Seeing Rape as Rape: Philosophical and Historical Perspectives on Marriage Law

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In this paper I critically challenge the ability of legal reforms to recognize and integrate the way in which a rape victim sees rape. Current limitations to the law are mainly due to the accepted patriarchal view on law as a form of objective and rational knowledge, outside which there are only impracticable and irrational views.

I investigate the case of marriage jurisprudence in the UK, as a prominent example, because it has long accepted marital rape as objectively and rationally part of a wife’s duty. Even though changes have occurred which improve the marital rape jurisdiction, prejudicial disbelief concerning a woman’s private life is still used in the courts to question the credibility of the victim.

Over the past year, extensive efforts have been made to reform the management of rape cases. Whilst there is a need to acknowledge the seriousness of the accusation with rigorous legal principles which provide appropriate safeguards for the accused person as well as the complainant, especially bearing in mind the often ‘private’ circumstances, with a concomitant lack of witnesses, it remains the case that the rate of attribution in attempts to secure successful prosecutions in rape case remains overwhelming.

I show how a Wittgensteinian approach to law would take into consideration the shape of gendered lives as they are experienced, and hence would not accept just one legal interpretation of marital law. The phenomenon of “seeing-as” in Wittgenstein’s philosophy can support the experience of being jolted into appreciating the feminist aspect of consent in marital sexual relationships.

Keywords: Ludwig Wittgenstein, seeing-as, feminist philosophy of law, marital rape, rape laws, sexual history evidence.

I should not like my writing to spare someone the trouble of thinking. But, if possible, to stimulate someone to thoughts of his own. (Ludwig Wittgenstein, Philosophical Investigation)

1. Introduction

Historically, the concept of marital rape has been regarded as an oxymoron. Therefore, whenever a case of violence involving a husband and wife was submitted to the attention of the court, it would have seldom been assumed from a legal point of view that when he had forced his wife to have sex without her permission he had committed an act of violence. In the UK, before the R v R sentence, it was considered objectively rational that any intercourse involving a husband and wife would be consensual, and that it was unnecessary to question whether a wife consented. Before this case, a husband having sexual access to his wife’s body was taken to be part of the marriage contract, and marital rape was not legally recognized. Hence, the need for a woman’s consent was lost when a stable relationship was formed.

A culture of favoring patriarchal legal theories has provided males both rapists and non-rapists with vocabularies and motives to rationalize, make objective and justify sexually aggressive behavior. These theories fail to consider that women see rape as violence even when deviant interpretations of rape are imposed by law. By exploring the Wittgensteinian notion of “seeing-as” it will be shown that Wittgenstein’s epistemological approach offers an alternative to the earlier view on the issues of objectivity and rationality in law. This approach shows why rape is an act of violence even when it occurs with a spouse.

2. Sexual Consent within the marriage contract

2.1 The marriage contract and contractual practice

Before applying Wittgenstein’s philosophy to the epistemological debate on objectivity and rationality within English marriage law, it is necessary to be familiar with some aspects of the marriage contract and its historical backdrop. As Lisa Frohmann and Elizabeth Mertz observed, feminist scholars “are turning or returning to ask about the social and cultural contexts within which laws are formulated, enforced, and interpreted” (1994, 829).
Currently, those who marry in England under a civil law ceremony are obliged to give their consent to marriage. English marriage law has originated from the fundamental changes introduced by the “Act for the better Prevention of Clandestine Marriage” – commonly known as Lord Hardwicke’s Marriage Act, dating back to 1754 – which laid the statutory basis for much of contemporary English marriage law and practice (Probert, 2009, chapter 5).

Prior to this Act, there were clandestine marriages, under age marriages, pagan traditions instead of formal promises, unqualified officiating clergies, as well as many forced marriages (2009). The Act required a formal ceremony of marriage and regularised the system of Banns which, in part was, to guarantee an arranged minimum period before the marriage and the giving of public notice of the wedding in order to allow any objections. Consent was established during the period of public notice, and eventually with the ceremony. Failure to give “valid consent” could be a consequence of duress, mistake, unsoundness of mind and could serve as a basis for nullifying the marriage.

Feminists have persistently criticized marriage for involving a less than proper contract. Their criticism dates back to at least 1860 when the social activist Elizabeth Cady Stanton publicly criticized the marriage contract during her talk to the America Anti Slavery Society. She observed that even if marriage is deemed “a contract”, only one party (the husband) has actual power (Pateman, 1988, 154). Legal writers did not completely agree that the marriage contract was unlike other contracts. According to feminist criticism: “if marriage were a proper contract, women would have to be brought into civil life on exactly the same footing as their husband” (1988, 154). In this sense, Thomson argued that a contract implies the intentional assent of both parties, but he also wondered, “can even both the parties, men and women, by agreement alter the terms, as to indissolubility and inequality, of this pretend contract?” (Thomson, 1992).

In fact, as long as the social custom and law failed to allow the possibility for women to have autonomy within marriage, one party was stronger than the other one. Even in those situations in which men did not exercise their dominance over their wives’ freedom that was merely related to the former’s willingness and was therefore contingent. A wife’s social pleasures depended on the goodwill of her husband and, as Pateman noted, women’s sexual pleasure was also submitted to this despotism (1988, 160).

In Great Britain a wife’s personal legal responsibility for the marriage contract was recognized by Parliament only in 1935, but with the legal restrictions to changing “the essentials” of marriage. This implied that the relation of obedience cannot be legally changed (1988, 166). Moreover, as Feminist critics pointed out, “unlike other contracts, the marriage contract cannot be entered into by any two (or more) sane adults, but is restricted to two parties, one of whom must be a man and the other a woman” (1988, 166). Therefore, gender difference is an aspect of the status of the parties involved, which has to be present within the marriage contract. Gender difference would not be considered relevant if marriage was a proper contract (1988, 167). According to Pateman, “men exercise their masculine capacity for political creativity by generating political relationships of subordination through contract” (1988, 187). The marriage contract warrants legal access to some sort of sexual “property” as long as the husband is seen as “owning” it.

