Male Rape in Law and the Courtroom

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ABSTRACT

This paper critically examines male rape in law and the courtroom. In particular, the legal definition of male rape is explored. This is because the phenomenon of male rape in law and the courtroom has gained very little attention to date in the legal literature in England and Wales. This paper intends to fill this gap in the literature by critically examining the adequacy of the law regarding male rape, and also how male rape victims are treated in the courts as a result of the law being applied. This paper highlights several themes in defence questioning of male rape victims and argues that the problematic definition of male rape in the rape law in England and Wales does not fully reflect male rape victims' experiences of what they classify as rape. The paper argues that the legal definition of male rape should fully reflect male rape victims' experiences, and the defence counsels' expectations of how a male rape victim is supposed to have suffered contradicts the male rape literature.

1. INTRODUCTION

Now that male rape is recognised in law, it does raise a number of concerns and issues regarding the conduct of male rape trials that have gained very little attention in the legal literature. The urgency to understand the issues of male rape in law and the courts is emphasised by the significant rise in male rape cases coming forward to the police. For example, recent figures show there were 2,164 rape and sexual assaults against males aged 13 or over recorded by the police in the year ending September 2013 (Ministry of Justice, 2014). As a result, the Government has committed £500,000 over the next financial year to provide services, such as counselling and advice, to help male rape victims, who previously have not been able to receive such support, and encourage them to come forward after suffering such a crime (Ministry of Justice, 2014). This fund will also support historic victims who were under 13 at the time of the attack. The fund is open to bids from all charities and support organisations that feel they can offer help specifically for male rape victims. This will build on the services already available for rape or sexual abuse victims and ensure victims of most serious crimes receive the highest level of support.

The need to understand the issue of male rape is further emphasised by the growing amount of research regarding male rape. For instance, rape in prison (King, 1993); rape in the general population (Lees, 1997); rape in the army (Mulkey, 2004; Belkin, 2008; Turchik and Edwards, 2012); feminist responses to male rape (author, 2014c); and also the dynamics, impact, and nature of male rape (Walker *et al*., 2005; Abdullah-Khan, 2008; author, 2014a, b, c). More recently, there has been research on how the media portray male rape (Cohen, 2014). These research studies have challenged many male rape myths and have highlighted the extent to which misunderstandings pertaining to male rape influence the attitudes of the wider community.

Male rape myths are stereotyped, prejudicial, and false beliefs about rape, offenders and victims of rape. Abdullah-Khan (2008) argues that the police and courts operate on the assumption of particular 'rape myths' regarding male rape victims, such as male rape is non-existent or heterosexual men are unable to be raped. As researchers have argued (e.g. Lees, 1997), all men regardless of sexual orientation have the potential to be raped. The persistence of male rape myths means that victims are often left untreated, isolated, and sidelined (Cohen, 2014). It is important to be aware of which specific rape myths the courts are more likely to subscribe to because they can influence how male rape victims are treated in the courts (Gregory and Lees, 1999). Research has shown that, in the context of rape of women, addressing these myths has been very important in changing criminal justice practices, as rape victims are more likely to trust and confide in local authorities; therefore, increasing the reporting rate of rape (Walklate, 2004). However, several research confirms that male rape victims are less likely than female rape victims to report to the police and to pursue their case to court because of male rape myths that facilitate inaccurate assumptions about male rape (Jamel, 2010), low reporting rates (Cohen, 2014), poor treatment (Sleath and Bull, 2010), and an increase in homophobia (Abdullah-Khan, 2008).

However, what is missing from the legal literature is research pertaining to male rape in law and the courtroom in England and Wales. To address this gap in the literature, this paper will draw on the growing amount of research on male rape. By doing so, this paper is divided into three parts: first, it is important to define male rape in this paper in order to understand the issue in law and the courts, and to critically examine the legal definition of male rape; second, male rape in law is explored, examining the wide range of issues and concerns articulated by critics of the rape law; third, male rape in the courts is critically analysed. Before this, it is important to define male rape in this paper, in order to understand and critically examine male rape in law and the courts.

