

Rape and Human Rights : A Feminist Perspective

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ABSTRACT

Echoing the ambivalent relationship feminism has historically had with law, feminists working within the violence against women movement within England and Wales have shown little enthusiasm for a statutory Bill of Rights. Neither the European Convention on Human Rights nor the Human Rights Act 1998 has been the focus of feminist research or activism in this area. Indeed, the social sciences as a whole have been slow to engage with international human rights law and theorise any impact on law and policy.

This thesis develops an analytical and conceptual framework in which to investigate the use, outcomes and policy impact of human rights arguments made by rape victims and defendants under the European Convention on Human Rights and the Human Rights Act 1998. Documentary analysis of 31 law reports using this framework showed that rape defendants used human rights more often than rape victims did, but that rape victims were more likely to win their case.

It is concluded that the European Convention on Human Rights has contributed to the development of some new pan-European standards in rape cases, despite the fact that few cases were taken by rape victims. There is a good understanding at the European Court of the impact rape has on its victims and also of the difficulties that exist in proving rape. Some suggestions for the future are offered, including the need for: clarity of procedures and funding for third party interventions; equal representation in the judiciary; feminists to think 'horizontally'; knowledge from and joint working with human rights experts. The time and space that human rights provide can provide an ideal opportunity to challenge existing criminal justice discourses around rape, victims and defendants.

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Author's Declaration

I declare that the work in this dissertation was carried out in accordance with the Regulations of the University of York. The work is original except where indicated by special reference in the text and no part of the dissertation has been submitted for any other degree.

Any views expressed in the dissertation are those of the author and in no way represent those of the University of York.

The dissertation has not been presented to any other University for examination either in the United Kingdom or overseas.

Signed: 

Date: 11 May 2006

INTRODUCTION

In 1987 Jennifer Temkin opened her book on rape and the legal process with the following statement:

For over a decade public disquiet has been intermittently but vehemently expressed about rape and the way it is handled by the criminal justice system. (pg. 1)

Over fifteen years on, this quote is still an appropriate starting point for a discussion about rape and the criminal justice system. Although huge steps forward have been made, including the review and strengthening of the substantive law and an improvement in the way women are treated by the police, other fundamental problems described by Temkin in 1987 such as the low conviction rate and the male dominated judiciary still exist. The last decade has seen resources ploughed into tackling domestic violence which has resulted in some positive policy and attitudinal changes, however sexual violence has been treated as an 'add on' and rarely properly considered in its own right (Kelly, 2004).

This thesis is about the use of the European Convention on Human Rights and the Human Rights Act 1998 by rape victims *and* by rape defendants within the prosecution process. In research terms, as with the study of other forms of violence against women, we know far more about women and rape than we do about men and rape. Here, I am not talking about women and mens experiences of being the victim of rape - although there is much more research on female victims than male victims this is simply because many more women than men are raped. But for every rape victim, female or male, there is a male rapist, for every domestic violence victim a person (generally male) who is violent and abusive, for every woman involved in prostitution a pimp and a user (again, generally male). Feminist research, however, has generally focused more on the female victim than on the male perpetrator. With the exception of Dianna Scully (1990), we have little feminist research about why some men rape, and none at all in England and Wales. Similarly, we have only patchy knowledge about how men as rape defendants navigate (or are navigated through) the criminal justice system, with the exception of Jennifer Temkin's (2000a) interviews with ten barristers experienced in prosecuting and defending rape cases. Men as rape

defendants are included in this research sample to start to plug this gap and in acknowledgement that how they use human rights is likely to have some impact on how women and men as victims experience the rape prosecution process.

This thesis is written from a multi-disciplinary, feminist perspective. It is multi-disciplinary in that it crosses the boundaries of law, sociology, politics, women's studies, policy studies and philosophy; boundaries which are increasingly acknowledged as being historical artefacts, reflective of the preoccupations of an era (Bacchi, 1999). Acknowledging these boundaries as being arbitrary however does not make them any easier to cross. Many of these disciplines have a number of internal boundaries as well, for example law is divided into civil, criminal, international, tort, human rights etc. and the scope of policy studies consists of the study of different areas of policy-making, for example environmental, criminal, family, child welfare, etc. This thesis is an example of the extension of policy studies boundaries into law, in acknowledgement of the ever-growing role of the judiciary within policy making and interpretation both in England and Wales and Europe:

The work of governments and parliaments is today structured by an ever-expanding web of constitutional constraints. In a word, European policy-making has become judicialised. (Stone Sweet, 2000 pg. 1, emphasis in original)

To justify its status as feminist is one that is more difficult, and there has been much discussion over what it is exactly that makes a piece of research 'feminist' (see for example Stanley and Wise, 1993; Maynard, 1994 and, for a debate over whether there is much a thing as feminist methodology, the one between Hammersley, 1992 and Gelsthorpe, 1992). There is no definitive 'tick list' of criteria that must be fulfilled to label research feminist; what may be classed as feminist to one person may not be to another and it is important to remember that there are also divisions *within* and *between* 'feminisms'. The days have passed where 'feminist research' was seen as synonymous with 'qualitative research', and discussions around what makes research feminist have moved away from individual methods and more towards how the method is used and what it is used for (Kelly et al., 1992). This research uses law reports as the data that are analysed using documentary analysis, hence neither the data nor the method of analysis could be argued to be inherently feminist in any way.

Feminism is a critical social movement that challenges, and ultimately aims to break down, the patriarchal structures that society is based upon. It means different things to different people at different times and has many overlaps, for example with movements against racism, poverty, war and violence. This thesis aspires to create socially significant knowledge that can be used by the feminist movement to work towards social change, a desire that is shared by many academic feminists:

Our desire to do, and goal in doing, research is to create useful knowledge, knowledge which can be used by ourselves and others to 'make a difference' (Kelly et al., 1994 pg. 28)

While this is clearly submitted as an academic piece of work it is hoped that the rape crisis movement and other anti-rape campaigns in particular will be able to use the findings from this research.

Why focus on the ECHR and HRA?

The development, machinery and impact of the European Convention on Human Rights (hereafter ECHR) and the Human Rights Act 1998 (hereafter HRA) are explained in the next chapter. This section simply explains why the ECHR and HRA have been chosen as the focus of this research. In a thesis about rape, a gendered act that impacts predominantly upon the lives of women, it may appear strange to be focusing on a generic convention (i.e. the ECHR) rather than a convention aimed specifically at women (there are six international human rights instruments specifically designed to protect the rights of women¹). The reasons for this are threefold.

The first reason is related to enforcement machinery. The ECHR allows the right of individual petition (since 1966 individuals have been able to take cases directly to a European court based in Strasbourg once all domestic remedies have been exhausted), which means that the rights contained within the ECHR are directly enforceable (at

¹ Declaration on the Elimination of All Forms of Discrimination against Women 1967, Convention on the Elimination of All Forms of Discrimination against Women 1979, Declaration on the Elimination of Violence against Women 1993, Convention on the Political Rights of Women 1952, Declaration on the Protection of Women and Children in Emergency and Armed Conflict 1974, Optional Protocol to the Convention on the Elimination of Discrimination against Women 1999.

least in theory and in contrast to the more recent European Charter of Fundamental Freedoms). Likewise, since the introduction of the HRA all courts in the UK must, since 2000 when it came into force, take the convention rights it guarantees (which are almost identical to those contained within the ECHR) into consideration when making a judgment. All UK legislation must be compatible with the convention rights and all public authorities must act in a compliant manner. This means that the ECHR and HRA are likely to have more potential to have a direct impact on the lives of women in the UK than conventions that have no enforcement machinery. The need for enforcement machinery to guarantee rights is one that is readily acknowledged by those writing about women's rights:

There are now about two dozen significant international instruments purporting to protect the rights of women or remedy-based inequalities. But rights mean little without corresponding remedies, and remedies are unlikely without institutions. (Fellmeth, 2000 pg. 727)

When we look at some of the most extreme violations of women's human rights on a mass level, it is clear that conventions with no enforcement machinery mean little to women whose rights are being violated. Fraser (1999), for example, highlights that when the Taliban took power of Afghanistan in 1994 and insisted on human rights abuses such as forbidding women to work outside of the home, the acts of the Taliban clearly abrogated principles under both the UDHR and CEDAW but these were of little use to halt the abuse. Likewise, the Fourth Geneva Convention of 1949 specifically prohibited rape in international and internal conflicts², yet (as a rhetorical commitment) women did not benefit from this in real terms (Human Rights Watch, 1995).

This is not to suggest that just because the ECHR and the HRA have the enforcement machinery to guarantee human rights that it can be taken as a given that they will be guaranteed; there can be substantial gaps between the guarantee of rights (rights in theory) and the actual ability to use and benefit from rights (rights in practice). This issue is explored in more depth in Chapter One. For now, the point is that both the

² Article 27 of the Fourth Geneva Convention states 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'

ECHR and the HRA are in theory enforceable which is the first reason they have been chosen.

The second reason for focusing on the ECHR and HRA is that the analysis of generic convention rights allow comparisons to be made between how women and men, in their different positions within the criminal justice system (as victims and as defendants) are using rights and how such rights are balanced. Thirdly, and finally, because the HRA impacts on law at the national level it allows some analysis of any impact on problems that were identified before it was incorporated into domestic law.

Violence against women and human rights

Feminist theorising about violence against women and human rights is still very much in its formative years in the UK. This is in sharp contrast to the international arena, where this has been developing over previous decades, as acknowledged in relation to violence against women in the CEDAW thematic shadow report:

The VAW sector in the UK is just coming to see and hopefully to use the potential in international human rights law both to push for appropriate actions from our government in the UK and to hold it to account through an international arena. Women's groups elsewhere in the world have been doing this for some years; we would do well to follow their lead. (Sen et al., 2004 pg. iii)

It is unclear why the UK has been slow to follow, however it is important to note that this criticism is not solely aimed at feminists and 'women's issues'; the social sciences as a whole have been criticised by their legal colleagues for failing to research the social implications of the ECHR (Freeman, 2002; Greer, 2004).

It is probably true to say that many people in the UK have not embraced the HRA with fully open arms. The media have been quick to criticise some of the arguments that have been made under the HRA, using headlines such as '*When does a right become very wrong?*' (Evening News, 2002³) and '*'Human Rights' are wrong for*

³ About a ban on the filming of a school nativity play in Edinburgh because of concerns over the right to privacy contained within the HRA (Article 10). The parents subsequently complained that the ban had infringed their right to a family life (Article 8).

Britain' (The Daily Telegraph, 2004⁴). Human rights claims made by high profile offenders such as Robert Thompson, Jon Venables and Dennis Nilsen have received particular attention because of the paradoxical nature of their argument (i.e. that they should have their human rights respected even though they have destroyed all human rights belonging to another). The Conservative Party have been quick to follow the path laid by the media, criticising the introduction of the HRA for creating a 'compensation culture' and promising a full review of the HRA with the possibility of reforming or even repealing it if they were to gain power. In an Article in August 2004 entitled '*Victim nation – Britain's compensation culture*', which was subsequently cited in most of the day's media, shadow home secretary David Davies distinguished between '*human rights*' (i.e. he used inverted commas around the term) and *genuine human rights*, complaining that 'human rights' reward 'criminal troublemakers' and 'compensation-chasers' (Davies, 2004).

Rather than focusing on 'criminal troublemakers' and 'compensation-chasers', the feminist endeavour has been to focus on the role of gender and power:

A perverse but consistent result of rights-based strategies is the reinforcement of the most privileged groups in society (Palmer, 1996 pg. 225).

Experience of entrenched rights elsewhere has shown their tendency to operate in the interests of the powerful, while leaving the powerless unprotected ... (McColgan, 2000 preface)

The concern here is not simply that women will not benefit through legal human rights, but that they might end up in a worse position than they were without them. This is not a new concern specific to human rights, but one that has been identified in relation to legal rights more generally for some time (Smart, 1989).

Rape defendants have used the right to a fair trial to challenge rape shield laws aimed at limiting questioning about a victim's sexual history evidence which has resulted in the interpretation of legislation changing in England and Wales (*R v A*⁵) and legislation struck down in Canada (*R v Seaboyer*⁶). Under the right to a fair trial

⁴ Describing how convicted men in prison may be able to father children through artificial insemination because of the HRA (Article 8).

⁵ [2001] 1 WLR 789

⁶ [1991] 83 DLR (4th) 193

provision within the Canadian Charter of Rights defendants have also been given access to personal records held on victims from schools therapists, counsellors and psychiatrists (*R v O'Connor*⁷) and a rape case was discontinued because records from a rape crisis centre had been destroyed (*R v Carosella*⁸). In the USA, McColgan (2000) describes how legislation allowing young rape victims to testify from behind a screen was classed as breaching the defendant's 'right to be confronted with the witnesses against him' under the Sixth Amendment (*Coy v State of Iowa*⁹).

Cases where rape victims have used human rights are more difficult to find. In 1998 Jane Doe successfully used the Canadian Charter of Rights to sue for damages by demonstrating how the Toronto police had failed to protect her right to life, liberty and security and right to equality when she was raped by a serial rapist (*Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto*¹⁰). In another case, an application was made under the ECHR in *JM v United Kingdom*¹¹ where Julia Mason argued that the ordeal she went through in court when she was cross-examined by the defendant in person constituted inhuman and degrading treatment¹² (in violation of Article 3 and/or 8), that she had had no effective remedy to address this through the UK courts (Article 13) and that this was discriminatory (Article 14) because child victims were protected from this form of cross-examination but adults were not. No judgement was made in this case because the government offered financial compensation to Julia Mason and agreed to change the law so that the situation would not occur again¹³.

This is where the knowledge base on the impact that the ECHR and HRA might have on the rape prosecution process ends, and many of these cases come from outside of the UK. Until now there has been no systematic analysis (i.e. looking at all cases within clearly defined sample boundaries) of human rights arguments made in rape cases under the ECHR and HRA.

⁷ [1995] 4 SCR 411

⁸ [1997] 1 SCR 80

⁹ [1988] 487 US 1012

¹⁰ [1998] 160 DLR (4th) 697. See also Doe (2003).

¹¹ Application no. 41518/98 (decision of 28th September 2000)

¹² She was physically sick during cross-examination and was admitted to hospital after the hearing.

¹³ The Youth Justice and Criminal Evidence Act 1999 prohibited defendants from cross-examining victim-witnesses in person.

Thesis structure

The first two chapters in this thesis are literature reviews. However, because so little is known about how legal human rights are used in rape cases (the cases listed in the previous section being the extent of what is known) the chapters instead review legal and social science literature on human rights, women and human rights, and rape to set up a solid base for the data analysis chapters. The literature review chapters are quite lengthy and avoid discussing individual cases that are contained within the data analysis chapters, however they are necessary because they contain bodies of literature that have not previously been synthesised.

Chapter One describes the machinery of the ECHR and HRA and their implications for policy and legislative change. The chapter goes on to show that there is disagreement over the usefulness of legal human rights for women and describes the ‘optimistic’ and ‘pessimistic’ pictures. The focus of Chapter Two is on rape, with theories of rape, substantive rape law and issues relating to the trial process discussed. The chapter then explains the ‘attrition problem’ at the base of many critiques of how rape is dealt with within the criminal justice system and shows how this can be theorised in relation to legal and criminological literature on miscarriages of justice and models of criminal justice.

The methodology is explained in Chapter Three, starting with a discussion of the problems facing social science researchers using law to investigate a social problem. Avoiding the problems many theories of women and human rights have fallen into, Chapter Three clearly defines how the cases analysed were chosen and the boundaries (self and externally imposed) of the sample. The chapter describes the process of analysis and builds conceptual frameworks that may act as a starting point for research on other forms of violence against women or even other policy arenas.

Chapter Four is the first of three data analysis chapters and focuses on *how* human rights have been used by rape victims and defendants. Chapters Five and Six then analyse the outcomes of the victims’ and defendants’ cases (respectively), defining success here as whether the case was ‘won’ or ‘lost’. Describing the reasoning behind

the judgments, these two chapters also answer more specific questions such as how the margin of appreciation was used. Chapter Seven takes the notion of ‘success’ further, looking at the impact of the judgment and its potential to create change. Finally, Chapter Eight concludes the thesis, drawing together the main findings with previous literature.

CHAPTER ONE: WOMEN AND HUMAN RIGHTS LAW

1.1 Introduction

The question '*what are human rights?*' is one that has been the subject of much theorising. There is no ahistorical, definitive, universally accepted definition of what the term 'human rights' actually means. Different ideologies produce different meanings of what human rights are, to the extent that '*... the rhetoric of human rights is really a description of ideals – and a controversial set of ideals at that*' (Heard, 2001 pg. 1). This chapter describes the distinction between moral and legal human rights, shows how the human rights we have contained in law are socially constructed and provides an outline of the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms (generally shortened to the European Convention on Human Rights) and the Human Rights Act 1998. The later parts of the chapter summarise the development of the international women's human rights movement and set up 'optimistic' and 'pessimistic' pictures based on an analysis of literature on women and legal human rights.

1.2 What are human rights?

Early discussions of human rights were based on the distinction between legal and moral rights, a distinction that is still sometimes made today. Legal, or 'justiceable' rights are, quite simply, those that exist in and are enforceable under the law and are hence able to be tried in a court of justice. Conversely, 'moral' or 'natural' rights refer to those rights that, in their early days were based on religious beliefs; that which was perceived as being 'naturally right' in the eyes of God. The later basis for moral or natural rights moved away from religion to an entitlement that was derived from nature and, later still, the basic rights that an individual needs to fully participate in civil society. The term 'legal rights' is generally used to describe the rights that individuals actually hold, whereas the terms 'moral' or 'natural rights' are used to describe the rights that a particular group of people argue they need to fully participate in society but are denied by the law. For example, women argued pre 1928 that they had the *moral right* to vote but it was not until 1928 that they actually held

the *legal right* to vote on an equal basis to men. Individuals may therefore claim that they have a moral right to something without actually having the legal right to it, and legal rights may stem from what have previously been claimed as moral rights.

Some well-known rights theorists, such as Hohfeld (1919) wrote exclusively about legal rights, and Bentham famously dismissed moral rights as '*conceptual nonsense*' (Bentham, 1792; cited by Campbell, 2001), arguing that rights are created through law and hence that there could be no such thing as 'moral' or 'natural' rights. In an attack on the French Declaration of the Rights of Man and the Citizen, which was based upon the 'natural' and 'sacred' rights of man, he famously stated:

Right, the substantive right, is the child of law: from real laws come real rights; but from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons come imaginary rights, a bastard brood of monsters, gorgons and chimeras dire. (pg. 69 in 1987 ed; emphasis in original).

Others however, such as Mill, believed that moral and legal rights were closely connected:

When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion (Mill, 1861; cited by Campbell, 2001)

Nickel (2003) points out that most contemporary writers agree that the concept of a right relates to both law and morality. Logically, the ideal is that legal rights should emerge from moral rights and that moral rights should be transformed into legal rights. This, of course, is not always the case because different groups of individuals have different conceptions of what moral rights are and indeed what is and is not 'moral'.

The modern understanding of human rights is not solely limited to the distinctions between legal and moral rights though. The modern conception of *human rights* is of '*... international moral and legal norms that aspire to protect all people everywhere from severe political, legal, and social abuses*' (Nickel, 2003). Because only states can be held responsible for abuses of human rights, it follows that international human rights law is mainly concerned with the regulation of public power in the form

of the state. This follows liberal theorising that individuals need their private lives to be protected from the misuse of state power.

This thesis is concerned exclusively with justiceable rights under the ECHR and their partial incorporation into domestic law under the HRA. However, it is acknowledged that these rights did not just ‘appear’ but are the outcome of a political process. They represent what are believed to be the basic rights needed to protect the individual from the state in civil society - at least by the individuals (predominantly white men) who have the power to draft such declarations and conventions. Just as there is no universally accepted definition of human rights, there is no universally accepted list of exactly what rights are necessary. Kennedy (2004) points out that while the right to carry weapons is a fiercely protected right in the USA this would never be accepted as a right in the UK. Even where rights in different charters appear similar on first sight, the way they are interpreted and the weight that they are accorded varies. For example, Lacey (2004) contrasts the right to free speech from its absolutist position in the USA (free speech highly valued and allowed in nearly all circumstances, even if this results in harm to other individuals) with the wide derogation conditions in the ECHR (freedom of expression subject to wide ranging restrictions deemed necessary in a democratic society). Human rights as they are discussed in this thesis are accepted as being socially constructed, recognising that they are created and recreated in particular social conditions at particular times in history (Stammers, 1999). As with law as a whole, charters of human rights are ‘living’ documents in that they are always open to interpretation and reinterpretation. How they are interpreted, for what purposes, and by whom, vary between charters, but also over time and place.

1.3 The development of international human rights law

Following the atrocities of the Second World War, a new organisation was established to prevent further conflict on this scale occurring in the future. The United Nations (hereafter UN) was established in 1945, replacing the League of Nations, with the primary aim of maintaining international peace and security (UN Charter, Article 1 (1)). While the UN Charter was radical in its inclusion of human rights, it did not contain any detail on what the term ‘human rights’ was to cover, and nor did it specify any State responsibility for the respect and promotion of them (Smith, 2003).

However, the UN has since become crucial in the development of international human rights. So much so, that the origin of international human rights law is generally acknowledged as being the UN's adoption of the Universal Declaration of Human Rights (hereafter UDHR) in 1948.

In the introduction to the UDHR the UN proclaim it as:

... a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. (UDHR: proclamation)

The rights set out in the UDHR are listed as thirty numbered 'Articles'. These include civil and political rights, such as:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. (UDHR, Article 1)

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ... (UDHR, Article 2)

Everyone has the right to life, liberty and security of person. (UDHR, Article 3)

Also included in the UDHR are what are known as 'second generation' rights. These are economic, social and cultural rights such as:

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. (UDHR, Article 24)

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. (UDHR, Article 25, part 2)

Parents have a prior right to choose the kind of education that shall be given to their children. (UDHR, Article 26, part 3)

This list of rights is impressive, even from the limited selection quoted above. They are clearly designed to be inclusive, despite a masculine linguistic bias (e.g. the use of the word brotherhood in Article 1) and the male majority of the group who drafted the rights¹⁴). However, the UDHR is just as its name implies - a 'declaration' and nothing more, despite the drafters' hopes that an enforceable version would soon follow. There has never been, and it is highly unlikely that there ever will be, any enforcement machinery although it is said to have 'strong moral force' (Smith, 2003, pg. 39). What this means is that neither states nor individuals have any form of redress if they believe any of their rights contained within the UDHR had been breached. Additionally, states were not required to sign up to the declaration (as they would if it had been a treaty) in order to join the UN, which has resulted in states paying 'lip service' rather than actually complying with the UDHR (Nickel, 2003).

The criticisms outlined above however are not meant to suggest that the UDHR was unimportant in the development of international human rights law, because this is far from the case. The significance of the UDHR lay in setting a standard and a blueprint for subsequent human rights treaties (Morsink, 1999), many of which *do* have enforcement machinery and are capable of effecting real change. Fifty-five years ago, pre UN and UDHR, there was no international human rights law whereas there now exists an impressive body of such law (Shestack, 1998). Since the UDHR over a hundred international human rights instruments have been developed. These include the International Covenant on Economic, Social and Cultural rights, the International Covenant on Civil and Political Rights (and its two Optional Protocols) and the Convention against Torture. Regional conventions have also been developed, most significantly the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and People's Rights and, more recently, the European Charter of Fundamental Freedoms. Although these treaties and conventions should, theoretically, protect the rights of all humans, a number of conventions have also been developed which focus specifically on the rights of certain 'groups of humans'¹⁵. These include the Convention on the Rights of the Child 1989, the Convention on the Elimination of Racial Discrimination and the

¹⁴ Although 10 of the 12 main participants involved in drafting the declaration were male the body was actually chaired by a woman (Eleanor Roosevelt). See Eide et al. (1992) for a fuller commentary of the development of the UDHR.

¹⁵ I avoid the term 'minority' rights here because women are clearly not a minority group numerically.

Convention on the Elimination of All Forms of Discrimination Against Women (and its Optional Protocol).

1.4 The European Convention on Human Rights

The Council of Europe is the organization responsible for the protection of human rights in Europe. It was founded in 1949 by ten member states that were concerned about security and a perceived threat from the East. Since then many more countries have signed up to the Council of Europe, with a huge increase during the 1990s when the Council was able to expand East. The Council of Europe introduced the European Convention on Human Rights (ECHR) in 1950, and it is now widely acknowledged as being the most developed of the regional organisations with jurisdiction for the protection of human rights (e.g. Smith, 2003). It was initially designed for states to be able to take other states to the European Court of Human Rights (ECtHR) in respect of alleged violations of human rights (known as inter-state applications) but in 1966 it also became possible for an individual to pursue their rights in the ECtHR once all domestic remedies had been exhausted (known as ‘individual petitions’ or ‘applications’) ¹⁶. The ECHR therefore acts both as a contract between European signatory states but also as a framework in which individuals’ rights are promoted and guaranteed. To date, 45 states have signed and ratified the ECHR ¹⁷. Some states signed up to and ratified the ECHR more or less immediately ¹⁸ while others joined more recently ¹⁹.

The human rights contained within the ECHR are civil and political in nature, with their basis in those in the previously described UDHR (particularly from the first part) ²⁰. The rights and freedoms are set out as ‘protocols’ and ‘Articles’. Article 1 ²¹ is rarely mentioned as it simply refers to an ‘obligation to respect human rights’, meaning that the rights and freedoms defined in the ECHR shall be available to

¹⁶ The compulsory nature of individual petition however did not come in to force until November 1998 (Protocol Eleven).

¹⁷ There is a common misunderstanding that a country must be part of the EU to ratify the ECHR. This is not the case and there are many states which have ratified the ECHR but who are not part of the EU.

¹⁸ The UK signed in 1950 and were one of the first to ratify it (in 1951)

¹⁹ Serbia and Montenegro were the most recent to sign (in 2004)

²⁰ Social and economic human rights are guaranteed under the European Social Charter 1961.

²¹ I generally follow the standard convention of writing the number in words if it is ten or below and numbers thereafter except when referring to the Articles where for ease I use numbers throughout.

everyone within their jurisdiction. Articles 2 –14 contain the substantive rights and freedoms: the right to life (Article 2); prohibition of torture (Article 3); prohibition of slavery and forced labour (Article 4); right to liberty and security (Article 5); right to a fair trial (Article 6); no punishment without law (Article 7); right to respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); right to marry (Article 12); right to an effective remedy (Article 13); and prohibition of discrimination (Article 14).

The full text of the Articles is too lengthy to be included here and can be found in Appendix One to this thesis. Likewise, it is not possible to explain here the uses and limitations of the Articles except for an extremely short overview²². Briefly, Articles 2 (right to life), 3 (prohibition of torture), 4 (1) (no-one shall be held in slavery or servitude) and 7 (no punishment without law) are ‘non-derogable’ rights, meaning that states may not ‘opt out’ or ‘derogate’ from these rights even in times of emergency or war²³. States can derogate from any of the other rights in times of emergency or war²⁴, as the UK did (controversially) regarding Article 5 in 2001 following the September 11th terrorist attacks. All the rights with the exception of Article 3 (prohibition of torture) have exceptions listed against them. For Articles 2 – 7 (excluding 3) these exceptions are very specific, whereas for Articles 8 – 11 there is a second paragraph listing a wide range of restrictions which generally relate to national security, the protection of morals, the rights of others and public safety (Fenwick, 2002). The margin of appreciation (area of discretion) is particularly important when considering Articles 8-11. This is discussed in the next section. Article 12 (right to marry) does not contain a second such limitations paragraph, however it has a broad qualification in the first paragraph as ‘according to the national laws’. Articles 13 (right to an effective remedy) and 14 (prohibition of discrimination) are not freestanding rights and can only be used if there is also an alleged violation of one of the substantive rights. However, a violation of 13 or 14 can still be found even if it is judged that the substantive right has not been violated.

²² For a well-written in-depth examination of the Articles see Fenwick (2002)

²³ Article 2 is generally classed as being non-derogable although it does not apply to lawful acts of war

²⁴ Article 15 concerns derogation from the rights and freedoms in case of public emergency

Some Articles are used less frequently than others. For example, there have been very few cases brought under Article 4 (prohibition of slavery and forced labour) and those that have been brought have failed. It has been argued that this right is largely irrelevant in modern Europe (Fenwick, 2002). Although forced labour clearly does exist in modern Europe (e.g. forced housework in some domestic violence situations, forced prostitution of ‘pimped’ or trafficked women and children) no applications have been made under this Article, perhaps because of an inability to argue state liability or because of a lack of access to legal remedies of those groups who experience the abuses. In fact, the only applications that have been made relate to lawyers objecting to compulsory ‘legal aid’ style work (no violations have been found using this argument). Article 6 (right to a fair trial) is the right most frequently found to be violated because of its wide scope whereby even if a claim under another Article fails there may still be a violation of Article 6 if the procedure was found to be unfair (Fenwick, 2002). The same rationale applies to Article 13 (right to an effective remedy) and Article 14 (right to freedom from discrimination) although to find a violation of these Articles a ‘stand-alone’ Article must have also been considered.

There are three key issues that need to be explained in relation to the ECHR as a backdrop to the chapters that follow: the margin of appreciation; the issue of competing rights; and the ‘horizontal’ effect. The margin of appreciation applies only to the ECHR whereas the issue of conflicting rights and the ‘horizontal’ effect applies to both the ECHR and the HRA, though in slightly different ways. Because the ‘horizontal’ effect has the potential to have more impact in relation to the HRA than the ECHR this is discussed under the HRA section.

1.4.1 The Margin of Appreciation

The term ‘margin of appreciation’ is taken from the French ‘*marge d’appréciation*’ which is a form of judicial review used by the *Council d’Etat* (O’Donnell, 1982). The margin of appreciation doctrine refers to a degree of discretion allowed to member states in respect of convention rights. The rationale for this is that national legal systems are thought to be better placed to balance individual’s rights with societal interests than international judges sitting in Strasbourg. Where the margin of

appreciation lies is far from static, and different Articles and individual judges choose where the parameters of the margin lie in any particular case (in theory but not always in practice following case law). Although the margin of appreciation has occasionally been used in cases concerning Articles 2-7 it is intended, and is used mostly, in cases relating to Articles 8-11 where the restrictions are less specific (as discussed above).

Some have argued that the margin of appreciation is an important part of the Convention's machinery (see for example Merrills, 1993). It plays a key role in ensuring that the Convention remains a 'living instrument' in that it allows the current societal context to be taken into consideration when making judgments. For example, it allowed the evolution of democratic societies responses to terrorism to be considered in the case of *Klass v Germany*²⁵ when judging whether surveillance interfered with an individual's freedom of correspondence under Article 8 (Waldock, 1980).

Others have been more critical of the margin doctrine. The most frequent criticism is that the Court fails to demonstrate consistency when deciding the breadth of the margin of appreciation (e.g. Lavender, 1997, Schokkenbroek, 1998). Jones (1995) argues that because of this lack of consistency the margin of appreciation devalues the rights, and European Court Judge De Meyer has argued that the margin of appreciation should be abandoned altogether:

I believe that it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies ... where human rights are concerned, there is no room for a margin of appreciation which would enable the states to decide what is acceptable and what is not ... the boundary not to be overstepped must be as clear and precise as possible. It is for the Court, not each state individually, to decide that issue, and the Court's views must apply to everyone within the jurisdiction of each state. (Z v Finland²⁶, partly dissenting opinion of De Meyer J.)

The margin of appreciation therefore reduces the universality of Convention rights, resulting in different levels of rights for different individuals depending upon their particular state's attitude towards different issues – often those relating to morality.

²⁵ [1978] 2 EHRR 214

²⁶ [1998] 25 EHRR 371

This was found in the case of *Handyside v UK*²⁷ in 1976 where the publisher of a book called 'The Little Red Schoolbook' (which contained a section on sexual acts) had criminal charges brought against him for having in his possession an obscene publication for gain. Because the book was originally written and published in Denmark and had subsequently been published in a number of other countries (including Sweden, Italy, France and Italy) and no proceedings had been taken against him in Northern Ireland, the Channel Islands or the Isle of Man, the applicant complained that his right to freedom of expression (Article 10) had been breached²⁸. The UK Government argued that they had not breached the applicant's right to freedom of expression because the actions they took were necessary for the protection of morals in a democratic society. Both the Commission and the Court agreed with the Government that there had been no violation of Article 10, relying upon the states margin of appreciation.

What this case demonstrates is the way the margin of appreciation allows variation depending on the state's moral convictions (which are likely to be in turn guided by the values advocated by the political party in power). The question then, is what role (if any) cultural relativism should play in a Convention that makes claims to guaranteeing human rights and fundamental freedoms in a *universal* fashion and whether or not the margin of appreciation is gendered. There is no literature available as to whether the margin of appreciation is applied differently to women's rights claims, and this will be one of the issues considered within this thesis in terms of rape cases.

1.4.2 Dealing with competing rights

Rights may compete or conflict with other rights on two levels. On the first level, an individual's rights may compete or conflict with another's rights - an individual enforcing their individual rights may in turn result in a breach of another individual's rights. An example of this is if one individual uses their right to free speech and in doing so infringes another individual's right to a fair trial (example given by Fenwick,

²⁷ [1976] 1 EHRR 737

²⁸ An unsuccessful prosecution took place in Scotland

2002). On the second level, an individual's rights may compete or be in conflict with the rights of society or a particular group of individuals (e.g. women, religious groups or black and minority ethnic groups) where a right to free speech may 'damage' society in some way.

Such 'damage' to society is generally explained in terms of morality, and Nowlin (2002) highlights that the legal enforcement of morality often focuses on sexual behaviour. This is the case even where there appears to be little or no harm to society by the actions of individuals. For example, in *Laskey, Jaggard and Brown v UK*²⁹ the applicants were convicted under the Offences Against the Person Act 1861 when they videoed themselves engaging in consensual sadomasochistic activities; acts which they had voluntarily participated in over a period of ten years. The ECtHR accepted that their conviction interfered with their right to a private life (Article 8) but judged that the interference was proportional and necessary in a democratic society. Fenwick (2002) argues that both the House of Lords and the ECtHR judgment showed distaste for sadomasochistic acts and suggests that it was this lack of sympathy for the activities in question that was actually the guiding force in their judgments.

There are also examples where judgments appear to be at best inconsistent, and at worst completely contradictory, suggesting that rights may be balanced in different ways in different cases. For example, Norrie (2001) highlights that in the case of *McCann v UK*³⁰ it was found that the UK violated the right to life of three suspected IRA members who were shot in Gibraltar, but in the case of *Andronicou and Constantinou v Cyprus*³¹ Cyprus was not found to have breached the right to life following intentional shooting by the state. Norrie (2001) also argues that there are some cases that he describes as being 'seemingly strong complaints' (pg. 266) (of which he cites a rape within marriage case which is discussed later) where the complaints were not upheld.

²⁹ [1997] 24 EHRR 39

³⁰ [1996] 21 EHRR 97

³¹ [1998] 25 EHRR 491

1.5 The Human Rights Act 1998

The HRA came into force in England and Wales on the 2nd October 2000 and has been argued by some to be the most important piece of legislation of the 20th Century (e.g. Ashcroft et al, 2000), or even since the Magna Carta in relation to the legal status of individuals if the potential of the horizontal effect is fully realised (Davies, 2000). However, the HRA does not actually give individuals any additional rights to those guaranteed under the ECHR. Individuals have had the right to life, a fair trial etc. since 1966 because the rights in the HRA are essentially identical to those in the ECHR. This is not to undermine the significance of the HRA or to suggest it is inconsequential. Prior to its introduction pursuing a human rights claim was an expensive and lengthy procedure, often taking five years or more to reach a judgment from the ECtHR in Strasbourg if the case got as far as a judgment³². Additionally, because most other European countries had already developed ‘Bills’ or ‘Charters’ of Rights which protected rights in domestic courts this meant that the UK was seen on the surface to have an extremely poor human rights record because cases were taken directly to the ECtHR since there were no domestic remedies available³³.

The substantive rights and freedoms contained within the HRA are effectively the same as those described earlier in the ECHR. The exception is Article 13 (right to effective remedy), which was not incorporated into the HRA. Importantly, section six of the HRA states that *‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’*. Exactly what constitutes a ‘public authority’ is not defined within the HRA but it is accepted as including government departments, local authorities, courts and tribunals, and any individuals whose duties are of a public nature; for example the police, local authorities, social workers, probation officers etc. This section also applies to ‘quasi-public authorities’, such as Group Four security, whose duties are carried out on behalf of a public authority. In simple terms, anyone who is carrying out a public function falls under this section with two

³² The ECtHR is notoriously overworked and is only able to hear a fraction of the applications it receives (Fenwick, 2002; Greer, 2004). It was reformed in 1998 (when the Commission was abolished) but the number of applications it receives is rising very swiftly. In 2003 it received 17,787 applications relating to 18,028 individual applicants (Council of Europe, 2003) and in 2004 it received 21,084 applications relating to 21,191 individual applicants (Council of Europe, 2004). This compares with 1,648 applications in 1991 (i.e. nearly thirteen times as many) (1991 figure cited in Fenwick, 2002).

³³ Prior to the introduction of the HRA only one country (Italy) had had more judgments against them than the UK.

exceptions. Firstly, parliament is not classed as a public authority and need not act in a compatible manner. The second exception is if a High Court or Court of Appeal rules that the domestic law in question is incompatible and cannot be read in a way to make it compatible. If this is the case then the court must make a declaration of incompatibility and parliament must decide what action to take (a declaration of incompatibility does not automatically invalidate the law in question). This is because the model of 'parliamentary sovereignty' was chosen when the HRA was introduced. This is explained further in the section on the impact of human rights.

Assuming that domestic law is not declared incompatible with the HRA, if a public authority acts in a way that is incompatible with a right then, as with the ECHR, there are no criminal penalties associated with their actions. Rather, the situation must be remedied by reversing a decision or, as in many cases the actions have already taken place (for example an individual spending too long imprisoned), by awarding a financial award of damages.

All new legislation must be compatible with the HRA and all existing legislation must be interpreted in a compatible manner as far as possible. ECHR case law must be taken into consideration in the domestic courts, but UK courts are not bound by decisions made in Strasbourg³⁴. It is also important to note that because of the case law approach both the ECHR and the HRA are 'living instruments', in that they are dynamic and evolving. In theory the interpretation of convention rights should change in line with societal attitudes and circumstances. However, this may not always be the case in practice as different members of society and, crucially, judges hold different attitudes about different issues (e.g. morality, as discussed earlier). However, it is this dynamic and uncertain future of how the HRA will be used and interpreted that makes it particularly interesting and relevant to study and monitor. It is also important to note that an 'interest group' or campaign cannot claim that their rights have been violated under the HRA, nor can they take a case to the European Court. This means that campaigns against specific domestic laws, for example advocates of rape law reform, cannot use the HRA or the ECHR directly as a campaign vehicle. A case can only be brought by someone who is a direct victim

³⁴ ECHR judgments should be used to inform judgments made in domestic courts but are not considered to be a binding precedent that must be followed.

(who must meet a ‘victim test’), although they may be assisted in their case by campaigners or interest groups.

1.5.1 The ‘horizontal effect’

The main effect of the ECHR and the HRA is a ‘vertical’ one. Vertical proceedings are those that are brought by individuals (‘non-state actors’) against the state for something the state has directly ‘done’ or ‘not done’. If a ‘state actor’ (someone working on behalf of the state) directly violates an individual’s human rights, for example if a police officer physically or sexually assaults someone in their custody and the state does not take appropriate actions against the police officer, then this would be a fairly ‘clear cut’ example of vertical human rights proceedings. In contrast, the ‘horizontal effect’ or ‘drittwirkung’ refers to the use of human rights in relation to state responsibility for actions between individual citizens (between two ‘non-state actors’). If, taking the above example, it was a non-state actor who physically or sexually assaulted another citizen then the assaulted citizen could not legally claim that the citizen who perpetrated the assaults had violated their human rights. The proceedings against the citizen would be criminal rather than rights based. However, the horizontal effect could come into play if it could be shown that the state had failed to properly protect the individual whose rights were violated.

The case of *X and Y v the Netherlands*³⁵ is the one often cited in legal journals and textbooks as a prime example of the horizontal effect - how the state can be held as violating an individual’s human rights based on harm that was perpetrated by other (non-state) individuals. This case, which is analysed later in this thesis, involved a girl who was raped by another (non-state) individual. It was held that the state had failed to protect the girl from another individual because of a legal loophole and that the state therefore failed to fulfil its positive obligations to protect human rights. This case is discussed in detail later in this thesis, but for now is used simply to demonstrate that the ECHR has accepted that it is conceptually possible for the state to be held liable for the actions of non-state individuals. This suggests that the path is also clear for the horizontal effect to work under the HRA (Davies, 2000).

³⁵ [1985] 8 EHRR 235

Of utmost importance when considering the potential impact of the horizontal effect under the HRA is Section 6 which, as described above, states: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. Because a court is a public authority this means that it is unlawful for them to act in a way that is incompatible with a Convention right. As Davies (2000) explains, the logical argument therefore stands that if an individual claims that they have had their human rights violated then it would be unlawful for a judge not to hear the case. Also of importance is that the HRA requires that all legislation be interpreted in a compatible manner with the rights contained within the HRA, regardless of the relationship or identity between the parties:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(HRA, Section 3 (1))

This horizontal effect under the HRA was demonstrated in *Douglas and Others v Hello! Ltd*³⁶. In this case Catherine Zeta Jones and Michael Douglas had granted exclusive rights to OK! magazine to run an article on their wedding for a large amount of money. Hello! magazine and others had also bid for exclusive rights but their bids were rejected in favour of OK! magazine's bid. Despite high security including a camera ban for all staff and guests at the wedding, some photographs were taken other than those by OK! and these were sold to Hello! who prepared that month's edition with these photographs as the lead story. The applicants were informed that Hello! intended to distribute these magazines and the couple obtained an injunction which restrained the magazine's publication. At the Court of Appeal the decision had to be made whether or not to uphold the injunction which would mean destroying a whole issue of Hello! Based on the recently introduced HRA, the court's requirement to interpret legislation in a manner compatible with convention rights, to take into account the jurisprudence of the ECtHR and as a public authority to not violate individuals convention rights, Sedley LJ decided that Article 8 (right to family and private life) was relevant in this case. It was, nevertheless, judged that the injunction should be removed and Hello! were able to distribute photographs of the

³⁶ [2001] 2 WLR 992

wedding because the couple's right to privacy was outweighed by the right of publication (particularly since they had already sold their privacy to others). Although no breach was found, this judgment highlights that the UK courts are willing to accept that there can be a horizontal effect under the HRA because it showed that the courts took human rights into consideration in a case between two private parties.

1.5.2 The politicisation of human rights under the HRA

The introduction of the HRA was done amid a great deal of political 'spin'. The Labour government that introduced it used slogans such as '*human rights come to life*', '*bringing rights home*', '*safeguarding your rights*' and poster campaigns using wording such as '*you'll probably never need it, but its nice to know it's there*'. Its introduction was one of a number of constitutional changes aimed at modernising the government, which has also included Scottish and Welsh devolution, freedom of information, an elected mayor of London, and reform of the House of Lords:

We believe it is right to increase individual rights, to decentralise power, to open up government and to reform Parliament (Tony Blair in his introduction to the Human Rights Bill, October 1997).

However, political campaigns concerning the incorporation of human rights have been around far longer than New Labour has been. Disagreement has tended to centre more on *how* they should be incorporated rather than *whether* or *what rights* should be incorporated, with notable exceptions such as John Major who stated '*We have no need of a Bill of Rights because we have freedom*' (cited by Lord Chancellor Irving, 2002, no page no.). A Bill of Rights has been in the Liberal Democratic Manifesto since 1987 and although the Conservative Manifesto of 1979 pledged to consider a Bill of Rights, this was not given priority once they gained power (Young, 1999). The Labour Party was traditionally against a Bill of Rights in the form of the incorporation of the ECHR but changed its policy after its 1992 defeat and put it into their 1997 manifesto, resulting in the HRA (Young, 1999).