In the modern age, according to Kant, marriage could be defined as a contract of sexual use between two persons who have the reason and capacity to act according to universal moral laws (1988, 168). Historically, in many countries the spouses/partners duty to have sex with each other was a moral contractual obligation. In England, when a woman was raped within marriage it was not possible to terminated a marriage contract until recently. Before 1700 there was no divorce (Wolfham, 1985, 157), but in 1857 it was granted by a private Act of Parliament. Until the 1857 Matrimonial Causes Act women could not escape a brutal husband (Pateman, 1988, 283).

2.2 Marital rape and early feminist critique: the right of women to control their bodies

From the beginning of the nineteenth century, early feminists’ requests for women’s rights to maintain full control over their bodies and fertility, raised the issue of consent in marital sexual relations, especially regarding contraception and abortion. The dominant masculine view that consent was not required emerged from the lack of regulation on marital rape. The legal construction of male heterosexuality constituted “the norm of commoditised sexuality” (Collier, 1995, 168). Women were the victims of the mythology of virility and, as Richard Collier notes, “the judges who pronounce on the bodies of women and men in these cases paradoxically testify to their own vulnerability and to the empowerment of a male subjectivity constituted through the “natural” discourse of male sexuality!” (1995, 168).

The first wave of English feminism was triggered by John Stuart Mill and his wife Harriet Taylor who when they married (1889, 3) directly condemned marital rape as a disgusting practice that was crucial to the subordination of women. It is Harriet Taylor who first drew attention to a possible link between women’s property rights and the nature of violence within marriage. In particular, they argued that if a
woman had property, her husband would show her respect and, if she earns money, she would be able to leave a violent husband easily (1988, 160). John Stuart Mill was one of the exceptional men who supported the feminist movement and put his approval into practice. Indeed, some months before he was married he rejected the legal rights that he would have obtained as a husband, therefore clearly expressing his disapproval for the existing marriage law (Pateman, 1988, 161).

In the nineteenth century, women started to argue for their right to be physically autonomous within marriage, even though this mostly depended upon the discretionary judgment of a male magistrate (Hunter, McGlynn, Rackley, 2010). In fact, according to the Matrimonial Causes Act of 1878 (MCA 1878) (Cornish, Clarke 1989, 382-398) the husband’s authority over his wife’s body gave him the right to reprimand her physically (1989, 169). As Lyndon Shanley noted “a husband’s repeated abuse of his wife, no matter how severe, was not considered as serious an offence against marriage as a single instance of wife’s infidelity” (1989, 170). The MCA 1878 Act did not give the right to women to leave their husbands, but only to appeal to the court to be allowed to do this: “without such a decree, a battered wife might leave her husband, but in doing so she would be guilty of desertion” (Shanley, 1989, 174) therefore losing her children and her maintenance. The Summary Jurisdiction (Married Woman) Act of 1895 expanded the MCA 1878 Act allowing women to apply to a court of summary jurisdiction for maintenance and custody of their children when their husbands were “persistently cruel” (1989, 174).

The British essayist Elmy Wolstenholme (1880) observed that the Criminal Code defined rape as the act of a man “having carnal knowledge of a woman who is not his wife”, and protested against the injustice of married women’s sexual subordination to their husband. This definition of rape was, according to her, “a degradation of every English wife to the legal position of the purchased slave of the harem” (1880/2010, 10). The main marriage law reform campaigns of Victorian Feminists (1989, 189) insisted on woman’s suffrage and on the principle that being a woman should make no difference in the ascription of both public and private roles and rights. In the same period, American feminists Emma Goldman and Victoria Woodhull also argued that there should be no distinction between rape outside of, and within marriage, in connection to a critique of marital rape to promote women's freedom and sexual pleasure.

However, in 1880 as Wolstenholme noted the Anglo-American legal system was not prepared to discuss marital rape and there were only a few isolated voices (Shanley 1989, 156). As sexual access was deemed to be part of the marriage contract, marital rape was not legally recognizable. Hence, a woman could not leave her husband because he had forced her to have a sexual intercourse with him. Even though the feminist approach was starting to draw attention to women’s situation within marriage, the Victorian marriage law reformers did not promote a substantial restructuring of family life (which is prerequisite for achieving justice in marriage) (1989, 156). In fact Victorian feminists “simply asked that married women be given equal legal status with men in both the family and the state” (1989, 184).

2.3 Marital rape criminalization in UK

The idea that there are husbands’ rights and wives’ duties regarding sexual intercourse has become less commonly accepted as the concept of human rights has developed in the international field. Feminists worked constantly to criminalize rape both in marriage and in long relationships because it has been recognised as the most common form of rape (Jackson, 1994, 183). Indeed, women are still raped predominantly by men they know. As the British Crime Survey (BCS) (1996, 344) observed there is a lower percentage of rapes that are committed by strangers (8%). Approximately half of rapes reported (45%) were committed by men who were victims’ partners when the incident occurred (2009, 6). The percentage of sexual assaults committed by acquaintances (28%) was high too. The recent British Crime Survey 2003 observed that “domestic violence forms the largest single category of violent crime – 20%. Home Office figures suggest 25%” (Kennedy H, 2004, 172).

However, only recently (namely in December 1993) the United Nations High Commissioner for Human Rights (HCHR) established marital rape as a human right abuse, mentioning it within the Declaration on the Elimination of Violence Against Women. Despite the positive tendency towards the criminalization of marital rape, it is still a dominant form of sexual violence that has received relatively little consideration from social scientists, the criminal justice system and society as a whole.

