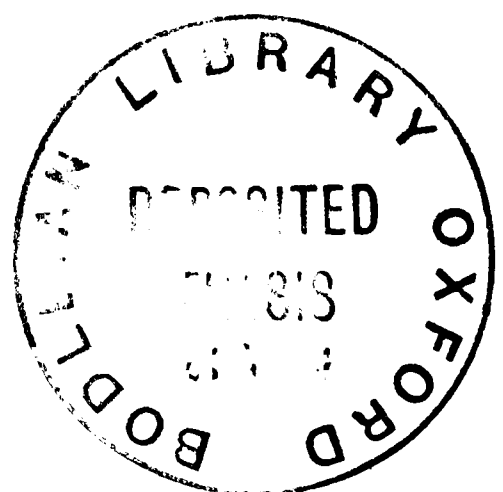


WOMEN, HUMAN RIGHTS AND CRIMINAL JUSTICE

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University of Oxford**

**D.Phil Thesis
Trinity Term 2005 [i.e. 2006]
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This thesis aims to contribute to the development of arguments that better incorporate women into the existing human rights paradigm. The human rights analysis is developed in relation to two substantive areas: sexual violence and female prisoners' rights. The first chapter questions whether the current human rights paradigm can address women's human rights claims, or if this discourse should be abandoned altogether. It sets out a number of feminist theories, showing how they evolved, analysing their strengths and weaknesses, and assessing them against the subject matter of the thesis. The strength of the human rights paradigm is examined with reference to the criticisms of liberal legal theory: the dependence on notions of negative freedom; the separation of public and private spheres of life; the emphasis on the neutrality and rationality of the liberal individual; and the focus on formal equality.

The manner in which the substantive law of rape is dealt with in human rights jurisprudence is analysed. The potential for human rights jurisprudence to affect the Sexual Offences Act 2003 is considered, particularly in relation to the new definition of consent. A new procedural framework for the handling of rape cases is developed. By drawing on the work of Alexy, it is argued that notions of rights within ECHR jurisprudence ought to be more subjective, enabling complainants to raise human rights claims in the context of criminal trials. A framework for the reconciliation of positive duties owed to defendant and complainant under the Convention is proposed. Similarly, the thesis analyses the substantive case law in relation to prisoners' rights, and its potential for addressing the rights of female prisoners. Finally, it is argued that ECHR jurisprudence needs to be developed further to address the substance of proportionate sentences, as opposed simply to the procedural aspects of sentencing decisions.

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ABBREVIATIONS

Convention against Torture	CAT
Convention for the Elimination of Discrimination against Women	CEDAW
Convention for the Elimination of Racial Discrimination	CERD
Convention on the Rights of the Child	CRC
Criminal Justice Act 2003	CJA
Criminal Procedures and Investigations Act 1996	CPIA
Disability Discrimination Act 1995	DDA
European Charter of Fundamental Rights	ECFR
European Committee for the Prevention of Torture	CPT
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
Human Rights Act 1998	HRA
Human Rights Committee	HRC
International Covenant of Economic, Social and Cultural Rights	ICESR
International Covenant of Civil and Political Rights	ICCPR
International Criminal Tribunal for the former Yugoslavia	ICTY
International Criminal Court	ICC
Race Relations (Amendment) Act 2000	RRAA
Race Relations Act 1976	RRA
Sex Discrimination Act 1975	SDA
Universal Declaration of Human Rights	UDHR

INTRODUCTION

Feminist commentators have argued that the human rights framework, with its basis in liberal political and legal theory, has failed to address the oppressive conditions experienced by women, and has marginalized their experiences of human rights violations.¹ The European Convention on Human Rights (ECHR)² was drafted at a time when there was little 'consciousness about women's rights' and it was not designed with the needs of women in mind.³ So-called first generation civil and political rights are regarded as a dated articulation of human rights concerns, reflecting the political marginalization of women at the time of drafting.⁴ Despite these shortcomings, feminist critique of the ECHR has only recently started to emerge, and the impact of the Human Rights Act 1998 (HRA) on the rights of women within the UK has not been subjected to in-depth scrutiny.⁵ A critique of this nature is important in order to articulate and develop women's genuine interests within this new framework of rights in the UK. The growing body of international law on women's rights such as the Convention on the Elimination of all forms of Discrimination against

¹ N Kim 'Towards a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism' (1993) 25 Columbia Human Rights L Rev 49, 50. Also J Kerr 'The Context and the Goal' in J Kerr (ed) *Ours by Right: Women's Rights as Human Rights* (Zed London 1993) 3; J Peters and A Wolper 'Introduction' in J Peters and A Wolper (eds) *Women's Rights Human Rights: International Feminist Perspectives* (Routledge New York 1995) 1; G Binion 'Human Rights: A Feminist Perspective' (1995) 17 Human Rights Q 509; S Palmer 'Critical Perspectives on Women's Rights: The European Convention on Human Rights and Fundamental Freedoms' in A Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish London 1996) 223; K Quinlivan 'Women's Rights and the European Convention on Human Rights' in C Bell (ed) *Women's Rights as Human Rights: A Practical Guide* (Centre for International and Comparative Human Rights Law Queens University Belfast 1997) 11.

² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

³ Quinlivan (n 1) 11; H Charlesworth 'The Mid-Life Crisis of the Universal Declaration of Human Rights' (1998) 55 Washington and Lee L Rev 781, 782.

⁴ Quinlivan (n 1) 11.

⁵ Works specifically on the impact of the ECHR on women's rights in the UK include Palmer (n 1); S Easton 'Feminist Perspectives on the Human Rights Act: Two Cheers for Incorporation' (2002) 8 Res Publica 21; A McColgan 'Women and the Human Rights Act' (2002) 51 (3) Northern Ireland L Q 417-444.

Women (CEDAW)⁶ can be seen as testament to the failure of first generation rights regimes to address the human rights violations that women suffer. Whilst the CEDAW committee has welcomed the incorporation of the ECHR into UK law given the prospect that it can be used to develop women's human rights,⁷ it has expressed concern that the Convention does not provide women with rights envisioned by the CEDAW treaty.⁸ The CEDAW committee has expressed particular concern about violence and sexual abuse/rape in the home as providing a serious impediment to women's enjoyment of human rights.⁹ Furthermore, they have highlighted concerns about women's treatment in the criminal justice system, which as defendants and prisoners can be more severe than their male counterparts.¹⁰

Whilst accepting that law as a concept needs to be challenged by feminism¹¹ any legal appeal to human rights necessarily involves developing arguments within an established set of legal rules. The perspective adopted in this thesis is one consistent with writers such as Palmer¹² and Williams¹³ of the importance of articulating rights discourse to assist the claims of disadvantaged groups. Such an enterprise is also important to ensure that those whose interests are already protected by the legal system do not commandeer this new language of rights.¹⁴ Essentially, the thesis seeks to open up liberal concepts of human rights to tackle the impediments to women's full

⁶ (Opened for signature 1st March 1980, entered into force 3rd September 1981) 1080 19 ILM 33.

⁷ UNGA 'Report of the Committee on the Elimination of Discrimination against Women' UN GAOR 54th Session Supp 38 UN Doc A/54/38/Rev 1 (1999) [293].

⁸ *ibid* [300] – [301].

⁹ CEDAW 'General Recommendation 19' (11th Session 1992) UN Doc CEDAW/C/1992/L1/Add 15.

¹⁰ UNGA (n 7) [312] – [313]; This view is reinforced by findings such as those by D Caddle and D Crisp *Mothers in Prison* Home Office Research Findings 38 (London Home Office 1997) who argue that women are indirectly discriminated against in the criminal justice system.

¹¹ C Smart *Feminism and the Power of Law* (Routledge London 1989) ch 1.

¹² Palmer (n 1).

¹³ P Williams 'Alchemical Notes: Reconstructed Ideals from Deconstructed Rights' (1987) 22 Harvard Civil Rights – Civil Liberties L R 401.

enjoyment of these ideals. In addressing these issues, the thesis aims to contribute to the development of arguments that better incorporate women's human rights into the existing paradigm. In so doing, it endeavours to expand the understanding of human rights concepts so that their universal applicability may be enhanced.

The civil and political rights encapsulated in the ECHR have historically epitomised classical liberal notions of individual, negative civil and political freedom and, conceived in this way, they are unable to address women's rights. Freedom characterised as the absence of state interference has marginalized women's concerns and reinforced the status quo of women's disadvantage.¹⁵ However, international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁶ and CEDAW have for some time recognized rights that are more consistent with notions of positive freedom. Additionally, the recent case law of the Human Rights Committee (HRC) has blurred the traditionally held distinction between civil and political rights, and economic, social and cultural rights.¹⁷ Equally, more local developments in discrimination law — in the jurisprudence of the European Community and in recent anti-discrimination provisions in the UK — reveal trends towards more positive duties to secure rights. Furthermore, shifts towards positive duties can be seen in the recent jurisprudence of the European

¹⁴ Palmer (n 1) 226; N Lacey *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Oxford 1998) 27.

¹⁵ On the difficulties with first generation rights in relation to women's rights H Charlesworth 'Human Rights as Men's Rights' in J Peters and A Wolper (ed) *Women's Rights: Human Rights International Feminist Perspectives* (Routledge London 1995) 103, 106.

¹⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

¹⁷ Human Rights Committee *Broeks v Netherlands* Communication no 172/1984: Netherlands. 09/04/87 CCPR/C/29/D/172/1984 and Human Rights Committee *Zwaan-de-Vries v Netherlands* Communication no 182/1984: Netherlands. 09/04/87 CCPR/C/29/D/182/1984 where it was held that Art 26 of the ICCPR, prohibiting discrimination was also applicable in the field of economic, social and cultural rights.

Court of Human Rights (ECtHR).¹⁸ These developments can be used as a basis to develop arguments for women's human rights within the current framework of the ECHR. While progress has been made to secure equality for women in the fields of employment, education and the provision of services, and to secure the human rights of those in the criminal justice system, these aspects of gender equality have not filtered through into the criminal justice context. British sex discrimination provisions have been held to be inapplicable in the field of criminal justice¹⁹ and while some feminists strove for equality in this sphere, a number of writers have challenged its meaning.²⁰ The thesis also examines how positive duties affect current notions of equality, particularly in relation to Article 14 and Protocol 12 of the ECHR, and the objectives that could be achieved.

Chapter one contains a theoretical analysis of these issues, and addresses the question of whether feminists should abandon the human rights discourse altogether or if it is possible to interpret human rights doctrines in a manner that addresses women's human rights.²¹ It is argued that the current tendencies towards positive duties should be applied more extensively to our current notions of justiciable human rights in order

¹⁸ *X and Y v Netherlands* Series A no 91 (1986) 8 EHRR 235; *Costello Roberts v United Kingdom* Series A no 247/C (1995) 19 EHRR 112; *A v United Kingdom* Appn no 25599/94 (1999) 27 EHRR 611; *Osman v United Kingdom* Series A 1998 VIII 3124 (2000) 29 EHRR 245; *Z v United Kingdom* Appn no 29392/95 (2002) 34 EHRR 3; *E v United Kingdom* Appn no 33218/96 (2003) 36 EHRR 31; *MC v Bulgaria* Appn no 39272/98 (2005) 40 EHRR 20.

¹⁹ *R v Entry Clearing Offices Bombay Ex parte Amin* [1983] 2 AC 818 (HL) where it was held that the Sex Discrimination Act 1975, and therefore the Race Relations Act 1976 did not apply to public authorities. In relation to race, the situation has been altered by s 19 B of the Race Relations (Amendment) Act 2000 prohibiting direct and indirect discrimination in the activities of public authorities. The new Equality Bill currently before the House of Lords would amend sections of the Sex Discrimination Act and make it 'unlawful for a public authority exercising a function to do any act which constitutes discrimination' (s 81). However, as it stands, the bill would exclude activities carried out as part of a 'judicial function' and decisions 'not to institute or continue criminal proceedings' (s 81 (9) 5 and 6). Additional amendments to the Sex Discrimination Act would also include the obligation on public bodies to 'have due regard to the need – (a) to eliminate unlawful discrimination, and (b) to promote equality between men and women' (s 82).

²⁰ L Gelsthorpe 'Feminism and Criminology' in M Maguire, R Morgan and R Reiner (eds) *Oxford Handbook of Criminology* (3rd edn Oxford University Press Oxford 2003) 112, 119.

to address women's claims in the field of criminal justice. It sets out a number of feminist theories, showing how they evolved and analysing their strengths and weaknesses against the subject areas of the thesis. This chapter argues that while traditional civil and political rights are limited in addressing women's claims, the development of positive duties to secure rights, evident in EC law and UK discrimination law as well as in the ECHR, presents opportunities to develop women's human rights. In order to address women's claims within the field of criminal justice, a more substantive notion of equality needs to be developed within the context of the Convention anti-discrimination provisions.

The human rights analysis is developed in relation to two substantive areas where the development of ECHR analysis with regard to women's rights has been limited. Part One 'Sexual Violence and Human Rights' aims to articulate the plight of all rape victims as an issue of human rights, and look for solutions within the human rights framework. It is divided into two sections. Chapter two examines the way that rape is substantively defined and treated in human rights law, and the potential for this to affect the substantive criminal law. It examines the feminist arguments about rape, particularly the interplay between radical and black feminist analyses of sexual violence. It looks at the theory behind basic human rights protections, specifically, the importance of human dignity, the way in which human rights operate under a hierarchy, and the gendered effects of *jus cogens*. The manner in which rape is treated in international law is analysed, developed from the jurisprudence of the International Covenant on Civil and Political Rights (ICCPR),²² the Convention Against Torture

²¹ Palmer (n 1) 224-231.

²² (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

(CAT),²³ the Convention on the Rights of the Child (CRC),²⁴ CEDAW, the Convention on the Elimination of all forms of Racial Discrimination (CERD),²⁵ the International Criminal Tribunal of the former Yugoslavia (ICTY) and the International Criminal Court (ICC). In human rights jurisprudence, torture is defined as having three elements: act(s) causing severe pain and suffering initiated or acquiesced to by a public official for the purposes of punishment, extracting information or confessions, intimidation or discrimination.²⁶ The development of ECHR arguments presented in this chapter centres mainly on Article 3, but include Articles 4, 5 and 14. The Article 3 analysis examines the extent to which the levels of suffering needed to ground an Article 3 claim have been determined, in part, by the status of the actor. This distinction is not easily sustainable in light of the extent of sexual violence perpetrated by private individuals, particularly in the context of the home.²⁷ The failure to treat rape *per se* as an act of discrimination means that acts of this nature cannot be articulated as torture when perpetrated by private actors under the Convention, notwithstanding the duration or severity of the treatment involved. Nevertheless, the doctrine of positive duties and the recent case of *MC v Bulgaria*²⁸ present significant opportunities to challenge the way that rape cases are articulated as human rights issues.

²³ (adopted 10 December 1984, entered into force 26th June 1987) 1465 UNTS 85.

²⁴ (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

²⁵ (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

²⁶ Art 1 CAT (n 23); *Prosecutor v Delacic* (Judgement) ICTY-96-21 (16th November 1998) [941].

²⁷ A Myhill and J Allen *Rape and Sexual Assault of Women: The Extent and Nature of the Problem. Findings from the British Crime Survey (Home Office Research Study 237)* (Home Office London 2002); P Tjaden and N Thoennes *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence against Women Survey* (US Department of Justice Washington DC 2000); P Tjaden and N Thoennes *Prevalence, Incidence, and Consequences of Violence against Women: Findings from the National Violence against Women Survey* (US Department of Justice Washington DC 1998); D Russell *Rape in Marriage* (Indiana University Press Bloomington and Indianapolis 1990).

²⁸ n 18.

Chapter three develops a new procedural framework based on human rights principles for the handling of rape cases, reconciling the positive duties towards complainants under Article 3 of the Convention, and towards defendants under Article 6. This chapter argues that the development of positive obligations under the Convention means that rights ought to be more subjective, enabling the complainant to raise human rights issues in the context of a criminal trial. Drawing on the work of Alexy,²⁹ it is argued that positive duties under Article 3 can lead to the victim having a legal interest in the way a trial is conducted. There is a powerful duty under Article 3 to investigate effectively violations in a manner that is capable of punishing the perpetrator. These duties must be reconciled with positive duties towards the defendant under Article 6. In order for the duties towards the defendant to be treated as of equivalent value, they must be articulated as a mechanism for the protection of the right to liberty, or to prevent the inhuman or degrading treatment of wrongful imprisonment. There have also been recent moves to give victims more of a direct procedural interest by expanding notions of fairness under Article 6 to include victims, particularly in the context of a criminal trial. Further, victims' rights as witnesses in a trial have been enhanced under Articles 5 and 8. The model developed in this chapter could be used to challenge many of the procedural difficulties that hamper rape trials.

Part Two of the thesis: 'Human Rights and Women in Prison' examines the substantive case law of Convention jurisprudence in relation to female prisoners, and proposes a new framework, developed from human rights principles, for evaluating the use of imprisonment for women. Chapter four examines the extent to which the Convention can address the particular needs of female prisoners. It will look at the

²⁹ R Alexy J Rivers (tr) *A Theory of Constitutional Rights* (Oxford University Press Oxford 2002).

characteristics of female prisoners and suggest that many of their difficulties are associated with the structural and psychological disadvantages that the female prison population experiences. Mirroring the arguments put forward by MacKinnon, it will be suggested that penal institutions can be seen in the same way as the law, designed with men in mind, and where notions of equality mean treating women like men. Some of the decisions of the ECtHR on prisoners in general are examined, with a view to seeing how they can be applied to the needs of female prisoners, particularly in relation to Articles 2, 3, 8 and 14. Whilst the majority of cases concerning prisoners tend to be brought by male applicants, and there is a need to frame the issues that female prisoners face as human rights violations, Articles 3 and 8 do present some possibilities for addressing the rights of female prisoners. Nevertheless, in view of the limited nature of prisoners' rights and the limits the Convention has placed on the development of these rights, significant inroads have yet to be made.

