Juridical Rape & Courtroom Lack of Belief: A Wittgensteinian View on Consent

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This paper focuses on the issue of consent in rape jurisprudence and in particular sets out to explore the issue via the application of a Wittgensteinian perspective. The presence of 'prior relationship with the accused' has long been used to create doubt as to the probity of the victim's claim that the event in question was non-consensual. This has been mostly prejudicial for women since patriarchal ideological influences have intervened in the cross-examination to discredit them as complainants and although reforms to the law have occurred, attempts may still be made to undermine victim accounts by reference to prior relationship.

In order to demonstrate that the use of the concept of consent in English criminal law is prejudicial, the legal meaning of the absence of consent is explored from a conceptual Wittgensteinian viewpoint in selected rape cases where the complainant was not believed during trial. It is shown that the practice of asking the victim of rape to provide her sexual history evidence in order to express a judgment on her present situation has led in most cases to a prejudicial construction of female sexuality.

Sexual History Evidence and the Issue of Consent

Introduction

Over the past several years, extensive efforts have been made to reform the management of rape cases, from the initial complaint to changes in statutory law. Whilst there is a need to acknowledge the seriousness of the accusation with rigorous legal principles, it re-

mains the case that the rate of attrition in attempts to secure successful prosecutions in rape cases remains overwhelming. In the legal cases of rape taken into account in this paper, the assumption was made that if a woman consented to engage in sexual intercourse in the past, the same consensual mind-set remained unchanged in future encounters. This type of assumption made by courts forms a continuum with the approach traditionally adopted in contract law with reference to the concept of consent. According to such an approach, it is legitimate to raise the possibility that from the time someone first expressed her consent to the clauses contained in a contract, such consent holds steadily until the end of the contract. In a similar fashion, the court asking for the sexual history evidence of the victim assumes that from the time a woman first expressed her consent to have a sexual relationship with an individual, they are allowed to or supposedly have the prerogative of accessing her body without restrictions.

The legal meaning of the absence of consent is explored from a conceptual Wittgensteinian viewpoint in selected rape cases in order to show that the use of the concept of consent in criminal law is prejudicial.

Wittgenstein's reflections on language have shown that there are no reliable criteria to predict which way the meaning of the word consent will change within the lives of persons in the future. The ways in which we will potentially proceed at future times can only be hypothesized nor calculated or theorized.

A prejudicial disbelief based on the sexual history evidence reveals sensitive information concerning womens' private lives, which may be of no actual use in supporting the victim's claim and proving the innocence or guilt of the defendant. The court's prejudicial disbelief, which leads women to reflect on their experience of rape with a

guilty conscience,[1] has been defined as a 'judicial rape'[2] or 'second rape' by many victims.

The main questions in this paper are: can a feminist legal approach to the concept of consent, if developed from a Wittgensteinian view, be seen as a new theoretical pillar in order to improve the English legal thought about the crime of rape, and; what can a Wittgensteinian legal view adduce to the concept of consent, in order to avoid the so called 'judicial rape'?

The concept of consent remains weakly elaborated in legal theory, despite its importance in both regulating the cases of rape and examining the contractual sphere within which heterosexual couples may engage in sexual intercourse. Although the concept of consent is central in contract law, a feminist approach to contracts, aiming to examine them in new ways, is still in development.[3]

According to Wittgenstein, we do not use language according to fixed rules, and it only acquires significance if we fix them within some language game. Therefore, we cannot consider the concept of consent as permanently given in all types of negotiations. From a Wittgensteinian linguistic point of view the meaning of that concept depends on the everyday use which people make of it in their activities. In this sense, this paper investigates how a Wittgensteinian view on consent dissuades the court from asking a victim of rape for past sexual evidence and why there is no logical relationship between the consent expressed by the victim in the past and the present sexual intercourse, and that to think differently does not assure a fair trial.

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[1] Barbara Krahe and others, 'Prospective lawyers' rape stereotypes and schematic decision making about rape cases' (2008) 14 Psychology Crime & Law 461.

[2] Claire McGlynn, '*R v A (No 2):* Judgement' in Rosemary Hunter, Claire McGlynn and Erika Rackle (eds), *Feminist Judgments From Theory to Practice* (Hart Publishing 2010) 213.

[3] See Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspective on Contract Law* (Glass House Press 2005) 5, 16.

Why use sexual history?

On the basis of what was established in 1887 in *R v Riley*,[4] in the past sexual history was largely used to demonstrate consent for the occasions considered in the accusation. In particular for a long period, marriage has given immunity to the husband, granting him permanent consent while requiring his wife to be sexually available.[5] It was only in 1991 that such privilege was removed from prosecution for rape in *R v R*.[6]

Section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) may allow questions to be heard in evidence concerning the sexual history of a woman up to approximately one week before the alleged rape.[7] Therefore, it is still deemed possible that if the complainant consented to have sexual relationship in the past, she is likely to consent in the future too.

Arguably, previous sexual activity between the complainant and the accused should have no relevance in demonstrating the former's consent because 'consent is given afresh on each occasion'.[8] In this sense, the concept of consent should be redefined or, better, re-thought. The urgent need for a new form of legal reasoning affirms the importance of a new approach to the issue.

Contrasting the Leading view on consent which emerges in both the past and new legislation, an application of a new Wittgensteinian

[4] *R v Riley* (1887) 18 QBD 481 [64].

[5] As Della Giustina pointed out '[t]he level of violence against wives was highest in those states where the status of women was the lowest, then the level dropped and rose again in those states where the status of was highest (almost as high as in the lowest state)'; See Jo-Ann Della Giustina, Why Women are Beaten and Killed Sociological Predictors of Femicide (Edwin Mellen Press 2010) 37.

[6] (1992) 1 AC 599.

[7] In *R v A (No 2)* [2001] UKHL 25, The judges in The Court of Appeal said: 'May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?'

[8] Hunter, McGlynn and Rackley (n 2) 223.

approach considers that in rape cases the consent should not be seen as something rigid. In this sense Wittgenstein says that if 'you wish to give a definition of wishing, ie to draw a sharp boundary, then you are free to draw it as you like; and this boundary will never entirely coincide with the actual usage'.[9] In fact, a distinction should be made between the different circumstances in which the concept of consent can be expressed. Moreover, it should be considered that it could be withdrawn at any time. In this sense, in rape cases it must be proved how the consent was communicated, and whether it was still present at the time the actual sexual relation actually occurred – not before or after.

The belief that when a woman says 'no' she means something different, has some grounding in reality. Certainly, it has been argued that many Victorian women used to say 'no' to all sexual advances desiring sexual contact, considering the 'relationship between virginity and goodness',[10] but this is no longer the case today. This specific belief was inherited from folklore and customs. Currently, two prejudicial beliefs have often recurred within the psychoanalytical model of women's sexuality and still remain as assumptions: the first is that when a women says ' no' she means ' yes'; the second considers that 'a women secretly desires to be violently ravished, any cry of resistance, any observation and struggle, is really indicative of a subconscious consent'.[11] These particular assumptions have found their way into every level of the criminal justice system. For example, in the popular case of *Morgan* (1975)[12] three men were charged with the rape of another's wife. The complainant's husband, Mr Morgan, was prosecuted on a charge of encouraging rape on his wife because, at the time, it was still technically legal for a man to rape his wife. In

[9] Ludwig Wittgenstein, *The Blue and Brown Books* (Blackwell Publishers 1958) 19.

