

Rape Law Reform in Canada: The Success and Limits of Legislation

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Abstract: *This article reviews the major changes and impacts of rape law reform in Canada. It is held that the 1983 reform addressed some of the key issues relating to sexual assault. In spite of the 1983 legislation, it is clear that critical issues linger in many areas. These include underreporting of sexual assault; low founding, charging, and conviction rates; the status of rape-shield rules; and the defence of honest but mistaken belief of consent. Collective and social actions on the part of women's groups and education are seen as important policy tools to counter sexual assault in our society.*

GENDER BIAS AND RAPE LAW

Legislation is popularly considered to be a potent weapon to combat sexual aggression and achieve justice for women. As rape has become an important social and political issue in industrialized countries, criminal justice professionals and women's associations alike demand new legislation to deal with this problem. Not surprisingly, many advanced industrialized countries have introduced some form of rape law reform in the past two decades (Allison & Wrightsman, 1993; Berger, Searles, & Neuman, 1995; Jones & Christie, 1992; Roberts & Mohr, 1994). In England and Wales, rape law reforms began as early as 1976 when the Sexual Offences (Amendment) Act was passed. In the United States, virtually all jurisdictions have introduced some form of rape law reform over the past 20 years. Similarly, a concerted overhaul in rape law legislation was conducted by the Canadian federal government in the early 1980s. These cross-national efforts attest to the deficiencies in existing laws and the need for improvements. Unquestionably, many people continue to have faith in the legal system's ability to deal with the problem of rape. Canadian rape law reform stands out as one example that indicates the substantial influence women and their advocates have in the legal process. Despite such participation, however, the Canadian case also illustrates the limits of legal reform.

Numerous studies canvass the issue of sexual aggression against women in the Canadian legal system (Dekeseredy & Hinch, 1991; Roberts & Mohr, 1994). Such concern is in large measure attributed to the women's groups across Canada that have dedicated their efforts to improving both the legal protection and status of women (Canadian Panel on Violence Against Women, 1993). These studies point



to widespread gender bias and unfairness in the criminal law against gender-based rape (Manitoba Association of Women and the Law, 1991). In effect, with 90% of sexual assault victims being female and 99% of offenders being male, rape is just one example of gender bias in the justice system. Public action has been taken to counter such bias, and this is best exemplified by the Canadian rape reform legislation of 1983. Its ramifications continue until today. The aim of this article is twofold: (a) to identify the main strands of changes in rape law and (b) to assess if these changes have advanced the cause of women victims by eliminating sexist assumptions and prejudicial practices.

SEXISM AND COMMON-LAW RAPE

Until rape was codified in the Criminal Code, rape was still a common-law offence. Rape itself is an offence with a long history. Canadian law derives from English common law, which can be traced back to medieval times. Common-law rules for rape have had some very hard criticism from women's organizations. Historically, this crime was thought to be an offshoot of abduction. The view then taken was that the carrying off of a woman was of greater offence to her husband or father than to the woman herself (Estrich, 1987; Jones & Christie, 1992). This was best exemplified by the first U.S. statute, which was created in Massachusetts, that imposed death for the crime of rape except in circumstances in which the woman was single (Allison & Wrightsman, 1993).

Sexism in society and law permeated the Canadian rape law before 1983, which reinforced the informal control of women and helped to perpetuate the ideological premises of the traditional gender order (Los, 1994). First, the patriarchal basis of marriage was protected when husbands had unlimited sexual access to their wives. A man was presumed to have some right of property over his wife's body. Hence, marital rape was not recognized. Second, women were considered morally underdeveloped, and a woman's testimony under oath could not be trusted; it alone could not convict the defendant. Rape complaints that were not made immediately after the attack were invalidated. Third, a woman's credibility depended on her sexual reputation in that her previous sexual conduct could be freely questioned. The complainant's sexual conduct with men other than the accused was considered important in establishing her consent. Finally, women's sexuality was defined by men's sexuality in that the requirement of vaginal penetration was the only standard with which a woman's body could be sexually violated in rape.