1.6 How human rights impact on law and policy

Any decentralisation of power through constitutional reform means a change to the policy arena. Feldman (2004a) describes the UK situation as the injection of law into politics and politics into law. On the one hand judges under the HRA are making political decisions, for example whether an infringement of a defendant's rights is 'necessary in a democratic society'. On the other hand, the introduction of such rights and the additional power that was handed over to the judiciary was a wholly political enterprise.

Although there are variants of each, the incorporation of human rights follows one of two models; 'constitutional Bills of Rights' or 'statutory Bills of Rights'. Constitutional Bills of Rights, as suggested by the term, are those that have constitutional status. Under this model, which is the one used in the USA and Canada, judges have the power to 'strike down' *any* legislation as being incompatible with the Bill of Rights. Effectively, judges can replace a state's policy with one of their own. Under a statutory Bill of Rights however, judicial power is more restrained. Under this model, which is the one used by the UK and New Zealand, parliamentary sovereignty remains supreme over the judiciary. The 'last word' remains, at least in theory, with Parliament.

Parliamentary sovereignty, or supremacy, means that Parliament has the right to pass whatever legislation it chooses to and no one, including the courts, can override this power. There is no written, codified constitution whose rules they must operate within³⁷. In line with the statutory Bill of Rights model, under the ECHR and HRA parliament is supreme. Some concerns have still been raised however. Even with the retention of parliamentary sovereignty, it has been argued that it is still problematic for a democratic state to enhance to this degree the political power held by judges (Campbell, 2001), particularly since they have no democratic legitimacy and their political priorities may be far from representative of society as a whole (Loughin, 1992). Tomkins (2001), for example, is highly sceptical about the appropriateness of

³⁷ Although the UK's joining of the European Union (EU) has undermined parliamentary sovereignty because they are bound by EU law and decisions of the European Court of Justice, sovereignty is still ultimately maintained because they do have the possibility of withdrawing from the EU, unlikely as that prospect may be.

judges to interpret the HRA arguing that other, perhaps more suitable, institutions were overlooked:

Why should it be the unrepresentative, overwhelmingly white male upper-middle-class judiciary of the UK's creaking courts who enjoy the emancipation that will come to them with the Human Rights Act? ... why give power to these people, and why not give it to others? (pg. 9, emphasis in original)

Tomkins (2001) cites ombudsmen, the Press Complaints Commission and the Broadcasting Standards Council as examples of how non-judicial institutions have been able to administrate good practice in other arenas.

In addition to concerns about whether judges are the right people to be giving additional power to, it is possible that they may take more power than intended. New Zealand has had a statutory Bill of Rights with parliamentary supremacy since 1990 and is the nearest model to the UK's HRA. Allan (2000) describes how the impact of the New Zealand Bill of Rights upon the judiciary has resulted in '*turning Clark Kent into Superman*' (pg. 613). By this he means that the judiciary has attempted to 'upgrade' the statutory model closer towards the constitutional model and has taken much more political power than was originally envisaged:

There are few differences between what judges could accomplish (in the way of 'giving life' to 'fundamental rights') when operating a New Zealand-type Bill of Rights Act and what they do accomplish when operating constitutionalized and entrenched models. (Allan 2001, pg. 390 emphasis in original)

As the New Zealand Bill of Rights actually gave slightly less power to the judiciary than the HRA does, Allan (2001) warns that the UK may find that the line the HRA attempted to draw between law and politics may be even more illusionary than sceptics first imagined.

Both constitutional and statutory Bills of Rights therefore entail a shifting of power from Parliament to individual judges, and the New Zealand experience suggests that the extent of this power shift may be greater in statutory Bills of Rights than is sometimes thought. But is giving judges more power necessarily a bad thing? With no political accountability, it is possible that the judiciary may be more likely to uphold

minority rights claims, particularly ones around recognition, that the legislature would not, in fear of losing support from the electorate majority. Indeed, the idea that the judiciary could be ‘hijacked’ or ‘hoodwinked’ by a wave of feminist demands was raised as a concern in Canada (Fudge, 2001).

Unfortunately, this situation has been found to lead to some degree of ‘game playing’ between the judges and the executive elsewhere. Feldman (2004a) describes the constitutional Bill of Rights model as the ‘*give it a run and see if we can get away with it*’ model, because laws which appeal to the majority (and hence gain votes in elections) can be introduced which will simply be struck down in the court when they fail to protect the rights of minorities. McColgan (2000) gives an example of this where politicians in the USA have introduced strong anti-abortion legislation to ‘score points’ from right wing voters while being content that the legislation will be struck down as being unconstitutional and the right to abortion will be protected. Although in this example the judiciary may be seen as pro-feminist, it must ultimately be remembered that feminists do not hold a monopoly of the ‘hijacking’ and ‘hoodwinking’ of the judiciary.

1.6.1 The interpretation of legislation under the HRA

Judges have always had to ‘interpret’ law, but the degree to which they have had to ‘make’ law is debatable and changes over time and between judges. This is what is known as ‘judicial politics’ or sometimes ‘judge made law’. Legal reasoning is key to the legitimacy of law. Most of the time a judge will carefully follow legal reasoning. In other cases there may appear to be different reasons guiding their judgement such as extra-legal factors. In very rare instances a judge will actually admit to this. Holland and Webb (2001) for example cite a ‘surprise admission’ made by Lord Denning in *Western Excavating v Sharp* that he would not be following his own legal reasoning from a previous judgement because his previous reasoning was not actually ‘correct’. He argued that his previous judgement had, however, been necessary in the name of ‘justice’:

It was not really [a case that fell within the definition of dismissal] ... but we had to stretch it a bit ...

So what is 'correct' legal reasoning? It is generally acknowledged that three 'rules' exist as primary aids to the interpretation of law (the literal rule, the golden or purposive rule, and the mischief rule). In reality, these 'rules' are far from discrete, are imprecise and rather vague. Judges can choose which rules to apply, and may apply more than one rule in the same case and should be viewed more as crude labels than as actual 'rules' (Holland and Webb, 2001).

The *literal rule* states that judges should simply apply legislation and case law to the material facts that they have in front of them. From this perspective, judges should have no role at all in 'making law' or even 'doing justice':

If people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right ... confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application (Lord Scarman in Duport Steels v Sirs³⁸)

Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fanciful ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences of doing so would be inexpedient, or even unjust or immoral (Lord Diplock in Duport Steel v Sirs³⁹)

Applying the literal rule means that judges are not called upon to consider the consequence of their judgement; the important factor is that their analysis is linguistically correct (Holland and Webb, 2001). Where a term is ambiguous the meaning should be found in a dictionary rather than what a judge interprets it to mean. This means that the application of the literal rule can sometimes lead to judgements that seem 'odd' and a feeling that justice may not have been done (Holland and Webb, 2001).

The *golden or purposive rule* is sometimes used when adoption of the literal rule would produce an 'absurd' result. As such, it can be seen as an accessory to or a 'shadow' of the literal rule (Holland and Webb, 2001). According to Lord Simon in

³⁸ [1980] 1 All ER 529, at 551.

³⁹ Duport Steel v Sirs [1980] 1 WLR 142, [1980] 1 All ER 529 at 541

*Stock v Frank Jones (Tipton) Ltd*⁴⁰ the golden rule should be used in favour of the literal rule in cases where:

- a) *there is a clear and gross anomaly;*
- b) *Parliament could not have envisaged the anomaly and would not have accepted its presence;*
- c) *the anomaly can be obviated without detriment to the legislative intent; and*
- d) *the language of the statute allows for such modification.*

This rule appears to take more of a ‘common sense’ approach when compared with the literal rule, however a degree of interpretation is needed in order to apply this rule. For example, a statute must be interpreted as having a clear and gross anomaly.

Finally, the *mischief rule*, or the *grand mischief rule* when taken to its extremes, is not as its name suggests a rule allowing judges to make ‘mischievous’ judgements! Rather it means looking at what ‘mischief’ Parliament were intending to deal with in the legislation under question and asking what judgement would correlate with Parliaments *intentions* as opposed to the draftspersons words (the latter being the literal rule).

The use of the mischief rule was widened in 1992 in a landmark judgement that has since allowed judges to consult and cite Hansard (*Pepper v Hart*⁴¹) in certain cases in order to clarify Parliamentary intention. Pre-Parliamentary documents, for example the Law Commission’s reports may also be consulted. Again, it is Lord Denning who has pushed the mischief rule to its extremity (known as the ‘grand’ style of the purposive approach when pushed this far). In a domestic violence case concerning an injunction under the Domestic Violence and Matrimonial Proceedings Act (1976), he went against previous case law, arguing that:

Social justice requires that personal rights should, in a proper sense, be given over rights of property ... I prefer to go by the principles underlying the out-dated notions of the past (Lord Denning)

⁴⁰ [1978] ICR 347, [1978] 1 All ER 948

⁴¹ [1992] 3 WLR 1032, [1993] 1 All ER 42.

Hence, Lord Denning chose to rebel against previous interpretations in order to do what he thought was socially just, although there is no accepted legal definition of what is meant by 'social justice'.

These three 'rules' therefore range along the spectrum from the strict following of the black letter law (the literal rule), to a more common-sense interpretation (the purposive rule), to attempts to investigate exactly what parliament intended (the mischief rule) which can sometimes veer towards 'judge made' law (the grand mischief rule).

England and Wales have traditionally tried to draw a clean line between law and politics; the judiciary and the legislature. This line has always been a somewhat false one, or at the very least a messy one, but it is only recently that judges in England and Wales have been willing to accept this (in contrast to the USA where judges generally appear to relish their political role). In his Hamlyn lectures on judicial activism, The Hon Justice Michael Kirby (Kirby, 2004) explained that until recently the fundamental doctrine that a judge applied rather than made the law remained. The accepted position was that judges do not make law, but simply apply it. Occasional doctrinal advances were seen as legitimate, so long as they grew strictly out of past precedents, not policy and certainly not social policy. This, he argues, has resulted in a move away from the rule of literal interpretation towards the principle of purposive construction.

The HRA massively increases the amount of interpretive powers held by the judiciary.

Under the HRA judges have the power to do four things:

1) To make a 'declaration of incompatibility' – to declare that it is not possible to read a section of primary legislation in a way that is compatible with the HRA⁴².

Making such a declaration does not mean that the legislation in question becomes

⁴² To date, declarations of incompatibility have been made in ten cases (in a further five cases declarations were made but overturned on appeal). These ten cases relate to 13 sections of eight pieces of legislation.

invalid (as it would under a constitutional Bill of Rights) and parliament is not obliged to change it, although the consequences of not changing it would be significant. Apart from the political implications of a government aware of non HRA compliant legislation failing to remedy the situation, each person whose rights were then violated through the use of this legislation would have a strong case to take under the ECHR.

- 2) To read primary legislation in a way that makes it compatible with the HRA, hence avoiding making a declaration of incompatibility. This may mean reading the legislation in a different way than that intended by parliament. The scope for judicial politics is potentially largest here, particularly if judges are trying too hard not to make a declaration of incompatibility.
- 3) To strike down secondary legislation⁴³ that is incompatible and not able to be read in a compatible way.
- 4) To judge that there is no incompatibility with the HRA and/or if some rights are infringed that this infringement is necessary and proportionate.

The second option described above has the greatest potential for judicial politics, which has the potential to go beyond the purposive or the mischief approaches to legal interpretation. This is because it might be necessary to read the legislation in a way that *was not intended by Parliament* in order for it to be compatible with the HRA. Where the line is drawn between being able to ‘read down’ (using section 3) or having to make a declaration of incompatibility (using section 4) is in itself a matter of interpretation, and one that may potentially cross the boundary into politics:

‘... a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.’ (Lord Nicholls of Birkenhead in *Hooper v Secretary of State for Work and Pensions*⁴⁴, para. 40)

⁴³ Secondary legislation (also known as delegated or subordinate legislation) is that made by ministers using powers given to them through a piece of primary legislation (an Act of Parliament).

⁴⁴ *Hooper v Secretary of State for Work and Pensions* [2002] UKHL 10 [2002] 2 AC 291

Depending on how judges interpret their powers under the HRA, the potential is certainly there for judges to be situated much closer to politics than ever before:

The HRA has extended the boundaries of purposive interpretation in the UK because of the instruction that statutory language should be given a meaning that is conformable with the ECHR. Indeed, the judges are enjoined by that Act to adopt such an interpretation so long as this is 'possible'. There is nothing quite like this ... anywhere else to my knowledge ... A party on the receiving end might complain that such a stretching of the meaning of the authoritative text (where a construction is 'possible' but not preferable) does not conform to an impartial exercise of the judicial power. (Kirkby, 2004, pg. 32-33)

1.6.2 How the ECHR can change policy

Under the ECHR judges have the power to find that a right has or has not been breached. As under the HRA it may be judged that, although there has been an infringement, this was necessary and proportional, meaning that there was no breach. If a breach of human rights is found there are two ways that this is dealt with (through individual and general measures). The aims of the measures are to put an end to the violations that had taken place (and which may still be taking place) and to erase the consequences of these violations (as far as this is possible).

- 1) Individual measures are the way in which most breaches are dealt with. This generally means the payment of just satisfaction, which covers damages and expenses. Legal fees are also refunded minus any legal aid already used by the applicant. Other individual measures are more specific to the nature of the violation. These may include the re-opening and re-examination of domestic proceedings to reconsider the applicant's position in light of the judgment.
- 2) General measures have the greatest policy-making potential and are aimed at ensuring that similar violations do not take place. Ultimately, general measures may result in a change in primary legislation. Although in theory it is up to government(s) to decide how their legislation should be changed in order to prevent similar violations taking place, in practice this is often almost dictated because of the nature of the breach. Sometimes it is new legislation that is needed.

1.7 Feminist jurisprudence and human rights

The terms 'feminist jurisprudence' and 'feminist legal theory' refer to the study of law through a feminist lens. From its marginal place in the academy in the 1960s, feminist ideas now permeate every area of law from equality and family through to tort and tax. Books and journals now exist dedicated to the study of feminism and the law, while many of the central tenets (particularly around discrimination) have become mainstreamed. Taken together as a body of knowledge, feminist legal theory arguably represents '*one of today's most significant challenges to contemporary law and legal institutions*' (Bartlett and Kennedy, 1991 pg. 1). Dismantling the myth of law's neutrality to unmask its gendered nature is a political as well as a legal task, and the methods used have included: 'consciousness raising/unsilencing women; asking 'the woman question'/critique/textual deconstruction; theorising law's gendered nature; and feminist practical reasoning' (Barnett, 1998 pg. 19). Perhaps the most radical denunciation and challenge to 'malestream' law of recent times came from the Oslo school where a Department of Women's Law was established in the 1980s⁴⁵.

Feminist legal theory is constructed from analytic and political-ethical claims, and varies in many ways, including by political orientation, and methodological and written styles (Lacey, 2004). It is probably best thought of as a 'framework of analysis' (Lacey, 2004 pg. 19). In terms of women and human rights, Bunch (1990) has identified four overlapping approaches. The first approach is 'women's rights as political and civil rights'. This involves identifying and then highlighting general human rights violations and linking them to gender-based violations. Women are 'added' on to general human rights, an approach that Bunch argues does not go far enough. The second approach she identifies is 'women's rights as socio-economic rights'. With its origins among socialists and labour activists, this approach is based on the notion that political rights for women are meaningless without economic rights. The feminisation of poverty is a main focus of this approach and this is said to be the root of other human rights abuses such as violence against women. Bunch argues that this approach focuses too narrowly upon women's economic needs, with the misguided assumption that other rights will follow. She points out that it has not

⁴⁵ The University of Zimbabwe and others have followed suite in the 1990s.

been proven that third world development leads to further rights for women and that a more transformative development process is needed. Bunch identifies the third approach as 'women's rights and the law'. This approach aims to make states accountable for violations of women's rights and involves the development of legal mechanisms such as CEDAW. This approach therefore envisages the realisation of women's rights through political and legal means. Bunch acknowledges the usefulness of this approach as a whole, but argues that CEDAW in particular is of little use in relation to violence against women. She highlights that it is seen as a document of secondary rights (i.e. women's rights) rather than human rights *per se*. The final approach identified by Bunch is the 'feminist transformation' of human rights. This involves using a feminist perspective in order to transform the whole concepts of human rights, which:

'... relates women's rights and human rights, looking first at the violations in women's lives and then asking how the human rights concept can change to be more responsive to women' (pg. 496).

By taking women as its starting point, Bunch argues that this approach to human rights is the most distinctly feminist. It names women's violations as human rights violations without waiting for others to do so. Although now somewhat dated, Bunch's article has since been described as an 'inspirational call' (Friedman, 1995 pg. 18) and even been cited, alongside Bunch's work as the Director of the Centre for Women's Global Leadership, as acting as a stimulus to the start of the international women's human rights movement (Friedman, 1995). Section 1.9 on women and legal human rights (below) elaborates on feminist jurisprudence issues as they relate to human rights.

1.8 The role of the United Nations in advancing the women's human rights agenda

When the United Nations was established in 1945 it represented the first international organization to have gender equality both as an objective and as an obligation (Reanda, 1999). In 1946 the Division for the Advancement of Women (DAW) was established (although it has only been known under this name since 1978). Since 1993, DAW has been based in New York under the Department of Economic and Social Affairs (DESA). The DAW is responsible for servicing the Committee of the

Convention on the Elimination of Discrimination against Women, which began work in 1982. The Convention on the Elimination of Discrimination against Women (CEDAW) is one of the most widely ratified (180 states as of late 2005), however it is also subject to a very high number of reservations that undermine its effectiveness (Smith, 2003) and the USA still refuse to ratify it at all. In ratifying CEDAW, countries become legally bound to submit national reports every four years on the activities they have undertaken to comply with their treaty obligations. However, the Committee is so under-resourced that it currently has a two-year backlog of reports (Kelly, 2005). In addition, with the exception of trafficking and prostitution, the issue of violence against women was completely missing from CEDAW (Coomaraswamy, 1997). Kelly (2005) suggests that this was because women's experiences were marginalized unless they were mirrored by or could be compared directly to men's experiences in public life.

It was not until the early 1990s that violence against women was taken seriously in the international arena, and since then things have moved forwards at an incredible pace. Gender-based violence was classified as a form of discrimination by the CEDAW Committee, resulting in 1993 in the United Nations Declaration on the Elimination of Violence Against Women (DEVAW), and in 1994 it was decided that a Special Rapporteur on violence against women, its causes and consequences should be appointed⁴⁶.

In 1993 delegates lobbied for women's rights to be clearly identified as human rights at the UN World Conference on Human Rights (Friedman, 1995), a conference that has subsequently been seen as representing a breakthrough in advancing women's human rights (Coomaraswamy, 1997; Bunch, 2004). The conference led to newspaper headlines such as '*Women Seize Focus at Rights Forum*' (New York Times, 6/16/1993, cited by Friedman, 1995 pg. 18), over sixty of the Conference sessions concerned women's human rights, and campaign badges declaring '*Women's Rights are Human Rights*' were worn by many of the delegates (Friedman, 1995). This led to women's human rights and violence against women being explicitly recognised in the Vienna Declaration and Programme of Action:

⁴⁶ Radhika Coomaraswamy was the first appointed to this post. She held the post until 2003 when Yakin Ertürk took over the role.

The human rights of women and of the girl child are an inalienable, integral and indivisible part of human rights ... Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudices and trafficking are incompatible with the dignity and worth of human beings and must be eliminated. (excerpt from Section one of the Vienna Declaration and Program of Action).

Even more advances were made at the Fourth World Conference on Women, held in 1995 in Beijing, where a platform of action was developed which had a specific section on violence against women:

Violence against women is an obstacle to the achievement of the objectives of equality, development and peace. Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long-standing failure to protect and promote those rights and freedoms in the case of violence against women is a matter of concern to all States and should be addressed. Knowledge about its causes and consequences, as well as its incidence and measures to combat it, have been greatly expanded since the Nairobi Conference. In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and a consequence of violence against women. (Fourth World Conference on Women Beijing, China, 4–15 September 1995. A/CONF.177/20 (1995), section D para 112, cited in Kelly, 2005 pg. 481)

Ten years on from its beginning of almost invisibility at the global level, sexual and gender-based violence is now identified and named by the UN as a pandemic, not only as a criminal law issue but as a human rights issue, and one that requires multi-sectoral and multi-dimensional responses:

It is no exaggeration to refer to sexual and gender-based violence as a pandemic. Globally, women and children are most in danger of being targets of this insidious form of human rights abuse, and those displaced or caught-up in conflict are often at greatest risk. The problem is pervasive and spans everything from domestic violence to rape as a war crime. No community, society, country or region is immune to sexual and gender-based violence. (UNHCR, 2001 foreword)

The last decade has, therefore, seen a huge shift towards labelling women's rights as human rights which some have argued has contributed, alongside globalisation, to a re-shaping of feminism (Walby, 2002).

1.9 Optimism and pessimism: women and legal human rights

Despite the advances made at the level of the UN, there is also a critical and pessimistic stance towards the role of human rights in women's lives. The 'optimistic' and 'pessimistic' pictures below position the arguments made, rather than the theorists themselves, whose arguments sometimes fit into both pictures.

1.9.1 The pessimistic picture

The 'pessimistic picture', as I am calling it, is made up of those who are sceptical of how useful legal human rights can be to women. Four overlapping areas of critique can be identified, concerned with: male dominated judiciaries; the public nature of human rights law; the weak anti-discrimination provision; and the gap between legal human rights (law in the books) and 'practical' rights (law in action).

Male dominated judiciaries

Women⁴⁷ have historically been disadvantaged through the law, as both victims and offenders. Men have always dominated the higher echelons of the criminal justice system, law and politics⁴⁸, a situation which in the past has led to allegations that the law functions as a form of male propaganda (Olsen, 1983, 1984) representative of a '*paradigm of maleness*' (Rifkin, 1980 pg. 84). MacKinnon (1989) went on to argue that this male standpoint does not even appear to function as a standpoint because it is so dominant that it takes the form of the objective standard where the maleness of this standard is rendered invisible. By taking the male standpoint as given, MacKinnon argues that '*law becomes legitimate, and social dominance becomes invisible*' (pg. 237) whereby the law adopts the male 'objective' position, which in turn enforces that same constructed view on society. For MacKinnon, the fact that male dominance does

⁴⁷ Although it is increasingly unpopular to use the term 'women' with such a sweeping brush, I use it while acknowledging that different groups of women are likely to experience such disadvantage to different degrees and, simultaneously, that some groups of men are also disadvantaged through the law.

⁴⁸ Only one of the twelve judges in the House of Lords is female (until 2003 there were none), five of the 43 Chief Constables are female and seven of the 42 Chief Crown Prosecutors are female (Fawcett Society, 2004). Although the number of women in the House of Commons doubled between 1992 and 1997 (Shepherd-Robinson and Lovenduski, 2002) it still remains that less than one in five MPs are female (following the 2005 election).

not appear to be epistemological is the very reason why it succeeds so effectively ontologically. More recently, the Fawcett Society (2003a) has talked of women being ‘shoehorned’ into the criminal justice system (both as ‘criminals’ and as ‘victims’). By this they mean that women are forced into a mould that does not really fit because it was designed for others; namely men (and particular men at that). Some advances have been made over the years; the appointment of the first woman into the House of Lords in 2003 marked a significant step forwards, however this still leaves the balance in the House of Lords at 1:11 in favour of men. In addition, Lady Justice Brenda Hale has herself suggested that her appointment may be partly due to not being seen as a ‘normal’ woman because of her unusual, academia-based career path (Hale, 2004).

Men also dominate the judiciary at the level of international law. O’Hare (1999) refers to this as the ‘*gender myopia*’ of international human rights law (pg. 364) and Charlesworth et al. (1991) suggest that international legal structures would be more accurately described as ‘*international men’s law*’ (pg. 644), pointing out that at the time of writing (in 1991) only one judge had been female at the International Court of Justice and no woman had ever been a member of the International Law Commission. Little has changed over time, more than a decade later, with only one female judge out of 15 at the International Court of Justice in 2004⁴⁹, and still no female members of the International Law Commission at the turn of the century (Paulus, 2001)⁵⁰. The ECHR is also far from having equal representation in terms of gender. Men dominate all levels, from the President down to the Assistant Registrars. In 2003 the President was male, both Vice-Presidents were male and both Section Presidents were male. Men therefore held all the highest posts within the Court. Overall, 31 out of the 41 judges were male (76%) and the Registrar and the Deputy Registrar were also both male⁵¹ despite a rule regarding the ‘balanced representation of the sexes’⁵². Charlesworth (1995) highlights that it is striking that the only time the gender

⁴⁹ Information collected for this thesis by investigating the composition of the court through its website (as of November 2004).

⁵⁰ It is not possible to calculate a more recent figure because the gender of the members is not clear through its website. Literature with more recent figures could not be found.

⁵¹ Counted for the purposes of this thesis.

⁵² Rule 14 of the ECHR reads: ‘In relation to the making of appointments governed by this [Ch. II - Presidency of the Court] and the following chapter [Ch. III - The Registry] of the present Rules, the Court shall pursue a policy aimed at securing a balanced representation of the sexes.’

imbalance was ever officially criticised was in relation to the nominations for the CEDAW Committee.

Exactly what impact, if any, gender imbalanced judiciaries have is debatable. Female attorneys and judges have been found to be more aware of gender bias in the courts and are likely to have a higher level of feminist consciousness⁵³ than their male colleagues (Martin et al., 2002). It may be the case that the impact of higher numbers of women in the judiciary will increase over time and that any change at the moment may be too subtle for the methodologies that have been designed to measure such change. This has been found in research on the government. In analysing the impact of the election of 120 women MPs in 1997 Norris and Lovenduski (2001) concluded that the increase in the number of women had not resulted in any radical political changes in the Westminster culture but that there was evidence of different, gendered values towards women's equality.

In addition to the male biased court compositions, most human rights instruments refer only to 'men' within their text, and this masculine vocabulary is argued to subtly exclude women (Charlesworth, 1994). The male pronoun is used throughout the ECHR, for example Article 8 (1) reads: *'Everyone has the right to respect for his private and family life, his home and his correspondence'* (my emphasis). In fact, the only time 'woman' is mentioned in the ECHR is in relation to Article 12 (Right to marry). This may sound like a semantic quibble in terms of the age of the ECHR, but this was not amended when it was incorporated into domestic law (the HRA has retained the masculine wording). However, even if the male pronoun were to be changed there is no evidence that this would substantially change the use or interpretation of the ECHR or the HRA. Talking about the more recent European Charter of Fundamental Rights (that uses gender-neutral language), Baer (2004) highlights that:

The extinction of explicit sexing ... does not solve the problem of implicit sexing, or of references to gendered or sexually and ethnically charged concepts and metaphors (Baer, 2004 pg. 109).

⁵³ Measured by respondent's dis/agreement to a range of statements around issues such as rape, domestic violence and divorce property rights.

The public nature of human rights law.

Many have pointed to the distinction made between public and private life as one of the principle reasons, if not *the* reason, why the human rights framework has been unresponsive to the human rights of women (e.g. Chinkin, 1999; Romany, 1994; Sullivan, 1995). This is particularly evident in terms of domestic violence (Copelon, 1994; Moore, 2003; Thomas and Beasley, 1993), which has traditionally been seen as falling within the private sphere and outside the boundaries of state control.

The questioning of the public/private divide has been central to the feminist movement (see for example O'Donovan, 1985; Pateman, 1988). Second wave feminists pointed out not only that the distinction between the public and private spheres supported the oppression of women and served to exclude them from full citizenship, but also that the idea that life could be split into two distinct spheres was an untenable one. The feminist slogan 'the personal is the political' emphasised not only that issues the state drew the line under as being 'private' should in theory and practice be important political issues (such as childcare and domestic violence) but also that the line was an arbitrary and mythological one because in fact the state chose to intervene in some 'private' issues but not others:

The framework for family is everywhere within a collective policy arena. Rules about who may marry, at what age, and with what rights and duties are made by the state (or its functional equivalent). Rules governing divorce, child custody, and inheritance are likewise a matter of 'public policy' (Binion, 1995, pg. 519).

In addition, what is seen as being 'public' and what is seen as being 'private' varies widely both historically and geographically which has led feminists to conclude that where the line is drawn between the private and the public is in itself a political act (Lister, 1997).

It is clear from the text of the ECHR that the primary concern of human rights is with the regulation of the public sphere and, in classic liberal style, the protection *of* the private sphere. The rights that cover the private sphere are concerned more with the right *to* a private life rather than *what happens within* such a private life. For example,

Article 12 guarantees the right to marry (albeit a heavily qualified one because of the reference to national law in the latter part of the Article):

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

However, there are no rights protecting individuals once they have married, nor is there a corresponding right to *leave* a marriage (i.e. a right to divorce) or any rights for those in relationships that do not fit into what the state decides constitutes marriage.

Similarly, Article 8 reads that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Again, and in spite of its heavy qualifications in section 2, the essence of the right is about the respect *for* private and family life rather than respect for what happens *within* a private and family life.

The issue of human rights and their applicability to women in the private sphere goes deeper than the substantive nature of the Articles. If human rights are limited to the public sphere (as they were intended to be under the ‘vertical’ effect described earlier) then this may be seen as disadvantaging those who may be particularly vulnerable to oppression in the hidden private sphere, primarily women and children (Palmer, 1996). However, social science literature about women and human rights has not tended to use the terms ‘horizontal’ and ‘vertical’ effects to describe the unresponsiveness of human rights law to women in the private sphere; the terms horizontal and vertical are rarely used within social science literature and the terms public and private are rarely used within legal literature.

Weak anti-discrimination provision

Legislation aimed at preventing sexual discrimination started to come under criticism in the UK following the introduction of the Equal Pay Act 1970 and the Sex Discrimination Act 1975, when it became clear that sexual equality legislation in theory did not necessarily equate with sexual equality in practice and had (and continues to have) a disappointingly low level of court enforcement (Fredman, 1996)⁵⁴. It became clear that ‘formal equality’ would not necessarily lead to ‘substantive equality’ (Gregory, 1987).

Others have argued that legislation based on treating people equally may be *worse* than ‘meaningless’. Kennedy (1992) states that ‘*dealing equally with those who are unequal creates more inequality*’ (pg. 31); a statement that she continues to make in her more recent work (Kennedy, 2004). Likewise, Barnett (1998) points out that ‘*to treat all equally gives no guarantee that all should benefit: indeed all may suffer as a result of equal treatment*’ (pg. 117). Fredman (1996) identified six ‘problems of equality’: structural inertia – the male norm (the ‘equal to whom?’ question); the problem of difference (how are equality and difference measured and how are any differences dealt with?); that equality guarantees consistency but not substance (equality legislation may result in a ‘levelling down’ rather than a ‘levelling up’); that equality is individualised (ignoring the collective dimension of discrimination); equality within a market order (that the capitalist economy is based upon inequality and competition); and the shifting meanings of equality (that the notion of equality is continuously stretched but always return to the traditional central values). These ‘problems of equality’ are present not only at the level of national law⁵⁵ but also in international human rights law, and Charlesworth (1994) argues that only women who attempt to conform to a male model (whose lives are based to some extent within the public sphere) will find any form of equality through the international prohibition

⁵⁴ Very few cases brought under the Sex Discrimination Act are successful at hearing. In Great Britain in 2000/1 only 7% (322/17,200) were successful and in 2001/2 only 3% (239/10,092) were successful. Similarly, in 2000/1 only 1% (11/6,586) of cases brought under the Equal Pay Act were successful at hearing and in 2001/2 this figure was 7% (149/5,314) (Women and Equality Unit, 2003).

⁵⁵ The problems associated with discrimination and the law are already well known within feminist literature and it is not necessary to describe these issues in any further depth (see for overview). Similarly, there is not room here to describe the approach that European Community law has taken in relation to these issues (see Fenwick, 2002, chapters 16 for overview).

of sex discrimination. Because nearly all human rights instruments deal with discrimination/equality issues, it is not possible here to attempt to review the literature on them (see McColgan, 2003 for overview) and the focus must return to the provision within the ECHR.

It is Article 14 of the ECHR and the HRA that is concerned with freedom from discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As explained earlier in this chapter, Article 14 has no ‘independent existence’ and can only be used alongside Articles 2-12. Article 14 therefore does not actually guarantee freedom from discrimination in its absolute sense or even in law in general, but is limited to the rights and freedoms within the Convention – to simply be discriminated against is ‘not enough’. This is a much weaker form of freedom from discrimination than in other charters of rights. For example the Canadian Charter of Rights and Freedoms guarantees that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (section 15 (1))

Possibly in light of Article 14’s weaknesses, the Council of Europe added Protocol 12 to the ECHR in November 2000. In the preamble to the Articles contained within the Protocol the Council of Europe stressed their commitment to equality and confirmed that what is often termed ‘positive discrimination’ would not constitute a violation of the Protocol:

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination ...

Reaffirming that the principle of non-discrimination does not prevent State Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.

Article 1 of Protocol 12 is called ‘General prohibition of discrimination’ and, as suggested by its name contains a wider, more ‘general’, right to be free from discrimination. It is ‘freestanding’ (it does not need to be used alongside another Article), includes equality under law (as with the provision in the Canadian Charter) and goes as far as prohibiting discrimination by any public authority on any ground:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

While this sounds a huge step forward when compared with the limited protection under Article 14, because the Protocol is an addition to the Convention it requires that states sign to ratify it. The UK has not, to date, ratified the Protocol and therefore UK citizens are not afforded the protections contained within it.

Probably the most regularly used example in human rights textbooks regarding sex discrimination in under Article 14 is the case of *Abdulaziz, Cabales and Balkandali*⁵⁶, which provides a prime example of one of the aforementioned six problems listed by Fredman (1996): that equality guarantees consistency but not substance (that equality legislation may result in a ‘levelling down’ rather than a ‘levelling up’). In this case the female applicants alleged that their rights under Article 8 (Right to private and family life) had been violated because they were not allowed to have their non-national spouses join them in the UK. Although their application under Article 8 failed, their related argument under Article 14 – that this situation was discriminatory – was successful because it was easier for men to have their non-national spouses join them in the UK than for women. However, the way the UK remedied this discrimination was to ‘level down’ to place both men and women wanting their non-national spouses to enter the UK in an *equally poor* situation.

⁵⁶ [1985] 7 EHRR 471

Similar problems have been reported under other Charters of Rights. McColgan (2000) describes how the equality rights within the Canadian Charter allowed judges to strike down legislation such as that banning male prison officers from strip-searching women prisoners and a law that provided benefits for single mothers on the basis that men were not treated equally.

There is also some evidence that the ECHR regularly fails to consider arguments under Article 14 if they have already judged that a different Article has been breached. McCafferty (2003) calls this the ‘no need’ approach to Article 14, the impact of such an approach resulting in relatively few cases finding a breach on the grounds of discrimination. One of the regularly used examples of this is the case of *ADT v United Kingdom*⁵⁷ where some gay men were prosecuted for having sexual intercourse with more than two men present. They argued this breached their right to private life (Article 8) and their right to be free from discrimination (Article 14) because their behaviour would have been legal if they had been lesbian or heterosexual. After finding a breach of Article 8 the ECHR argued there was ‘no need’ to examine Article 14. While this may not seem an important issue on first sight (it had already been acknowledged that the applicants had had their human rights breached), it is important to bear in mind the symbolic value of a judgment as well as the issue of just satisfaction⁵⁸.

The weak anti-discrimination provision and the ECHR’s ‘no need’ approach to Article 14 have therefore led to criticisms that gender-based discrimination is not taken seriously within the ECHR and HRA.

The gap between law on the books and law in practice

Feminists (and also socio-legal scholars) have pointed to the disparity between legal rights that exist in ‘black letter law’ and those that are actually capable of creating substantive, ‘real’ change for women (the gap between law on the books and law in practice). Using the domestic violence legislation introduced in the 1970’s as an

⁵⁷ *ADT v United Kingdom*, no. 35765/97, ECHR judgment of 31 July 2000

⁵⁸ This is what the court awards to the applicants for the breach, usually a financial award

example, Smart (1986) distinguishes between ‘law as legislation’ and ‘law in practice’, describing how legislation introduced by the government can result in minimal change if support from criminal justice and legal structures is not available (Smart, 1986). However, the gap between law on the books and law in practice is not limited to criminal justice and legal structures.

McColgan (2000) argues that the disparity between formal legal rights and practical enforceable rights is most clearly visible when considering the history of abortion rights in the USA. Women in the USA have a constitutionally protected right to abortion, despite continuous strong oppositional lobbying from a large proportion of the population. However, although the court restricted the powers of states to prohibit abortion there was no corresponding positive right attached to the ruling. This meant that states were under no obligation to fund abortion clinics or permit them to be carried out using public money. Abortions have not been carried out by Medicaid⁵⁹ since 1997 unless it was deemed necessary to save a woman’s life or in cases of rape or incest. McColgan reports on a case where Nebraska charged a young woman with welfare fraud in 1997 for applying for an abortion after she was raped. Although corroborative evidence existed that the young woman had come home crying, with torn clothing and had phoned a rape crisis helpline Nebraska filed the fraud claim against her on the basis she had not reported the rape to the police⁶⁰. This lack of positive right means that, particularly for women who cannot afford private abortion centres (which may not even exist in their area), the constitutional right to abortion means very little. This is an example of what McColgan (2000) calls ‘*the false promise of human rights*’ (the subtitle of her book). This point has also been made by Smart (1989) as an example of what she calls an ‘*empty right*’:

The law may concede a right, but if the state refuses to fund abortions or abortion clinics, it is an empty right. (pg. 144)

There is very little literature around regarding ‘how’ and ‘why’ a person comes to frame their problem in terms of rights, and how they come to ‘*adopt rights talk*’

⁵⁹ Who provide free health care for those on low incomes.

⁶⁰ The prosecution was eventually dropped.

(Merry, 2003, pg. 346). Barriers are thought to include a lack of support, knowledge, resources and access, which Baer (2004) argues contribute to a '*hidden rightlessness of individuals*' (pg. 102). Although there are a number of ways in which human rights cases may be financially supported, (through legal aid, through a human rights organisation such as Liberty funding it as a 'test case' or through a 'no win no fee' contract) there is no literature on whether such financial support is discriminatory to women.

Despite limited research, the pessimistic picture has importantly highlighted that a right may not be as positive as it first seems and that it is necessary to fully investigate the implications and resources associated with human rights.

1.9.2 The optimistic picture

The optimistic picture emphasises the possibility of change. It accepts that rights may sometimes have worked in the past to the detriment of women but does not accept that this need be the future or that this is consistently the case. The optimistic picture suggests more agency and power in women's ability to re-frame human rights, which may then be used to legitimise claims and provide spaces to challenge existing discourses. Those advocating the optimistic picture point to the ability to transform 'women's issues' into 'human rights issues' and the need to think horizontally instead of vertically (questioning the public/private divide).

Transforming 'women's issues' into 'human rights issues'

To transform something that is perceived as being an everyday occurrence (such as pornography or sexual harassment) into a matter of rights (such as civil rights or employment rights) can serve to legitimise the claim (MacKinnon, 1987) and act as a '*powerful rhetorical force*' (Bridgeman and Millns, 1998 pg. 27). The legal forum has been identified as an ideal place for feminists to engage in such re-definitional processes:

... feminism can (re)define harmless flirtation into sexual harassment, misplaced parental affection into child sexual abuse, enthusiastic seduction into rape, foetal rights into enforced reproduction, and so on. (Smart, 1989 pg. 165)

It has long been recognised outside of the women's movement that to transform an issue not only into a legal rights issue but also into a *human rights* issue is likely to legitimise the claim even further:

To assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy (Wilder, 1969 pg. 171)

In Phillips' (1991) theory of women and citizenship she suggests that it may be possible to reshape a term rather than simply reject it. She calls this 'gendered substitution', and this may also be possible in terms of women and human rights. Medina (1994) argues that this neglect can be remedied if women start to consistently use human rights laws to their benefit. Feminist theorists have therefore acknowledged that it may be possible to reframe human rights law to be more responsive to women and, even more optimistically, that it might actually be an ideal place in which to do so:

The introduction of the European Convention into domestic law may provide an opportunity to unsettle existing discourses. A space may be created which would allow women's perspectives and experiences to enter into the law. There could be openings to ask previously unasked questions and to reframe debates ... (Palmer, 1996 pg. 242).

Central to the ability to transform 'women's issues' into 'human rights' issues, however, is the challenging of the public/private divide and the need to think horizontally instead of vertically.

Thinking horizontally instead of vertically

As described earlier, the horizontal effect of the ECHR means that states can be held responsible for their inaction to protect against human rights violations as well as their direct actions. While feminist theorists have argued this may be key to unlocking the usefulness of human rights for women, as with the vertical effect/public nature of human rights law discussed under the pessimistic picture, the language used in social

science literature has tended to talk in terms of challenging the public/private divide rather than in terms of thinking horizontally.

Many have argued nonetheless that it is this dimension that can be useful to address the issues women face in the private sphere, particularly in relation to violence against women (e.g. Roth, 1994; Copelon, 1994). Roth (1994) argues that violence against women can be seen to be reinforcing the subjugation of women by acting as a form of social control. In this sense, the human rights violation is caused by the systematic failure of a government to do something rather than something they have done. He explains:

Implicit in this approach is that a state has some duty to protect those within its territory from private acts of violence and illicit force. When the state makes little or no effort to stop a certain form of private violence, it tacitly condones that violence. This complicity transforms what would otherwise be wholly private conduct into a constructive act of the state. (pg. 330)

The notion of ‘non-intervention’ being as politically significant as ‘intervention’ has also been highlighted in relation to national law and provides yet another example of how the lack of public policies can impact on the private sphere, whereby ‘*non-intervention is as potent an ideology as regulation*’ (O’Donovan, 1985 pg 184). Similarly, in the area of constitutional law, it is the horizontal effect of rights that are pointed to as particularly important (Baines and Rubio-Marin, 2005).

It is possible that the pessimistic picture’s critique of the public nature of human rights law has been over centralised in the debate over the usefulness of human rights law for women. As discussed earlier in the chapter, ECHR case law has shown that the Court are quite willing to hold states responsible for violations within the private sphere, and this has been the case from a relatively early stage; as mentioned earlier the ECtHR found the Netherlands guilty of violating an individual’s human rights after she was raped by another (non-state) individual in 1985. In other landmark cases, the UK have been held responsible for acts perpetrated within a private school by (non-state) individuals (*Costello-Roberts v the United Kingdom*⁶¹) and for failing to adequately respond to a situation which resulted in murder committed by an (non-

⁶¹ *Costello-Roberts v United Kingdom* [1995] 19 EHRR 116.

state) individual (*Osman v the United Kingdom*⁶²). This means that while criticisms are being made of the inability of human rights to respond to violations of women's rights in the private sphere the case law shows that, at least in ECHR cases, that the Court has been willing to find states responsible for such violations.

It is therefore argued and generally accepted that the key to unlocking the usefulness of human rights law for women lies in the challenging of the public/private divide. While writers such as Roth (1994) have shown how this may be achieved, in at least some cases heard under the ECHR when women's issues have been re-framed in terms of human rights issues and when the appropriate legal language has been employed (i.e. vertical/horizontal effect instead of public/private) this argument has already been accepted to some degree.

1.9.3 Balancing the pictures

In addition to the cases described in this chapter and the introduction, many more examples can be found of where human rights law has worked 'for' or 'against' women. However, it is easy in a field the size of international law to pick and choose cases based on whether they support whichever argument the theorist is making. Unless research has clear criteria for case selection it runs the risk of being viewed as largely anecdotal (Morton and Allen, 2001). Unfortunately, most research on women and human rights does not have clear criteria for case selection. A large amount of theory has been generated with no empirical base at all and there is a pressing need for empirical research to guide the development of theory on women and human rights (Lacey, 2004). It is also possible that feminism, as a critical social movement, has been more likely to veer towards pessimism than optimism⁶³.

When cases are analysed systematically it would appear that there is certainly room for optimism in relation to some issues facing women. In the most systematic and exhaustive review of feminist groups' use of the Canadian Charter of Rights, Morton and Allen (2001) boldly state that '*no group has been more active in using litigation than organized feminists*' (pg. 56). When measuring success as the 'winner' of the

⁶² *Osman v United Kingdom* [1998] 29 EHRR 245.