[10] Susan SM Edwards, *Female Sexuality and the Law: A Study of Constructs of Female Sexuality as they Inform Statute and Legal Procedure* (M Robertson 1981) 113.

[11] ibid 109.

[12] *Director of Public Prosecutions v Morgan* [1976] AC 172; Dolly F Alexander, 'Twenty Years of Morgan: A Criticism of the Subjectivist View of Mens Rea and Rape in Great Britain' (1995) 7 International Law Review 207.

their defence, the three accused claimed that they thought that the complainant was crying to stimulate her own excitement. Therefore, they said they thought that her struggling and crying represented the demonstration of her consent. Mrs Morgan's story was different; she 'alleged that she was forcibly dragged out of her bedroom whilst each one raped her in turn'.[13] The defending counsel for the accused appealed against conviction maintaining that the men believed she consented to these sexual activities. However, the House of Lords held that if an accused 'reasonably believed' that the woman consented then he would not be found guilty of rape. The issue of the 'reasonable belief' was that there were cases in which a woman does not consent but her conduct is such that men can reasonably believe she expressed her consent.

As it will be shown later, the Wittgensteinian idea of language can offer some support to the ambitious task of investigating why the concept of consent should work in different ways for different kinds of contracts. The jurisprudence of rape is trying to avoid absorbing the contractual doctrine about the concept of consent in order to pay attention to the prejudicial evidence of past sexual conduct in rape cases. Despite this willingness, evidence of sexual history based on a 'theorized concept of consent' borrowed from contract law is sometimes admitted in rulings on rape, especially in those cases in which the victims are recognised, for example, as 'promiscuous' by society. As Wheeler and Shaw point out,[14] in some situations the original contract theory created a relationship of subordination among the contractors where some were women, because it did not take into account this contemporary story of sexual contracts and, therefore, the development of women's political rights. In particular, 'the omission of the story of the sexual contract is that conventional approaches to the classical texts, whether those of the mainstream political theorists or their socialist critics, give a misleading picture of a

[13] Edwards (n 10) 110.

[14] Sally Wheeler and Jo Shaw, *Contract Law: Cases, Materials and Commentary* (Clarendon Press 2001) 72.

distinctive feature of the civil society'.[15] Undoubtedly, according to the original contract theory, the story of the social contract should only recognise the public sphere;[16] whereas, the private one would be deemed not significant. In this sense, the 'marriage and the marriage contract are, therefore, also deemed politically irrelevant'.[17]

It seems in fact that Contract Law theory becomes inadequate as it neglects the complexity of human activities by making universal assumptions while defining the concept of consent in just one way. As Wittgenstein pointed out: 'A main cause of philosophical disease—a one-sided diet: one nourishes one's thinking with only one kind of example'.[18] Wittgenstein's philosophy can be effectively employed to identify the causes of philosophical disease in Contract Law theory. In fact, as the latter defines the concept of consent in just one way for every kind of situation, it is insufficient to explore those cases which are far different from those it was originally meant to investigate – especially those being commercial in nature – and therefore it can be said to follow one point of view or a 'one-sided diet'.[19]

Despite the formal consideration of Contract Law jurisprudence within rape cases, the statute is inadequate to support women, and it

[15] ibid 126.

[16] Feminists have noted the normative dimension to the gendered division between the spheres, the valuing and privileging of the public (male) over the (female) private. According to Buss: 'The concept of due diligence, by which the state's legal obligation to protect its citizen is activated, together with an understanding of violence against women as apart of continuum, attempts to collapse, in effect, the divisions between public/private that characterise the legal recognition of violence'. Doris Buss, '*Austerlitz* and International Law: a Feminist Reading at the Boundaries' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart 2005) 97.

[17] ibid; In the words of Linda Zerilli 'acting politically is about testing the limits of every claim to community; it is about positing agreement and discovery what happens when that agreement breaks down or simply fails to materialize in the first place'; see Linda Zerilli, 'Doing without Knowing: Feminism's Politics of the Ordinary' (1998) 26 Political Theory 435, 454.

[18] Ludwig Wittgenstein, *Philosophical Investigations: The German Text, with a Revised English Translation* (Gertrude Elizabeth and Margaret Anscombe trs, Blackwell 2006) 593.

[19] ibid.

has influenced gender-bias. In particular, this happens when law permits a supposed link between the consent expressed in the past and what happens in the present. Under section 41(3) of the YJCEA 1999 evidence is admissible if 'relating to belief in consent, but not in relation to the question of whether the complainant in fact consented'. Section 41 correctly precludes the admission of such evidence, due to its being irrelevant. There is, therefore, no contravention of the defendant's right to a fair trial under Article 6 of the European Convention on Human Rights'.[20]

Moreover, according to McGlynn section 41 does not protect the defendant's right to have a fair trial.[21] The right to a fair trial should not be seen as a conflict between parties but, as something which is in the interest of society. In this sense, the urgency of protecting against sexual crimes and reducing them are of interests to both parties. Identifying legitimate restrictions on the admission of evidence in sexual assault trials is also beneficial for the defendant's right to a fair trial.

In the context of sexual history evidence, as discussed above, the victims of rape are likely to be treated in a prejudicial manner and their right to a private life may be compromised. However, a balance should be sought amongst parties' interests even though as McGlynn noted, in practice it is more unlikely that the complainant rather than the defendant will not have a fair trial. Consider for example, the Canadian experience, the defendant's right to a fair trial should be seen within context and with a wide range of considerations. In this sense 'The Supreme Court of Canada in *R v Darrach* … made clear that fundamental principles of justice do not permit the accused to have procedures crafted which take only his interests into ac-

[20] The presumption of innocence and right to a fair trial is guaranteed by section 41; see Hunter, McGlynn and Rackle (n 2) 223, 224.
[21] ibid 224.

count'.[22] Further, in *R v Darrach* it was stated that actual consent must be given for each instance of sexual activity.[23]

'Continuous consent' and 'mistaken judicial beliefs'

In order to recognise the legal aspect of sexual violence in intimate relationships, it is relevant to understand the dynamic that characterises it. A critical step in this direction should be achieved in UK law to reform the laws that govern sexual assault. Despite considerable past reform around sexual assault, misunderstandings and stereotypical assumptions are still held about sexual violence in intimate relationships.[24] In particular, the complexity seems to be in considering the assumptions about what is 'normal' and/or distinctive in intimate sexual relationships.

Some judges routinely read rape cases in the continuation of a past relationship, generating the assumption of continuous consent. The existence of a past intimate relationship itself does not create a presumption of continuous consent to sexual engagement.

Consent to sexual activity, also in a long relationship, is a dynamic process, which requires constant renegotiation between partners. It cannot be assumed from the past relationship, even though this is exactly the assumption that some judges can tend to make.

There is the assumption that past sexual history, and an ongoing confidential relationship, creates the presumption of consent to sexual engagement that requires complainants to make an intense resistance to counteract it.

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[22] ibid.

[23] *R v Darrach* (2000) 191 DLR (4th) 539, 568.

[24] As Waiby and Myhill point out 'the popular imagery of rape … typically involves strangers, madmen, multiple attacks and reckless women, some of whom brought it on themselves'. Sylvia Walby and Andrew Myhill 'New Survey Methodologies in Researching Violence Against Women' (2001) 41 British Journal of Criminology 502, 514.

