private parts’.⁶⁹ While the Defendant was initially found guilty of sexual assault, the Court of Appeal overturned his conviction. It held that the modifier “sexual” in the new offence of sexual assault should be interpreted to apply to portions of the body, notably the genitalia, and in this case, there was no contact with the complainant’s genitals.⁷⁰ The Court argued that ‘to include as sexual an assault to the parts of the body considered as having secondary sexual characteristics may lead to absurd results if one considers a man’s beard’.⁷¹ Therefore, the Defendant was convicted for common assault instead of sexual assault.⁷² However, the verdict was reversed by the Canadian Supreme Court which determined that the attack was sexual in nature. Judge McIntyre stressed that the Trial Judge had enough evidence to conclude that sexual assault had taken place. It is self-evident that the Defendant’s groping of the Complainant’s breasts was a sexual assault.⁷³

Each of the above-mentioned concerns is essentially hypothetical in nature, and even when explicit statements are made, any empirically reliable evidence does not support them.⁷⁴ Therefore gender neutrality should be applied to all sexual offences, not only in Canada but also in England and Wales.

5. Conclusion

The purpose of this article was to explore the degree of gender neutrality in the Sexual Offences Act 2003, determining whether more needs to be done to recognise men and women as potential victims and perpetrators. This article demonstrated that at least parts of the Sexual Offences Act 2003, namely the definition of rape, remain

⁶⁷ [1987] 2 SCR 293.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *R v Chase* (n 67) para 13.

⁷⁴ *Rumney* (58) 499.

gendered. As a result, more must be done in England and Wales to create a more inclusive approach to sexual offences, one that is completely gender neutral.

This article contributes to the growing body of research indicating that the current law is a product of society's gender stereotypical views. Without a change in the law, this will continue to affect both men and women. Thus, judgements are made for future directions.

Including forced to penetrate cases under the definition of rape is a clear way to address most of the issues that this article has raised. However, the current definition of rape centres on penile penetration and male offenders and therefore excludes forced to penetrate cases and does not acknowledge women as offenders. Therefore, this article suggests that a new definition of rape should be offered, one that is based on sexual intercourse with the victim without the victim's consent. This is required to meet The Sexual Offence Review tea's initial goals of gender neutrality as well as to eliminate many of the contradictions that have arisen throughout the Review, resulting in inadequate protection for male rape victims. Thus, it is crucial for lawmakers and society to critically examine and challenge these gendered assumptions in order to achieve true gender neutrality and justice within the Sexual Offences Act 2003. By doing so, it will create a legal framework that adequately addresses the experiences and needs of all victims, regardless of their gender.

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