

Sex and Sexual Violation in the Criminal Law

Findings from a Study into How People Distinguish Sex from Sexual Violation

The Sexual Offences Act 2003 defines various kinds of sexual behaviour as criminal. It prohibits all non-consensual sexual behaviour through crimes including rape and sexual assault. Consent is therefore a key way in which the law distinguishes between sex and sexual violation. This research set out to rethink that distinction. This was explored by conducting interviews and focus groups with four categories of people: lay people; police officers; support workers working with female victims of domestic violence; and caseworkers supporting women trapped in or with a history of street sex work. The purpose of the study was to learn from lay people and relevant professionals about how they understand the concepts of sex and sexual violation, in order to inform the researcher's ideas about how the current law might be improved.

Key findings

- Most respondents valued sexual autonomy, that is, the right of a person to choose what sexual activity she or he takes part in.
- Many respondents identified consent as the main dividing line between sex and sexual violation and the best way to protect sexual autonomy. There was, however, a lack of agreement about the definition of consent.
- Several respondents disclosed sexual experiences which they struggled to classify as strictly 'non-consensual', but which they nevertheless experienced as violating.
- When asked to evaluate specific hypothetical scenarios, respondents brought in a range of contextual factors in order to decide whether the incident was sex or sexual violation.
- There was a lack of consensus as to whether each specific scenario constituted sex or sexual violation.
- Respondents emphasised the need for open discussion and communication in sexual relationships.

Background to the Research

The Sexual Offences Act 2003 defines various kinds of sexual behaviour as criminal. It prohibits non-consensual sexual activity through the crimes of rape and sexual assault. It also prohibits some sexual activity even if everyone involved consents (or appears to consent). For example: sexual activity with children under 16 is a crime even if the child claims it is what they wanted. The same applies to sexual activity with an adult who has 'a mental disorder impeding choice'. Penetrative sexual activity between close family members is also prohibited, even if the people involved are all consenting adults. For each crime a different set of elements has to be proven, and each has a specific maximum sentence available. Therefore, the way that the different crimes are defined can affect how easy or difficult it is to prove that a person is guilty of an offence; and how severely they will be punished if they are found guilty.

The purpose of this research was to reconsider the way sexual offences are defined, and to try to develop alternative legal definitions that could better reflect the way ordinary people categorise incidents as sexually violating. This study was designed to help with that rethinking by engaging with the participants' own ideas, attitudes and experiences.

About the Study

The study consisted of a series of interviews and focus groups carried out in late 2010 / early 2011:

- 18 individual telephone interviews with lay persons¹ (12 female, 6 male).
- 1 individual face to face interview with a lay person (female).

¹ 'Lay persons' here refers to anyone who is not a legal professional. These interviewees were recruited through adverts placed in local media inviting people to take part in interviews about sex, sexual violation and criminal law.

- 1 focus group with 4 police officers specialising in sexual offences (2 male, 2 female).
- 1 focus group with 5 domestic violence support workers (all female).
- 2 individual telephone interviews with caseworkers from a charity supporting women trapped in or with a history of street sex work (both female).

Each interview or focus group consisted of three parts:

1. Respondents were asked how they would distinguish between sex and sexual violation;
2. They were asked to consider some hypothetical sexual encounters and discuss whether and why they would classify them as either sex or sexual violation;
3. They were asked for their views on specific aspects of the Sexual Offences Act 2003.

The respondents did not constitute a representative sample of adults in England and Wales, and the findings presented here cannot be generalised to the public at large. Rather, the purpose of the interviews and focus groups was to open up a dialogue and exchange ideas about how to define sex and sexual violation. Respondents offered a fresh perspective and alternative ways of interpreting the issues that ultimately fed in, alongside several other strands of research, to proposals for a new legal model of sex and sexual violation.

Findings

Sexual Autonomy and Consent

Most respondents thought that sexual autonomy, i.e. having control over one's own sexual activity, was important. They did not want anyone to be forced to engage in sexual activity that they had not chosen; and (provided everyone involved was a willing participant) people should be free to engage in whatever sexual activity they wished. The finding that autonomy, or choice, was so central for respondents raises questions about how to tell whether or not someone is 'choosing' to engage in sexual activity.