⁶³ Although adopting and expressing *scepticism* can be seen as the essence of good academic scholarship (Tomkins, 2001).

dispute, they found that out of 21 Charter cases feminist litigants/interventions were successful in 67 per cent of cases. This shows not only that a feminist case was more likely to be successful than unsuccessful, but also that feminist cases were more likely to win than other cases; in a review of all cases in the first ten years of the Charter, claimants won just 33 per cent of cases (Morton et al., 1995).

In the areas of pornography, immigration and abortion/foetal rights, Morton and Allen (2001) report that feminists have not lost a single case under the Canadian Charter. As examples they cite the immigration cases of *Cheung*⁶⁴, where it was ruled that China's use of forced sterilisation to enforce its one-child policy constituted grounds for refugee status, and *Mayers*⁶⁵, where grounds for refugee status were granted based on Trinidad's failure to protect women from domestic violence. In their analysis they found that success was lowest in the areas of sexual assault and income tax and highest in the areas of abortion, private sector discrimination and pornography.

Under the Canadian Charter the picture is therefore more 'successful' than 'unsuccessful' when analysed systematically. Unfortunately, literature containing this level of data is not available for any other rights charters/conventions outside of Canada, making claims regarding the outcomes of human rights claims sketchy and sometimes one sided. In addition, the situation in Canada is different to that in the UK; the Canadian Charter is a constitutional rather than a statutory Bill of Rights and Canada has public funding that campaign groups can draw on to support litigation.

Outside of Canada where the use of human rights has been well researched, examples of positive judgments are rare. It is unclear whether this is because of a lack of success or because of a lack of research and literature. In terms of the ECHR there appear to have been few cases with feminist involvement as a whole, whether successful or unsuccessful. In her Article on women's rights and the ECHR, Palmer (1996) gives just one example. In the case of *Open Door Counselling Ltd, Dublin Well Woman Centre Ltd and Others v Ireland*⁶⁶ where women's centres successfully

⁶⁴ No case reference is given

⁶⁵ No case reference is given

⁶⁶ *Open Door Counselling Ltd, Dublin Well Woman Centre Ltd and Others v Ireland* no 1423/88 and 142335/88 ECHR, judgment of 29 October 1992

argued that Ireland's blanket prohibition on abortion counselling and information on the availability of abortions in Britain was in breach of Article 10 (Freedom of expression)⁶⁷. Similarly, Easton (2002) predicts (although not using a systematic empirical base) that the HRA will have a beneficial impact on claims around recognition rather than distribution, specifically in the areas of women and sexual discrimination, disability discrimination, property and prisoners.

This suggests that both the optimistic and pessimistic pictures are probably operating simultaneously. Dividing the literature into pessimistic and optimistic pictures has been useful in order to map out the broad arguments made in the area of women and human rights, however it has oversimplified issues somewhat. This is reflective of most of the literature. While many theorists have been willing to see both the pros and cons of using legal human rights, few have recognised that human rights law can result in both the 'optimistic' and 'pessimistic' pictures simultaneously. In other words, there are many variables that are likely to impact upon the usefulness of human rights law. Some charters might be more useful than others, and there may be more focus on some articles than others. It is important to create a more developed and nuanced jurisprudence that is able to take into account all these factors.

Human rights law, as has been argued in terms of law in general, appears not to be a simplistic and dichotomous tool of liberation or oppression but rather a tool that can be inconsistent and applied 'unevenly' (Smart, 1984a, 1984b, 1985, 1989). Among the variables that may impact on its outcomes are the issue they are used for (Morton and Allen, 2001; Easton, 2002; Lacey, 2004) and in what 'role' women are using them:

Whether a woman will benefit from entrenched rights will depend on her particular status, so it is hard to see rights as uniformly repressive or liberating (Easton, 2002 pg. 35).

⁶⁷ However, the issue of the legality of the prohibition of abortion was left open (see also Ewing and Gearty, 1992 for discussion).

1.10 Chapter conclusions

This chapter has described how the machinery of the ECHR and HRA operates. It has outlined the arguments that contribute towards a ‘pessimistic picture’ on the basis of: male dominated judiciaries; the public nature of human rights law; the weak anti-discrimination provision; and the gap between legal human rights and ‘practical’ rights. It has also shown, via the ‘optimistic picture’, that while there are problems in the area of women and human rights, it would be a mistake to completely ‘write off rights’. Rather, the optimistic picture has explained how, by thinking horizontally rather than vertically, the public/private divide may be challenged through human rights law and the law may be an ideal place in which to transform ‘women’s issues’ into ‘human rights issues’ through feminist jurisprudence.

In focusing on just one issue concerning feminists, this thesis may appear narrow. It will certainly not be possible to make any broad conclusions about whether human rights law is ‘good’ for women, but nor does it intend to. Rather, by focusing in-depth on one issue and specific legal human rights, it aims to avoid some of the problems associated with previous literature by having a clearly defined research area and empirical base. In choosing rape as the ‘feminist issue’ upon which to study the impact of human rights law, this constitutes both a very specific subject area but also one that may be seen as not only representing but exemplifying the gendered nature of law and one where the rights of women, children and, to a lesser extent men, as victims and men as defendants are seen as particularly difficult to reconcile:

The substantive criminal law contains one of the most crucial balances between human rights and public protection. Never will this balance be more delicate or important than in a law of sex offences. (Wheldon, 2000 pg. 275)

CHAPTER TWO: RAPE AND THE PROSECUTION PROCESS

2.1 Introduction

Over the last three decades, following the advent of second wave feminism, the cultural and legal meanings of rape have changed and rape is now widely acknowledged as a social problem (Chasteen, 2001). To borrow Jordan's words, '*rape is an old crime with a recent past*' (Jordan, 2002 pg. 319). We now have a substantial body of research documenting the problems that are evident in rape cases in England and Wales (see for example Gregory and Lees, 1999; Kelly and Regan, 2001; Kelly, 2002; Kelly et al., 2005; Lees 1996a, 1996b, 2002; Temkin, 1997, 1999, 2002). One of the outcomes of these problems is that very few men who are reported to the police for rape are subsequently convicted of rape.

Although acknowledged as a social problem that is massively under-reported to the police, there is disagreement over how prevalent rape is. Not surprisingly, research produces different findings depending on the populations surveyed and the methods used (Hofer, 2000; Russell and Bolen, 2000; Schwartz, 1997). This was exemplified in the US National Crime Victimization Study in 1992, where the redesign of questions resulted in a fourfold increase in disclosures (Greenfield, 1997). Rape is a crime that is extremely difficult to measure in terms of incidence and prevalence, and statistics often say more about how crime statistics are collected and constructed than how many rapes have actually been reported (von Hofer, 2000). The way in which women are asked if they have been raped is important. For example, women may be more likely to disclose that they have been raped if they are asked 'have you ever been forced to have sex' or 'have you ever been coerced into sex' than if they are asked 'have you been raped?' despite the question being essentially the same (Lees, 1996a). Additionally, the way the interview is conducted is also important. Walby and Myhill (2001) highlight that privacy during the interview, special training for the interviewer on sensitive issues and the presence of a partner or other household member all effect the likelihood of disclosure of rape or other forms of violence against women. The gender of the interviewer is thought to be particularly salient (Walby and Myhill, 2001), with research showing that both women and men were

more likely (1.27 times more likely) to disclose a sexual assault when interviewed by a woman than by a man (Sorenson, Stein, Siegel, Golding and Burnham, 1987).

The first study of rape prevalence to be based on a probability sample was carried out in the USA in 1978 by Diana Russell (Russell, 1983). A total of 930 women were interviewed, and she discovered that 24 percent of women disclosed at least one completed rape, and 44 percent reported at least one completed or attempted rape (or both). Furthermore, this was a repeated experience for half of the women. In the UK the few non-governmental studies that have been conducted have found that approximately one in four women will experience rape at some stage in their lives (Coid et al., 2003⁶⁸; Mooney, 1994, 2000⁶⁹; Painter, 1991⁷⁰). In contrast, the government's British Crime Survey (BCS) estimates the prevalence of rape to be much lower, at one in nineteen women (5.2%) at any point in their lives and one in twenty-eight (3.6%) since the age of sixteen⁷¹ (Walby and Allen, 2004). When penile penetration of the mouth without consent is included in the definition of rape⁷² the figures rise slightly to one in eighteen (5.5%) at any point in their lives and one in twenty-seven (3.7%) since the age of sixteen⁷³.

There is therefore a considerable difference between rape prevalence estimates from governmental and non-governmental research. While the BCS should in theory be the more methodologically sound estimate of rape prevalence because it is the only research that has used a large, national, representative sample⁷⁴, this is probably not the case. The BCS has always had problems with the way it measures rape. In its early days, very few women reported rape to the BCS, for example in the 1983 sweep only one woman disclosed an attempted rape (Hough and Mayhew, 1983). This led to a period of time where the results for rape were simply not included in BCS

⁶⁸ Coid et al (2003) asked about rape in a number of different ways. They found that 8% of participants reported that they had been 'raped', but a further 16% reported that they had been 'forced to have sex by a present or former partner' (both at the age of 16 years or above). A further 9% reported 'unwanted sexual intercourse in childhood'.

⁶⁹ Mooney (1994, 2000) defined rape as made to have sex without consent.

⁷⁰ Painter (1991) defined rape as having sex when they had been coerced.

⁷¹ These figures include attempted rape. For actual rape the figures are 4.2% in lifetime and 3.0% since the age of sixteen.

⁷² This is now included in the legal definition of rape but was not included in 2001 when the survey took place. Changes to the legal definition of rape are discussed later in this chapter.

⁷³ These figures include attempted rape. For actual rape the figures are 4.4% in lifetime and 3.1% since the age of sixteen.

⁷⁴ 22,463 women and men were surveyed in the 2001 sweep

publications because so few disclosures were being made (Percy and Mayhew, 1997), until the mid 1990's when the new Computer Assisted Self-Interviewing method (CASI) was introduced (for discussion of this method see Mirrlees-Black, 1999; Walby and Allen, 2004). There are a number of reasons why rape may be under reported in the BCS. For example, framing the questions within the context of crime may reduce the likelihood of people reporting acts they do not feel to be criminal (Walby and Myhill, 2001) and those who are excluded from the survey (people who are homeless or living in temporary accommodation such as refuges and hostels) may be populations that experience particularly high rates of abuse (Hagemann-White, 2001; Walby and Allen, 2004). On the other hand, it is also possible that the non-governmental surveys have included a disproportionate number of people who have been raped in their samples. For example, the terms 'unwanted', 'nonvoluntary' and 'forced' are all often interpreted to mean 'rape', yet empirical research using focus groups suggests they may not be equivalent terms (Hamby and Koss, 2003). Participants in the focus groups have also expressed ambiguity around the term 'coercion' (Hamby and Koss, 2003). In addition, it may be those who have experienced rape who are more likely to participate in such studies than those who have not.

Much discussion has taken place in a quest to develop more accurate ways of recording rape and other forms of violence against women (see for example Hagemann-White, 2001; Hamby and Koss, 2003; Schwartz, 1997; Walby and Myhill, 2001). Hagemann-White (2001) highlights that estimates of prevalence have been a constant theme in the discussion of violence against women since the 1970s, as has the caveat that reliable data do not exist. This is still true in relation to rape because of the lack of national, representative non-governmental research. Prevalence estimates of domestic violence tend to be more readily accepted as 'true' because the large number of such studies has built up a relatively consistent knowledge base.

Despite the different findings in governmental and non-governmental studies, it is clear that rape constitutes a large social problem. Even if we take the lower prevalence estimate (i.e. that of the BCS) and do not include penile penetration of the mouth without consent, this still equates to a best estimate that in the last year 47,000

women in England and Wales experienced rape and attempted rape, 79,000 a serious sexual assault and 293,000 a less serious sexual assault (Walby and Allen, 2004).

Regardless of methodology and prevalence estimates, research consistently shows that rape is most likely to be perpetrated by someone known to the victim (e.g. Harris and Grace, 1999; Kelly et al., 2005; Myhill and Allen, 2002; Walby and Allen, 2004). It is also agreed upon that most rapes are never reported to the police and never enter official criminal statistics (e.g. Hall, 1985; Walby and Allen, 2004). While the number of police recorded rape cases more than doubled in the decade between 1991 and 2001/2⁷⁵, the proportion of cases that reach court and result in a conviction for rape has steadily dropped. The most recently published non-governmental figures show that in a sample of rape cases reported to the police between 1996 and 2000 only five per cent resulted in a conviction for rape (Lea et al., 2003). Home Office figures are similar, with the most recently published figures showing that in 2002 the rape conviction rate was only 5.6 per cent (Kelly et al., 2005).

This chapter starts with an overview of some of the theories that have been put forward to explain 'why men rape'. The next section shows that, regardless of the different individual motivations for rape, it is extremely unlikely that men will be convicted for rape because of a number of attrition stages within the criminal justice system. Problems with the substantive rape law, evidential, procedural or extra-legal factors are then discussed, along with reforms that have attempted to overcome these problems. Using Greer's (1994) typology of 'unjustified avoidance of conviction', the next section theorises rape attrition in terms of miscarriages of justice, before looking at some of the reasons why men as rape defendants have argued that the rape trial is not fair to them. This is followed by a consideration of the due process and crime control models of criminal justice and how these relate to recent calls to close the 'justice gap'.

2.2 Theorising why men rape

Theorising why men rape is important in the discussion of rape and human rights in terms of *whether*, to *what extent* and *how* the state can be seen to hold some

⁷⁵ From 4,045 in 1991 to 9,008 in 2001/2002 (Simmons et al., 2002)

accountability for men who rape. Many theories have attempted to answer the question of why men rape, and these theories place differing emphasis on the roles and responsibilities of the state, society and the individual (as victim or as offender).

Early theories of rape tended to minimise, excuse and/or deny men's agency, and rape was explained in one of two ways. Firstly, men were said to rape because of *uncontrollable internal factors*, for example because of an overpowering sexual impulse (Glueck, 1925; Guttmacher and Weihofen, 1952; Karpman, 1951), an under-developed ego (Cohen et al., 1971) or as a result of unresolved sexual childhood desires (Freud, 1905, reprinted 1953). Secondly, rape was explained in terms of *uncontrollable external factors*, for example placing the blame on the behaviour of the victim (Amir, 1967, 1971), his wife and/or his mother (Abrahamsen, 1960). According to these theories the state could have little or no impact on whether or not men rape or not because rape was 'not their fault' and a matter of individual pathology.

Second-wave feminist theories of rape moved away from the idea that men who rape lack agency, and placed the emphasis of study onto men, masculinity and the social structures that support male power. Rape was argued to be a *form* of control rather than a *lack* of control. This approach is best exemplified by Brownmiller (1975) who described rape in her groundbreaking book as '*... nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear*' (pg. 15). By this she meant that rape is not about individual men 'losing control' as the earlier theories suggested, but is actually about the conscious *upholding* (rather than exemplifying) of oppressive patriarchal structures in society. Rape, from this perspective, therefore serves a political function as a powerful form of social control⁷⁶.

Feminist theories of rape continued to focus primarily on theorising rape at the societal rather than individual level. The 'feminist hypothesis' (as it is generally

⁷⁶ Research is, for the most part, supportive of Brownmiller's theory that the existence of rape in society keeps women in a state of fear. Women tell researchers that they fear rape more than any other crime (Hough, 1995; Warr, 1985) and women may devise a wide range of rituals, strategies and routines in an attempt to ensure or promote their personal safety (Gordon and Riger, 1988; Jeffreys and Radford, 1984; Radford, 1987; Stanko, 1990a, 1990b). Other research however, suggests that although Western women may live under the fear of rape, this may not be universal to all women (Helliwell, 2000; Sanday, 1981).

referred to) was that an increase in women's equality should *ultimately* lead to a decrease in the prevalence of rape (see Baron and Straus, 1987; Peterson and Bailey, 1992). However, in the shorter term it was acknowledged that a 'backlash' or 'inverted feminist hypothesis' (Ellis and Beattie, 1983) might occur:

Rape is the way some men express their hostility to women. More threatened egos may mean more rape. In the short run, the more women who break out of the traditional female role and assert themselves in new ways, the more threatened male egos there are (Russell, 1975, pg. 14).

Whaley (2001) refers to this as the '*paradoxical relationship between gender inequality and rape*' (pg. 531). She found support using panel data collected over three decades in the U.S. for the 'refined hypothesis' that while the short term effect of increased gender equality would be an increase in rape that this result would be short lived and be replaced by a long-term decrease in rape prevalence, however Whaley's research does have some methodological limitations⁷⁷.

The 1970s and 80s also saw the development of social learning theories of rape, led primarily by psychologists but generally with a strong feminist influence⁷⁸. Scully's research is probably the best example of the fusion of psychology and feminism in the development of a social learning explanation for 'why men rape'. Scully (1990; see also Scully and Marolla, 1985a, 1985b) developed her theory of rape by interviewing convicted rapists in the USA and, using Mills' (1940) concept of a 'vocabulary of motive' (where people attempt to explain an act in acceptable terms), concluded that:

An important part of learning to rape includes the mastery of a vocabulary that can be used to explain sexual violence against women in socially acceptable terms (pg. 98).

⁷⁷ There are a number of problems with Whaley's analysis; in particular her measurement of rape as rapes reported to the police and recorded in the U.S. Uniform Crime Reports and her extremely limited consideration of variables that may have confounded her results. There are a number of problems associated with reliance upon official rape statistics, only some of which are acknowledged by Whaley. Of more importance are possible confounding variables, such as changes in rape laws (in particular the withdrawal of the marital rape exception in most U.S. states), societal attitudes to rape and criminal justice responses to rape.

⁷⁸ Social learning theorists explain rape in terms of learned behaviours, where rape occurs through modelling (e.g. copying rape scenes from films), linking sex with violence (e.g. pornography), belief in rape myths ('... *prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists*' Burt, 1980, pg. 217) and/or desensitisation to violence (whereby sexual violence is not seen as serious because of its prevalence on television/in computer games etc.).

Scully thus explains rape in terms of both individual and societal factors; men who rape do so as a low risk, high reward '*act of normal deviance*' (pg. 63) but the 'rewards' vary for different men in different situations. According to this perspective rape, rather than directly upholding patriarchy (as suggested by Brownmiller) is *symptomatic* of patriarchal society; if society did not have gender inequality based upon patriarchal structures then rape would not be rewarding for some men and rape would not be a low risk act.

A further approach, advanced mostly over the last decade, is the development of cognitive theories to explain rape. According to cognition-based theories of rape, rapists are able to minimise, rationalise or even justify their behaviour because of cognitive distortions. For example, it is argued from this perspective that rapists may wrongly interpret a victim's facial expression as pleasure instead of fear (McFall, 1990) or have empathic or social skill deficits (Covell and Scalora, 2002; Geer and Manguno-Mire, 1996; Geer et al., 2000). Although this perspective has some overlaps with social learning theories in that they seek to explain why individual men rape, cognitive theories of rape tend to return to an individual level of analysis without placing enough emphasis on the role society plays in developing and supporting such cognitive distortions⁷⁹.

Also focusing primarily on the individual level of analysis, the last decade has seen an increase in the development of 'typologies' of sexual offending, although attempts to classify 'types' of rapists dates back to the late 1970s (e.g. Groth et al., 1977). These typologies are generally grounded in empirical research and attempt to differentiate between offenders in terms of their individual motivations⁸⁰. These

⁷⁹ For example, one study compared rapists with non-rapists and found that the penile arousal of rapists was higher than for non-rapists when they were shown images involving the sexual humiliation of women (Proulx et al., 1994). While it is conceivable that the rapists had distorted cognitions that caused them to become aroused by images of the sexual humiliation of women, it is equally conceivable that social factors such as sexually degrading pornography and societal attitudes towards women played a part in shaping and hence distorting these cognitions.

⁸⁰ It has been argued that classification is essential if we are ever to fully understand sexual offending (Polaschek et al., 1997), develop refined theories (Millon, 1991), develop effective 'treatment' for rapists (Marx et al., 1999) and conduct more accurate risk assessments (Hazelwood and Warren, 2000) and assist criminal profilers. They are generally developed by forensic or clinical psychologists and while they are not specifically feminist in nature, nor are they based on the 'victim-blaming' attitudes evident in some previous psychological theories.

classifications, or typologies, of rapists using multi-factoral explanations for rape mark a significant shift from the (generally) mono-causal feminist theories and reinforce the argument that men who rape do so for different reasons.

Summary

Theories of 'why men rape' have placed different emphasis on the role of individual and societal factors. Feminists have been critical of theories focusing solely on individual motivations for rape while they in turn have been accused of focusing too heavily on societal levels of analysis and portraying men who rape as a relatively homogenous group:

... because of their essentially societal level of analysis they cannot on their own account for the differential impact of such influences at the individual level (Polaschek et al., 1997 pg. 126).

Polaschek et al., (1997) suggest that a global theory that adequately explains why men rape is still some way off and theoretical pluralism⁸¹ may have to suffice for the moment. If we accept that men rape for different motivations (such as those suggested by Scully, 1990 and also in the various rape classifications) we still need to consider the social space that allows these motivations to take place, particularly if men are perceiving it as a low risk, high reward crime (Scully, 1990). As rape is a criminal offence, defined by the government, interpreted by and enforced by state actors, it is necessary to consider this wider structure within which the individual motivations take place. This raises the question of whether there are appropriate laws that sanction rape and also whether laws and policies are being properly enforced.

2.3 Attrition in rape cases

Research shows that while more and more men are being reported to the police for rape in the United Kingdom, the proportion that are convicted for rape has been steadily falling since records began (Chambers and Miller, 1983; Chambers and Miller, 1986; Grace et al., 1992; Harris and Grace, 1999; Kelly et al., 2005; Lea et al.,

⁸¹ Using different theories to explain different factors of any given phenomenon (Hooker, 1987)

2003; Lees and Gregory, 1993; Smith, 1989). The conviction rate for rapes reported to the police now stands at an all-time low since records began of around five per cent (Kelly et al., 2005; Lea et al., 2003). This compares unfavourably to other offences; the proportion of offenders brought to justice⁸² for all offences in 2000/01 was around 20 per cent (Home Office, 2002a).

Comparative analysis shows that the pattern of increasing attrition over time in rape cases is not restricted to the United Kingdom. In many European countries rape conviction rates (as a proportion of reported cases) have fallen over the last two decades (Kelly and Regan, 2001; Regan and Kelly, 2003). Although direct comparisons can be methodologically difficult, research has found great disparity in attrition rates across Europe. For the period between 1998 and 2001, Regan and Kelly (2003) found rape conviction rates (as a proportion of reported cases) varied from an average of 1 per cent (Ireland), 7 per cent (Sweden) and 8 per cent (in England and Wales) at the lower end up to 54 per cent (Hungary) and 66 per cent (Latvia) at the higher end. However, Hungary and Latvia have not seen a consistent increase in the number of reports recorded as most of the countries with lower conviction rates have. They found the only country that had an increase in both convictions and reporting was Germany (with an average conviction rate of 25 per cent between 1998 and 2001).

Comparative analysis within England and Wales also shows disparity, with different geographical areas having different levels of attrition. In 2002 for example, Cleveland, Gwent, South Wales and South Yorkshire all obtained conviction rates of between 12.2 and 12.8 per cent in comparison with Gloucestershire and Warwickshire who obtained conviction rates of 1.75 and 1.67 per cent respectively (figures taken from Kelly et al., 2005 Appendix 1). Research on domestic violence shows that the high level of attrition is not peculiar to rape, but rather a feature in the prosecution of male violence against women in general (Hester et al., 2003; Hester and Westmarland, 2005; HMIC and HMCPSI, 2004; Phillips and Brown, 1998)⁸³.

⁸² Defined by the Home Office (2002a) as when an offender receives a caution, conviction or has the offence taken into consideration in court.

⁸³ Hester et al found that out of 869 domestic violence incidents recorded by the police only 31 (3.6%) resulted in a conviction and even fewer were given custodial sentences. This does not, however mean

In 2002 Kelly reviewed six rape attrition studies in the UK (as part of a larger research review) and identified four key attrition stages⁸⁴: whether a woman decides to make an official rape report to the police (which the police decide to record); whether the police pass the case to the Crown Prosecution Service (CPS); whether the CPS decide to prosecute and finally; whether the defendant is found guilty of rape. These stages will now be discussed in turn.

As with other forms of violence against women, very few women who are raped make an official report to the police. Research shows that the proportion of women that report rape ranges between five and fifteen per cent (Hall, 1985; Johnson and Sacco, 1995; Painter, 1991; Russell, 1983; Walby and Allen, 2004; Warshaw and Koss, 1994), depending on the time and place the research was conducted and the research methods and samples used. The likelihood of reporting may be even lower for women from black and other minority ethnic groups (HMCPSI and HMIC, 2002). There are many reasons why women do not report rape to the police. These reasons include that they may: not recognise that what has happened to them is rape (Kahn, 2004; Kelly, 1988; Peterson and Muehlenhard, 2004), particularly if the rape does not conform to what they view as 'real rape' (Soothill and Walby, 1991; Estrich, 1987); feel they will not be taken seriously by the police or worry that they will not be believed (Faizey, 1994); feel embarrassed for 'putting themselves in the situation' and blame themselves for being raped (Finkelson and Oswalt, 1995); be encouraged to invalidate their experiences (Kelly and Radford, 1996); and/or have recollection problems if they have been administered alcohol or other drug (Hindmarch and Brinkmann, 1999; Rape Crisis Federation, 2002)⁸⁵. For an incident of reported rape to

that the domestic violence attrition rate is higher than the rape attrition rate because not all of the domestic violence incidents would have been criminal offences.

⁸⁴ More recently Kelly et al. (2005) have discussed the attrition process in six rather than four stages in a study aimed at finding out more about attrition in the early stages of the criminal justice system. As the aim of this section is to provide a general overview of attrition the detail of these additional stages is not discussed here.

⁸⁵ Although 'date rape' drugs (primarily Rohypnol) have been the subjects of media attention, alcohol remains the most frequently used 'date rape' drug. In an analysis of 1,033 urine samples in rape cases in the USA between 1996 and 1998, 37 per cent were positive for alcohol compared to less than 1 per cent for Rohypnol (Hindmarch and Brinkmann, 1999). It is unclear from the information available in the UK on drug-assisted rape whether this is indeed an increasing problem or whether the media has created a new 'moral panic' in which illegal drugs are seen to be more newsworthy than alcohol in rape cases (see Cohen, 1972 on the development of moral panics). Recent research found that 6 per cent of victims in London described them as 'drug rapes' (Ruparel, 2004)

enter official rape statistics the rape must also be recorded by the police (Kelly, 2002), and although this *should* always happen it is not known what proportion of reported cases are recorded⁸⁶.

The second point of attrition is whether or not the police pass the case to the CPS for prosecution. Cases are not forwarded to the CPS if they are 'no-crimed'⁸⁷ or undetected⁸⁸ and logged as 'no further action'. Even if an incident is 'crimed' and a suspect is identified and caught the police may still record it as 'no-further action' and not forward the case to the CPS. The possible reasons for this are laid out in a set of Home Office categories⁸⁹. In her review of six research studies, Kelly (2002) found that between half and two thirds of cases were dropped in this stage.

The third key attrition point lies with the CPS, who decide whether or not to continue with the prosecution passed to them by the police. For a case to proceed through the CPS to the court an evidential, and purportedly objective, 'test' is applied to the case. The evidence is reviewed in terms of admissibility, reliability and credibility. The main aim of this test is to ascertain whether or not there is a realistic likelihood of gaining a conviction in court – whether a jury would be more likely than not to find the defendant guilty on the evidence available. If this is the case then it must also be judged as to whether it is in the public's interest to continue with the case. If these tests are met then the case proceeds to the court, which is where the final key attrition point lies⁹⁰. In Kelly's (2002) review between seven per cent and 32 per cent were discontinued at the prosecution stage and did not proceed to court.

⁸⁶ Only around 50 per cent of domestic violence incidents that are reported are likely to be recorded as such (Hanmer et al., 1999), however one of the reasons for this is because domestic violence does not represent an individual offence and it is unlikely that the gap between reported and recorded rapes would be anywhere near this size.

⁸⁷ If the police believe the rape report to be false or if the complaint is withdrawn (although if the complaint is withdrawn this may alternatively be logged as 'no further action').

⁸⁸ If no suspect is identified and caught.

⁸⁹ These include where a suspect has been identified but the case is not taken any further, for example if the offender has been formally warned by the police, a key witness refuses to give evidence or if there is insufficient admissible evidence to make a conviction likely. The police may also ask for advice from the CPS and cases may be dropped at the advice of the CPS.

⁹⁰ If these evidential tests are not met then it is possible for a private prosecution to take place, although these are rare and very expensive. The first private prosecution for rape was brought in 1995 and was successful which suggests problems with CPS decision making (see Weale in *The Guardian* 18.5.1995 for details of the case).

In the courtroom there are three main outcomes. The defendant may be acquitted of all charges (found not guilty), convicted on another charge (for example the lesser charge of indecent assault) or be convicted of rape. Kelly (2002) found that the proportion of men reported for rape that were convicted for rape varied between fifteen per cent and six per cent, with the latter figure being the most recent (Harris and Grace, 1999). More recent Home Office figures since Kelly's 2002 review show that this has now dropped further, to 5.6 per cent (Kelly et al., 2005).

Summary

The high attrition rate has long been a major concern of feminist activists, practitioners and activists. It is unrealistic to expect all men who are reported for rape to be prosecuted and convicted for rape (i.e. 0% attrition). Sometimes there will not be enough evidence to prosecute and sometimes the accused will not be guilty of rape. However, that this is the situation in such a large proportion of cases (i.e. almost 95%) is, for many, just as unrealistic. Indeed, the high attrition rate has led some to question whether rape is actually becoming decriminalised (Gregory and Lees, 1999). Until recently this high attrition rate occurred alongside an overwhelming lack of political will to change the situation, leading to arguments that rape was being legitimised (Los, 1990; Matoesian, 1993) and that rape was treated as an enforcement of the social order rather than a violation of it (Connell, 1987). The inclination for the state to criminalise and/or prosecute only certain 'types' of rape ('real rape') led to arguments that rape was being regulated rather than prohibited and that the state was simply setting the '*limits of violence appropriate for the control of women*' (Radford, 1987, pg. 43). Although this situation has now changed to some extent with recent changes to substantive law and legal procedures, it remains the case that most rape victims do not receive justice (defined here as seeing the perpetrator punished) through the criminal justice system.

2.4 Substantive rape law

The last few years have seen a major re-organisation of the substantive law on sexual offences⁹¹. Until 2004 the law on sexual offences was based on legislation implemented in the 1950s, some of which dated back as far as the 19th Century. Unsurprisingly, this legislation was grossly dated and unsuitable for the 21st Century. Although a number of amendments had been made since the 1950s, the result of these piecemeal changes led to very confusing laws, to the extent that many different Acts had to be accessed in order to decipher how the law stood on any given matter. The previous law was also plagued by anomalies, inappropriate language⁹² and discrimination, some of which could have been construed as being in breach of Article 14 of the HRA (Freedom from discrimination)⁹³.

In order to secure a conviction for rape it is necessary to prove beyond reasonable doubt not only that the defendant committed an act that meets the legal definition of rape but also that the defendant knew that the victim was not consenting. These are known as the *actus reus* (the guilty act) and the *mens rea* (the guilty mind, or criminal intent). These two aspects of rape are now described in turn in terms of the reforms that have taken place.

2.4.1 The actus reus (guilty act)

The actus reus of rape under the Sexual Offences Act 1956 was defined as unlawful sexual intercourse with a woman, which was amended under the Sexual Offences Amendment Act 1976 to unlawful sexual intercourse with a woman without her consent. The 1990s saw two major changes to the rape actus reus. In 1991 rape within marriage became illegal within common-law and this was placed into statute in the Criminal Justice and Public Order Act 1994 when the word 'unlawful' was removed from the definition. The second change was also encompassed within the 1994 Act when it was acknowledged that a male could be a victim of rape and the actus reus

⁹¹ There is not room here to describe fully the processes, discussions and debates that took place during the Sexual Offences Review. See Westmarland (2004) for a more in-depth discussion.

⁹² For example the use of the term 'defective' for individuals with learning disabilities.

⁹³ For example, it was classed as an offence for an adult male to have sexual intercourse with a girl under the age of 16, but it was not an offence for an adult female to have sexual intercourse with a boy under the age of 16.

was extended to include anal intercourse against a woman or another man without their consent. The actus reus then remained the same until the Sexual Offences Act 2003 widened the actus reus further to penile penetration of another's mouth, anus or vagina without consent or reasonable belief in consent. Therefore rape was extended to include penile penetration of the mouth, on the basis that '*... forced oral sex is as horrible, as demeaning and as traumatising as other forms of penile penetration*' (Home Office, 2000 pg. 15). It remains the case that a man or a woman can be raped, but only a man can rape (because of the need for a penis).

The second part of the actus reus, 'without consent or reasonable belief in consent', overlaps with the mens rea. Technically, 'without consent' refers to the actus reus and the 'reasonable belief in consent' refers to the mens rea and this is how they will be discussed here. There are generally three lines of defence used in rape cases: that intercourse did not take place, that intercourse did take place but not with the defendant, or that intercourse took place but the victim consented to it or the defendant believed that the victim consented to it (Baird, 1999). Baird (1999) highlights that there are very few cases that are 'whodunnits' and that the defence that sexual intercourse never took place is also rare. These defences are likely to have reduced since developments in DNA testing (Lees, 1996a). The issue of consent is therefore what many rape defence arguments focus on, and one of the aims of the Sexual Offences Review was to 'clarify the law on consent'⁹⁴.

The root of the 'consent' problem lies with the requirement of the prosecution to prove the absence of consent (rather than requiring the defence to prove that they had taken steps to ascertain consent), and in many ways this problem is unique to rape cases. If, for example, a person reported that their car had been stolen it would not be necessary to prove that it had been taken without their consent. Similarly, if an individual were physically assaulted, for example punched in the face, they would not be asked if they agreed to be punched in the face. A further problem in rape cases is that the only direct witness is likely to be the rape victim. If the defendant says that the victim consented and the victim says she did not consent then it is difficult to

⁹⁴ This was then used as the title of Chapter Two in the white paper 'Protecting the Public' (Home Office, 2002b).

validate either person's statement of the act⁹⁵. Because of the nature of rape it is unlikely there would be a third party available to directly corroborate either statement, making police evidence gathering and experienced police interviewers vitally important in rape cases.

The Sexual Offences (Amendment) Act 1976 was the first to use the term 'consent' in statute. However, exactly what was meant by 'consent' was never defined in statute and common-law approaches were confusing (see Temkin 2000b for discussion of the issues that led to confusion). The Sexual Offences Act 2003 addressed this confusion by defining consent, as 'if a person agrees by choice, and has the freedom and capacity to make that choice' (Section 24). It also lists six categories where consent is 'presumed' to be absent (Section 75) and two where consent is 'conclusively presumed' to be absent (Section 76). When applied to children under 13, rape does not have the consent element attached to it. This means that the 2003 Act recognises that a child aged under 13 can never 'consent' to sexual intercourse and that any sexual intercourse with a child under 13 is now classified as a 'strict liability' offence (i.e. the standard for proving culpability is lowered).

2.4.2 The mens rea (guilty mind)

This second part of the offence of rape, the mens rea, is based on the premise that an individual should not be punished for an act that they did not know they were committing at the time of the act (the crime of trespass is a regularly used example to explain the mens rea)⁹⁶. Although the mens rea is a component of most offences, it only becomes relevant when the conduct in question is ambiguous.

Prior to the Sexual Offences Act 2003 if a man committed the actus reus of rape – the guilty act, but he honestly believed that the woman was consenting regardless of how unreasonable that belief was, he could not be convicted of rape because the mens rea

⁹⁵ Until 1995 Judge's were required to give the 'corroboration warning' in their summing up - by warning the jury that it is unsafe to convict a man of rape purely on the woman's uncorroborated evidence. Sexual offences were one of only two trials in which this warning was deemed necessary (the other being child witnesses).

⁹⁶ It is against the law to trespass onto another's property, but a person cannot be convicted if they did not know they were trespassing. For example if they walked onto someone's land while on a country walk which was not clearly signed as being someone's private property. NB. This example is simply to show how the mens rea works and not to draw any other parallels between trespass and rape.

– the guilty mind – was not present. This was known formally as the ‘mistaken belief’ clause⁹⁷ and informally as the ‘rapists charter’ (Temkin, 1987) or ‘men’s rea’ (Cousins, 1980) because it meant that a woman could be actively non-consenting, even shouting ‘no’ and struggling to free herself, and a man could still be acquitted of rape. Although there has been no research on its success as a defence in the UK, it was presumably a defence that was very difficult, if not impossible, to rebut because it was based upon what was going on in the defendant’s mind.

Feminists lobbied for many years against the ‘mistaken belief in consent’, arguing either that the clause should either be removed *or* that that the belief should at least be a reasonable one. After much debate, the Sexual Offences Act 2003 defined the mens rea as if a person does not *reasonably* believe that the other consents (section 1c). Whether or not the belief is classed as reasonable is to be determined after looking at all the circumstances, including any steps a person may have taken to ascertain whether the other consented.

Summary

The widening of the definition of rape to include penile penetration of the mouth, the removal of the consent issue for children under the age of 13, the defining of consent and the need for belief in consent to be a *reasonable* one all significantly strengthen the law on sexual offences. These changes, intentionally or unintentionally guided by a strong feminist influence⁹⁸, mean that accusations made in the past that the state was condoning rape through weak and ineffective criminal laws (as described above) are reduced in terms of the substantive law.

⁹⁷ The ‘mistaken belief’ clause was first introduced in the case of *Morgan* ([1976] AC 182) when a husband colluded in the raping of his wife by three of his friends. He allegedly told his friends that his wife would struggle and say ‘no’, as though she did not want to have intercourse with them, but that this ‘turned her on’ because she was ‘kinky’. The accused men claimed that they honestly believed she was enjoying it and consenting and that they did not intend to rape her – in other words that they did not have a guilty mind. Although in the *Morgan* case the men were convicted, and the husband convicted of aiding and abetting, *Morgan* set a new precedent and the House of Lords ruled that if a man honestly believed that a woman consented, regardless of how unreasonable this belief was, he could not be found guilty of rape.

⁹⁸ The external reference group set up as part of the Sexual Offences Review included established feminist academics, representatives from feminist organisations working with victims of rape and feminist activists.

However, the problems that have been documented around rape and the law go wider than the substantive law, which is one of the reasons why some have been sceptical of the amount of change the Sexual Offences Act 2003 can achieve. Rumney (2001), for example, warned that the review might lead to '*another false dawn*' (pg. 890) because of its sole focus on the 'black letter' law and others have argued that it is important for law reform to focus on the trial process, particularly on how rules of evidence and the ways in which rape cases are constructed relate to social perceptions of gender, coercion and sexuality (e.g. Goldberg-Ambrose, 1992). In addition, it has long been recognised by feminists that legal reforms can only be implemented effectively if they are linked to attitudinal transformations (e.g. Jeffreys and Radford, 1984), although it is also acknowledged that laws are probably easier to change than prejudiced attitudes (Gaines, 1997). This suggests that it is necessary to look beyond the 'black letter' of substantive rape law and look at the evidential and procedural factors associated with rape prosecutions, many of which are also influenced by, or even led by, extra-legal factors such as myths about rape.

2.5 Evidential, procedural and extra-legal factors

Research shows that women find the rape prosecution process very traumatic culminating, if the case gets that far, in the trial at court. Throughout the prosecution process and at the trial the role of the rape victim is as a *witness*, with the Crown Prosecution Service acting as the prosecutor *on behalf of the public* (except in very rare cases of private prosecutions⁹⁹). However, research has described how many women feel that they are not treated solely as a 'witness' or a 'victim', but made to feel as if they are on trial themselves (Lees, 1996a; Victim Support, 1996). In spite of the low conviction rate for rape, the following sections will show that the focus in rape trials continues to be skewed towards ensuring fairness for the defendant, sometimes at the expense of the victim. Lees (1993) describes this as loading the dice against the victim. This is not peculiar to England and Wales, with similar problems found elsewhere. In Scotland, Brown et al. (1993) have argued that in rape cases the adversarial system is an asymmetrical one and Eastaugh (1998a) makes the same point in relation to the situation in Australia:

⁹⁹ Private prosecutions may be brought under section 6 of the Prosecution of Offenders Act 1985.

Traditionally, in rape trials, the scales of justice have been weighted far more heavily on the side of the defendant. (pg. vii)

Feminists have tended to reject the argument that the low rape conviction rate is 'inevitable' because of the nature of the crime. Rather, they argue that there are number of factors that, if properly addressed, could make rape trials more 'balanced' and more 'fair' to the victim. This section describes some of the ways in which the 'scales' of justice are argued to be skewed in rape trials towards the defendant and away from the public prosecutor.

The victim has no legal advocate

The victim has no legal representation in court or, indeed throughout the prosecution process whereas the defendant does have legal representation in the form of his defence team. In 1986 the Crown Prosecution Service (CPS) was created and took over the responsibility for criminal prosecutions meaning that the prosecution works on behalf of *the public* not the victim. This leaves the victim with no advocate, acting only as a witness in 'her' case. Few people understand that the CPS is acting for the state and not for the individual victim and this is rarely explained to victims (Fawcett Society, 2003b).

The defence barrister is generally more experienced than the prosecution barrister

Typically, the defence barrister will be paid around twice as much as the prosecution, which tends to result in the more experienced barristers taking on the defence work leaving the less experienced barristers with the lower paid prosecution work (Temkin, 2000a). In Lees' interview with an Old Bailey judge in the Dispatches (2000) television programme Mrs Judge Rafferty pointed out that *'the prosecution is going to be outgunned and outclassed by the more seasoned performer'* (cited by Lees, 2002 pg. xxii) and in Temkin's (2000a) interviews with ten QCs experienced in rape cases she found that they were often shocked by the lack of experience held by prosecution barristers, with one QC describing them as an *'open target'* for the defence. The QCs also described how their knowledge and experience of the

difficulties involved in prosecuting rape was used to assist their development of strategies to use in defence cases.

The CPS introduced specialist rape prosecutors in 2004, however this does not mean that the barrister will act any differently or that the victim will have a legal advocate. The degree to how 'specialist' the rape prosecutors are is questionable and appears to vary between geographical areas. The minimum requirements to qualify as a specialist rape prosecutor is for a prosecutor to be 'interested' in prosecuting rape cases, have more than three years experience and attend one training session written and delivered by the CPS.

The victim has very few legal rights

Although victims of crime of course have human rights, the principle focus of human rights has generally been on the rights of suspects, defendants and convicted offenders (de Than, 2003). This is evident from the content of legal journals, in the case law of the ECHR and in some of the substantive Articles which are explicitly geared towards suspects, defendants and offenders, in particular Articles 5 (Right to liberty and security), 6 (Right to a fair trial) and 7 (No punishment without law). In contrast, there is clearly no explicit 'right to be free from rape'. The right to sexual autonomy remains a 'missing entitlement' (Schulhofer, 1998).

Human rights aside, victim's rights in general have tended to take a poor second place to the rights of defendants (de Than, 2003). In the UK the first Victim's Charter was published in 1990 by the Home Office in response to the heightened awareness of victims needs developed throughout the 1980s. The Charter had as its subtitle '*A statement on the rights of victims of crime*', however it is now accepted that if there were any right contained within the document they were very difficult to find (Home Office, 2001). The Charter was revised in 1996, setting out 27 '*standards of service*' that victims could expect to receive, hence removing the previous language of '*rights*'. Regardless of the revision, public awareness of the Charter has constantly remained very low (Home Office, 2001). In addition, as 'rights' or as 'standards', the provision within the Victims Charter are only 'quasi-legal' (Fenwick, 1997),

according to Ganz's (1987) definition of the term (as rules, but not ones that are directly enforceable in criminal/civil proceedings).