RAPE LAW REFORM IN CANADA

Considered together, Canadian rape laws before 1983 incorporated deep-seated sexism. Such blatant distrust of women claiming rape was accompanied

by statistics that strongly indicated the sheer impotence of the criminal law system. Rape is a crime that is grossly underreported (Clark & Lewis, 1977). One study of 551 women in Winnipeg revealed that one out of every four women had been sexually victimized (Brickman, Briere, Ward, Kalef, & Lungen, 1980). A similar problem plagued the United States. The Federal Bureau of Investigation continued to list rape as the most underreported violent crime. It was estimated that only one out of every four rapes was reported to the police (Brown, Esbense, & Geis (1991), Schmalleger & McKendrick (1991).

The Working Group of Attorneys General Officials (1992) opined that low reporting, charge, and conviction rates as well as victim harassment were associated with the old rape laws. A study done in Winnipeg in the mid-1970s indicated that only 10% of original charges resulted in convictions, 20% were reduced to lesser charges, and more than 70% of the charges were filtered out of the criminal justice system (Gunn & Minch, 1988). Similarly, rape continued to be a difficult crime to prove in other jurisdictions. Fewer than one third of all rapes resulted in arrest, and a much smaller fraction resulted in conviction in the United States (Doudna, 1990).

In 1983, amendments were made to the Criminal Code (C-127) that specifically abolished some rules that perpetuated bias against women. The purposes of these reform statutes are as follows:

1. To encourage the victims of sexual assault to report incidents to the police (Roberts & Grossman, 1994). As mentioned, low reporting, charge, and conviction rates as well as victim harassment were related to the old rape laws.
2. To focus on the violence committed by the assailant rather than the sexual nature of the offence (Gunn & Minch, 1988; Stuart, 1992). Feminists had lobbied hard for reform that would emphasize the violent nature of rape and minimize the sexual aspects of the offence.
3. To limit judicial discretion and the legal link between unchastity and low credibility. Until 1983, Canadian law incorporated biased views that lowered the credibility of sexually assaulted women and presumed that sexually active women were more likely to consent to sex.

Some significant changes resulted from these reforms. The offence was redefined in gender-neutral terms. The term *sexual assault* replaced rape because a whole range of sexual activities were now studied. Rape was reclassified as a type of assault. The recent-complaint requirement was abrogated, and the special rules of corroboration were repealed. Inquiries into the complainant's sexual conduct with other people were restricted. As discussed later, this rape-shield rule was soon challenged in the courts and was subsequently held unconstitutional in the Supreme Court of Canada. Finally, the examination of the victim's sexual history in regard to her credibility was prohibited.

Progress was also made in instituting the prohibition of spousal rape. In addition, Criminal Code provisions have made it possible to introduce into the

sentencing process a statement of the impact of the crime on the victim (Working Group of Attorneys General Officials, 1992). At present, there are three offences: (a) sexual assault; (b) sexual assault with a weapon, threats to a third party, or causing bodily harm; and (c) aggravated sexual assault. The maximum penalties of the assault offences are imprisonment for 10 years, 14 years, and life, respectively.

COMPARATIVE RAPE LAW REFORMS

A look at rape law reforms in England shows that very similar kinds of policy measures have been introduced to eliminate bias embedded in sexual aggression. The English laws do not follow the North American reforms by redefining the crime of rape in order to underscore the violent nature of the crime. But, like Canada, there are efforts to eliminate prejudicial evidentiary rules. The changes to rape law in England are illustrative of the efforts to rid inherent sexism from the criminal justice system. Three sets of beliefs surrounded rape, which was a common-law offence, and they reflected institutional sexism (Horne, 1993): (a) rape corroboration rules are required to avoid false complaints, (b) failure to report rape with the police makes conviction impossible, and (c) a woman cannot be raped by her husband.

In England and Wales, rape was not actually defined by statute until 1976 in the Sexual Offences (Amendment) Act (Smith & Hogan, 1996). By Section 1(1) of the act, the conduct prohibited by the offence is defined as "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it." The crucial mental element required for rape is that at the time of intercourse the man either knows that the woman did not consent to it or "is reckless as to whether she consents to it." The prosecution has to prove this mental element together with the fact that the accused had sexual intercourse with the complainant with lack of consent. If the jury concluded that the defendant did not care whether the woman wanted to have intercourse and carried on regardless, then the jury could convict him of reckless rape (Reed, 1995).