The nature of the confidential relationship itself suggests to some judges that consent can be assumed in the context of spousal, or other ongoing intimate relationships. These judges have difficulty in understanding that in both marriage and long-term relationships, there is not any implicit presumed 'continuous consent' to sex. Consent cannot be assumed from consent given in a prior sexual activity. The belief that the concept of consent can be generalised seems to be present in the minds of some judges. In fact, consent cannot be inferred from consent to prior sexual activity. This positive development has been reached by s 276 of the Canadian Criminal Code.[25] Canada has better results in terms of protection of rape victims during the trial, as the Canadian law proscribes the introduction of sexual history evidence for the purposes of challenging the victim's credibility or supporting a claim of consent.

In fact 'Critical Supreme Court of Canada decisions in cases such as *R v Seaboyer*, *R v Park*, *R v Ewanchuk*, and *R v Darrach* have significantly altered the legal landscape governing the criminal law's response to sexual assault in this country'.[26]

Likewise, the concept of consent in rape cases applied by international criminal tribunals is rather different than the one in England and Wales. Until the early 1980s violence against women was largely ignored on the international human rights agenda, despite gradual changes, which affected women of different cultural and geographic backgrounds.[27] It is only relatively recently that a conceptualisation of gender violence as a violation of human rights has been developed. In this sense international criminal tribunals developed the notion of 'coercive circumstances', which make the issue of consent void in

[25] *Criminal Code* (RSC 1985, c C-46, as amended), s 276.

[26] M Randall, 'Sexual Assault in Spousal Relationships, "Continuous Consent", and the Law: Honest But Mistaken Judicial Beliefs' (2008) 32 Manitoba Law Journal 144.

[27] Lori L Heise, 'Violence Against Women: An Integrated, Ecological Framework' (1998) 4 Violence Against Women 262.

some situations.[28] However, many of the dominant 'myths' about sexual assault need to be challenged in every new case.

Cases of rape and past sexual activity

This section explores specific cases of unjustified beliefs that emerged during some trials in English Courts. The aim of this investigation will be to underline how such aspects of the trial did not support the victim of rape. In this regard, it will be useful to illustrate the case of *R v A*[29] as analysed by McGlynn, which is rich in interesting details.[30]

The story presents a situation in which a complainant shared a flat with two men, one of whom became her boyfriend. However, she had also had sexual intercourse with the other flatmate before starting the relationship with the boyfriend. On the 14 June 2000, a few weeks after they met for the first time, the complainant and her boyfriend had sexual intercourse at the latter's flat when the other flatmate, 'K', was not at home.[31] Later the same day, when K returned the three of them went out for a picnic and all drank alcohol.[32] The boyfriend collapsed on the way home, so an ambulance was called which took him to the hospital. The complainant and K tried to reach the hospital on foot. During their walk K fell down and while the complainant was trying to help him to get up K pulled her down

[28] Amnesty International, 'Rape and Sexual Violence: Human Rights and Standards in the International Criminal Court' (Amnesty International Publications 2008).

[29] [2001] UKHL 25, [2001] 3 All ER 1.

[30] Hunter, McGlynn and Rackle (n 2) 212.

[31] ibid.

[32] Claire Gunby, Anne Carline and Caryl Beynon, 'Alcohol-Related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and its Impact on Practice' (2010) 74 Journal of Criminal Law 579; Shlomit Wallerstein, 'A Drunken Consent is Still Consent - Or is It? A Critical Analysis of the Law on a Drunken Consent to Sex Following Bree' (2009) 73 Journal of Criminal Law 582; see also, for example, the recent case of the grave abuse of a drunk woman, 'Huntsman who raped a drunk woman after a hunt ball jailed for four years' *The Telegraph* (London, 21 May 2012) <www.telegraph.co.uk/news/uknews/crime/9280285/Huntsman-who-raped-a-drunk-woman-after-a-hunt-ball-jailed-for-four-years.html> accessed 2 June 2012.

and raped her. The day after that, the complainant reported the rape to the police.[33] According to K the sexual intercourse they had the night of 14 June was part of a sexual relationship they had one week before. He said that he believed in her consent in both situations. However the court could not be sure that what he said was true.[34]

Before investigating this specific case, a few points about the rapist's mistaken belief are also worth noting.

According to Cooper, we should consider that there is no liability for rape 'if he has an honest, mistaken belief that there had been consent'.[35] If a woman behaved in a way that could be deemed 'irresponsible', for example having more than one sexual relationship or going home with a man after a heavy drinking session, the jury is unlikely to convict him. As Kennedy observes:

> If the woman who is making an allegation of rape can be shown to have abused alcohol or drugs, or if it can be

[33] Police are responsible for conducting the investigation and interviewing the victim, and interviewing possible witnesses. There are 43 police force areas across England and Wales. They operate independently, although they follow an over-arching body – the Association of Chief Police Officers (ACPO). Trained police officers known as Sexual Offence Liaison Officers (SOLOs) or Sexual Offence Investigation Trained Officers (SOITs) are responsible for the parts involving sexual offence victims. In London, there are exclusive detectives teams known as 'Sapphire' who work specifically on sexual offences; See Jo Lovett and Liz Kelly, 'Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries' (Child and Women Abuse Studies Unit, London Metropolitan University 2009) <www.cwasu.org/filedown.asp?file=different_systems_03_web(2).pdf> accessed 14 January 2013.

[34] Even in those situations in which there are some evidences about the ways in which people interacted, it is not easy to give the right interpretation of the events. For example, if a camera recorded a family during a party and all of them looked happy in that recording, we would still be unable to come to the conclusion that their internal feelings were as they seemed. In this sense, in *R v Osbourne (Wayne)* (CA, 27 October 2009), a situation occurred in which a video was taken showing a girl singing a song along with her mother's new partner. Despite this, the latter confirmed that in that period 'he would regularly call her "a fucking bitch" and he would constantly tell her that she was 'nothing fucking special' and yet there she was singing the song to him'. The girl also reported that in the same period in which the video was recorded she was being subjected to sexual abuse by him.

[35] See John Cooper, 'Consent and How to Prove?' (2011) 4 Criminal Law & Justice Weekly 330.

> shown that she has had any psychiatric treatment at all. Such as psychotherapy for depression or eating disorders or family relationships, she will be vulnerable to suggestions that she is unreliable as a witness.[36]

In order to provide substantial support to the defendant, Cooper considered cases involving people suffering from a condition such as Asperger's syndrome,[37] (an infrequent form of autism which makes it difficult for those who suffered it to grasp facial expressions, body language or gestures - ie, non-verbal communication). On this basis, the argument was that in some rape cases the defendant could have actually been incapable of grasping the refutation expressed nonverbally by the claimant just because he suffered that particular kind of syndrome.[38] The fault element is satisfied by proof that the defendant intentionally engaged in intercourse without reasonable belief that the complainant is consenting.[39]

However, not only is there no standardised way to diagnose Asperger syndrome, but it has also been demonstrated that it occurs espe-

[36] Helena Kennedy, *Just Law: The Changing Face of Justice and Why It Matters to Us All* (Chatto and Windus 2004) 169.

