

“I Have the Freedom and Capacity to... Or Do I?”

Challenging the Definition of ‘Consent’ under the Sexual Offences Act 2003

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The process of preparing this paper and presenting it at the 2015 LSE Conference on Gender and Sexuality was both challenging and, in the end, highly rewarding. From the starting point of the relative intellectual and emotional comfort of researching and writing a text on a subject of personal and academic interest, the challenge for me lay mainly in two areas: (1) How to transition from the written to the oral and, in so doing, how to clearly verbalise fairly complex ideas and analyses; (2) How to impose the added discipline of precision, of ‘getting to the point,’ while presenting somewhat intricate arguments in a limited time-slot. These were also related to two broader challenges of time management – trying to ensure that the paper was ready on time and learning from my ‘mishaps’ at the moment of presentation (unnumbered loose papers tumbling to the floor), and overcoming a persistent lack of self-confidence in relation to performing in public (regaining my composure and finding the right ‘spot’ in the presentation to be able to continue). Despite these ‘hiccoughs,’ my difficulties and fears dissipated as I settled into delivering my presentation and listening to those of my peers. The entire experience provided very useful insight into the technicalities of the ‘conference paper,’ while presenting a refreshing opportunity to create the link between academic study and real life, and to be able to interact with others on their particular, and even passionate, interests.

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CAPACITY, FREEDOM and CHOICE... These are the words that define “consent” under section 74 of the Sexual Offences Act 2003, and this is where my concern begins, especially in relation to the conceptualisation of ‘rape’ and sexual degradation. In line with the fundamentals of Socratic critical thinking and metaphorically celebrating Les Back’s ‘art of listening’, my disquiet lies with words that defy precise interpretation or meaning. This is relevant when language becomes the primary mechanism by which we act out our power relations in society. Indeed, a dichotomy exists between the intended rigidity of the terms employed for legislative purposes and the ambiguity of consent in reality. Rather than discussing the “age of consent” through a psychoanalytical framework, I shall explore the philosophy behind terms employed in section 74 through a critique of sexuality and consent, beyond the arguments of libertarianism or equality.

The Sexual Offences Act 2003 reveals subtle assumptions about words premised on the value of interpretation reflecting, in parallel, subjective moral suppositions around meanings of ‘consent.’ “Yes means yes,” “no means no” or, provocatively, “does no sometimes mean yes”? To interpret ‘consent’ as a predisposed given is a failure in intellectual reasoning and in the fight for justice. The definition of ‘consent’ in section 74 states, *inter alia*: “a person consents if he agrees by choice and has the freedom and capacity to make that choice.” One cannot reduce the complexity of such terms to a simple ‘yes’ and ‘no.’ Yet the fragmentation between what is presumed and actual events in the context of sexual consent persists. One must question the political contours of ‘freedom’ and ‘capacity’ when injustice in both private and public spheres continues to prevail, and when many subconsciously continue to dehumanise those who do not conform to the established heteronormative framework. My reflections will focus initially on the authenticity of ‘capacity’, who is *allowed* to perform and internalise this ‘capacity’ and how this

affects restrictions on choice. Finally, I shall examine how we may think of sexual consent beyond the current legal framework, and what alternative language may be appropriate.

I am not challenging the complexity of human dignity or the significance of establishing human ‘capacity’ through human rights, nor am I trying to reduce the power of agency. However, it is difficult to accept section 74 as presenting full capacities to “consent”, as it ignores the value of conflicted subjectivities and the continued transformations associated with sexuality and intimacy. Heterosexist connotations are rife. Looking for example at the definition, an absolute “he” is prevalent. Indeed, this highlights hegemonic patriarchal ignorance or dis-interest vis-à-vis the manifestations and functioning of power in forming the boundaries of knowledge, the core existence of which should continue to be ruptured and dismantled: Queering does the job!

In reality, power is not a machine embodied by all in a ‘cyborgian’ dimension, but rather, as Michel Foucault would insist, constitutes itself in certain ‘knowledges.’ In other words, “power always operates with the consent of those who submit to it” (Chambers, 2008: 31). An individual can choose which forms of power or knowledge to endorse, and seek alternative forms of simple resistance. However, when ‘consent’ and ‘power’ become inter-changeable, or if ‘consent’ propaganda becomes an endorsement perpetuated by the manipulation of power, how can one truly choose to ‘consent’? Essentially, the capacity to ‘choose’ and to embody the sexualisation of ‘choice’ continues to fall within the purview of those who *have* the power and knowledge to be ‘free’ sexually, physically and affectively. Accordingly, the 2003 Act reveals its underlying conventional thinking by regarding the penetrative “he” as endorsing the power and knowledge to be ‘free and capable.’ This not only illustrates the re-establishment of binary-driven oppositions between ‘heterosexual’ and ‘homosexual’, endorsing the pathologisation of the latter, and active/passive alignments, but immediately alienates the ‘Object’ in Beauvoirian terms and any borderless sexuality protesting against the language and law that celebrate a

heteronormative system of thought. In line with Diana Fuss's articulation of "inside/out," section 74 maintains its power to instruct by re-institutionalising the politics of exclusion.