Generally, in the 1980s, rape reforms in England were marked by policy developments with respect to policing practices, increasing commitment to complainant anonymity, and greater prominence of victim support. It has to be pointed out that the prominence of victim support certainly helped rape victims, but this was not developed specifically with rape victims in mind. Little change has occurred in women's actual experiences with the courts and the range of services available to them (Mawby & Walklate, 1994).

In the early 1990s, the court, contrary to common-law rule that a woman cannot be raped by her husband, decided that marital rape is an offence. The right to anonymity is now embodied in the Victim's Charter, which sets out for the first time the rights and entitlements of victims of crime. However, the Charter carries

no legal force. Backed by the Criminal Justice Act of 1988, women reporting rape have the right to anonymity. It is also an offence to publicize or broadcast matters likely to lead the public to identify a woman as the complainant in a rape case. Publicity restrictions will last for the lifetime of the victim, irrespective of whether the accused is convicted or not (Emmins & Scaular, 1988). At the same time, anonymity for the accused is no longer required in rape cases.

Evidentiary rules also changed. The old rule that the victim must launch her complaint within 24 hours of the act no longer applies. Moreover, the Police and Criminal Evidence Act 1984, in Section 80(8), introduced a provision that made spouses legally compellable to give evidence against physically abusive husbands. Furthermore, according to the Criminal Justice and Public Order Act 1994, the old rule that a judge must warn a jury of the dangers of convicting a defendant on the uncorroborated evidence of an accomplice or the victim of a sexual assault was abolished. Similarly, magistrates acting in their summary capacity no longer need to give the corroboration warning.

SUCCESS AND FAILURE OF CANADIAN LEGAL REFORM

All in all, the 1983 reforms in Canada represented a positive development because they specifically abolished some discriminatory rules against rape victims. Women's groups welcomed the elimination of evidentiary rules of corroboration and the recent-complaint requirement. Roberts and Grossman (1994) note that a significant increase in reporting took place at the time the legislation was passed. More important, women's active participation in the legal reform process demonstrated the possibility of voicing women's concerns in the legal process. As McIntyre (1994) confidently put it, "There is already evidence that for sectors of the women's community who have never before so influenced power politics, there will be no going back" (p. 310).

The women's movement in Canada has been articulate and vocal. Women's groups form a strong political lobby and have been active in the process of legal reform. This is best illustrated in the case of the recent rape-shield law (Bill C-49) when a coalition of women participated in the framing of the bill. The drafting of the bill exemplified a new approach to criminal law reform because the participants included lay people with considerable experience in the social reality of sexual assault. The groups involved included frontline rape and transition-house workers and national women's organizations.

A study in the early 1990s shows the extent of public awareness of these legal reforms (Canadian Centre for Justice Statistics, 1994). Findings indicate that a small minority of the Canadian public is aware of the change in terminology, and the assaultive nature of the crime is not fully acknowledged. On the other hand, the public is quite aware of the substantive changes to the rape law (e.g., a man can be charged with sexually assaulting his wife; sexual assault can occur in the absence of sexual intercourse). Such a level of awareness is a very encouraging sign.

Notwithstanding these positive changes, there are certain areas of reforms that raise women's concerns. These areas, as discussed below, include rape statistics, the issue of consent, rape shield, and defence tactics.