[37] See 'Asperger Syndrome Fact Sheet' (NIH Publication No 05-5624, National Institute of Neurological Disorders and Stroke 2012) <www.ninds.nih.gov/disorders/asperger/detail_asperger.htm> accessed 25 January 2013; however, according to Roy, Dillo, Emrich and Ohlmeirer, Asperger's syndrome can be experienced in adults in different ways. There could be an inability to listen to others and pick up on nonverbal signs such as body language or facial expressions, therefore a good way to communicate with Asperger Adults is to use Socratic Communication. In any case, Asperger adults can understand direct styles of communication exactly like an adult who is not characterized by this syndrome; see Mandy Roy and others, 'Asperger's syndrome in adulthood' (2009) 106 Dtsch Arztebl Int 59.

[38] See *R v M* (2010) EWCA Crim 592, where a sentence of two years and nine months' imprisonment on a young offender for rape of a young girl was reduced to two years and two months when new evidence showed that the offender suffered from Asperger's syndrome.

[39] Sexual Offences Act 2003, s 2(1); in particular, this section provides that all the circumstances should be taken into account in deciding whether the defendant's belief in consent was reasonable or not. This includes the steps that they took to ascertain whether there was consent.

cially as childhood autism.[40] It has been argued that the probability of an adult being affected by Asperger's syndrome is extremely low,[41] and those that may be affected could not show any inability to interpret other types of intention in the same situations. In any case, there is no easy way to demonstrate that some rapists may not perceive a denial of consent when the rape happened. Therefore, the rapist cannot be exonerated from the punishment.

In *R v A*, during the original trial, before the defendant was charged with rape the indictment asked for an examination of the past sexual activity of the complainant. As McGlynn observes: 'the trial judge had ruled that section 41 of the YJCEA 1999 precluded such a line of questioning' because 'alleged previous sexual relationship is inadmissible on the issue of consent'.[42] On this issue, the Court of Appeal considered that the alleged previous sexual relationship was 'admissible regarding belief in consent' and in this sense it allowed the appeal.[43] However, the court was of the view that such a ruling could be incompatible with the right to a fair trial. In this sense, the Court of Appeal argued that demonstrating past sexual intercourse between the defendant and the complainant was relevant in determining whether there was consent. This, therefore, justified ignoring section 41 of the YJCEA 1999 in order to guarantee a fair trial of the defendant.

[40] Prachi Shah, Richard Dalton and Neil Boris, 'Pervasive developmental disorders and childhood psychosis' in Robert M Kliegman and others (eds), *Nelson Textbook of Pediatrics* (18th ed, Saunders Elsevier 2008) 200.

[41] As Williams pointed out new pathologies 'present particular difficulties in law, since psychiatric evaluations impinge upon so many principles of central importance to the law- of capacity, competence and so on'; see Melanie Williams, *Secrets and Laws: Collected Essay in Law, Lives and Literature* (UCL Press 2005) 123; an excellent example on this difficulty is *Hunter v Edney (1885) PD 92*.

[42] Hunter, McGlynn and Rackle (n 2) 213.

[43] See Neil Kibble, 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2001) 32 Cambrian Law Review 27.

Further case studies

A report published by the Home Office in 2006[44] has revealed the failure of legislation to prevent a rape complainant's previous sexual experience being used as evidence in rape court cases despite changes to the law in 1999 to restrict its access. In this report, it was stated that:

1. Applications to introduce sexual history were made in almost one quarter of the cases. Two thirds of these applications were successful;
2. Sexual history was also introduced into trials without application being made as required by the law – these applications could be made in writing and before the trial.

Cases that have referred to the past sexual history are no exception. To illustrate this point, it is useful to present a brief overview of two case studies, most of them deeply analysed in the 2006 report:

1. In *R v F*[45] it was held that once the criteria for the admissibility of evidence as to complainant's sexual history were established, then subject to section 41 of the YJCEA 1999, the court lacked any discretion to refuse to admit it, or to limit relevant evidence that was properly admissible. It has been deemed lately that one of the reasons for miscarriages of justice in the trials of sex offenders was 'false-memory'[46] syndrome. Allegations of sexual abuse based on recovered memory are treated by the criminal justice system as postponed reports and there is no time limit for indicting the sexual abuse. False-memory, or 'repressed-memory syndrome',

[44] Liz Kelly, Jennifer Temkin and Sue Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' Home Office Online Report 20/06 (Home Office 2006) 30,
<library.npia.police.uk/docs/hordsolr/rdsolr2006.pdf> accessed 12 April 2012.

[45] [2005] EWCA Crim 493, [2005] 1 WLR 2848.

[46] *R v M (DW)* [2006] EWCA Crim 1971.

has been defined as the memory of an event which did not happen but in which a person solidly believes'.[47]

2. In *R v M (DW)*[48] the sexual assaults and the rape took place in 1999 and 2000, when the victim (V) was aged 13 and 14 years old. The case concerns a misdirection by the trial judge in not allowing the defence to cross-examine and introduce particular evidence that would suggest V was sexually irresponsible. The past sexual history evidence showed that when V was 17 she lied to her boyfriend when she said that their first sexual intercourse together was her first time; and there was new evidence that in 2003, V had lied to a friend by saying she was pregnant and she had given birth to a baby.

The admissibility of evidence of sexual history depends on relevance and the satisfaction of auxiliary tests and extrinsic policies which include compatibility with Convention rights pursuant to section 3 of the Human Rights Act 1998 (HRA 1998). It is therefore submitted that the prohibition of cross-examination in sections 34 and 35 of the YJCEA 1999 violates Article 6(3) (d) of the Convention as the only pivot on which the defendant can establish his defence has been removed. In determining two recent cases,[49] British judges fortunately used an interpretation of human rights held by the Supreme Court of Canada[50] where it was assumed that rape shield legislation was

[47] Retrospective allegations of sexual abuse are to be proven, considering that evidence of recovered-memory are tricky. For example, in *R v H* [1994] 2 All ER 881, a brother and sister experiencing psychiatric care began to ascribe their illness to sexual abuse within the family by means of 'flashbacks' and 'new memories'. Luckily, a psychiatrist recognised this as a false memory syndrome; cf Solomon Salako, 'Chapter 11: The Course of Evidence: Examination-in-Chief, Cross-Examination and Re-Examination' (*Insite Law Magazine*, 18 September 2009) <www.insitelawmagazine.com/evidencech11.htm> accessed 22 December 2012.

[48] *R v M (DW)* (n 46).

[49] R v Martin [2005] EWCA Crim 916; [2004] 2 Cr App R 22; R v A (No 2) [2001] UKHL 25; [2001] 1 AC 45.

[50] Home Office, *Report of the Advisory Group on the Law of Rape* (Cmd 6352, 1975); cf Peter Murphy, *Murphy on Evidence* (10th Edn, OUP 2007) 200. See the Canadian Supreme Court decision in R v Seaboyer [1991] 2 SCR 577.

compatible with the Canadian Charter of Rights and Freedoms 1982,[51] by which there is a compromise between the individual and the community and their respective rights.[52]

Common law and how to use entrenchment rights; avoiding isolating common law from new reforms

In the past, sexual history evidence was used to examine the moral behaviour of the complainant in cases of rape, although it does not contribute to the verification of the credibility of the victim. At present, a rape shield against using the sexual history evidence has been promoted by the Sexual Offences Act 2003, and by entrenched international rights borrowed from other legislations.[53] The use of such entrenched rights has been supportive in seeing rape as violence in those cases in which the national law was 'blind'.