2. WHAT IS MALE RAPE?

This paper focuses on male on male rape. According to the current rape law in England and Wales, only a man can perpetrate rape (as the penetration has to be with a penis). However, both men and women can be raped. Section 1 of the Sexual Offences Act (2003: chapter 42, part 1) currently defines male rape as the following:

1. A person (A) commits an offence if-
    a. he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
    b. B does not consent to that penetration, and
    c. A does not reasonably believe that B consents.
2. Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

3. LAW AND MALE RAPE

The Criminal Justice and Public Order Act (1994) was the very first act to criminalise male rape, giving male rape victims recognition in law for the first time (Mezey and King, 2000). Until the Criminal Justice and Public Order Act (1994), in law male rape was not defined as a criminal offence, so a man could only commit rape against a woman. This Act is partially gender-neutral in that it substituted the words "it is an offence for a man to rape a woman" [2] with "it is an offence for a man to commit rape". [3] The 1994 Act simply defined rape as penile penetration of the anus or vagina. Consequently, the first case of male rape emerged before the courts. [4] Before the enactment of section 142 of the Criminal Justice and Public Order Act (1994), forced penile-anal intercourse was classed as buggery, not rape. Buggery carried a lesser penalty than vaginal rape; buggery carried a maximum penalty of 10 years (where the male victim was over the age of 16), in comparison to the crime of rape for which the maximum punishment was life imprisonment. The Sexual Offences Act (1956), s.12 states that, "It is an offence for a person to commit buggery with another person or an animal", which remained the basis of legislation for prosecuting acts of anal sex between men until the Sexual Offences Act (1967) that decriminalised private homosexual acts between men aged over 21. It could be argued, thus, that prior to the 1967 Act, if male rape victims wanted to disclose their rape, there was the risk of consent being presumed if they were not able to provide evidence that they were raped. This might have facilitated a judgment of the victim consensually participating in homosexual activity, which could be a crime under the law of the pertinent state. The risk of this occurring could have deterred some male rape victims from reporting.

The Criminal Justice and Public Order Act (1994) emerged because of ideas surrounding gender equality, for prior to the 1994 Act, the coercive buggery of male victims was subject to a shorter sentence than the coercive buggery or the vaginal rape of female victims (Graham, 2006). Therefore, it has been argued that in law, raping a man was less serious than raping a woman (Graham, 2006). The different penalties for forced buggery and rape prior to the 1994 Act came under the Sexual Offences Act (1956) conditional on the sex and age of the victim. For male victims, a sliding sentencing scale was utilised conditional on the ages of the victim and defendant: cases in which the offender was over 21 and the male victim was under 16, the maximum penalty was life, as it was when against a female of any age; cases in which the male victim and offender were respectively older than 16 and 21, however, the maximum penalty was 10 years [5] (Rumney and Morgan-Taylor, 1998). This supports graham's argument that the rape of a man was less serious than that of a woman, in law. It was also evidenced in cases that forced buggery was less serious than the rape of a woman. For instance, the Court of Appeal in *Wall* (1989) 11 Cr App R (S) 111 argued the following:

> … rape was the most serious sexual offence, and if other sexual offences were equated with rape, there would be a risk that rape would be diminished as the most serious of sexual offences … by enacting the Sexual Offences Act 1967, s 3, Parliament had made clear its view that non-consensual buggery was a less serious crime than rape. [6]

Before the 1994 Act, there were no clear guidelines exclusively for forced adult male attacks. The comprehensive guidelines in *Willis* (1974) 60 Cr App R 146 merely covered cases regarding boys below the age of 16. Therefore, the guidelines set out in *Billam* (1986) 8 Cr App R (S) 48 for vaginal rape were applied to cases regarding buggery in a string of cases, such as *Stanford* (1990) Crim LR 526 and *Mendez* (1992) 13 Cr App R (S) 94, with a suitable sentence reduction to consider the apparent severity

of the crime in comparison to vaginal rape. Certain critics stated that they found the punishment of 5 years in the case of *Stanford* (1990) Crim LR 526 to be longer than one would expect. By examining the punishment under laws prior to the 1994 Act including examples of female and male victims of buggery, one can infer that within *some* cases there were penalties without considering the sex of the victim (e.g., *Wall* (1989) 11 Cr App R (S) 111; *Stanford* (1990) Crim LR 526; *Mendez* (1992) 13 Cr App R (S) 94). In some cases, it seems that sentences for forced buggery were not different depending on the victim's gender. On balance, it could be argued that there was a lack of coherence and consistency in sentencing within law prior to the 1994 Act.