Now to be called the 'Victim's Code of Practice', the Charter is again being revised in a consultation exercise due to close in May 2005. While the most recent draft does set out clearly what a victim of crime can expect from a range of agencies (including the police and CPS), it remains a quasi-legal document and is vague in places:

'Where a person fails to comply with this Code, that does not, of itself, make him liable to legal proceedings.' (Victims' Code of Practice Consultation section 1.2)

'... the CPS must usually agree to meet you to explain why they decided not to bring charges ...' (Victims' Code of Practice: A Guide for Victims Consultation pg. 6, my emphasis)

Although acknowledgement of the importance of the victim has become heightened over recent years with the expansion of victim support schemes, the development of witness support for those called to give evidence in court and the revision of the Victims' Code of Practice, these have been developed within a government agenda to increase conviction rates and decrease what they call the 'justice gap' for all offences (the difference between the number of recorded offences and the number of offenders brought to justice for these offences). While increasing the conviction rate is clearly important, it must also be remembered that procedural justice not only for defendants but also for victim witnesses is also vital. Kelly et al. (2005) found that a sense of procedural justice was seen by women as more, or at least as, important as the final court outcome when they were given proper support throughout the process. Of the cases that resulted in acquittals, it was found that while the women were disappointed at the outcomes, they did not regret pursuing the case.

Some have argued that increasing the rights of victims is seen as synonymous with increasing the rights of the state:

'... when the government talks about rebalancing the system, it is really about a rebalancing in favour of the state, giving more power to the state. That is the fraud in the government's rhetoric, the sleight of hand.' (Kennedy, 2004 pg. 26)

The role of the HRA and the ECHR have been largely neglected when thinking about rights for victims, with the emphasis placed on the development of the Victims' Code of Practice. de Than (2003) suggests that the focus should be on upholding the rights that victims and vulnerable witnesses already hold under the ECHR rather than on the creation of guidelines, codes of practice and ombudsmen.

Victims are asked intrusive questions about their sexual history

Research with rape victims has consistently shown that they find giving evidence and being cross-examined about their sexual history extremely distressing and humiliating, to the extent that they may change their minds about giving evidence in court (Lowe, 1984) or be put off from even reporting the rape to the police (Adler, 1982, 1987). In addition to the emotional impact of answering such questions, Lees' (1996) research shows that unnecessary questioning of a victim about her previous sexual experiences was used in rape trials to destroy her credibility as a witness and to imply that if she had had consensual intercourse in the past then she must have consented on the occasion in question.

Section Two of the Sexual Offences (Amendment) Act 1976 ruled that women could only be questioned regarding their sexual history if leave from the judge was obtained and also that women could not be named in the media, but judges continued to frequently allow sexual history evidence to be used (Adler, 1982; Lowe, 1984; Temkin, 1993). Brereton (1997), for example, found that three quarters of rape victims in Australia were questioned about their sexual history when the defence sought to show that the victim consented.

It was to be two decades, in 1998, before the issue of sexual history evidence was again reviewed. In line with New Labour's 1997 election manifesto promise to provide greater protection to victim-witnesses in rape and other serious sexual offence trials, they published 'Speaking Up for Justice', a consultation paper about vulnerable and intimidated witnesses (Home Office, 1998). New provision was subsequently contained within the Youth Justice and Criminal Evidence Act 1999, which limited the use of sexual history evidence to a number of specified situations. Some feminists, however, were still uneasy about the sexual history restrictions,

arguing that they lacked clarity and did not go far enough (Cook, 1999). Other academics argued that the restrictions were well intentioned but went too far (Birch, 2000) and a House of Lords challenge (*R v A*) later weakened the restrictions further by allowing more judicial discretion than was intended within the Act (this case is discussed in more detail in Chapters Six and Seven).

Evidence is given and victims are cross-examined about factors that are aimed at discrediting and/or intimidating the witness

In addition to sexual history evidence, Lees (1996a) found that most rape victims reported feeling that they had generally been asked irrelevant and unfair questions during the trial. She found that questions often centred on the complainants personal life, for example her use of alcohol or drugs, her living arrangements or financial situation and concluded that questioning around issues such as these did not elicit any relevant information but rather was used to discredit the witness thereby causing the jury to question the truthfulness of her rape allegation. Questions such as what underwear the woman was wearing and whether she had a vibrator were used to insinuate that the woman had a 'bad' reputation and questions about clothing and make-up (for example the colour of her lipstick or whether she was wearing a 'petticoat') were asked, despite being of no relevance to the trial. Lees argued that these lines of questioning were used to imply that the woman must have consented because she was a 'tart' or a 'slut', that she 'deserved' to be raped, and/or to distress her when giving evidence.

Lees (1996a) findings are supported by Temkin's (2000a) research, where the QC's described that discrediting the witness was a key strategy they used when defending rape cases. The aim of this was to undermine the victim's credibility, and this was seen as being even more important than the facts of the case:

You'll put your chap's facts and obviously controvert her facts. They're less important than undermining her personality. It sounds sinister but that's what you're trying to do, make her sound and appear less credible. (QC interviewed in Temkin, 2000a pg. 231)

Those who had acted as barristers for the prosecution tended to accept that this would happen and agreed that this, rather than the facts of the case, tended to be the 'prime

impediment to gaining a conviction: *'Her appearance, her behaviour, her lifestyle were all viewed as obstacles'* (Temkin, 2000a pg. 224).

Perhaps not surprisingly, since defence barristers continue to use it, research shows that this strategy can be successful. Research using simulated rape trials have found, for example, that participants interpret an acquaintance rape differently depending on the length of the victim's skirt (Workman and Orr, 1996) and are less likely to find the defendant guilty if the victim had consumed alcohol (Schuller and Wall, 1998).

Although trial judges are under a common-law obligation to prevent unnecessary and/or oppressive cross-examination, this regulation is argued to be inadequate (Ellison, 1998). In one case a judge failed to prevent a defendant representing himself from cross-examining the victim for six days while wearing the same clothes at the trial that he had worn at the time of the rape (cited by Cook, 1998). A similar scenario occurred in *Brown* in 1997 where the cross-examination was allowed to continue despite the trial judge acknowledging in his summing up that *'[the] merciless cross-examination [was] clearly only designed to intimidate and humiliate them [the witnesses]'* (Judge Pontius, cited by Cook, 1998, pg. 3).

Some have argued that the things that happen in a rape trial, particularly around cross-examination but also around attrition, are not peculiar to rape trials but rather are purely symptomatic of the adversarial system and its emphasis on the establishment of 'proof' rather than 'truth'. In Australia Brereton (1997) compared rape trials with assault trials and found that assault complainants were just as likely as rape complainants to have their character and credibility questioned, to exploit any inconsistencies in evidence and to be questioned about alcohol consumption and emotional stability. However, both evidence-in-chief and cross-examination lasted around twice as long in rape trials than in assault trials. In the UK, participants in Rocks's (1993) research on prosecution witnesses appearing at the Crown Court described the cross-examination process in similar terms as rape victims have, explaining that it made them feel degraded and as if they were the ones on trial. More recently, Ellison (1998) has argued that although reforms around the use of sexual history evidence and cross-examination in rape trials should be welcomed, rape trials

must be viewed within the broader framework of the adversarial system more generally if the treatment of rape victims is to be improved.

Many of the criticisms made of rape trials are certainly linked to the way in which the adversarial system works and are true to some extent of other criminal trials. Countries such as France, with a strong commitment to the inquisitorial system, have gone to great lengths to avoid adversarialism:

The adversarial system of justice is by nature unfair and unjust. It favours the strong over the weak. It accentuates social and cultural differences, favouring the rich who are able to engage and pay for the services of one or more layers. (Justice Minister Madame Guigou, 1999, cited in Hodgeson, 2004)

Human rights take centre stage in France, with the ECHR incorporated totally and constitutionally guaranteed since 1974 (Hodgeson, 2004). France also appears to have a higher conviction rate than England and Wales (data chart 16, in Kelly and Regan, 2003).

The nature of the adversarial system may therefore play a large part in the problematic nature of rape trials in England and Wales, and more research is needed on this issue and on how this links with human rights. There are also, however, issues that are specific to rape trials that go beyond the general features of an adversarial trial. For example: in no other offences do such powerful stereotypes exist to define what is 'real' (Kelly et al., 2005); in no other category of offences are defendants as likely to plead not guilty¹⁰⁰ (Home Office/National Statistics, 2004); and in no other trial do key actors within the criminal justice system routinely (and incorrectly¹⁰¹) assume the victim to be lying:

... I would say a good half that come through are not genuine ones. (Police Officer interviewed in Kelly et al., 2005 pg. 50)

¹⁰⁰ In 2003 32 per cent of sexual offence defendants pleaded guilty at Crown Court compared with 54 per cent of violence against the person defendants and an overall rate of 63 percent for defendants of all indictable offences.

¹⁰¹ Kelly et al. (2005) found that in their sample of 2,643 rape cases, 3 per cent were 'probably' or 'possibly' false.

... I have dealt with hundreds and hundreds of rapes in the last few years, and I can honestly probably count on both hands the ones that I believe are truly genuine. (Police Officer interviewed in Kelly et al., 2005 pg. 51)

Problems relating to evidential requirements

It is relatively easy to prove that sexual intercourse took place, particularly since DNA testing has become more widespread, however proving beyond reasonable doubt that the intercourse was not consensual is more difficult and leads to what often seems to be a 'one person's word against another's' type scenario (Lees, 1996a). While there are a number of problems relating to evidential requirements, there is only space here to discuss the two issues that are most regularly identified in literature as problematic. These relate to corroborative evidence and the 'mistaken belief in consent' defence.

There is confusion and inconsistency about exactly what evidence can be classed as corroborative. Lees (1996a) points out that while a distressed state at the time of the rape report is seen in Scotland as being corroborative, in England and Wales it is simply seen as being 'consistent'. Until 1995 judges were required to give the 'corroboration warning', warning the jury that it is unsafe to convict a man of rape purely on a woman's uncorroborated evidence. The warning was often 'embroidered' by judges with comments about women making false rape complaints (Lees, 1996a). Under the Criminal Justice and Public Order Act 1994 it is no longer mandatory for judges to give the warning and it is now discretionary. Cooper (1995) warns that relying upon discretion will result in rape trials being conducted differently depending on the trial judge. There has been no research in the UK on how often such warnings are now given or the nature of the warning, however a review of Australian literature shows that the warning was still regularly given following its abolishment there (Mack, 1998).

Another area that is widely cited as being problematic in evidential terms is when the 'mistaken belief in consent' defence is used. As already discussed, the Sexual Offences Act 2003 amended the rape mens rea and belief in consent must now be reasonable. It is too early to know whether this will continue to be a problem, and

whether the term 'reasonable' will be interpreted as reasonable 'man' or 'person' in a way that has previously allowed the law to apply male defined norms to assess the actions of women (see for example Forell and Matthews, 2000). It must, however, be noted that no research has been conducted in the UK regarding the prevalence or impact of the defence before the change was made. Research in Australia suggest that the mistaken belief was used in less than one in four cases (23%) and that defendants were actually *more* likely to be found guilty when this defence was used (Law Reform Commission of Victoria, 1991a, 1991b). If the same was true in the UK then feminist campaigning for change may have been misplaced. Gans (1997), however, argues that the methodology of the Australian study was fundamentally flawed and that this led to invalid and misleading findings. Criticising the research for not taking into account pre-trial decisions on attrition, ignoring the role of mistaken belief within juror decision making and for having vague coding categories around consent and mistaken belief, Gans (1997) suggests that, by re-coding the data, at least 74 per cent rather than 23 per cent of the trials actually had at least some element of mistaken belief defence. All that can be concluded from this is that the mistaken belief in consent defence has been identified as an evidential issue contributing to the low rape conviction rate, but that it is not known how often it is used, how it impacts on case outcome or how the change to a 'reasonable' mistaken belief will be interpreted.

The lack of judge and jury knowledge about rape

Lees (2001) highlights that the effectiveness of rape law reforms is questionable while many lawyers, police and prosecutors remain opposed to such changes. She argues that the virtual lack of training about the effects of rape, imbalances in trials and the characteristics of rapists leaves them '*... woefully ignorant and prejudiced about rape and sexual assault*' (Lees, 1996a, pg. 248).

Training, however, may not have the positive implications attached to it as it may first appear. In Temkin's (2000a) study of barristers she found mixed feelings about training. Some were against training, with one female barrister stating that it was not her responsibility to be concerned about the effects of cross-examination. Even more worryingly, barristers who looked favourably upon training did so in order to cross-examine witnesses more effectively from the perspective of the defence.

Without any knowledge about how victims respond to rape, people tend to rely on how they believe a 'real' rape victim should act. Research using simulated rape cases has found that these beliefs overlap with consent decisions. For example participants in one study rated women as having been more likely to have consented if they waited three days to report the incident to the police and were uninjured (Harris and Weiss, 1995). In contrast, people who have some understanding about rape victims, through being raped themselves or having known someone who has been raped, are more likely to give a guilty verdict (Wiener et al., 1989). This may be because they are less likely to believe rape myths about how a 'real' rape victim would behave following the rape.

It has been suggested that expert testimonies, or even a general education testimony, could help counteract and compensate for myths held by jurors about how a rape victim 'should' act and behave (Tetreault, 1989). More research on the effect of this is needed, however Spanos et al. (1991-1992) found that when mock jurors heard evidence by an expert witness this increased the frequency of guilty votes but that this increase was reversed when the expert was cross-examined. More generally, however, research shows that education about rape can make both women and men more empathic towards rape victims (e.g. Pinzone-Glover et al., 1998).

Judges are predominantly white, middle class men

Despite minimal evidence, it is often assumed in rape cases that male judges are more likely than female judges to make questionable judgments, provide biased directions to juries and make inappropriate comments in their summing up. Some support for this assumption comes from popularised quotes about what misogynistic male judges have said in court. In 2001 when the House of Lords were required to consider the compatibility of the sexual history evidence provision contained within the Youth Justice and Criminal Evidence Act's 1999 with the right to a fair trial (Article 6) of the HRA, the Fawcett Society challenged the legitimacy of having this decision made by an all male panel of judges but were unsuccessful in their challenge (described by Lees, 2002).

While it is true that some women believe and perpetuate rape myths and hold negative attitudes to rape victims and also that some men can be incredibly supportive of rape victims and anti-rape campaigns, this is not the general pattern. Men are more likely than women to: hold negative attitudes towards the rape victim (Ryckman et al., 1998), believe rape myths (Furnham and Boston, 1996; Johnson et al., 1997; Lonsway and Fitzgerald, 1994; Sinclair and Bourne, 1998), consider the event to be consensual (Harris and Weiss, 1995), find the defendant not guilty or prescribe a shorter sentence (Fischer, 1991; McNamara et al., 1993; Schutte and Hosch, 1997) and not to accept that 'vaginal intercourse with one's wife without consent' is rape (Kirkwood and Cecil, 2001). Some ethnicity bias is also evident. In simulated rape trials some participants show bias towards black rape victims or victims who had dated a black defendant (Willis, 1992) and recommend longer sentences for black men found guilty of rape (Rector and Bagby, 1995).

Summary

This shows that there are many problems relating to the prosecution of rape, which all contribute to the fact that very few men reported for rape are convicted for rape. This means that substantive justice is rarely achieved in rape cases and this is what feminists mean when they write things like:

The majority of women involved in a rape trial either as a witness, supporting a witness or as an observer will be well aware that justice is the last thing likely to be dispensed in court (Foley, 1995 pg. 54)

As with many of the changes to the substantive criminal law and with wider criminal justice policies relating to violence against women, the government is beginning to accept some feminist arguments (without using the term 'feminist!'). The New Labour government brought with them a 'tough on crime' pledge, coining the term 'justice gap' to describe how some victims of crime are getting a raw deal when guilty people are not punished for crimes they have committed. The time has come when the scales of justice, they claim, have swung too far in the favour of the defendant.

Reforms to government policy to ‘rebalance the scales’ are aimed to benefit all victims and are not specific to rape or other forms of violence against women. Such reforms have so far included a relaxation of the double jeopardy rules (a significant reform since the rules had previously existed in English common law since the 12th century) and earlier involvement by the CPS when charging offenders. In the run up to the publication of the white paper ‘Justice for All’, PM Tony Blair explained why the criminal justice system needed reforming and rebalancing. The following part of his press release was widely reported in the press:

It's a miscarriage of justice when the police see their hard work thrown away by the courts who can let a mugger out on bail for the seventh or eighth time to offend again, or when courts don't have the secure accommodation or prison places to put people. It's perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished.

Although the notion that victims of crime can then become victims of miscarriages of justice is not a unique revelation, this marks a significant diversion from popular discourse around miscarriages of justice, which has traditionally focused far more heavily on the wrongful conviction of the innocent than on the wrongful acquittal of the guilty.

2.6 Theorising rape attrition in terms of miscarriages of justice

Following a spate of wrongful convictions in the 1980s, which received a great deal of media attention spurred by investigative journalism, in 1991 a Royal Commission of Criminal Justice was established¹⁰². In its report it was accepted that miscarriages of justice include not only wrongful convictions (due to error, malpractice or procedural irregularity) but also wrongful acquittals (due to error or jury bias) (Runciman Committee, 1993). While this served as a powerful acknowledgement that victims of crime can be victims of miscarriages of justice, Greer (1994) argues that these categories developed by the Royal Commission are incomplete and problematic because of their focus on the criminal trial. The starting point for Greer’s classification of miscarriages of justice is that miscarriages of justice can occur earlier in the prosecution process rather than just at the trial stage. Because we know from

¹⁰² This was set up on the day the Court of Appeal overturned the conviction of the Birmingham Six (14.3.1991).

rape attrition research that problems gaining convictions are not limited to the trial but rather that the criminal justice system acts as a type of funnel throughout the prosecution process, this makes Greer's classification the most interesting to consider in terms of rape and criminal justice.

Greer (1994) criticises the Runciman Committee for distinguishing between '*unjust acquittals*' and '*unjust convictions*' as the basis for understanding miscarriages of justice, preferring to differentiate between '*unjustified avoidance of conviction*' (of which he identifies four types) and '*unjustified convictions*' (of which he identifies six types). Of the four types of unjustified avoidance of conviction he identifies, he relates two to structural sources (due to defects in substantive criminal law and defects in criminal procedure) and two relating to agency (indefensible decisions not to charge or prosecute and unjustified acquittals). If Greer's typology is applied to rape, examples can be given for each of these types of unjustified avoidance of conviction.

Structural Source 1: Defects in substantive criminal law

Greer describes miscarriages of justice under this category as cases where the behaviour in question is not sanctioned by the criminal law but where there is an argument that it should be defined as criminal and cases where conviction is avoided because of the 'quirkish' effect of some defences. These have traditionally been referred to as 'legal loopholes' by feminists rather than explicitly labelled as 'miscarriages of justice'. Examples relating to rape that may fall under this category include the non-criminalisation of rape within marriage in the substantive criminal law pre-1994 and the 'quirkish' effect of the Morgan ruling.

Structural Source 2: Defects in criminal procedure

Under this category, Greer argues that some aspects of procedural law may result in unjust acquittals, although he warns that a compelling argument must be made before changing any procedural laws to make it easier to convict. Greer himself cites rape cases as examples of miscarriages of justice that may arise from defects in criminal procedure, citing the corroboration warning (which was mandatory at the time of

Greer's writing in 1994) and some of the rules of evidence (he does not specify which ones).

Agency 1: Indefensible decisions not to charge or prosecute.

Greer identifies three sources of injustice relating to police and CPS decision making in relation to charging and prosecution. The first source is decisions not to charge or prosecute because of external pressures on the system such as witness intimidation. An example of where this may occur in a rape case is if the rape occurred within a domestic violence situation and the woman was threatened with more violence to her/her children/her family if she did not withdraw her statement. The second source under this category is decisions not to charge or prosecute because of malpractice and/or mistakes made by the police or prosecutors, such as negligence or prejudice towards the victim. Although not specific to rape, an example of this occurring in a rape case could be if the police fail to collect all the available evidence or if the police or prosecutor discontinues the case because their prejudiced beliefs lead them to the conclusion that the victim is not telling the truth despite evidence to the contrary. Ultimately, there would be strong grounds for defining a case as a miscarriage of justice if the CPS discontinued a case that was then subject to a successful private prosecution. Although these are rarely brought because of the trial and prosecution financial costs, these have on occasion been brought and been successful in rape cases. For example, in 1994 two women involved in prostitution successfully brought a private prosecution against a man for rape, indecent assault, false imprisonment and actual bodily harm after the CPS had discontinued the case (Pearson, 1995). The third source of injustice Greer identifies under this category is decisions to downgrade an offence – to charge or prosecute for a lesser offence than that allegedly committed. An example of this would be to prosecute a rape as sexual assault rather than as rape¹⁰³.

¹⁰³ This would not be the case in the new offence of sexual assault by penetration contained within the Sexual Offences Act 2003 because sexual assault by penetration carries with it the same maximum sentence as rape (life imprisonment). However, rapes may still be downgraded to sexual assault (intentional sexual touching without consent or belief in consent) which has a lower maximum sentence (ten years imprisonment).

Agency 2: Unjustified acquittals.

Finally, there are two sources of unjustified acquittals that Greer identifies, resulting from deliberate external interference through 'jury nobbling' and intimidation and those that stem from prejudice against the victim or the prosecution that are unrelated to the offence itself (e.g. gender, class or ethnicity). Cases of 'jury nobbling' and intimidation are probably rare in rape cases (although there is no evidence to back up this assumption) but in non-stranger rape the victim may be intimidated, particularly if the rape is within the context of domestic violence. It is the latter source, in particular prejudice against the victim rather than the prosecution, which has been most researched and is thought to be the most relevant in terms of rape cases. This research was reviewed earlier in the chapter and would include cases where an acquittal was made based on rape myths, for example 'prostitutes cannot be raped'. Defence strategies to discredit the victim that can result in a complete shift from whether the woman has been raped to whether she is a 'rapeable' woman (McColgan, 2000) may also result in unjustified acquittals if prejudice is created.

Summary

Because of the high rape attrition rate and the difficulties discussed earlier relating to the prosecution of rape, it follows that there is likely to be a much higher risk of a rape victim experiencing a miscarriage of justice (an unjustified avoidance of conviction) than a rape defendant experiencing one (an unjustified conviction). Statistically, only five per cent of rape defendants are at any risk of experiencing an unjustified conviction because this is the proportion that receive a conviction. In contrast, over 95 per cent of rape victims are at risk of experiencing an unjustified avoidance of conviction.

2.7 Rape defendants and fair trials

The consistent pattern that has emerged so far in this chapter is one of rape victims being treated unfairly by the criminal justice system, having a high likelihood of experiencing a miscarriage of justice and a very low chance of seeing the man who raped them punished. There is also a second pattern however, applied equally

consistently, but in contradiction to the first pattern. This second pattern is of rape defendants claiming that rape trials are not fair *to them*. The following examples show that this often happens following reform to a rape law.

Example 1. Rape victims found facing defendants in court difficult and traumatic (the ‘victim’s problem’). The government extended the use of ‘special measures’ such as screens to vulnerable victims in rape and serious sexual assault cases under the Youth Justice and Criminal Evidence Act 1999 (the ‘reform’). It is argued that this is not fair to the defendant (the ‘defendant’s response’):

Imagine you’re an innocent man and the woman is still allowed to tell a pack of lies about you from behind a screen and you can’t even see her face (Barrister interviewed in Temkin, 2000a pg. 238).

Example 2. Non-consensual intercourse between a husband and his wife was not classed as rape (the ‘victim’s problem’). In *R v R* the trial judge ruled that non-consensual intercourse is rape regardless of the relationship between the defendant and the victim (the ‘reform’). It was argued (in *CR v United Kingdom*) that this was not fair to the defendant (the ‘defendant’s response’).

Example 3: The use of sexual history evidence was used in rape trials to undermine the victim’s credibility and to humiliate and distress her (the ‘victim’s’ problem). The Youth Justice and Criminal Evidence Act 1999 placed further restrictions on the use of sexual history evidence and reduced the amount of judicial discretion (the ‘reform’). It was argued (in *R v A*) this was not fair to the defendant (the ‘defendant’s response’).

These represent just three examples of how rape law reforms are often followed by the allegation that the situation is unfair to the defendant. They show some of the tensions not only between the victims and defendants, but also between procedural justice and substantive justice and between due process¹⁰⁴ and crime control.

¹⁰⁴ Due process refers to the ‘umbrella under which various mechanisms for ensuring fairness throughout the criminal process are classified’ (Walker and Telford, 2000 pg. 12).

2.7.1 Due process and crime control

The most renowned attempt to model the criminal justice process is that by Packer (1968) who developed the influential 'crime control' and 'due process' models. Although Packer's models are now dated and have had their limitations pointed out over the years, his two models still form the basis of more recent attempts to model the criminal justice process (e.g. Roach, 1999). The crux of Packer's argument is that a tension exists within the criminal justice system between the crime control model of criminal justice, which is focused on societies concerns about security, and the due process model of criminal justice that is focused on the individual and their rights against the state. These two models lead, in turn, to different priorities. While the priority of the crime concern model is to convict the guilty, the priority of the due process model is to protect the innocent, even if this sometimes results in the acquittal of the guilty. He argued that, at the time, the criminal justice system was being turned from an assembly line into an obstacle course, meaning that the due process model was overtaking the crime control model as the main priority of the criminal justice system.

Government calls to close 'the justice gap' alongside the development of regional targets stating a minimum of how many offenders should be brought to justice¹⁰⁵ sound warning bells for those who fear this will mean a move towards the crime control model and an increased risk that defendants will experience miscarriages of justice (e.g. Kennedy, 2004). However, it must be remembered that the justice gap discourse is operating alongside the new 'culture of human rights' instigated by the same government. Defendants have never held the same level of rights against the state as they hold post HRA. Using Packer's analogy of an obstacle course, the HRA may be seen as adding a further hurdle at the end of the course. In respect of rape cases, already viewed by many as an obstacle course with almost insurmountable hurdles, this has in turn led to concern that even fewer rape defendants will reach the end of the 'course':

¹⁰⁵ They have even developed a new term and acronym of 'Offenders brought to justice', or 'OBTJ'.

... advocating increased judicial intervention in the criminal trial – on the basis that it will augment ‘fairness’ – promises an uncertain future for rape prosecutions (Murphy and Whitty, 2000 pg. 146).

2.8 Chapter conclusions

This chapter has attempted to merge feminist literature on rape with the wider literature on law and the rights of victims and defendants. It has described a constant tug of war played out in the legal field between rape victims and defendants, crime control and due process, substantive justice and procedural justice, miscarriages of justice for victims and miscarriages of justice for defendants. These categories are generally portrayed as being mutually exclusive with the government in the middle as the distributor of rights.

Of course, the adversarial criminal trial is not a tug of war between the victim and the defendant, but is played out between the defendant and the state with the victim as an onlooker. While the government post HRA still maintains its role as the distributor of rights, these rights are now subjected to a new set of ground rules in the form of human rights, which judges have been given the power to enforce and interpret. Any shifts in power make it necessary to re-visit the position of disadvantaged groups (McColgan, 2000) and the fact that human rights are not held by defendants and victims directly against each other, but rather by both groups against the state, making the ECHR and HRA particularly interesting to look at in terms of rape and the prosecution process.

CHAPTER THREE: METHODS AND METHODOLOGY

3.1 Introduction

This chapter begins with the thesis rationale and aims and then describes the type of data used, the sample boundaries and ethical issues related to the data. It then explains generally how the data was analysed in terms of the use of computer software to aid the analysis of qualitative data before going through each of the aims in turn and explaining the specific analysis processes and any methodological issues that arose. The chapter ends with a reflection on the research process.

3.2 Rationale and Aims

The previous two chapters have shown that there is little knowledge about how legal human rights have been used in relation to rape in England and Wales or in Europe as a whole (at least in terms of research published in the English language). Chapter One showed that while both ‘optimism’ and ‘pessimism’ exists with regard to how useful human rights may be to women it is important for theories to be empirically based, with clear sample boundaries and clear definitions of terms such as ‘human rights’ and ‘success’. Chapter Two explained that there are already known problems in relation to rape and the rape prosecution process, which result in an extremely low conviction rate. As mentioned in the introduction, feminist research on violence against women has tended to focus more on the victim than the perpetrator, however this thesis aims to investigate how both rape victims¹⁰⁶ and defendants have used human rights in relation to the prosecution process¹⁰⁷. This research has six aims, as follows:

¹⁰⁶ The term victim rather than complainant is used because the reports are not about criminal trials. I start from the position that they are victims not complainants of rape.

¹⁰⁷ I use the term ‘prosecution process’ to mean the process whereby a victim of rape attempts to hold the perpetrator accountable through either the criminal justice system or under civil law. In the criminal justice system I define this process as starting when a report is made to the police and ending at the conviction stage (I do not include sentencing following conviction within this process). Under civil law I define this process as starting when a claim for financial damages is filed and ending when a judgment is made regarding whether financial compensation should be awarded (I do not include the amount of financial compensation within this process). Note that the human rights argument need not be made during the prosecution process (i.e. at the trial stage) but be *about* the prosecution process (i.e. at the appeal stage).

1. To find out how rape victims and defendants have used human rights law in relation to the prosecution process.
2. To discover how successful rape victim and defendants human rights arguments have been.
3. To investigate how the margin of appreciation has been used in the ECHR cases.
4. To find out what just satisfaction has been awarded under the ECHR in relation to human rights violations.
5. To discover whether the male:female gender ratio in the ECtHR chambers has any impact on the judgment made.
6. To assess what policy impact human rights judgments have had and whether any changes are in favour of rape victims or defendants.

The analysis process and methodological issues for these aims is discussed later in this chapter.

3.3 Type of data used - using law reports in social policy research

This research uses documentary analysis, defined widely by Jupp (2001) as *'the detailed analysis of documents with a view to making assertions about some aspect of the social world ...'* (pg. 103). Content analysis is one way in which documents can be analysed, which involves a process of counting the number of times a given thing (often referred to as a 'theme') occurs and/or the identification and interpretation of themes. Analysis can therefore be quantitative and/or qualitative. The range of documents that can be used as research data is extensive and includes: official documents; web pages; private letters; company records; and newspapers amongst others. Some well-known studies where feminists have analysed documents include Friedan's (1963) analysis of women's magazines for 'The Feminist Mystique' and Kitzinger's (1987) analysis of 'scientific' literature on homosexuality to show how lesbianism is constructed within positivist empiricism.

Law reports are used here as the documents to be analysed. Two sources of law reports are used: a) court judgments from the European Court of Human Rights and b) reported and unreported judgments from courts in England and Wales. The law reports are analysed using quantitative and qualitative content analysis, although the quantitative analysis goes no further than reporting frequencies because of the level of data (categorical data with a relatively small sample size).

3.3.1 What are law reports?

In simple terms, law reports are used to record case law, also known as ‘common law’. In contrast with continental ‘civil law’ systems, law reports are crucial to common law legal systems. This is because such a large part of legal reasoning is concerned not simply with the literal words contained within legislation, but how such words have been interpreted and applied in previous cases (the creation of precedent). There are three types of law reports: official court judgments; reported cases; and unreported cases. This thesis uses all three categories (obtained from two sources).

Official court judgments are law reports published by an official source. For the purpose of this thesis the cases that are official judgments are those from the House of Lords and at the European Court of Human Rights. All of the cases heard in these two courts are reported and the reports are classed as having an official status.

Law reports from *reported cases* from the other courts in England and Wales are privately published, and the series entitled ‘The Law Reports’¹⁰⁸ is the only one that is published by an independent and charitable body (the Incorporated Council of Law Reporting). Commercial legal publishers publish all other reported law report series’, for example the All England Law Reports. The Law Reports are the only reports with an official status and are considered to be the most authoritative of all the law report series’ because the judge checks the reports for accuracy before publication. This does not happen with other law report series’. On the negative side, this means that

¹⁰⁸ To minimise confusion when I refer to law reports in general I use lower case initials and when I refer to the law reporting series ‘The Law Reports’ I use upper case initials.

publication time of The Law Reports is longer than for other series'. In the High Court and the Court of Appeal The Law Reports always take preference when citing cases, and law reports from other series' should only be used in court if the Incorporated Council of Law Reporting has not reported the case.

The term 'law reports from *unreported cases*' is very misleading because the cases are, in fact, reported just not by one of the law reporting series'. 'Unreported cases' are generally published by newspapers (primarily The Times that has been publishing law reports since 1884) or law journals (such as the New Law Journal or the Criminal Law Review). These are much shorter than reported cases and are typically just a page or two, sometimes accompanied by a case analysis.

Typically, 'reported' and 'official' law reports will contain the following information: the case name, the case citation, the name of the court in which the case is heard and the judges presiding¹⁰⁹ (and the registrar at the ECtHR), catchwords¹¹⁰, the headnote¹¹¹, cases cited and relevant legislation¹¹² and the judgment, which includes: a description of the material facts of the case¹¹³; any submissions made by the parties (defence and prosecution in criminal cases)¹¹⁴; the legal reasoning that has led to the judgment made and the final judgment made. In ECHR judgments this is followed by the amount of compensation and expenses awarded if a violation of rights has been

¹⁰⁹ These give information about how much 'weight' the judgment holds (e.g. what level is the court? How many judges are presiding?). The higher the court, the more authoritative the judgment is considered to be.

¹¹⁰ Catchwords are listed to make electronic searches for reports easier as it is possible to limit a search to catchwords only. Catchwords in law reports are listed in the same way as 'key terms' are in academic journal articles.

¹¹¹ The headnote gives a very brief summary (often just one sentence) of the judgment made in the case. The headnote is written by the publishers of the report, and although they are generally accurate there have been occasions where serious errors have been made (Holland and Webb, 2001).

¹¹² All cases and relevant legislation cited in the court report are listed and fully referenced.

¹¹³ The material facts of the case are those that the judge deems to be important and those that affect their reasoning and subsequent judgment. The facts that a judge identifies as important may not be those that a researcher would have chosen as the most important and this is remembered when analysing the law reports. The material facts are also important in terms of legal precedent because legal precedent is based on the concept of *stare decisis* which means that '*... [a] court must follow the decision of a superior court when dealing with similar cases*' (Holland and Webb, 2001 p.139). However, a 'similar case' may not only relate to similar material facts but also to similar legal reasoning on a point of law.

¹¹⁴ Although this rarely has the subtitle of such, the judge then generally summarises the history of the case (as most are appeals) and any submissions made by the parties (their arguments). This section often uses the cases and legislation referenced earlier in order to build the current cases. Usefully, the cases relied upon are often summarised here and any legislation referenced generally has the relevant section(s) quoted in full. This was particularly useful in the ECHR reports because it meant I rarely had to look up legislation from other countries.

found. Occasionally a judge (or several judges) will dissent or partly dissent and the reasons are given in an annex to the report.

So why choose law reports as the data source from which to study rape and human rights law? Previous social science rape research has tended to use interviews with rape victims, interviews with barristers, data obtained from the police and CPS and/or court observations and transcripts (where affordable) to study rape and the law rather than law reports. In addition, most rape research has focused on the rape trials themselves rather than appeal hearings. There are, however, major differences between rape trials and rape appeal hearings that mean different methods are needed to study appeals. For example, rape appeals heard at the Court of Appeal (Criminal Division) last on average just an hour and a quarter, rape victim witnesses are rarely called to give evidence, rarely attend the appeal and may not even be aware that an appeal is taking place¹¹⁵ (Cook, 2002).

The study of rape at the appellate level is very different to research conducted at the earlier stages of the rape trial. Law reports of appeals can be used to answer some research questions that other data cannot, but cannot answer a lot of the questions dealt with by previous research, for example how women experience the prosecution process. This is only the second piece of research in England and Wales to focus on rape at the appellate level (the first being Cook, 2002), yet according to Bibbings (2000), appellate courts are an ideal place to study gendered decision-making. This is because it is in appeals that judges give lengthy justifications for their reasoning and decisions, in contrast to jury decisions which can not be scrutinised and where there is no way of knowing how decisions have been reached. She describes how a close reading of law reports can be more revealing in terms of how judges justify their decision-making and lead to a more in-depth analysis than solely focusing on the judgment itself:

... in reading judgments, one must attend to more than the judges' pronouncements on the application of statute and case law, and consider what extra-legal factors were

¹¹⁵ In the future this should not be the case. The Draft Victims' Code of Practice proposes that the Witness Care Unit must tell victims whether the sentence or conviction is being appealed and whether or not the appeal was successful within five working days (two for vulnerable victims) of them finding out themselves.

influential. Thus, a lengthy and sympathetic portrayal of the victim, or an unnecessary (in terms of logical decision making) reflection on some factual detail on the 'evil' done or the lack of any real harm may be significant. Attempts to justify decisions upon public interest or policy grounds are of even more obvious importance, because, here, the judge is arguably admitting to abandoning even the appearance of logical reasoning. (pg. 258)

Further methodological issues related to the use of law reports are discussed in the next section regarding the production of law reports.

3.3.2 The production of law reports

Finding out how law reports are produced in order to understand the limitations of using law reports in social science research proved difficult. It would appear that issues relating to data and sampling are not something that those working with law question very often¹¹⁶. A British library search on law reporting revealed nothing of direct relevance to this research. The few publications that were found were extremely dated¹¹⁷, historical studies¹¹⁸ and/or concerning law reporting in other countries¹¹⁹. As such, most of the information on the law reporting of reported cases was found on law reporting websites and guidance to databases.

W.T.S. Daniel Q.C first proposed the need for a Council of Law Reporting in 1863. The proposal included a paper by Lindley (1863) that set out what a 'good law report' should look like. Four key points were made regarding which cases should be reported: all cases which introduce, or appear to introduce, a new principle or a new rule; all cases which materially modify an existing principle or rule; all cases which settle, or materially tend to settle, a question upon which the law is doubtful; and all cases which for any reason are peculiarly instructive (Lindley, 1863 cited by ICLR website). Cases passed with no discussion, which had no precedent value or were

¹¹⁶ Colleagues with undergraduate law degrees told me that they were never taught anything about the production of law reports.

¹¹⁷ Alexander the Elder Pulling's (1863) book entitled 'Our Law-reporting System: Cannot its evils be prevented' and Moran's (1948) collection of essays on the reporting of law cases entitled 'The Heralds of the Law'.

¹¹⁸ Brand's 1998 Seldon Society lecture on 'Observing the medieval bar and bench at work – the origins of law reporting in England', Abbott's (1973) book entitled 'Law Reporting in England, 1485-1585' and Wells' (1994) PhD thesis on 'Common law reporting in England 1550-1650'.

¹¹⁹ Holdsworth's (1941) book on 'Law reporting in the nineteenth and twentieth centuries' in the USA and Louder's (1982) occasional paper on 'Case law reporting in Canada'.

repetitive of previously reported cases should not be reported (Lindley, 1863, cited by ICLR website). Guidelines on what the reported cases should cover included the parties, pleadings, facts of the case, point contended, grounds for the judgment and the judgment itself (Lindley, 1863, cited by ICLR website). These reporting guidelines remain as the ones followed today.

It is important for the purpose of this thesis to recognise that not all cases result in a law report. In other words a case may be heard in court, a judgment may be made and a sentence passed yet the case will never be 'reported' or even 'unreported' in the form of a law report. In cases such as these the only way of finding out the judgment would be to request records from the court, however these would only record the case name, outcome and sentence. No further detail would be included, for example *why* the defendant was acquitted or had his appeal rejected or why a particular sentence was given.

Generally speaking, cases lower than appellate level are rarely reported. In the Court of Appeal (Civil Division) around 70 per cent of cases are reported but in the Court of Appeal (Criminal Division) only around 10 per cent are reported. It is the editors of law report series' that decide whether or not a case is reported. In addition, between 20 and 30 per cent of High Court judgments are reported. Judgments in the lower courts are very rarely reported. Although the Incorporated Council of Law Reporting for England and Wales (ICLR) point out that the almost universal view amongst English judges is that too many cases are reported (ICLR website), the universal view amongst social science researchers would probably be that the more cases that are reported the better! Because of their weight, ECHR and House of Lords cases are always reported.

The fact that not all cases result in law reports becomes less of a problem for this research when bearing in mind how such cases are chosen, i.e. those that have precedent value, have some discussion and are not repetitive of previous cases. This means that cases that have the *potential* to create some kind of change (although many may not) should be reported. In addition, cases in the higher courts are especially important because their decisions are binding on lower courts. An analysis of law reports can show the nature of the case and any change the case creates, but

not how far the impact of this change goes. For example, it would be possible to say that the colour turquoise has been judged to be blue not green but not how many cases then will rely on the colour turquoise being classed as blue and/or how many judgments will be affected by turquoise being classed as blue. While this is not ideal, the methodological alternative to using law reports is completely unrealistic. For England and Wales cases this would entail enlisting court clerks as ‘gatekeepers’ to inform me which of the cases were rape cases, and then there would have been no way of knowing whether a human rights argument would be made. Following the legal reasoning verbally would have been difficult as a non-lawyer, as the court reports had to be read many times before they were comprehensible. Finally, this methodology would have resulted in a limited time sample, as the data would have had to have been collected during the three years of a PhD. In terms of ECHR cases, the same argument applies but in addition the costs of travelling to Strasbourg would have been prohibitive. In fact, only one of the ECHR cases in my sample would have been within the PhD time limit and letters to the ECtHR registrar asking when the next rape case would be and whether it would be possible to observe the hearing got no response.

3.3.3 The limitations of using law reports as data

There are a number of different ways in which the impacts of the ECHR and HRA on rape cases could have been investigated. For example, interviews could have been carried out with ‘key players’ which could have included human rights campaign groups (such as Liberty and Amnesty International), feminist campaign groups (such as Campaign to End Rape, Truth About Rape, Rape Crisis Federation/Co-ordination Group) as well as service providers (individual Rape Crisis Centres, Sexual Assault Referral Centres, other rape and sexual abuse organisations). Although there are no specific groups that campaign on behalf of rights for rape defendants, human rights campaign group Liberty does work in the area of defendants rights and prisoners rights so could have been interviewed about how rape defendants might use human rights. Barristers and QC’s for both the defence and the prosecution could also have been interviewed. The use of interviews would have resulted in a more nuanced picture of who uses human rights, in which circumstances and with what success.

However, this would have meant that the study be largely limited to the UK, losing most of European element of the study .

This is the first sociological attempt to look at patterns of rape cases over time and place using law reports. Hence, the research involved learning about the use of law reports almost as much as it did about the use of human rights in rape cases. The table below summarises some of the advantages and disadvantages of using law reports in sociological research.

Advantages	Disadvantages
<ul style="list-style-type: none"> • A relatively inexpensive way of gathering data. • A large volume of data can be collected quickly. • The justifications for decisions are given. • Dissenting views are given. • It is possible to look at the data over time. • A wide range of countries can be studied. • English is one of the languages that Council of Europe documents are printed in, so translation is not an issue. 	<ul style="list-style-type: none"> • Only the ‘official’ line can be viewed (what has gone on behind the scenes is invisible). • The information is static. There is no opportunity to ask for more detail/information about particularly interesting parts. • Because they have not been used before in this way there is no literature on methods of analysis. • It can be difficult to track what happens in the lower courts after a judgement has been made at the appellate level because reporting at the trial level is not routine. • The views of actors other than judges in the process (e.g. defendants, rape victims) are not known.

3.4 The research sample

The research sample therefore consists of law reports from England and Wales and the ECHR. These two sub-samples were obtained from different sources and are described separately below after explaining the sample boundaries. A law report was included in the research sample if it met the following criteria:

- a) The law report included at least one rape case, regardless of how ‘rape’ was defined in the relevant country at the relevant time. Because the legal definition of rape varies between countries and over time it was decided that the definition

of rape for the purpose of this thesis would be whatever the legal code of the country defined it as at the time the alleged human rights violation took place. This necessarily means that rape does not mean ‘one thing’ in this thesis but is variable. Other sexual offences however, including attempted rape and threat to rape, are excluded from the research sample¹²⁰.