The URSS (1922/1960) and Poland (1932) were among the first countries to criminalize marital rape, whereas North Carolina was the last to do that in 1993 (however, in comparison there were less reported marital rapes there) (Kennedy R, 1999). Although not being amongst the first countries to do it, England and Wales recognised marital rape as a crime in 1991 in the popular case of R v R by the Appellate Committee of the House of Lords. As Lovett and Kelly noted “marital rape was recognised as a criminal offence in 1991 and male rape in 1994” (2009, 2).
In England, it has been estimated that rape is usually reported directly to the police and it can also be made via a Sexual Assault Referral Centre (SARC). These services have been put together since 1986 but they are becoming popular across England & Wales since 2000 providing “forensic examinations, medical assistance, immediate crisis support, advocacy and counselling. In areas where there is no SARC, forensic services may be undertaken by local doctors or private contractors, and the availability and quality of provision is more variable”(2009, 2). The frequency of marital rapes varies in each legal and cultural context. In the UK even though it has been subject to condemnation marital rape still occurs frequently.

Police, lawyers and judges often deem legal prosecution inappropriate in marital rape cases because it might “accelerate the disintegration of the relationship or damage family unit; however inappropriate it may be, they often see their role as helping to preserve the marriage” (Kennedy H.,1992, 84).

According to the statistics circulated by the “Rape Crisis Federation”, in the UK the most frequent rapists are husbands, partners, ex-husbands, or ex-partners. A first attempt to put a husband on trial for marital rape was R v Clarke [1949] 2 All ER 448. However, R v R in 1991 was the first case in which the marital rights exception had been requested as far as the House of Lords was concerned, and it followed three other cases since 1988 where the marital rights exemption was upheld. The principal judgment to reject marital rape was given by Lord Keith of Kinkel though unanimously approved. In R v R, R’s appeal was dismissed and he was convicted of the rape of his wife. Despite the fact that marital rape has not been penalized for a long time in the UK, it is clearly a severe form of violence against women and worthy of public attention. Research to date indicates that women who are raped by their husbands are expected to experience multiple assaults and often suffer severe long-term physical and emotional consequences (Mahoney, Williams, 1998).

2.4 Sexual history evidence: the ideal rape and the illogical relationship between “unchaste women” and the lack of consent

As Aileen McColgan (1996) points out, an earlier concept of “ideal rape” identifies those situations in which the victim has a “chaste” standard of living, the rapist is a stranger who physically hurt her, and finally she has quickly reported the crime soon after it happened. However, this “ideal” type of rape coincides with few cases.

In R v Buttolph, Buttolph who was a village policeman was charged with the rape of a professional dancer. In this case, “the defending counsel spent a considerable length of time putting questions to the complainant that related to her sexual desires and her subconscious longings, reflecting the assimilation of psychoanalytical theory in the court room procedure” (Edward, 1981, 113). The Defence Counsel constructed a picture of the complainant as a fantasizing and masochistic female who could make false accusations against men for her unchaste character. According to the defence Counsel, “her claim that she was raped at gunpoint by a masked man could be what she would have liked to have happened” (113). This attempt to discredit the complainant constitutes the basis for an unfair trial and has its origin in the prejudicial construction of a female sexuality which fits with the “ideal” type of rape.

Adler notes that the pervasiveness of the notion of “ideal rape” has had a great effect on the idea of victim’s credibility during the twentieth century. One of the most relevant factors of the “ideal rape” is concerned with the (sexual) “decorum” of the complainant. In fact, as observed by Aileen McColgan, up to 95% of defendants charged with rape have been accused by women who were able to claim good sexual reputation during the trial (1996, 281). By contrast, in those situations in which the complainant and the offender knew each other, the courtroom focuses more on the examination of which life style the woman involved had before and after the unfortunate event than on the rape trial (1996, 278-279).

This means that the classical approach in common law has considered appropriate that a complainant's sexual history is investigated in order to pursue evidence of 1) her credibility, and 2) her consent (1996, 280). Women deemed “unchaste” were more likely suspected of telling lies than those supposedly having a “chaste” sexual life. The “unchaste” woman was more easily assumed to have consented to the sexual intercourse rather than to have been raped. These assumptions have long represented limitations to the possibility of obtaining a fair trial. Despite the absence of any logical reason to presume a direct relationship between sincerity and chastity, the common law system has assumed such a link whenever the sexual history of a victim of rape has been under examination. Hence, women involved in rape cases have been more likely to receive appropriate protection in law when recognised to have a good sexual reputation, and when promptly reporting the crime. In all other cases assumptions have been made about women’s lack of candidness.

In cases of marital rape, in particular, it was supposed to be more likely that a woman reporting such crime was just attempting to escape accusations of infidelity (1996, 280). Such assumptions were adopted even in the absence of any logical reason that supported any connection between a woman
having been more or less faithful to her partner and her account of the reported sexual offence being more or less trustworthy. In fact, the number of verified falsely reported rape cases is extremely low (2000, 280). Therefore, Aileen McColgan invites us to reflect on the following question: “Is there any logic in the assumption that “unchaste” women are more likely to lie, in relation to sexual offences, than are others? No evidence has ever been proffered in support of this notion, although as recently as 1976 it was accepted by the Victorian Law Reform Commissioner in the Rape Prosecutions (Court Procedures and Rules of Evidence) report” (2000, 281). There is evidently no logical reason supporting the assumption that a woman’s past sexual behaviour determines her general credibility. Despite this, according to the English legal system adultery could be deemed relevant in proving a woman’s integrity within and outside the marriage. Such legal assumptions were the result of a generalised prejudicial perception of women in society. During the nineteenth century, at least within the so called polite society, it was common practice to associate women who engaged in extra-marital sex with mental abnormality, even locking them up as lunatics in those unfortunate cases in which children resulted. It was a characteristic of the Victorian approach to female sexuality to accept the general distinction between “good” and “bad” – i.e. between asexual and sexual – women:

Good women were virgin until married and medical writings of that period distinguished between 'the majority of women [who] (happily for society) are not very much troubled with sexual feeling of any kind', and 'low and vulgar women' who derived pleasure from sex: ‘(a)s a general rule, a modest woman seldom desires any sexual gratification for herself. Women suspected of 'nymphomania', together with those who admitted to indulgence in masturbation, could be cured by the excision of the external part of their genitals (2000, 284).