SEXUAL ASSAULT STATISTICS AFTER 1983

As noted above, amendments in Canadian legislation eliminated some discriminatory rules against rape victims. This led initially to a rise in reporting. However, it is pertinent to examine existing rape statistics to assess the impact of this legislative amendment. The proportion of all reports classified by the police as Sexual Assault Level 1 has risen steadily, from 88% in 1983 to 96% in 1992. Undoubtedly, the increase in reports of sexual assault has largely been accounted for by classifying incidents at the least serious level. Most victims are young; more than 60% of female victims were under 18 years of age at the time of the offence (Canadian Centre for Justice Statistics, 1994). Some legal scholars attribute the increase in sexual assault to the lack of clarity in the definitions of sexual assault (e.g., Barnhorst & Barnhorst, 1996; Roberts, 1996). In the 1983 rape reform legislation, there is no definition of sexual assault in the Criminal Code. The courts have attempted to define it in the case of *R. v. Chase* (1987). The proper test of sexual assault is as follows: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?" (p. 103). Scholars such as Roberts (1996) have doubted if this rule of construction has been consistently applied by the police throughout the country.

The Canadian Centre for Justice Statistics (1994) further observed that the incidence of sexual assaults reported to the police increased at a faster rate than did the incidence of all assaults over the period from 1983 to 1992. Yet, this difference is diminishing, and the rates of increase are now very comparable. On the founding rate (i.e., official action is taken after the complaint), there has been little change since the 1980s in the percentage of reports of sexual aggression declared by the police to be founded. The percentage of sexual assault reports that are deemed to be unfounded is higher than the unfounded rate for other crimes of violence (Roberts, 1996). From 1983 to 1992, the average unfounded rate for Sexual Assault Level 1 was 15% compared to 7% for Assault Level 1.

In retrospect, sexual assault offences have one of the highest attrition rates: 57% of the cases from the initial pool of reports were filtered out of the criminal system in 1992. Roberts (1996) compared the attrition rate with those of 15 other offences including aggravated assault and assault causing bodily harm and found that sexual assault had the highest attrition rate among these offences. In her study, attrition rate was defined as the drop-off of cases from the initial contact with the police to the point of the laying of a criminal charge.

The dissatisfaction of rape reform advocates is aptly summed up by the Working Group of Attorneys General Officials (1992): "Sexual assault is still under-reported; victims fear the system is biased against them. Founding, charging and conviction rates remained low" (p. 14).

In this respect, experiences from the United States that deal with these issues are relevant to Canada. A number of measures are devised to target the problems of underreporting and police insensitivity: specialized police training regarding victims of sexual assault; increased responsiveness of criminal justice leaders to rape victims; police-based crisis interveners, victim advocates, and victim-assistance units; hospital-based rape crisis programs; and battered women shelters.

DESEXUALIZING RAPE

Some advocates for rape victims question changes to the Criminal Code that introduced the gender-neutral offence of sexual assault. Cohen and Backhouse (1980) contend that these changes are superficial and that they work to the detriment of women by minimizing the harm of rape. Chase (1984) shares this feeling, noting the harm suffered by rape victims has been desexualized by the gender-neutral language of the term *sexual assault*. Above all, gender-neutral interpretations preclude recognition of the conditions that caused the amendments by "recurrent exclusion of the collective impact of sexual violence" (Ellis, 1986, p. 17). These worries are not without ground. Most legal analysis in the courts is both abstract and decontextualized. Feminist writers are concerned that contextualized and inequality-grounded analyses of the women's situations are not receiving sufficient attention in judicial deliberations (Majury, 1994).

CONSENT VERSUS NONCONSENT

Los (1990) sees additional problems. In Canada, the defence of honestly mistaken belief has been intensely debated. First, the "honest belief" that the complainant in sexual assault case consented to the conduct constitutes a successful defence and would exonerate the accused if there is a reasonable evidential basis. In *Pappajohn* (1980), the Supreme Court of Canada held that an honest but mistaken belief that the victim consented is a defence even if the belief is not based on reasonable grounds. The defence requires that there be some supporting evidence beyond the mere assertion of belief in consent. The court referred to this supporting evidence as giving an "air of reality" to the defence. The jury should consider the reasonableness of the belief in deciding if the belief was an honest mistake. However, the jury is not required to find that the belief was reasonable for the defence to succeed (Barnhorst & Barnhorst, 1996). This requirement of reasonableness was later codified as Section 265 in the Criminal Code. The *Pappajohn* ruling was reconfirmed by the Supreme Court of Canada in the following two cases: *Osolin* (1993) and *Park* (1995). Both of these cases demonstrate how the defence of mistaken belief in consent is limited by requiring the air-of-reality test. This means that the jury will act as objective observers and decide what reasonable grounds the accused had (i.e., subjectively) for his alleged honest belief.