It has been beneficial to use entrenched rights[54] even though they can exclude common law from starting democratic reforms. According to McColgan, this exclusion has been noted 'even in those cases where judges confine their attention to procedural matters such as those relating to the admissibility of evidence'.[55] However, the use of entrenched rights is based on the premise that these rights, as defined by international law, have compatibility with the 'fundamentals principle' of common law. When there are contradictions between them it is necessary to decide which takes precedence. For example,

[51] Canadian Charter of Rights and Freedoms, Constitution Act 1982 (Canada) pt 1 <laws.justice.gc.ca/eng/Const/page-15.html> accessed 1 December 2012.

[52] Salako (n 47) 152.

[53] Entrenched rights clarify and improve the national laws in connection with an international landscape. Such a perspective can be extremely significant for rape cases, since they have to be dealt with in a dynamic context, in which the legal system becomes increasingly interdependent.

[54] International rights can become internal to a domestic legal system and there are no convincing reasons in refusing the matter of principle; see Larry Alexander, 'What's inside and outside the law' (2012) 31 Law and Philosophy 213, 213-214.

[55] Aileen McColgan, *Women Under the Law: The False Promise of Human Rights* (Wm Gaunt & Sons 2000) 290.

when the European Convention on Human Rights has been used to support the UK law, one of the most frequent questions was: 'what might be expected in the UK for the implementation of the Human Rights Act 1998?'.[56]

The use of human rights needs to consider the context in which the borrowed jurisdiction has been implemented. For example, with the Convention, it is important to remember that it was drawn up after the Second World War when Europe was scarred by Nazism. Within this historical context, the original scope of the Convention was to guarantee essential 'rights and freedoms'. More recently it has come to cover some 'social rights'[57] such as, minimum working social conditions. It is important to consider whether the application of other contextualised jurisdiction in UK would actually be useful to improve its legal landscape, and whether 'this same approach to rights is acceptable in the UK in the early 21st century'.[58] Sexual violence against women is a global human rights injustice of vast proportions with severe health and social consequences. However, according to McColgan, under the HRA 1998 social rights have been marginalised.[59] Although within the HRA 1998, both article 6 and 14 support women as victims of violence in the determination of the criminal charges.

In England and in Wales, the matter of sexual history evidence has been the subject of criticism. Even though the traditional common law position is that sexual history was generally irrelevant to consent, there have been requests to demonstrate that the complainant was not a prostitute or person with immoral character, and that therefore sexual history evidence was relevant to the issue of consent.

Today, although attempts have been made to enrich the UK legislation with the European one, this can leave women vulnerable as

[56] ibid 291.

[57] See generally: Malcolm Langford (ed), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* (CUP 2009).

[58] McColgan (n 55) 306.

[59] ibid.

there is a trend to leave difficult decisions to the judge.[60] In addition, the HRA 1998 does not directly express a rape shield in the case of the sexual history evidence. In fact, we can observe that:

> It is hard to image that any Human Rights Act 1998 challenge to the legislation could found a declaration of incompatibility: s 2 does not require the exclusion of any evidence which is regarded as being relevant to an issue at trial.[61]

The reform of British law through the incorporation of human rights laws could reduce the situations under which evidence of complainant sexual history could be introduced. According to Clare McGlynn, in those cases in which it can be deemed the sections 41-43 of the YJCEA 1999 contravenes the defendant's right to a fair trial, a possible step could be to consider the compatibility with sections 3 and 4 of the HRA 1998.[62] In this case, it would be necessary to consider the justification for the restrictions, and the balance of interests among people involved. Investigations of rape cases should particularly try to find an equilibrium between providing an impartial trial for the defendant and defending the rights of the victim. McGlynn noted that as one contrast the legislation in Canada and UK, some differences emerge that could be useful in order to improve the latter. It is worth comparing legislation if an improvement is to be achieved. However, it is not always easy to say with any confidence how the law will be affected by the HRA 1998 when it comes to the question of admissibility of evidence.

In fact within the national framework there was a wide space to determine what evidence was relevant because they had not been determined expressly. In particular, for the sexual history evidence:

> The right to cross-examine witnesses, though not subject to any exceptions on the face of Article 6, is not absolute

[60] ibid 254.
[61] ibid 291.
[62] ibid 226.

> but is intended, rather, to ensure equality of arms between defendant and prosecution. It is clear, for example, and has been reiterated by the European Court of Human Rights on countless occasions that Contracting Parties have the right to establish their own rules of evidence, though these must be within reasonable parameters.[63]

According to McColgan the European Court has reiterated on every occasion that rules of evidence are a matter for national law, subject to the obligation to provide a fair trial and the wide discretion afforded thereto. Therefore 'according to the Commission, the national authorities had wide latitude to determine what evidence was relevant'.[64] It is not possible to say that there are not any benefits when incorporated European rights are used.[65] However, if such an incorporation is not clearly expressed it would be unrestrained by the margin of error and responsibility. Therefore, as McColgan observed 'entrenched rights must not be regarded as a panacea against the ills of government'.[66] In fact, entrenched rights when adopted differently every time, have limited impact on the national jurisdiction and political action to secure substantive protection to Women's Rights. Sometimes Parliament has preferred to leave the process to the existing common law procedures because when it did not, there was not the possibility to predict in which way the European law could be applied in a beneficial manner for women. In this sense McColgan has noted:

> Whereas Parliament has attempted to regulate the introduction of sexual history evidence, judicial shortcomings in this matter having become evident prior to the passage of the Sexual Offences (Amendment) Act 1976, judges have reacted by preferring their common law (and at times highly questionable) notions of relevance over the ex-

[63] ibid 296.
[64] ibid 297.
[65] ibid 304.
[66] ibid.

> pressed will of the Parliament, and in doing so, have rendered the 1976 provisions largely ineffective.[67]

To the extent that the HRA 1998 gives judges the power to intervene in the face of attempted amendments in this and other areas, the outcomes are unlikely to benefit women. It seems that for achieving substantive equality, entrenched rights are a good mechanism but they are not the unerring one.

Wittgensteinian View on Consent

Why apply Wittgenstein to the concept of consent?

In applying a Wittgensteinian view to the concept of consent, it is important to realise that from a linguistic point of view it is nonsense to consider consent expressed in the past as potentially relevant for determining whether or not consent has been expressed in the present. Although, this may seem like common sense, everyday legal practice (including use of sexual history evidence), is in fact based on the assumption that consent, once given, is held to remain. This section questions this assumption from a conceptual perspective, pointing out that there is no logical reasoning to the way in which general and rigid principles have been applied to regulate the legislation of sexual history evidence. The application of Wittgensteinian methods to sexual assault cases provides a clear critique of the dogmatic practice which supports general inferences from past sexual behaviour to present sexual behaviour – deductions based on the hypothesis of repetition which have little relevance to real cases brought to trial. Analysing these cases, it is possible to show that 'there are reasons to think that it is not valid or rather [it] is valid only in a small minority of cases'.[68] In this sense, the assumption that sexual history has any

[67] ibid 308- 309.