Women were detrimentally and unreasonably perceived as passive and subordinate to men in both social life and the contract of marriage. This raises questions as to, how these prejudicial assumptions affected the trial? In particular, the lack of chastity – and therefore, the lack of a characteristic which would have contributed to define a woman as “normal” (2000, 300)12 legitimated a prejudicial approach to the investigation of the issue of consent which lacked logical reasoning. In R v Bradley [1910] - an appeal against a conviction for rape introduced sexual history evidence to show that they were previously acquainted (2000, 66). Evidence relating to a prior relationship between the defendant and complainant continued to be admissible. In the late nineteenth century extra-marital sex was much less commonly engaged in by women than it is nowadays and hence subject to extreme social and moral condemnation. In light of this condemnation the link between past sexual history per se and the likelihood of consent seems more legitimate. However, “in these changed moral climes” it is logical that a woman being perceived as sexually active by juries will not be harshly judged as a result In this sense, McColgan observes:

Could it be that there is in fact a logical link between past sexual history per se and the likelihood of consent and that, in these changed moral climes, women who are perceived as sexually active by juries will not be harshly judged as a result?(2000, 285)

Rather than the “probative credibility (McColgan, 2000, 281) the complainant’s morality was put on trial, and instead of considering “the truth-value of a witness’s testimony” (281) attention was paid to the “moral credibility to his or her standing as a person”( 281). In this sense, the sexual history evidence was used in the past to examine the moral behaviour of the complainant in cases of rape although – as we analyze in detail in the next chapter of this work – it could not contribute to the verification of the credibility of the victim. Defining “moral behaviour” was just a way to require certain kinds of stereotypical behaviour from a woman. In any case, the legal admission of sexual history evidence leads to the acceptance of the idea that “unchaste” women are more likely to give their consent to a sexual intercourse.

In some case, jurisdictions instituted law reform to limit cross-examination about a women’s sexual history. In particular UK legislations “too the law was changed but the judiciary was left with discretion as to when such questioning should be allowed. Sentencing guidelines were issued to prevent courts from dealing with rape as they would theft of a bicycle or minor assault” (2004, 171). The debate started by Sue Lees in Carnal Knowledge was thought to preclude the use of invasive and inappropriate cross-examination of sexual history. This debate highlighted the prejudicial way in which the courts could ask about the past sexual history evidences leading to the government introducing new statutory law to restrict cross-examination in rape cases. Recent legislation has eliminated the traditional obligation of corroboration by an independent witness and has changed the language of the direction of the jury to draw attention about the complainant’s declarations.
Despite these changes the conviction rate for rape in the UK has been still estimated as lowest for all grave crimes “over the past decade the numbers of reported rapes have doubled but only the 7% of complaints ever lead to a conviction. Very few of the remaining 93% proceed to court, because a huge number are withdrawn […]. Of the cases that proceed to trial the conviction rate is 41%. The generalized conviction rate for crime across the board is 73 %. So why is the conviction rate so low for rape?” (2004, 171). Law leaves a woman undefended against unwanted sexual relationship of previous lovers. Even though changes have occurred to improve women’s sexual history legislation the way in which the cross-examination is still conducted has been recognized as tough by women.

3. Marital rape and contract law: the construction of objective rationality

3.1 The language of law

As we have seen in the sections above, the contract of marriage has long neglected the need to protect women’s rights. In the following section the issue of marital rape in law is discussed in more depth from a philosophical point of view which engages in an epistemological debate on the concepts of objectivity and rationality.

It will be shown, how a Wittgensteinian view would question the traditional legal approach by dismissing the current conceptual framework in which we necessarily need to look for objectivity and completeness in law for there to be justice in law. In fact, Wittgenstein criticizes those ways of proceeding in philosophy that have a tendency to simplify the knowledge of reality by claiming to describe it objectively through one sided pictures\textsuperscript{(3)}(PI, 593). Wittgenstein promotes a move away from the tendency – which he considers dangerous – to build absolute theories which are meant to apply to a variety of different and specific cases, and solve them by means of just one kind of approach.

A theory that protects the concept of law as dogmatically constrained and which has been always regarded as an unquestionable\textsuperscript{(2007; 2010), actually excludes a multiplicity of ways in which law can be used. For instance, understanding “gendered lives” as they are experienced daily involve the consideration of the details of every life and context, while not ignoring the structures which produce injustice and inequalities for women. Thus a Wittgensteinian approach can clarify the use of law within the contract of marriage and also promote an investigation into different perspectives on law, instead of focussing on it supposedly being objectively correct or incorrect. As Wittgenstein observed, clarifying concepts involves looking at the different activities in which they are used. These kinds of activities are things people “do” with their language. As Patterson notes, according to Wittgenstein “the things we do with language – these activities – are all part of the “grammar” of concepts”\textsuperscript{(1988, 361). Consequently, to clarify a concept means to understand its grammar. Indeed, “grammar tells us what kind of object anything is”\textsuperscript{( PI, 373).}\textsuperscript{(34)} Any attempt to research legal rationality and objectivity in law is a process of construction of one determined reality. This excludes the possibility of addressing particular types of injustice for example, the elimination of the past sexual history evidence in rape jurisprudence.

3.2 Law and laws: male dominance as a construction in law

It is important to recognize that male sexuality has been predominantly constructed and accepted as driven by an “essential natural force” (Collier,1995,148) and this assumption has been accepted as indisputable within the institution of marriage.

This work discusses law’s apparent neutrality and objectivity making explicit how the structure of legal discourse and legal rules implicates dogmatic power. According to Lisa Frohmann and Elizabeth Mertz “by dismissing subordinate persons’ accounts as non-realities, legal representatives remove the possibility of addressing particular claims of injustice while simultaneously allowing the court to appear sympathetic to the notion that injustices generally are offensive and should be redressed” (1994, 845). Legal traditional and patriarchal discourse excludes the voices of women and the challenge for legal reform is to integrate the voices of oppressed persons and to identify the legal areas in which it is important to operate.