- b) The human right(s) in question had to be contained within either the ECHR or HRA. This means that ECHR cases could be in relation to any country that has ratified the ECHR (known as High Contracting Parties). The HRA cases had to be heard in England or Wales for them to be included. Scotland and Northern Ireland were excluded because they have different rape laws and because the HRA was enacted at a different time.
- c) The human rights issue in the rape case had to be related to the prosecution process (as defined above under 3.2).
- d) The rape case within the law report also had to be about human rights. All ECHR reports, by definition, were about human rights but the England and Wales cases had to be searched. In the latter cases, a *specific* human rights argument had to be made, defined as if one or more convention rights were mentioned. This meant that law reports with only general statements such as ‘*we must remember that human rights must be taken into consideration*’ were excluded from the sample.
- e) The start date of the law reports analysed was prescribed by the first date when law reports became electronically searchable. For England and Wales law this date is 1965 for reported cases and 1980 for unreported cases. Although the HRA did not come into force until 2000, cases from all available dates were searched to see if there were any cases that relied upon ECHR case law (i.e. where the ECHR had had an impact in England and Wales courts). All ECHR are electronically

¹²⁰ One of the reasons for restricting the sample to actual rape cases was because I was dealing with international law as a non-lawyer I thought it would be difficult to understand the law on a number of different offences in different countries. In actuality, I found most European laws much easier to understand and much simpler to study than the laws of England and Wales because of the codified legal system used in the rest of Europe (excluding Scotland and Ireland) and their tendency to use more ‘everyday’ language which is designed for citizens to understand.

searchable, and therefore the start date is 1966 when individual petition became possible (as described in Chapter One).

- f) It was necessary to impose an 'end' date to the sample to allow for analysis and writing up to take place within the thesis time limit. The 'end' date of the sample was set at February 2004.

3.4.1 The ECHR court judgment sub-sample

ECHR court judgments are freely available online (no subscription necessary) through the HUDOC (Human Rights Documents) database which is accessed through the Council of Europe website. Through HUDOC it is possible to search for cases against any selected country and/or any terms of interest. It is not necessary here to explain all that HUDOC is capable of¹²¹.

The search term 'rape' was used (it was not necessary to use 'human rights' as well because by definition all cases brought under the ECHR relate to human rights) for cases against all countries up until February 2004. This search resulted in 79 court judgments. Over half of these judgments (n=44) were not actually about rape even though they contained the word 'rape'. In these cases the term was used to describe a legal system, criminal code or sentencing guidelines¹²² or the case was about attempted rape or threat to rape and these cases were removed from the sample. In the remaining 35 cases, 2 were about protection from rape, 10 were about sentencing/punishment for rape and 4 related to the risk posed by rapists once they were released into the community¹²³. This left 19 law reports relating to the prosecution process, which are listed below in Table 3.1.

¹²¹ A useful HUDOC internet manual was published by the European Court of Human Rights in 1999

¹²² For example, 'In England and Wales serious crimes, such as murder, manslaughter and rape, are punishable by a maximum of life imprisonment'.

¹²³ My original intention was to look at how human rights were used in all cases concerning rape, however it became clear as I started to analyse and write up the cases that the thesis needed to be more focused.

Table 3. 1 ECHR sample	
1	X and Y v the Netherlands
2	Stubbings and Others v the United Kingdom
3	Aydin v Turkey
4	Selmouni v France
5	Englert v Germany
6	MC v Bulgaria
7	T v Italy
8	Stanford v the United Kingdom
9	SW v the United Kingdom
10	G v France
11	Baegen v the Netherlands
12	Trzaska v Poland
13	Mattoccia v Italy
14	GB v France
15	Kucera v Austria
16	MM v the Netherlands
17	Mellors v the United Kingdom
18	Matwiejczuk v Poland
19	Korellis v Cyprus

3.4.2 The England and Wales law reports HRA sub-sample

A search was conducted for all cases including the terms ‘rape’ and ‘human rights’ within the text in ‘England and Wales Reported and Unreported cases’ search engine on the LexisNexis Professional database. This database contains reported cases from 1865, tax cases from 1875 (although these were not relevant in my research) and unreported cases from 1980. Altogether, the England and Wales Reported and Unreported cases database contains over 150,000 cases from over 30 law report series including the two major law reporting services: ‘All England Law Reports’ established in 1936 and ‘The Law Reports’ established in 1865.

LexisNexis is a database that requires a high subscription fee that was unaffordable as part of a PhD. The first LexisNexis search was conducted in July 2002 in the first year of my PhD via a one-week free trial offered to me at the British Criminology conference. A second search was conducted in February 2004 in my third year using a university subscription having started part time employment for a university with a law department. Altogether, these two searches combined resulted in 263 cases adding up to a huge amount of data (5,787 pages of single spaced font size 10 text).

Most of the cases (n=204, 78% of original sample) were coded as not being relevant because of the same reasons as mentioned above for the ECHR sub-sample (e.g. rape was used as an example, was about attempted rape or threat to rape). This left 59 law reports. Of these 59, 12 were about protection from rape or protection following a rape (mostly related to asylum application appeals), 23 related to sentencing or conditions during imprisonment (mostly related to parole applications and the imposition of discretionary life sentences) and 12 were about the risk posed by rapists once they were released into the community. This left 12 law reports relating to the prosecution process, which are listed below in Table 3.2.

1	R v DPP, ex parte C
2	Attorney Generals Reference (No 3 of 1999)
3	R v T, R v H
4	R v Rooney
5	R v Porter
6	R v Morgan
7	R v C and others
8	R v A
9	R v M, R v Kerr, R v H
10	R v Archibald
11	R v R and another
12	R v Laskey

3.5 Ethical issues

This research raised few ethical issues because it only used data that was already in the public domain. It was therefore not necessary to deal with issues such as the anonymising of data, gaining informed consent or respondent validation. It was, however, important that the law reports were treated respectfully and that it was remembered that they are not simply words on a piece of paper or computer screen but instead represent real people, their lives and experiences. Beyond this, it is not necessary to enter into a discussion about research ethics.

3.6 The analysis process

Although I had attended qualitative research methods courses at both an undergraduate and postgraduate level I did not find these very useful when it came to analysing the law reports. Such courses, and indeed most qualitative research

textbooks tend to focus more on the methods themselves and particularly the advantages and disadvantages of such methods rather than the analysis of data. However, how the data is actually analysed and who is doing the analysis is, from an epistemological perspective, just as important (if not more so) than the actual methods used. Bearing this in mind, I intend in the next section to describe exactly how I analysed the law reports but first I provide a more general overview of how computer software can be used in qualitative research, as they were in this research.

3.6.1 The use of computers to analyse qualitative data

Computer assisted qualitative data analysis (CAQDA) has grown in popularity over the last decade. While researchers have shown that mainstream software can be useful when analysing qualitative data, for example Microsoft Word (see Nideröst, 2002) and Microsoft Access (see Meyer, Gruppe and Franz, 2002), there are now a number of programmes that have been specifically designed to assist qualitative data analysis. These are known collectively as computer assisted qualitative data analysis software (CAQDAS), and include: HyperResearch; Ethnograph; ATLAS.ti; the Qualitative Analyser; CI-SAID; QUALRUS; and QSR NUD*IST's N6 and NVivo amongst others. As it was not possible to review each form of CAQDAS in terms of my research needs¹²⁴ I decided to focus my attention on two CAQDAS: N6 and NVivo. In addition to a brief review of websites, available literature and on-line demonstrations for the alternative CAQDAS, these two were chosen for a number of reasons including: positive recommendations from colleagues; whether I had access to them; how up to date they were; and the software support available¹²⁵.

NVivo is an upgrade package to the QSR NUD*IST software (whose current version is N6). I attended training sessions on both N6 and NVivo to help decide which one would be most appropriate for assisting the analysis of the law reports and found

¹²⁴ When choosing which CAQDAS to use it is not simply a matter of which one is the 'best' per se, but is to a great extent reliant on the type of data and form of analysis as well as personal preference in terms of interface etc.

¹²⁵ NVivo and N6 are both CAQDAS that the CAQDAS networking project at the University of Surrey provide training in and, as an ESRC funded centre, they provide a free telephone help-line for researchers.

NVivo to be the superior software for my needs in this particular piece of research. In particular, I found NVivo to have a better user interface and, unlike N6, it is possible to edit text within the browser windows, it is not necessary to predefine text units before importing documents and documents can be imported in RTF (rich text format) which allows visual coding in contrast to the text only format required for N6.

It is important to be clear about what CAQDA can and cannot do. Many new users (including myself initially) are under the incorrect impression that a CAQDAS can analyse their data for them (understandable since they are called data analysis software and in light of how quantitative data analysis software such as SPSS work). Although the more up to date software such as NVivo can carry out some analytic functions (it even has a drop down 'analyse' menu) the main function of such programmes is to 'hold' and 'organise' the data for the *researcher* to analyse.

Coffey et al. (1996) point out that in reality, CAQDA adds little if anything at the conceptual level and that most of the processes involved in analysing data (e.g. coding and searching) are almost the same when using CAQDAS as when analysing data manually. It is rather, they argue, the speediness and comprehensiveness that CAQDA allows that constitutes its main benefit over manual data analysis. Because of the large quantity of text in the early stages of this research CAQDA was particularly useful from a data management perspective and it allowed more extensive coding than colour coding or cut and pasting would have done. It made the research more 'portable' in that the project¹²⁶ could be saved on a disk or laptop computer and it could also be argued that CAQDA allows for more ecologically friendly research in that it very much reduces the amount of paper and ink needed in research of this size.

There are three main ways of organising documents (in this research in the form of law reports) in NVivo. They can be: 1) coded according to their 'attributes', 2) coded at 'nodes' (free, tree or case) and/or 3) placed into 'sets'. *Attributes* are used in NVivo to code basic information about a document or a node. Any number of attributes can

¹²⁶ A 'project' is the term used by NVivo to describe the collection of data and coding for a piece of research.

be applied to a document or node, but each attribute can only have one value coded for each document/node. For example, if the attributes related to a document which contained an interview with a domestic violence victim then 'gender' may be used as an attribute with 'male' and 'female' used as values but 'type of violence experienced' could not be used because people might have experienced more than one time of violence. Instead of using 'type of violence experienced' as an attribute each type of violence would have to be a single attribute, for example 'physical violence', 'verbal abuse' etc. The values for each attribute could then be binary ('yes' or 'no') or scaled ('often', 'sometimes' or 'never') or numerical.

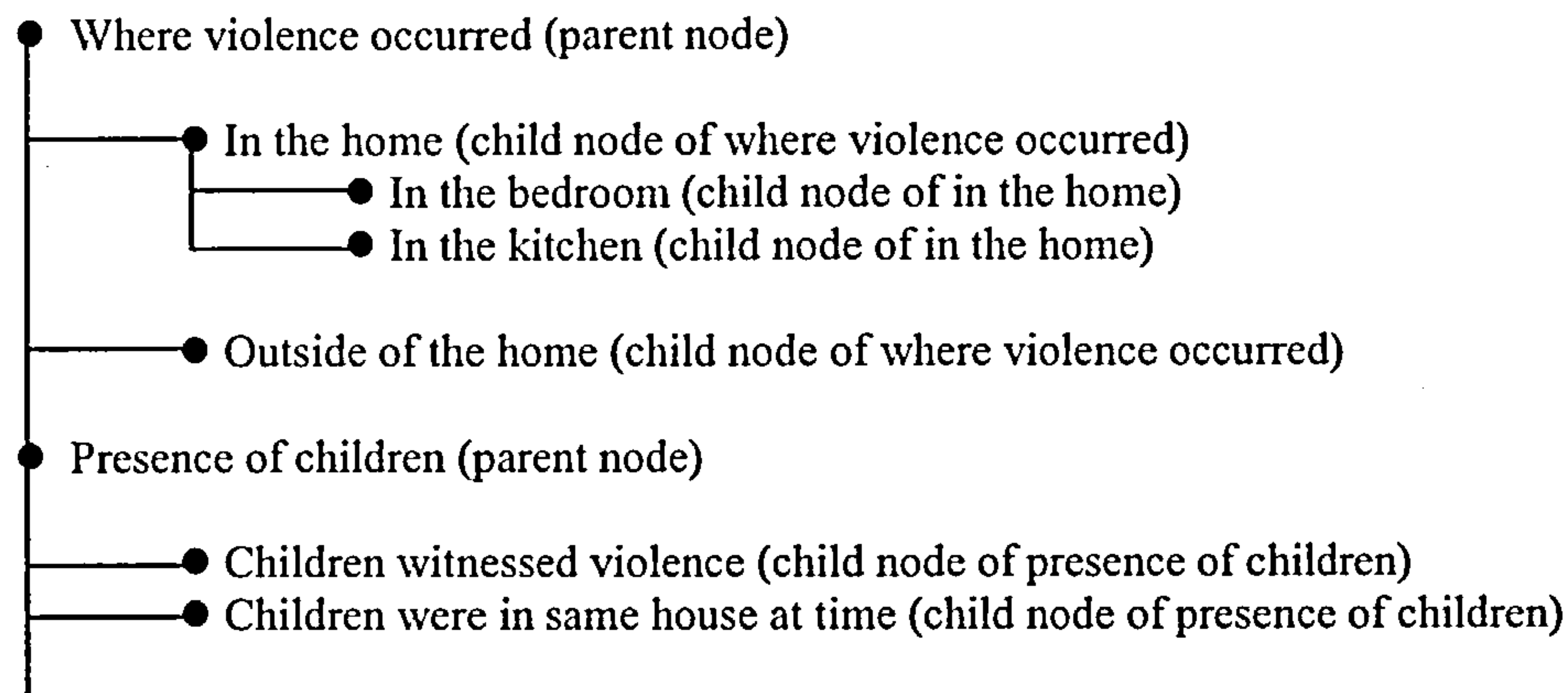
Nodes are the most complex and in-depth way of coding a document, similar to the colour coding technique often used when coding by pen and paper. A *free node* is a node that has no structure to it; it exists as a theme in the research but is not linked to any other themes. Free nodes are often used in the early stages of a project where ideas for themes can be coded and investigated. These may remain as free nodes throughout the analysis or may be changed into 'tree nodes'. A *tree node* is a way of organising different nodes into hierarchical systems into categories (known as parent nodes) and sub-categories (known as children nodes). The number of free and tree nodes generally grows as the analysis is developed. Returning to the previous example of a project analysing responses from interviews with victims of domestic violence, an early coding system using free and tree nodes may look something like the example in Figure 3.1:

Figure 3.1 Example of simple node system using free and tree nodes

Free nodes

Feelings of anxiety
Difficulties accessing support

Tree nodes



When the data has been coded at nodes it is easy to retrieve all passages coded at any given node and further coding may be developed. *Case nodes* can also be used, but were not applied in this research because the attributes were able to handle all the case relevant information I wanted to use.

Sets are used to organise the data into relevant groupings and documents can be placed into as many sets as necessary. For example, a document of an interview with 'Jenny' may be placed into a set containing all female victims and a set containing all victims who had accessed support. By placing documents into sets they are more easily accessible to code at nodes.

Attributes, nodes and sets, are the three main tools used to analyse data using NVivo. Alongside these tools, 'memos' can be held electronically in order to keep a record of ideas or to make general notes relating to the documents and/or coding, retrieve facilities are available to allow easy searching of documents, sets, nodes and memos and models can be created to view the data. There are other features of NVivo, such as the possibility of adding DataBites (links to external data) to the project, however

these were not used in this research and are not explained here (see Richards, 1999 for an overview of other NVivo features).

3.6.2 Analysing the data in relation to the thesis aims

This section draws upon the information given above regarding how computers can be used to analyse qualitative data and specifically how the various NVivo tools described above were used. It also discusses methodological issues relating to the aims. There is a lot of detail under each aim, which is given for two reasons. Firstly, and as previously mentioned, detailed information relating to analysis is rarely written up yet can be central to the research findings. The second reason relates to the difficulties I had with the analysis. Alongside a lack of literature on the production of law reports (already discussed above), I found no literature at all suggesting how law reports could be analysed. Even books and Articles with words such as ‘analysing law’, ‘legal methods’ and ‘legal research’ in their titles turned out to be completely unrelated to the development of my methodology. Instead, the focus in this body of literature was on how to ‘find’ law (including law reports), how to use law libraries and how legal reasoning works. As mentioned in the introduction, academic work on human rights has tended to take place within law rather than the social sciences, meaning that there is very little information on researching human rights law from a sociological perspective:

... socio-legal work on human rights in the national context has failed to match the pace and enthusiasm of doctrinal work, particularly in terms of the empirical socio-legal evidence necessary to assess the claims made for human rights as legal practice ... Socio-legal analysis is the weaker party to doctrinal analysis. (Schmidt and Halliday, 2004 pg. 3)

The nearest research I found to my own and whose methodologies could be drawn on were studies of the Canadian Charter of Rights. While these did help with some conceptualisation problems, the differences between the Canadian Charter and the ECHR and HRA meant that their methodologies could not be adopted for this research. The detail is therefore offered in the hope that this research will just be the starting point for research on women and human rights and that the models of

analysis described here may be adapted in the future to study other forms of violence against women and possibly other policy issues as well.

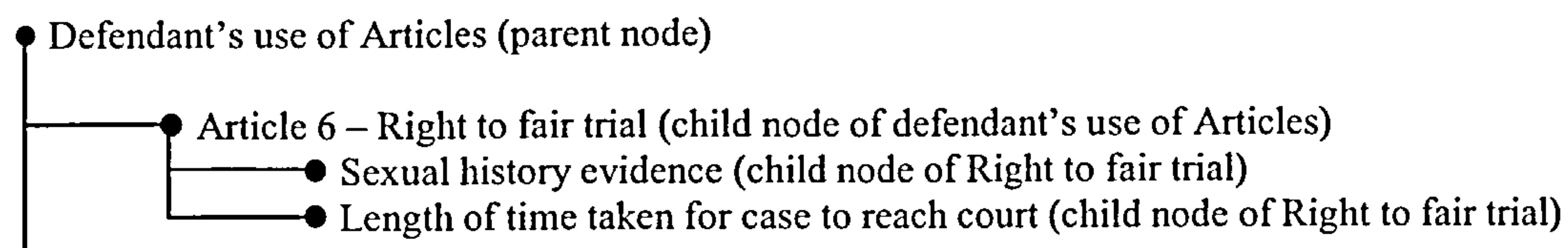
Aim 1: To find out how rape victims and defendants have used human rights law.

This analysis was done by creating two sets (victim and defendant) and creating attributes and nodes. The attributes used and their possible values are listed in Table 3.3.

Table 3.3 Attributes created to analyse aim 1		
Attribute	Possible values	Comments
Position of applicant	Victim or defendant	Also organised into sets
Year case reported	Any year within sample time frame	
Type of law report	ECHR or HRA	
Who the case was against	Any country that has ratified the ECHR (High Contracting Parties)	HRA reports coded as n/a
Number of applicants	Number	There can be more than one applicant per case
Gender of applicant 1	Male or female	
Gender of applicant 2	Male or female	Can be coded as n/a
Gender of applicant 3	Male or female	Can be coded as n/a
Gender of applicant 4	Male or female	Can be coded as n/a
Alleged violation Article 2	Yes or no	
Alleged violation Article 3	Yes or no	
Alleged violation Article 4	Yes or no	
Alleged violation Article 5	Yes or no	
Alleged violation Article 6	Yes or no	
Alleged violation Article 7	Yes or no	
Alleged violation Article 8	Yes or no	
Alleged violation Article 9	Yes or no	
Alleged violation Article 10	Yes or no	
Alleged violation Article 11	Yes or no	
Alleged violation Article 12	Yes or no	
Alleged violation Article 13	Yes or no	
Alleged violation Article 14	Yes or no	

The way in which the Articles were used was analysed using nodes. ‘Victim’s use of Articles’ and ‘Defendant’s use of Articles’ were created as parent nodes and the Articles used were created as child nodes. Further themes relating to the use of the Articles were coded at further child nodes if they arose. Part of this node tree is shown as an example below in Figure 3.2.

Figure 3.2 Excerpt of node tree designed to analyse aim 1



Aim 2: To discover how successful rape victim and defendants' human rights arguments have been.

Before explaining how the data were analysed in relation to this aim it is necessary to consider some methodological issues. As highlighted in Chapter One, it is important to clearly define what is meant by 'success'. The conceptualisation of 'success' was something that I struggled with for a long time during this research.

The term success has been used in different ways in terms of feminism and legal human rights. Morton and Allen (2001) argue that disagreements about what constitutes success come down to the *scale* of success rather than disagreements about success per se. They propose that there are two different scopes of success: intramural and extramural. Here, intramural relates to what happens within the courtroom while extramural refers to the impact of the judgment and the 'real world change' it creates. While Morton and Allen highlight the need for research to be conducted via an assessment of intramural and extramural success, they suggest that the starting point for longer term, extramural studies should be an initial focus on the intramural scope of success.

This research uses two different measures of success. The first measure of success, and the one used when analysing this aim (the second is described under Aim 6), is the more basic of the two, falling within the intramural scale and consisting of a basic win/lose analysis. Even if research goes on to conceptualise success in a more complex way, analysing how many cases have been 'won' and how many have been 'lost' (and, crucially in this research won and lost by whom), this is still an important starting point.

A similar measure of success has been used in the Canadian analyses. In the Canadian analyses, however, the win/lose analysis does not primarily relate to an applicant (in their role as victim or defendant) but rather to the 'feminist position' advocated in court. Because the Canadian samples are taken from cases where a feminist group intervened, this means that all cases had a 'feminist position' and all related to feminist issues. The analogy here would be if an organised feminist group were supporting the government by intervening in a particular case. Unfortunately, feminist groups in England and Wales are not able to access public funds to intervene in cases as they are in Canada.

In contrast, this research sample is made up of victims and defendants and looks at in how many cases victims and defendants 'won' the case against the state. A report is classed as an applicant's 'win' if at least one Article is found to have been violated and therefore one part of the argument made accepted, even if other parts of the argument are not accepted. The reports are then described depending on who was taking the case (victim or defendant) in terms of the win/lose analysis.

Aim 3: To investigate how the margin of appreciation was used in the ECHR cases.

To analyse how the margin of appreciation was used in the ECHR cases (as mentioned in Chapter One the margin doctrine is not applicable to HRA cases) the law reports were searched for the term 'margin of appreciation' to find out how many times the term was used and in how many reports. The results of this search were saved at a node. Because of the small number of reports that mentioned the margin of appreciation it was not appropriate to code at any further levels and the analysis simply consists of a description of how it was used in the reports.

Aim 4: To find out what just satisfaction is awarded in relation to human rights violations.

Under the ECHR if a state is found to have violated an applicant's human rights the applicant is entitled to 'just satisfaction' (normally a sum of money) and also to have their legal fees reimbursed. This is stated as Article 41 of the ECHR:

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Generally the amount of money the ECtHR allocates in just satisfaction appears to be dependent on the type of violation, the number of Articles that are judged to have been violated and the impact of the violation, although there are no guidelines on the amount that should be awarded. In other cases however, the judgment of the court is seen as being just satisfaction in itself and no financial award is made. The absence of clear principles as to when damages should be awarded and how any damages should be measured has been argued to be one of the most striking features of ECHR case law (Law Commission and Scottish Law Commission, 2000).

The amount of money awarded, if any, was coded as an attribute in NVivo. Ideally the analysis would have been done via a calculation of the range and measures of central tendency (i.e. mean, median and mode) to look at the amount of money awarded to victims and to defendants. There are two complications however with these methods of analysis. Firstly, because the sums were awarded at different times it would be necessary to re-calculate the sums according to their *values*. This would mean finding out what rate of inflation had occurred since the sum was awarded and calculating its value on a set date, for example at the end of the data collection period (February 2004). While this would be possible, there is a second complication. Awards of just satisfaction are made in the currency of the applicant's home, meaning that prior to the introduction of the Euro in 1999 there were different amounts awarded, at different times and in different currencies. Therefore, calculating a true value would mean converting the amount awarded in each case into a common currency in existence at the time and at the exchange rate at the time, then converting all these figures again when the Euro was introduced and then allowing for inflation. It is also important to remember that the relative value of money in different countries (for example between Turkey and Germany) is very different (Law Commission and Scottish Law Commission, 2000).

Weighing up the potential benefit of finding out the range and central tendency with the difficulties in calculating their true values, it was decided that it was not

worthwhile to follow the 'ideal' method. Instead, the amount of money is listed for each case and rough comparisons (not adjusted for inflation) are made for cases reported since the Euro was introduced.

Aim 5: To discover whether the male:female gender ratio in the ECtHR chamber appears to have any impact on the judgment made.

In ECHR reports the names of the judges sitting are listed with their gendered title (Mr or Mrs). This means that it is possible to work out how many female and male judges were sitting for each of the ECHR judgments.

For each of the ECHR cases the ratio of male to female judges was coded as an attribute, as well as the gender of the president, vice-president (if applicable), registrar and deputy registrar (if applicable). These attributes were then compared with the outcomes of the case (using the win/lose analysis) to try and find out if any gendered decision-making was evident. Any sections of a report where it was clear an argument was being made by a male or female judge (particularly in dissenting opinions) and where that argument seemed to use different legal reasoning or affected the judgment were coded at a free node. Where the gender of the judge was known in the England and Wales cases (possible only for the more well known, higher judges such as those sitting in the House of Lords) relevant sections were coded to the same free node.

Aim 6: To assess the potential creation of change created through human rights judgments.

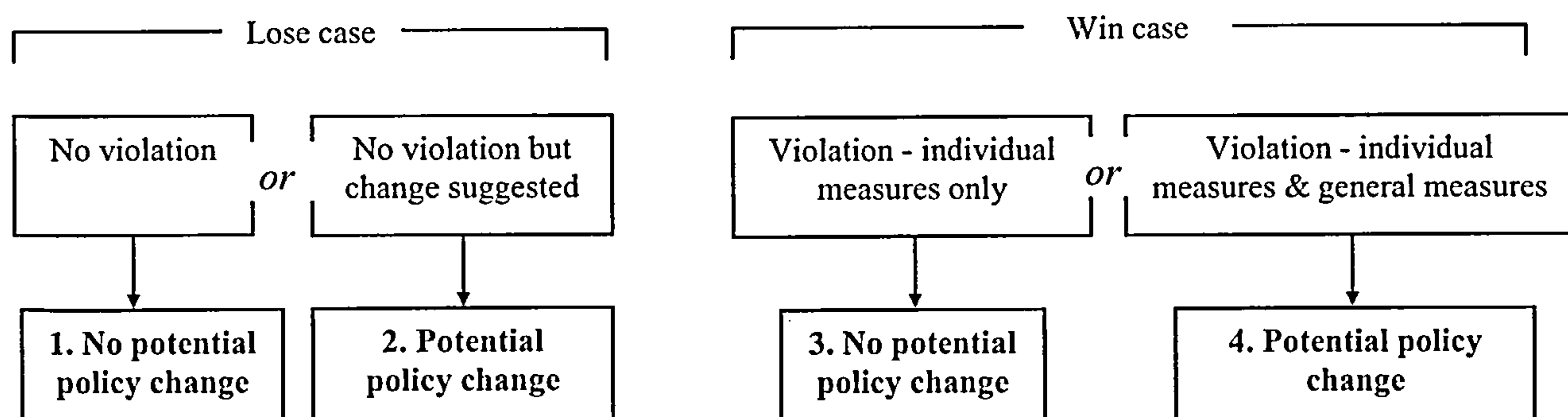
Extramural success refers to the impact of the judgment and the 'real world change' it creates. Morton and Allen (2001) analysed how judgments impacted upon the policy status quo (although they did not look at the impact of this change), however the framework they developed cannot be used here for a number of reasons which include amongst others the nature of the cases they used (all were centred around a 'feminist issue') and the different way that the Canadian system can create change (as described in Chapter One).

Analysing change created by the judgments proved to be very difficult and was not always possible. Since this thesis is concerned with two different levels of judicial politics (HRA/ECHR) and the potential to create policy change¹²⁷ is different (as explained in Chapter One) these will be discussed separately here.

Potential policy change following judgments made under the ECHR

Chapter One explained the different ways in which ECHR judgments can create policy change. However, these are generally described in quite vague terms, and it was necessary for this research to ‘firm up’ these possible outcomes and provide a typology of potential policy change. This was developed both from literature about the court’s powers and deductively from reading the law reports used in this research. The term ‘potential’ is used because it was difficult to monitor the actual change that each judgment created¹²⁸. The potential for policy change following judgments made under the ECHR are shown below in Figure 3.3:

Figure 3.3 Potential for policy change following judgments made under the ECHR



¹²⁷ I use the term policy change in its widest sense to include legal changes.

¹²⁸ The ECtHR does not, in its judgment, specifically dictate the policy change that should be made. There is information on the impact of judgments in three places on the Council of Europe website. The first is simply a page that lists cases and their impact, for example it may say ‘part 3 of Criminal Code amended’. The second is by looking at resolution reports made by the Committee of Ministers responsible for the execution of remedies and the third is by scrolling through minutes of the meetings of the Committee of Ministers. None of these methods supplied me with the information I needed (they tended only to record specific, legislative changes made) so additional methods were used. These included a search of law journals, e-mails to human rights organisations in the country in question and internet searches. Even so, it was not always possible to be sure what and how change was made, hence the use of the term ‘potential change’.

Arguments that are unsuccessful ('lose case') are perhaps the simplest to categorise, in that if the human rights argument is not successful then the government in question are under no obligation to change their policies because they have been judged to be compatible with the ECHR. Hence, the judgments in these cases usually have no potential to create policy change (no violation - outcome 1). However, a second category was created to take into account cases where there was no violation of human rights found but suggestions for policy change were still made (no violation but change suggested – outcome 2)¹²⁹.

Sometimes cases may be successful ('win case') but still have no potential to create policy change. This was the case where only individual measures were needed to rectify the violation (violation - individual measures only - outcome 3), i.e. where a change in policy was not necessary. These individual measures were described in Chapter One and generally involve a financial award of just satisfaction and/or the re-opening of domestic proceedings.

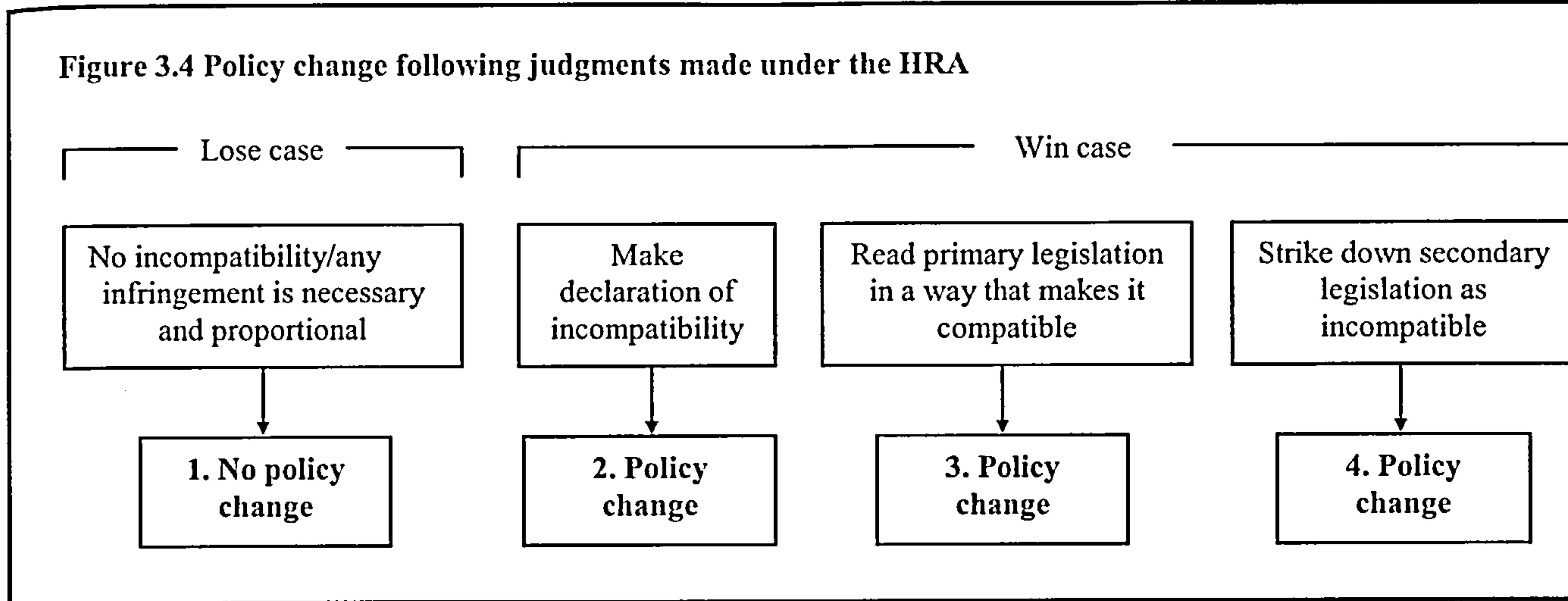
The type of case with the most potential to create policy change is where the case was successful ('win case') and where both individual and general measures were needed to rectify the violation (violation - individual measures and general measures – outcome 4), i.e. where a change in policy was necessary to prevent further violations. These general measures were described in Chapter One and may involve a change to primary or secondary legislation (either substantive or procedural), a change in case law (how the legislation is interpreted) and/or a change in the way the offence is investigated or prosecuted.

Potential policy change following judgments made under the HRA

Policy changes following judgments made under the HRA were far easier to track. This was not only because the scope of the change was limited to England and Wales rather than the whole of Europe, but because the judgment was often the change in

¹²⁹ This category was created deductively from the analysis.

itself (i.e. a change created through case law). Figure 3.4 (below) shows how policy may be changed following HRA judgments¹³⁰.



Unsuccessful cases ('lose case') had no potential to create any policy change because it was judged that there was no incompatibility and if there was any infringement on an individual's human rights that this infringement was necessary and proportional (outcome 1). If a case was successful ('win case') there were three possible outcomes, all of which could result in some form of policy change (outcome 2 – legislative change; outcome 3 – case-law change; outcome 4 – legislative change).

3.7 Reflecting on the research process

There were three parts of the analysis that were particularly difficult. First, was the selecting of the boundaries to decide which cases to include as 'relevant' and which not to include. It was very tempting to include some 'interesting' cases and reject some 'boring' ones in the early stages. Altogether, the coding process of inclusion and exclusion of reports occurred five times. Firstly a sample was coded regarding their relevance on paper (whether they should or should not be included and why), then once using Microsoft Word, then once in Nudist, then once again on paper, then finally an amalgamation of Microsoft Excel and cutting up the case names and placing them into piles. Only the reports coded as relevant were then imported into NVivo. This process, repeated the five times on such a large initial sample, was incredibly time consuming. It was important to 'get to know' the data and be

¹³⁰ I do not use the term 'potential' when talking about policy change under the HRA because the change was easier to track.

completely certain about my aims and the boundaries of what to include and what not to before I was finally happy with the sample and its boundaries.

The second particularly difficult part was summarising the many pages in a law report into the ‘bones’ of the case in order to describe them for analytic purposes. The summaries provided by the report editors were of no use because for my purposes I needed to centre on the rape and human rights issues. In contrast, report editors’ focus was on legal technicalities and how the case changes legal precedent. In some reports the term rape was mentioned only once, in others human rights mentioned only once, and my challenge was to centre the case on these two aspects avoiding the legal jargon but without losing the meaning of the case or ignoring or distorting the legal technicalities. Quite often a report had to be read twenty times or more before I fully understood it and the legal dictionary was coming away from its binding! This was difficult because it was necessary to understand the previous hearings, all relevant case law and all relevant legislation in order to properly understand the case.

The third difficulty in relation to the analysis was the emotional impact of the continuous reading of rape cases. It is not unusual for a researcher to feel some level of distress when researching rape and to be affected by the cases they study (Campbell, 2002; Zandt, 1998). When what you are studying draws parallels with previous personal life experiences this distress may be heightened (Kelly, 1988). Some solace may be taken simply in knowing that this is a ‘normal’ reaction to doing research on rape. The emotional impact may be managed, as it was in this research, by ensuring that the supervisor-student relationship is a trusting one where the student feels able to talk to their supervisor about such issues. Continuing involvement in anti-rape campaign groups, rape crisis centres and knowing women who have been raped also helped as it served as a reminder of the amazing strength and determination that women are capable of.

3.8 Chapter summary

This chapter has explained the aims of the research, the data used to address the aims and how these data were analysed. It has also shown that doing social science research using law reports was challenging because many of the standards expected in

the social sciences (describing how the data was produced, having clear sample boundaries etc.) have not taken into consideration by legal academics. This has resulted in a lack of literature about doing social science research using law reports. As well as setting a basis for the data analysis chapters that follow, it is hoped that the information contained within this chapter will be of use to others embarking on similar research.

CHAPTER FOUR: HOW HUMAN RIGHTS HAVE BEEN USED

4.1 Introduction

Human rights may be used in a variety of different ways by different people. While it is generally agreed upon that the rights contained within the ECHR and HRA are geared more towards defendants than victims within the criminal justice system there has been no research that has systematically analysed whether or to what extent this is true. Similarly, there has been no systematic analysis of which Articles are used by defendants and victims or how they are used. This chapter addresses the first aim of this thesis, investigating *how* rape victims and defendants have used human rights in relation to the prosecution process. Looking at rape victim's use first, it provides an overview and then describes the arguments made by the applicant's under each of the convention rights used in their case. The same structure is then used in terms of rape defendants.

4.2 Rape victims use of human rights law

Table 4.1 lists the details of the cases that been brought by rape victims in chronological order.

Case name	ECHR/ HRA	Year	Gender of applicants			Articles				
			Male	Fem	Total	3 Torture	6 Fair trial	8 Family/ private life	13 Effective remedy	14 Discrimi nation
<i>X and Y v the Netherlands</i>	ECHR	1985	1	1	2	✓		✓	✓	✓
<i>Stubbings and others v UK</i>	ECHR	1996	0	4	4		✓	✓		✓
<i>Aydin v Turkey</i>	ECHR	1997	0	1	1	✓	✓		✓	
<i>Selmouni v France</i>	ECHR	1999	1	0	1	✓	✓			
<i>R v DPP, ex parte C</i>	HRA	2000	0	1	1			✓		
<i>MC v Bulgaria</i>	ECHR	2003	0	1	1	✓		✓	✓	✓
Totals	ECHR = 5 HRA = 1		2	8	10	4	3	4	3	3

There have been six cases in total, brought by a total of ten applicants (two male and eight females) who claimed their human rights had been breached. The ECHR/HRA column shows that five of these cases were brought under the ECHR and one under the HRA. The five ECHR cases were brought against the Netherlands, the United Kingdom, Turkey, France and Bulgaria. No countries had more than one case brought against them. The year column shows that the earliest case was in 1985, but there was then over a decade gap before the next one was taken.

The average number of alleged Articles breached in a case was 2.8. This ranged between one (in *R v DPP, ex parte C*) and four Articles (in *MC v Bulgaria*). Five convention rights were used, and these were used in similar frequencies (3 or 4 times). These were: Article 3 (Prohibition of torture); Article 6 (Right to a fair trial); Article 8 (Right to respect for private and family life); Article 13 (Right to an effective remedy); and Article 14 (Prohibition of discrimination).

The next section discusses the convention rights that were used in turn, describing the arguments made as to why the right had allegedly been breached. The amount of information given when describing the cases varies depending on how complex the events were that led up to the allegation that a right had been breached.

4.2.1 Article 3: Freedom from torture

Article 3 was used in four cases: *Aydin v Turkey*¹³¹; *MC v Bulgaria*¹³²; *Selmouni v France*¹³³; and *X and Y v the Netherlands*¹³⁴. In *Aydin v Turkey* and *Selmouni v France* it was alleged that state actors were the perpetrators of the rape. In both cases it was the police who were the state actors and it was alleged that the rapes had taken place in custody. In both cases the alleged torture was not limited to the rape but also included other severe ill treatment. In Mrs Aydin's case this included being stripped naked, put into a car tyre and spun round and round and being sprayed with cold water from high-pressure jets. In Mr Selmouni's case, the other ill treatment included

¹³¹ *Aydin v Turkey*, judgment of 25 September 1997

¹³² *MC v Bulgaria*, no. 39272/98 ECHR 2003

¹³³ *Selmouni v France* [GC], no. 25803/94, ECHR 1999

¹³⁴ *X and Y v the Netherlands*, judgment of 27 February 1985

being beaten with a baseball bat, being attacked so badly he lost his sight from one eye and threatened with two blowlamps and a syringe.

In both cases, the argument made by the applicants was that: a) the rape and other ill treatment amounted to torture, inhuman or degrading treatment within the ambit of Article 3; b) that the acts were perpetrated by state actors; and c) that the state had failed to appropriately investigate the allegations and punish the perpetrators. These cases are therefore examples of the vertical effect of the ECHR.

In contrast, the alleged Article 3 violations in *X and Y v the Netherlands* and *MC v Bulgaria* are examples of the horizontal effect of the ECHR. In these cases the alleged rapists were not state actors, but other 'non-state' individuals. The applicants in *X and Y v the Netherlands* were Miss Y and her father Mr X, but the alleged breach of Article 3 applied only to Miss Y. It was alleged that Miss Y, who was living in a home for mentally handicapped children was raped in 1977 when she was 16 by Mr B, the son-in-law of the home's directress. Because of Miss Y's disabilities her father made the police complaint on her behalf, but the criminal proceedings were discontinued because the criminal code required the complaint to be made by the actual victim. Because Miss Y was not able to make the complaint and Mr X was not legally empowered to make the complaint, this amounted to a loophole in the Netherlands' rape laws. That this loophole existed was accepted by the Arnhem Court of Appeal in the Netherlands:

... the father's complaint ... could not be regarded as a substitute for the complaint which the girl, being over the age of sixteen, should have lodged herself, although the police had regarded her as incapable of doing so; since in the instant case no one was legally empowered to file a complaint, there was on this point a gap in the law ...

The applicants argued under the ECHR that the rape amounted to torture, inhuman or degrading treatment within the scope of Article 3 and that the state had failed to enact appropriate laws because it was impossible for a prosecution to take place.

In *MC v Bulgaria* it was possible to make a complaint of rape and a prosecution was started against the two alleged perpetrators of Miss MC (a fourteen year old girl), however the prosecution was discontinued because the rape had not involved physical

force or threats; elements that were needed under the definition of rape under Bulgarian law:

There can be no criminal act under Article 152 §§ 1(2) and 3 of the Criminal Code ... unless the applicant was coerced into having sexual intercourse by means of physical force or threats [...] There is insufficient evidence to establish that the applicant demonstrated unwillingness to have sexual intercourse and that P. and A. used threats or force. (Report from regional prosecutors office, cited in MC v Bulgaria, para. 64)

Miss MC argued that the definition of rape was written in a way that made it impossible in her case to have the acts against her classified as rape for the purpose of a criminal trial because she had responded to the rape with ‘frozen fright’ rather than resisting physically.

In *X and Y v the Netherlands* and *MC v Bulgaria* there was therefore no direct state involvement in the perpetration of the rape as there was in *Aydin v Turkey* and *Selmouni v France*, but it was alleged that the state had prevented them from seeing the perpetrators punished for their actions because of a lack of suitably drafted legislation.

4.2.2 Article 6: Right to a fair trial

Article 6 was used in three cases: *Stubbings and others v the United Kingdom*¹³⁵, *Aydin v Turkey* and *Selmouni v France*. In *Stubbings and others v the United Kingdom* all four applicants argued that, in completely unrelated cases, they had been denied access to a court to claim compensation from men who raped and sexually abused them in other ways while they were children. The nature of the abuse varied between the applicants: Ms Stubbings alleged that her adopted father sexually assaulted her for twelve years when she was aged between two and fourteen years old and that one of her adopted siblings had raped her twice when she was twelve; Ms JL alleged that her father abused her by taking pornographic photographs of her and conducting serious assaults of a sexual nature over a period of eleven years; Ms JP alleged that the headmaster of her primary school had violently raped and sexually

¹³⁵ *Stubbings and others v UK*, judgment of 24 September 1996

assaulted her for two years and; Ms DS alleged that she was subjected to repeated sexual assaults and rapes by her father for nine years.

When the applicants were older they all attempted to use civil law to claim compensation from the alleged perpetrators for the abuse they had suffered as children. Ms DS had already sought redress through the criminal law; her father pleaded guilty to the sexual assaults but not the rapes and was sentenced to probation for one year. She instigated civil proceedings because she felt this punishment was too lenient. All of the applicants civil proceedings were dismissed as 'time-barred' under the Limitation Act 1980; the latter three cases dismissed following the House of Lords decision in Ms Stubbings' case.