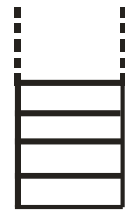
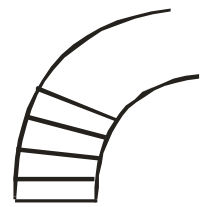
[68] Liat Levanon-Morag, 'Sexual History Evidence in Sexual Assault Cases: A Critical Reevaluation', (*The Israel Democracy Institute*, Faculty of Law Hebrew University of Jerusalem, 7 March 2012) <law.huji.ac.il/calendar.asp?act=event&event_id=1312&cat=494&thepage=iruim> accessed 14 July 2012.

probative value for proving consent is prejudicial. From a philosophical legal perspective it does not make sense to apply a general assumption of inference to investigate sexual history evidence. The use of these assumptions provides an unfair treatment of women in trials.

Through theory, it is possible to set up new ways to consider individual concepts once we realise that the usefulness of a particular doctrinaire approach to such concepts is limited to a specific area. In this sense contract law considers the concept of consent by defining it in a strict manner, in terms that are designed to work for commercial aspects. Despite this commercial concept of consent being defined by a rigid, context-specific theory, it has been applied to some contracts in which the relationships between people were a pivotal aspect. Notably, this characterises, for example, the regulation of marriage. Wittgenstein shows that a theorising grammatical work may lead us to some philosophical '*craving for generalization*'[69] and to distance language from the everyday use made of it. In many cases, the continuum of the craving prevents us from developing our concepts properly.

The view on the concept of consent expressed in this research draws on Wittgenstein's method of exploring the complexity of terms in flux. Wittgenstein shows by means of his philosophy that the use of a concept is correlated to the unlimited ways in which it can be employed, and that we have to take this into account.[70] The innumerable ways in which we apply a concept cannot be exhaustively outlined by rules. In order to frame this view in clearer terms, Wittgenstein uses an example to demonstrate that rules are not followed in an automatic and mechanical way. In particular he says:

[69] Ludwig Wittgenstein, *Vorsellungen über die Grundlagen der Mathematik, Cambridge 1939* (Cora Diamond ed, Joachim Schulte tr, Suhrkamp Verlag 1978) 17.
[70] Wittgenstein (n 18) 292.

> If I put bricks on top of one another, I must get something which goes up straight
>
> 
>
> (fig 1)
>
> But in fact, I try and I get something which goes not thus but so:
>
> 
>
> (fig 2)
>
> I should then say that I hadn't put them one on another, or the bricks weren't really square or something of the sort. The point is: by saying they have stopped going straight, I am saying, "I have adopted it as new criterion for their being square that they go like this."[71]

This passage highlights the link between the concept of rules and the one of criteria. According to Wittgenstein the difficulty in finding a general criterion to predict how things will go on[72] in the future is

[71] Wittgenstein (n 69) 13, 128-129.

[72] As Rush Rhees points out: 'learning what the word means or learning how to speak, is above all or essentially a matter of learning how to go on - of being able to learn from examples, and so forth); see Rush Rhees, *Wittgenstein and the possibility of discourse* (DZ Phillips ed, Blackwell 1998) 241.

associated with the difficulty in fixing a universal rule[73] to define once and for all how our concepts go on.

Wittgenstein gives the example of a society willing to state some rules by writing them down. This society could choose to go on by means of a definite formalisation of those rules that they followed in the past. However, such a formalisation would not necessarily reduce the risk of uncertainty about how to proceed in a particular situation in the future or, as Wittgenstein observes, it doesn't 'calm us down' about future procedures. Indeed, the formalisation of rules does not prevent us from feeling 'heavily unsure' in some circumstances.[74]

According to Wittgenstein a general rule only considers some cases that have something in common with each other. However, it should not be overlooked that there are differences between each case, and that such differences play an important role in the application of the rule. Rules are not being set resolutely because they have to take into account the specific variety of praxis.

In the realm of contract law, Wittgenstein's approach to the concept of consent would prevent the consequences of considering that an assertion, such as 'yes', once expressed is understood as a warranty of permanent consent in all future circumstances occurring within a relationship, just as within a commercial contract.

In order to give relevance to the moment in which the lack of consent occurred in contracts that are not commercial, it is useful to consider whether the consent was ever clearly expressed at any time, and whether it was subsequently revoked in any successive phase.

The Wittgensteinian approach demonstrates that should the long-established contractual vision of consent remain unmodified, violence against women will continue to be supported by improper ap-

[73] In this sense, Wittgenstein says: 'not only rules, but also examples are needed for establishing a practice. Our rules leave loop-holes open, and the practice has to speak for itself'. Ludwig Wittgenstein, *On Certainty* (Basil Blackwell, 1977) 139.
[74] ibid 8.

plications of conventional contractual theories in which the consent expressed in the past still holds its validity in the present. The concept of consent is amongst the key concepts used in contemporary social contract theories. In politics, the concept of consent is used to legitimise the exercise of power. In bioethics it turns what would be otherwise an unjustified attack to the private sphere of the person. In criminal law consent 'does turn homicide into voluntary euthanasia, battery into sport, theft into a gift, and rape, our concern here, into sexual intercourse'.[75] In this work the concept of consent is related to the crime of rape during marriage or long-term relationships. The consent in this context is what makes the difference between an acceptable sexual intercourse and rape. Even though the issue of consent could seem simple at first glance, when it is explored from both a theoretical and a practical perspective, many philosophical questions arise.

Whilst law is inquiring the meaningfulness of consent, the following need to be known: can consent be forced, pursued or manipulated? Should consent be seen as holding continuously in any contractual circumstance? How can a feminist approach to contract law be helpful in order to take into account neglected aspects that are relevant in a gendered context?

International organisations have been working vigorously to remove the patriarchal gender biases in contract laws in order to mitigate the risk that women are subject to discrimination during the trials due to their past sexual choices.[76]

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[75] Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (Darthmouth Publishing Company 1996) 91.

[76] The tendency to describe the domestic character of the state as analogous to the patriarchal family, with the state and its government standing metaphorically for the patriarch, reinforces a conception of public and private spheres as coherent embodied spaces. Feminist efforts to challenge the statism of international law may in fact be undermined by its own state-as-patriarch argument. The question about this issue in feminist studies is often been the same: could the understanding of violence against women attempts to collapse the divisions between public/private? According to Buss: 'The concept off due diligence, by which the state's legal obligation to protect its citizen is activated, together with an understanding of violence against women as a part of continuum, attempts to collapse, in effect, the divisions between pub-

The Wittgensteinian idea of consent also moves away from the prototype of considering a sexual relationship as a commercial transaction in which a woman cannot contravene the clause agreed in the contract without receiving some form of penalty. However, any such reforms of the judicial system are no guarantee of non-prejudicial treatment as 'along with the reformation of the judicial system into a gender bias-free system, there is, of course, an immense need to implement educational programs regarding the importance of respecting women's autonomy and choices in all aspects of our society'.[77]

'Form of life' and shared conventions

Wittgenstein's philosophical method aims to eliminate confusions about the meaning of words that are created by a dominant theory. It allows us to perceive what we do with language and how we place it – eg use it – in our practices. We may say that 'the use of language is part of a way of living'.[78] In order to grasp the meaning of a word we have to pay attention to our linguistic conventions, therefore we must look at a concept as it is used in the language games played within our 'form of life'.

What permits language to work properly – and for that reason must be considered as something of a 'given' – are the forms of life. Language is not something abstract; indeed, it is situated within the common activity into which the language games are interlaced.[79] In Wittgenstein's terms, agreement in language brings meaning to the communication between people, and this agreement is 'not agree-

lic/private that characterise the legal recognition of violence'; see Buss and Manji (n 16) 97.