Epistemologically, the claim of this being a “scientific, objective and rational fact” made by those supporting the aforementioned reasoning constitutes the hierarchic discourse which has proved justification for marriage rape within society, thus bringing disorder not only within the institution of marriage but also in the use of common language in society. In fact, not only law has been concerned with ensuring that marriage is a heterosexual institution, thus excluding homosexual couples; but also it has considered the way in which the genital interaction\textsuperscript{(3) (1995,130) should happen, therefore ascribing specific gendered roles within the community on this basis. It should not sound surprising therefore that homosexual relationships are denied within the institution of marriage, and the mythology of virility has long justified rape within marriage, and be seen as “natural”. For example, according to Kant thought, one of the most popular philosophies of the modern era, “homosexual relations are contrary to nature and, as such, degrade a person “below the level of animals”, thus dishonouring his or her humanity” (Papadaki,
2010, 290; Kant, 1960, 170). In this way, the hegemonic sexist approach in marital law can be summed up with the imposition of sexually active males as symbols of a fundamental “natural” force (which has its counterpart in a similarly constructed idea of passive woman).

Most researchers agree that rape within marriage is an act of violence by which a husband tries to impose dominance and control over his wife. Even where these studies do not show a picture of a husband-rapist according to US researchers “these men are often portrayed as jealous, domineering individuals who feel a sense of entitlement to have sex with their property”. Given this, women seem to be principally at risk of being raped by their partners under some conditions, one of which is the profile of the rapist.

As Richard Collier (1995, 151) noted the difficult question of what a “true” marriage intercourse involves has been central in succession of cases concerning the formation of marriage. In particular, the failure to attribute significance to the issue of a married woman’s consent or lack thereof resulted in a common law position which seemed to suggest that sexual intercourse within marriage was a “natural” pleasure for the “ordinary” man (1995, 158) whether or not the wife consented, which to all modern interpretations would be a common law condemnation of the act which we understand as rape. If the goal was to challenge such a legal approach, one possible resource was the so-called “indeterminacy critique” (Singer 2008, 139) which has been discussed earlier within the critical legal studies in the United States during the 1980s. Within the feminist jurisprudence there are discordant voices about the possibility to consider “indeterminacy” as the best answer to the debate on objectivity and rationality in law. There were, indeed, continuous accusations that the critiques of objectivity were “relativistic”, and that their only interest was to annihilate what was deemed improperly objective from a feminist view.

The legal realists attacked the idea that law is neutral and objective in the 1920s, drawing upon an even older tradition of jurisprudence dating back to the American jurist Oliver Wendell Holmes (1881) who served the Supreme Court of the United States from 1902 to 1932 (Epstein, 2004). Human rights advocates, who have forged their identities through fights against repression and dictatorship, generally have rested their claims for authority and legitimacy on the charge that existing authorities have violated universal norms. After the Second World Word the scope of International Human Rights has frequently been limited to guarantee some fundamental and universal freedoms and only ultimately those “social rights” which in a contemporary society are relevant to improve a new legal landscape (McColgan, 2000, 306). The language of human rights rests heavily on notions of universality which are similar to those that the critique of objectivity targets.

A Wittgensteinian approach to law shows that the language of law is not something which we can define as neutral, objective, and rational. However, despite not being a self-executing system of rules, “it is not entirely indeterminate either” (William, 2011, 375). In particular, according to Wittgenstein the meaning of our language is related less to logics than it is to the form of life which language itself is a part of. It is assumed here that law is part of language. The key point, from a Wittgenstein perspective, is that certainty represents a statement about the role that a rule plays in one’s form of life, not a statement about some definitive, rational, objective truth all rational beings are, or should be, automatic in agreement with.

A chapter on objectivity and rationality could obviously bring the reader to think of questions such as; What are “objectivity” and “rationality”? Why do we need them? Why do we need them for law? However, readers of this paper who are seeking explanation on these questions will definitely be disappointed. A Wittgensteinian view, in fact, denies that a general or theoretical account of law contributes to the understanding of the meaning of “objective and rational” laws. In the context of gender, the key problem is that even conceding that objectivity is possible, courts and legislatures fail to live up to their own stated standards of objectivity in how they treat women. From the perspective of gender, all we need to show is that current applied laws do not live up to their own claims of objectivity.

4. Objectivity and Rationality in Wittgenstein: seeing rape as rape

4.1 Interpreting vs. seeing

The traditional legal philosophies are inclined to search for essential facts. Wittgenstein would wonder whether they are actually seeing something different in each issue they discuss or merely see the same thing and interpreting it in one way or another.

Wittgenstein makes a clear distinction between the words “to see” and “to interpret”. As Wittgenstein explains, interpreting is an action. When we are interpreting we are acting by following our opinions, which could be different from others’. This distinction is relevant since, as Matoesian has maintained, “rape and sexual violence against women are reproduced and legitimated through culturally mediated interpretative devices which justify, excuse, and glorify male violence against females” (1993, 13).
Rape myths and patriarchal thought provide the linguistic rationalization and interpretative framework for assessing the individual cases of rape. The legal treatment of rape cases are surrounded by “myth”: that the assailant is always a stranger; that physical injury can always be documented; and that once a woman expresses her consent to have an intercourse such consent is permanently valid as if the parties had stipulated a contract. In this way, rape has often been legitimated by blaming the victim – just as we have previously seen while discussing the use of the sexual history evidence. Conversely, when we see a legal case of marital rape in one way instead of another, we are not actively producing an interpretation of it. Rather our seeing it in such and such way is an expression of our experience.

This differentiation between “seeing” and “interpreting” can be discussed in more specific terms by making reference to Wittgenstein’s Philosophical Investigations in which the aspect of seeing is a dedicated theme. An often mentioned example taken from that work is the duck-rabbit puzzle figure (Figure 1). It consists of a drawing that can be seen either as a duck or as a rabbit depending on which direction one looks at it. The sudden awareness of the previously unseen animal in the picture is what Wittgenstein considers “the dawning of an aspect”.