Women's groups have opposed the honest-belief issue from the start. This issue has plagued legal systems in other countries. In this area of law, many women's groups contend that reform is needed. Pickard (1980) argues for an objective test in that the nature of the sexual conduct involved in rape should be underlined. To her, a man about to have sexual intercourse has "his mind focused necessarily on the legally relevant transaction" that can only be determined harmful by "reference to the world outside him." Other feminists strongly argue that the mental element of the offence should be objectively assessed. Scotland uses this approach (Jones & Christie, 1992). It is enough to establish that the accused ought to have known of the woman's unwillingness. In partial response, Parliament put further restrictions on the mistaken-belief defence by enacting S.273(2) as part of the "no means no" law, which reads as follows:

273(2) It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from the accused's
 - (i) self-induced intoxication, or
 - (ii) recklessness or willful blindness; or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

CRIMINALITY AND RAPE-SHIELD RULES

Although the new law correctly highlights the violent nature of the crime, removes the condition of vaginal penetration, and alleviates the stigmatization of the victim, some people worry that this underplays the women's experience of rape as a sexual violation. This may send a signal to the court that only brutal rapes are criminal and sexual imposition itself is not of much consequence. To a certain extent, the above-mentioned conviction and sentencing statistics give partial support to this claim.

Most important of all, the rape-shield rule that restricts questioning the victim about sexual relations with others was held unconstitutional in *Seaboyer* (1991). In this case, Seaboyer was a young man charged with sexual assault. He launched an appeal for the right to introduce evidence relating to the complainant's sexual history before his case came to trial. This case went to the Supreme Court of Canada, and the majority decision of the court struck down most of the 1983 rape-shield provisions. It held that a blanket prohibition on the use of evidence of a complainant's prior sexual history was too restrictive and jeopardized an accused's right to a fair trial. Thus, Section 146 of the Criminal Code, which stipulated such a prohibition, was held unconstitutional because it violated Sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms (i.e., the right to fundamental justice and a fair trial). This immediately evoked public outrage because women's groups had assumed that the Criminal Code would

protect the use of irrelevant sexual history evidence. They warned that victims would be unlikely to report rapes once again because the apprehension that they would be subject to intense questioning about their previous sexual histories (Horner, 1993).

In response, the federal government passed Bill C-49, which embodied a number of guidelines on cross-examination by the defence to reestablish the rape shield. The new Section 276(1) imposes a requirement of written notice for a hearing to determine the admissibility of such evidence. Most important, this is not an absolute shield (Stuart & Delisle, 1997) because the new Section 276(2) gives judges discretion to admit such evidence if it "(a) is of specific instance of sexual activity; (b) is relevant to an issue to be proved at trial; and (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice." In the *Osolin* (1993) case, Justice Cory reaffirmed the rights of the accused to cross-examine the complainant when the probative value outweighed the prejudicial impact.

The accused continue to look for all possible grounds to pursue their cases. Sometimes, this search is extremely wide. Most recently, a British Columbia case almost went to the Supreme Court of Canada. The accused was convicted of sexually assaulting the complainant and was sentenced to prison. Later, the complainant filed a civil lawsuit against the accused, claiming years of abuse had caused a series of trauma. The lawyer of the accused sought access to her diaries, which he claimed had some bearings on her claim of a history of psychological injuries. The trial judge granted his request, but a divided British Columbia Court of Appeal ruled the diaries were privileged and could not be disclosed. Finally, there was an out-of-court settlement before the case was heard in the Supreme Court of Canada ("B.C. Woman Wins Fight," 1995).

INHERENT LIMITATIONS OF LEGAL REFORM

Laws alone cannot provide the changes demanded by feminists. In some instances, law reforms may be counterproductive. The impact of the law can also be minimal. One research article in the United States indicates mixed results, ranging from highly successful impact, to little impact, to conclusions that feminists' goals have been compromised (Goldberg-Ambrose, 1992). Trials can lead to fewer rather than more convictions and to plea bargaining (Edwards, 1990; Los, 1990, 1994). Many people feel that some form of law reform is always better than none. Yet, there are some problems with relying on law reform per se as a mechanism for change. The following examples illustrate this.