At the same time, the courts showed discomfort surrounding the myopic term rape and the ensuing sentencing disparity in some cases concerning the buggery of female victims prior to the 1994 Act. For example, in the case of *Ball* (1982) 4 Cr App R (S) 351, 352, initially the judge thought that, if the victim did not have consensual buggery, then it is an issue of 'anal rape'. Similarly, Glidewell LJ in the case of *Jenkins* (1991) Crim LR 460 (abridged report) specified that, "Non-consensual buggery is in many ways a particularly unpleasant form of rape, and is treated as such …". Glidewell LJ expanded on this point in the case of *Mendez* (1992) 13 Cr App R (S) 94: "In our view, forcible buggery of a *woman* is equatable to rape, but worse than *normal* vaginal rape" (italics mine). This leads Rumney and Morgan-Taylor (1998) to argue that it is unknown whether the courts implied that there ought to be an extra element aggravating forced buggery perpetrated against a woman, or whether the courts questioned the unique status of rape. It is important to note that one judge, at least, mentioned the act of buggery as a form of rape against a male in the case of *Payne* (1994) 15 Cr App R (S) 395, 396: "Here was this unfortunate creature … for whom the only human emotion should have been the deepest pity and desire to help, instead of which, *he is raped* by you" (emphasis added).

The quotes above conflict with the inferences made by the Criminal Law Revision Committee report because it states that rape is a "unique and grave" crime (CLRC, 1984: paragraph 2.3), and other penetrative acts are "distinct from rape" (ibid.: 2.47).

The CLRC (1984) supports the view that rape is a highly gendered crime whereby rapists are men and women are victims, so the report outlined that forced buggery should be excluded as a crime. This view suggests that the criminal sentencing of coercive rape of a man was regarded as less important than coercive rape of a woman. It is not clear, then, whether the approach in the cases of *Mendez* (1992) 13 Cr App R (S) 94 and *Jenkins* (1991) Crim LR 460 (abridged report) would have been applicable to male victims of forced buggery. Similarly, in parliamentary debates about the 1994 Act to criminalise male rape, there were continual discussions on the anal rape of females, and there were many suggestions that coercive anal rape might be less upsetting for a man than for a woman (*Hansard*, House of Lords, 1994, 20 June. London.). However, the report did highlight the need to consider male rape in law, so it is plausible that at the time of the report, it was able to at least give recognition to the hidden nature and existence of male rape, where much legal literature and research failed to do so:

> It is clear that the distinction between buggery that is really consensual anal sex and buggery that is really rape must be clarified in law. That legal distinction is long overdue, both for women and for men. Consensual sex of whatever nature is not the business of the law, but it is the law's job to protect women, men and children from anal rape (*Hansard*, House of Lords, 1994: 20 June, column 179).

For the first time ever, the parliamentary debates associated with the amendment paid significant attention to the concept of male rape (Rumney, 2008). "The amendment was

seen as a means of securing equality of treatment with female victims, as well as ensuring appropriate labelling and sentencing for male*and* female victims of anal rape" (ibid.: 82) (italics in original). These points were continually raised in the debates found in the *Hansard* House of Lords (1994), 20 June, London report. Graham (2006) and Saunders (2006) argue that this amendment is 'privileging' male rape victims over female rape victims. However, Abdullah-Khan (2008) believes that the criminal justice system provides poor treatment for male rape victims, suggesting no preferential treatment is provided. In balancing the argument, within the initial parliamentary debates, in which there was a brief debate about the amendment, there was more discussion about the non-consensual penile-anal intercourse of men instead of women (*Hansard* House of Lords (1994), 20 June, London). Therefore, it is clear from the *Hansard* House of Lords (1994), 20 June, London report that MPs were aware of the existence of male rape, considering at the time, male rape had a lack of recognition, so they felt it was important to highlight male rape in order to give it societal recognition. For example:

> Men and boys, like women and girls, are raped by strangers, by members of their families, by their partners in gay relationships, by casual acquaintances or dates, and, especially when they are young, by men in positions of power and authority over them. Male rape is especially common in prison. It is time that the law addressed that problem, which could easily be done by changing the word in the Sexual Offences (Amendment) Act from "she" to "person" (*Hansard*, House of Lords, 1994: 20 June, column 179).

Thus, male rape victims are not being privileged in any sort of way over female rape victims (Abdullah-Khan, 2008). In fact, this preferential argument may be harmful since it could be argued that we must not compare and contrast who is being given preferential treatment, as this is not providing any context in which to support all victims of rape, regardless of gender. Other writers, however, believe that females should get preferential treatment in law and so the law ought to be, above all, concerned of the safeguard regarding female autonomy:

> Given man's greater physical strength and woman's consequent vulnerability, the overriding objective which, it is submitted, the law of rape should seek to pursue is the protection of sexual choice - that is to say, the protection of a *woman's* right to choose, whether, when and with whom to have sexual intercourse (Temkin, 1982: 400-01. Italics added).