The fifth and final chapter seeks to move towards a new human rights paradigm for evaluating the claims of female prisoners. It will suggest that the disproportionate effects of imprisonment for women and their families should limit the use of custody for women in all but the most serious offences. It will argue that in this area, the ECHR needs to be developed in relation to substantive arguments concerning the use of imprisonment as opposed to simply the procedural aspects that bring it about. The higher rates of mental illness among female prisoners, and the disproportionate effects on their family structure, will form the basis of arguments under Articles 3, 5, 8 and 14 of the Convention to reduce the use of imprisonment for women in all but the most serious offences.

The thesis concludes by suggesting that while the potential exists for arguments to be made that better incorporate women's rights into the existing framework, it remains the case that the ECHR was not designed with the needs of women in mind. In order to succeed in bringing women's rights into the mainstream, the will to interpret human rights principles in a manner that more effectively encompasses their claims needs to be present.

1.

CAN THE HUMAN RIGHTS PARADIGM ADDRESS WOMEN'S CLAIMS? LIBERALISM AND FEMINIST CRITIQUES

A. INTRODUCTION

This chapter will address whether the human rights paradigm can be used to advance the human rights claims of women or whether it should be discarded as a vehicle for effective change. Analysis of the usefulness of human rights principles will centre on the main themes of feminism's criticisms of liberal political theory and the legal ideals that emerge from it.¹ There are five main aspects to this critique. Firstly, feminists argue that classical liberal theory's dependence on notions of negative freedom fails to address women's particular need for positive resources, such as might be addressed through the development of socio-economic rights. Secondly, the liberal separation of public and private areas of life disguises the fact that it is in the private area that women suffer the most disadvantage. Thirdly, the neutrality and rationality of liberalism obscures the socially situated nature of subjects. Fourthly, the transcendental liberal individual overlooks issues of embodiment that are of particular importance to understanding gender identity and finally, the focus on formal equality ignores the structural disadvantages that women face. These issues offer significant challenges to notions of human rights as currently conceived. However, recent shifts towards positive notions of freedom, the blurring of the distinction between the

¹ For an analysis of feminist legal theory with regard to strategies to use human rights 'to secure justice, autonomy or equality for women' see N Lacey 'Feminist Legal Theory and the Rights of Women' in K Knop (ed) *Gender and Human Rights* (Oxford University Press Oxford 2004) 13.

public/private divide and moves towards substantive equality afford new approaches for addressing women's rights. It will be suggested that while developments in rights discourse do present opportunities to address women's claims, these developments need to be rigorously articulated within the human rights framework.

B. LIBERAL FREEDOM AND FEMINIST CRITIQUES

1. The Development of Liberal Notions of Freedom

Liberal ideas of freedom have undergone considerable development since the 17th century.² The traditional liberal ideal advocated by early English thinkers³ has, in recent years, been articulated by Isaiah Berlin. In Berlin's classic formulation, freedom may be characterised as either 'negative' or 'positive'.⁴ Negative liberty is defined as an area where 'man can act unobstructed by others' towards his goals.⁵ While attainment of these goals may be impeded by circumstances such as poverty, these would not, in themselves, constitute interference with 'political freedom' in the negative sense.⁶ To prevent this area of liberty being encroached upon by others and thus maximize the amount of liberty available for all, negative freedom would need to have limits placed on it by law.⁷ These limitations would be guided by principles such as justice, security and equality, so that freedom could be restricted to protect 'other

² JG Merquior *Liberalism Old and New* (Twayne Publishers Boston 1991) 2-13.

³ *ibid* 9-13. Merquior differentiates between the different emphases placed on aspects of liberal freedom in different European countries, so that that the French developed freedom from a republican perspective and the Germans from a humanist perspective.

⁴ I Berlin *Four Essays on Liberty* (Oxford University Press Oxford 1969) 118-172.

⁵ *ibid* 122.

⁶ *ibid* 122-3.

values and, indeed ... freedom itself'.⁸ A minimum space of personal liberty is advocated to allow the individual an arena for their personal development and, influenced by the importance of having a 'free market in ideas', for the development of civilization as a whole.⁹ However, the location of the dividing line between the arena of personal liberty and the realm of the State is, Berlin acknowledges, a matter of considerable debate in view of man's interdependence, and because no action can be so entirely 'private' as to not interfere with the life of another.¹⁰

Negative freedom was criticized as being of little use to those who could not put such freedom to meaningful value: the poor, illiterate and underprivileged.¹¹ Thus, thinkers in the 1880s, so-called 'social liberals' or 'new liberals,' started to reject negative liberty in favour of a notion of positive freedom.¹² Positive freedom is 'not freedom from, but freedom to ... lead one prescribed form of life'.¹³ For thinkers such as Green, this meant removing obstacles to self-development and access to opportunity.¹⁴ This type of liberal thinking developed to reach its zenith in post-war welfare state policies. '[W]elfare state' liberals¹⁵ argue that freedom can only be meaningful, and we can only be the true determiners of our life decisions if certain needs are met and facilities provided.¹⁶ Social liberalism involves a more interventionist role for the State, redistributing wealth and expanding opportunity for

⁷ *ibid* 123-4.

⁸ *ibid* 123-4.

⁹ *ibid* 124,127.

¹⁰ *ibid* 124.

¹¹ *ibid* 124-5.

¹² Merquior (n 2) 99, 150.

¹³ Berlin (n 4) 131.

¹⁴ T H Green D Bagnoli *Lectures on the Principles of Political Obligation* (Cambridge Scholars Press London 2002) 4.

¹⁵ MJ Sandel *Liberalism and the Limits of Justice* (2nd edn Cambridge University Press Cambridge 1998) ch 2, 66; J Rawls *A Theory of Justice* (Oxford University Press Oxford 1999).

¹⁶ N Lacey *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing Oxford 1998) 52.

the least well off.¹⁷ These developments are regarded with suspicion by the proponents of negative freedom for presupposing an idea of the higher self — a self that would agree to the limitation of freedom for the loftier goals of wider social justice — and which could be used to justify oppression and tyranny in the name of these goals.¹⁸

Whilst contemporary liberal theory has advocated ideas that are consistent with positive freedom,¹⁹ this has been challenged by the ascendance of so-called ‘neoliberal’ thought in recent years, which questioned the social policies of social liberalism, and advocated a return to a minimalist State.²⁰ These shifts within the liberal ideal notwithstanding, the dominance of the liberal tradition in Western democratic and legal arrangements appears to be unquestionable: the radical socialist movements, such as Marxism, which challenged Western liberal thought, have not undermined its dominance.²¹

2. The Development of Contemporary Feminist Thought

The language of liberal freedom brought with it a ‘currency’ with which early feminists could articulate the need for women’s liberation.²² Liberal feminism emerged at this time, when women had no voting rights, entitlement to property or

¹⁷ S Fredman *Women and the Law* (Clarendon Oxford 1997) 18.

¹⁸ Berlin (n 4) 132-4.

¹⁹ M Freeden *The New Liberalism: An Ideology of Social Reform* (Clarendon Oxford 1978) ch 2.

²⁰ Merquior (n 2) 147.

²¹ M Freeman *Liberalism, Socialism and Human Rights* (Department of Government University of Essex Colchester 1992) 3-4 and from a feminist perspective C V Ward ‘Introduction: Reconstructing Liberalism’ (1999) 40 *William and Mary L Rev* 719.

rights over their children.²³ The ‘*a priori* presumption...in favour of freedom and impartiality’ that existed for men was in sharp contrast to the life of servitude that was a woman’s lot.²⁴ The advancement of the liberal ideal had enshrined the importance of freedom of individual choice. However, women were, almost uniquely, limited by virtue of their sex to having such freedoms curtailed.²⁵ Early liberal feminists, such as Wollstonecraft, therefore sought to extend these principles to women. Writing in 1792, Wollstonecraft argued that women had the capacity for rationality, so important to liberal thought, but were kept, by men, in a state of childishness and domesticity. She argued that women should have access to education to develop their rational faculties.²⁶ Liberal feminists thus sought the same treatment for men and women and in doing so, rejected the idea that men and women have different natures: ‘there is only human nature and that has no sex’.²⁷

In line with the liberal debates of the time, early feminists advanced views that were more consistent with notions of positive liberty. Unlike the advocates of negative liberty who articulated freedom as the absence of State coercion, Wollstonecraft, Mill and Taylor enounced ideals consistent with the removal of obstacles to development. Such freedom was freedom from social interference or dependence upon others (men).²⁸ Additionally, moves such as those by Wollstonecraft to secure equal access to education for women were more proactive in

²² Fredman (n 17) 9; M Nussbaum *Sex and Social Justice* (Oxford University Press Oxford 1999) for an up-to-date exposition of this perspective.

²³ Fredman (n 17) 9-11.

²⁴ J Mill (1869) ‘The Subjection of Women’ in *J Mill/ M Wollstonecraft: The Rights of Woman/ The Subjection of Women* (Everyman London Reprinted in 1970) 219.

²⁵ *ibid* 236.

²⁶ M Wollstonecraft (1792) ‘A Vindication of the Rights of Woman’ in *The Rights of Woman/ The Subjection of Women* (Everyman London Reprinted in 1970) 323-325.

²⁷ A Jagger *Feminist Politics and Human Nature* (Rowman and Allanheld Totowa New Jersey 1983) 37.

nature. However, what liberal feminism traditionally sought were equal rights to the citizenship enjoyed by men.²⁹ Herein lay the weakness. In its attempts to secure equal citizenship rights for men and women, liberal feminism was accused of circumventing the 'sexual-class identification of women as women'.³⁰ The patriarchal bias inherent in liberal theory means that the liberal feminist project was and is fundamentally limited.³¹ Liberal feminists were accused of prioritising the values of individualism and freedom over collective advantage, and promoting 'gender neutral humanism over a gender-specific feminism'.³² In line with contemporary liberal thought, some liberal feminists have sought to emphasize individualism that accommodates the importance of 'the social collectivity' as opposed to that which adopts 'a competitive view' of individual relations.³³ In addition, Eisenstein has sought to bridge the gap between radical and liberal feminism by returning to the implicit class nature of the claims made by early feminists. She argues that liberal ideals underlie all feminist claims in that they aspire to the independence and autonomy of women, and that all feminist claims are radical in that they are influenced by women's identity as a sexual class.³⁴

These later developments notwithstanding, radical feminism developed in response to the inadequacies of liberal feminism outlined here. In particular, radical feminism was not optimistic that the claims of women could be reconciled with the patriarchal bias inherent in liberal thought. Radical feminists believe that female oppression is structural, and based on sex and gender.³⁵ It moves beyond the gender

²⁸ Z R Eisenstein *The Radical Future of Liberal Feminism* (Boston Northern University Press 1981) 94, 117.

²⁹ *ibid* 5-6.

³⁰ *ibid* 6.

³¹ *ibid* 5.

³² R Tong *Feminist Thought: A Comprehensive Introduction* (Routledge London 1992) 31.

³³ Eisenstein (n 28) 5; text between n 193 and n 253.

³⁴ Eisenstein (n 28) 4.

³⁵ Tong (n 32) ch 4.

neutrality of liberal theory, seeking structural explanations for women's disadvantage. Radical feminism is grounded in the idea of patriarchy: power struggles, competition, domination and hierarchy determine society's systems.³⁶ These characteristics govern political and legal arrangements and cultural and social organizations.³⁷ Structural gender distinctions are therefore profound and remain largely unrecognized in society.³⁸ Furthermore, society's 'duties and obligations' are borne disproportionately by women.³⁹ In particular, radical feminism is responsible for specifically articulating the class nature of women's claims. Female class oppression is based on sexuality: MacKinnon famously stated that 'sexuality is to feminism what work is to Marxism'.⁴⁰

The emphasis on sexuality has focussed attention on the male control of the female body.⁴¹ It is seen as the basis of female subordination and in need of reconstruction.⁴² Women are seen to be deprived of their humanity to the extent that they are deprived of power over their bodies.⁴³ This focus on biology and sexuality has enabled radical feminism, perhaps more than other branches of feminism, to articulate and bring to the fore problems of sexual violence against women.⁴⁴ While there are some statistical differences in relation to the incidence and prevalence of sexual violence along class and racial lines (and the statistics in relation to race need to be developed considerably) the biggest risk factor for sexual violence appears to be

³⁶ *ibid* 2-3.

³⁷ *ibid* 2-3.

³⁸ Jagger (n 27) 85.

³⁹ D Thompson *Radical Feminism Today* (Sage London 2001) 8.

⁴⁰ C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press Cambridge Mass 1987) 48.

⁴¹ Tong (n 32) 72.

⁴² MacKinnon (n 40) ch 3.

⁴³ Tong (n 32) 72.

⁴⁴ J Brenner *Women and the Politics of Class* (Monthly Review Press New York 2000) 263-266.

youth.⁴⁵ Therefore, it is perhaps in this arena that radical feminists' class claims for women as women are the strongest.⁴⁶

However, this emphasis on female biology has led to criticism that radical feminists' stance is both essentialist and reductionist.⁴⁷ Jagger argues that biology cannot be regarded as the only source of female oppression (although it is an important one) — it needs to be contextualized, taking into account other physical and social factors. This is the specific criticism levelled at MacKinnon by Cornell. She has criticized MacKinnon's argument that women's subordination and sexual domination are interlinked and can only be addressed through substantive equality by suggesting that MacKinnon returns to a protectionist and fundamentally conservative outlook which is 'part of the encoding of the wounds of femininity'.⁴⁸ A further weakness of radical feminism is that the middle class background of many of its proponents limits the incorporation of the experiences of working class women or women of the ethnic minorities.⁴⁹

In response to these criticisms, contemporary radical feminists such as Thompson warn against prioritising issues 'of race or class while ignoring male

⁴⁵ A Myhill and J Allen *Rape and Sexual Assault of Women: The Extent and Nature of the Problem. Findings from the British Crime Survey (Home Office Research Study 237)* (Home Office London 2002); P Tjaden and N Thoennes *Prevalence, Incidence, and Consequences of Violence against Women: Findings from the National Violence against Women Survey* (US Department of Justice Washington DC 1998).

⁴⁶ Indeed Russell's survey into marital rape appears to be influenced by the radical feminist perspective when she argues that marital rape is largely a product of the patriarchal family where men believe that wives are 'the sexual property of their husbands' D Russell *Rape in Marriage* (Indiana University Press Bloomington 1990) 3.

⁴⁷ S Walklate *Gender, Crime and Criminal Justice* (Willan Cullompton Portland 2001) 37.

⁴⁸ D Cornell *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge New York 1995) 24.

⁴⁹ A Jagger (n 27) 84; A Harris 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford L Rev 581.

supremacy'.⁵⁰ These categories include men, with the risk that their interests will take precedence over those of women, not least because their 'human' status is less ambiguous. This means that they have 'a clearer apprehension of their exclusion from human rights' than do women.⁵¹ Additionally, identifying the primacy of male supremacy does not translate into a single notion of domination: '[w]hile it is sometimes violent and blatantly dehumanising, it is also as multifarious and all-pervasive as everyday life'.⁵²

Structural biases also influenced the work of Gilligan, although her challenge was aimed specifically at the bias in psychological and philosophical literature concerning women's moral development.⁵³ Social/psychoanalytical or cultural⁵⁴ feminism argues that women have special attributes and social skills and that these should be given equivalent recognition and regard as the attributes traditionally ascribed to men.⁵⁵ Gilligan's research indicated that women make decisions based on an 'ethic of care' whereas men make decisions on the basis of a 'logic of justice approach'.⁵⁶ The 'ethic of care' essentially means to operate on a relational basis and emphasizes mutual connection — a link 'between relationship and responsibility'.⁵⁷ The 'logic of justice' emphasizes the well-established concepts of rights and rationality.⁵⁸ Some feminists such as West have subsequently argued for systems of

⁵⁰ D Thompson *Radical Feminism Today* (Sage London 2001) 92.

⁵¹ *ibid* 92.

⁵² *ibid* 56.

⁵³ Tong (n 32) 162.

⁵⁴ Kim uses 'the term "social/psychoanalytic" feminism to refer to both "social feminism" and "psychoanalytic feminism", recognising that there may often be subtle differences between the two' N Kim 'Towards a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism' (1993) 25 Columbia Human Rights L Rev 49, 55.

⁵⁵ *ibid* 55.

⁵⁶ C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press Cambridge Mass 1993) ch 2.

⁵⁷ *ibid* 173.

⁵⁸ *ibid* ch 2.

law to be based on this ‘ethic of care’.⁵⁹ However, Gilligan’s approach has been criticized by radical feminists for giving the moral reasoning she ascribes to women:

[T]he affirmative rather than the negative valuation of that which has accurately distinguished women from men, by making it seem as though these attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use.⁶⁰

Additionally, some commentators have expressed concern that attributing these characteristics to women could be used as a justification to reinforce women’s traditional roles.⁶¹ Lacey argues that Gilligan’s research could be interpreted as advocating the ‘less formal and abstract’ construction of legal concerns or legal subjects.⁶² She suggests that this can obscure the detrimental way in which the contextualization of legal subjects already occurs, such as can be seen in the sentencing of offenders.⁶³ An example of this could be a plea in mitigation, which can introduce social factors, and contextualizes the legal subject at this point in the legal process. Lacey suggests that some contextualizations may even be a source of concern to feminists, such as the assumptions underpinning the treatment of the defendant and victim in a rape case. It is also probable that legal thinking is already “‘relational”” but that it tends to prioritise particular types of relationship ‘such as proprietary, object relations’.⁶⁴ The attempt to contextualize legal concerns and subjects may be over-optimistic in attempting to tackle the underlying power dynamics of these relationships.⁶⁵

⁵⁹ R West ‘Love, Rage and Legal Theory’ (1989) 1 Yale J of L and Feminism 101, 107 and 109 cited in L C McClain “‘Automistic Man” Revisited: Liberalism, Connection and Feminist Jurisprudence’ (1992) 65 Southern California Law Rev 1171, 1183.