[77] Michele Alexandre, 'Girls Gone Wild and Rape Law: Revising the Contractual Concept and Ensuring an Unbiased Application of Reasonable Doubt When the Victim is Non-Traditional' (2009) 17 Journal of Gender, Social Policy & the Law 78.

[78] Rhees (n 72) 142.

[79] Wittgenstein (n 18) 23: 'It is interesting to compare the multiplicity of the tools in language and of the ways they are used, the multiplicity of kinds of word and sentence, with what logicians have said about the structure of language'.

ment in opinions but in form of life'.[80] The forms of life are the ordinary ways in which humankind can go on, or as Wittgenstein said, they are 'the system of reference by means of which we interpret an unknown language'.[81]

According to Wittgenstein, the concept of a 'language-game' emphasises how language communication is part of an activity, and that in such activities are forms of life. In this sense, meaning is to be found in the discernible shared conventions of our form of life, and in the way in which they change in different contexts.

As Cavell notes, when learning language, you do not learn just the sound of words or how to organise them in the right order. Rather, you learn what words do, ie their form of life. He wrote:

> In 'learning language' you learn not merely what the names of things are, but what a name is; not merely what the form of expression is for expressing a wish, but what expressing a wish is; not merely what the word for 'father' is, but what a father is; not merely what the word for 'love' is, but what love is.[82]

This view of the learning of language could seem to exclude the option of a variety of forms of life, or the presence of a range of meanings inside a form of life. However, the form of life is not something fixed, which is given once and for all. In fact, new types of language-games come into existence, while others turn out to be old-fashioned and abandoned, depending on what happens during the life of a society. Wittgenstein wrote:

> New types of languages, new language-game … come into existence, and others become obsolete and get forgotten.[83]

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[80] Wittgenstein (n 18) 241.

[81] Wittgenstein (n 18) 206.

[82] Stanley Cavell, 'Excursus on Wittgenstein's vision' in Alice Crary and Rupert Read (eds), *The New Wittgenstein* (Routledge 2000)

[83] Wittgenstein (n 18) 23.

Therefore, if we would like to grasp a concept we cannot define it by means of theory, because our language is played in a particular language game and it shares a form of life. Yet, when someone expresses the concept of consent it is possible to understand it by means of a process of acknowledgement of such a concept. Wittgenstein called this kind of process 'family resemblances', which contrasts with the idea of universal essences of our concepts. Therefore, the concept of family resemblances implies a generally shared community of meanings.

Family resemblances of consent among contracts

In order to explore the concept of consent we should place it within the pertinent language game and consider how such a game has been played within a particular form of life in an exact moment in time. Sharing this approach will lead us to recognise the peculiar concept of consent in every kind of situation and to make a distinction among a variety of concepts of consent. In terms of Wittgensteinian language, we can say that different kinds of consent are expressed within diverse kinds of language games (eg commercial, relational etc.), contractual situations and settings, although it can be seen that there are family resemblances among them.

In contract law, language games concerning claims of consent occur frequently. However, this concept of consent has been theorised in a fixed way for every kind of contract, and this theory cannot take into account the different relationships among people. There is no great misfortune if there is a misunderstanding between the owner and someone who takes her property because it can be returned with compensation for any lost goods. A misunderstanding in non-consensual sex is irreversible because 'there is no way to erase the falsely intimate connection'.[84]

By using the 'family resemblance' approach in contract law, it is possible to pay attention to the similarities and differences among differ-

[84] Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 116.

ent types of consent expressed in every type of contract. But what does Wittgenstein mean by the expression 'family resemblance'? He pointed out that what connects the exemplars among them is not an essential characteristic.[85] Rather, such connections are possible by means of a succession of overlapping correspondences. In such succession, it may happen that not even a single characteristic is in common to all.

By means of some examples, it is possible to show in simple terms Wittgenstein's idea of 'family resemblance'. One of these is the sorites[86] type. It consists in describing the characteristic (A, B, C, D) of a group of things, for example the types of consent expressed within different contracts. Assume we can compare the type of consent expressed in four different types of contracts – 1) Contract of sale for goods; 2) Purchase of a winning lottery ticket 3) Marriage contract; and 4) Prenuptial agreement – the characteristics of which are as described below.

Consent in different types of Contracts

Consent/contract relevant to a number of aspects of general interaction:

(1) sale: A B C D
(2) lottery tickets: B C D E
(3) marriage: C D E F
(4) prenuptial agreement : D E F G

In this example, resemblances among consent within different contracts can be set up either by means of shared features (eg in this case each contract shares some features with the others. For instance, in contract 1, 2, and 3 feature C is a common one), or by taking into account what the differences are (eg contract 4 has just one feature in common with contract 1). Expressly, we considered two contracts

[85] Wittgenstein (n 18) 68.
[86] A line of argument with syllogism.

that emphasised the commercial aspect and two others in which such an aspect is less relevant. Nevertheless, there is a significant difference between the standard contract of sale and the contract of lottery ticket too. For example, the latter is not transferable as a common good and its value cannot be estimated until someone wins.[87] Before someone wins, a lottery ticket has only an 'expected' value, that is: the value of the possible win is weighted by the probability that such a win actually occurs.

In a different way from a contract of marriage, a prenuptial agreement or premarital agreement[88] is a prior contract to marriage, or civil union. The content of it commonly takes account of division of property and spousal support in the occurrence of breakup of marriage or divorce; further contents may be included as well. In England, prenuptial agreements have historically not been deemed valid. However, in 2010 Supreme Court test case between the German heiress Katrin Radmacher and Nicolas Granatino,[89] indicated that such agreements have decisive weight in a divorce settlement.

In order to explore the notion of family resemblances, it is often suggested that we should think about a series of things that are recognised as exemplars of the same kind, for example flowers. If we have a garden with violets, lotuses, lilies and roses we could say that there are flowers in the garden even though every flower is different from the others. In fact, we could observe some similarities among these flowers, even though between a lotus and a violet there is very little in common in terms of, for example, colour or shape. We may also consider that there is no 'essence' in common among them, but we could always distinguish them as being flowers. As Rhees points out

[87] See The National Lottery Act 2006 (c 23).

[88] Generally abbreviated to *prenup* or *prenupt*.

[89] *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42; [2011] 1 AC 534; Owen Bowcott, 'Prenup agreement enforced under UK law' *The Guardian* (London, 20 October 2010) <www.guardian.co.uk/money/2010/oct/20/prenuptial-agreement-enforced-uk-law> accessed 2 April 2013.

the importance of the analogies between objects 'is precisely to get you look on the 'relation to reality' differently'.[90]

If we look at the concept of consent in contract law by means of a Wittgensteinian prospective, we will no longer be able to define some essential concepts of consent in a rigid form, because not all types of contracts show the same similarities. If we organised such concepts according to a linear configuration, the first concept of consent that we can analyse may have nothing in common – or something in common – with the last one in this kind of configuration. Or rather, as Rodriguez-Blanco observed: 'The notion of family resemblance leaves the boundaries of any concept open to an infinite potential number of entities and therefore, we might say, everything resembles everything else.'[91]

Following Wittgenstein, in order to see what is in common among all kinds of consents in contract law we cannot fix a true paradigm to define the concept of consent itself. Rather, we should be able to perceive the family resemblances among consents after having explored different kinds of consent. Once a series of consent has been observed and arranged in a linear configuration, it will no longer be possible for us to express a 'median' type of consent, or an 'universal sample'. Therefore, we do not need to analyse an indefinite number of cases of consent in contract law to understand what consent is.