This myopic argument expects men to be strong, dominant, powerful, and invulnerable, ignoring the possibility that many men may not subscribe to or fulfill these expectations. Whilst her argument is supporting women's rights, her formulation ignores men's rights in respect of getting equivalent rights to women in law. Her argument also ignores the many different ways wherein an individual can be controlled to having sexual intercourse that is unwanted, such as bribes, blackmail, manipulation, threats, alcohol, and drugs (see Mezey and King, 1989). Further, she ignores the extent of physical strength in that it differs amongst men and disregards that women or men may become victims of rape by offenders of identical gender. Moreover, her gender-specific approach overlooks that many male rape victims are so fearful throughout the attack, which means they are not able to fight back (Carpenter, 2009), so there are dangers in generalising.

The Criminal Justice and Public Order Act (1994) helped to expand the consequences for male rape offenders. At the same time, though, reformers sought to challenge the legal definitions of male rape. The Criminal Justice and Public Order Act (1994) came

with many inadequacies. For example, the 1994 Act is usually seen as producing a criminal classification for 'male rape', [7] though this is deceptive, as it only incorporated penile-anal intercourse as a form of rape. This deception being about 'male rape' instead of anal rape is at least, in part, because of the structure of reference wherein the reform in legislation occurred, as the Act developed from worries over dissimilar criminal sentencing for coercive buggery of a male and female victim (Graham, 2006). Before this Act, the propensity to perceive penile-anal intercourse of women and of men as inherently dissimilar was reflected in the difference between the criminal sentencing for the coercive buggery of a woman and of a man (ibid.). The difference in criminal sentencing of coercive buggery facilitated a movement to reform the legislation (hence, the introduction of the 1994 Act), rooted in expanding criminal sentencing for the crime of male rape (ibid.). Intrinsically, the reform in legislation that made criminal sentencing for anal and vaginal rape of females and non-consensual penile-anal intercourse of men equal can be conceived of what Card (1981) describes as a less complex procedure of contemporary legal restructuring within criminal law, as classifications of analogous violations were enmeshed collectively under the same crime. However, the legal discourse on the reform in legislation is dependent on ideas pertaining to discretely sexed bodies.

Prior to the Criminal Justice and Public Order Act (1994), debates surrounding whether to include 'male rape' in the Act caused great controversy, as there were arguments that supported the inclusion of male rape, yet there were arguments against it, which highlighted dissimilarity between sexed bodies instead of similarity (Graham, 2006). The arguments *against* the inclusion of male rape in the Act (i.e., to incorporate coercive penile-anal intercourse as rape) implied that the female vagina has 'special significance,' so violating it needs discrete identification within a gender-specific crime of rape (Card, 1981). This view relies heavily on a firm division of male and female bodies instead of including classifications of sexual violence. Card (1981: 373) quotes:

> The restriction of rape to vaginal intercourse with a woman results in the oddity that a man who has non-consensual vaginal intercourse is only guilty of indecent assault where the victim was born a male but has undergone a sex-change operation … [s]imilar problems might be encountered in the case of hermaphroditic victims. Of course, such cases are unlikely to arise, but if they did such a strange result would have been resolved if there was simply one offence of penile penetration of the vagina, anus or mouth of another person.

The arguments that supported the inclusion of male rape perceived it as similar to vaginal rape, though the similarity was perceived as to harm being caused instead of the nature of the act itself; but arguing that the harm caused is similar is not the same as arguing that the vagina, female anus, and male anus are analogous (Graham, 2006). Graham goes on to say that, by exclusively focusing on coercive penile-anal intercourse of men instead of anal rape in general conveys a picture of discrete gender difference, illustrating firm boundaries between female and male bodies. Contradictorily, this indicates that the discourse that enmeshed classifications of female and male violation collectively under one umbrella, on the basis of equality in sentencing, efficiently reconfirmed firm ideas of gender difference between the violation of female and male bodies (ibid.).