Under the Limitation Act 1980 rape is classed as an intentional injury, and the Act states that claims for intentional injuries must be brought within six years of the act taking place or, if the injured was a child as Ms Stubbings was when the acts took place, that the six years would run from when the injured turned 18 years old. This means that Ms Stubbings had until she was aged 24 in which to start proceedings. Ms Stubbings case was discontinued because she was aged 30 when she started proceedings. She took her case to the Court of Appeal, arguing that while she had always known she had been abused, she did not realise that this amounted to 'significantly serious illness' (as needed to justify a claim) until she was aged 27 and the link was made between the abuse and her mental illness. The Court of Appeal accepted Ms Stubbings argument, but the defendants applied to the House of Lords and the appeal judgment was overturned in their favour, with the four Law Lords refusing to accept that she did not make this realisation earlier:

I have the greatest difficulty in accepting that a woman who has been raped does not know that she has suffered a significant injury. (Lord Griffiths in Stubbings v Webb pg. 498)

With similar material facts in the other three cases, they were dismissed on the basis of the *Stubbings v Webb* House of Lords judgment. This led to the four applicants' allegations under the ECHR that they had been denied access to a court to have their claims heard, in breach of Article 6.

The Article 6 arguments made in *Aydin v Turkey* and *Selmouni v France* are somewhat simpler to explain. Mrs Aydin argued that because an effective criminal investigation was not conducted this resulted in her being denied access to a court to claim compensation through the civil or administrative courts. In particular, she argued that the criminal investigation was ineffective because the public prosecutor: sent her to be examined by incompetent medical examiners who focused on whether she was a virgin rather than whether she had been raped; did not seek out any potential eyewitnesses from the village where she was taken from and; failed to question any of the gendarmes (police officers) at the gendarmerie where the alleged acts took place. This lack of evidence then prevented her from proving that the torture took place for the purpose of a civil or administrative claim.

In *Selmouni v France* Mr Selmouni argued that he had not had a fair trial because the proceedings against the police officers were not conducted within a reasonable length of time. At the time the ECHR were required to judge whether this amounted to a breach of Article 6, the proceedings were still pending and had already lasted over six years and seven months.

4.2.3 Article 8: Right to respect for private and family life

Article 8 was used in four cases: *X and Y v the Netherlands*; *Stubbings and others v UK*; *R v DPP ex parte C*¹³⁶; and *MC v Bulgaria*. All of the cases were concerned with the state's positive obligations. In other words, the arguments made were that the state had failed to protect the complainants right to respect for private and family life rather than arguing that the state had directly done something that infringed on this right.

In *X and Y v the Netherlands* Miss Y argued that that the inability to prosecute the man who allegedly raped her (as described under Article 3) meant that the Netherlands have failed to protect her right to respect for private and family life. As her father, Mr X argued that the rape of his daughter had violated his rights under Article 8 as well. Similarly, in *MC v Bulgaria* it was argued that because of the way

¹³⁶ *R v Director of Public Prosecutions ex parte C*, CO/1450/99 (Transcript: Smith Bernal)

consent was constructed in Bulgarian criminal law (as described under Article 3) this had meant that her right to physical integrity and private life had not been protected. In *Stubbings and others v the United Kingdom* the Article 8 argument also related to an argument made under another Article, with three of the four applicants arguing that because they did not have access to a court (as described under Article 6) that this also meant their private life had not been respected.

R v DPP ex parte C was the only case in the sample where a HRA argument was made on behalf of a rape victim. The case was an application for judicial review of a decision made by the CPS to discontinue a prosecution for rape without consulting the complainant. Indeed, the applicant was not even informed by the CPS that the charge had been dropped and only discovered this when her family telephoned the police to report that the defendant had breached his bail conditions.

The applicant accepted that at the time the offence was committed (in 1998) there was no general duty for the CPS to consult with a victim when deciding to discontinue a case. However, she argued that a duty could be seen to arise if a) the victim is likely to suffer a high level of distress, b) when there are implications regarding the character of the victim in terms of discontinuance or c) when discontinuing with the case interferes with the moral integrity of the victim's private life. This latter point, she argued, amounted to a violation of Article 8.

4.2.4 Article 13: Right to an effective remedy

In three cases: *X and Y v the Netherlands*, *Aydin v Turkey* and *MC v Bulgaria* it was alleged that the applicants' rights had been breached under Article 13. In each of the cases, as is self-explanatory under Article 13, it was alleged that this was because the state had not provided them with an effective remedy in respect of their claims. In *X and Y v the Netherlands* this was argued on behalf of both applicants (father and daughter).

4.2.5 Article 14: Prohibition of discrimination

Three cases contained arguments that there had been a violation of Article 14: *X and Y v the Netherlands*; *Stubbings and others v the UK*; and *MC v Bulgaria*. As highlighted earlier (in Chapter One), Article 14 is not a ‘standalone’ Article and can only be used in conjunction with one or more of the standalone Articles.

In *X and Y v the Netherlands* Article 14 was used alongside Articles 3 and 8 in respect of both of the applicants. The applicants argued that by protecting some individuals from sexual assault and not others, the Netherlands criminal law provided differential treatment. If Miss Y had been under rather than over 16 years old her father as her legal representative could have made the complaint on her behalf (the incident had actually occurred on the day after Miss Y’s 16th birthday). Alternatively, if Miss Y had been aged 21 or over she could have been placed under her father’s curatele (guardianship) and he could have made the complaint. It was therefore argued that Miss Y had received differential treatment because of her age.

Article 14 was central to the arguments made in *Stubbings and Others v the UK*. All four of the applicants in this case argued that their rights under Article 14 with 6 had been violated, and three of the applicants also argued that their rights under Article 14 with 8 had been violated. The applicants argued that the situation was discriminatory because the civil law provision varied depending on whether the individual was a victim of *intentional* or *unintentional* injury. Because rape was classed as an *intentionally* caused injury under the Limitation Act 1980, this meant that their cases were time-barred by the time they realised that they had been psychologically injured and were able to relate this to the rape. If the injury had been *unintentional* then the time bar would not have started until the victim first knew the injury was significant and attributable to the defendant, and the judge would have had discretionary powers to extend this period. It was argued that this was not only discriminatory in terms of the distinction drawn between intentional and unintentional injuries, but also in terms of those who experienced intentional injuries which did not lead to similar psychological effects. These psychological effects, the applicants claimed, prevented them from realising that they could start proceedings until it was too late to start them.

In *MC v Bulgaria*, unusually, it was not stated in the judgment which of the Article(s) Article 14 was being used alongside but it is likely to have been 3 and/or 8. The Article 14 argument made was that the Bulgarian Criminal Code provided better protection from rape to ‘homosexual children’ than to ‘heterosexual children’ because of the age of consent. This was because, at the material time, the age of consent for sexual intercourse with a person of the opposite sex was 14 years but the age of consent for sexual intercourse with a person of the same sex was 16 years. If the age of consent had been 16 years in Miss MC’s case then the case would have been classed as statutory rape or at minimum a ‘strict liability’ offence and there would have been none of the problems relating to proving a lack of consent, which were at the heart of the case.

4.2.6 Summary: Rape victims use of human rights law

Rape victims have therefore used a range of articles and made different arguments to frame their allegations that their human rights have been breached, with most of the law reports relating to cases taken under the ECHR rather than the HRA. Applications using Article 3 raised two key questions, both of which were raised in the literature under the optimistic picture; whether rape could be defined as a form of torture, inhuman or degrading treatment and if so, whether this extended to a positive duty on the state to draft suitable criminal laws for those raped by other private individuals to use.

The right to a fair trial (Article 6) has generally been associated more with defendants than with victims of crime, however the cases described here show that victims of crime can also make admissible¹³⁷ Article 6 arguments. The term ‘trial’ was used to refer to civil cases only, and all the arguments hinged on the right of *access to* a trial per se (within a reasonable length of time) rather than on the *fairness* of a trial. Given the literature discussed in Chapter Two that sought to show that rape trials are unfair to rape victims in a number of ways, it was therefore surprising initially that there were no applications that argued that a rape victim had not had a fair trial. Further

¹³⁷ If an argument had not already been classed as admissible it would not have been put before the court.

investigation revealed that this would not be an argument that could be made under Article 6, the relevant part being the first sentence of Article 6 section 1:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Because a victim does not have '*a criminal charge against him*', this means that the Article 6 provision in terms of criminal law can relate only to a defendant. This resulted in further investigation being needed, because Mr Selmouni's case was a criminal one and he was able to argue that the proceedings had not taken place within a reasonable length of time. In France, however, because of the different legal system to the United Kingdom, Mr Selmouni had been able to lodge both a criminal complaint and an application to join the proceedings as a civil party. Because the United Kingdom deals with civil and criminal complaints separately, a rape victim in the United Kingdom would not be able to use Article 6 in the way that Mr Selmouni did.

Article 8 arguments tended to have overlaps with arguments made under Articles 3 (that the right to respect to private and family life was because of the inability to make a criminal complaint or continue with a prosecution) and Article 6 (because there was not access to a court).

While Article 14 was used in three cases, none of the applicants argued that they had been discriminated against specifically because of their gender. Rather, the reasons given for discrimination were age, sexuality and how intentional the injury sustained was.

4.3 Rape defendants use of human rights law

Table 4.2 lists the details of the cases that been brought by rape defendants, in chronological order.

Case name	ECHR/ HRA	Year	Gender of applicants			Articles			
			Male	Fem	Total	5 Liberty/ security	6 Fair trial	7 No punishment	8 Fam/ private life
<i>Englert v Germany</i>	ECHR	1987	1	0	1		✓		
<i>T v Italy</i>	ECHR	1992	1	0	1		✓		
<i>Stanford v the UK</i>	ECHR	1994	1	0	1		✓		
<i>SW v the UK</i>	ECHR	1995	1	0	1			✓	
<i>G v France</i>	ECHR	1995	1	0	1			✓	
<i>Baegen v Netherlands</i>	ECHR	1995	1	0	1		✓		
<i>Trzaska v Poland</i>	ECHR	2000	1	0	1	✓	✓		
<i>Mattoccia v Italy</i>	ECHR	2000	1	0	1		✓		
<i>A-G Ref (No 3 of 1999)</i>	HRA	2000	1	0	1		✓		✓
<i>R v T, R v H</i>	HRA	2001	2	0	2		✓		
<i>R v Rooney</i>	HRA	2001	1	0	1		✓		
<i>R v Porter</i>	HRA	2001	1	0	1		✓		
<i>R v Morgan</i>	HRA	2001	1	0	1		✓		
<i>R v C and others</i>	HRA	2001	3	0	3		✓		
<i>R v A</i>	HRA	2001	1	0	1		✓		
<i>GB v France</i>	ECHR	2001	1	0	1		✓		
<i>R v M, R v Kerr, R v H</i>	HRA	2002	3	0	3		✓		
<i>R v Archibald</i>	HRA	2002	1	0	1		✓		
<i>Kucera v Austria</i>	ECHR	2002	1	0	1		✓		
<i>R v R and another</i>	HRA	2003	2	0	2		✓		
<i>R v Laskey</i>	HRA	2003	1	0	1			✓	
<i>MM v the Netherlands</i>	ECHR	2003	1	0	1				✓
<i>Mellors v the UK</i>	ECHR	2003	1	0	1		✓		
<i>Matwiejczuk v Poland</i>	ECHR	2003	1	0	1	✓	✓		✓
<i>Korellis v Cyprus</i>	ECHR	2003	1	0	1		✓		
Totals	ECHR=14 HRA=11		31	0	31	2	21	3	3

What is immediately evident is that there have been far more cases taken on behalf of rape defendants than there have for rape victims. There have been 25 cases (which is over four times as many as have been taken by rape victims), taken by 31 applicants (over three times as many as the number of applicants in cases taken by rape victims).

All of the applicants were male. 14 of these were ECHR cases (nearly three times as many as rape victims) and 11 were HRA cases (eleven times as many as rape victims). The earliest case brought by a rape defendant was heard in 1987, two years after the first case was heard with a rape victim as the applicant. The most recent case in the sample was heard in 2003. Of the fourteen ECHR cases, one case was taken against Austria, Cyprus and Germany, two cases were taken against Italy, France, the Netherlands and Poland and three cases were taken against the UK. Interestingly, those countries which Regan and Kelly (2003) found to have the highest conviction rates for rape (Austria, Denmark, Finland, Germany, Hungary, Iceland and Latvia) are not over-represented at the ECHR. In fact, the opposite seems to be true with the UK having one of the highest levels of attrition within Europe and also having the most defendants claiming that their human rights have been breached.

The average number of alleged Articles breached in a case was 1.2. This is less than half the average number used per case by rape victims (which was 2.8). The number of Articles that were allegedly breached ranged from one (in 22 cases) to three (in one case). Four Articles were used. Article 6 was the most used Article by far, used in 21 cases (84% of all defendants cases). The other three Articles used were 5, 7 and 8, which were used less frequently (each used in two or three cases).

4.3.1 Article 5: Right to liberty and security

The two cases that used Article 5 were both taken against Poland. In *Trzaska v Poland*¹³⁸ it was argued that the length of time Mr Trzaska spent in detention on remand for rape and other offences was unreasonable, at three years and six months. The same argument was made in *Matwiejczuk v Poland*¹³⁹ who was suspected of committing armed robbery and rape. Mr Matwiejczuk was held on remand for three years and two months.

¹³⁸ *Trzaska v Poland*, no. 25792/94, ECHR 2000.

¹³⁹ *Matwiejczuk v Poland*, no. 37641/97, ECHR 2003.

4.3.2 Article 6: Right to a fair trial

Article 6 arguments were made in 21 cases. For ease of description, these can be further subdivided into the reasons why it was argued that the trial was not fair: because of the length of time that had elapsed between being charged and being tried for the offence(s); because of an issue about the trial unrelated to evidence; or because of an evidential issue.

Length of time between charge and trial

In five cases it was argued that the trial had not been fair because of the length of time that had elapsed between being charged and being tried for the offence(s). In four of these five cases it was argued that the period of time had been too long. In *Trzaska v Poland* Mr Trzaka was charged with seven violent offences, including rape and attempted manslaughter. Mr Trzaka spent a total of three years and six months on remand in prison before being tried and subsequently sentenced to twenty-five years imprisonment. In *Mattoccia v Italy*¹⁴⁰ Mr Mattoccia was a bus driver who was charged with the rape of one of the disabled children in his care. It took a period of seven years and five months from when the allegations were made against him until the court judgment. In *Matwiejczuk v Poland* there was a period of three years and two months between Mr Matwiejczuk being taken into custody on arrest for armed robbery and rape and his appeal being dismissed. The criminal proceedings in *Mellors v UK*¹⁴¹ lasted a total of three years, eight months and twenty-three days from when he was arrested for rape and the date when his appeal was finally rejected. In contrast to these four reports, in *R v Porter*¹⁴² it was argued that the length of time before the trial took place was not long enough. Mr Porter alleged that his trial was not fair because he had not been allowed enough time to prepare his case by obtaining expert reports regarding some DNA evidence.

¹⁴⁰ *Mattoccia v Italy*, no. 23969/94, ECHR 2000

¹⁴¹ *Mellors v UK*, no. 57836/00, ECHR 2003

¹⁴² *R v Porter* [2001] EWCA Crim 2699

Issues about the trial unrelated to evidence

Five cases related to an issue about the trial unrelated to evidential issues. Mr Korellis was convicted for rape and sentenced to three years imprisonment, but argued in *Korellis v Cyprus*¹⁴³ that part of his trial was unfair because a judge was not impartial. In his trial at the Assize Court the defence requested that a further forensic examination of the complainant's knickers should be carried out and swabs from her vagina taken to be analysed. The trial judge granted an order for this to take place but the Attorney General applied for judicial review of the order and Justice Artemides, a member of the Supreme Court, suspended the order made by the trial judge. Mr Korellis appealed against the suspension of the order and Justice Artemides sat again as one of nine judges at the Supreme Court. The appeal against suspension of the order was again unsuccessful (at 7 votes to 2) and the trial went ahead which resulted in Mr Korellis' conviction. Mr Korellis, having an application under Article 6 refused (that by not making the knickers available to the defence the trial had not been fair) alternatively argued that in the decision over the knickers Justice Artemides had acted as a judge in his own case because he was participating in appeal proceedings of his own decision.

The other issue about the trial but unrelated to evidence was that the defendant could not fully participate in the proceedings, and this argument was made in four cases. In two of these cases the argument was made because they had been tried in absentia; they had not had the opportunity to attend the proceedings. This was the argument made in *Kucera v Austria*¹⁴⁴. Mr Kucera had been convicted for two counts of aggravated rape and sentenced to fourteen years imprisonment. After an unsuccessful appeal against sentence, he argued that the appeal proceedings had not been fair because he had not been present at the Court of Appeal when they considered his case. In *T v Italy*¹⁴⁵ Mr T argued that Italy had breached his rights when they convicted and sentenced him in absentia to seven years imprisonment for the rape of his fourteen-year-old stepdaughter. Mr T had not been formally notified about the

¹⁴³ *Korellis v Cyprus*, no. 54528/00, ECHR 2003

¹⁴⁴ *Kucera v Austria*, no. 40072/98, ECHR 2000

¹⁴⁵ *T v Italy*, judgment of 24 September 1992

proceedings as he was working in Sudan, even though he had informed the Italian Embassy in Khartoum of his change of address.

In *Stanford v United Kingdom*¹⁴⁶ Mr Stanford argued that he could not fully participate in proceedings because he was unable to hear all of the proceedings for his trial for two counts of rape and five other offences against a young girl for which he was sentenced to ten years imprisonment. Mr Stanford's trial was the first to be heard at the new Norwich Crown Court building, which had a glass-fronted dock. When the victim (who by this time was fifteen) started giving evidence she spoke in a soft voice with her head bowed so the judge requested that she be placed closer to himself and the jury. Mr Stanford had complained to his solicitor, counsel and a prison guard but not to the court that he could not hear what she was saying.

The final case in this section concerned three separate applicants. In *R v M; R v Kerr; R v H*¹⁴⁷ it was argued that the applicants were not able to fully participate in the proceedings because they were mentally unable to. Mr M and Mr H had been charged with indecent assault and Mr Kerr had been charged with indecent assault and rape. It was argued that since the defendants had mental disabilities they would be unable to follow the proceedings or give instructions, meaning that any trial would be unfair. Mr Kerr¹⁴⁸ had been charged with four counts of rape and fifteen of sexual assault on his patients between 1968 and 1988 during his work as a consultant psychiatrist. Under section 4a of the Criminal Procedure (Insanity) Act 1964 a jury found him unfit to stand trial (following the rules of the Act the jury were not informed of what Mr Kerr had been charged for). A second jury then found that Mr Kerr had committed one of the indecent assaults, were unable to agree on a verdict on the other charges and Mr Kerr was given an absolute discharge¹⁴⁹.

¹⁴⁶ *Stanford v United Kingdom*, judgment of 25 January 1994

¹⁴⁷ *R v M; R v Kerr; R v H* [2002] 1 WLR 824

¹⁴⁸ I focusing on Mr Kerr here because he was a rape defendant and the other two applicants were indecent assault defendants.

¹⁴⁹ Note that this second jury could not actually find Mr Kerr guilty of the charges even if they had found he had committed the acts because only the actus reus of rape could ever be proved because he was unfit to stand trial and therefore unfit to be questioned to satisfy the mens rea requirement of the offence (as described in Chapter Two).

Evidential issues

In twelve cases it was argued that the trial had not been fair because of an issue relating to evidence. In one of these cases two separate arguments were made as to why Article 6 had been breached (*R v Rooney*¹⁵⁰). Both of these arguments related to evidential issues and the case is therefore discussed twice in the following section.

In five of these twelve cases the evidence in question was sexual history evidence. The case of *R v A*¹⁵¹ was described briefly earlier in Chapter One. The case concerned the alleged rape of a woman in December 2000 on a towpath close to the river Thames. The woman alleged she had been pulled to the ground by the defendant who was the friend of her boyfriend and raped. The defendant claimed that the woman had initiated the intercourse as part of an ongoing relationship they were having and read out a brief statement when interviewed by the police where he stated '*she was never against this relationship that we were having*'. His defence in court was that she consented, and that if she did not, then he thought she did.

Referring to the new provisions within Section 41 of the Youth Justice and Criminal Evidence Act 1999, the Judge at the preparatory hearing refused the defendants counsel leave to cross-examine or use evidence relating to the alleged previous sexual intercourse with either the defendant or his friend. This also meant that the prepared statement read at the police station could not be used as evidence because it alleged they had had consensual intercourse prior to the incident in question. In refusing leave to use this sexual history evidence, the judge recognised that that this ruling might result in a breach of the defendant's right to a fair trial. The trial did not go ahead on this basis and was referred to the Court of Appeal.

At the Court of Appeal Lord Justice Rose ruled that the evidence and questioning about the defendant's alleged previous sexual relationship with the complainant was, in fact, admissible under Section 41 and that the judge's ruling in excluding such evidence had been incorrect. This was because while sexual history evidence is not admissible on the issue of consent, it is admissible in relation to belief in consent. As

¹⁵⁰ *R v Rooney* [2001] EWCA Crim 2844

¹⁵¹ *R v A* [2001] UKHL 25, [2001] 1 WLR 789

the defence was that the complainant was consenting, and if she was not, that the defendant believed that she was, this would have resulted in a ruling to the jury that they must consider the evidence only in terms of whether he believed she was consenting and not in terms of whether she actually did consent to intercourse. Lord Justice Rose gave the opinion that a direction such as this may lead to an unfair and very confusing trial and the question was certified by the Court of Appeal to be considered by the House of Lords:

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?

The other four cases that related to sexual history evidence varied from *R v A* in their material facts. In *R v Rooney* the trial was a retrial and section 41 had come into force in between Mr Rooney's first and second trials. He argued that it was unfair not to allow similar cross-examination to take place in the second trial to that which had taken place in the first. In particular, he pointed out that the first trial had shown that her statement that she had had no previous sexual experiences had been untrue because she had admitted under cross-examination about her sexual history that she had carried out fellatio on a boy when she was 13 years old. In *R v T, R v H*¹⁵² Mr T sought to cross-examine the victim about why she had not complained earlier about the abuse when making a complaint to the police about abuse from two other family members. In Mr H's case he sought to cross-examine the victim about an occasion when she had told her brother and friends that she had been raped and other questions which were designed to discredit her and show that she had lied in the past. Both applicants argued that the evidence and cross-examination was not 'about' the victim's sexual history but rather about her failure to complain in the past (in the case of Mr T) and her alleged previous lies (in Mr H's case). In *R v R and another*¹⁵³ limited sexual history evidence in respect of a previous relationship was allowed under section 41 but was refused in relation to previous and post complaint consensual intercourse on the grounds that it was not relevant to the case. The applicants argued this had led to an unfair trial. In *R v Morgan*¹⁵⁴ Mr Morgan's

¹⁵² *R v T, R v H* [2001] EWCA Crim 1877, [2002] 1 All ER 683, [2002] 1 WLR 632

¹⁵³ *R v R and another* [2003] EWCA Crim 2754

¹⁵⁴ *R v Morgan* [2001] EWCA Crim 445

defence in court was that he could not remember the incident because he had had a 'complete mental blackout' but that since he and the victim were having a long-term sexual relationship she would have consented on the occasion in question because 'she always consented' (this case was pre-section 41). In the police interview, however, Mr Morgan had not mentioned that he had had a relationship with the victim and the judge warned the jury that they may draw inferences from his failure to mention when questioned something that he later relied on in court. Mr Morgan argued he had not mentioned it when questioned by the police because he was still drunk at the time, and that the jury warning had meant that the trial was unfair.

In two of the eleven cases where it was alleged that the trial had been unfair for evidential reasons, the argument made was that the defence had not had 'equality of arms' (access to all the evidence the prosecution had). In *GB v France*¹⁵⁵ the prosecution introduced new documentary evidence at the start of the trial that then led to one of the expert witnesses substantially changing his oral submission from his written submission. In *R v C and others*¹⁵⁶ the applicants argued that the prosecution had failed to share evidence that shed doubt on the credibility of the victim because the evidence showed that the girl had previously given inconsistent statements and told lies to the police in a completely unrelated case where her boyfriend had been accused of murder.

While most rape defendants would presumably be pleased to have their cases discontinued, this was not the case in *Englert v Germany*¹⁵⁷. When the court decided to stay the case and withdraw the rape charge against Mr Englert he argued that this constituted a 'conviction in disguise' because the inability to have his personal costs and expenses refunded or be awarded compensation for the time he had spent detained on remand was contrary to his right to be presumed innocent until convicted via a fair trial. Had he been tried and acquitted an order may have been made for defence costs to be reimbursed and he may have been compensated for his time on remand.

¹⁵⁵ *GB v France*, 44069/98 ECHR 2001

¹⁵⁶ *R v C and others* [2001] EWCA Crim 1529

¹⁵⁷ *Englert v Germany*, judgment of 24 June 1987

The remaining arguments made in relation to evidential issues were whether a trial was a fair one if: unlawfully retained DNA was used as evidence (*Attorney General's Reference (No 3 of 1999)*¹⁵⁸); a defendant was convicted on the basis of statements made by an anonymous witness (*Baegen v the Netherlands*¹⁵⁹); a complainant could not be cross-examined because a mental disability resulted in her evidence being presented on video (*R v Archibald; Attorney General's Reference (No 69 of 2001)*¹⁶⁰); or if a fair retrial was possible after some evidence had already been given back to and destroyed by the victim (*R v Rooney*¹⁶¹).

4.3.3 Article 7: No punishment without law

In three cases (*SW v the United Kingdom*¹⁶², *G v France*¹⁶³ and *R v Laskey*¹⁶⁴) it was alleged that Article 7 had been breached because the state had prosecuted the applicant for an act that was not a criminal offence at the time the act had taken place.

In the case of *SW v the United Kingdom* Mr SW argued that he should not have been prosecuted for raping his wife because at the time the act was not against the law in England and Wales (subject to certain exceptions such if as a non-molestation order had been in place). This judgment was passed as an identical judgment to and at the same time as *CR v the United Kingdom*¹⁶⁵, which is the better-known case (known as *R v R*¹⁶⁶ while in the English courts) because it was the first to criminalise rape within marriage. Both cases had already passed through the Court of Appeal (Criminal Division) and the House of Lords before they were heard at the European Court of Human Rights. The case of SW rather than CR is included in this sample because the latter was actually an attempted rape case. As the ECHR judgment was identical, the discussion in this thesis of SW applies equally to CR.

¹⁵⁸ *Attorney General's Reference (No 3 of 1999)* [2001] 2 WLR 56; [2001] 2 AC 91

¹⁵⁹ *Baegen v the Netherlands*, judgment of 24 October 1995

¹⁶⁰ *R v Archibald; R v Archibald; Attorney General's Reference (No 69 of 2001)* [2002] EWCA Crim 858

¹⁶¹ *R v Rooney* [2001] EWCA Crim 2844

¹⁶² *SW v the United Kingdom*, judgment of 27 October 1995

¹⁶³ *G v France*, judgment of 31 August 1995

¹⁶⁴ *R v Laskey* [2003] All ER (D) 69 (May)

¹⁶⁵ *CR v the United Kingdom*, judgment of 27 October 1995

¹⁶⁶ *R v R* [1991] 2 All ER 257

Mr SW, on being told by his wife that their marriage was over, raped her at knifepoint and was charged with rape, threatening to kill and assault occasioning actual bodily harm. He argued that although sexual intercourse had taken place without consent this could not be classed as rape because of the wording of the definition of rape in statute and a general agreement within case law that it was not possible for a man to rape his wife – known as ‘marital immunity’ to rape. He relied upon the same argument that was made in *R v R*; that Parliament were fully aware that rape within marriage was not illegal and had *actively chosen* not to define and penalise some acts of non-consensual intercourse as rape when they are perpetrated towards certain groups (e.g. wives, other men). The Criminal Law Revision Committee had presented a report in 1984 that recommended that immunity should be maintained (with a new exception). Parliament had then had the opportunity to remove the word ‘unlawful’ or introduce new provision for non-consensual intercourse in 1988 when considering revisions to the 1976 Act but had chosen not to do so. In September 1990 the Law Commission provisionally recommended that immunity should be abolished through an act of parliament but any debate was pre-empted by *R v R*. As judges do not have the power to change the law and parliament had not changed the law, it was therefore argued that he had been prosecuted and convicted for an act that was not against the law. The same argument was then made again in 2003 in *R v Laskey* when Mr Laskey argued at the Court of Appeal that he should not have been prosecuted for raping his ex-wife on two occasions, the first on a date not known around 1988 and the second in 1995.

In the last of the Article 7 arguments in this sample, Mr G claimed in *G v France* that he had been prosecuted using a new rape law that only came into force after he committed the acts. While he admitted that in his role as a driving test examiner he had used coercion to force a woman with a mental disability to submit to acts of buggery he argued that at the time such acts had been classified as indecent assault rather than rape. Specifically, that the new law introduced on 23rd December 1980 was applied even though he committed the act on the 14th November 1980.

4.3.4 Article 8: Right to respect for private and family life

Article 8 arguments were made in three cases: *MM v the Netherlands*¹⁶⁷, *Matwiejczuk v Poland* and *Attorney General's Reference No 9 of 2003*. In *MM v the Netherlands* it was alleged that Mrs S had been sexually assaulted by Mr MM while acting as the defence lawyer for Mrs S's husband who was being held on pre-trial detention for an unrelated matter. Mrs S was reluctant to make a statement against Mr MM because she was worried that she would not be believed because there was only her word against his. The police suggested that Mrs S tape record her telephone conversations with Mr MM to collect evidence and the police provided her with a tape recorder, showed her how to operate it and came to collect the recordings from her. Two other women then came forward and reported that they had been raped and sexually assaulted by Mr MM and he was convicted for sexually assaulting two of the women and acquitted for the rape and sexual assault of the third. Mr MM argued that the tapping of his phone by the police constituted 'interference by a public authority' in breach of his right to respect for private and family life.

Attorney General's Reference (No 3 of 1999) was mentioned briefly under Article 6 in relation to whether unlawfully retained DNA evidence could be used as evidence in court. In the trial it was alleged that the defendant had broken into an old woman's house, assaulted, anally raped and burgled her before locking her in a cupboard for 12 hours until she was found. Swabs were taken from the woman following the rape and the results were placed on the national DNA database. From this database, a suspect was identified. The suspect was on the database for a case in which he was a suspect for burglary (but found not guilty of) when he had had saliva swabs taken. The frequency of the occurrence of such a match, if the DNA on the swabs had come from someone other than the defendant, would have been one in 17 million. However, despite the strength of this evidence, the defendant was acquitted because his DNA should have been destroyed after he had been acquitted on the burglary charge. The DNA evidence had therefore been obtained as a result of improper retention. The defendant had argued that if he was convicted this would breach his rights because the interference with this right would not be 'in accordance with law' (Article 8 (2))

¹⁶⁷ *MM v the Netherlands*, no. 39339/98 ECHR 2003

and was acquitted on this basis. A defendant charged with murder had recently had his conviction overturned in similar circumstances (in *R v Weir*¹⁶⁸). The Attorney General referred the case to the House of Lords for consideration on a point of law.

It is not necessary here to explain the Article 8 argument made in *Matwiejczuk v Poland* because it relates to imprisonment. The case is included in the sample because the other arguments made fit within the sample boundaries.

4.3.5 Summary: Rape defendant's use of human rights law

More rape defendants than rape victims argued that their human rights had been breached, however they used a smaller range of Articles and hence proportionately fewer arguments were made. Some arguments were made under Articles 5, 7 and 8 but the vast majority used Article 6.

Rape defendants' use of Article 5 overlapped with one of the arguments made under Article 6; that they had been held on remand for an unreasonable length of time (i.e. the Article 5 argument) because their trial had not been conducted within a reasonable length of time (i.e. the Article 6 argument). The other arguments made under Article 6 were that the trial had been unfair because of issues related to the trial but unrelated to evidential issues or that the trial had been unfair because of evidential issues. In line with the pessimistic picture of rape and human rights described in Chapter Two, defendant's argued that if evidence was not allowed that related to the woman's credibility then they had not had a fair trial. This included challenges to section 41 of the Youth Justice and Criminal Evidence Act 1999 as described earlier in Chapter Two. In some cases the arguments challenged legislation that, on first sight, would appear unrelated to rape law, but which still had as its main aim the introduction of evidence relating to credibility or belief in consent.

The arguments made under Article 7 seem to run contrary to both substantive and procedural justice. However, the strict following of legal reasoning (alongside inappropriately drafted legislation in the United Kingdom) meant that rape defendants

¹⁶⁸ *R v Weir* [2001] 1 WLR 421

were able to put forward strong arguments that sexual intercourse without consent was not rape when the act took place against a defendant's wife and against a girl with a mental disability. Article 8 was used to argue that to obtain the evidence needed to prove rape had occurred the state had failed to respect the defendant's right to a private and family life.

4.4 Chapter conclusions

Far more rape defendants than rape victims argued that they had had their human rights breached, with defendants over four times more likely to use human rights law than victims. There are three explanations as to why this may be the case, which may not be specific to rape victims and defendants. Firstly, because one of the main issues raised in the literature is about the fairness of the trial, and Article 6 can only be used if the applicant is either the criminal defendant or either party in a civil trial. This means that rape victims in criminal trials cannot use this Article. This is likely to be more limiting in England and Wales where criminal and civil law are more separate than in many countries in continental Europe.

Secondly, rape defendants might have more to benefit by using human rights. For a rape victim, much of the harm has already been done by the time she may be able to use her rights in relation to the prosecution process. The rape has occurred and she has been through a traumatic trial. Because finding a breach of her human rights would have no impact on the defendant, but simply provide her with some financial compensation and the acknowledgement that the state had breached her human rights, this may not be her main concern. In other words, the defendant rather than the state may be her main concern at this time. Although finding a breach of human rights may go on to create change for other rape victims in similar situations and some rape victims go on to be extremely active in anti-rape movements, including those pushing for legal reform, applications under the ECHR must be made within six months of the alleged breach taking place and this may be too early for rape victims to start thinking about using human rights as a form of activism. Some may never reach this stage, wanting to put the whole ordeal behind them and move on with their lives. In contrast, rape defendants potentially have a lot to gain. If they have been convicted for rape it is likely they are in prison while they are making their human rights

argument. Although finding that human rights have been breached does not automatically equate to an acquittal, the state is expected to do something if the breach means that the conviction is not a safe one, particularly in relation to Article 6 breaches. The finding that a defendant has not had a fair trial is therefore likely to result in either a retrial if a fair one is possible or an acquittal.

Finally, the third reason is related to the way the criminal justice system works. In relation to the HRA, only one rape victim made a human rights argument compared to eleven rape defendants. In Chapter Two it was explained that it is the crown that is the prosecutor in most criminal trials and the crown that has the legal representation. Hence if the rape victim, at this point a witness in the crown's case against the defendant, did want to argue that her human rights had been breached then she would have no channels at all during the trial to make this argument. Of course, it is unlikely that the 'victims' and 'defendants' themselves would have enough knowledge about human rights to be able to make such an argument¹⁶⁹ and the legal representatives would make the argument. Because the victim has no legal representative at the trial, the only way she can allege a human rights abuse is after the trial and then only if permission is granted for an application for judicial review (a review of the lawfulness of a public body's act or failure to act). The application must be made within three months, there is no guarantee that legal aid will be made available and there are fees that must be paid on application. Without some form of legal advice a victim is unlikely to know that this route is even available. In one case in particular, a strong argument could have been made by a rape victim which, if successful, could have created legislative change that would have pre-empted defendants' human rights claims. For example, rape victims who were married to the rapist could have argued that the state failed to prevent them from torture (Article 3), that they did not respect their right to private life which includes sexual autonomy (Article 8), that there was no effective remedy (Article 13) and that this situation was discriminatory because a prosecution could have been brought if they had not been married or if they fell into any of the pre-defined categories around separation (Article 14). If this case had been brought then rape within marriage may have been criminalized earlier and, crucially,

¹⁶⁹ Although in *MM v the Netherlands* described earlier in the chapter Mr MM was a convicted rapist and also a defence lawyer when he made his human rights argument, this is clearly an exceptional case.

through statute rather than the evolution of case law, and the case of *SW v UK* could not have been brought. This may also have implications for strategies for campaigning, and it may be that governments would have been more receptive to enact legislative change if the argument was framed within legal human rights terms than in moral rights terms. '*Human rights discourse is a powerful tool with which to criticize states*' (Coomaraswamy, 1997 np.).

Without knowledge about how human rights may be successfully used by rape victims (which this thesis starts to provide) and funding and training for legal advocates to help victims become empowered to use their rights, human rights are likely to continue to be used more frequently by rape defendants than rape victims.

Another finding to emerge from this chapter about how human rights were used relates to the legislation at issue in the arguments. When the thesis proposal was written it was assumed that the cases would be about *rape law*. Instead, most of these cases are about rape and about law but not specifically about *rape law*. While this has little relevance specifically in relation to rape and human rights, what it does show is that in challenging their rape convictions men will use a wide range of legislation and that rape campaigners and researchers may have focused too heavily at times on the issues within rape laws when the problem seems to be a wider one.

This chapter has shown *how* rape victims and defendants have used human rights. However, the use of human rights does not imply success. The next chapter looks at the judgements made in relation to these human rights arguments, considering how and why they were or were not successful.

CHAPTER FIVE: THE OUTCOMES OF VICTIM'S HUMAN RIGHTS ARGUMENTS

5.1 Introduction

This chapter analyses how successful rape victim's human rights arguments were (as described in Chapter Four) in terms of their intramural success; whether they 'won' or 'lost' the case. This relates to Aim Two. It also analyses the use of the margin of appreciation (Aim Three), compares the win/lose analysis with the gender ratio of male to female judges for the ECHR cases (Aim Five) and looks at the amount of just satisfaction awarded in the cases that were successful (Aim Four).

5.2 How successful were rape victim's human rights arguments?

Table 5.1 (below) shows whether the overall cases and arguments made under individual Articles were successful or unsuccessful, coded by 'win', 'lose' or 'N/C' (argument not considered). The column on the right relates to whether or not the decisions were unanimous. A blank cell means that no argument was put forward in respect of the convention right. The question of whether the judgment was unanimous was applied only to the ECHR cases.

Case name	Overall	3 Torture	6 Fair trial	8 Fam/private life	13 Effective remedy	14 Discrimination	Unanimous?		
<i>X and Y v the Netherlands</i>	Win	N/C		Win ¹⁷⁰	N/C	N/C	Yes		
<i>Stubbings and others v UK</i>	Lose		Lose	Lose		Lose	No		
<i>Aydin v Turkey</i>	Win	Win	N/C		Win		No		
<i>Selmouni v France</i>	Win	Win	Win				Yes		
<i>R v DPP, ex parte C</i>	Lose			Lose			-		
<i>MC v Bulgaria</i>	Win	Win		Win	N/C	N/C	Yes		
Totals	Win	4	3	1	2	1	0	Yes	3
	Lose	2	0	1	2	0	1	No	2
	N/C	-	1	1	0	2	2		

¹⁷⁰ Miss Y only. Not considered in relation to Mr X's Article 8 claim.

Overall, cases brought by victims were twice as likely to be won than lost (four were won and two were lost). Four of the five ECHR cases were successful and the only case taken using the HRA was lost. In three of the five ECHR cases the judges were unanimous in their verdicts. In terms of the individual convention rights, arguments made using Article 3 were most likely to be successful (in three out of four cases) and arguments made under Article 14 were least likely to be successful (none of the three cases were successful on these grounds). Arguments made using Articles 13 and 14 were least likely to be considered by the court (two out of three cases for each were not considered).

5.2.1 The outcomes of Article 3 arguments (Freedom from torture)

Three out of the four Article 3 arguments were successful and the fourth was not considered. This means that none of the Article 3 arguments were actually judged to be unsuccessful. The case of *X and Y v the Netherlands* was the first to be taken under the ECHR by a rape victim and therefore also the first Article 3 argument to be made. This was the case, however, that did not have its Article 3 argument considered. Dismissing the argument as not necessary to consider because a breach of Article 8 had already been found, there is no way of knowing whether the ECtHR would have accepted the first ever argument that rape could be classed as ‘inhuman and degrading treatment’ as the applicants submitted. There is no justification given as to why one Article is considered before another; in this case why Article 8 was considered before Article 3. If Article 3 had been considered before Article 8 then it is possible that the decision may have been reversed, and Article 3 could have been found to have been breached and 8 dismissed as not necessary to consider. It is also probably the case that an Article 3 breach may have held more weight than the Article 8 breach. This is because of the international stigma that is attached to the term ‘torture’ (Article 3), reflected in the fact that Article 3 is non-derogable. In contrast, Article 8 has wide restrictions and states can argue their margin of appreciation (as discussed in Chapter One).

It is disappointing that the ECHR did not consider whether rape could be classed as falling under the ambit of Article 3 because it was to be twelve years before another Article 3 argument was to be made within the sample boundaries used in this

research. It is possible that other rape victims may have felt more empowered to take their cases to the ECHR if *X and Y v the Netherlands* had contained a discussion about whether and in what circumstances rape could fall under Article 3.

In 1997 and 1999 two separate Article 3 arguments were made, both were considered and both were successful. In both of these cases the alleged perpetrators were policemen (state actors) so they do not answer the questions raised in *X and Y v the Netherlands* where Miss Y was raped by a non-state actor. Nonetheless, Mrs Aydin's claim in *Aydin v Turkey* that her experiences of rape and other forms of ill treatment by the Turkish police fell under the ambit of Article 3 was still important because it was the first to consider rape in terms of Article 3.

In deciding whether the rape should fall under the ambit of Article 3 and if so, whether it should be classed as 'torture', 'inhuman treatment' or 'degrading treatment' the ECtHR applied the distinction made in *Ireland v the United Kingdom*¹⁷¹; that because of the special stigma associated with the term 'torture' it should only be applied to deliberate inhuman treatment causing very serious and cruel suffering. In judging whether this criteria had been met in Mrs Aydin's case the ECtHR acknowledged the psychological, physical and emotional consequences of rape:

Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally. (Aydin v Turkey, para. 83)

It was judged that the rape and other physical abuse did amount to torture and hence that Article 3 had been violated (at fourteen votes to seven). This was therefore an important judgment because it was the first time that rape was labelled as torture under the ECHR.

¹⁷¹ *Ireland v the United Kingdom* [1979-1980] 2 EHRR 25

At fourteen votes to seven however, this was clearly not a judgment accepted by all, with a third of the judges holding partly dissenting opinions. The differences of opinion were not related to whether the acts amounted to torture however, but whether the acts had actually taken place:

There can be no doubt that the matters alleged would, if proved, constitute an extremely serious violation of Article 3 of the Convention ... without being able to say what the "truth" of the matter was in this case, I am far from convinced that the applicant's allegations have been proved beyond all reasonable doubt. I therefore conclude that no violation of Article 3 of the Convention can be found, for want of sufficient proof of the facts relied upon. (Partly concurring, partly dissenting opinion of Judge Matscher in Aydin v Turkey)

In common with my colleagues in the minority, I consider that the investigation did not provide the necessary certainty that the events alleged really took place, as customarily required by the Court's case-law. If the facts had been established with certainty, it is obvious that there would have been an extremely serious violation. (Partly concurring, partly dissenting opinion of Judge Pettiti in Aydin v Turkey)

This has some overlaps with Article 6 in terms of whether an effective investigation was conducted, but as it was given as a reason by a third of the judges as to why they could not vote that Article 3 had been breached it is important to briefly consider the reasons here.

The judges voting that Article 3 had been breached placed the onus on Turkey to prove that the acts *did not* take place, while the judges voting that Article 3 had not been breached placed the onus on Mrs Aydin to prove that they *did* take place. For example, the majority criticised the public prosecutor for failing to collect suitable medical evidence from Mrs Aydin. While she had been medically examined by three different doctors, the first two were not experienced with rape cases and stated that they could not provide any conclusions as to why bruising existed on the insides of Mrs Aydin's thighs. One even suggested it might have been because she rode a donkey! The third doctor was experienced in rape examinations but the examination took place so long after the event it was not possible to reach any firm conclusions. In addition, the majority judges criticised the fact that all the examinations focused on whether she was a virgin rather than whether or not she had been raped. The dissenting judges, however, preferred to criticise Mrs Aydin rather than the Turkish public prosecutor for the lack of suitable medical evidence:

It is a pity that she did not, immediately after the alleged ill-treatment, likewise consult a more diligent, better-qualified or better-equipped doctor than Dr Akkus and Dr Çetin. (Joint dissenting opinion of Judges Gölcüklü, Matscher, Pettiti, De Meyer, Lopes Rocha, Makarczyk and Gotchev in Aydin v Turkey).