Further, if we look at the particular word "has" in relation to "he" – a hetero-patriarchal marker – it could potentially signal a commodification of sexual consent. It denotes a particular contract – an inequitable one – as referred to by Foucault ([1978] 1998). By associating ownership with "he" this institutional exclusion emerges through a Hegelian master/slave dialect reinforcing not only hierarchy in "capacity" and sexual "freedom," but also subtly suggesting that intimacy can only be an exchange determined by undemocratic powers, the most powerful being the heterosexual "he" according to section 74.

Now, when public institutions are clamouring for a 'sexist regulation of the private' and sex is embraced as a commodity belonging to the hegemonic masculinity of a penetrative "he," this directly affects the development of one's sexual citizenship. Why? Not conforming to the act's definition of 'consent' deprives one of the chance to negotiate between the public/private and master/slave narratives and more importantly, I believe, the sexual 'rights' to 'choose' and be 'free' are suppressed by the privilege of the powerful "he." The denial of any sexual right limits the growth of selfhood and personal freedom and, thereby, reduces individual capacity for sexual and intimate citizenship.

In pursuing an alternative vision vis-à-vis consent, the suggestion of an ontological origin of consent would legitimate the politics of exclusion by assuming a 'given' truth about the nature of consent – that truth being the exclusivity of the "he" and his capacity and freedom as extended properties. Questioning the epistemology of 'consent' on the other hand highlights a necessity to protest against the very knowledge that enables this exclusion.

In part 1 of the Act, rape is committed if:

(a) He (A) intentionally penetrates the vagina, anus or mouth of another person (B) with

his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

This legal framing illustrates an acceptance that ‘gender does exist’ and that sexuality is a fixed entity beyond negotiation, that the mechanisms of how the body is used form our command of knowledge and that the heterosexual “he” and his penetration carry the force of control and power – the power to consent, to have ‘sex’ or to rape.

Within the privacy of intimacy and considering Butler’s critique in *Gender Trouble* (1990), active/passive conditioning is not an embodiment through choice, but becomes manipulated, in a Foucauldian sense, within “regulative discourses” that exist as tools for indirect public coercion – presented ontologically. Achieving genuine sexual freedoms and capacities is disguised by legislative narratives and disciplinary techniques ensuring the essentiality and naturalness of the penis/vagina and penetrator/penetrated binary, for as long as the Law can display a sort of truth vis-à-vis sexual ‘difference,’ the growth of power distinctions can persist. Beyond the testimony of a natural difference, the “intentionally penetrates the vagina” statement in part 1 of the Act suggests that this ‘illusionary’ difference is inherent to the elaboration of a hierarchy. Based on Moira Gatens’ (1983) reflections, would legislation even consider replacing “penetration of the penis” with “encapsulating by the vagina” as a means for addressing “consent” and “rape” specifically? If there are “sexual freedoms,” they cannot take the form of consent, since consent is already colonised by law and its related ideologies based on an assumption that gender exists. With that said, in the following section, I intend to move away from the materialisation of bodily distinction in order to tackle the complexity of ‘consent’ beyond the simple utterance of a “yes” or “no” statement.

What fascinates me is that the Sexual Offences Act seeks to define “consent” objectively and through measurable capacities, yet it uses highly subjective propositions – “consent” and intimacy, bound by an interplay between available possibilities, ‘knowledges’ and personal sexual preference. How does the *personal* encapsulate this ambiguity in everyday intimacy and through the negotiation of consent? By introducing theories that disrupt the optimism in the potential of “affect,” we can start to understand how the 2003 Act and the regulation of the status quo continue to invade spaces of the ‘private.’ In other words, how the epistemology of “consent” really affects what we do sexually and why. Sarah Ahmed (2004; 2014) explicitly argues that “emotions” are not intrinsic, nor do they rest upon private matters, but are created through the inter-twining of bodies and signs (see also Ahmed and Stacey, 2001). What we *feel* or how we interact with the other in bodily contact, is already marked with knowledge and meaning denying a true freedom in experience. This is not to say that interaction can never move beyond the ordinary, but the potential for ‘alternative attachments’ can only emerge once the premise of our current emotions is acknowledged.