⁶⁰ MacKinnon (n 40) 38-9.

⁶¹ McClain (n 59) 1197.

⁶² Lacey (n 16) 6.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

Gilligan's perspective seeks to affirm and validate a 'female' outlook, a 'voice' that had been silenced and ignored in psychological practice.⁶⁶ If differences between men and women are societal constructs, then it may be argued that both sexes could have both 'relational' and 'justice' tendencies, but that these have been divided along gender lines instead of the more balanced approach of developing both characteristics in both sexes.⁶⁷ If this is the case, then articulating that voice, whilst important, is only half the battle. The other is giving women an interest in justice-based rights. If women are predominantly relational in their thinking, this is perhaps evidence of the extent to which they have been unable to articulate their needs in a justice-based forum. These divisions appear to have been replicated in a number of legal systems which adopt an approach similar to Gilligan's relational model in negotiation and dispute resolution: so called 'soft law' approaches to international law.⁶⁸ However, as will be seen, these kinds of approaches are not accorded the equal weight of a justice-based approach as advocated by this branch of feminism.⁶⁹

Other radical challenges to the dominance of liberalism in society, such as Marxism and socialism, also influenced feminist responses to the inadequacies of the liberal feminist approach. Marxist feminism regards female oppression, as being class based.⁷⁰ In line with Marxist thinking, it believes that the small number of powerful people in society, who acquire 'the wealth produced by the powerless many', hinder

⁶⁶ C Gilligan 'Getting Civilized' (1994) 63 Fordham L Rev 17.

⁶⁷ Indeed, Gilligan herself came to the conclusion later on that both sexes needed to look at problems from both perspectives C Gilligan, J V Ward and J McLean Taylor (eds) *Mapping the Moral Domain: A Contribution to Women's Thinking to Psychological Theory and Education* (Harvard University Press Cambridge Mass 1988).

⁶⁸ H Charlesworth, C Chinkin and S Wright 'Feminist Approaches to International Law' (1991) 85 American J of Intl L 613, 615-621.

⁶⁹ Text between n 246 and n 252.

⁷⁰ MacKinnon (n 40) 48.

true equality of opportunity.⁷¹ For them, liberation cannot be forthcoming unless there is common ownership of ‘the means of production’.⁷² Marxist feminists thus regard class as being the most important source of female oppression.⁷³ Marxist theory rejects liberal notions of rationality and the separation of the moral and physical self so important to the Kantian tradition.⁷⁴ Instead, they ground their analysis of human nature in biology, believing that humans are one species among many and that they have a number of biological needs including sustenance and shelter.⁷⁵ Marx believed that the rights of ‘the abstract and universal man...promote...the selfish and possessive individual of capitalism’.⁷⁶ The ‘*institutional structure of the State*’ including its capitalist framework and ‘bourgeois domination’ inscribe both the political and class struggle.⁷⁷ Marx’s work was hugely influential in the critique (including the feminist critique) of rights.⁷⁸ Nevertheless, Marxist feminism was criticized for its focus on class that did not recognize specific gender oppression.⁷⁹ In particular, Marxist feminism failed to take account of the fact that women’s work was largely domestic.⁸⁰ In contrast to Marxist feminism, socialist feminism focuses on the relationship between patriarchy and capitalism as sources of female oppression.⁸¹ It argues for the integration of all elements and perspectives of women’s lives and for feminism to develop a united theory.⁸²

⁷¹ Tong (n 32) 2.

⁷² *ibid.*

⁷³ *ibid* 39.

⁷⁴ Jagger (n 27) 53; text between n 194 and n 238.

⁷⁵ *ibid.*

⁷⁶ C Douzinas *The End of Human Rights* (Hart Oxford 2000) 159.

⁷⁷ N Poulantzas P Camiller (tr) *State, Power, Socialism* (NLB London 1978) 125.

⁷⁸ Douzinas (n 76) 169.

⁷⁹ Walklate (n 47) 37-8.

⁸⁰ *ibid.*

⁸¹ *ibid* 38; Tong (n 32) 217.

⁸² Tong (n 32) 5-7.

These approaches essentially question the value of the liberal framework of rights in addressing injustice and disadvantage, defined in terms of the class struggle. Women's claims are, according to this, a product of the oppression of the dominant capitalist classes, and while socialist feminism has sought to align itself more with issues of gender, these perspectives share an outlook that essentially seeks ownership of finances and resources as a means of tackling disadvantage. Hence, whilst some parallels can be drawn between them and arguments for positive freedom and resources associated with liberal thought, its preservation of a capitalist framework would undermine the changes that these branches of feminism deem necessary to tackle inequality. Additionally, Marxist feminism, in line with Marxist theory, does not appear to be able to tackle issues associated with sexuality and reproduction and consequently, tends to focus on work-related issues for women.⁸³ This means that this branch of feminist thought cannot claim to be a complete explanation for women's disadvantage.⁸⁴ To some extent, this is supported by empirical research, which suggests that the incidence of rape in marriage is not prevented by women's improved financial status or independence, although it may influence the length of time that women stay in abusive relationships.⁸⁵ While this would indicate that the prevalence of attacks of this nature in the home might be influenced by changes advocated by theories of this nature, they do not appear to be a satisfactory explanation for attacks outside the context of intimate relationships. These theories also appear to be inadequate in explaining female crime, although a Marxist/socialist perspective could indicate that criminal justice systems add to the exploitation of undervalued domestic labour within capitalism by imprisoning women for property crimes, particularly those with young children. However, women make up a very small proportion of offenders

⁸³ Tong (n 32) 51.

and prisoners in the criminal justice system in comparison to men. This points quite strongly to the influence of gender, such that a Marxist perspective would again be limited in this area. The intersection of class and gender embraced by socialist feminists could be of value in addressing female crime. However, it should be noted that social liberalism, in seeking to protect basic welfare rights has blurred the distinction between socialism and liberalism, and in so doing, has marginalized the more radical aspects of socialist theory.⁸⁶

The postmodern movement that has strongly affected other disciplines has also influenced feminism.⁸⁷ Primarily used in deconstruction and critique however, its influence in feminist legal theory has been less pronounced.⁸⁸ In response to the perceived racism of radical feminism,⁸⁹ postmodern, or 'third wave' feminism holds that factors such as class, race and culture impact in different ways on women's lives.⁹⁰ In this way, postmodern feminism could be regarded as more inclusive than the other strands of legal feminism. It is influenced by the work of French feminists, Cixous, Irigaray, and Kristeva, who seek to deconstruct and celebrate "Otherness".⁹¹ To focus on the worthwhile aspects of 'otherness' in turn enhances an evaluative and critical perspective towards all other theorizing such as the necessity of deconstructing language ideas and their structures.⁹² As such, both '[d]ifference and deconstruction' invalidate the quest both for universal truths, and for singular ideas of self.⁹³

⁸⁴ *ibid* 51.

⁸⁵ Russell (n 46) 3-4.

⁸⁶ Freeman (n 21) 3-4.

⁸⁷ M Eichner 'On Postmodern Feminist Theory' (2001) 36 *Harvard Civil Rights-Civil Liberties L Rev* 1-77, 2-3.

⁸⁸ *ibid* 3.

⁸⁹ C MacKinnon 'Points against Postmodernism' (2000) 75 *Chicago-Kent L Rev* 687, 697.

⁹⁰ Tong (n 32) 7; Harris (n 49).

⁹¹ Cited in Walklate (n 47) 39.

⁹² *ibid*.

⁹³ *ibid* 39-40.

These principles can be illustrated by the work of Irigaray who moves beyond sameness and difference as understood within the context of this debate. Irigaray argues that both men and women are 'sexed' in a natural and spiritual way so that claiming equality with men is ethically misguided.⁹⁴ Nature comprises two: male and female, so that an appeal to a singular concept of "Nature" is misplaced.⁹⁵ The natural and universal need to be explored 'as particularities' and it is on this basis that rationality should be re-grounded, from this multiple, natural order.⁹⁶ Irigaray regards 'sexual difference' as a constant and natural reality, an 'irreducible component of the universal'.⁹⁷ The ability to respect difference is a cultural issue, necessitating a civil law to mediate 'this cultivation'.⁹⁸ Instead of women becoming men, women ought to have specific and particular rights.⁹⁹ The 'sexuate' identities of men and women require a horizontal and vertical legal framework, which reflects these differences.¹⁰⁰ Irigaray goes on to list what these rights should include, such as '*human dignity*', '*human identity*', and entitlement to '*motherhood* as a component (not a priority) of female identity', equal representation of women in decision-making bodies, among others.¹⁰¹ She is criticized however, in that her natural sexual difference could be interpreted as essentialist.¹⁰² To inscribe these differences into law runs the risk that they could be used as a reference point of what women's role should be.¹⁰³ One can accept that men and women lead different lives without basing such arguments within the context of a natural imperative.

⁹⁴ L Irigaray A Martin (tr) *I Love to You: A Sketch of a Possible Felicity in History* (Routledge New York 1996) 27.

⁹⁵ *ibid* 35.

⁹⁶ *ibid* 36-7.

⁹⁷ *ibid* 47.

⁹⁸ *ibid* 51.

⁹⁹ L Irigaray A Martin (tr) *Je, Tu, Nous: Towards a Culture of Difference* (New York London 1993) 78.

¹⁰⁰ *ibid* 83.

¹⁰¹ *ibid* 86-9.

¹⁰² E Porter 'Equality in the Law and Irigaray's Different Universals' in J Richardson and R Sandland (eds) *Feminist Perspectives on Law and Theory* (Cavendish London 2000) 135, 146.

Postmodern feminism has been criticized for being unable to produce analyses of sufficient rigour to challenge existing discourses.¹⁰⁴ Their theoretical debates are located at a level too high up to construct a political ‘strategy of resistance’.¹⁰⁵ The diversity and difference embraced by postmodern feminism and its emphasis on the deconstruction of language structures has also been criticized for threatening chaos.¹⁰⁶ In addition, like difference feminism, cultural perspectives can be used to justify reinforcing female stereotypes and damaging cultural attitudes.¹⁰⁷ In the celebration of difference, some postmodern feminists fail to address the fact that many of these differences may be ‘socially constructed’, as accepted by liberal, radical and Marxist feminists.¹⁰⁸ The social construction of difference is one of the premises underlying this thesis.

The strength of postmodern feminism is that it has introduced discourses by black feminists, who challenge the idea that female oppression can be a similar experience for all.¹⁰⁹ Specifically, critical race theorists suggest that the dual dynamics of race and gender disadvantage leave women of colour vulnerable to being subordinated to the dynamics of both.¹¹⁰ Addressing violence against women of colour requires a framework sensitive to the manner in which these dynamics intersect.¹¹¹ Crenshaw argues that intersections happen at three levels: structural, political and representational. ‘Structural intersectionality’ refers to the ways that

¹⁰³ *ibid* 150.

¹⁰⁴ Eichner (n 87) 6.

¹⁰⁵ *ibid* 48.

¹⁰⁶ Walklate (n 47) 40.

¹⁰⁷ MacKinnon (n 89) 699-700.

¹⁰⁸ Eichner (n 87) 54.

¹⁰⁹ Harris (n 49).

¹¹⁰ K Williams Crenshaw 'Beyond Racism and Misogyny: Black Feminism and 2 Live Crew' in MJ Matsuda, et al. (eds) *Words That Wound: Critical Race Theory, Assaultative Speech, and the First Amendment* (Westview Press Oxford 1993) 111, 112.

¹¹¹ *ibid*.

women of colour are subjected to ‘overlapping structures of subordination’.¹¹² In relation to violence against women, this means recognizing that a number of factors (race, class, gender) intersect and impede the chance of effective help.¹¹³ ‘Political intersectionality’ refers to the way that women of colour are excluded from the political forum because the exclusive focus of race and gender leave them without an arena to contextualize the violence they experience.¹¹⁴ ‘Representational intersectionality’ refers to the ways that images, most obviously sexual images, ‘converge to create unique and specific narratives deemed appropriate for women of color’.¹¹⁵ From a human rights perspective, this means acknowledging that discrimination can happen on more than one level, and that groups who have traditionally been disadvantaged within our society are vulnerable to experiencing multi-layered human rights abuses, if they are a member of more than one category of disadvantaged group.

The strict and literal application of liberal principles to women is clearly inadequate as a strategy, and liberal feminism appears to have moved away from these earlier leanings. While it may be true that differences and attributes assigned to women are indeed social constructs, these differences and attributes have been used as a justification for women’s disadvantaged position and to simply add women to a liberal paradigm without a sense of this history is inadequate, at best, and at worst, compounds that disadvantage. This is particularly the case for women of colour. An example of this is the imprisonment of female offenders with sole responsibility for children, for petty crimes. To treat women in the same way as men within the criminal

¹¹² *ibid* 114.

¹¹³ *ibid* 115.

¹¹⁴ *ibid* 116.

¹¹⁵ *ibid* 116.

justice systems denies the ways in which their lives are different, and can lead to additional disadvantage. For women to benefit from liberal principles requires the expansion of established concepts in a more meaningful way. This requires a rigorous re-interpretation of ideals such as freedom, so that the perils and impediments to freedom for women are articulated within current frameworks in a manner that reflects their reality.

3. Liberal Freedom and Feminism's Critique

Arguments in favour of positive resources are mirrored in the feminist critique of the classical liberal tradition. Feminists argue that liberal theory's commitment to negative freedom as the absence of state coercion disguises women's economic, political and social marginalization, particularly in the domestic realm.¹¹⁶ From the perspective of negative freedom, liberal feminists can argue that the state is not the only source of coercion. For women, the coercion most likely to compromise their freedom comes from private individuals.

Both liberal and Marxist feminists argue that women have a particular need for positive resources. Liberal feminism, in line with social liberalism, is also committed to notions of positive freedom that involve the redistribution of resources to enhance equal opportunities.¹¹⁷ In recent years, liberal feminists have used the rise in social liberalism to articulate 'a formative project that involves governmental responsibility

¹¹⁶ These are more gender specific effects of dividing positive and negative freedom discussed further at text between n 153 and n 193.

¹¹⁷ Tong (n 32) 12-13.

to help citizens live good, self-governing lives'.¹¹⁸ This involves a more proactive approach to self-development on the part of States. The realization of liberal ideals of freedom depends on the material basis upon which that freedom is exercised. Liberal feminists, thus, challenge human rights interpretations and point to the need for the development of socio-economic rights. As seen however, Marxism and socialism, locate the source of human oppression as lying within the structure of capitalism, a structure that is reflected in human rights discourse.¹¹⁹ For both Marxist and socialist feminists, the notion of human rights would be inadequate to address the underlying sources of female oppression, to the extent that they are located within a capitalist society.¹²⁰ In as far as Convention rights might be extended to protect those vulnerable under 'market economy,' and address material disadvantage there may be lessons to learn from Marxist/socialist feminists. Radical feminists regard women's impediments to freedom as stemming from the extent that they are sexualized in society and this is, for them, the biggest obstacle to women's liberty and autonomy. Black feminism argues that gender intersects with race and class to produce additional disadvantage, making ideas of freedom even more illusory.

Other feminists, most notably Drucilla Cornell, have sought to move beyond the division between positive and negative liberty outlined by Berlin, to a more objective critique of rights.¹²¹ Through her theory of 'minimum conditions of individuation', Cornell argues that the distinction between positive and negative

¹¹⁸ LC McClain 'Reconstructive Tasks for a Liberal Feminist Conception of Privacy' (1999) 40 William and Mary L Rev 759, 780; LC McClain 'Toleration, Autonomy and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect' (1998) 59 Ohio ST L J 19.

¹¹⁹ Freeman (n 21) 2-3.

¹²⁰ Also S Easton 'Feminist Perspectives on the Human Rights Act: Two Cheers for Incorporation' (2002) 8 Res Publica 21, 29-30.

¹²¹ Cornell (n 48) 5 fn 3.

liberty has limited our thinking about rights.¹²² The division between these two areas of life is misguided from the perspective of developing conditions for the self-actualization she advocates, and which requires an open-ended idea of what being a human being entails. This is in contrast to classical notions of liberal theory that presuppose ‘a general and comprehensive theory of human being’.¹²³ Such an open-ended conception of what it means to be human presents a significant challenge to liberal notions of freedom. Furthermore, it challenges our understanding of human rights ideas by highlighting the limited nature of protections based on this closed conception of human nature.¹²⁴ This is considered further when this chapter examines the possibility of re-envisioning human rights to challenge the liberal idea of the disembodied individual.¹²⁵

4. Liberal Freedom and Human Rights

While human rights reflect notions of both positive and negative freedom, historically, there has been a stronger bias in legal instruments and legal interpretation towards the protection of negative liberty.¹²⁶ The rights prescribed in the Universal Declaration of Human Rights (UDHR) were separated into “‘traditional” civil and political rights’ and ‘economic, social and cultural rights’.¹²⁷ The UDHR refers to rights that would

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ Douzinas (n 76) 215, 324-6; text between n 221 and n 224.

¹²⁵ Text between n 194 and n 252.

¹²⁶ M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Oxford 1995) 10-11.