Moreover, the 1994 Act did not criminalise oral and object penetration. This was problematic because research has found that some male rape offenders commit both oral and object penetration without the male rape victims' consent, and the victims

saw these as forms of rape (Abdullah-Khan, 2008). Feminists also saw the Criminal Justice and Public Order Act (1994) problematic, as it predominately concentrated on one specific sexual act: a man's penis sexually penetrating a woman's vagina. This led feminists to argue that this criminalisation mirrors a male heterosexual obsession with one opening and one object. Feminists argue that this type of conceptualisation (or definition) does not reflect female rape victims' victimisation. This can also be said for male rape victims' experiences, in that they do not just see forced penile-anal intercourse as rape (Abdullah-Khan, 2008). Additionally, Walklate (2004) comments that the Criminal Justice and Public Order Act (1994) centers on the notion of consent (or being irresponsible as to that consent), which situates the responsibility of providing evidence on the alleged victim.

While it is 20 years since the Criminal Justice and Public Order Act (1994) came into existence, Weiss (2010) argues that the legal literature still assumes that rape is a gender-specific crime. For instance, Temkin (1987) and the Sexual Offences Amendment Act (1976) stipulate that rape is 'gender specific,' that is, only a man can perpetrate rape, and only a woman can be a victim of rape. Temkin (1987: 37) further adds that the extension of the Criminal Justice and Public Order Act (1994) to include male rape is counter-productive, as male victims at trial will suffer the same poor treatment that females suffer, with defence counsel implying that 'he consented at the time', 'he asked for it', or 'led him on'. Lees (1997) challenges Temkin's argument, arguing that all men have the potential to be raped, not just women, and that the legal recognition of male rape will encourage male victims to report rape. Thus, the emergence of the Sexual Offences Act (2003) helps to strengthen the position of male rape victims in court and to raise greater awareness of the crime while highlighting its seriousness. The Act also helps to eradicate the inadequacies that the Criminal Justice and Public Order Act (1994) caused; this included criminalising non-consensual oral penetration [8] while keeping non-consensual anus-penile penetration a crime. Despite the improved legal changes in law, rape is still assumed to be non-consensual vaginal-penile penetration (Weiss, 2010).

Nevertheless, section 1 of the Sexual Offences Act (2003) brings in the inception of oral penetration and introduces the conceptions of recklessness and consent by re-expressing a consideration of consent and of 'reasonable.' However, the term 'reasonable' is not clearly defined and leaves it open to subjective interpretation as to what counts as 'reasonable.' The Sexual Offences Act (2003: section 79) also incorporated surgically reconstructed genitalia (e.g., gender-reassignment surgery) to the current offence of rape. Moreover, women cannot be convicted for rape, which is problematic because some research has shown that male rape victims classify being forced to perform oral and anal sex on women as rape (e.g., Weiss, 2010). Although a few cases occur, the fact that some cases of women forcing men to perform such acts are evidenced clearly warrant legal protection for all male rape victims. Further research evidence (e.g., Abdullah-Khan, 2008) shows that women do also force other women to perform these sexual acts; for example, an 18-year-old woman involved in the rape of a 37-year-old woman. In this case, the female offender,

Struck her victim to the ground and held down her arms before another gang member kicked the woman in the head … the victim described how a girl, (believed to be the perpetrator Claire Marsh) laughed throughout the ordeal and rallied the rapists … with the cry 'go on, give her some' (case cited in Abdullah-Khan, 2008: 31).

The prosecuting counsel advised the jury of the following:

> Obviously being a female, she herself couldn't commit what is defined as sexual intercourse in law, by herself penetrating the victim. But, if she

> was party to a group attack and if she was actively encouraging, ready to lend a hand, to join in, or she was holding down when the event was taking place, she in law would be guilty of rape, although female.

The female offender, who did not admit to the offence, was sentenced to 7 years in a young offenders' institution. Abdullah-Khan (2008) says that people who believe that women cannot be offenders of rape would undoubtedly argue that gang rape incorporates a certain psychology of manic group behavior and, intrinsically, cannot be evidenced to advocate the requirement for gender-neutrality in law pertaining to rape. Whilst women offenders of rape seem to be uncommon, the fact that some studies have documented their existence (e.g., Sarrel and Masters, 1982; Johnson and Shrier, 1987; Anderson and Struckman-Johnson, 1998; Fiebert and Tucci, 1998; Oliver, 2007; Abdullah-Khan, 2008; Duncan, 2010; Weiss, 2010) shows that they do occur.