![Figure 1: The duck-rabbit puzzle figure](Image 254x489 to 355x589)

To see the image both as a duck and as a rabbit is to see two different aspects of the image. When we normally speak of seeing in our everyday language-game, we are not inclined to say, “I see the picture as a duck” but rather we simply say, “I see a duck”. Looking at a friend, we do not tell ourselves “she might be seen as a human being”, but simply “I am looking at my friend”. To deal with the aspect- dawning Wittgenstein does not focus on how the images can be interpreted. Rather, he focuses on the perspicious view that people make when they are experiencing the dawning of an aspect. In this way, it makes as little sense to claim that one aspect of the concepts of objectivity and rationality is the “true” aspect as it does to argue that the duck in the duck-rabbit figure is what the figure is “really” representing. However, the fact that there is not one “true” aspect such as “objectivity” or “rationality” does not mean that the meaning of these words is relative. From a Wittgensteinian view, the argument presented here is not that the philosophy of law is non-normative, but that the normative tendency of philosophy of law can lead to aspect-blindness. If the legal philosopher defends one aspect of objectivity and rationality as normatively superior at all times and in all places, then he or she is aspect-blind. The point is to know which aspect of legal philosophy should be used in which circumstance.

4.2 Using different aspects of objectivity/rationality in marital rape jurisprudence

To “see” objectivity and rationality “as” means more than simply respecting others’ interpretations of such concepts. It means being able to use different aspects of objectivity and rationality and to know which situations require them to be used in a specific way. By focusing only on different aspects of objectivity and rationality, legal theorists have been trapped into a debate about which is correct. Instead, taking a Wittgensteinian view, legal theorists should be asking how a change that occurs in the aspect of objectivity and rationality an individual is using, would affect how they think and act. This shift in the questions asked would have significant effects on how legal theory is practiced in rape jurisprudence. Moreover, the legal philosopher, through a perspicuous representation of the different aspects of objectivity and rationality being used in the debate, might be able to demonstrate how the debate is to a large extent the result of confusions between the parties involved. Each side experiences aspect-blindness with respect to the way in which the other side sees objectivity and rationality. Women could examine the different aspects of objectivity and rationality, see a new way of looking at the debate, and propose an alternative way of seeing objectivity and rationality.

The theory-centered approach to law poses problems and seeks solutions in universal terms. In this way a culture that favored patriarchal theories has provided both rapists and “normal” males with vocabularies and motives with which to rationalize, make objective and justify their sexually aggressive behavior, without considering that women see rape as sexual violence even when deviant interpretations
are imposed by law. While conducting their intellectual and practical studies in various fields, legal theorists have assumed that exclusively rational and objective interpretations of problems exist. However, the work of philosophers such as Wittgenstein has made a move away from this theory-centered approach to law possible. Legal philosophy can once again see itself as a practical activity.

4.3 Seeing women as victims of violence: common law and how to use entrenched rights.

“Seeing rape within marriage as violence” is the first step in acknowledging a crime during a trial. This step is crucial in order to identify which part of the legislation judges should apply in the trial, distilling it from the common law and/or using “entrenchment rights”. The courtroom experience and examination is an expression of how an event is interpreted from a legal point view and the result of this view is expressed by choosing one piece of legislation instead of another (Matoesian, 1993, 278-279).

In the past, sexual history evidence was used to examine the moral behaviour of the complainant in cases of rape, although it does not contribute to verification of the credibility of the victim. At present, a rape shield against using the sexual history evidence has been promoted by the Sexual Offences Act 2003, and by entrenched international rights borrowed from other legislations. As investigated in the second part of this work, the use of such entrenched rights has been a support in seeing rape as violence in those cases in which the national law was “blind”.

It has been beneficial to use entrenched rights (2012, 213-214) even though they can exclude common law from starting democratic reforms. According to McColgan, this exclusion has been noted “even in those cases where judges confine their attention to procedural matters such as those relating to the admissibility of evidence” (1996, 290). However, the use of entrenched rights is based on the premise that these international rights have compatibility with the “fundamentals principle” of the common law background. When there are contradictions between them it is necessary to decide which has precedence. For example, when the European jurisdiction has been used to support the UK law, one of the most frequent questions was:

What might be expected in the UK for the implementation of the Human Rights Act 1998? (Larry 2012, 291)

The use of entrenched rights needs to consider the context in which the borrowed jurisdiction has been implemented. For example, with the European 1951 Convention on Human Rights, it is important to remember that it was drawn up after the Second World War when Europe was scarred by Nazism. Within this historical context the original scope of the Convention was to guarantee essential freedoms, more recently it has come to cover some “social rights” such as, minimum working social conditions. It is important to consider whether the application of other contextualized jurisdiction in UK would actually be useful to improve its legal landscape, and whether “this same approach to rights is acceptable in the UK in the late 20th century” (2000, 306).

According to McColgan, with the Human Rights Act 1998 social rights have been marginalized (1996, 306). Within the Human Rights Act 1998, both article 6 and 14 support women as victims of violence in the determination of the criminal charges. In England and in Wales the matter of sexual history evidence has been the subject of criticism. Even though the traditional common law position is that sexual history was generally irrelevant to consent, there have been requests to demonstrate that the complainant was not a prostitute or person with immoral character, and that therefore sexual history evidence was relevant to the issue of consent.

In the Twentieth Century judges have recognized that the admissibility of details relating to the chastity and moral character of the complainant has led to difficulties for victims of rape. These difficulties have been recognized openly by few judges since 1800. For example, RvClarke (1817) was an example in cases of attempted rape authorizing the cross examination of the prosecutor for chastity. In this case Mrs Justice Holroyd asserted “the defendant is such case may impeach her character for chastity by general, but not by particular evidence, thereby allowing cross-examination as to general fact” (1981, 68). Facts describing general evidence were legal but specific evidence was not admitted.