¹²⁷ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR); H Steiner and P Alston *International Human Rights in Context: Law, Politics, Morals* (2nd edn Oxford University Press Oxford 2000) 237.

traditionally be associated with negative freedom: protection of physical integrity,¹²⁸ property¹²⁹ and from arbitrary State interference,¹³⁰ for example. The Declaration also refers to rights that would be associated with positive freedom or social democratic values¹³¹: the right to social security and the 'realization...of economic, social and cultural rights indispensable for ...dignity and the free development of...personality'.¹³² These include the right to employment,¹³³ holidays¹³⁴ and a reasonable standard of living¹³⁵. However, while civil and political rights developed into a framework of individually enforceable rights, such as those contained in the European Convention of Human Rights (ECHR), socio-economic rights were felt by some legal liberals not to constitute rights at all.¹³⁶ They were thought to jeopardise individual liberty, minimize the value of civil and political rights, and provide a rationale for wide ranging State interference.¹³⁷ Administratively, the legal mechanisms required for adopting socio-economic rights as human rights, such as entrenchment, or administrative or legislative arrangements, have not been forthcoming.¹³⁸ Furthermore, these rights did not form part of the debate into constitutional reform that accompanied the incorporation of the ECHR into UK law.¹³⁹

While it is true that human rights doctrines have traditionally displayed a bias towards negative freedom, even if in principle embracing both positive and negative

¹²⁸ UDHR arts 3 and 5.

¹²⁹ UDHR art 17.

¹³⁰ UDHR arts 10, 11 and 12.

¹³¹ Douzinas (n 76) 122-8.

¹³² UDHR art 22.

¹³³ UDHR art 23.

¹³⁴ UDHR art 24.

¹³⁵ UDHR art 25.

¹³⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); Steiner and Alston (n 127) 237.

¹³⁷ Steiner and Alston (n 127).

¹³⁸ *ibid* 237-8.

¹³⁹ K Ewing 'Social Rights and Constitutional Law' [1999] PL 104, 104.

liberty, there are signs of change. Rights associated with positive freedom, such as those encapsulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR), have seen significant expansion (whilst continuing to be less justiciable than civil and political rights) in international and European law in recent decades.¹⁴⁰ Both the International Labour Organization and the European Social Charter¹⁴¹ are committed to rights based upon social justice.¹⁴² The European Charter of Fundamental Rights (ECFR)¹⁴³ contains a combination both of traditional civil and political rights¹⁴⁴ combined with social, labour and positive equality rights.¹⁴⁵ The provisions of European Community law¹⁴⁶ and the Convention on the Elimination of Discrimination against Women (CEDAW)¹⁴⁷ make reference to positive measures to eliminate discrimination. Furthermore, while the ECHR encapsulates the rights protected by the International Covenant on Civil and Political Rights (ICCPR)¹⁴⁸ and could be seen to mirror the traditional concerns of negative freedom, the European Court of Human Rights (ECtHR) has held that the Article 8 ECHR provision limiting State interference in ‘private and family life’:

¹⁴⁰ (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

¹⁴¹ Council of Europe ETS No 35 European Social Charter Turin 18 X 1961.

¹⁴² Ewing (1999) 108-10. The rights encapsulated in the European Social Charter include an entitlement to work (art 1), ‘just conditions of work’ (art 2), to collective bargaining (art 6) and to social security (art 12) among many other social rights.

¹⁴³ Charter of Fundamental Rights of the European Union [2000] OJ C364/1 entered into force 7 Dec 2000 (European Charter of Fundamental Rights) (ECFR); P Craig and G De Búrca *EU Law: Text, Cases, and Materials* (3rd edn Oxford University Press Oxford 2003) 358-363.

¹⁴⁴ ECFR arts 2-7, 9-12.

¹⁴⁵ ECFR arts 14-16, 20, 21, 23.

¹⁴⁶ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 Amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions [2002] OJ L 269/15 paras [4] [14] [15] and arts 1(A) 2(5) and 8 (The Gender Directive); Also Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16 (The Equal Treatment Directive); Council Directive 2000/43/EC of June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22 (The Race Directive).

¹⁴⁷ (Opened for signature 1st March 1980, entered into force 3rd September 1981) 1080 19 ILM 33 (CEDAW) arts 2 and 4.

¹⁴⁸ Steiner and Alston (n 127) 787-8; International Covenant on Civil and Political Rights (adopted 16th December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[D]oes not merely compel the state to abstain from...interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life...¹⁴⁹

‘[P]ositive obligations’ to secure rights have also been important in the development of other Articles of the Convention, such as Article 2 (the right to life).¹⁵⁰ These moves towards ‘positive obligations’ are an incipient shift from strictly negative notions of liberal freedom towards ideas of positive freedom. Rather than entrenching a negative rights approach, the ECHR might present an opportunity to move away from the interests protected by classical liberal theory towards the values of social democracy¹⁵¹ and notions of positive duties.¹⁵² Whilst the development of arguments for the provision of positive facilities is in its infancy in the context of the ECHR, this jurisprudence is a step forward for those who argue that freedom requires positive measures. As this thesis will argue, these shifts provide us with the foundation for the further development of human rights in such a way that incorporates women’s claims.

C. LIBERALISM AND THE PUBLIC/PRIVATE DIVIDE

The traditional liberal separation of public and private areas of life seeks to foster individual development shielded from State interference.¹⁵³ The home and private life are protected from State involvement. Feminists have argued that this separation of public and private spheres disguises the fact that it is in the private arena that women

¹⁴⁹ *X and Y v Netherlands* Series A no 91 (1986) 8 EHRR 235 [23].

¹⁵⁰ *Osman v United Kingdom* Series A 1998 VIII 3124 (2000) 29 EHRR 245 [115].

¹⁵¹ S Fredman 'Scepticism under Scrutiny: Labour Law and Human Rights' in T Campbell, K Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press Oxford 2001) 197, 197.

¹⁵² R Bellamy 'Constitutive Citizenship Versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' in T Campbell, K Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press Oxford 2001) 15, 22-30.

experience the most disadvantage.¹⁵⁴ The use of the term ‘private’, at a number of different levels, has been used to justify excluding ‘women from the sources of power’.¹⁵⁵ The division of labour in the home is reinforced, marginalizing and excluding women from political, social and economic activity. This section will consider whether the feminist critiques of the public/private divide can be reconciled with a commitment to using human rights to further women’s claims.

1. Feminism and the Public/Private Divide

Classical liberalism’s commitment to non-interference in the ‘private’ arena has enabled it to disguise power relations in the domestic realm.¹⁵⁶ Feminists of various persuasions have extensively criticized the manner in which the term ‘private’ has been deployed in contemporary legal theory.¹⁵⁷ The term ‘private’ is used in describing a number of dichotomies.¹⁵⁸ The separation between public and private delineates areas that are free from State activity.¹⁵⁹ In discussions about liberalism and the free market, the private realm signifies society or the market’s freedom from regulation by the State.¹⁶⁰ However, the division is also deployed to differentiate between the private area of family and domestic life, and the public area of politics,

¹⁵³ Berlin (n 4) 124,127; text between n 2 and n 10.

¹⁵⁴ C Pateman ‘Feminist Critiques of the Public Private Dichotomy’ in C Pateman *The Disorder of Women: Democracy, Feminism and Political Theory* (Oxford Polity Press 1989).

¹⁵⁵ Charlesworth, Chinkin and Wright (n 68) 629.

¹⁵⁶ Lacey (n 16) 77-8.

¹⁵⁷ Works on this subject include K O’Donovan *Sexual Divisions in Law* (Weidenfeld and Nicholson London 1984); Pateman (n 154) ch 6; Lacey (n 16) 57-8, 71-86; D Sullivan ‘The Public/Private Distinction in International Human Rights Law’ in J Peters and A Wolper (eds) *Women’s Rights Human Rights: International Feminist Perspectives* (Routledge New York 1995) 126 for a human rights perspective.

¹⁵⁸ Pateman (n 154) 120.

¹⁵⁹ Text between n 2 and n 10.

¹⁶⁰ Fredman (n 17) 16.

‘the market or workplace’.¹⁶¹ These two definitions have been conflated so as to justify non-interference by the State in familial relations in the same way as it justifies non-regulation in the market.¹⁶² Another (perhaps more urgent) way of examining the divide is in terms of legal practice, such as the non-enforcement of cases of domestic violence, and problems with the implementation of the Child Support Agency.¹⁶³ Practices of this nature are influenced by the idea that the State should not interfere in family matters, due to their supposed capacity for self-regulation articulated in the Victorian era.¹⁶⁴ Even where regulation and criminal sanctions exist, such perspective has undermined attempts at ‘effective legal regulation’.¹⁶⁵ In terms of international law, this division manifests itself at a third level: a ‘private’ actor is said to be a non-state actor against whom the traditional principles of international law do not apply.¹⁶⁶

Dividing public and private areas marginalizes concerns about power relations and the allocation of goods in the domestic realm.¹⁶⁷ This depoliticizes those who inhabit the private sphere by inhibiting their ability to participate in the public arena.¹⁶⁸ Extensive feminist critique has argued that the separation of these two spheres effectively relegates women to domestic life and away from public life, and also serves to leave unaddressed the ‘[p]hysical and sexual abuse of wives and children’ in

¹⁶¹ *ibid.*

¹⁶² *ibid* 17; F Olsen ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1983) 96 Harvard L Rev 1497.

¹⁶³ Recent reports indicate that in 30 per cent of cases brought to the CSA, child maintenance was not being collected from the absent parents, and nearly £200 million assessed as requiring payment is being written off each year J Pirrie ‘Report of the Child Support Agency, March 2002’ [2003] 33 Family L 105-110, 105-6.

¹⁶⁴ L Zedner ‘Regulating Sexual Offences within the Home’ in I Loveland (ed) *Frontiers of Criminality* (Sweet and Maxwell London 1995) 173-194, 175-181.

¹⁶⁵ *ibid* 191.

¹⁶⁶ The public and private divide in international law is discussed by Charlesworth, Chinkin and Wright (n 68) 625-30.

¹⁶⁷ Lacey (n 16) 77-8.

¹⁶⁸ *ibid.*

view of the so-called private nature of these crimes.¹⁶⁹ For example, marital rape was, until relatively recently, not regarded as rape at all for the purposes of the criminal law.¹⁷⁰ Even now, research indicates that current partners perpetrate nearly half of all the most recent rapes reported since the age of 16.¹⁷¹ Nevertheless, it remains the ‘type’ of rape where the perpetrators are least likely to be brought to justice.¹⁷² Addressing this marginalization of violence against women in the home requires a willingness to interpret human rights violations with reference to the nature of the act as opposed to the status of the perpetrator, as has traditionally been the case in human rights doctrine.

Feminists have employed a variety of techniques for exposing the public/private divide. Liberal feminists can argue that the limitations created by this divide are at variance with the actualization of liberal values.¹⁷³ For example, a normative commitment to privacy can have the effect of undermining women’s entitlement to physical integrity in the domestic sphere. In order to challenge this divide, Lacey has argued for the re-politicization of the so-called private area and observes that a vital distinction should be maintained between ‘what has been thought of as private ... within the scope of political *critique*’ and what must be regulated.¹⁷⁴ Arguing that something be subject to political critique in of itself does not imply that it should be regulated. From a liberal feminist perspective, Allen has argued that the proverbial baby should not be thrown out with the bath water. For women to develop

¹⁶⁹ G Binion ‘Human Rights: A Feminist Perspective’ (1995) 17 Human Rights Q 509, 516.

¹⁷⁰ This was altered by the decision in *R v R* [1992] 1 AC 599 HL.

¹⁷¹ Myhill and Allen (n 45) found that 45 per cent of the most recent rapes reported since the age of 16 by respondents in their study were perpetrated by current partners iv.

¹⁷² J Harris and S Grace *A Question of Evidence? Investigating and Prosecuting Rape in the 1990's Home Office Research Study 196* (Home Office London 1999) xi-xii.

¹⁷³ Kim (n 54) 53; Lacey (n 16) 78 although Lacey is a communitarian of a very restricted kind: E Frazer and N Lacey *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Harvester Wheatsheaf New York 1993) ch 5.

a sense of value concerning their 'privacy and private choice' is 'an appropriate feminist emphasis'.¹⁷⁵ The lines of public and private can be re-drawn by 'making better or different use of evidence regarding what occurs among family members' so that women can benefit from privacy for their own development.¹⁷⁶ The reformulation of privacy from a feminist perspective can provide a way in for arguments that tackle the disadvantage experienced by women in this arena and how this has impeded their personal development.

Marxist/socialist feminists on the other hand base their arguments on the economic basis of the divide. Prior to industrialization, all production occurred in what is now regarded as the private, domestic realm.¹⁷⁷ The transfer of labour to the public realm meant that domestic work was not regarded as productive.¹⁷⁸ Some Marxist feminists have argued for the government (not husbands) to pay women for housework in view of the unseen nature of the labour that takes place in the home.¹⁷⁹ Thus, socio-economic rights can be used to highlight the way that the public/private divide enables governments to abandon the domestic realm. This has the potential to bring domestic activity into what has traditionally been thought of as the public arena.¹⁸⁰ This could assist women who experience violence in the home.¹⁸¹

¹⁷⁴ Lacey (n 16) 78.

¹⁷⁵ A L Allen 'Coercing Privacy' (1999) 40 William and Mary L Rev 723-757, 744.

¹⁷⁶ *ibid* 746. Also L C McClain 'Reconstructive Tasks for a Liberal Feminist Conception of Privacy' (1999) 40 William and Mary L Rev 759-794.

¹⁷⁷ Tong (n 32) 51; Olsen (n 162) 1499-1528; text between n 70 and n 86.

¹⁷⁸ Tong (n 32) 51.

¹⁷⁹ *ibid* 55.

¹⁸⁰ Tong (n 32) 53-8.

¹⁸¹ Text between n 84 and n 86.

2. The Public/Private Divide and Human Rights

The Convention differentiates between public and private in two ways. Firstly, the Convention contains a commitment to differentiating between public and private areas of life, illustrated by, for example, Article 8 ECHR, which protects the individual's 'private and family life'. Secondly, the main focus of ECHR human rights safeguards is on those violations perpetrated by public authorities as opposed to private individuals.¹⁸² The reproduction of these ideas can have the effect, if unchallenged, of re-inscribing into human rights doctrine the normative commitment to privacy that has proved to be so damaging to women in the private realm.¹⁸³ The Convention reproduces the notions of privacy central to liberal thought and it seems unlikely that, conceived in this way, European human rights doctrine can address women's human rights claims.

Whilst the realization of liberal values for women presents a challenge to human rights doctrine in a number of ways, there are also grounds for believing that these challenges can be met by the development of human rights interpretation. Firstly, liberal and radical feminists challenge the idea that only public actors are capable of perpetrating violations when the violations that are most significant to women's lives are perpetrated by private actors.¹⁸⁴ A response to this challenge is already evident in CEDAW's attention towards abuses in both the public and private arenas.¹⁸⁵ Secondly, as indicated, liberal feminists can challenge the problematic normative use of 'privacy' as non-interference in family life, which is also of

¹⁸² Human Rights Act 1998 (UK) (HRA) s 6 (1).

¹⁸³ Charlesworth, Chinkin and Wright (n 68) 627.

¹⁸⁴ *ibid* 628.

¹⁸⁵ CEDAW art 2 (e).

particular relevance in relation to abuses in the domestic realm.¹⁸⁶ But, as already seen,¹⁸⁷ the case law of the ECtHR has moved towards emphasising the positive duties on States to secure Convention rights in the field of private relations,¹⁸⁸ stressing the obligations upon public authorities to investigate and uphold these rights as between private actors.¹⁸⁹ In this context, it is encouraging that the UK courts have held that the Immigration Appeal Tribunal failed to secure rights under Article 3 for a Jamaican asylum seeker who feared further violent assaults from her former partner, because it had failed to consider whether there was effective protection for women from domestic violence in that country.¹⁹⁰ Moreover, the Human Rights Act (HRA), and the obligations on public authorities, including the courts, to act in a manner that is consistent with Convention rights, has given legislative force to the horizontal effects of human rights in the UK.¹⁹¹ Finally, our grounds for optimism are reinforced by the positive duties to secure rights that are emerging, not only in the CEDAW referred to above,¹⁹² but also in European Community law.¹⁹³ These moves towards positive notions of freedom represent a significant challenge to the normative ideal of private life that has characterised classic liberal and human rights traditions. Positive notions of freedom can challenge the traditional hands-off approach to the domestic realm, by articulating a proactive approach to securing human rights for women in this arena. However, for progress to continue, women's claims would need to be rigorously articulated within this framework.

¹⁸⁶ Text between n 172 and n 176; Charlesworth, Chinkin and Wright (n 68) 627.

¹⁸⁷ Text between n 148 and n 150.

¹⁸⁸ *X and Y* (n 149).

¹⁸⁹ *Osman* (n 150).

¹⁹⁰ *Movern Marcia McPherson v Secretary of State for the Home Department* [2001] EWCA Civ 1955.

¹⁹¹ *Venables and Another v Newsgroup Newspapers Ltd and Others* [2001] FLR 791 (HC) [25]; *Douglas v Hello* [2001] QB 967 (CA) [80], [129], [133]; *Theakston v MGN Ltd* [2002] EWHC 137 [25], [28].

¹⁹² Text to n 147.

¹⁹³ The Gender Directive, The Equal Treatment Directive, The Race Directive (n 146).

D. CHARACTERISTICS OF THE LIBERAL INDIVIDUAL

The liberal tradition espouses the idea of the rational, autonomous and transcendental individual, which is in turn reflected in human rights doctrine. This section will examine these characteristics and the associated feminist critique. It will then briefly outline the ways that these liberal principles are mirrored in human rights principles with a view to understanding their impediments.