Furthermore, the Sexual Offences Act (2003: section 2) considers non-consensual penetration of the vagina or anus by a part of the body (e.g., a finger) or anything else (e.g., a bottle) that excludes the penis as assault by penetration. [9] However, the Criminal Law Revision Committee illustrates these as being 'grave' and 'severely degrading experiences for the victims, with the possibility of psychological damage enduring long after the event' (CLRC, 1984: paragraph 4.5). Despite highlighting these injuries, the Committee concludes that these additional types of forced sexual acts are separate from rape, even though documented research proves that male rape victims themselves name such acts as rape (see, for example, Abdullah-Khan, 2008). Legal acknowledgement of such forced sexual acts will assist in tackling societal ideas of denial and help female and male victims to seek legal redress and support, while validating male rape victims' experiences of rape (Rumney, 2007). If this notion of naming or labeling such forced sexual acts as rape is ignored in law, it will exacerbate the institutional neglect of male rape and the lack of societal recognition of this social issue (ibid.). In addition, this lack of legal acknowledgement would strengthen the idea that 'male rape is not really a social problem', while causing isolation amongst male rape victims (ibid.). Rumney and Taylor (1994) argue that such issues of definition would have, in part, been tackled if the proposed amendment (cl. 93) to the Criminal Justice and Public Order Bill, defining sexual intercourse as 'vaginal or anal penetration to any degree by any part of the assailant's body, or any object, and shall include non-consensual oral intercourse,' had been employed. This would also eradicate the gender issue in rape within law. After all:

> [Rape] is not a gender [specific] issue. Many victims are men and boys. Indeed, one concern is that boys who were abused as children find it particularly difficult to come forward and say they have been abused, because there is still the stigma that means they might be called *gay* (*Hansard*, House of Lords, 8 July, 2010: column 590. Emphasis added).

There is an issue that arises from this passage: although this recent Hansard debate regarding male rape highlights that rape is not a gender-specific issue, it perpetuates the male rape myth that 'male rape is solely a homosexual issue.' The debate implicitly suggests that male rape does not affect heterosexual men since it equates the phenomenon with the word 'gay'. However, research evidence has shown that some male rape victims are heterosexual or bisexual (Groth and Burgess, 1980; Mezey and King, 1989; Stermac *et al*., 1996; Isley and Gehrenbeck-Shim, 1997; Lees, 1997). Therefore, it could be argued that the House of Lords is unaware of the growing amount of research evidence that contradicts the male rape myth, in this instance. The members of the House of Lords may have overlooked disciplines such as criminology, sociology, or the social sciences to better understand male rape and this particular

male rape myth. Consequently, it could be argued that the above passage ignores the violence, suffering, and pain experienced by heterosexual and bisexual male rape victims. The members' of the House of Lords belief may influence the way state and voluntary agencies enforce the law or subsequently deal with heterosexual and bisexual male rape victims, in particular. It may also lead to inappropriate policy decisions or provide scholars, societies, and practitioners with a misleading impression of male rape. Basing policy decisions on inaccurate information could pose a risk since such information possibly will result in misguided or unnecessary reforms to the criminal justice procedure.

This section of the paper critically examined the legal definitions of male rape and outlined that contemporary legislation within England and Wales is too restraining for male rape victims. This can partly explain the under-reporting of male rape. In law, male rape was not identified until the 1994 Act; ergo, the state and voluntary agencies are *inexperienced* in dealing with male rape victims' needs, which further restrains reporting (Carpenter, 2009). The gender-specific Sexual Offences Act (2003) may not only be deleterious to male rape victims, but it also fails to protect women from being raped by other women. It could be argued that this Act trivialises the issue of male rape, while preventing men from coming forward and seeking the support and help they need. Even so, the legislation pertaining to male rape has improved, giving male rape victims a stronger position in law and society than was the case previously (Abdullah-Khan, 2008). It is important to examine how the legislation has improved in practice, particularly in the courts because it is here where male rape victims can get justice for the rape that they suffered.