When asked 'what is the difference between sex and sexual violation?' a majority of respondents answered that consent was the dividing line. They defined sexual violation as non-consensual sexual activity. For these respondents consent was seen as the best way of protecting sexual autonomy.

However, although many respondents agreed that consent was important for distinguishing sex from sexual violation, they had different ideas about what 'consent' actually consists of. Some respondents struggled to explain what they meant by consent. Of those respondents who did attempt to define consent, their definitions varied considerably. If, for example, Alex initiates sex with Sam:

- Some respondents implied that Sam could consent simply by not saying or doing anything, or "letting it happen". By contrast, other respondents felt that giving consent needed to be more active.
- Respondents had different views on whether consent needed to be given in words, or whether it could be expressed through actions and body language.
- For some respondents, if Sam expressed consent (e.g. by saying 'yes') it wouldn't matter what s/he was thinking or feeling at the time. However, other respondents felt this would not count as consent if Sam did not understand what was happening and thus could not give "informed consent". Some respondents also felt Sam's motivation might invalidate his/her consent – for example if Sam was 'consenting' in order to avoid a negative outcome such as Alex being violent or moody.

Consent therefore appears to be an ambiguous concept which was used by respondents in a variety of ways.

Sex and Sexual Violation in Hypothetical Scenarios

Respondents were asked to discuss 4 hypothetical scenarios and to consider whether sex or sexual violation was taking place in each case:

1. A 14 year old has a sexual relationship with a 27 year old.
2. A person engages in sexual activity that they do not enjoy, in order to please their partner.
3. A person engages in sexual activity that they do not enjoy for money.
4. A person has sex with their partner. The relationship is characterised by the partner being controlling, jealous, undermining the person's self-esteem and being emotionally abusive.²

Each scenario produced mixed responses as to whether a person involved had been sexually violated. In each case, respondents tended to bring in a range of contextual factors when deciding whether it was sex or sexual violation.

Most respondents thought **Scenario 1** would constitute sexual violation, however their reasons varied. A few stated that a 14-year-old is never capable of consenting to sex. For many, however, the picture was more complex. A key concern was the age gap between the parties: some respondents felt that a 14-year-old may be capable of understanding what sex is and consenting to it (e.g. with a partner of a similar age), but that a partner who was significantly older would have the power to manipulate and pressure the teenager. Thus, the sexual activity, as well as other aspects of the relationship, was likely to be carried out on the older partner's terms.

Most respondents did not think the sexual activity in **Scenario 2** was a problem, provided the person freely chose to do it. One issue that was important to respondents discussing this scenario was the person's motivation: if they just wanted to do something nice for their partner this was ok, but if they felt like they had to do it or if they were doing it to avoid a negative outcome, it was likely to be classed as sexual

violation. Respondents also stressed the need for open discussion and communication between sexual partners so that they would each know what the other was comfortable with. The domestic violence support workers in particular were concerned that the person should have the "room to say no", and to know that their wishes will be respected. They also felt that wider social expectations might impact whether a person feels able to refuse sexual activity.

Scenario 3 illustrated many of the difficulties of using consent to distinguish sex from sexual violation. Respondents were aware that someone might agree or 'consent' to have sex for money, but that their choice might be limited over the longer term by a range of factors such as poverty, addiction, mental health issues, trafficking, a history of sexual abuse, and controlling partners or pimps. This was most clearly summed up by one of the caseworkers for women involved in street-based sex work:

"A lot of the women that we deal with, they might be consenting to a particular activity but actually if they're out of their heads or if they're being controlled by a pimp or a manipulative partner then that really clouds the whole issue of consent and actually what that means. So therefore what might look from the outside like a consensual activity between two adults is actually a lot more complicated than that."

Some respondents also felt that prostitution was wrong regardless of whether a person freely chose to engage in it, because it was "demeaning" and encouraged men to see women as objects.