1. The Liberal Person

The ‘self’ or ‘person’ of the liberal tradition is imbued with the characteristics of autonomy, rationality and freedom.¹⁹⁴ According to Kant, this human, rational self is not determined by elements of physicality and is transcendental.¹⁹⁵ Kant’s moral person is thus ‘independent of physical attributes’.¹⁹⁶ This person is also ‘*pre social*’ in that these characteristics exist prior to embodiment and entry into society.¹⁹⁷ These features of liberal theory underpin liberal feminism’s use of liberal principles to address women’s claims. The physical differences between men and women are regarded as irrelevant to a woman’s status.¹⁹⁸

The prominence of autonomy, rationality and freedom locate the individual as central in the liberal tradition.¹⁹⁹ Reason dictates the ‘*capacity for choice*’, which

¹⁹⁴ I Kant (1797) M Gregor (tr) *The Metaphysics of Morals* (Cambridge University Press Cambridge 1991).

¹⁹⁵ *ibid* 42, 48.

¹⁹⁶ *ibid* 65.

¹⁹⁷ Frazer and Lacey (n 173) 45.

¹⁹⁸ Jagger (n 27) 37.

¹⁹⁹ Frazer and Lacey (n 173) 45-7.

guides the decision-making processes of the individual,²⁰⁰ who is thus regarded as being able to make decisions independent of ‘any particular social circumstances’.²⁰¹ This rationality underpins Kant’s legal ideals, conferring individuals with rights.²⁰² It is the notion of rationality which also informs the ideal that all persons should be, and are entitled to be treated as, equal.²⁰³ The legal arena is regarded as independent from the political realm, and the primacy given to the rule of law protects individual freedom from the State.²⁰⁴ Kant’s thinking is deeply influential in the somewhat elusive concept of dignity.²⁰⁵ This tradition holds that moral agency entails the development of individual talent to the fullest extent possible, as far as is consistent with the same entitlement for others.²⁰⁶

2. Feminists Critique of the Liberal Self

The rational, autonomous and transcendental individual of liberal theory has been criticized by non-feminist as well as feminist academics. From a non-feminist perspective, Alan Norrie, for example, has argued that the liberal:

[A]bstract juridical individual...constantly comes into conflict with the socio-political realities of individual crime on the one hand and the politics of the judiciary, as an arm of the state, on the other.²⁰⁷

²⁰⁰ Kant (n 194) 42, 52.

²⁰¹ Frazer and Lacey (n 173) 45.

²⁰² Kant (n 194) 42; C Battersby *The Phenomenal Woman: Feminist Metaphysics and the Patterns of Identity* (Polity Cambridge 1998) 64.

²⁰³ Frazer and Lacey (n 173) 48.

²⁰⁴ Lacey (n 16) 27; Frazer and Lacey (n 173) 49-50.

²⁰⁵ E J Eberle ‘Human Dignity, Privacy, and Personality in German and American Constitutional Law’ [1997] *Utah L Rev* 963, 964.

²⁰⁶ *ibid* 965.

²⁰⁷ A Norrie *Crime, Reason and History* (2nd ed Butterworths London 2001) 199.

Communitarians criticize the portrayal of the legal subject as devoid of particularities of identity, including gender.²⁰⁸ This perspective is also consistent with postmodern feminism. The neutrality engendered is a purposive, legal construction designed to circumvent distinctions of culture, race, gender and others.²⁰⁹ This presents problems for feminist advocates of neutrality, such as liberal feminists. The problem lies in the way this approach circumvents various aspects of women's lives.²¹⁰

Other branches of feminism have considered the ways that women are not like men. These differences are key in Gilligan's ideas about the ethic of care that women articulate, and the logic of justice adopted by men and emphasized in the liberal model.²¹¹ Additionally, as we have seen, some postmodern feminists like Irigaray argue that there are inherent cultural differences between men and women.²¹² The postmodern feminist argument that class, race and gender impact in different ways on women's lives makes it difficult for them to support a universalistic conception of rights.²¹³ The inclusion of a number of perspectives challenges the universal nature of legal rules.²¹⁴

The main criticism of neutrality is that it is, in fact, non-existent. O'Donovan has argued that laws are not gender-neutral, either in formation or in application; that they represent masculine ideals that have been sneaked into the legal arena under the guise of the so-called neutral legal standard.²¹⁵ Perhaps the best example of this is the

²⁰⁸ K O'Donovan 'With Sense, Consent or Just a Con? Legal Subjects in the Discourse of Autonomy' in N Naffine and RJ Owens (eds) *Sexing the Subject of Law* (Sweet and Maxwell London 1997) 47, 47.

²⁰⁹ *ibid.*

²¹⁰ The liberal feminist approach is discussed at text between n 22 and n 34.

²¹¹ Text between n 52 and n 69.

²¹² Particularly Irigaray (n 94) and Irigaray (n 99); text between n 86 and n 108.

²¹³ Easton (n 120) 30.

²¹⁴ Cornell (n 48) 16; text between n 120 and n 125; text between n 216 and n 220.

²¹⁵ O' Donovan (n 208) 48.

legal device of the ‘reasonable man,’ epitomizing the rationality and autonomy of the (male) liberal subject.²¹⁶

With these issues in mind, some feminists have argued for subjective elements to be introduced to the reasonable man test.²¹⁷ Such a course could also address social, political and economic realities that would not only benefit women. Indeed, some feminists — so-called “third wave” feminists — have increasingly acknowledged that the “maleness” of law based on these characteristics has served to preclude significant numbers of men, because of their race or sexual orientation, from its advantages.²¹⁸ However, to the extent that these arguments represent a ‘flight towards subjectivity’: to a variety of reasonableness tests employed to mirror the reasonableness standard of a variety of oppressed groups, Cornell argues this is mistaken.²¹⁹ She bases her argument on a separation between the “as if” or ‘rightfulness’ components of this necessary legal exercise and the fact that the perception of what these are has traditionally been decided with reference to a male view of the world.²²⁰

In line with Cornell’s arguments about the open ended nature of human development and the protection of the ‘imaginary domain’,²²¹ Douzinas has argued for a non-metaphysical interpretation of human rights that would move away from the generality of the universal ‘to the public recognition and protection of the becoming-

²¹⁶ Cornell (n 48) 14-15.

²¹⁷ *ibid* 15-17.

²¹⁸ J Richardson and R Sandland 'Feminism, Law and Theory' in J Richardson and R Sandland (eds) *Feminist Perspectives on Law and Theory* (Cavendish London 2000) 1, 2.

²¹⁹ Cornell (n 48) 16.

²²⁰ *ibid* 13-15.

²²¹ *ibid* 3-20.

human with others'.²²² Douzinas affirms Cornell's perspective by arguing human rights doctrines as currently conceived are only partial entities, and need to be opened up to 'wholeness of self and body'.²²³ He argues that:

A woman who is given civil and political rights, but does not have her gender recognised by the predominantly male definition of human rights, is not a complete person.²²⁴

Cornell's arguments support the idea that it is possible to separate ideas of legal universalism from a unitary and gender blind notion of the transcendental individual.

Transcendentalism has also been criticized by feminists for precluding elements of embodiment such as the emotional realm, corporality and some social aspects from the ethical and thus political arena.²²⁵ Both communitarian and Marxist feminists argue that the situation of women within society — as the primary caretakers of children and others, and as largely responsible for domestic duties — has meant that this ideal of being able to transcend the body; to focus on the political, intellectual, spiritual and scientific areas of life, is something that men have been more readily able to achieve.²²⁶ Furthermore, the exploitation of women is particularly associated with the body.²²⁷ Women have been traditionally connected with the body: their reproductive roles are thought to align them with nature, 'reinforced ... by a sexual division of labour'.²²⁸ This point is taken further by Jagger who argues that the masculine notion of human nature, with its privilege of the mind over the body, accompanied by the division of labour in the home is not a scenario that could have

²²² Douzinas (n 76) 215.

²²³ *ibid* 324.

²²⁴ *ibid* 323.

²²⁵ Frazer and Lacey (n 173) 53.

²²⁶ *ibid*; Jagger (n 27) 74.

²²⁷ Frazer and Lacey (n 173) 54.

been arrived at with the female perspective in mind. Women's need for pregnancy services, for example, makes it unlikely that they would have espoused a liberal notion of equality that meant treating everyone's needs in the same way.²²⁹ Liberal theory's normative construction of a disembodied personhood causes it to neglect the physical aspects of the person.²³⁰

Liberal individualism has been criticized by both communitarian and liberal feminists for being an inaccurate portrayal of human social arrangements.²³¹ Communitarians have argued that human existence, independent of others in terms of 'human society, interaction and interdependence,' is impossible.²³² This is particularly evident when one considers the scientific reality of human existence especially in relation to human reproduction.²³³ Not only, then, is the liberal individual a problematic concept,²³⁴ but the premise of a pre-social, transcendental individual is inappropriate as a starting point for political theorizing.²³⁵ The disembodiment of the liberal individual can be replaced with a type of collective body to which we must relate by identifying a 'common human nature' on the basis of human need.²³⁶

This is a point re-emphasized by liberal feminists who have pointed to research which suggests that far from being pre-social, the wishes and interests of individuals are heavily influenced by the social context that they are exposed to, and from which

²²⁸ Jagger (n 27) 46.

²²⁹ Jagger (n 27) 46-7.

²³⁰ Frazer and Lacey (n 173) 54.

²³¹ *ibid* 56-7. Jagger (n 27) 42-44.

²³² Frazer and Lacey (n 173) 56.

²³³ Jagger (n 27) 40.

²³⁴ *ibid* 41.

²³⁵ Frazer and Lacey (n 173) 56-7.

²³⁶ A Assiter 'Common Human Nature: An Empty Concept?' in J Richardson and R Sandland (eds) *Feminist Perspectives on Law and Theory* (Cavendish London 2000) 153, 153.

they acquire their value system.²³⁷ Jagger argues that this presents serious challenges to the notion of individualism and thus to liberal theory itself. The challenge to the pre-social nature of individuals undermines the ‘justification of the state, which presupposes that individuals have certain fixed interests’, the idea of liberty characterised as non-interference, and the notion of liberal, formal equality.²³⁸

3. The liberal individual and human rights doctrine

The ideals of freedom, autonomy, rationality, formal equality and the rule of law are core to human rights doctrine. The Preamble to the UDHR emphasizes that ‘inherent dignity and ... equal and inalienable rights ... [are] the foundation of freedom, justice and peace’.²³⁹ It also stresses the rule of law in protecting human rights.²⁴⁰ Additionally, rationality and formal equality before the law are seen in the Articles of the Declaration.²⁴¹ The introduction to the ECHR also refers to ‘political traditions, ideals, freedom and the rule of law’. Furthermore, the ECFR ‘places the individual at the heart of its activities’ through EU citizenship ‘and by creating an area of freedom, security and justice’.²⁴²

The ‘inherent dignity of the human person’ is the foundation of all human rights.²⁴³ In terms of the ECHR, Article 3 — the prohibition on ‘inhuman or degrading treatment or punishment’ — is explicitly concerned with the protection of

²³⁷ Jagger (n 27) 28, 39-47.

²³⁸ Jagger (n 27) 43.

²³⁹ UDHR Preamble.

²⁴⁰ UDHR.

²⁴¹ UDHR arts 1, 2 and 7.

²⁴² ECFR Preamble.

²⁴³ D Feldman ‘Human Dignity as a Legal Value—Part I’ [1999] PL 682, 688-9.

‘dignity and physical integrity’.²⁴⁴ Other rights, which encompass ‘the interests in autonomy, equality and respect’, include protection of family life, marriage, self-expression, conscience and association, and ‘are important in providing circumstances in which dignity can flourish’.²⁴⁵

Nevertheless, traditional human rights instruments are premised on notions of individual freedom, while failing fully to address the material basis of such freedom. However, the ICESCR recognizes that individuals have ‘duties to other individuals and to the community to which he belongs’.²⁴⁶ This is a more explicit acknowledgement of the socially situated nature of individuals. A number of international treaties, the ICESCR and CEDAW are based on ‘soft law’ in their application, representing a move away from justice models of human rights adjudication associated with liberal theory. Charlesworth argues that aspects of Gilligan’s philosophy on relational thinking, with its emphasis on ‘dispute resolution’, can be seen in the way that developing countries negotiate using “‘soft law”” resolutions of the UN General Assembly.²⁴⁷ Parallels can be drawn with the radical feminist critique of Gilligan’s model of relational thinking,²⁴⁸ and the criticisms made of the relational ‘soft law’ approach to international law.²⁴⁹ The soft law approach could be regarded as a ‘product of colonial and patriarchal conceptual schemes’ that ascribes and then marginalizes relational perspectives to a subordinate (third world) group.²⁵⁰ Byrnes has argued that this type of approach to the implementation of

²⁴⁴ *ibid* 690.

²⁴⁵ *ibid*.

²⁴⁶ ICESCR Preamble.

²⁴⁷ Charlesworth, Chinkin and Wright (n 68) 616-7.

²⁴⁸ Text between n 52 and n 69.

²⁴⁹ Charlesworth, Chinkin and Wright (n 68) 616-7.

²⁵⁰ *ibid* 617.

CEDAW marginalizes it from main human rights discourse.²⁵¹ This can only inhibit the development of human rights claims. The soft law approach to dispute resolution may not necessarily advance the power of human rights rhetoric to effectively incorporate women's claims within the existing adjudicative framework.²⁵² Achieving this end would thus require the interpretation of the current adjudicative framework in a manner that accommodates women's claims, such as will be attempted in this thesis.

E. LIBERAL EQUALITY

The liberal notion of formal equality, with its basis in symmetry and individual justice, has also been criticized by feminists for ignoring structural inequality. Under formal equality, women are required to emulate their male counterparts to acquire rights.²⁵³ This emphasis on sameness can have the effect of devaluing differences between men and women.²⁵⁴ Nevertheless, formal equality, 'or equality as consistency' remains the most widely used method of formulating equal rights.²⁵⁵ The model is mirrored in Article 14 ECHR. The dominance of formal equality not only limits significantly the promise of equality, the emphasis on 'consistency' impedes the development of substantive measures to address social disadvantage.²⁵⁶ Furthermore, the anti-discrimination provisions relating to sex have hitherto been inapplicable in the arena of criminal justice. This can lead to some disproportionate consequences for women. There are indications that women receive harsher non-custodial sentences than their

²⁵¹ A Byrnes 'Women, Feminism and International Human Rights Law: Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation' (1992) 12 *Australian Yearbook of International Law* 205, 205-6.

²⁵² *ibid.*

²⁵³ Richardson and Sandland (n 218) 8.

²⁵⁴ S Fredman 'Combating Racism with Human Rights: The Right to Equality' in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (Oxford University Press Oxford 2000) 16-17.

²⁵⁵ *ibid* 23.

male counterparts.²⁵⁷ Additionally, research suggests that the effects of imprisonment on women and their families are so much greater than the effects on men and their families that women experience indirect sex discrimination in the criminal justice system.²⁵⁸

However, recent years have seen moves in the UK and the EC towards more positive duties to secure equality in the fields of employment, education and the provision of services. Positive duties or so-called “fourth generation” equality rights recognize ‘that societal discrimination extends well beyond individual acts of prejudice’.²⁵⁹ This formulation of equality gives those who are identified as ‘duty-bearers’ responsibility for participating in the elimination of discrimination.²⁶⁰ These moves can be used to influence the human rights debate in a manner that could assist women’s claims. The potential exists for the ECtHR to develop positive obligations under the Convention, allowing notions of rights to be interpreted in a more dynamic way to address women’s claims. It could provide a way in to addressing disadvantage for women both generally and in the field of criminal justice where the provisions of equality law have been excluded.²⁶¹

²⁵⁶ *ibid* 18.

²⁵⁷ C Hedderman and L Gelsthorpe *Understanding the Sentencing of Women* Home Office Research Study 170 (London Home Office 1997) 21.

²⁵⁸ D Caddle and D Crisp *Mothers in Prison* (Home Office Research Findings 38 Home Office London 1997).

²⁵⁹ Fredman (n 254) 26 quoting B Hepple M Coussey and T Choudhry *Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Oxford 2000).

²⁶⁰ *ibid* quoting Hepple, Coussey and Choudhry.

²⁶¹ *R v Entry Clearance Officer Bombay Ex parte Amin* [1983] 2 AC 818 (HL). This sex discrimination case held that the provisions of the Sex Discrimination Act 1975 and therefore the Race Relations Act 1976 were not applicable outside the areas of employment, training and the provision of services. The Race Relations Amendment Act 2000 overrules this case in the area of race discrimination.

1. Formal Equality and Human Rights

The liberal commitment to formal equality was evident in the Sex Discrimination Act 1975 (SDA) and Race Relations Act 1976 (RRA). The SDA prohibits less favourable treatment on the grounds of sex, whether male or female.²⁶² Both the SDA and the RRA were criticized for their so-called symmetrical approach to discrimination, which failed to address the structural disadvantages faced by these groups.²⁶³ The symmetrical approach in this way distorted the societal disadvantages that it sought to address.²⁶⁴ The concept of indirect discrimination, where ‘a requirement or condition’ is applied to all but ‘the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply’, was intended to tackle discrimination against disadvantaged groups.²⁶⁵ However, the ability of indirect discrimination doctrines to achieve substantive equality has been undermined by a number of factors. This is because indirect discrimination can be justified on the basis of other factors if not related to race or gender, requires comparison to a dominant (male or white) group, does not encompass positive duties ‘to accommodate diversity’, and is based on an individual justice model.²⁶⁶

Similar problems arise in relation to Article 14 ECHR, also based on formal equality, which requires that Convention rights ‘be secured without discrimination on any ground such as sex’. The ECtHR’s use of this Article has been disappointing, adopting a ‘narrow and cautious approach’ to interpretation.²⁶⁷ At the outer limits of

²⁶² Sex Discrimination Act 1975 (UK) (SDA) s 1.

²⁶³ Lacey (n 16) 25.

²⁶⁴ Lacey (n 16) 25.

²⁶⁵ SDA s 1(1) (b).

²⁶⁶ Fredman (n 254) 24-26.