If we perceive “affect” as re-establishing forms of normative attachment and hierarchies that are based on the significance of historicised repetition through interaction with another body, the way in which one seeks consent is determined by the “capacity” of one’s control and power. Extrapolating from Spinoza, the power to act (for example, the power to have sex) corresponds with the power to be affected – “to feel in control.” On this point, in light of the passive/active discourse illustrated in the 2003 Act, I have associated “consent” with “feeling in control”. Despite the involvement of interactional bodies, the “affective process” vis-à-vis consent is one in which the penetrative “he” subconsciously re-calls the epistemology of consent, the historicised knowledge associated with intimacy, produces an ontology and his authority is performed by unquestionably exercising the fundamental “ownership” of control: in other words, HE immediately embodies “consent” as in section 74. The consent of non-penetrators becomes nullified as *their* status regarding consent is premature and under-developed. I am not denying

the essence of agency, nor am I trying to produce a 'save yourselves' narrative. However, we need to question the true extent of one's "freedom", when the constraints of that freedom are in themselves restrained by the contours of "who *feels* in control". So rather than viewing "affect" as the unexpected – this feeling attached to "consent", feeling in control – is common and expected.

Simultaneously, as Ahmed (2004) suggests when talking about "fear," this feeling of "control" reproduces the hegemony related to sex; it exacerbates the association between the heterosexual "he" and power. Through the intermingling of bodies and the performance of sex, the movement intensifies this power of "feeling in control." Carolyn Pedwell and Anne Whitehead (2012: 116) encapsulate these concerns: 'power circulates through feeling and how politically salient ways of being and knowing are produced through affective relations and discourses.' In line with Claire Hemmings (2005), I have moved away from the optimism that 'the affective turn' is assumed to bring by asserting the value of the construction of knowledge in reproducing the meaning of the body, in producing its very existence and how affective politics highlights the ways in which feelings can re-establish dominant social and geo-political inequalities and exclusions. So the issue remains as to whether there really is a potential for the body's capacity to affect and be affected when consent under section 74 is a feeling belonging to the "he", felt by the heterosexual penis and endorsed by an institution obviously supporting patriarchy in all its glory. These feelings might be, Ahmed (2010: 216) argues, "how structures get under our skin."

Reflecting Claire Hemmings' proposition, we can start to transform our understandings of "consent" by situating the argument "in between/and outside" "epistemology" and "ontology." Focusing on this 'gap' and by metaphorically coming out of the 'closet,' I begin with Queer spaces and language as a political challenge against the heterosexual/patriarchal status quo,

against exclusion and any identity right claims based on those narratives. By violently re-incorporating the Other in a sort of parody, we can begin to assimilate the invisible within the discourse of consent under the Sexual Offences Act. The rupturing, mixing, crossing and deconstructing of heteronormativity, the active/passive, hetero-homo sexual boundaries – basically the queering of “consent” – is essential if we are to begin to abolish the ‘control-power’ paradigm restricting potential for genuine “freedom” and “capacity,” for Queer is used as a mode of liberation.

Taking the position of the marginalised and de-centred, and following a process of “erotic justice,” BDSM, conventionally tabooed sexual practice, is interesting as it positions itself as an alternative, and yet willingly and consensually encapsulates the very binaries characterising the 2003 Act. What is different, however, is that sexuality takes no precedence in the success of the experience. The adopted roles, be they dominance or submission or both, depending on setting, are intelligently performed through a play in parody, yet liberated violence can be used out of “choice” to enhance a protest against the norm.

I am aware that there are different forms of “consent” within BDSM which can pose interesting conflicts, however consent is seen as working on a continuum of choice and autonomy; it becomes continually translated depending on the social development of desire. Pleasure can be born both out of the initiating perception of consent and during the imagined or dreamed violation of it. Of course, some BDSM practices can be criminalised (one would need to define that). However, ‘affectively’ speaking, rather than consent being active and clear-headed, it is shaped through the process of emotion and can be a little bit of both. For example, consent is publicly perceived as a straight forward “yes or no,” non-negotiable decision, autonomously owned, whereas BDSM, in non-homogenous terms, demonstrates that consent is much more complex, transgressive and emotional – it is not owned but occurs through action. In other words, when one fantasises about being raped, one may form a desire towards the consent

AND non-consent of the experience, and from a Deluzian view, this can transform the self into something *new*, contradicting the rigidity of the present language of law.

Essentially, if we begin to frame the analysis of “consent” from the position of those who create, re-create and re-write their sentimentality vis-à-vis choice in intimacy and who continue to transform its very meaning by rejecting the core conditions restricting a genuine “freedom” and “capability,” the potential for queering and ‘playing with language’ within legislation and social spaces can begin. This is not an easy project and requires in-depth reflection, but a discussion of “sexual consent” cannot continue through the continued use of the illusion in the Sexual Offences Act 2003. As Judith Butler (2011: 19) proposes, we need

to allow ‘consent’ to be re-thought in relation to another set of terms that cannot be fully constrained within this kind of legal language and its presumptive individualism... Sexual subjects are formed in dependency and this has clear consequences when thinking about what is opaque and not fully knowable in the realm of sexual desire.

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