The other criticisms made of the investigation will be considered under the discussion of the outcomes of Article 6 arguments. The point here is that the majority of judges were willing to accept that in the absence of evidence to the contrary the torture *did* take place while the minority were not convinced without evidence that showed *beyond reasonable doubt* that Mrs Aydin had been tortured.

Mr Selmouni, in *Selmouni v France*, also won his argument under Article 3, however his argument was accepted in terms of the physical ill treatment he had suffered rather than the alleged rape. While there was medical evidence to show that he had experienced physical ill-treatment which was sustained during the period of time he was in police custody, including wounding with a weapon and assault causing permanent disability the only evidence of rape came from his criminal complaint:

*... one of them said 'You Arabs enjoy being screwed'. They took hold of me, made me undress and one of them inserted a small black truncheon into my anus. NB. When Mr Selmouni relates that scene, he starts crying. (Criminal complaint made by Mr Selmouni, cited in *Selmouni v France*, para. 24. Comment about crying made at the time by police officer)*

After making the criminal complaint Mr Selmouni was medically examined in relation to the alleged rape¹⁷², but the examiner stated that there were no lesions that could corroborate or invalidate his statement because of the length of time that had elapsed. The doctor noted that Mr Selmouni had not mentioned the rape in his earlier medical examinations while in police custody because he said he felt ashamed of it.

The French government argued that the acts did not meet the level needed to class them as 'torture' following ECHR case law, however the ECtHR pointed out, in

¹⁷² Although the act described above would not be classed as rape in England and Wales the definition of rape used in this sample is how rape was defined in the country the allegation was being made against (see Chapter Three).

labelling his experiences as torture, that the ECHR is a 'living document' (see Chapter One):

... the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies. (Selmouni v France, para. 101)

In evidential terms, the judges accepted unanimously that the onus was on the French police to show that they had not perpetrated the acts rather than on Mr Selmouni to prove that they had:

... where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. (Selmouni v France, para. 87)

There was no medical evidence though that the rape had taken place, as in the *Aydin* case. The ECtHR managed to side step this issue because they judged that the other acts in themselves had constituted torture; the rape was superfluous. It is interesting to note, however, that they appear to have accepted that other acts had taken place without any medical evidence (e.g. the blowlamp and syringe threats and the allegation that a police officer had shown Mr Selmouni his penis and said 'here, suck this' before urinating on him) and also that the consistency of evidence relating to his other allegations was not described as being corroborative evidence for the rape.

In *MC v Bulgaria* the Article 3 argument was also successful, but differed from the *Aydin* and *Selmouni* cases because the alleged rapists were not state actors. The argument in *MC v Bulgaria* relied upon the horizontal effect of the ECHR, making it closest to the argument that the Court had failed to consider in *X and Y v the Netherlands*. With *MC v Bulgaria* being the latest of the cases in this sample and *X and Y v the Netherlands* being the earliest, it was nearly two decades before the issue of the horizontal effect of Article 3 was examined in this context (there were 18 years between the two cases). Miss MC's argument, was not that there was no legal

protection against rape and sexual abuse as Miss Y's argument had been, but rather that the legal protection was not effective.

The European Court accepted Miss MC's argument that she had 'frozen' in fright when she was raped on two subsequent days by two different boys known to her. Two Bulgarian experts had provided written expert evidence to the public prosecutor that had substantiated that this was a common reaction to being faced with rape, particularly by children and young people. In judging whether Bulgarian law was ineffective, the Court compared the Bulgarian rape law, particularly that relating to consent, with rape laws in Czechoslovakia, Denmark, Finland, France, Germany, Slovenia, the United Kingdom and various American States. They took into consideration recommendations from the Committee of Ministers of the Council of Europe on the protection of women against violence and the United Nations Committee on the Elimination of Discrimination against Women and looked at how consent had been understood in the International Criminal Tribunal for the former Yugoslavia.

In reviewing these criminal codes and recommendations, the Court accepted that there had been a move away from narrow interpretations of consent and that in most European countries it is no longer necessary that a victim must physically resist. A breach of Article 3 was found in this respect. There were no discussions over whether the rapes should be classed as torture, degrading or inhuman treatment as in the *Aydin* and *Selmouni* cases, and it appears to have been taken for granted that two rapes of a fourteen year old girl should automatically be classed as torture under the ambit of Article 3.

5.2.2 The outcomes of Article 6 arguments (Right to a fair trial)

Of the three Article 6 arguments, one was not considered, one was successful and one was unsuccessful. *Aydin v Turkey* was the case that was not considered, where the ECtHR judged (at 20 votes to 1) that it was more appropriate to examine Mrs Aydin's claim that the criminal investigation had been inadequate under her Article 13 claim (Right to an effective remedy). In *Selmouni v France* the argument that his right to a fair trial had been violated because the proceedings in respect of his torture complaint

had not been conducted within a reasonable length of time was successful. The judges' verdict was unanimous, and the French government in their submission accepted that they had not conducted the proceedings in a reasonable length of time.

In *Stubbings and others v the United Kingdom* the Article 6 argument was not successful. The ECtHR did not accept that because the applicants could not pursue their complaints of rape using civil law after the limitation period set out in the Limitations Act 1980 that this denied them access to a court as guaranteed by Article 6, highlighting that it falls within the state's margin of appreciation to decide *how* their citizens have the right of access to a court. This decision was not unanimous though, at seven votes to two. The majority agreed with the submission made by the United Kingdom government, who argued that the applicants did have access to a court to commence proceedings for six years following their eighteenth birthdays and that the limitation period of six years served in all cases to prevent stale claims from getting to court (where witnesses memories may have lapsed), provide finality and legal certainty and therefore that the limitation period served a legitimate aim. Furthermore, they agreed with the government that the applicants still had access to a criminal court with no time limitations if there was enough evidence to proceed with the case.

... taking into account in particular the legitimate aims served by the rules of limitation in question and the margin of appreciation afforded to States in regulating the right of access to a court ... the Court finds that there has been no violation of Article 6 para. 1 of the Convention taken alone. (para. 57)

Hence, the Court argued that the 'essence' of the right was not breached, that the limitations pursued a legitimate aim that were proportional to the means employed and the aim achieved.

Even in the majority verdict, the view was expressed that the policy chosen by the United Kingdom government may not be the most appropriate for victims of childhood sexual abuse:

There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in member States of the Council of Europe

may have to be amended to make special provision for this group of claimants in the near future. (Stubbings and others v the United Kingdom, Para 56)

Those voting that Article 6 had not been breached were of the opinion that it was not the role of the ECtHR to substitute its view as to what would be the most appropriate policy in place of that of the UK. However, the two dissenting judges disagreed with this interpretation of their role, voting that Article 6 had been breached because the right to access to a court was not an *effective* one and therefore that the margin of appreciation had been interpreted too widely in the majority judgment.

Judge Foighel accepted that in itself the imposition of a fixed limitation period did not constitute a violation, nor was the six years allowed from the date of their eighteenth birthdays an unreasonable period. However, he argued that the margin of appreciation could not be used to justify depriving an individual of the right in question altogether. He argued that this was the case in the current situation where the applicants had no realistic opportunity to access a court at an earlier stage, meaning that the very essence of the right had been violated which could not be justified by the margin of appreciation.

Judge MacDonald agreed, arguing that the specific nature of the injury meant that the six year limitation period was disproportionate to the aims achieved, in that many victims of childhood sexual abuse are unaware for periods of time of the causal link between the abuse and the damage suffered. He argued this meant that the denial of right to access to a court was unreasonable and went beyond the State's margin of appreciation.

5.2.3 The outcomes of Article 8 arguments (Right to respect for private and family life)

All of the arguments made under Article 8 were considered. Two were successful and two were unsuccessful. Violations of Article 8 were found in *X and Y v the Netherlands* and *MC v Bulgaria*. In *X and Y v the Netherlands* the Netherlands government accepted that these were important loopholes in the parts of their criminal code relating to sexual offences and started preparing a bill which would make it an offence to make sexual advances towards a mentally handicapped person. However,

the government argued that just because there were no criminal sanctions in place that Miss Y could use, this did not prevent her from using civil law to seek damages from or an injunction against Mr B. The Court did not agree that the potential use of civil law was adequate in this situation. They accepted that the *means* by which the Netherlands chose to secure compliance with Article 8 fell within their margin of appreciation and that recourse to criminal law is not necessarily the only way of protecting Article 8 rights but accepted the applicants argument that the civil law did not provide a sufficient degree of protection from rape which could only be found in criminal law. The Court judged unanimously that Miss Y's right to private life, which includes the physical and moral integrity of the person and their sexual life, had been breached because of the impossibility of having criminal proceedings instituted against her alleged rapist. They noted that although Article 8 is aimed at protecting the individual from interference from public authorities there are also positive obligations that may involve the adoption of measures to enable respect for private life between individuals. Having found a breach of Miss Y's Article 8 rights the ECtHR decided that it was not necessary to investigate her father's (Mr X) claim that his Article 8 rights had also been breached.

In *MC v Bulgaria* the Court followed the legal reasoning they used when finding a breach of Article 3, judging that the rapes amounted not only to torture but also as an infringement to personal integrity under Article 8. By considering Articles 3 and 8 simultaneously, this meant that both Articles were considered, in contrast to *X and Y v the Netherlands* where only one was considered. One of the judges thought this was so important that she chose to emphasise it in a concurring opinion:

I consider that it was important and significant that the Court should examine the case under both Article 3 and Article 8 of the Convention. Rape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by Article 3 but also the right to autonomy as a component of the right to respect for private life as guaranteed by Article 8. (Concurring opinion of Judge Tulkens, MC v Bulgaria)

The margin of appreciation was taken into consideration and the ECtHR pointed out that the *means* by which the state secure compliance lies within their margin of appreciation, but that nonetheless their must be effective deterrence through criminal-law provisions which are effective to protect against 'grave acts' such as rape,

particularly where children and vulnerable adults are concerned and therefore that the actions of Bulgaria did not fall within their margin of appreciation.

The Article 8 arguments made in *R v DPP, ex parte C* and in *Stubbings and others v the United Kingdom* were unsuccessful. In *R v DPP, ex parte C* the two judges at the Queens Bench Division ruled that although it was ‘regrettable’ that Miss SC had not been informed by the CPS about the decision to discontinue the prosecution (described as being common courtesy at the time in the Code of Practice for Crown Prosecutors and in the Victims Charter), that there was no entitlement for Miss SC to be informed or consulted before this decision was made and there had been no breach of her human rights. The judgment that Mrs Stubbings and the other applicant’s Article 8 rights had not been breached was unanimous, finding that the United Kingdom had protected the applicants’ respect for private life under their criminal laws. Again, when making their (unanimous under this article) judgment that Article 8 had not been breached, the ECtHR emphasised the choice of means a state has to protect the right to private life.

... in view of the protection afforded by the domestic law against the sexual abuse of children and the margin of appreciation allowed to States in these matters, the Court concludes that there has been no violation of Article 8 of the Convention. (para. 67)

5.2.4 The outcomes of Article 13 arguments (Right to an effective remedy)

Three cases made Article 13 arguments, but only one was considered. *X and Y v the Netherlands* was not considered because the lack of a legal remedy was at the heart of Miss Y’s successful Article 8 argument. It was also judged in *MC v Bulgaria* that no separate issue arose under Article 13, presumably because of the same reason as in *X and Y*.

Having not considered Mrs Aydin’s Article 6 argument because of its overlaps with Article 13, in *Aydin v Turkey* the Article 13 argument was considered. Although successful, as with the Article 3 judgment, there was disagreement between the judges. Sixteen judges were of the opinion that Article 13 had been breached and five

were of the opinion that there had been no breach. This is still quite a high level of disagreement, but is not as high as in the Article 3 judgment (which was made at fourteen votes to seven). Their views on the inappropriateness and incompetency of the medical examinations were discussed earlier in the chapter. In addition, the majority judges criticised the inquiry for not attempting to collect any corroborative evidence and for taking no meaningful measures to establish the veracity of the allegation.

The dissenting judges had two main arguments. Firstly, that domestic remedies had not been exhausted and hence that it was too soon to talk of an abuse of process and secondly, that Mrs Aydin had contributed towards the lack of effectiveness of the investigation:

Admittedly, the remedy has not been effective so far, but the responsibility for this lack of effectiveness is to some extent a shared one ... (Partly concurring, partly dissenting opinion of Judge Pettiti)

In addition to Mrs Aydin's failure to collect her own medical evidence, the dissenting judges criticised Mrs Aydin for not making a criminal complaint until eight days after the alleged acts took place and for fleeing the area soon after the event. They also criticised the Human Rights Association she went to for assistance for not trying to find any witnesses that were present at the time of her arrest and for failing to instigate civil or administrative action. As with Article 3, the dissenting judges hence placed more onus on Mrs Aydin's actions than on the actions of the Turkish government:

... the applicant did no more than complain of the alleged facts, moreover in an incomplete manner, and did nothing else to assist the prosecutor's investigation. Not only was she of no assistance for that purpose but she also did everything she could to hamper the proceedings by disappearing for nearly a year without leaving any address. (Individual dissenting opinion of Judge Gölcüklü in *Aydin v Turkey*)

Hence, the dissenting judges expected Mrs Aydin to play a role in making the remedy an effective one.

5.2.5 The outcomes of Article 14 arguments (Freedom from discrimination)

Three cases made Article 14 arguments, but only one was considered. The Article 14 with 8 argument in *X and Y v the Netherlands* was not considered on the basis that a breach of Article 8 had already been found and the Article 14 with 3 argument was not considered because it had already been judged that it was not necessary to consider Article 3. This means that Miss X's argument that the position she was in was discriminatory was never investigated. The same was true in *MC v Bulgaria*, where breaches of Articles 3 and 8 had already been found.

Having already failed in their Article 6 and 8 arguments, in *Stubbings and others v the United Kingdom* the Article 14 argument was considered but also was unsuccessful. In considering their Article 14 argument in relation to Articles 6 and 8, the ECtHR pointed out that in order to prove discrimination it must be shown that others in an '*analogous or similar situation*' (Para. 72) would receive preferential treatment and that the states margin of appreciation can be used in assessing which differences justify different treatment in law. They judged (at eight votes to one) that there had been no violation of Article 14 (with 6 or with 8) because the victims of intentional and unintentional injuries could not be seen as analogous and that even if they could, that this issue would fall within the state's margin of appreciation.

5.3 The impact of the judges' gender in rape victims' cases

Table 5.2 below shows the cases brought by victims and compares information already known from earlier in this chapter (whether the case was won or lost and whether the judgment was unanimous) with the number of male and female judges¹⁷³ as well as the gender of the Registrar and Deputy registrar (where applicable).

¹⁷³ The number of judges hearing cases has varied over time depending on how the court was structured. Once a complaint is deemed admissible (previously this was decided by the commission, currently it is decided by a committee of three judges) the case is heard by either a Chamber (currently seven judges) or a Grand Chamber (currently 17 judges). Generally speaking, whether a case is decided by a Chamber or a Grand Chamber is dependent on the gravity of the complaint. A further re-structure is imminent which will change this structure again - Protocol 14, which was adopted in May 2005 and will come into force when it has been ratified by all signatory states.

Case name	Overall	Unanimous?	Male judges	Female judges	Reg	Dep Reg
<i>X and Y v the Netherlands</i>	Win	Yes	7	0	Male	Male
<i>Stubbings and others v UK</i>	Lose	No	9	0	Male	Male
<i>Aydin v Turkey</i>	Win	No	20	1	Male	Male
<i>Selmouni v France</i>	Win	Yes	14	3	-	Female
<i>MC v Bulgaria</i>	Win	Yes	4	3	-	Male
Totals			54	7	Male=3	Male=4 Female=1

In two of the five cases there were no female judges at all in the chamber (*X and Y v the Netherlands* and *Stubbings and others v the United Kingdom*). Where there were female judges, the ratio of male to female judges ranged from 20:1 (*Aydin v Turkey*) to 1.3:1 (*MC v Bulgaria*). No pattern emerges as to whether the judgment was unanimous based on the gender ratio. In the cases where there was a Registrar the role was always performed by a male and in four out of the five cases the Deputy Registrar was male. The only conclusion that can be drawn from the analysis of the Registrar and Deputy Registrar's gender is that they are predominantly male. It would not be expected that the gender of the deputy/registrar would have any impact on the judgment because they hold no vote.

It is difficult to see if the gender ratio has any impact on whether the case was won or lost from Table 5.2, so cumulative figures are shown below in Table 5.3.

	Male Judges	Female Judges	Ratio
Wins (n=4)	45	7	6.4:1
Losses (n=1)	9	0	9:0
Overall (n=5)	54	7	7.7:1

The overall gender ratio of male to female judges was 7.7:1. In the cases that were won this ratio drops to 6.4:1 and in the one case that was lost this ratio rises to 9:0. While this means that the rape victim was more likely to win their case when the proportion of female judges was higher, no conclusions can be drawn from this because of the low sample size; in particular that only one case was lost.

5.4 Just satisfaction awarded in response to breaches

Looking at those cases that were successful under the ECHR (i.e. the only cases that can be awarded just satisfaction), Table 5.4 shows the non-pecuniary damage awarded (if any) and the costs and expenses awarded. The Articles that were found to have been violated are also listed.

Judgment	Year	Violations	Non-pecuniary damage	Costs & expenses
<i>X and Y v the Netherlands</i>	1985	8 (Fam/private life)	3,000 Dutch Guilders	Not stated
<i>Aydin v Turkey</i>	1997	3 and 13 (Torture and effective remedy)	£25,000	£37,360 minus FRF 19,145 legal aid (French francs)
<i>Selmouni v France</i>	1999	3 and 6 (Torture and fair trial)	FRF 500,000 (French francs)	FRF 113,364 (French francs)
<i>MC v Bulgaria</i>	2003	3 and 8 (Torture and fam/private)	EUR 8,000	EUR 4,110

As discussed earlier in Chapter Three, there are a number of methodological problems related to this aim, in particular the lack of comparability between the currencies. Bearing this in mind and given the lack of common currency in any of the cases brought by victims it is not possible to draw any conclusions solely from this data. An analysis of the preceding text to the award of just satisfaction being made, however, suggests two tentative (though fairly obvious) findings. Firstly, that when the rape was committed by a private individual rather than a state actor it seemed to be the case that the victim was not being compensated for the rape itself but for the states failings:

The Court considers that the applicant must have suffered distress and psychological trauma resulting at least partly from the shortcomings in the authorities' approach found in the present case... (MC v Bulgaria, para. 194)

The Government ... did not challenge the allegations as such, but they argued that the suffering was the result of the act committed by Mr. B and not of the violation of the Convention. (X and Y v the Netherlands, Para. 38)

A vague estimation of the value of the money awarded in the rape victim's cases supports this, with higher awards given when the rape was perpetrated by a state actor. This finding is as would be expected because these are the cases where the traditional, vertical, 'public' effect of human rights is evident.

Secondly, and again not surprisingly, there was some evidence that both applicants and the ECtHR found it difficult to calculate how much money should be awarded to rape victims in light of the ongoing harm the applicants might experience:

The applicants left it to the Court's discretion to determine a standard for compensation. The damage in question does not lend itself even to an approximate process of calculation. (X and Y v the Netherlands, para. 40)

... having regard to the seriousness of the violation of the Convention suffered by the applicant while in custody and the enduring psychological harm which she may be considered to have suffered on account of being raped ... (Aydin v Turkey, para. 131)

Although somewhat of a 'non-finding', this is supportive of other research that has concluded that it is very rare to find a decision relating to just satisfaction that articulates the reasons behind the assessment:

One former judge of the European Court of Human Rights states: 'We have no principles'. Another judge responds, 'We have principles, we just do not apply them'. (Shelton, 1999 pg. 1)

It is interesting to note, although again direct comparisons cannot be made, that the Criminal Injuries Compensation Authority calculate damages for rape as ranging from £11,000 for non consensual vaginal or anal intercourse involving one attacker with no serious injuries up to £33,000 if the rape results in serious internal bodily injury with permanent disabling mental illness confirmed by psychiatric prognosis (Criminal Injuries Compensation Authority, 2001).

5.5 Chapter conclusions

Most of the cases brought by rape victims were successful in intramural terms. Under Article 3 the Court accepted that the psychological, physical and emotional nature of rape means that it is a particularly grave and abhorrent form of ill treatment that meets the level required to define it as torture. This was the case regardless of whether the rapist(s) was a state actor or a private individual whose actions the state had failed to prosecute due to defects in substantive criminal law. While there were disagreements about whether it was the role of the states to provide evidence that the

torture *did not* occur or the role of the victim to show that it *did* occur, the majority of judges accepted that the onus was on the state to provide an explanation for any injuries sustained while in police custody, although the issue was sidestepped slightly in relation to the rape allegation in *Selmouni v France* (by not considering the rape allegation in its own right because the other acts alone amounted to torture).

Article 6 was used in three cases and considered in two. Only Mr Selmouni's argument that the trial did not take place within a reasonable length of time was successful, although in *Stubbings and others v UK* the Court did point out that the way the United Kingdom interpreted the right to a fair trial may not be the most suitable in relation to women who were raped and sexually abused when they were children. Two Article 8 arguments were successful and both related to the positive duty on the state to protect individuals rather than arguing that the state had directly done something that did not respect their right to a private and family life.

Chapter One described what McCafferty (2003) calls the 'no need' approach to Article 14, whereby arguments relating to discrimination were not always considered if a breach had already been found in relation to the Article that was being used alongside Article 14 (as Article 14 is not a 'standalone' Article). Although based on small numbers, the data from this research is supportive of McCafferty's argument with two out of the three cases making Article 14 arguments not being considered. However, this finding was not limited to Article 14. The same was true of Article 13 (two of the three cases did not consider the Article 13 argument). The no need approach was also used once in relation to Article 3 and once in relation to Article 6. Although the Court is notoriously overworked with a backlog of cases that they will probably never get through without further reform to its systems¹⁷⁴, the possible consequences of not considering arguments should not be ignored. One possible consequence is solely a financial one, in that a higher level of just satisfaction may be given if a higher number of Articles have been breached. A second, more far reaching consequence relates to the discussion in Chapter One about the potential for women to create their own jurisprudence. If, for example, rape by a non-state actor had been judged to fall under the ambit of Article 3 the first time it was made in 1985 (in *X and*

¹⁷⁴ The last reform took place in 1998 when they abolished their two-tier system of a Commission and a Court.

Y v the Netherlands where the argument was not considered) then further cases may have been brought by applicants against other countries regarding loopholes in their rape laws.

The margin of appreciation was mentioned in three of the six judgments (where it was mentioned a total of 17 times). In *Stubbings and others v United Kingdom* the margin of appreciation was crucial to the judgment. No further conclusions can be made in terms of the outcomes of rape victims' use of human rights until they can be compared with the outcomes of rape defendants' use. Further discussion of rape victims' cases will take place after the data analysis relating to defendants has been considered (at the end of the next Chapter).

**CHAPTER SIX: THE OUTCOMES OF DEFENDANT'S HUMAN RIGHTS
ARGUMENTS**

6.1 Introduction

Table 6.1 (below) shows the same information considered in the previous chapter on rape victims for rape defendants in terms of the case in intramural terms.

Table 6.1 Win/lose analysis – defendants use of human rights								
Case name	Overall	5 Liberty/security	6 Fair trial	7 No punishment	8 Fam/private life	Unanimous?		
<i>Englert v Germany</i>	Lose		Lose			No		
<i>T v Italy</i>	Win		Win			Yes		
<i>Stanford v UK</i>	Lose		Lose			Yes		
<i>SW v UK</i>	Lose			Lose		Yes		
<i>G v France</i>	Lose			Lose		Yes		
<i>Baegen v the Netherlands</i>	N/C		N/C			Yes		
<i>Trzaska v Poland</i>	Win	Win	Win			Yes		
<i>Mattoccia v Italy</i>	Win		Win			Yes		
<i>A-G Ref (No 3 of 1999)</i>	-		-		-	-		
<i>R v T, R v H</i>	Win		Win			-		
<i>R v Rooney</i>	Lose		Lose			-		
<i>R v Porter</i>	Lose		Lose			-		
<i>R v Morgan</i>	Lose		Lose			-		
<i>R v C and others</i>	Lose		Lose			-		
<i>R v A</i>	Win		Win			-		
<i>GB v France</i>	Win		Win			Yes		
<i>R v M, R v Kerr, R v H</i>	Lose		Lose			-		
<i>R v Archibald; A-G Ref (No. 69 of 2001)</i>	Lose		Lose			-		
<i>Kucera v Austria</i>	Lose		Lose			Yes		
<i>R v R and another</i>	Lose		Lose			-		
<i>R v Laskey</i>	Lose			Lose		-		
<i>MM v Netherlands</i>	Win				Win	No		
<i>Mellors v the UK</i>	Win		Win			Yes		
<i>Matwiejczuk v Poland</i>	Win	Win	Win		Win	Yes		
<i>Korellis v Cyprus</i>	Lose		Lose			Yes		
Totals	Win	9 (38%)	2 (100%)	8 (40%)	0 (0%)	2 (100%)	Yes	12 (86%)
	Lose	14 (58%)	0 (0%)	11 (55%)	3 (100%)	0 (0%)	No	2 (14%)
	N/C	1 (4%)	0 (0%)	1 (5%)	0 (0%)	0 (0%)		

Table 6.1 shows that overall, rape defendants were more likely to lose their case than to win (58% compared with 38% respectively). This was the opposite in rape victim's cases, where they were more likely to win than lose their case overall. The decisions made in cases taken by rape defendants were more likely to be unanimous than in decisions regarding rape victims (86% compared with 60% respectively). Only one argument was not considered, and the reason for non-consideration was related to the defendant rather than to the Court.

All three Article 7 arguments were unsuccessful. Both Article 5 arguments and both Article 8 arguments were successful. The Article 8 argument in Attorney General's Reference (No 3 of 1999) is not coded as being successful or unsuccessful for the defendant because he had already been acquitted for rape and the case was heard to clarify a point in law.

6.2 The outcomes of Article 5 arguments (Right to liberty and security)

Both of the Article 5 arguments were taken under the ECHR, both were unanimous judgments and both were successful. In *Trzaska v Poland* the Court judged that two parts of Article 5 had been breached because the length of time he was detained on remand was contrary to his right to be brought to trial within a reasonable time (Article 5 § 3) *and* that the proceedings regarding the lawfulness of his detention while on remand were unfair (Article 5 § 4). In *Matwiejczuk v Poland* the Court also agreed that the length of pre-trial detention had been excessive and found that Article 5 had been breached.

6.2.1 The outcomes of Article 6 arguments (Right to a fair trial)

The outcomes of Article 6 arguments is again split into sub-categories as they were when describing how the Article had been used. Again, this is because of the high number of cases.

Length of time between charge and trial

The four cases where it was argued that the length of time before the case reached court was too long were all successful (*Trzaska v Poland*, *Mattoccia v Italy*, *Matwiejczuk v Poland*, *Mellors v the United Kingdom*). In each case the ECtHR judged that the delay had been excessive and unreasonable and each of the judgments were unanimous. This means that the breach of two separate Articles (i.e. 5 and 6) were found in *Trzaska v Poland* and *Matwiejczuk v Poland* based on related issues; if the length of time before the case reached court had not been unreasonable then their pre-trial detention would not have been unreasonable.

In *R v Porter* the argument that the length of time before trial had not been long enough was not successful. Although the Court of Appeal described the trial judges decision not to allow an adjournment as 'unwise' and also accepted the defendant's argument that a warning should have been given to the jury, they did not accept that this made the trial unfair because of the weight of evidence against Mr Porter. Judge Rafferty explained:

... the Crown's case against Porter was on any view compelling. There was not only the evidence of the complainant but also that of her immediate distress and hysteria, her injuries, the tape, the traces of her body hair upon it, and the presence in the flat of the metal pipe ... In our judgment, the evidence as it emerged founded so strong a case that we are satisfied that the conviction is safe. (R v Porter, para 25)

Issues about the trial unrelated to evidence

Four of the five cases that were about the rape trial but were not directly about evidence were not successful. In *Korellis v Cyprus*, the ECtHR judged unanimously that even though a judge acted as part of an appeal panel that reviewed his own decision, this did not render the trial unfair because the outcome of the appeal panel (whether a re-examination of the victim's knickers could be carried out) did not play a decisive role in the evidence against Mr Korellis:

... the Court gives special weight to the fact that the conviction of the applicant was mainly based on the oral testimony of the complainant, who was described by the Assize Court as "completely credible". The presence of Vaseline on the complainant's

knickers was only one of three subsidiary elements of evidence corroborating the complainant's testimony. (Korellis v Cyprus, para. 35)

The ECtHR hence viewed the trial as a whole in judging whether it had been a fair one rather than judging that even if one part had been unfair then this necessarily resulted in the whole trial being unfair.

In *Kucera v Austria* the ECtHR used case law to show that a defendant's attendance at an appeal should only occur if their presence is necessary in the interests of justice, judging that this was not the case in Mr Kucera's case. In *R v M; R v Kerr; R v H*, the argument that the trial would not be fair because of the mental disabilities of the defendants was judged to raise no human rights issues. Because the trial in their case could only result in an acquittal and hence no penalty could be imposed this was incongruent with the objective of human rights; to protect citizens from the abuse of their rights by the state. The problems Mr Stanford had hearing the victims evidence in *Stanford v the United Kingdom* were found not to have been the fault of the state who were able to show that acoustic design targets had been met in the building of the new court and that they should not be held responsible for the decision the accused legal team made in not alerting the court to the problem at the time. The one successful case in this subsection was in *T v Italy*, where it was judged that Italy did not make sufficient effort to locate Mr T (particularly since Mr T had recently renewed his passport) before declaring him untraceable and trying him in absentia.

Evidential issues

Three of the five arguments made in relation to sexual history evidence were successful. Of the two unsuccessful cases, it was judged in *R v Rooney* that although section 41 of the Youth Justice and Criminal Evidence Act 1999 came into force after his first trial but before his retrial the sexual history evidence he wished to cross-examine the victim on was not central to the re-trial and hence that the trial was a fair one. *R v Morgan* was also unsuccessful, with the court judging that the judge had been correct to warn the jury that he should have stated when questioned by the police that he had had a previous sexual relationship with the victim if he wished to rely on it in court and that the jury could draw inferences from this if they did not

accept that he was still drunk when questioned by the police (the police interview had taken place 18 hours after Mr Morgan was taken into custody).

R v A was one of the three successful cases relating to sexual history evidence and influenced the decision of the other two successful sexual history evidence cases. Following the certified question that the House of Lords were asked (quoted earlier on pg. 133), a decision was needed as to whether section 41 could be read down (using Section 3 of the Human Rights Act 1998) to be compatible with Article 6 of the Human Rights Act 1998 or whether a declaration of incompatibility would be required (using Section 4).

Acknowledging the previous problems that had existed pre-section 41, and accepting that most of section 41 was compatible with the right to a fair trial (e.g. to prevent sexual history evidence being used in relation to men other than the defendant), they argued that sexual history evidence relating to the victim's relationship with the defendant may sometimes be necessary to ensure a fair trial:

As a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant's state of mind. It cannot, of course, prove that she consented on the occasion in question ... But it is logically relevant to that issue. After all, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue. It is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not usually blot out all memories. What one has been engaged on in the past may influence what choice one makes on a future occasion. Accordingly, a prior relationship between a complainant and an accused may sometimes be relevant to what decision was made on a particular occasion. (R v A, para. 31)

It was therefore ruled that sexual history evidence may be relevant in some cases other than those specified in section 41 and that to disallow that evidence may result in the defendant not having a fair trial in breach of Article 6, despite recognising the rights of the complainant in general terms:

It is plain that a balance must be struck between the right of the defendant to a fair trial and the right of the complainant not to be subjected to unnecessary humiliation and distress when giving evidence. (R v A, para. 51)

However, the Law Lords argued that this did not mean that a declaration of incompatibility was needed. Rather, they stated that judges should 'read down' section 41 in cases where it was necessary to admit such evidence in order to ensure a fair trial for the defendant. This, they argued, could be done using section 41(3)(c) which states that sexual history evidence may be used if the court is satisfied it is relevant, within the following parameters:

It is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar [...] that the similarity cannot reasonably be explained as a coincidence.

The words 'in any respect' and 'similar' were particularly emphasised by the Law Lords:

... there should be a similarity in any respect between the two incidents of sexual behaviour which cannot reasonably be explained as a coincidence. It is only a similarity that is required, not an identity ... The task for the judge is to examine the evidence proposed to be led and see if such a similarity in some respect can be found. The matter comes eventually to be one of the circumstances of the particular case. (Lord Clyde in R v A, para. 135)

This is clearly an extremely wide reading of section 41, and one that arguably is contrary to what parliament intended. The playing with the apparently inelastic wording of section 41(3)(c) and the many parliamentary debates pre-section 41 has led Spencer (2000) to highlight his '*wonderment at the change that section 3 of the Human Rights Act wrought*':

Four of the five Law Lords were clear that [section 3 of the HRA] gives the courts power to bend an Act to fit the requirements of the Convention, even where the Act is not ambiguous. We may be on the threshold of exciting times! (Spencer, 2001 pg. 454)

Similarly, Sandy (2001) questioned whether this meant the death of the declaration of incompatibility.

It is also important to note that two third party interventions were made in *R v A*. The first was a written intervention by Rape Crisis Federation of England and Wales, the Campaign to End Rape, The Child and Woman Abuse Studies Unit and Justice for

Women which explained how complainants feel when they are questioned about their sexual history evidence in court and stated the reasons why previous sexual conduct was not relevant in rape cases (this intervention was permitted). A second application to intervene was made by the Fawcett Society who argued that any decision would be biased because of the all male House of Lords (this intervention was not allowed and no reasons why were offered). How much impact it actually had is very difficult to assess; although only one of the judges referred to the written intervention, it is possible that it assisted the other judges by contextualising the issue (Samuels, 2005).

R v A was followed in *R v R and another*, judging that while a strict interpretation of Section 41 would preclude the sexual history evidence the defendants had wanted to use, its exclusion deprived the defendants of a fair trial and that the HRA now provided a 'gateway' to allow the evidence. Taking the decision of *R v A* into consideration, the Court of Appeal in *R v T; R v H* ruled that questions about previous false sexual offence complaints or the failure to complain in the past could be allowed even if they went principally to credibility because the questions were essentially about past statements and not 'about' sexual behaviour. In doing so, as in *R v A*, the judges were keen to point out that they accepted that victims have rights and interestingly this is the only case where the rights of the victim are clearly stated in specific convention terms rather than in general terms. Nonetheless, it was still decided that the rights of the defendant outweighed those of the victim:

... we recognise that victims of crime have rights as well as defendants and that in cases of sexual offences the complainant has a right to respect to a private life under art 8 of the convention which would include privacy in respect of her previous sexual conduct and experiences ... in the present cases the balancing exercise must recognise the gravity of the charges faced by these two appellants and the serious consequences which they may face if convicted. (R v T; R v H, para. 38)

Of the two cases where it was alleged the defence had not had equality of arms (access to all the information the prosecution had), one was successful and the other unsuccessful. The ECtHR held that the introduction of new evidence at the start of the trial which led one of the expert witnesses to alter their oral evidence from their written submission had breached Article 6 in *GB v France*. Where the defence had found out that the victim had previously lied to the police in an unrelated matter, this was not found to breach the right to a fair trial in *R v C and others*. The Court of

Appeal noted that during the trial a ‘wholesale assault’ on the victim’s credibility had been mounted even without the additional evidence, and commented that the case did not rely on issues of credibility anyway because of the strength of other evidence.

Of the five remaining cases, the Article 6 argument was not considered in *Baegen v the Netherlands*. This was because Mr Baegen failed to respond to correspondence from the ECtHR to confirm he wanted to take part in the proceedings and designate a legal representative. As explained earlier, in *Attorney Generals Reference (3 of 1999)* the defendant had already been acquitted and so the case could not be successful or unsuccessful. The remaining two cases in this section were both unsuccessful. In *Englert v Germany* the ECtHR did not accept (at 16 votes to 1) that the discontinuance of his prosecution constituted a ‘conviction in disguise’ because the discontinuance did not indicate guilt or innocence but rather a ‘state of suspicion’. In *Attorney Generals Reference (69 of 2001)* the argument that the victim’s evidence being given by video breached the right to a fair trial was dismissed, with the judges ruling that it had no impact at all on the fairness of the trial.

6.2.2 The outcomes of Article 7 arguments (No punishment without law)

None of the three Article 7 arguments were successful. In *G v France* the court judged unanimously that there had been no breach of Mr G’s human rights. Although he had been prosecuted for acts classified as rape rather than as indecent assault with coercion, the latter being the classification of the acts when they took place, the re-classification had actually downgraded the offence. The ECtHR ruled that although the application of the new law had been retrospectively applied, this had actually operated in Mr G’s favour.

The two marital rape cases were also unsuccessful. It is necessary to look at the first of these cases, *SW v the United Kingdom* in detail because of the legal commentary that surrounds the judgment. Within feminist social science literature and the feminist movement as a whole Mr Justice Owen’s decision in *R v R* to abolish the marital immunity to rape, has been heralded as a success story. Following the Crown Court verdict, an appeal against conviction was dismissed at the Court of Appeal, where Lord Lane stated the opinion of the court:

We take the view that the time has now arrived when the law should declare a rapist a rapist subject to the criminal law, irrespective of his relationship with his victim.

The decisions made at the Crown Court and the Court of Appeal were subsequently supported at the House of Lords:

Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable...

For feminists what was of primary concern was that the decision made by Justice Owen to criminalise rape within marriage was upheld. However, discussions within the legal field had a different focus. While not disputing the notion that sexual intercourse without consent within marriage *should* be a criminal offence, it was argued that it was not within the courts power to make this decision; that the role of the judge is to interpret law rather than to create it. This is why the human rights challenge in *SW and CR v the United Kingdom* have been described as '*seemingly strong complaints*' (e.g. Norrie, 2001 pg. 266) and why the outcome of the ECHR case has been questioned.

Many believe that the very fact that the case was about rape coloured the judgment and led to a different case outcome to what would have been obtained had the act been a less serious one and/or one that there was no pressure to criminalise. Change the act from one of rape within marriage to a different act, and the argument made by legal academics becomes clearer. Imagine for example that you do an act that does not appear in any legislation as a criminal offence and you are arrested and prosecuted for this act. You know that other people, in some cases very recently, have also been prosecuted for this act but have been acquitted in court because the judge said that the act was not a criminal offence, you know that parliament had recently had the chance to make the act a criminal offence but they had not done so and you also know that the Law Commission had reported that legislation would be needed to make it into a criminal offence. Imagine then that two appeal courts upheld your conviction and when you complained under the ECHR that you had been convicted for an act that was not a criminal offence at the time you did it, something specifically

prohibited under Article 7, but the ECtHR judged that your human rights had not been breached. Following established rules of legal interpretation, upholding *R v R* and then finding no breach at the ECtHR seems illogical.

The act in question in *SW v United Kingdom* was a violent attack on another individual's psychological, physical and sexual integrity. Both of these points, the illogical legal reasoning used to reach a decision that Mr SW's human rights had not been breached and the nature of the act are reflected in how legal academics have interpreted the case:

... even if the outcome of these cases is to be welcomed considerable disquiet should be raised by its method of achievement (Ghandi and James, 1997 pg. 17).

The Court of Appeal and the House of Lords did what had to be done. If the methodology was faulty, the result was not. (Temkin, 2002 pg. 85)

So how did the ECtHR manage to justify the decisions made in domestic courts without finding a breach of human rights? Agreeing with the United Kingdom's government, they stated that there had been an evolution of the offence of rape through case law, reflective of changes in the way women were perceived in society, which meant that it was reasonably foreseeable that the act would become a criminal offence. They highlighted that although Article 7 requires criminal offences to be clearly stated, that there would always be some degree of judicial interpretation in a common law legal system and refused to accept that the courts had acted as legislators and created a new criminal offence. They acknowledged the rights of victims of rape only in passing and in general convention terms:

... the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom. (*SW v UK*, pg. 16)

It makes little sense from reading the report neither why the appeal in *Laskey* (the second of the marital rape cases) was allowed nor why it was reported because it raised the same issue already decided in *CR v UK*. Not surprisingly, this was a very

short law report, little over a page, in which the court ruled that *R v R* applied and that there had been no breach of human rights because the ECtHR had previously upheld the House of Lords decision in *R v R* in *CR v UK* and *SW v UK*.

6.2.3 The outcomes of Article 8 arguments (Right to respect for private and family life)

Where it was possible for a defendant to ‘win’ or ‘lose’ an Article 8 argument, both cases were successful. Again, it is not necessary to look at the Article 8 claim made in *Matwiejczuk v Poland* because it relates to an imprisonment issue.

In *MM v the Netherlands* the ECtHR judged that Mr MM’s rights had been breached because supplying the rape victim with a tape player and suggesting she tape telephone conversations represented a direct state infringement into his right for respect for private life. All but one of the judges (at six votes to one) rejected the Netherlands argument that because it was the rape victim who actually activated the tape recorder there was no state infringement. The dissenting opinion, given by the only female judge in the chamber, also showed a clearer understanding of the vulnerable position the rape victim was in:

The situation in which Mrs S. found herself is unfortunately not an unusual one. It is a well-known fact that in cases which concern sexual harassment and violence against women it is difficult for the woman to be believed. Her word stands against that of the perpetrator. In the present case she was all the more vulnerable as her husband was in jail and the perpetrator was the husband's lawyer. I see the police action, as the Supreme Court did, as a suggestion or information to Mrs S. that one way of getting evidence would be for her to use her legal right to tape-record an incoming telephone call. It was left entirely to her to decide whether she wanted to make use of the recorder and the tapes. (MM v the Netherlands, dissenting opinion of Judge Palm)

It is still possible to discuss the judgment made in Attorney Generals Reference (No 3 of 1999) even though it was not possible for the rape defendant to ‘win’ or ‘lose’ the case because he had already been acquitted. The Court of Appeal, on its second referral by the Attorney General, reversed the decisions made by the trial judge and the first Court of Appeal, ruled that if the DNA evidence had been allowed in the trial that this would not have amounted to an unlawful interference with the defendant's

right to a private life and hence would not have breached Article 8. They refused to accept the argument that because a DNA sample should be destroyed following an acquittal that the use of such evidence could then never be ‘in accordance with law’, arguing that such interference would be necessary in a democratic society to ensure the prosecution of crime, stating firmly ‘*There is plainly no breach of Article 8*’ (Lord Steyn, section VIII) and highlighting what they called the ‘*triangulation of interests*’:

It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public. (Attorney General’s Reference (No 3 of 1999), Section VI)

Essentially, what the House of Lords ruled was that both the murder defendant and the rape defendant should not have been acquitted but by this stage it was too late. The decision is, however, important for future cases.

6.3 The impact of the judges’ gender in rape defendant’s cases

Tables 6.2 and 6.3 below look at the same factors considered above for rape victims in terms of rape defendants.