²⁶⁷ Easton (n 120) 23.

Article 14, a failure on the part of a State ‘to treat differently persons whose situations are significantly different’ could breach the Convention.²⁶⁸ While it prohibits discrimination on a number of grounds, it is not a freestanding right and therefore has not prohibited discrimination per se.²⁶⁹ Article 14 does not make explicit provision for indirect discrimination although it would, in any event, be difficult to establish.²⁷⁰ Unlike UK discrimination law, Article 14 ECHR has applicability in the field of criminal justice. However, as with UK discrimination law, only individual victims are able to bring a case both to the ECtHR²⁷¹ and under the Human Rights Act.²⁷² This indicates that the discrimination provisions currently conceived under the ECHR are limited in addressing the inequalities faced by women as a group generally, and in framing their human rights claims. Protocol 12 expands Article 14 to create a free-standing right to equality, which although based on the traditional model of formal equality ‘does not prevent State Parties from taking measures in order to promote full and effective equality’.²⁷³

The failure of formal equality to tackle structural disadvantage, particularly the requirements for individual complaints, has led to a broader critique of the language of rights,²⁷⁴ which are seen as ‘individualistic’ and ‘competitive’.²⁷⁵ It is argued that traditional human rights jurisprudence has failed to develop a ‘rich concept of

²⁶⁸ *Thlimmenos v Greece* 34369/97 (2001) 31 EHRR 15 [44].

²⁶⁹ K Starmer *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group London 1999) 145-6, ch 29.

²⁷⁰ *Abdulaziz, Cabales and Balkandali v United Kingdom* Series A no 94 (1985) 7 EHRR 471.

²⁷¹ ECHR art 34.

²⁷² Human Rights Act 1998 (UK) (HRA) s 7(1).

²⁷³ Art 1 provides that ‘[t]he 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’ (entered into force 1 April 2005).

²⁷⁴ S Palmer ‘Critical Perspectives on Women's Rights: The European Convention on Human Rights and Fundamental Freedoms’ in A Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish London 1996) 223, 224-231; Lacey (n 1) 38.

equality' that is able to 'formulate rights which take a group dimension into account'.²⁷⁶ The individualistic and competitive nature of rights is regarded as a narrow arena within which to include women's experience of rights abuses.²⁷⁷ These criticisms have raised the question of whether human rights doctrine can address women's claims at all.²⁷⁸ Some radical feminists advocate this perspective. They regard the inherently competitive and justice-based model of human rights, with its basis in male-centred or patriarchal ideals, as a potential source of oppression.²⁷⁹ In relation to the language and categories of human rights, a key question for radical feminists would be whether these characterizations actually reproduce or reinforce gender oppression or patriarchal control over the female body. Charlesworth argues that the UDHR only incorporates women in as much as they are associated with men, in their maternal or spousal roles, reinforcing a narrow portrayal of women.²⁸⁰ This is a consideration that will be returned to throughout this thesis. Jagger has argued that radical feminists confront patriarchy 'on the patriarchy's own ground',²⁸¹ suggesting that it is difficult to alter substantively a system that remains essentially male dominated. Whilst the fluid language of rights itself may give cause for optimism that the sources of female oppression could be articulated within the ECHR framework, the current adjudicative model of human rights, combined with reliance on a largely male judiciary outlined by Palmer below,²⁸² could impede the progress of the development of ECHR rights discourse in ways that assist women.

²⁷⁵ Lacey (n 16) 27.

²⁷⁶ Fredman (n 254) 30.

²⁷⁷ H Charlesworth 'What are Women's International Human Rights?' in R Cook (ed) *Human Rights of Women* (1994 University of Pennsylvania Press) 58, 61.

²⁷⁸ Palmer (n 274) 224-231; A McColgan 'Women and the Human Rights Act' (2002) 51 (3) *Northern Ireland L Q* 417-444.

²⁷⁹ Text between n 34 and n 52.

²⁸⁰ H Charlesworth 'The Mid-Life Crisis of the Universal Declaration of Human Rights' (1998) 55 *Washington and Lee L Rev* 781, 783.

²⁸¹ Jagger (n 27) 98.

²⁸² Palmer (n 274) 226.

Palmer's argument is that whilst the language of rights 'can simplify complex power relations', it falls short of addressing the structural disadvantages that 'are woven into women's daily lives'.²⁸³ She expresses concern that the incorporation of the ECHR could detract from the necessity for political change into the limited legal arena which reinforces the 'dominant discourse', with rights concerns being tackled by predominately male judges.²⁸⁴ This mirrors concerns expressed by rights sceptics who argue that the HRA could be used as an excuse to abandon the search for improved methods of government and administration, or more equitable laws.²⁸⁵ Rights could be commandeered by those whose interests are already protected, perpetuating the marginalization of issues of interest to women.²⁸⁶ However, in contrast to the less optimistic perspective of radical feminists, Palmer believes that:

[T]he potential to exploit the immense political power of a rights-orientated framework cannot be ignored or discarded as irrelevant. Given the power of law in society, women cannot afford to abandon law as a potential medium for change.²⁸⁷

Rights can provide a way of channelling political pressure for change and bring in standpoints that have been traditionally marginalized in UK constitutional law.²⁸⁸ As Douzinas argues, human rights can be a rallying call for 'the oppressed, the exploited, the dispossessed, a kind of imaginary or exceptional law for those who have nothing

²⁸³ *ibid* 225.

²⁸⁴ *ibid* 226.

²⁸⁵ A Tomkins 'Introduction: On Being Sceptical About Human Rights' in T Campbell, K Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press Oxford 2001) 1, 3.

²⁸⁶ Palmer (n 274) 226.

²⁸⁷ Palmer (n 274) 227. Also P Williams 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' *Harvard Civil Rights and Civil Liberties L Rev* 22 (1987) 401.

²⁸⁸ Palmer (n 274) 227.

else to fall back on'.²⁸⁹ Human rights are, he argues, 'the utopian futural aspect of law'.²⁹⁰

2. Substantive equality and positive duties

As we have seen, the European Charter of Fundamental Rights (ECFR) and EC law move beyond notions of formal equality towards notions of substantive equality.²⁹¹ The ECFR emulates a number of the civil and political rights contained in the ECHR.²⁹² Article 21 includes a general prohibition on discrimination that resembles Protocol 12 ECHR. Furthermore, Article 23 ECFR provides that '[e]quality between men and women must be ensured in all areas' although this does not prohibit positive action 'in favour of the under-represented sex'. The status of the Charter is uncertain: it was incorporated into the European Constitution²⁹³ and its future is now in doubt in view of the rejection of that treaty in referenda over recent months. There have also been a number of EU Directives in the field of employment, training and the provision of goods and services that encourage moves towards positive action to secure equality.²⁹⁴

Similar ideas are encapsulated in the provisions of CEDAW. CEDAW does not create an entitlement of individual complaint but rather, serves to monitor the progress of States through the activities of its Committee.²⁹⁵ This is in contrast to the

²⁸⁹ Douzinas (n 76) 145.

²⁹⁰ *ibid* 250.

²⁹¹ Text between n 140 and n 148; text to n 193.

²⁹² European Charter of Fundamental Rights (ECFR) arts 2-7, 9-12.

²⁹³ 'What is the EU Constitution' *The Observer* Sun May 15th 2005.

²⁹⁴ The Gender Directive, The Equal Treatment Directive and The Race Directive (n 146).

²⁹⁵ CEDAW art 18. The UN has put adopted an optional protocol for individual complaints UNGA Res 54/4 (15th October 1999) UN Doc A/Res/54/4 although the UK has not signed up to it <<http://www.un.org/womenwatch/daw/cedaw/sigop.htm>> (18th March 2003).

binding nature of the EU directives on equality. CEDAW is applicable in all areas, including criminal justice. In the 1999 report of the CEDAW committee, concerns about the treatment of female offenders and prisoners was expressed in view of the research indicating that their treatment in the criminal justice system is more severe than their male counterparts.²⁹⁶ They have also highlighted concern about violence and sexual abuse/rape in the home as a serious impediment to women's enjoyment of human rights.²⁹⁷ Article 2 represents a commitment by the signatories '[t]o embody the principle of equality of men and women' and contains a specific commitment '[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'.²⁹⁸ Notwithstanding CEDAW's apparent commitment to formal equality, Article 4 states that:

Adoption by States...of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.²⁹⁹

Both CEDAW and recent European directives thus go further than protecting formal equality and advocate active measures to provide substantive equality. These movements towards substantive notions of equality have been given increased impetus by recent shifts towards positive duties to secure freedom from discrimination — so-called 'fourth generation' equality rights.³⁰⁰ As we have already seen, the new gender directive refers to 'positive obligations' to promote equality between the sexes in the

²⁹⁶ UNGA 'Report of the Committee on the Elimination of Discrimination against Women' UN GAOR 54th Session Supp 38 UN Doc A/54/38 Rev 1 (1999) [293]; Caddle and Crisp (n 258).

²⁹⁷ CEDAW General Recommendation 19 (11th Session 1992) UN Doc CEDAW/ C/1992/L1/Add 15.

²⁹⁸ CEDAW art 2(a) and (e).

²⁹⁹ CEDAW art 4 (1).

³⁰⁰ Term coined by Hepple, Coussey and Chondhury (2000) in Fredman (n 254).

areas of employment, training and working conditions.³⁰¹ In the UK, both the Disability Discrimination Act 1995 (DDA) and the Race Relations Amendment Act 2000 (RRAA) encompass positive duties. The DDA, because of the extent of the problems faced by disabled people to gain ‘access to a world shaped for the able-bodied’ imposed ‘a duty to accommodate the needs of’ the disabled.³⁰² The RRAA introduced positive duties on public authorities including the police and prisons from discriminating, directly or indirectly, on the grounds of race.³⁰³ The RRAA also inserts a new s 71 into the Race Relations Act 1976 (RRA), which imposes on public authorities a statutory duty to have:

[D]ue regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups.³⁰⁴

The effect of this is to make it incumbent on public authorities such as the Prison Service to tackle racist abuse in prison,³⁰⁵ and on the police to adhere to these provisions in the exercise of their powers such as stop and search.³⁰⁶ However, the duties are not applicable with regard to decisions to institute or discontinue criminal proceedings.³⁰⁷ The new Equality Bill currently before the House of Lords is couched in similar terms. It inserts amendments into the SDA making it ‘unlawful for a public

³⁰¹ The Gender Directive [4] (n 146).

³⁰² A McColgan *Discrimination Law: Text, Cases and Materials* (Hart Oxford 2000) 449; Disability Discrimination Act 1995 (UK) s 6.

³⁰³ Race Relations (Amendment) Act 2000 s 1 (RRAA) (UK) inserting s 19 (B) into the RRA.

³⁰⁴ RRAA s 2; C O’ Cinneide ‘The Race Relations (Amendment) Act 2000’ [2001] PL 220, 229-231. Similar duties are made upon public authorities under s 75 of the Northern Ireland Act 1998 (NIA), which expands upon the category of race to include a number of other groups. S 73 of the NIA also established a single equality commission for Northern Ireland.

³⁰⁵ Lord Dholakia ‘The Prison Service: Equality, Human Rights and the Future’ March (2001) Issue 134 Prison Service J 10.

³⁰⁶ L Lustgarten ‘The Future of Stop and Search’ [2002] Crim L R 603, 606-616.

³⁰⁷ S 1 RRAA inserting a new s 19 (F) into the RRA.

authority ... to do any act which constitutes discrimination'.³⁰⁸ However, as with the RRAA, these obligations do not apply to decisions to institute or continue with criminal proceedings.³⁰⁹ S 82 of the Bill inserts a new s 76 A into the SDA and provides that '[a] public authority shall in carrying out its functions have due regard to the need – (a) to eliminate unlawful discrimination, and (b) to promote equality of opportunity between men and women'.³¹⁰ The Sex Discrimination Act will be amended further by the new equality regulations, updating existing equality provisions in line with the EC Directives.³¹¹ Notwithstanding moves towards freestanding equality rights under the ECHR and ECFR, government legislation preventing public authorities from engaging in discriminatory acts, and inscribing into law a positive duty to promote equality; the effects of these provisions in the field of criminal justice have been heavily circumscribed. As it stands, the main way to address sex discrimination in the field of criminal justice is through Article 14 ECHR and Protocol 12. However, moves towards positive duties to secure rights, evident in these areas of discrimination law, could be used and applied to human rights jurisprudence and allow us to conceive equality provisions in a different way.

3. The development of concepts of equality within the human rights paradigm

If human rights are to be truly applicable to all, the requirements of formal equality characterised by liberal theory and illustrated by Article 14 ECHR needs to be opened

³⁰⁸ S 81 (1) Equality Bill (UK) inserting a new s 21 A into the SDA.

³⁰⁹ S 81 (1) 5-7.

³¹⁰ S 76 A (1).

³¹¹ The Employment Equality (Sex Discrimination) Regulations 2005 URN 05/833 available from http://www.womenandequalityunit.gov.uk/publications/draft_regulations/pdf (27 June 05). Also, Commission of the European Communities 'Proposal for a Directive of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast version)' Brussels 21.04.04 COM

up. Whilst Protocol 12 has not reworked the notion of formal equality encapsulated in Article 14,³¹² it permits positive measures to secure equality and, as we have seen, Convention jurisprudence has started to move in this direction to secure Convention rights. Additionally, s 6 of the Human Rights Act, with its emphasis on the actions of public authorities, could be interpreted as advocating positive duties. The question must be whether positive duties can go far enough to tackle the structural disadvantages faced by women in society and in framing their human rights claims, or whether stronger measures are called for. The devaluation of difference by notions of formal equality has led some feminists to call for the explicit recognition of that difference.³¹³ There are inherent dangers associated with this. An explicit recognition of difference can re-inscribe limited gender roles and be used to justify differential treatment that may not be appealing to feminists.³¹⁴ Lacey argues that:

[A]ppeals to specific needs, interests, ways of life or sensibilities are inherently dangerous and double-edged in the context of a legal system informed by the formally egalitarian ideology of the rule of law.³¹⁵

These concerns need to be balanced against the significant disadvantages experienced by women, particularly in the field of criminal justice. Such abuses could suggest that only an explicit recognition of sexual difference would suffice, even if only as a temporary strategy. However, an alternative strategy could be to aim for equal protection of the violations of human dignity laid out in the Convention, within the Convention framework, with the use of positive duties. This would involve allowing CEDAW thinking to influence the development of human rights concepts,

(2004) 279 final 2004/004 (COD) available from http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0279en01.pdf.

³¹² Fredman (n 254) 42.

³¹³ Particularly Irigaray (n 94 and n 99).

³¹⁴ Text between n 52 and n 65.

³¹⁵ Lacey (n 16) 25.

including dignity. As stated earlier, this would require interpreting human rights abuses with reference to ‘the nature of the act’ as opposed to ‘the status of the person who committed it’ as has traditionally been the case.³¹⁶ This avoids an essentialist specific recognition of difference. Part of the justification for CEDAW was a recognition that the existing human rights framework did not cater adequately for women’s rights.³¹⁷ The provisions in Article 4 of CEDAW, in the EC equality directives, and Article 23 of the ECFR all permit positive action to address inequality. In terms of human rights claims, this could be translated into a special bill of rights such as a strengthened version of CEDAW. This would be in line with calls from the CEDAW committee to the UK government to incorporate this treaty into UK law in the same way that it has the ECHR.³¹⁸ Alternatively, the positive duties that have started to emerge in other areas of law could be developed and applied in a manner that can address women’s human rights claims through Article 14 ECHR. This would have the advantage of giving women a genuine interest in justiciable claims. Such a course would require a more active and dynamic application of equality provisions of the Convention than has hitherto been the case. Either way, significant attempts would need to be made to articulate women’s claims in the current human rights discourse.

³¹⁶ This has already started to happen as evidenced by the important decision of *Prosecutor v Kunarac, Kovac and Vukovic* Case no IT-96-23T, Judgement 22 February 2001 para 495.

³¹⁷ E Evatt ‘Finding a Voice for Women’s Rights: The Early Days of CEDAW’ (2002) 34 *George Washington Intl L Rev* 515, 515-6.

³¹⁸ UNGA (n 296) [301].

F. CAN HUMAN RIGHTS ADDRESS WOMEN'S CLAIMS?

The theoretical discussion so far gives cause for some optimism. The traditional emphasis of notions of rights encapsulated in the ECHR and incorporated into UK law are essentially predicated on notions of negative freedom. This chapter has argued that this framework, currently conceived, is unable to address issues that are of particular concern for women. However, as indicated by Palmer, the language of human rights may in itself present opportunities to examine currently understood experiences of oppression.³¹⁹ Moves within liberal theory towards notions of positive freedom are currently being developed in ways that encompass positive duties in a number of areas of law. These can be used to develop women's claims.

In addition to this, the various strands of feminist thought present challenges to the way we think about rights. Liberal feminists, who have aligned themselves with the liberal proponents of positive freedom, and are content to develop existing frameworks, can pose significant challenges to existing conceptions of rights by arguing for example, that the normative commitment to privacy can be used to undermine the realization of liberal values for women. This has the potential to impact upon the field of criminal justice, with implications for the enforcement of crimes such as violence and sexual abuse in the home. Liberal feminists' commitment to positive resources can also advance arguments that the rights enshrined in the ICESCR are as important as civil and political rights.

³¹⁹ Palmer (n 274) 227; Williams (n 287).