First, the law tends to frame issues in terms of individual pathology and therefore offers individual remedies. Law reform leaves untouched the institutions and practices that are at the root of women's subordination. A second concern among radical feminists is that law reform must be accompanied by more

fundamental changes—changes in women's social and economic positions and in the power relations between men and women. Moreover, the law has traditionally encompassed men's accounts of events because it is men who both legislate and then interpret the law (Gelsthorpe & Morris, 1990). To the radical feminists, the state is guided by men's ideologies and interests, and it will continue to define "the limits of violence appropriate for the control of women" (Radford, 1987, p. 43, cited in Los, 1994).

Third, the role of criminal law in eliminating sexism is very limited. Experience shows that law in itself cannot change attitudes overnight and that social changes develop in a context of education and formal rules. In particular, myths and stereotypes that arose from earlier laws still are accepted by some jurors.

Another major concern is that rape law reform symbolically closes the issue and makes it difficult for women to campaign against the conditions that generate rape. This includes the dominant culture with its well-defined gender roles and power lines. Thus, Heald (1985) concludes that the new laws are based on the same assumptions as the old laws and that "changes to laws that do not recognize that sexual offences and sexuality are defined by men will never result in less sexual assault" (p. 125).

For some time, legal scholars have cautioned against feminists' overoptimism of their influence (Los, 1990). Rape law reform was possible not only because of pressure from women. Rather, it coincided with the introduction of the Canadian Charter of Rights and Freedom in 1982. Apparently, not all advocates share the ideological goals of social change. Many conservatives had also advocated for legal reform that met their interests, and their objectives often differed from those of liberals and women's groups. Some legal scholars in the United States came to the same conclusion after studying rape law reform (Berger et al., 1995). They suggest that rape law reforms passed by the states are products of political coalitions and legislative compromises between feminist and nonfeminist interests and that in many states reforms are basically piecemeal and ineffective.

Despite these shortcomings, participating in the law reform process is indeed a triumph for women's groups (Razack, 1992). Some feminists caution against their movement being co-opted and their claims compromised. Opponents to rape law reform only yield to demands and concede reforms that will lessen the forces of change. In reality, there is a marked neglect of the consciousness-raising activities around rape.

This created a backlash, whereby defenders of the gender status quo mobilized their forces to trivialize and block women's attempts to reconstruct the notion of rape and unmask the role of sexualized violence in men's efforts to "keep women in their place." (Los, 1990, p. 171)

This is illustrated in the passing of Bill C-49 regarding the rape shield rules in Canada. The efforts of women's groups to incorporate a preamble into the Criminal Code were finally rejected (McIntyre, 1994).

CONCLUSION

There is no lack of public confidence in legal reform. Some believe in its educative value. Others see it as an opportunity for consciousness-raising. Still others continue to trust that the prospect for change is bright and that improvements are cumulative. Recently, Berger and her associates (1995) alerted us to the symbolic goals of any social movement. Rape law reform could possibly be viewed as having originated in large part from the women's movement. In contrast to instrumental goals, symbolic goals focus on changing attitudes and legitimize the values of social movements. Seen in this light, instrumental goals such as reductions of sexual assault rates and concern about low conviction rates play a role in any social reform. But symbolic messages from the rape law reform movement are as important as the legal sanctions designed to reduce sexism in rape laws. Clearly, these goals take time to materialize and should be judged on a long-term basis. Education will be important as one factor that heightens women's awareness of the problem and its ramifications.

If education is one means of enhancing public perception of sexual assault and dispelling prejudices about this crime, then social policy has much to contribute. In particular, the state should support all kinds of activities and social institutions that aim at raising the collective consciousness of society. These would include the setting up of sexual assault centres, instituting sexual harassment programmes, and implementing programmes that aim at reducing violence against women. With these social and collective actions, the impact of sexual assault legislation would be considerably strengthened.

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