Today, although attempts have been made to enrich the UK legislation with the European one, this can leave women vulnerable as there is a trend to leave difficult decisions to the judge (2000, 254). In addition, the Human rights Act 1998 does not directly express a rape shield in the case of the sexual history evidence. In fact, we can observe that:

it is hard to image that any Human Rights Act 1998 challenge to the legislation could found a declaration of incompatibility: it does not require the exclusion of any evidence which is regarded as being relevant to an issue at trial (McColgan, 2000, 291).
The reform of British law through the incorporation of Human Rights law could reduce the situations under which evidence of complainant sexual history could be introduced. According to Clare McGlynn in those cases in which it can be deemed the sections 41-43 of the 1999 Act contravenes the defendant’s right to a fair trial, a possible step could be to consider the compatibility with sections 3 and 4 of the Human Rights Act 1998 (2000, 296). In this case, it would be necessary to consider the justification for the restrictions, and the balance of interests among people involved. Investigations of rape cases should particularly try to find an equilibrium between providing an impartial trial for the defendant and defending the rights of the victim. McGlynn noted that as one contrasts the legislation in Canada and UK, some differences emerge that could be useful in order to improve the latter.

It is worth comparing legislations if an improvement is to be achieved. However, it has not been easy to say with any confidence how British law could be affected by Human Rights Act 1998 when it is used. In fact within the national framework there was a wide space to determine what evidence was relevant because they had not been determined expressly. In particular, for the sexual history evidence:

The right to cross-examine witnesses, though not subject to any exceptions on the face of Article 6, is not absolute but is intended, rather, to ensure equality of arms between defendant and prosecution. It is clear, for example, and has been reiterated by the European Court of Human Rights on countless occasions that Contracting Parties have the right to establish their own rules of evidence, though these must be within reasonable have the right to establish their own rules of evidence, though these must be within reasonable parameters (McColgan, 2000, 296).

According to McColgan the European Court has reiterated on every occasion that rules of evidence are a matter for national law, subject to the obligation to provide a fair trial and the wide discretion afforded thereto. Therefore “according to the Commission, the national authorities had wide latitude to determine what evidence was relevant” (1996, 297). It is not possible to say that there are not any benefits when incorporated European right are used (1996, 304). However, if such an incorporation is not clearly expressed it would be unrestrained by the margin of error and responsibility. Therefore as McColgan observed “entrenched rights must not be regarded as a panacea against the ills of government” (1996, 304).

In fact, entrenched rights when adopted differently every time, have limited impact on the national jurisdiction and political action to secure substantive protection to Women’s Rights. Sometimes Parliament has preferred to use its common law because when it did not, there was not the possibility to predict in which way the European law could be applied in beneficial manner for women. In this sense McColgan said “whereas Parliament has attempted to regulate the introduction of sexual history evidence, judicial shortcomings in this matter having become evident prior to the passage of the Sexual Offences (Amendment) Act 1976, judges have reacted by preferring their common law (and at times highly questionable) notions of relevance over the expressed will of the Parliament, and in doing so, have rendered the 1976 provisions largely ineffective” (2000, 308). To the extent that the Human Rights Act 1998 will give judges the power to intervene in the face of attempted amendments in this other areas, the outcomes are unlikely to benefit women (2000, 309). It seems that for achieving substantive equality, entrenched rights are a good mechanism but it is not the unerring one.

Comparative studies are having significant role in the investigation of criminal law issue and rape jurisprudence. However, it is usual matter that international law does not take liability on private matters. In this sense, in the early 1990s Feminists explored the ways in which international law was structured along a divide between public and private legal issues. Within the discipline itself, a distinction is made between issues of international concern and those that are properly taken into account within the domestic jurisdiction. Public/private divisions are additionally evident in the distinct, and legal recognition of, public international organisations (such as the UN) and private (non-state) actors; or between state-sanctioned international human rights violations (subject to international legal regulation) and those committed by private, non state-actors (beyond the reach of international law). Feminist noted the normative dimension to the gendered division between the spheres, the valuing and privileging of the (male) over the (female) private. The focus on the public and the exclusion of private matters from the remit of international law reinforces as natural a legal system concentrated exclusively on a narrow range of affairs conducted between states that reflects male priorities. The tendency to describe the domestic character of the state as analogous to the patriarchal family, with the state and its government standing metaphorically for the patriarch, reinforces a conception of public and private spheres as coherent embodied spaces. Feminist efforts to challenge the statism of international law may in fact be undermined by its own state-as-patriarch argument. The question about this issue in feminist studies is often been the same: could the understanding of violence against women attempts to collapse the divisions between public/private? According to Buss:
The concept of due diligence, by which the state’s legal obligation to protect its citizen is activated, together with an understanding of violence against women as apart of continuum, attempts to collapse, in effect, the divisions between public/private that characterise the legal recognition of violence (2005, 97).

Whenever an abuse takes place it remains abuse. This can disrupt those abstraction by which the ordering of “structures, processes and identities” is made possible. By focusing on the power relationship between men and women through which violence is enabled and naturalised it is possible to underline the weakens the normative grip of public and private ideology on the perception and application of international human rights law. Implicit in this approach is an argument that having revealed the boundaries that divide and regulate the national legal system from an international landscape of understanding, the next step should aim to extend is aspiration beyond the boundaries in a more inclusive way.

5. Conclusion

This paper proposed to approach the interpretive questions in law from a perspective which is different from those usually encountered in the legal tradition, by challenging the ability of legal reforms to accept or integrate the way in which oppressed persons see rape. In this sense, “by dismissing subordinate persons’ accounts as non realities, legal representatives remove the possibilities of addressing particular claims of injustice” (Frohmann and Mertz 1994, 845). In particular, a Wittgensteinian approach would pay attention to the shape of gendered lives as they are experienced (PI,157) and could not accept just one legal interpretation to address marital law because such a view would neglect the requirements of particular lives, as well as the details of several contexts. With his later work, Wittgenstein has shown that the logical form of propositions is not the only way in which words can be significant. Therefore, routinized modes of interpreting objectivity and rationality in law are not an expression of our internal experience and represent the institutionalized discrimination and legitimating of rape. Differently, Wittgenstein “underlined the importance of possibilities that exist for projecting concepts into the world in different ways” (Patterson 2001, 358).