Once we move beyond the universality and generality advocated by liberal theory, we move into the realm of trying to *specifically* address women's human rights, either by a conscious acknowledgement and articulation of women's concerns within current frameworks (such as for example, the expansion of current ideas of positive duties to the field of sex and criminal justice) or by seeking a bill of rights for women, such as a strengthened version of CEDAW. CEDAW has been criticized for placing men as the standard by which equality is to be measured.³²⁰ In this way, it seems as though both radical and postmodern feminists would oppose special rights as conceived by this treaty. There are dangers associated with a bill of rights, such as reinscribing women's gender identities and advocating an essentialist position for women and this chapter has argued that this may be overcome by seeking equal protection of human dignity. Developing existing principles in line with CEDAW's provisions would have the advantage of giving women an interest in the main adjudicative human rights frameworks. Furthermore, the various grounds of discrimination under Article 14 could present opportunities to consider the effects of many layers of discrimination. This could be achieved by articulating women's rights through the developing area of positive duties. These are strands of thought that will be developed in the subsequent chapters of this thesis.

³²⁰ Charlesworth, Chinkin and Wright (n 68) 631-632.

PART ONE

SEXUAL VIOLENCE AND HUMAN RIGHTS

2.

RAPE AND HUMAN RIGHTS LAW: DEFINING RAPE UNDER THE ECHR

A. INTRODUCTION

In chapter one, it was argued that positive duties to secure rights could affect current notions of equality, particularly in relation to Article 14 and Protocol 12 of the European Convention on Human Rights (ECHR).¹ Trends towards positive duties could be applied more extensively to our current notions of justiciable human rights in order to address women's claims in the field of criminal justice.² Equal protection from violations of human dignity is especially pertinent in the context of rape. The degradation and serious trauma experienced by victims of rape and sexual assault makes this one of the most severe affronts to human dignity.³ Rape trials are thought to epitomize the shortcomings of law, shortcomings which include problems of methodology, the male-centred nature of law, the exclusion and disempowering of women and their experiences, and the affirmation of all these factors in a public

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR).

² Ch one especially p 31–32, p 38–39, p 55–59.

³ The serious long-term effects of rape are well-documented: L Kelly *Surviving Sexual Violence* (Polity Press Cambridge 1988) especially ch 8; D Russell *Rape in Marriage* (Indiana University Press Bloomington and Indianapolis 1990) ch 14; BL Katz 'The Psychological Impact of Stranger Versus Nonstranger Rape on Victims' Recovery' in A Parrot and L Bechhofer (eds) *Acquaintance Rape: The Hidden Crime* (Wiley-Interscience New York 1991) 251; CA Gidycz and MP Koss 'The Effects of Acquaintance Rape on the Female Victim' in A Parrot and L Bechhofer (eds) *Acquaintance Rape: The Hidden Crime* (Wiley-Interscience New York 1991) 270; J Morgan and L Zedner *Child Victims: Crime, Impact and Criminal Justice* (Clarendon Oxford 1992) ch 3; JA Allison and LS Wrightsman *Rape: The Misunderstood Crime* (Sage London 1993) ch 8; P Johnson 'In Their Own Voices: Report of a Study on the Later Effects of Child Sexual Abuse' [2001] 7 J of Sexual Aggression 41; A Clarke, J Moran-Ellis and J Sleney *Research Report - 2: Attitudes to Date Rape and Relationship Rape: A Qualitative Study* (Sentencing Advisory Panel London 2002) <<http://www.sentencing-advisory-panel.gov.uk/research/rape/page4.htm>> (10 November 2003) 4.3.

forum.⁴ The Convention on the Elimination of Discrimination against Women (CEDAW) articulates rape, and the treatment of rape victims, as a product of the significant structural disadvantages experienced by women in the public and private spheres.⁵ This chapter examines the way that rape is substantively defined and treated in human rights law. It will take as its basis the perspective advocated by the CEDAW committee that rape and sexual violence are forms of discrimination, disproportionately affecting women and girls, and which are perpetuated by stereotypical and prejudicial perspectives that permeate all aspects of society, including the home.⁶

As examined in chapter one, human rights were primarily intended to protect individuals from abuses perpetrated by the State and were not set up with the needs of women in mind.⁷ The liberal separation of public and private areas of life disguises the fact that it is in the private arena that women suffer the most disadvantages. Private individuals perpetrate the majority of human rights violations experienced by women.⁸ Additionally, these abuses tend to occur in the domestic realm.⁹ The focus on formal equality ignores the structural disadvantages that women face.¹⁰

⁴ C Smart *Feminism and the Power of Law* (Routledge London 1989) 26.

⁵ Convention on the Elimination of all Forms of Discrimination against Women (opened for signature 1st March 1980, entered into force 3rd September 1981) (1980) 19 ILM 33 (CEDAW); CEDAW General Recommendation 19 (11th Session 1992) UN Doc CEDAW/ C/1992/L1/Add 15 [4] [6] [11] [12] [23]. Research into why men rape indicates that while there is a link between the experience of physical and sexual abuse as children and sexual crime as adults, rape is predominantly an extreme manifestation of social and cultural attitudes towards women: AN Groth *Men Who Rape: The Psychology of the Offender* (Plenum Press London 1979); Russell (n 3) ch 10, 11, 13; Allison and Wrightsman (n 3) ch 2; D Simons, SK Wurtele and P Heil 'Childhood Victimization and Lack of Empathy as Predictors of Sexual Offending against Women and Children' [2002] 17 J of Interpersonal Violence 1291.

⁶ General Recommendation 19 (n 5) [4] [6] [11] [12] [23].

⁷ K Quinlivan 'Women's Rights and the European Convention on Human Rights' in C Bell (ed) *Women's Rights as Human Rights: A Practical Guide* (Centre for International and Comparative Human Rights Law Queens University Belfast 1997) 11, 11; H Charlesworth 'The Mid-Life Crisis of the Universal Declaration of Human Rights' (1998) 55 Washington and Lee L Rev 781, 782; ch one generally and Introduction p 1.

⁸ H Charlesworth, C Chinkin and S Wright 'Feminist Approaches to International Law' (1991) 85 American J of Intl L 613.

The potential for developing justiciable human rights for women in the context of the ECHR lies in the recent developments in human rights doctrine and the evolving doctrine of positive obligations to secure rights between private individuals,¹¹ including cases involving domestic violence,¹² and sexual abuse within the home.¹³ However, the reluctance of the ECtHR to engage Article 14 of the Convention¹⁴ has impeded the development of human rights arguments to address the ways in which violations may disproportionately affect particular groups, and to tackle sexual violence as an issue of inequality. Notwithstanding recent developments to secure rights as between private individuals, including in the domestic realm, traditional human rights doctrine has yet to reflect the specific reality of rape. The development of human rights doctrine to address rape has tended to focus on times of conflict and has, in any event, been a relatively recent development.¹⁵ Despite recent moves to articulate sexual violence between private actors as human rights violations within the ECHR, the emphasis on individual complaints and underdeveloped notions of equality means that the ECHR does not articulate rape or sexual crime as something that is both commonplace, and which substantially impedes women's enjoyment of rights.¹⁶

⁹ G Binion 'Human Rights: A Feminist Perspective' (1995) 17 Human Rights Q 509, 516.

¹⁰ Ch one p 47–53.

¹¹ *X and Y v Netherlands* Series A no 91 (1986) 8 EHRR 235; *Costello Roberts v United Kingdom* Series A no 247/C (1995) 19 EHRR 112; *A v United Kingdom* Appn no 25599/94 (1999) 27 EHRR 611; *Osman v United Kingdom* Series A 1998 VIII 3124 (2000) 29 EHRR 245; *Z v United Kingdom* Appn no 29392/95 (2002) 34 EHRR 3; *E v United Kingdom* Appn no 33218/96 (2003) 36 EHRR 31; *M C v Bulgaria* Appn no 39272/98 (2005) 40 EHRR 20.

¹² *Movern Marcia McPherson v Secretary of State for the Home Department* [2001] EWCA Civ 1955.

¹³ *E* (n 11).

¹⁴ For example, *Dudgeon v United Kingdom* Series A no 45 (1982) 4 EHRR 149; S Easton 'Feminist Perspectives on the Human Rights Act: Two Cheers for Incorporation' (2002) 8 Res Publica 21, 23.

¹⁵ Text from n 197.

¹⁶ On group rights N Lacey *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing Oxford 1998) ch one; CEDAW General Recommendation 19 (n 5) states that '[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men' [1].

This chapter will seek to articulate sexual violence in the context of Articles 2, 3, 4, 5, 14 and Protocol 12 of the ECHR. It will start by examining some of the feminist arguments concerning rape, and then consider some of the empirical studies on the prevalence of sexual violence. The theoretical principles behind basic rights protections will then be discussed. This chapter will examine rape as a human rights violation in terms of international law, including how it is treated within CEDAW, and the potential for this to influence the jurisprudence of the ECHR. It will analyse the case law of the ECtHR concerning this issue, before going on to evaluate the potential for the development of effective human rights claims for women in this field.

B. FEMINIST ARGUMENTS ABOUT RAPE

In chapter one, the main strands of feminist thought were outlined.¹⁷ Early liberal feminists focussed on liberal values, such as the value of liberty as freedom from social interference and dependence, and while these arguments could be used to develop a liberal feminist rationale for strategies to deal with rape, the liberal feminist project has been limited by the gender-neutral nature of its claims.¹⁸ This emphasis on gender-neutrality obscures the ‘profoundly sexed nature of the crime of rape’ and the inequality in social conditions that perpetuate it.¹⁹ Liberal constructions of rape focus on a discrete act, limiting a variety of contextual factors admissible in evidence by

¹⁷ Ch one p 13–27.

¹⁸ Although some liberal feminists have moved away from gender-neutrality in addressing issues such as maternity leave and childbirth, for example Betty Friedan *The Second Stage* (Harvard University Press Cambridge Mass 1998); R Tong *Feminist Thought: A Comprehensive Introduction* (Routledge London 1992) 27.

¹⁹ N Naffine ‘Possession: Erotic Love in the Law of Rape’ (1994) 57 MLR 10, 24-5; J Temkin *Rape and the Legal Process* (2nd edn Oxford University Press Oxford 2002) ch 6; E Frazer and N Lacey *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Harvester Wheatsheaf New York 1993) ch 3.

rules that are themselves sexist.²⁰ These rules exclude social factors concerning the ability of women to communicate effectively their non-consent in an environment of unequal power relations ‘in the sexual sphere’, and where non-consent is frequently construed as consent.²¹ Excluding particular forms of knowledge — women’s accounts of rape — leads to the disqualification of women and their sexuality.²² This is, according to Smart, a product of a ‘phallocentric culture’— a culture ‘structured to meet the needs of the masculine imperative’— which goes beyond observable dominance at a surface level to evoke ‘sexuality, desire, and the subconscious, psychic world’.²³ The rape trial is the celebration of phallocentrism and the disqualification of women’s sexuality using a ‘binary system of logic’ toward consent, which ‘is completely irrelevant to women’s experience of sex’.²⁴ At a deconstructive level, and following Irigaray’s theory of sexual difference,²⁵ Duncan argues that rape laws and trials of cases of rape have the effect of constructing women ‘to mirror the desires of the male subject ... while she herself is construed without subjectivity and without desire’.²⁶

While liberals and radical feminists have been united in their condemnation of the harm associated with rape, radical feminists have argued that the law has a limited notion of harm that does not take into account the perspective of the victim.²⁷ They

²⁰ Frazer and Lacey (n 19) ch 3. The procedural aspects of rape cases are examined in ch three.

²¹ Frazer and Lacey (n 19) 92.

²² Smart (n 4) 26.

²³ *ibid* 27.

²⁴ *ibid* 33.

²⁵ Ch one p 23–25.

²⁶ S Duncan ‘The Mirror Tells Its Tale: Constructions of Gender in Criminal Law’ in A Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish London 1996) 173, 173.

²⁷ J Gardner and S Shute ‘The Wrongness of Rape’ in J Horder (ed) *Oxford Essays in Jurisprudence: Fourth Series* (Oxford University Press Oxford 2000) 193, 197.

argue that rape is a form of social control or dominance over women²⁸ perpetuated by conditions of male supremacy.²⁹ The emphasis of this critique is on male control of the female body and the associated deprivation of women's humanity.³⁰ This has formed the basis of powerful criticisms of the laws concerning both rape,³¹ and the manner in which human rights doctrine has marginalized this issue. Violence against women is, argues Thompson, prompted by the perception of women as less 'human', and their limited redress and ability to assert their human rights.³² Violence of this nature is a result of this phallocentrism, which structures masculine imperatives 'as something which has to be defended at someone else's expense'.³³ MacKinnon has argued that women's human rights are elided in two ways. Firstly, when women experience the same human rights violations as men, the fact that they 'are *women*' is not registered in the record of human atrocity'.³⁴ Secondly, when women are beaten, tortured or sexually violated by those they are close to, these incidents are not regarded as human rights violations.³⁵ MacKinnon argues that the sex of the victim impedes the process of recognition because 'what was done to them smells of sex'.³⁶ A woman's humanity is not compromised if she is tortured as a wife in the domestic environment.³⁷ This is because:

What is done to women is either too specific to women to be seen as human or too generic to humans to be seen as specific to women.

²⁸ Brownmiller in H Eisenstein 'Contemporary Feminist Thought' (Unwin London 1985) ch 3; C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press Cambridge Mass 1987) ch 3.

²⁹ D Thompson *Radical Feminism Today* (Sage London 2001) 126-131; MacKinnon (1987) ch 3 and 7.

³⁰ Tong (n 18) 72; ch one p 15-18.

³¹ MacKinnon (n 28) ch 3 and 7.

³² Thompson (n 29) 28.

³³ *ibid.*

³⁴ C MacKinnon 'Rape, Genocide and Women's Human Rights' (1994) 17 *Harvard Women's L J* 5, 5.

³⁵ *ibid.*

³⁶ *ibid.* 6.

³⁷ *ibid.*

Atrocities committed against women are either too human to fit the notion of female or too female to fit the notion of human.³⁸

The argument that the dynamics of oppression cannot be the same for all women, put forward most pertinently by black feminists, is also evident in the debate about rape. As we have seen, Williams Crenshaw argues that feminist projects do not sufficiently problematize issues of race.³⁹ She argues that while it might seem ‘unnecessarily divisive’ to focus on issues of race when what women share is being the main object of sexual violence and battery, the politics of race are often associated with gender-based violence.⁴⁰ Issues of race influence the manner in which violence is experienced, the ways in which victims are helped or how the effects of that violence are represented or politicized.⁴¹ As examined in chapter one, Williams Crenshaw argues that intersections between race and gender happen at three different levels, structural, political and representational.⁴² ‘Structural intersectionality’— where the interplay between racial and gender oppression can impede chances for effective help — is illustrated by the additional problems that rape crisis centres have to deal with when they are based in impoverished areas that have high numbers of immigrants or ethnic minorities.⁴³ These additional problems emerge because of poor housing, lack of employment opportunities, serious poverty, mistrust of the police and possibly language barriers. Tackling these problems is impeded by policies based ‘on the needs of middle-class white rape survivors’.⁴⁴ ‘Political intersectionality’, as we have seen,

³⁸ *ibid* 6.

³⁹ K Williams Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' in K Crenshaw, et al. (eds) *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press New York 1995) 357.

⁴⁰ K Williams Crenshaw 'Beyond Racism and Misogyny: Black Feminism and 2 Live Crew' in MJ Matsuda, et al. (eds) *Words That Wound: Critical Race Theory, Assaultative Speech, and the First Amendment* (Westview Press Oxford 1993) 111, 122.

⁴¹ *ibid*.

⁴² *ibid* 114; ch one p 25–26.

⁴³ *ibid* 115.

⁴⁴ *ibid*.

refers to the way that women of colour are excluded from the political forum because the exclusive focus of race and gender leaves them without an arena to contextualize the violence they experience.⁴⁵ She examines arguments which suggest that there is a form of 'sexual hierarchy' where white female bodies appear to be held in greater regard than others.⁴⁶ This is emphasized by the significant discrepancies between sentences for convictions for rape of black, Latina and white women in the US: averages of two, five and ten years respectively. Furthermore, black women are most likely to be regarded as untruthful witnesses. These problems exist because the plight of black women falls away between the discourses of feminism and antiracism. The difficulties associated with the highly prescribed definition of rape and the assessment of the victim against a confined standard of suitable sexual behaviour are exacerbated in cases involving victims from ethnic minorities. Perceptions of black women have involved highly sexualized ideas about race, which portray black women as more sexually active, earthy, and 'gratification orientated'.⁴⁷ Perceptions of this nature compound the cultural perspectives that exist in relation to rape about the 'bad' woman who cannot be raped and the 'good' women that can.⁴⁸ These problems have not been addressed because anti-rape reformers have failed to tackle the intersection of race and gender in relation to rape. Additionally, the racist emphasis on the rape of white women by black men has also meant that there has been little space for black women to articulate their experiences within antiracist discourses.⁴⁹ These problems are compounded by 'representational intersectionality' where sex and race overlap to produce racialized sexual images of black women.⁵⁰ Williams Crenshaw's arguments

⁴⁵ *ibid* 116; ch one p 26.

⁴⁶ Williams Crenshaw (n 39) 368.

⁴⁷ *ibid* 369.

⁴⁸ *ibid*.

⁴⁹ *ibid* 369-70.

⁵⁰ Williams Crenshaw (n 40) 117-120.

suggest that for some women, sexual violence involves multiple layers of discrimination.

C. EMPIRICAL STUDIES ON RAPE AND SEXUAL VIOLENCE

Rape is particularly underreported in comparison to other crimes.⁵¹ The low attrition rate for rape and sexual offences has been the source of some concern.⁵² Only one fifth of rape cases are reported to the police,⁵³ and of these, only 5.6 per cent result in conviction.⁵⁴ Further, the treatment of victims within the criminal justice system has come in for severe criticism.⁵⁵ Judicial treatment of victims has tended to reflect sexist attitudes, undermining various attempts by government to secure greater equality for women in the courtroom.⁵⁶ This part will examine what is known about the characteristics of rape, and sexual violence including its prevalence and incidence. It will also consider how sexual crimes are treated by the criminal justice system, from the police to the courts.

