

## Rape law remains overwhelmingly loaded against the victim

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# Rape: the burden of proof

In the past year, the media have tickled the public conscience once again about rape. The incident last summer of the 'innocent' footballers in Sweden was reported with the usual innuendo, and even featured a picture of the complainant. Since she is not British, and the incident took place abroad, the limited protection offered under British law concerning anonymity did not apply. Early last year, the outcry over the Thames Valley Police treatment of a raped woman in the *Policy* series highlighted for a short while some of the gross shortcomings in police procedure for sexual offences. The only recent controversy over the law, however, concerned the differences between insanity and criminal responsibility arising from the trial of Peter Sutcliffe.

It may come as something of a surprise to discover that while rape has been grabbing the headlines, there has been a body investigating possible changes in the laws on sexual assault. For some years now a body called the Criminal Law Revision Committee has been considering (amongst other things) the Sexual Offences Act (amended 1976); they produced a Green Paper in 1980<sup>1</sup> and, last December, a working paper on Prostitution and Allied Offences. These papers will lead eventually to the drafting of new legislation.

The Committee invites comments on these papers, although so quietly that we suspect many do not hear. Our main concern is that although police procedure may be spasmodically newsworthy, the Sexual Offences Act itself, and the preliminary work now going on to draft new legislation, are simply not known about. Clearly that legislation is both determined by and determining of the myths about rape and female/male sexuality which so often keep women who have been raped in guilt-ridden silence. And the Green Paper is an interesting illustration of the preoccupations of those 'responsible' for dealing with these issues.

## Consent

The Green Paper was written by a commit-

tee of 13 men and 2 women — an unfortunate imbalance in the consideration of legislation primarily affecting women. In considering some of the areas covered by the Green Paper — consent, incest, the concept of rape including rape in marriage, and uncorroborated evidence — we want to highlight the inadequacies of the law's approach to the question of sexual violence. We have room here only to sketch some of the more glaring shortcomings.

In all sexual offences very great weight is placed on the issue of consent. The question is never 'Did the man rape the woman?' but

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'Did she consent to the intercourse that took place?' Sex is something that is 'done' to women by men, and the passivity of women's role is assumed. (It is illuminating to imagine a man being asked if he had consented to having his wallet stolen in the street.) As the burden of proof lies with the prosecution, for whom she is chief witness, the woman is in the position — unique in crimes of violence — of fighting the accusation of having consented.

The defence usually hinges on whether she is the 'type' likely to consent to intercourse. It is astonishing how, as a matter of routine, what makes or breaks the outcome of a sexual offence trial, is not what happened on the day in question, but whether the woman has ever had VD, and generally prefers wearing stockings to tights. Following the 1976 amendment a woman's past sexual history in a rape case is admissible only at the judge's discretion; but this has resulted in the defence resting its case on insinuation and unsubstantiated allegations.

Any suggestion of provocation, however nebulous, in a woman's appearance and behaviour, carries more real weight than anything she can say about the incident.

The practice of defences resting on assumptions about 'types' of women has grave implications for the issue of the age of consent, and indeed of incest. The age of consent — 16 — is supposedly the age when a woman can agree, or not, to intercourse. Intercourse with a woman under 16 is automatically a crime (legally known as 'unlawful sexual intercourse' or USI). However the police will often lay a charge of USI with an under-age complainant when what actually happened was rape, since it is easier to get a conviction this way. In USI cases, sentencing reflects the underlying reality of the defence of consent: provocation, and the age at which a girl — though under age — 'provokes arousal' in a man. Hence intercourse with a girl under 13 carries a maximum of life, while 13 to 16 carries only two years. The minute a girl becomes 'sexually mature', by the wildest stretch of the imagination, the defendant can successfully allege he thought she was over 16 (thereby implying consent). Thus she is no longer the 'innocent victim', and the part she is supposed to have played in causing the intercourse will affect the weight of the sentence.

Thus there exists the phenomenon of the 'young man's defence', under which at present a man under 24 is not guilty of USI if he has not been charged before with a like offence and believed *with reasonable cause* that the woman was over 16, regardless of her actual age (in some cases as low as 10). The CLRC recommends that this defence be available to all men, irrespective of age. Furthermore they do not consider that the defendant should be held to a standard of reasonableness, but that an honest mistake is sufficient (a defence already admissible in rape cases, following the Appeal Court judges' ruling that 'if a man believed that a woman was consenting, *no matter how unrea-*

sonable that belief might be, then he should not be convicted or rape').

The whole tenor of the Committee's treatment of sexual offences against girls and young women shows clearly where their sympathies lie: that they see legislative reform in terms of increased protection for men accused of assaults that are 'actually' consensual. What concerns us about the proposed changes in this area is that they will legitimate greater access for, more particularly, older men to young women and girls. As long as male sexuality is seen as uncontrollable more and more sophisticated defences will continue to be elaborated. Except in the most extreme cases (eg, a man of 50 and a girl of 10 who is severely injured), any young woman appearing as a prosecution witness in a case that began with a complaint of rape will find herself having to counter allegations of provocation, seduction, and consent.