Traditional constructive legal interpretations suffer the deficiencies of all the external forms of lines of reasoning. However, “there is no way to translate external perspective into legislative value choice. External perspectives do not explain the law, they merely serve as a basis for critiquing it”(2001, 379). The effort made here to analyze the meaning of objectivity and rationality is limited to the context of marital rape. Such restriction was necessary to keep a focussed scope for the analysis presented here, but it allowed the capture of only some parts of a vast topic within the legal landscape.

The general theoretical task of this work has been to stimulate the legal debate in a new way, proposing an alternative to those conceptual views that have generated restricted frameworks around the concept of rape, thus limiting its use in legal practice. Since patriarchal thought provides the interpretative framework for assessing cases of domestic rape throughout the judicial process, it seemed appropriate to begin this work with a preliminary legal-historical analysis of how the law has exerted forms of patriarchal control on female sexuality within the institution of marriage. Based on public domain historical evidence, it has been shown how rape has long been legitimised by blaming the victim. The analysis then focused on how the current treatment of women during the trial may still be prejudicial, especially in those cases in the UK in which evidence concerning the sexual history of the rape victim is used by the courts to question the victim’s credibility.

A new legal-philosophical approach based on an application of Wittgenstein’s thought has been proposed. The value of the proposed application of Wittgenstein’s investigations lies not in their ability to “resolve the empirical issue between the proponents of judgment and their formalist opponents”. (Nelson, 2001, 56) but rather in the expectation that they might “help keep alive questions” (2001, 56). In particular, the questions addressed here have been those of the status of women in the patriarchal ideologies, myths and prejudice against female sexuality which are still reproduced in both the language and practice of law. The expected contribution to knowledge of this work is that of having provided rigorous philosophical ground for the adoption of a feminist legal perspective on the concept of rape, trying to set aside some preconceived discriminating characteristics in the trial, which render it judicial rape.

Overall, the way in which this paper can be read is twofold. It can be read as a critical work analysing how rape shield laws, which prevent the undermining of the victim's credibility, have not yet fully matured with respect to the sexual history evidence in UK law. Legislation such as the sections 41-43 of the 1999 Act reflect the intention to introduce a new regime for evidence in sexual offence trials. Yet, the jurisprudence that followed the Act has failed to promote feminism as a relevant human movement and to
raise gender issues. It has been shown in this work that the 1999 Act is not compatible with the full protection of women’s interests as it reflects anachronistic views. Legal reforms on SIE in UK have failed in their most important task; they have not been able to fight the prejudice and false beliefs which are still deep rooted and interconnected and therefore often allowed to enter the jurisprudence through the “back door”.

The second way to read this work is as a call for action by conducting further philosophical and empirical research to extend the analysis carried out here. Wide-ranging research would allow not only an informed evaluation of the current situation on consent in UK rape law, but also the proposal of reforms, where needed.

To conclude, it is opportune to remind that rape is a kind of violence which affects the functioning of society by profoundly altering the lives of victims. The humiliation experienced by a rape victim on trial is a social problem, and legal initiatives to shield her from further oppressions after experiencing rape are still in their infancy.

In order to improve the situation about the sexual history evidence a wider, radical change is needed. In particular, the legislation should support a total prohibition on the use of sexual history evidence, the main problem being the prejudicial attitude of society towards it, especially during trial. In this sense, even a rape shield law which promotes judicial discretion can fail to protect the victim of rape during a trial. A radical, absolute rape shield about the sexual history evidence is therefore not a definitive solution. Rather, it can be seen as the initial step that needs to be promoted from a legal point of view in order to encourage respect for the victims of rape and the protection of their fundamental rights.

Given these limitations of a purely legal approach, a philosophical therapy has been promoted in this work. This could lead to a change of attitude towards the concept of rape within society. In order to make effective rape shield provisions, a cultural change must be achieved challenging the traditional rape myths, by educating both public and juries. If justice systems were not influenced by rape stereotypes, prejudicial acquittals based on sexual history evidence would disappear.

Notes

3. The new Act permitted men to be divorced on the grounds of adultery and women to be divorced on the same grounds so long as there was physical violence, incest, rape, sodomy in the marriage.
4. ‘The big change came in 1969, when the Divorce Reform Act was passed, allowing couples to divorce after they had been separated for two years (or five years if only one of them wanted a divorce). A marriage could be ended if it had irrevocably broken down, and neither partner no longer had to prove “fault”.’ For a summary on divorce see: http://m.guardian.co.uk/lifeandstyle/2009/sep/19/divorce
5. The most common assault locations were victims’ homes (29%) and shared homes where the victim lived with a partner (18%). The majority of suspects (77%) were known to the victim.
8. It functioned as a court of first instance, in particular, for the trials of peers, impeachment cases, and as a court of last resort within the United Kingdom.
9. See http://www.rapecrisis.org.uk/
11. As McCollan Aileen, noted ‘women are occasionally prosecuted for false accusations of rape […] Research carried out by police forces in the United States has consistently shown a false reporting rate of 2 per cent or less for sexual offences’ (2000, 280).
12. In particular, ‘Defence counsel to this day draw, in rape trials, on the notion that ‘normal’ women are sexually passive, and that women are either good or bad, madonna or whore.’ Lvi, p. 300.
14. PI, 373, PU, 373 ‘Welche Art von Genenstand etwas ist sagt die Grammatik (theologie als Grammatik)’.
15. As Collier noted ‘specifically, this is a connection of penis and vagina in which male and female can be ascribe very different roles, pleasures and desires and whereby legitimacy is denied to other connections outside this genital economy, for example genital/oral, genital/anal, anal/oral’. (1995, 149).
17. A central aspect of the critique of indeterminacy has been an assertion that the language and the content of legal rules are open to a wide spectrum of interpretations (2008).


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