Responses to **Scenario 4** were mixed. Some respondents felt that any sex in a relationship like this would be violating. One lay respondent remarked: "the underlying foundation of the relationship would be about control and power. You know, that's the underlying thing in any interaction." Other respondents felt that the sex could still be ok despite the negative aspects of the relationship. For some respondents it depended whether the person was

² Lay respondents were asked to discuss all 4 scenarios. The caseworkers for women involved in sex work were only asked to discuss scenarios 1, 3 and 4. The Police Officer focus group only discussed 3 and 4. The domestic violence support worker focus group only discussed 2 and 4.

agreeing to sex *because* of the controlling behaviour or *in spite* of it.

Each scenario resulted in a range of responses as to whether it was sex or sexual violation, suggesting there is a lack of consensus about where the distinction should be drawn. Some respondents commented on this: The domestic violence support workers discussed how women they supported didn't always recognise what was happening in their sexual relationships as abusive, and were reluctant to use the word 'rape'. They also felt some perpetrators didn't realise they were being abusive. Police officers suggested that more public education on rape and consent would help to create a shared understanding across all sections of society about what kinds of sexual behaviour were or were not acceptable.

The responses to the four scenarios suggest that, although consent was key to distinguishing sex from sexual violation in the abstract, it was less significant when trying to make sense of specific hypothetical cases. Instead, respondents relied on a range of contextual factors to decide whether an incident was sex or sexual violation. When respondents did refer to consent, deciding whether someone consented and in what circumstances their consent should 'count' was a complex and challenging process.

Personal Experiences

Several interviewees also disclosed sexual experiences from their own lives which they struggled to classify as strictly 'non-consensual', but which they nevertheless experienced as violating:

Rosa³ described a situation when her partner came home "in a foul mood". Knowing from past experience that he was likely to become violent if she didn't find a way to defuse his anger, she initiated sex with him. Although Rosa initiated the sex, she felt like she had been violated: "I wasn't consenting. I had no choice."

Isobel spoke about an incident from her past where she went to a man's flat after meeting him several

times in a bar. The man pinned her down, undressed her, then sexually penetrated her. Isobel did not fight back; in her words she "consented" and "complied" in order to avoid being hurt or raped. However later in the interview she said that she did not consent, and that she thinks what the man did to her is rape. Isobel never reported the incident to the police because she "didn't think anyone would listen to [her]".

Georgia explained that she was raped several times by her former partner. He would do things like driving erratically or threatening their children in order to intimidate her. For her own and her children's safety, she did not resist whenever her partner demanded sex: "Putting up with or going along with it actually made other things easier. And then you kind of regain a bit of control, as if he hadn't completely broken you." After she ended the relationship her partner stalked her, made intimidating telephone calls, "trashed her house", threatened to take her children away and threatened to kill her. This sometimes made her wonder if she would be safer if she was still in the relationship. Georgia reported her partner to the police but he was not prosecuted, she believed the main reason for this was because she had no physical injuries to use as evidence.

Views on the Sexual Offences Act 2003

Respondents were asked to comment on the legal definition of consent from section 74 of the Sexual Offences Act: "A person consents if he agrees by choice, and has the freedom and capacity to make that choice." Views were mixed. In general, respondents agreed with the definition, but some expressed concerns about how easy it would be to apply in practice and about the difficulties of proving whether or not someone consented to sex.

Respondents were told that to convict a person (Sam) of raping or sexually assaulting another person (Alex), it would have to be proven that Alex did not consent, *and* that Sam did not reasonably believe that Alex consented. Again, views were mixed, with some respondents believing this was necessary to protect Sam who should not be guilty of a crime if s/he didn't know that Alex was not consenting. Others expressed

³ All names have been changed.

the contrary view that this made it too difficult to prove Sam was guilty.

It was also explained to respondents that non-consensual sexual behaviour is grouped into different offences depending on the type of sexual act:

- **Rape** covers penetration by a penis of the vagina, anus or mouth.
- **Assault by penetration** covers penetration by any body part or object of the vagina or anus.
- **Sexual assault** covers any intentional sexual touching.
- **Causing sexual activity without consent** covers other sexual behaviours including a woman forcing a man to penetrate her, or an abuser who makes their victim engage in masturbation.