### Incest

The CLRC is obsessed with consensual relationships, and does not appear to recognise the prevalence of female child molestation (conservative US estimates indicate that one woman in four was sexually assaulted before reaching the age of puberty), or the sexual assault of girls within the family. Gross indecency, which is any sexual assault on a child stopping short of penetration, has historically 'acquired a fairly fixed connotation in relation to male homosexual acts. Incest is defined in isolation, and not as part of the larger picture of sexual violence by men against women and girls, as an aspect of the power imbalance between them. (It should be noted that the crime of incest does not cover any sexual contact except penis/vagina penetration. A father can sexually assault his daughter repeatedly over a period of years, and not be liable to a charge of incest so long as penetration does not occur. And in a case of incest a woman over 16 is criminally liable alongside the man, and will stand in the dock charged with the same offence.)

Most of the concern in this area is with fathers and 'consenting' daughters, which leads to lengthy discussions of pregnancy and genetic risks. The main interest is whether or not there should be an age of consent within 'consensual' incestuous relationships. While it is conceded that non-consensual sex between biological fathers and daughters is a grave offence, the frequency with which non-biological fathers also abuse female children is simply not recognised. Furthermore, a foster father, stepfather or *de facto* adoptive father cannot be guilty of incest, but only of a crime carrying a much lower sentence, or,

if the daughter is over 16, of no offence at all. The point is not that non-biological fathers escape the risk of prosecution if the girl is under 16 (in theory, there is always USI); what is unacceptable is that the crime of incest is defined as one 'against nature' (ie unnatural sex between blood relations), as opposed to the blatant abuse of power specifically within the family. In practice non-biological offenders will get away with a much lighter sentence, as well as escaping the moral censure attendant upon a conviction for incest.

### Broadening the concept of rape

For the past decade, rape crisis centres have demanded that sexual assaults not involving penis/vagina penetration be given weight as serious offences. Forced oral penetration, or penetration of the vagina or anus by, for example, a stick, are equally traumatic; more to the point, they are done for the same reasons as forced penetration of the vagina: to humiliate, degrade and control. No one can seriously suggest that a man forcibly penetrates a woman with a stick or bottle because of uncontrollable sexual urges. Yet while the Committee concedes — quietly — that such assaults are serious, they are not serious enough to warrant equally heavy penalties. The current maximum for indecent assault, which is what these offences are, is 2 years, which it is proposed should be raised to 5 years.

The main objection to broadening the concept of rape to include these other forms of penetration is a true indication of the world which the majority of the legal profession inhabits, *viz* that rape is special because it is the only assault carrying the risk of pregnancy: 'The risk of pregnancy is a further and important distinguishing characteristic of rape.' This is an oblique reference to the history of rape as a crime of property: for a man's property to be abused was bad enough, but to have it impregnated as well. . . The horror of pregnancy resulting from rape is not denied. What is objectionable is hiding behind such a 'fear' to avoid questioning why men rape, or sexually assault, women generally; it is to talk about the *results* of rape rather than confronting the violence and misogyny behind all sexual assaults on women and girls.

### Attitudes towards women

The Green Paper's recommendations about rape in marriage best illustrate prevalent attitudes towards women. Though they agree that this should become an offence, the tone of this section is alarming in its consequences for women. Firstly it is recommended that 'in the interests of the family' all prosecu-

tions should require the sanction of the Director of Public Prosecutions (who theoretically can step in and take over the prosecution of 'more serious' offences).

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Much concern is shown for the 'breakdown of marriage' which will doubtless follow women charging their husbands with rape: 'The family ties would be severed and the wife with children would have to cope with her emotional, social and financial problems as best she could; and possibly the children might resent what *she* had done to their *father*, (our emphasis) Nearly all breakdowns of marriage cause problems. A breakdown brought about by a wife who had sought the protection of the criminal law of rape would be particularly painful.' In other words, the major concern is for the sanctity of the family unit, and the damage women will cause if they are 'allowed' to prosecute their husbands for rape.

### The use of evidence

In law, a woman's statement of a sexual assault does not require corroboration (eg by eye-witnesses, medical evidence, torn clothing, etc). However in practice a judge will always warn the jury not to convict on her uncorroborated evidence. Even though suffering, for instance, severe bruising, many women are accused under defence cross-examination of having inflicted the injuries themselves, or else that they are the result of 'passionate love-play' — consensual of course — some few hours before the rape. This is indicative of the attitude towards women throughout the laws on sexual offences, and the fact that the losers in all such cases of anomalies and inconsistencies within these laws are women. If corroboration is not required in law, then it should not be in practice. Comments such as 'It is dangerous to convict on the uncorroborated evidence of a woman' (Judge Rigg, Old Bailey, July 1975) are blatantly insulting reflections on the whole of the female sex. However it is not unusual for members of the legal profession to make such pronouncements in connection with sexual offences; it indicates clearly their standpoint — and the CLRC is sadly no different. D

<sup>1</sup> CLRC Working Paper on Sexual Offences, October 1980, HMSO, £3.70.