Table 6.2 Gender of judges in rape defendants cases						
Case name	Overall	Unanimous?	Male judges	Female judges	Reg	Dep reg
<i>Englert v Germany</i>	Lose	No	16	1	Male	Male
<i>T v Italy</i>	Win	Yes	9	0	Male	Male
<i>Stanford v UK</i>	Lose	Yes	9	0	Male	Male
<i>SW v UK</i>	Lose	Yes	9	0	Male	-
<i>G v France</i>	Lose	Yes	8	1	Male	-
<i>Baegen v the Netherlands</i>	N/C	Yes	8	1	Male	Male
<i>Trzaska v Poland</i>	Win	Yes	5	2	Male	-
<i>Mattoccia v Italy</i>	Win	Yes	5	2	Male	-
<i>GB v France</i>	Win	Yes	6	1	Female	-
<i>Kucera v Austria</i>	Lose	Yes	5	2	Male	-
<i>MM v the Netherlands</i>	Win	No	6	1	Female	-
<i>Mellors v the UK</i>	Win	Yes	6	1	-	Female
<i>Matwiejczuk v Poland</i>	Win	Yes	5	2	Male	-
<i>Korellis v Cyprus</i>	Lose	Yes	5	2	Female	-
Totals			102	16	Male=10 Female=3	Male=4 Female=1

Table 6.2 shows that in three of the fourteen cases (21%) there were no female judges at all in the chamber (*T v Italy*, *Stanford v the United Kingdom* and *SW v the United Kingdom*). Where there were female judges, the ratio of male to female judges ranged from 16:1 (*Englert v Germany*) to 2.5:1 (*Trzaska v Poland*, *Mattoccia v Italy*, *Kucera v Austria*; *Matwiejczuk v Poland*, and *Korellis v Cyprus*). No pattern emerges as to whether the judgment was unanimous based on the gender ratio. Again, the registrars and deputy registrars were most likely to be male.

It is difficult to see if the gender ratio has any impact on whether the case was won or lost from Table 6.2 so cumulative figures are shown below in Table 6.3.

Table 6.3 Gender ratio in rape defendants cases			
	Male Judges	Female Judges	Ratio
Wins (n=7)	42	9	4.7:1
Losses (n=6)	52	6	8.7:1
Totals (n=13)	94	15	6.3:1

Table 6.3 shows that overall, when a case was considered, the gender ratio of male to female judges was 6.3:1. In the cases that were won this ratio drops to 4.7:1 and in the cases that were lost the ratio rises to 8.7:1. What this shows is that rape defendants were more likely to win their case when the proportion of female judges was higher.

In total, male judges sat far more often, outnumbering female judges by 148 to 22. Because judges are chosen by lot this reflects the gender imbalance of male to female judges as a whole and is not specific to rape cases. No meaningful conclusions can be drawn from the data on the impact of gender on the outcomes of cases because both rape victims and rape defendants were more likely to win their case when the proportion of female judges was higher than average.

Analysis of the dissenting opinions is also inconclusive, largely due to the small number of cases where female judges were sitting and where the judgment was not unanimous. While the only judge who was female in *MM v the Netherlands* was also the only judge who dissented, stressing how difficult it is to get evidence that rape occurred, more data would be needed, for example by widening the sample

boundaries to all forms of violence against women, to be able to show whether this is a pattern or not.

6.4 Just satisfaction awarded in response to breaches

Taking into account cases that were successful at the ECHR (i.e. the only cases that can be awarded just satisfaction), Table 6.4 shows the non-pecuniary damage awarded (if any) and the costs and expenses awarded. The Articles that were found to have been violated are also listed.

Judgment	Year	Violations	Non-pecuniary damage	Costs & expenses
<i>T v Italy</i>	1992	6 (Fair trial)	None awarded	None awarded (Legal aid claimed)
<i>Trzaska v Poland</i>	2000	5 and 6 (Liberty/security and fair trial)	None awarded	PLN 6,000 (Polish zlotys)
<i>Mattoccia v Italy</i>	2000	6 (Fair trial)	ITL 27,000,000 (Italian lire)	ITL 15,000,000 (Italian lire)
<i>GB v France</i>	2001	6 (Fair trial)	FRF 90,000 (French Francs)	None claimed
<i>MM v the Netherlands</i>	2003	8 (Fam/private life)	None claimed	EUR 10,000
<i>Mellors v the UK</i>	2003	6 (Fair trial)	EUR 2,800	EUR 2,800
<i>Matwiejczuk v Poland</i>	2003	5,6 and 8 (Liberty/security, fair trial and fam/private life)	EUR 2,000	EUR 790

As discussed earlier in Chapter Three, there are a number of methodological problems related to this aim, in particular the lack of comparability between the currencies.

6.5 Chapter conclusions

Overall, defendants were more likely to be unsuccessful than successful in terms of their human rights arguments. However, both of the arguments based on Article 5 regarding the length of pre-trial detention were successful, as were the four arguments made under Article 6 that the length of time before the trial was unreasonable. Some arguments to allow sexual history evidence were successful, with the House of Lords

creating in *R v A* what was referred to as a 'gateway' to allow such evidence in *R v R and another*. Where the collection of evidence of rape was seen to infringe on a defendant's right to respect for private life his Article 8 rights were found to be breached in *MM v the Netherlands*.

Where there was some unfairness but that unfairness did not mean that the trial overall was not a fair one, Article 6 arguments were unsuccessful. In *Korellis v Cyprus* it did not matter that a judge had judged his own decision about the relevancy of further examination of the victim's knickers at the appeal stage because the knickers were not central to the trial; in *R v Rooney* it did not matter that he could not cross-examine the victim about an alleged sexual experience in his re-trial because it was not relevant whether it was true or not; in *R v C and others* it did not matter that the defence were not provided with information the prosecution had about the victim lying to the police in an unrelated incident because the case did not hinge on credibility; and in *Attorney Generals Reference (69 of 2001)* it had no bearing to the fairness of the trial whether the victim's evidence was given via video.

Article 7 arguments were also unsuccessful, however legal commentary on *SW v the United Kingdom* shows ambivalence towards the judgment in legal terms but not in social terms.

The Courts 'no need' approach was used more frequently in relation to arguments made by rape victims than defendants. Only one argument (in one case) made by a rape defendant was not considered by the ECtHR in comparison to eight arguments (in three cases) made by rape victims (this includes the two arguments made by Mr X). Hence, the 'no need' approach was used in one out of fourteen defendants cases and three out of five victims cases. In the one defendants case however, the Court did not consider Mr Baegan's argument against the Netherlands because he had not replied to correspondence from the ECtHR rather than taking the 'no need' approach. This means that the 'no need' approach identified by McCafferty (2003) was far more likely to be used in relation to arguments made by rape victims than rape defendants.

It is likely that this is because rape victims generally used more convention rights than rape defendants did in their cases; all five ECHR cases taken by rape victims

used more than one convention right in comparison to only two of the fourteen rape defendants cases. This suggests that the use of human rights in cases involving rape victims is a less clear area of jurisprudence and that there is more space for developments. This may also be true of jurisprudence relating to victims more generally. As the 'no need' approach would not be taken in cases where only one argument was made under one convention right (if there was no need to consider the only argument made it would have been inadmissible), this means that the likelihood of it occurring would be higher the more arguments were made (i.e. in the rape victims cases).

Even so, there were some examples where all of the rape defendants arguments were considered even when there was considerable overlap between them; one of the reasons given for there being no need to consider arguments in victims cases. The best example of this is in *Trzaska v Poland*, where Mr Trzaska had two arguments considered and breaches found under Article 5 and one related argument considered in Article 6 regarding the length of time taken before trial *and* the length of time spent in pre-trial detention. In contrast, in *X and Y v the Netherlands* only one of Miss Y's four arguments was considered and neither of Mr X's were considered. It is important to remember that all of these arguments had been judged admissible. There also seems to have been change over time. In *X and Y v the Netherlands* in 1985 there was 'no need' to examine arguments made under both Articles 8 and 3:

Having found that Article 8 (art. 8) was violated, the Court does not consider that it has also to examine the case under Article 3, taken alone (art. 3) or in conjunction with Article 14 (art. 14+3). (X and Y v the Netherlands, para. 34)

Yet in *MC v Bulgaria* in 2003 the need to consider both of these arguments was seen as so important that it should be explicitly highlighted in a concurring opinion (these are rarely given at the ECtHR):

... it was important and significant that the Court should examine the case under both Article 3 and Article 8 of the Convention. (Concurring opinion of Judge Tulkens, MC v Bulgaria)

This may represent a growing recognition of the importance of examining all arguments, but alternatively it may simply represent the view of one (female) judge

who put her case strongly to the rest of the chamber. There is no other research that could support either of these positions.

Judgments at the ECtHR were more likely to be unanimous in rape defendants than rape victims' cases. Three out of five cases (60%) were unanimous in their judgments in respect of all Articles in relation to rape victims compared with twelve out of fourteen rape defendants' cases (86%). Additionally, the scale of disagreement was also higher in rape victims' cases. In *Aydin v Turkey* there was disagreement regarding two Articles, with seven out of 21 judges dissenting in relation to Article 3 and five out of 21 judges dissenting in relation to Article 13. In the other victims' case and the two defendants' cases only one judge dissented in each case.

In intramural terms using the 'win/lose' analysis of success, arguments made by rape victims were *more likely* to be successful than those made by rape defendants. However, this is proportional and based on a small sample of cases taken by rape victims. Because there were more cases brought by rape defendants, numerically more breaches were found in respect of defendants' rights. This means that the picture of success painted in solely intramural terms is mixed, and emphasises the need to look at success in more than intramural terms and consider the potential policy change created by the judgments.

CHAPTER SEVEN: POTENTIAL FOR CHANGE

7.1 Introduction

Described as a '*web of decisions*' (Easton, 1953 pg. 130), it is notoriously difficult to capture the complexities involved in the making and interpretation of policy. Pre-HRA, the impact that international human rights had on the policy making process was extremely difficult to assess because it was largely discussed beyond the closed doors of government (Feldman, 2004b). It is easier to assess the impact of human rights on policy post-HRA. However, just as social scientists have tended to overlook the ECHR (Greer, 2004), the impact of the HRA has not been subject to the social and policy analysis that it is arguably worthy of.

Bearing in mind the limitations outlined in Chapter Three, this chapter addresses Aim 6 and looks at the potential policy change that may have been created by the judgments discussed in the previous chapters. Judgments that resulted in no policy change are considered first, followed by judgments where there was the potential for change.

7.2 No policy change

As described in Chapter Three, judgments resulted in no policy change if the case was unsuccessful or if the measures needed to address the breach were only individual ones.

7.2.1 No change: applicant lost case

Cases that were lost under the ECHR or HRA generally had no potential to create any change. This is because it was judged their human rights were not breached so no change was necessary.

Victim's cases

Two victims cases were lost, however in one of these cases (*Stubbings and others v the UK*) it was suggested that change might be needed even though the current situation did not result in a breach of human rights (so this case is discussed in a

different section). The other case that was lost (*R v DPP, ex parte C*) had the potential to create policy change which would have resulted in rape victims in certain situations being consulted before the CPS discontinued the case, however the change was not realised because the case was lost. Instead, the judge chose to reinforce the policy status quo. If the change had been made this may also have reduced the likelihood of a rape victim experiencing a miscarriage of justice of the 'indefensible decisions not to charge or prosecute' type. This is because the rape victim had not completed her police interview because she ran to the toilet crying. Had she known that the case was to be discontinued on the basis of a lack of evidence she may have felt able to try again to finish the interview, hence potentially giving more evidence. Importantly, this would have reduced the victim's likelihood of experiencing a miscarriage of justice without impacting on the fairness of the trial and hence without impacting on any of the defendant's rights (either general due process or human rights). The new CPS policy for prosecuting cases of rape states that they will offer to meet with the victim to provide a full explanation if they decide to drop or substantially reduce a rape charge (CPS, 2004). This new policy is unlikely to have been influenced by the human rights argument made in *R v DPP, ex parte C*, firstly because the argument was unsuccessful and secondly because the new policy relates to an 'explanation' rather than a 'consultation'.

Defendant's cases

Fourteen defendants cases were unsuccessful and led to no potential policy change. Some of these cases did not have the potential to create any policy changes anyway because they could only have resulted in individual measures had they been successful. All of the Article 7 claims fall into this category; indeed all of the Article 7 arguments arose *from* a policy change that the applicants argued should not have been applied in their case. For example, in the cases where it was argued that they should not have been prosecuted for rape when it was against their wives (*SW v United Kingdom* and *R v Laskey*) it was not the policy itself they argued breached their human rights, but rather the way in which the new policy had been unfairly applied. Hence, if they had won their cases they may have had their conviction overturned and been awarded financial damages but the policy itself (that rape within marriage is a criminal offence) would not have needed changing in order to prevent further breaches.

None of these cases, if they had been successful, could potentially have resulted in legislative change. Some may have resulted in case-law change, but these case-law changes would not have been specific to rape. For example, in *Kucera v Austria* where it was unsuccessfully argued that Mr Kucera should have been allowed to attend his rape appeal hearing, the case law change potentially would have been that convicted people have the right to attend their appeal hearing rather than that men convicted for rape have this right. Another example of this is in *Englert v Germany* where Mr Englert unsuccessfully argued that he should have had his expenses refunded and received compensation when his rape charge was withdrawn. Again, the potential change here would have related to *all* defendants.

Summary

None of the defendant's cases where there was no change because the case was lost would have had the potential to create legislative change if won. Some had the potential to create non-rape specific case-law change and others, particularly Article 7 arguments, could only have resulted in individual measures. In contrast, the rape victim's case could have created policy change if it had been successful. It is not known how far reaching this policy change could have reached (rape victims only, all vulnerable victims or all victims).

7.2.2 No change: applicant(s) won case

Where the applicant(s) won their case but there was no change this was because general policy change was not needed; the judgment meant that only individual measures were necessary.

Victim's cases

There were no cases brought by victims that were successful but created no policy change.

Defendant's cases

Five cases brought by rape defendants were successful but cannot be said to have potentially created any specific policy change. These were the four cases where it was successfully argued that the length of time was excessive (*Trzaska v Poland*, *Mattoccia v Italy*, *Mellors v United Kingdom* and *Matwiejczuk v Poland*) and the one where there was no equality of arms because new evidence was introduced at the start of the trial with no adjournment (*GB v France*). These may have fallen under the category of case-law change but it is presumed that none of these countries actually had a policy to take as much time as possible before trying a defendant or for the prosecution not to share evidence with the defence and therefore the judgments can not actually change the policy because there was not one to change. The issue was instead about the implementation of policy, most often in relation to procedural law.

7.3 Policy change

As described in Chapter Three, there was potential for policy change if a case was lost but change was suggested within the judgment or if the case was won.

7.3.1 Possible policy change

Victim's cases

Stubbings and others v United Kingdom had the potential to create change and the ECtHR hinted that change might be necessary even though the current policy did not actually breach any of the convention rights:

There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future. (Stubbings and others v the United Kingdom, para. 56)

Following the judgment in September 1996, the Law Commission published a consultation paper in January 1998 entitled '*Making the law on civil limitation periods simpler and fairer*' (Law Commission, 1998). As this was published just 16 months after the judgment, it is likely that this was started at the time, if not before, the judgment in was made in *Stubbings and others*. In their consultation paper, the

Law Commission acknowledged the particular problems faced by victims of child sexual abuse and also took into consideration the unsuccessful human rights arguments in *Stubbings and others*. They considered a number of options, including: that claims by victims of child sexual abuse should continue to be subject to a limitation period because the principle that the possibility of litigation should be stopped at some point to ensure a fair trial was still valid; that victims of child sexual abuse should have an extended limitation period; or that there should be no limitation period at all for victims of child sexual abuse. A report was published following the consultation period (Law Commission, 2001) in which around 90 per cent of respondents agreed that claimants in sexual abuse cases should be subject to a limitation period, with the majority (65 per cent) agreeing that it should be the same length of time as in any other case. Three respondents¹⁷⁵ suggested that if sexual abuse claims were given special treatment that this might be discriminatory to claimants who experienced non-sexual abuse as children:

... it is difficult to justify giving special treatment to sexual abuse claims alone, without according similar protection to, for example, non-sexual assaults against children. Sexual abuse may, in the current climate, be regarded as uniquely unacceptable but other non-sexual abuse of children may be just as damaging. Yet it would be difficult to argue that all attacks against children should be exempted from the limitation regime. (Law Commission, 2001 pg. 106, summarising the comments of three respondents)

The Law Commission do not indicate whether they agree or disagree with the comments made by these respondents, but as they do not challenge or suggest a contrary view it may be assumed that they are in general agreement. It would be difficult to dispute that some non-sexual abuse can be just as damaging as sexual abuse¹⁷⁶. However, is not the *level* of damage that is the issue when considering the impact of limitation periods on child sexual abuse claimants. Rather, it is the difficulties in acknowledging child sexual abuse, overcoming the myths surrounding sexual abuse and children, feeling able to disclose the abuse to someone and being

¹⁷⁵ Prof. Andrew Tetterborn, Michael Lerego QC and His Honor Judge John Griffith Williams QC (responding on behalf of the Wales and Chester Circuit)

¹⁷⁶ A prime example of the damage non-sexual abuse can cause being the murder of eight-year-old Victoria Climbié who died in 2000 from hypothermia after suffering months of neglect and physical abuse by her great aunt and her partner.

able to link ‘damage’ in later life with abuse in childhood. Physical abuse in contemporary society is much more acceptable to talk about than sexual abuse.

Two respondents to the consultation¹⁷⁷ argued that no limitation period should be in place for victims of child sexual abuse because of the incidence of dissociative amnesia¹⁷⁸ in survivors of sexual abuse. The Law Commission dismissed this argument, pointing out that if proceedings could not be commenced within the limitation period because of a disability then they would be afforded the same protection (an extended limitation period) as any other claimant. The final recommendation made by the Law Commission in relation to child sexual abuse cases was that such claims should be ‘... *subject to the core regime as modified in relation to other personal injury claims*’ (pg. 108). In 2002 the Government accepted the Law Commissions recommendations in principle and the reforms are currently awaiting implementation (Law Commission, 2004/2005).

The high number of consultation papers that have been published under the current government has opened up the policy process to groups and individuals who may previously have been excluded. The list of respondents to the Law Commission’s consultation spans four pages consisting of: members of the judiciary; academic lawyers; practitioners (barristers and solicitors); government departments; doctors; individuals; insurers; and other organisations. None of the established feminist organisations are listed under ‘other organisations’ as responding. Indeed, only two overtly victim focused groups responded¹⁷⁹ and even victim support – often heralded as the ‘national voice of victims’ – are not listed as having responded. It is understandable why some groups may not have responded. Although the high number of consultation papers has opened up the policy process, it must be noted that preparing a response can be very time consuming. Like many consultation papers the Law Commissions was lengthy and difficult to read because of its (mostly necessary) legal language. Without funding to be involved in the policy process, many individuals and organisations will find it difficult to participate as fully as they might

¹⁷⁷ Lee Moore and Pannone and Partners

¹⁷⁸ A recognised psychiatric condition that prevents a person from recalling information of a stressful and traumatic nature.

¹⁷⁹ Action for Victims of Medical Accidents and the Liverpool and District Victims of Asbestos Support Group.

wish to. Having said that, it is probably the case that feminist groups have missed an ideal opportunity to influence policy following a human rights judgment. Although the argument made in the human rights case was unsuccessful, the ECtHR did suggest that change may be needed and the Law Commission appeared to be willing to consider a range of possible changes.

Defendant's cases

There were no cases brought by rape defendants that fell into this category.

7.3.2 Policy change: legislative

Victim's cases

Legislative change stemmed from two of the rape victim's cases. In the successful case of *X and Y v the Netherlands* positive change was created for rape victims. However, it was the bringing of the human rights case rather than specifically the judgment that effected this change. By the time the case reached the ECtHR the Netherlands had already drafted new legislation to fill the gap in the law identified by this case. Hence, it was accepted by the Netherlands that the gap in the law was a problem that needed remedying without the acceptance that they were at fault. This is one of the only cases from the thesis sample where the change is documented via a resolution report. It states that the Netherlands had paid Miss Y's lawyer the money awarded to her by the ECtHR in just satisfaction and that by an Act of 27th February 1985 which entered into force on 1st April 1985 the Dutch Criminal Code had been amended to allow a legal representative to file a complaint on behalf of a mentally handicapped person (Appendix to Resolution DH (89) 3). By rectifying the gap in law, this judgment is likely to have reduced the likelihood of rape victims experiencing miscarriages of justice in terms of defects in substantive criminal law without impacting on the fairness of the trial and therefore without reducing the rights of the defendant.

In *MC v Bulgaria* there was also the potential to create legislative change. Additionally, the impact is potentially a wide one because if any other countries who are signatories to the ECHR had similar rape laws it means (presumably successful) cases could be brought against them if changes were not made. Although all of the

countries whose legislation was reviewed in the judgment already had rape laws that were compatible it would have implications for new countries joining. The exact way in which Bulgaria have altered/intend to amend their rape laws to make them compatible with the ECHR is not known. A review of minutes from meetings of the Council of Europe's Committee of Ministers show that the matter is still outstanding, an internet search, law journal search and e-mails to a variety of agencies in Bulgaria shed no light on the exact change that has or is planned to be put in place. Nonetheless, the nature of the judgment dictates that they will need to change the definition of non-consent so that it is not only limited to physical force or threats.

Defendant's cases

Legislative change had already been enacted in respect of the case of *T v Italy*, however this change had already been made by the time the case was heard, following another ECHR case where an applicant from Italy had been tried in absentia (*Colozza v Italy*). *T v Italy* is the second of the two only cases where there was a resolution recorded by the Council of Europe (although the resolution was simply a reference to *Colozza*). The new Code of Criminal Procedure reformed the rules regarding leave to appeal out of time against an *in absentia* judgment and the Committee of Ministers found that this new rule had already been successfully applied in Italy (Resolution DH (93) 64 of 14 December 1993).

7.3.3 Policy change: case law

Victim's cases

There were no cases brought by rape victims that fell into this category.

Defendant's cases

The case of *R v A* created the most substantial policy change in relation to England and Wales. Chapter Six described how the law lords interpreted the wording within section 41 of the Youth Justice and Criminal Evidence Act to allow sexual history evidence to be allowed in court in situations where Parliament did not intend it to be allowed. Even Lord Irvine, the Lord Chancellor who introduced the Human Rights Bill in the House of Lords back in 1997 has conceded that the reading down in *R v A* was 'extreme':

This was an expansive use of section 3, and one which surprised many observers. It appears to have been the most extreme use of the interpretative power ... (Lord Irvine of Lairg, 2002, no pg no.)

Chapter One described how the HRA has retained parliamentary sovereignty and how the rights have been adopted within a statutory Act rather than as part of the constitution. Yet it would appear that Parliament were far from supreme in the case of *R v A* or in the cases that followed its judgment. As with the New Zealand situation as described by Allen (2001) (and discussed earlier in Chapter One of this PhD) it would appear from this case not only that Clark Kent did indeed turn into Superman but also that he did it very quickly. This is to say, not only did the Law Lords take more power than was arguably intended by parliament, they did it very quickly. This was not a gradual increase in power, but one of the first HRA cases to be decided at the House of Lords.

Rewinding to a few years earlier, some feminists criticised the new sexual history evidence limitations as being vague and not going far enough their main worry was the time and effort needed to create further change:

... it is a chilling prospect that it could take another 20 years, and numerous further research projects to achieve another legislative reform. (Cook, 1999 pg. 2)

If that was a chilling prospect then the reality post-*R v A* places the situation in the deep freeze cabinet. This is because while the HRA is in place no legislation with similar restrictions can be put into place. Although the Conservative party have made indications that should they regain power they would review the HRA with the possibility of removing it from the statute books, it must be presumed that the HRA is here to stay and the Conservative party is speaking mostly in its role as the opposition. It also means that the years spent lobbying the Government to reform the previous sexual history limitations have largely been wasted because ultimately it was five male law lords who had the last say on the matter. This calls into question the whole issue of Government lobbying and suggests that the higher echelons of the judiciary may be just as important if not more to direct attention at.

In Chapter One Allan's (2001) argument was cited that there are few differences between the policy changes that judges could potentially accomplish under a statutory Bill of Rights compared with what they do accomplish under constitutional models. In *R v A* this arguably went even further. If the House of Lords had made a declaration of incompatibility then Parliament would have had the opportunity to change legislation to make it compatible with Article 6 while still doing what they set out to do – restrict individual judges from deciding on a case by case nature when sexual history evidence should be allowed. My argument here is not related to a view on whether the Section 41 restrictions struck the right balance between the rights of victims and defendants, but rather that in reading Section 41 in the way they did, the House of Lords has probably re-instigated the air of confusion over when sexual history evidence should and should not be allowed. In this case legal interpretation moved so far into politics that the judges moved beyond a purposive approach and actually changed the meaning of the legislation. The impact of this is as yet uncertain. Liz Kelly and her colleagues at London Metropolitan University have investigated the impact of *R v A* but the Home Office have not yet published the findings.

7.3.4 Change: investigative

Victim's cases

In the successful cases of *Aydin v Turkey* and *Selmouni v France* some potential change was possible whereby the states may be more likely to conduct future investigations into rape by state actors in a more effective manner in order to avoid any more adverse judgments against them from the ECtHR. This may also have emphasised Europe-wide the need to conduct effective investigations and highlighted that rape cannot be 'pushed under the carpet' because of a lack of evidence when that evidence has not been sought. This was further emphasised in another judgment against Turkey in relation to threat to rape and other torture where a breach was found but the reasoning behind it was based on it being a 'procedural' breach rather than an actual breach. This led to a particularly strong critical and sarcastic dissenting opinion put forward by one of the judges:

Expecting those who claim to be victims of torture to prove their allegations 'beyond reasonable doubt' places on them a burden that is as impossible to meet as it is unfair to request. Independent observers are not, to my knowledge, usually invited to witness

*the rack, nor is a transcript of proceedings in triplicate handed over at the end of each session of torture; its victims cower alone in oppressive and painful solitude, while the team of interrogators has almost unlimited means at its disposal to deny the happening of, or their participation in, the gruesome pageant. The solitary victim's complaint is almost invariably confronted with the negation 'corroborated' by many. (Partly dissenting opinion of Judge Bonella, *Sevtap Veznedaroglu v Turkey*¹⁸⁰)*

*For the court to expect from torture victims any 'hard' evidence, beyond the eloquence of their injuries, is to reward and invigorate the 'inequality of arms' inherent in most torture situations. (Partly dissenting opinion of Judge Bonella, *Sevtap Veznedaroglu v Turkey*)*

Turkey is notorious for not paying just satisfaction to successful applicants as directed by the court and it follows that they may not necessarily have taken steps to improve the way in which torture within custody is investigated. However, it would appear that the *Aydin* judgment and others similar to it did in fact create change, but that this change was a negative and inappropriate one. If it seemed impossible for the actions of the Turkish police to get any worse, this is what happened in *YF v Turkey*¹⁸¹. After being taken from her home by Geredermes under the same circumstances in both Ms Aydin and Ms Sevtap Vezendaroglu, Ms F was tortured and threatened with rape. Over eager not to be accused of rape, the police forced her to have a gynecological examination despite her refusal, staying on the premises while Ms F was examined vaginally and anally behind a curtain without her consent. Her husband complained under the ECHR and the Court unanimously judged that Article 8 had been breached. Hence, Turkey responded by creating change but this change was negative in that it created a further breach of human rights.

No information could be found regarding any changes to the investigative procedure following *Selmouni v France*.

¹⁸⁰ *Sevtap Veznedaroglu v Turkey* no. 32357/96, judgment of 11th April 2000. This case is not in the original sample because it concerns the threat to rape. It is included here because it relates to the policy impact of a sample case.

¹⁸¹ *YF v Turkey* no. 24209/94, judgment of 22nd July 2003. This case is not in the original sample because it concerns the threat to rape. It is included here because it relates to the policy impact of a sample case.

Defendant's cases

The judgment in *MM v the Netherlands*; that the use of a telephone-tap by a rape victim to collect evidence on her alleged attacker breached his human rights means that investigations in the future should not seek to collect such evidence. This case could open up debates over what would happen if it were a non-state actor (e.g. a rape crisis centre) rather than the police who were suggesting the telephone-tap to the rape victim. In the UK however, the newly enacted s17 of the Regulation of Investigatory Powers Act 2000 now bans all telephone-tap evidence regardless of the lawfulness by which it was collected.

7.4 Chapter conclusions

This chapter has shown that human rights can impact on policy in a number of ways, at different levels and different stages. Many of the policies discussed do not at first glance appear to be related to rape (e.g. Limitation Act 1980, Regulation of Investigatory Powers Act 2000) and it may be that feminist groups have focused on sexual offence laws to the exclusion of other relevant legislation when campaigning for legal change. The impact of some of the judgments have the potential to reach much further than rape cases, particularly where the change was a case law one. In the same way, it is possible that the judgments in some human rights cases unrelated to rape (and therefore not examined in this thesis) might have had an impact on rape and the prosecution process.

Attempting to systematically track all the changes created by the ECHR judgments was, in retrospect, an impossible task. The general changes made were often of a non-specific nature, which even the Council of Europe is not able to record or definitively classify. HRA cases were simpler to find out what change was created and therefore easier to deal with as a research sample. This is largely because the change is generally an instant, case law one. In other words, the judgment *is itself* the change. None of the cases resulted in a declaration of incompatibility being made, although any change created following a declaration would also have been relatively easy to track.

CHAPTER EIGHT: CONCLUSIONS

8.1 Introduction

This research has found that rape defendants have been more likely than rape victims to use the ECHR and HRA, but that rape victims have been more likely to be successful in intramural terms (i.e. they were more likely to win their case). Cases involving rape victims contained arguments using more Articles, but were less likely to have their arguments considered or for the judgement to be unanimous at the European Court when compared with cases taken by rape defendants.

8.2. The development of pan-European standards in rape cases

Although only a few cases have been taken on behalf of rape victims, those that have been taken have created important new pan-European standards in rape cases that will be far reaching in their scope. These standards include:

- The need for rape complaints to be thoroughly investigated, in a timely manner, with suitable forensic medical examinations offered (*Aydin v Turkey* and *Selmouni v France*).
- The need for nation states to provide adequate protection from rape through the criminal law (*X and Y v the Netherlands* and *MC v Bulgaria*)
- That the act of rape can not be defined only in terms of the victims physical resistance (*MC v Bulgaria*)
- That the state has a responsibility in protecting individuals from other non-state actors (*X and Y v the Netherlands* and *MC v Bulgaria*)

These standards might sound quite basic when thinking about rape laws in England and Wales. However, they are likely to be more use to new countries joining the Council of Europe, particularly from former communist countries that might have less developed rape laws.

8.3 Few human rights arguments have been made on behalf of rape victims

Internationally, feminist activists have become adept at using the vocabulary of human rights at the UN level, and the violence against women movement has been central to the success of this process (Kelly, 2005). However, this has not happened in England and Wales at the local level of the HRA or at the regional level of the ECHR. Far from 'hijacking' or 'hoodwinking' the judiciary (Fudge, 2001), there have been few moves to use the language of the HRA/ECHR to improve the criminal justice response to women who have been raped. Feminist groups have only intervened in one case under the HRA (*R v A*) and only one HRA case has been taken on behalf of a rape victim (and this case did not involve feminist campaigners/NGO's). Research is needed into why there have been so few cases involving rape victims compared with the large number of cases involving rape defendants. However, the reasons are likely to include:

- The way the criminal justice system works in England and Wales, where only the defendant has access to a legal representative. This means that rape defendants are more likely than rape victims to be made aware of human rights arguments that might be applied in their case.
- That rape victims have anonymity in the press might mean that lawyers interested in helping take test cases might not be easily able to make contact with them.
- Men suspected or convicted of rape might have more to gain by using human rights than rape victims (i.e. they might avoid conviction or be released from prison).
- A lack of knowledge within feminist campaign groups/NGOs about how rape victims might be able to use the human rights contained within the HRA/ECHR. This may partly be because of a focus on CEDAW as *the* convention for securing women's rights and DEVAW as *the* declaration of rights in relation to violence against women.
- A lack of finances for feminist campaign groups/NGOs to draw on to make third party interventions.
- The inability for a victim in the UK to use Article 6 in reference to a criminal case because of the division between civil and criminal legal procedures.

- That when the HRA came into force the main feminist campaign groups were involved in consultations with the Home Office about the Sexual Offences Act 2003. Therefore, feminist campaign groups were in a historically unique position in terms of their relationship with the state. Because feminist groups had had so much input into the new legislation, it is not surprising that they are not rushing to the courts with challenges.
- A lack of information and procedures about how third party interventions are made in HRA cases and under what circumstances interventions will and will not be allowed.

8.4 There is a good understanding at the European Court of the impact of rape and the difficulties proving rape by both male and female judges

Some individual judges at the European Court have shown a very good understanding of the impact of rape and the difficulties faced in the prosecution process. Chapters Five and Six showed how there seemed to be no difference between judgments made in rape victims cases and rape defendants cases depending on the ratio of female to male judges in the chamber, with both victims and defendants more likely to win their case when the number of female judges in a chamber was higher than average. From the quotes given in Chapters Five and Six it is clear that some female judges have strongly articulated their views, whether in agreement or disagreement with the majority:

...rape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by Article 3 but also the right to autonomy as a component of the right to respect for private life as guaranteed by Article 8. (Concurring opinion of Judge Tulkens, MC v Bulgaria)

The situation in which Mrs S. found herself is unfortunately not an unusual one. It is a well-known fact that in cases which concern sexual harassment and violence against women it is difficult for the woman to be believed. (MM v the Netherlands, dissenting opinion of Judge Palm)

However, even when female judges were massively outnumbered by men (in the example below only one of 21 judges were female) the majority judgement were often able to acknowledge the impact of rape in what might be defined as feminist terms:

... rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally. (Aydin v Turkey, para. 83)

There are times when the development of case law relating to rape victims has been somewhat stilted when the Court has failed to consider some arguments put forward, particularly those relating to Articles 13 (Right to an effective remedy) and 14 (Freedom from discrimination). This has been a feature of cases taken by rape victims far more than in cases taken by rape defendants. While this may be reflective to some degree of the higher number of Articles used in cases taken by rape victims, the importance of considering all arguments made is heightened since the introduction of the HRA. Because national courts have to take judgments made under the ECHR into consideration, any positive judgments made at the European Court have the potential to have a top-down effect on national courts.

8.5 There is still an ongoing problem regarding equal representation in the judiciary

The HRA represented a shift of power from the legislature to the judiciary. How much impact this shift has is dependant on how much power judges actually take. This, in turn depends on how sections 3 and 4 of the HRA work in practice; how far judges will be prepared to 'read down' a piece of legislation (under section 3) before declaring it incompatible with the HRA (under section 4). While it is too early to show overall patterns on how sections 3 and 4 are used, it is widely acknowledged that the case of *R v A* pushed the boundaries of section 3 as far as they possibly *could* go, and perhaps a bit further than they *should* go:

The decision of the House of Lords in R v A is the most radical example so far of the use of section 3 to adopt a construction of a recent statute that appears to fly in the face of Parliament's intention ... (Rose and Weir, 2003 pg. 45)

An analysis of how judges are interpreting section 41 of the Youth Justice and Criminal Evidence Act (i.e. the section under question) post *R v A* is yet to be published by the Home Office, so the full impact of the decision is not yet clear.

What is clear is that judicial attitudes have become increasingly important as the relationship between the courts, the executive and Parliament shift in favour of the courts (Samuels, 2005). The issue then of judges getting involved in areas where parliament has already legislated must be problematised in this light (Conaghan and Millns, 2005). This is a particular problem when the gender and ethnicity make-up of the judiciary is taken into consideration and means that the need for equal representation in the judiciary is higher than ever before. Although there is disagreement on the impact women judges have in changing case outcomes, far more research is needed on this topic. As stated earlier, research in the USA has found that differences between male and female judges and attorneys are greatest in the areas of rape and domestic violence (Martin et al., 2002). This suggests that equal representation is particularly important in cases involving violence against women. Added to this is the increased potential to make law (under sections 3 and 4) rather than just to merely interpret it and it becomes more essential and urgent that more female judges (as well as more judges from black and minority ethnic groups) are appointed at the appellate level in order to maintain the legitimacy of, and increase confidence in, the judiciary.

8.6 Clarity of procedures and funding for third party interventions are needed

The Public Law Project has found that the lack of rules and guidelines deter potential intervenors, as do fears about liability for costs. This is something that needs to be addressed:

Clearly, if third party intervention in the public interest is perceived to perform an important function in litigation under the HRA, then it is crucial to ensure that those who can assist the court are not deterred from providing it to the court because of ignorance of procedures or fears about costs. (Lieven and Kilroy, 2003 pg. 133)

NGOs providing services for women who have been raped are notoriously underfunded. Rape crisis centres generally have long waiting lists, and some even need to close their waiting lists on a regular basis because they are unable to meet the level of demand for their services. Most funds are 'restricted', meaning that they can only be spent on certain things (e.g. counselling, training). In the absence of a strong

women's voice in the judiciary, funding and clear procedures for third party interventions are even more important.

8.7 Time for feminists to start thinking 'horizontally'

The text of the ECHR shows a primary concern with the regulation of the public sphere and protection *of* (as opposed to '*within*') the private sphere. This was described in Chapter One. However, Chapter One also described that the ECHR and the HRA are 'living instruments', able to take the contemporary societal context into consideration when making judgments. When the ECHR was introduced back in 1950, recognition of the prevalence of rape and other forms of violence against women was low particularly within a domestic violence context. As a living document the ECHR should then be able to move with the new knowledge base and increased awareness that second-wave feminism has created.

Chapter One described how second-wave feminism also questioned the arbitrary divide often made between 'public' and 'private' spheres, calling for increased rights and state protection for women and children. As far back as 1985 the European Court has accepted that a state can be held responsible for the violation of an individual's human rights based on harm perpetrated by a non-state individual if it has failed to fulfil its positive obligations to protect human rights. That the first case of this nature was a rape case (*X and Y v the Netherlands*) may be reflective of the problems within rape trials, reflective of the work of second wave feminism or purely coincidental.

Theorists in the 1990s argued that the key to unlocking the usefulness of human rights for women lies in challenging the public/private divide, particularly in relation to violence against women (e.g. Copelon, 1994; Roth, 1994). In terms of the ECHR it is clear that this has already been unlocked and has been for some time. Despite the ECHR and HRA focus on civil and political 'first generation' rights, arguments about gender and violence can be reformulated and 'squeezed' into the framework on offer (Conaghan and Millns, 2005). The case of *MC v Bulgaria* provides evidence that this approach is not only *possible*, but is *happening* as part of an ongoing process of the development of feminist jurisprudence in the area of human rights.

8.8 A time and space to challenge existing discourses

Chapter Two described the tensions that exist between procedural justice and substantive justice, due process and crime control and the rights of victims and defendants. These tensions have led to a number of incorrect equations that may have stifled discussions around improving the rape prosecution process.

The first of these false equations is that miscarriages of justice for victims and defendants mirror each other; that a reduction in miscarriages of justice for victims ('freeing the guilty') mirrors an increase in miscarriages of justice for offenders ('convicting the innocent') and vice versa. This position suggests that there is little that can be done to improve the situation of victims while maintaining a fair trial for the defendant:

There are miscarriages of justice in the freeing of the guilty and in the convicting of the innocent. The problem is that, other than better police investigation, there is no way of reducing the former without increasing the latter. Every time we play with the rules to make it easier to convict the guilty, we make it easier to convict the innocent. (Kennedy, 2004 pg. 30)

When there is talk of 'rebalancing' the criminal justice system and 'reducing the justice gap', it is often assumed that guarantees of more rights for victims and calls for more offenders to be brought to justice will necessarily mean a move away from the due process model to move closer to the crime control model. From this perspective, 'victims rights' are falsely equated with a lack of concern for due process:

... "victim's rights" has produced an emerging structure of criminal law and procedure that closely resembles the "crime control" model so antithetical to liberal thought (Henderson, 1985 pg. 953)

Specific cautions have been given in feminist writing directed towards other feminists. Lewis et al. (2001) argue that where crimes such as rape, sexual abuse and other forms of violence against women and children are concerned feminists have focused more of their attention on gaining convictions and heavy sentences than ensuring that the trial is fair for the defendant. They warn:

This inconsistency ignores the very real issues of offenders' civil liberties, of which feminists on the left are generally mindful, except when considering men who offend against women and children when concerns about civil liberties seem to disappear. (pg. 110).

Along with the wide variety of groups covered under the shorthand term of the 'victims rights movement', the idea that such tensions cannot be reconciled is a dangerous one:

... there is a danger of polarisation in the debate, support for victim's rights being associated with traditional conservatives who are hostile to criminology's concern with due process and the rights of prisoners (Fenwick, 1997, pg. 319)

In fact, it is entirely possible to 'play with the rules to make it easier to convict the guilty', as Kennedy (2004) puts it, but without making it any easier to convict the innocent. Even those opposed to other changes such as tight restrictions on the use of sexual history are able to suggest ways in which it may be easier to convict the guilty by making it more fair for all rather than just the defendant:

Complainants should routinely give their evidence with the public and the press excluded: something the "fair trial" requirements in Article 6 permits. And what is wrong, surely, is that the complainant can be asked if she regularly consents to sex without the defendant having to admit – if such be so – that he has previously forced others to have sex with him without it. (Spencer, 2001 pg. 455)

Indeed, rape law reform does not necessarily mean that there will be an increase in convictions¹⁸² but may lead to a less traumatic court process for rape victims (Easteal, 1998b).

The human rights model overlaps with the due process model because they are both concerned with individuals' rights against the state and protecting the innocent from conviction. Given this, it is not surprising that human rights groups (for example Liberty) have tended to focus more on defendants than victims. Once we question the

¹⁸² Two evaluations in Australia found that there was actually a decrease in the number of rape convictions following reform (Heath and Naffine, 1994; Heenan and McKelvie, 1997). Similarly, reforms in the 1980s and 1990s in the USA created no significant change in the number of convictions. (Spohn and Horney, 1992). Both of the Australian studies, however, did find that victims reported a reduction in the overall distress felt during the trial process and an increase in guilty pleas.

dichotomy between due process and crime control and realise that due process is essential *for* crime control (McBarnet, 1981) the role human rights can play for victims becomes clearer.

8.9 Where next?

Using a human rights framework to understand the rape trial means a move away from the concept of ‘balancing’; a term that some have argued should be banned in general (Ashworth, 1996) and others have suggested is untenable in rape trials (Easteal, 1998b). To ‘do justice’ for a rape victim is currently constructed in an incredibly narrow sense, related mainly to the criminal justice system and in particular to the gaining of a criminal conviction and lengthy custodial sentence. Procedural justice for victims, including the provision of counselling for victims of rape, is seen at best as an ‘add on’ to criminal justice and at worst as an ‘optional extra’.

A radical rethink of criminal justice responses to rape (indeed to violence against women as a whole) is needed before any dramatic improvements are likely to be seen. Advances such as the changes made following the review of sexual offences legislation are certainly to be welcomed in the short term, but are unlikely to provide either quick fixes or long term solutions. This research has shown that using human rights law to challenge state responses to rape is one way of achieving change and such change may be substantial, resulting in the establishing of new pan-European standards for rape prosecutions. Legal human rights can therefore act as a powerful implement in the feminist toolbox. Fair trial jurisprudence has traditionally focused on procedural justice for the defendant, and only recently has the importance of procedural justice for rape victims been emphasised (Kelly et al., 2005). Acknowledging the importance of gaining convictions and narrowing the justice gap should continue to be of importance for rape law and policy, but respecting human rights means going further than this. Justice for rape victims means engaging with a broader concept of justice; possibly following the lead of parallel justice programmes in the USA (where society is held responsible not only to hold the offender accountable for harms caused to the victim but also to honour a separate obligation to repair any harms to the victim).

The UK violence against women movement has often called for others to be trained in violence against women (e.g. the CPS, judges, police). It is now time that we looked to other specialists (human rights lawyers, human rights campaign groups) to help fill the knowledge gap that has emerged between the violence against women and human rights movement in the UK. Lessons can be learnt from the global women's human rights movement at the level of the UN, and from human rights groups such as Amnesty International. Addressing the knowledge gap now may be crucial to be closing the justice gap and to help create a new vision of justice in rape cases that is respectful of victim and defendant's human rights. It is hoped that this thesis will be of use in that endeavour.

APPENDIX ONE: HUMAN RIGHTS CONTAINED WITHIN THE ECHR

Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 – Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term “forced or compulsory labour” shall not include:

- a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- d) any work or service which forms part of normal civic obligations.

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a) the lawful detention of a person after conviction by a competent court;
- b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
- c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

2 Everyone charged with a criminal offence has the following minimum rights:

- a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b) to have adequate time and facilities for the preparation of his defence;
- c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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