4. THE COURTS AND MALE RAPE

Male rape victims' experiences of the court process can provide them with the opportunity of reclaiming the power they lost to the offenders, for example, by getting justice for what has happened to them (Lees, 1997). In 2011, there were 1,058 offenders found guilty of rape of a female, and 95 offenders found guilty of rape of a male (Ministry of Justice, 2013). This shows that the conviction rate for female rape is higher than male rape. However, the report does not offer any explanations for this disparity in figures. The figures could largely be overestimates depending on what the review is basing the figures on. That said, the review goes on to mention that a very small number of men go through the court system, and they state that the statistics imply that getting a conviction in either a sexual assault of a male case or a male rape case is very difficult. With that said, it may be that the review is basing its inference on a very small number of cases. This is also notable in Gregory and Lees (1999), as they premise their conclusions from a small number of male rape cases that reached the courts and argued that the conviction rate for male rape is high. Gregory and Lees examined sixty sexual assault and male rape incidents and concluded that only eleven male rape cases got to the courts, but there was a high conviction rate of 75%-100%, so they conclude that the figures imply that juries may be more willing to convict in male rape cases. Gregory and Lees (1999) study, however, prove bias in their findings since the number of cases that they draw conclusions from is very small.

After all, attrition and conviction rates in male rape cases are determined from an intricate combination of the male rape victim's decision to report to local authorities; the police able to find suspects; the police deciding to investigate the male rape case further; and the prosecution deciding to take the case to the court system (Lees, 1997). In this study, Lees also identifies how the jury is usually dubious of a scarcity of a rape victim's physical resistance and injury during an episode of rape, and the defence will frequently argue that such scarcity is inconsistent with a claim of rape [10]. This

stereotype, she argues, can be even more influential in a male rape case rather than a female rape case. As a result of this stereotype ingrained in the jury, male rape victims may be reluctant to report their rape or are more likely to drop out from their case (ibid.). It may also influence societies', voluntary agencies', and state agencies' responses to, and attitudes toward, male rape victims.

A further issue, which is prevalent in the courts, is the idea that men who obtain an erection or ejaculate during their attack somehow consented to the rape; and so the defence counsel may use this against the victim in court to suggest that consent was given, wrongly influencing the jurors (Rumney and Morgan-Taylor, 1998). It has been argued, however, that some male rape victims will reluctantly respond with an erection or ejaculation during their attack (Sarrel and Masters, 1982; McMullen, 1990). Getting an erection and ejaculating are involuntary physiological reactions to male rape (Groth and Burgess, 1980; Sarrel and Masters, 1982). Still, this may be utilised within courts to establish consent. Such a reaction may serve to impeach male rape victims' credibility in trial testimony and discredit their allegation of non-consent (Groth and Burgess, 1980). It is possible that this reaction to rape can also be utilised to establish a mitigating factor in sentencing within female rape cases. For example, in the female rape case of *Billam* (1986: 51) 8 Cr App R (S) 48, it was concluded by the court that there ought to be some mitigation of sentence where "the victim has behaved in a manner calculated to lead the defendant to believe that she would consent to sexual intercourse". It could be argued that it is unreasonable for a judge, who does not consider the reality of rape, to use a rape victim's involuntary physiological reaction to their rape as a ground for mitigation.

It is also unreasonable for the courts to perpetuate the idea that 'male rape is solely a homosexual issue' in that the courts assume that all victims and offenders of male rape are homosexual (Rumney and Morgan-Taylor, 1998). For instance, within certain cases of buggery, the offender is assumed to be gay (ibid.). In one male rape case, the heterosexuality of the offender was in fact thought of as a mitigating factor in sentencing. This was evidenced in the case of *Harvey* (1984: 186) 6 Cr App R (S) 184, whereby Lawton LJ reduced a sentence to 30 months from 3.5 years on a man convicted of forced buggery of a boy who was at the age of 12. Lawton LJ quotes:

> [T]his was an isolated incident … in the experience of this court those who commit this kind of offence usually have fairly marked *homosexual tendencies.* There is nothing about this case to indicate that this man has got those tendencies (emphasis added).

From this, it appears that the courts maintain the male rape myth that 'male rape is a homosexual issue', while equating homosexuality with a tendency to perpetrate offences relating to sexual violence. It ought to be reminded that many offenders and victims of male sexual assault and male rape are not solely homosexual (Groth and Burgess, 1980; Mezey and King, 1989). Of course, these misconceptions in court may not only be pernicious to the lives of male rape victims, but also may influence the way state and voluntary agencies deal with male rape victims in practice. This is evidenced in Abdullah-Khan (2008), Jamel (2010), Sleath and Bull (2010), and Cohen (2014), where it was found that many male rape victims report that the treatment they get from the courts and state agencies is worse than the rape itself. For instance, Rumney (2009) argues that male rape victims who are believed to be homosexual or are actually homosexual may experience homophobic attitudes by the courts and so will be perceived as more to blame for, and less traumatised by, their rape, than heterosexual male rape victims and female rape victims. This was evident in the parliamentary process. During the parliamentary debates over the legal recognition of

male rape in England and Wales, Lord Swinfen stated:

> Non-consensual buggery for a homosexual man would be an extremely traumatic experience. For a heterosexual man it would be an even greater trauma. However, if it happens to a woman it could be more distressing still because not only is she being violated, but her total femininity is being destroyed at the same time as she would not be used in a natural manner that one might expect (*Hansard*, House of Lords, 20 June, 1994: column 66).