To look at more than one contract is not useful in order to understand when consent is present. In this sense, looking at the interactions among people, we can recognise whether there was consent in a particular situation.

[90] Rhees (n 72).

[91] Veronica Rodriguez-Blanco, 'Towards a Concept of Human Rights: Inside and Outside Genealogy' (2011) <papers.ssrn.com/sol3/papers.cfm?abstract_id=1749787> accessed 2 April 2013.

Conclusion

Rethinking Consent in a Wittgensteinian Way

The general theoretical task of this work has been to stimulate the legal debate in a new way, proposing an alternative to those conceptual views that have generated restricted frameworks around the concept of consent, thus limiting its use in legal practice. In a more practical sense it has attempted to shed some light on the way in which the UK law deals with rape cases involving long-term relationships. Several practical legal cases involving UK law have been taken into account in these papers, which revealed a need to direct the debate towards the prejudicial typified practices in jurisprudence regarding rape.

In order to improve the situation regarding sexual history evidence a wider, radical change is needed. In particular, the legislation should support a total prohibition on the use of sexual history evidence, the main problem being the prejudicial attitude of society towards it, especially during trial. In this sense, even a rape shield law that promotes judicial discretion can fail to protect the victim of rape during a trial. However, even Canadian legislation – which has been discussed here as an example of how to proceed,[92] shows that an absolute prohibition in a legal system is incompatible with the idea of fundamental human rights of a fair trial. A radical, absolute rape shield about the sexual history evidence is therefore not a definitive solution. Rather, it can be seen as the initial step that needs to be promoted from a legal point of view in order to encourage respect for the victims of rape and the protection of their fundamental rights.

Given these limitations of a purely legal approach, a philosophical therapy has been promoted in this work. This could lead to a change of attitude towards the concept of consent within society. Consistent with a Wittgensteinian argument, this work has not sought a solution to solve a problem – in this case the prejudicial rape trial. Rather, the Wittgensteinian approach is to find methods which can

[92] Levanon-Morag (n 68) 156.

make the problem disappear[93] in a variety of ways. For the 'disease' to get better, therapies are needed which treat it, and make it gradually disappear. In order to make effective rape shield provisions, a cultural change must be achieved challenging the traditional rape myths, by educating both public and juries. If justice systems were not influenced by rape stereotypes, prejudicial acquittals based on sexual history evidence would disappear.

Bibliography

––, 'Supreme Court rules in favour of prenuptial agreement' *BBC* (London, 20 October 2010) <www.bbc.co.uk/news/uk-11580907> accessed 29 August 2013

Alexander D, 'Twenty Years of Morgan: A Criticism of the Subjectivist View of Mens Rea and Rape in Great Britain' (1995) 7 International Law Review 207

Alexander L, 'What's inside and outside the law' (2012) 31 Law and Philosophy 213

Alexandre M, 'Girls gone wild and rape law: revising the contractual concept and ensuring an unbiased application of Reasonable Doubt When the Victim is Non-Traditional' (2009) 17 Journal of Gender, Social Policy & the Law 78

Bowcott O, 'Prenup agreement enforced under UK law' *The Guardian* (London, 20 October 2010) <www.guardian.co.uk/money/2010/oct/20/prenuptial-agreement-enforced-uk-law> accessed 23 April 2013

Burgess-Jackson K, *Rape: A Philosophical Investigation* (Darthmouth Publishing Company 1996)

Buss D and Manji A (eds), *International Law: Modern Feminist Approaches* (Hart 2005)

[93] Wittgenstein (n 18) 133.

Cavell S, 'Excursus on Wittgenstein's vision' in A Crary and R Read (eds), *The New Wittgenstein* (Routledge 2000)

Della Giustina J, *Why Women are Beaten and Killed Sociological Predictors of Femicide* (Edwin Mellen Press 2010)

Dworkin R, *A Matter of Principle* (Harvard University Press 1985)

Home Office, *Report of the Advisory Group on the Law of Rape* (Cmnd 6352, 1975)

Hunter R, McGlynn C and Rackle E (eds), *Feminist Judgments From Theory to Practice* (Hart Publishing 2010)

Kennedy H, *Just Law: The Changing Face of Justice and Why It Matters to Us All* (Chatto and Windus 2004)

Kelly L, Temkin J and Griffiths S, 'Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials' (Online Report 20/06, Home Office 2006 <library.npia.police.uk/docs/hordsolr/rdsolr2006.pdf> accessed 12 April 2013

Kibble N, 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2000) 32 Cambrian Law Review 27

Krahe B and others, 'Prospective lawyers' rape stereotypes and schematic decision making about rape cases' (2008) 14 Psychology, Crime & Law 461

Langford M (ed), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* (Norwegian Centre for Human Rights, University of Oslo 2009)

McColgan A, *Women Under the Law: The False Promise of Human Rights* (Wm Gaunt & Sons 2000)

Mulcahy L and Wheeler S (eds), *Feminist Perspective on Contract Law* (Glass House Press 2005)

Randall M, 'Sexual Assault in Spousal Relationships, "Continuous Consent", and the Law: Honest But Mistaken Judicial Beliefs' (2008) 32 University of Manitoba Law Journal 144

Rhees R, *Wittgenstein and the possibility of discourse* (DZ Phillips ed, Blackwell 1998)

Rodriguez-Blanco V, 'Towards a Concept of Human Rights: Inside and Outside Genealogy' (Social Science Research Network, 27 January 2011) <papers.ssrn.com/sol3/papers.cfm?abstract_id=1749787> accessed 2 April 2013

Salako S, 'Chapter 11: The Course of Evidence: Examination-in-chief, cross-examination and re-examination' (*Insite Law Magazine*, 18 September 2009) <www.insitelawmagazine.com/evidencech11.htm> accessed 22 December 2012

Shah P, Dalton R and Boris N, *Pervasive developmental disorders and childhood psychosis*, in Kliegman RM, and others (eds), *Nelson Textbook of Pediatrics* (18th ed, Saunders Elsevier 2008)

Walby S and Myhill A, 'New Survey Methodologies in Researching Violence Against Women' (2001) 41 British Journal of Criminology 502

Wheeler S and Shaw J, *Contract Law: Cases, Materials and Commentary* (Clarendon Press 2001)

Williams M, *Secrets and Laws: Collected Essay in Law, Lives and Literature* (UCL Press 2005)

Wittgenstein L, *The Blue and Brown Books* (Blackwell Publishers 1958)

- *On Certainty* (Basil Blackwell, 1977)
- *Vorselungen über die Grundlagen der Mathematik Cambridge 1939. Nach den Aufzeichungen von R. G. Bosanquet, Norman Malcom, Rush Rhees und Yorick Smythies, Herausgegeben von Cora Diamond, Übersetzt von Joachim Schulte, Suhrkamp Verlag, Frankfurt am Main, 1978* (original version: *Wittgenstein's lecture on the*

foundation of mathematics - Cambridge, 1939, Cornell University Press, Ithaca 1975)

- *Philosophical Investigations: The German Text, with a Revised English Translation* (Elizabeth G and Anscombe M trs, Blackwell 2006)

Zerilli L, 'Doing without Knowing: Feminism's Politics of the Ordinary' (1998) 26 Political Theory 435