Six lay person respondents, two domestic violence support workers and one sex work caseworker expressed very strong views that the behaviours covered by *assault by penetration* should be included within the definition of *rape*. Two lay people thought it was right to split the offences. The other respondents did not comment specifically on this issue. Some respondents also suggested that a woman forcing a man to penetrate her should be classed as rape. Views about whether all non-consensual sexual activity should be collapsed into a single offence were more mixed – some respondents argued that non-penetrative sexual contact could be just as traumatic for victims as non-consensual penetration.

Conclusions

This study showed that autonomy – having a choice over whether and how to participate in sexual activity – was very important to respondents. Many thought that ‘consent’ was the best way to protect autonomy.

However, further questioning revealed that respondents defined consent in a range of different ways, with no clear consensus as to what would count as consent to sex. When asked to evaluate specific hypothetical scenarios, respondents often found consent difficult to apply, and drew on a range of contextual factors to decide whether the scenario

depicted acceptable sex or sexual violation. Several respondents also disclosed sexual experiences from their own lives which they struggled to classify as strictly ‘non-consensual’, but which they nevertheless experienced as violating.

This suggests a need for developing an alternative model for distinguishing sex from sexual violation that does not rely on asking whether consent was given at a particular moment in time. I therefore advocate replacing the legal standard of ‘consent’ with a standard of ‘freedom to negotiate’. In essence, ‘freedom to negotiate’ looks at the context within which any agreement to have sex was given. Was the person free to say no? Did they have an equal say in what kind of sexual activity took place or was it all on somebody else’s terms? The main differences between ‘consent’ and ‘freedom to negotiate’ are set out in a table overleaf.

A person’s freedom to negotiate sexual activity might be unduly restricted if:

- violence is being or has been used against them;
- they are threatened with violence or other negative consequences;
- they are drunk or on drugs so that they do not know what they are doing or are unable to express their wishes;
- they are in an abusive relationship with someone who intimidates or bullies them in order to control their life;
- they are financially dependent on their partner, or they are dependent on money earned through sex work (and thus cannot choose not to do sex work);
- they rely on someone for day to day care, for example because of a physical disability;
- they are having sex with someone who has considerable power or authority over them, such as a child having sex with an adult, or a prison inmate having sex with a warden.

My ongoing research is concerned with developing the ‘freedom to negotiate’ model into a more

concrete law reform proposal. In particular this involves thinking about how to define the point at which a person's freedom is so restricted by factors such as those listed on page 5, that it should be a criminal offence to have sex with them. A key issue this raises is how to recognise when sexual activity is not freely negotiated, without assuming that a person who is in some way 'vulnerable' or dependent on others is never capable of actively choosing or negotiating their sexual encounters.

As well as looking at the law on rape and sexual assault, the 'freedom to negotiate' model also provides a starting point for rethinking the circumstances in which sexual behaviour involving children or mentally disordered adults should be criminalised.

Consent

Focuses on the complainant (the alleged victim)'s behaviour and asks questions like: *Did they consent? Did they do anything that would make the defendant think they consented?*

Implies a one-sided view of sexual relations where one person proposes an activity and the other either agrees or refuses.

Focuses on what the complainant and defendant were thinking at one specific moment.

Forces complainants to describe their experience as either strictly consensual or non-consensual – something several respondents struggled to do.

Freedom to negotiate

Focuses on the defendant's behaviour and asks questions like: *Did they do anything to restrict the complainant's freedom? Did they make the complainant feel like his/her wishes would not be respected? Did they ignore the complainant's words or body language?*

Implies a mutual, interactive process for deciding whether to have sex and what kind of sexual activity to engage in.

Allows for the wider context of the interaction to be taken into account, for example if the complainant and defendant were in an ongoing abusive relationship.

Provides greater scope for complainants to describe in their own words why they felt they didn't have a free choice about engaging in sexual activity.

About the Researcher

Dr Tanya Palmer is an ESRC Postdoctoral Research Fellow at the University of Bristol Law School. This study was carried out as part of her PhD research. She is now working on a book based on the PhD thesis to be published in 2014. If you have any questions about the research or would like to provide feedback on this report please contact: Tanya.Palmer@bristol.ac.uk; or Tanya Palmer, University of Bristol School of Law, Wills Memorial Building, Queens Road, Bristol, BS8 1RJ. For updates about Tanya's research and related matters follow her on Twitter, @TanyaVPalmer.

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