Another tactic used to diminish the male rape victims' credibility can come in the form of implying that he was lying about the rape, and so a 'false allegation' was made (Rumney, 2001). Defence counsel will frequently suggest a possible motive for the alleged victim making a false allegation of rape during cross-examination (ibid.). In the case of *R. v. Richards* (1996) 2 Cr. App. R (S)16 7, for instance, it was argued that the false allegation of attempted indecent assault and rape occurred out of regret at having sex for money. In addition, the Director of Public Prosecutions (2013) carried out a recent study on false allegations in rape by examining 159 charging decisions [11] and found that false allegations of rape are rife. The report also found that there were a large number (5,651) of prosecutions for rape, but that only a very small number (35) of individuals were prosecuted for having made a false complaint. It also emphasises the intricate issues that can arise in these serious cases, such as in one female rape case, a suspect who had mental health issues made a telephone call to the police and alleged that she had been raped by an unnamed individual. Soon after the police arrived, she admitted that the allegation was false and that she had made a false report because she wanted food and shelter. Despite this, female rape and male rape are difficult crimes to report in the first place, so the number of false rape allegations is low or at least no higher than the rate for other felonies (Lees, 1997).

5. CONCLUSION

This article has raised a number of issues surrounding male rape in law and the courts. This paper has argued that the legal definitions of male rape do not fully reflect male rape victims' experiences. Consequently, the idea that 'male rape is not really a social problem' is strengthened in law and the courts, while causing isolation amongst male rape victims. The gender-specific Sexual Offences Act (2003) is not gender-neutral in that women cannot be convicted for male rape, which is problematic when this paper has provided research evidence demonstrating that females can and do rape males (e.g., Sarrel and Masters, 1982; Johnson and Shrier, 1987; Anderson and Struckman-Johnson, 1998; Fiebert and Tucci, 1998; Oliver, 2007; Abdullah-Khan, 2008; Duncan, 2010; Weiss, 2010). It could be argued that, in court and the legal literature, some of the attitudes around male rape may trivialise this phenomenon, while possibly preventing men from coming forward and seeking the support and help they need. This paper has also evident that the defence counsels' expectations of how a male rape victim is supposed to have suffered contradicts the male rape literature. However, one must be cautious about making inferences regarding the treatment of male rape victims in court from a limited number of sources and cases. Still, this paper highlights the urgency to educate the defence about the facts surrounding male rape.

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[2] Section 1(1) Sexual Offences Act (1956).

[3] Section 142 of the Criminal Justice and Public Order Act (1994).

[4] The first such case was *R. v. Richards* (1996) 2 Cr. App. R (S)16 7; for a detailed description of the case, see Abdullah-Khan (2008: 35).

[5] Sexual Offences Act (1956), Sched 2; Sexual Offences Act (1967), s 20. The CLRC (1984: paragraphs 3.7-3.8) suggested a return to a maximum sentence of life imprisonment for the crime.

[6] This point was also well-established in the case of *Stanford* (1990) Crim LR 526.

[7] For instance, Lord Ponsonby of Shulbrede refers to his revision in legislation, which the House of Lords brought in, as associated to male rape (*Hansard*, House of Lords, 1994. 20 June).

[8] Sexual Offences Act (2003), s. 1. For the first time, this legislation incorporated penile penetration of the mouth in the *actus reus* of rape. Before this, such sexual assaults were conceptualised as indecent assault, which carried a lesser punishment for offenders.

[9] No other object or appendage meets the requirements to be eligible as 'rape' because these simply become assault by penetration; however, many male rape victims may see these as forms of rape. By demeaning these acts in law, could provide a disservice to all rape victims-perhaps this is more to do with refusing to acknowledge women as rapists.

[10] Many male rape victims are so fearful during the rape that they are incapable of resisting, so they just freeze (Walker *et al*., 2005).

[11] The expression 'decision' correlates with the number of suspects, not the number of cases, because in a small number of cases there was more than one suspect, in relation to each of whom an individual decision was made.