⁵¹ JV Roberts 'Sexual Assault in Canada: Recent Statistical Trends' (1996) 21 Queen's Law Journal 395, 401.

⁵² J Harris and S Grace *A Question of Evidence? Investigating and Prosecuting Rape in the 1990's Home Office Research Study 196* (Home Office London 1999); HM Crown Prosecution Service Inspectorate *A Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape* (HM Crown Prosecution Service Inspectorate London 2002) I; SJ Lea, U Lanvers and S Shaw 'Attrition in Rape Cases: Developing a Profile and Identifying Relevant Factors' (2003) 43 British J of Criminology 583; Temkin (n 19) ch 1; L Kelly J Lovett and L Regan *A Gap or Chasm? Attrition in Reported Rape Cases* (HORS 293 London Home Office 2005).

⁵³ A Myhill and J Allen *Rape and Sexual Assault of Women: The Extent and Nature of the Problem. Findings from the British Crime Survey (Home Office Research Study 237)* (Home Office London 2002) 50.

⁵⁴ Kelly et al (n 52) ix; also, S Lees *Carnal Knowledge: Rape on Trial* (Women's Press London 2002) x; Harris and Grace (n 52) Appendix A, 51.

⁵⁵ J Temkin 'Plus Ça Change: Reporting Rape in the 1990's' (1997) 37 British J of Criminology 507; J Temkin 'Reporting Rape in London: A Qualitative Study' (1999) 38 The Howard J 17; J Temkin 'Medical Evidence in Rape Cases: A Continuing Problem for Criminal Justice' (1998) 61 MLR 821; J Temkin 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 J of L and Society 219; Harris and Grace (n 52); HM Crown Prosecution Service Inspectorate (n 52); Lees (n 54).

⁵⁶ J Temkin 'Sexual History Evidence-the Ravishment of Section 2' [1993] Crim L R 3; J Temkin 'Sexual History Evidence-Beware the Backlash' [2003] Crim L R 217; Lees (n 54).

1. The Prevalence of Rape and Sexual Assault

(a) Recorded Crime

The number of recorded sexual offences has increased dramatically in recent decades,⁵⁷ from an average of 1642 per year in the period 1900–09, to an average of 38,176 per year in the period 1998/9–2002.⁵⁸ Rape of a female has seen striking increases over the past 100 years: from an annual average of 202 recorded incidents in the period 1900–1909, to an annual average of 7970 in the period 1998/9–2002.⁵⁹ There have also been marked increases in the past two years, with 9,008 rapes of a female reported in the year 2001/2,⁶⁰ up to 11,432 reported in 2002/3.⁶¹ The largest increases in sexual crime have been in indecent assaults of females: from an annual average of 741 in the period 1900–1910 to 20,564 in 1998/9–2002.⁶² In 2002/3, there were 24,811 reported indecent assaults of a female.⁶³ The most prevalent recorded sexual crime involving children is indecent assault of a female under 16, this accounting for approximately half of all recorded sexual offences against children.⁶⁴ Recorded incidents of gross indecency with a child have also crept up from an annual

⁵⁷ Also, Temkin 2002 (n 19) 11–13.

⁵⁸ Figures calculated from Home Office 'Recorded Crime Statistics 1898 - 2001-2' <<http://www.homeoffice.gov.uk/rds/recordedcrime1.html>> (22.10.03). These offences include buggery, indecent assaults on males, indecency between males, rape, indecent assaults on females, unlawful sexual intercourse with a girl under 13, unlawful sexual intercourse with a girl under 16, incest, procuration, abduction and bigamy. Recent changes have meant that rape can now be perpetrated against males as well as female, and that offences such as soliciting or importuning by a man, gross indecency with a child and abuse of a position of trust are also included in the more recent calculations. The averages are calculated and rounded off to the nearest whole number.

⁵⁹ *ibid.* Rape is now governed by s 1 of the Sexual Offences Act 2003.

⁶⁰ *ibid.*

⁶¹ J Simmons and T Dodd (eds) *Crime in England and Wales 2002/2003 Home Office Statistical Bulletin 07/03* (Home Office London 2003) 82.

⁶² Recorded Crime Statistics 1898 – 2001/2 (n 58). Indecent assault has been replaced with s 3 'assault by penetration', and s 4 the offence of 'sexual assault' of the Sexual Offences Act 2003.

⁶³ Simmons and Dodd (n 61) 82.

⁶⁴ D Grubin *Sex Offending against Children: Understanding the Risk* (Police Research Series Paper 99 Home Office London 1998) 3; s 14 (2) Sexual Offences Act 1956.

average of 1,252 in 1990–9, to 1,415 in the period 1998/9–2002.⁶⁵ In the year 2002–3, there were 1880 recorded incidents of gross indecency with a child.⁶⁶

(b) National Surveys

(i) The British Crime Survey

The regular sweeps of the British Crime Survey (BCS) have been unable to provide an accurate assessment of the extent of rape and sexual assault.⁶⁷ Criticisms of generic crime surveys such as the BCS in establishing the true extent of sexual offences⁶⁸ has led to the development of more refined methods to ascertain the prevalence of these crimes in recent years.⁶⁹ Using ‘computerised self-completion questionnaires’, Myhill and Allen’s study estimated that 9.7 per cent of women had been sexually victimized (including rape) since the age of 16, with 4.9 per cent reporting being raped at least once since the age of 16.⁷⁰ In the preceding year, 0.9 per cent of women between the ages of 16 and 59 reported being sexually victimized (including rape) with 0.4 per cent reporting rape in that period. From this, Myhill and Allen estimated that three quarters of a million women from the age of 16 to 59 had been raped at least once since 16. In the year preceding the study, 61,000 women had been raped.⁷¹

⁶⁵ Prior to the Sexual Offences Act 2003, this was governed by the Indecency with Children Act 1960.

⁶⁶ Simmons and Dodd (n 61) 82.

⁶⁷ C Kenshaw, et al. *The 2001 British Crime Survey: First Results England and Wales* (Home Office Statistical Bulletin 18/01 (Home Office London 2001) 3.

⁶⁸ L Zedner ‘Victims’ in M Maguire, R Morgan and R Reiner (eds) *The Oxford Handbook of Criminology* (3rd edn Oxford University Press Oxford 2002) 419, 421–425.

⁶⁹ S Walby and A Myhill ‘New Survey Methodologies in Researching Violence against Women’ 2001 (41) *British J of Criminology* 502.

⁷⁰ Myhill and Allen (n 53) vi.

⁷¹ *ibid.*

The biggest risk factor identified in this study was age.⁷² Women between the ages of 16 and 19 were four times more likely to have reported being raped in the preceding year than other age groups. Women from lower income households, those living in rented accommodation, students and single people were more likely to report incidents.⁷³ Myhill and Allen also found that 45 per cent of the most recent incidents of rape reported since the age of 16 were perpetrated by current partners, 11 per cent by ex-partners, 10 per cent by 'other intimates' (including relatives), 11 per cent by dates, 16 per cent by acquaintances, and eight per cent by strangers.⁷⁴ Those close to the victim committed the great majority of rapes. For sexual assaults, the figures were different with some 18 per cent being perpetrated by current partners, 8 per cent former partners, 11 per cent other intimates, 12 per cent dates, 28 per cent acquaintances and 23 per cent strangers.⁷⁵ Repeat victimization (of both types of incident) was more likely to occur where the perpetrator was a partner, ex-partner or other intimate (62, 52 and 48 per cent respectively). This is an important finding and Myhill and Allen argue that sexual violence should be explored as part of the cycle of domestic violence.⁷⁶

Large numbers of rapes involved 'physical force or violence', some 74 per cent with 37 per cent of those reporting an incident sustaining physical injury.⁷⁷ Physical

⁷² This finding is borne out by other studies of rape such Harris and Grace (n 52); P Tjaden and N Thoennes *Prevalence, Incidence, and Consequences of Violence against Women: Findings from the National Violence against Women Survey* (US Department of Justice Washington DC 1998); P Tjaden and N Thoennes *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence against Women Survey* (US Department of Justice Washington DC 2000); Lea et al (n 52) 589.

⁷³ Myhill and Allen (n 53) ch 4. This finding is also supported by Harris and Grace (n 52).

⁷⁴ Myhill and Allen (n 53) 67. The report by HM Crown Prosecution Inspectorate found that in the 1471 reports they examined where such information was documented, 14 per cent of cases involved strangers (n 52) 31.

⁷⁵ Myhill and Allen (n 53) 67.

⁷⁶ *ibid* 31-2.

⁷⁷ *ibid* 32.

force, violence and physical injury were greatest in rapes perpetrated by partners or ex-partners. Current partners used force or physical violence in 70 per cent of incidents of sexual victimization, with 39 per cent of women sustaining injury.⁷⁸ Similarly, 65 per cent of incidents involving ex-partners included force with 33 per cent of women sustaining injury. Those attacked by partners or ex-partners were most likely to have been ‘threatened, blackmailed or intimidated’ with considerable numbers of women, 55 per cent, being victimized in their own homes.⁷⁹ Women attacked by partners or ex-partners were more likely to be distressed (‘very angry and very upset’) after the incident: four fifths compared to three quarters of those who were attacked by a stranger or an acquaintance. However, this group ‘were less likely to be shocked by their victimisation than were victims of stranger attacks’ (64 per cent in comparison to 76 per cent of cases involving strangers).⁸⁰ These findings lend increased weight to the examination of this issue within the context of domestic violence in view of the findings that sexual violence perpetrated by partners or ex-partners is more likely to be accompanied by other types of violence.

Only one fifth of rape and sexual assaults were reported to the police. In this study, attacks involving strangers were significantly more likely to be reported than other types of attack: strangers made up 36 per cent of cases reported, acquaintances 16 per cent, dates eight per cent, ‘other intimates’ 14 per cent, ex-partners 19 per cent and partners 15 per cent.⁸¹ Women who were attacked by partners or dates were slightly less likely to describe their incidents as rape.⁸²

⁷⁸ *ibid* 34.

⁷⁹ *ibid* 35-38.

⁸⁰ *ibid* 41.

⁸¹ *ibid* 50.

A number of methodological problems can be identified in this survey. British Crime Surveys (including this survey) do not measure crimes perpetrated against minors,⁸³ a group that is among those at greatest risk of victimization.⁸⁴ These surveys are directed towards householders and their members, and exclude those who are homeless or living in temporary accommodation.⁸⁵ This group of people will include those who have recently fled domestic violence.⁸⁶ This suggests that the figures of those who have experienced sexual crimes by partners or ex-partners may well be underestimates.

c) Local Qualitative Studies

More small-scale studies, which tend to be localized in nature, can give us additional information about the nature of sexual crimes. Russell's study of marital rape was conducted in San Francisco where 930 face-to-face interview questionnaires were completed. She directly links the problem of marital rape to the traditional patriarchal family, and argues that the notion of women being the property of men is key to understanding rape and the laws surrounding it.⁸⁷ In the family, wives are regarded not only as the property of their husbands in general terms, but 'as the *sexual* property of their husbands'.⁸⁸ This belief system is exacerbated by the inequality associated with the traditional division of labour in the marital home, which places the husband in a 'position of economic power'.⁸⁹ The dependency of women on their husbands is

⁸² *ibid* 58. This is confirmed by the study conducted by Russell (n 3) 48.

⁸³ Zedner (n 68) 423.

⁸⁴ Tjaden and Thoennes 1998 (n 72) 6.

⁸⁵ Walby and Myhill (n 69) 510.

⁸⁶ *ibid*.

⁸⁷ Russell (n 3).

⁸⁸ *ibid* 3.

⁸⁹ *ibid* 4.

especially acute where there are children involved, leading to what Russell describes as ‘economic vulnerability’, placing the wife in a critical position should the marriage break down.⁹⁰ Women who find themselves in this position can be ‘coerced by their vulnerability into living with an objectionable or abusive husband’.⁹¹ The division of labour in the home maintains and enhances the man’s power over his wife. Russell suggests that women who are still married to the perpetrators are less likely to disclose those experiences, or are more likely to minimize the attacks, particularly where the incident involved intimidation rather than force. Many women who have been raped in marriage do not regard themselves as victims of rape. These issues can disguise attempts to gain a true picture of the extent of rape in marriage, and suggests that some of the figures may be underestimates.⁹² However, it should be borne in mind that Russell conducted her study at a time and place where rape in marriage was not illegal, and it is unclear whether these perceptions may have changed as a result of the removal of the marital rape exemption.⁹³ What was clear from Russell’s San Francisco study was that the women who did not regard themselves as victims of rape nevertheless felt ‘that they had been sexually abused by their husbands’.⁹⁴ Russell’s findings were that 14 per cent of women (87/644) who had ever been married had experienced ‘at least one attempted or completed rape by their husbands or ex-husbands’.⁹⁵ The survey excluded women who are in a number of institutions and most likely to have experienced abuse, and inevitably excluded the many women who are murdered each year by their husbands.

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² *ibid* 39-41.

⁹³ In the UK this was done with the case of *R v R* [1992] 1 AC 599 (HL).

⁹⁴ Russell (n 3) 53.

⁹⁵ *ibid* 57.

Russell's study found that 84 per cent of wife rapes involved physical force, with 58 per cent of these involving 'pushing and pinning down', 16 per cent 'hitting, kicking or slapping' and 19 per cent extreme force.⁹⁶ That this crime was an isolated incident was reported by 31 per cent of respondents. However, 37 per cent experienced between two and 20 rapes, and 31 per cent over twenty rapes. Additionally, 35 per cent of women who had experienced wife rape were subjected to 'verbal threats of physical harm'.⁹⁷

The incidence of rape in marriage was not governed by how traditional the wives were in their spousal roles; although this did tend to affect how they dealt with it. Like other types of rape, rape in marriage tends to affect particularly the young with 64 per cent being raped for the first time between the ages of 13 and 25. Many of the wives were very traumatized by the experience, with 56 per cent being 'extremely upset' and 21 per cent being 'very upset'.⁹⁸ Some 49 per cent stated that the 'experiences had a great effect on their lives', and 29 per cent 'some effect'.⁹⁹ The long-term effects increased with the number of incidents and the length of time that the rapes occurred. Furthermore, 70 per cent 'of those physically threatened were extremely upset by the experience'.¹⁰⁰ This figure increased to 83 per cent when the husband used non-physical threats such as finding another partner. Russell draws an analogy with slavery in that 'the exploitation of women is intrinsic to the structure and functioning of the family': they are regarded as property, can be assaulted and raped by their husbands with relative impunity, are not paid for their domestic labour, and

⁹⁶ *ibid* 112.

⁹⁷ *ibid*.

⁹⁸ *ibid* 191.

⁹⁹ *ibid*.

¹⁰⁰ *ibid* 201.

the wife rarely has the ‘freedom of movement’ that the husband has.¹⁰¹ A further analogy with slavery can be drawn from the significant power differential in the relationship.¹⁰²

2. Reporting and Attrition in the UK

(a) The Police

A study carried out by Grace and others in 1985 of offences initially recorded as rape found that 30 per cent of cases involved strangers, 35 per cent involved acquaintances, and 35 per cent involved intimates.¹⁰³ The study by Harris and Grace in 1996 found that the picture had changed quite dramatically. Cases involving strangers made up 12 per cent of the sample, those involving acquaintances made up 45 per cent of the sample, and cases involving intimates made up 43 per cent of the sample.¹⁰⁴ However, in 2003, the study by Lea and others found that the greatest category was, by far, that of acquaintances, with 30 per cent of cases involving intimates, 44 per cent of cases involving acquaintances and 26 per cent involving strangers.¹⁰⁵ What is consistent with these cases is that rape by strangers always makes up the smallest number of cases. Gregory and Lees, in their Islington study into the effect of changes in the criminal justice system on attrition rates, argue that whether as a result of increases in incidents of rape, or an increase in the ‘willingness to report, more women are coming

¹⁰¹ *ibid* 236.

¹⁰² *ibid*.

¹⁰³ S Grace, C Lloyd and LJF Smith *Rape: From Recording to Conviction* (Research and Planning Unit Paper 71 Home Office London 1992) 13.

¹⁰⁴ Harris and Grace (n 52) 6.

¹⁰⁵ Lea et al (n 52) 590. For the sake of accurate comparison, I have tried to treat all these categories in a similar way.

forward' to report crimes of this nature.¹⁰⁶ It is, nevertheless, becoming more and more difficult to secure convictions.¹⁰⁷ An alternative interpretation is that it has always been difficult to secure convictions in cases of rape but that the nature of the crimes reported has changed (being more likely to include intimate and acquaintance cases), and the courts have not caught up with the increasing awareness of the nature of sexual violence.

The study conducted by Harris and Grace highlights concerns that police continue to treat as 'no crime' some claims made by alleged victims, who have not completely retracted their allegations and admitted fabricating the claims as is currently required.¹⁰⁸ Some of these are thought to be as a result of police decisions as to the reliability of the victim, including decisions about their mental state.¹⁰⁹ These findings are reiterated in the recent study by Kelly and others. Their study found that 'the vast majority of cases did not proceed beyond the investigative stage'.¹¹⁰

Harris and Grace found that age and the levels of violence used were predictors as to whether an allegation would result in no further action.¹¹¹ If there was no evidence either of violence, or threats of violence made to the victim, there was a greater chance that the case would be treated as no crime. Cases were more likely to result in no further action if the incidents involved intimates, if the alleged victims were between the ages of 26 and 45 and if there had 'been some consensual contact'

¹⁰⁶ J Gregory and S Lees 'Attrition in Rape and Sexual Assault Cases' (1996) 36 British J of Criminology 1, 15.

¹⁰⁷ *ibid.*

¹⁰⁸ Harris and Grace (n 52) 14; *ibid* 4.

¹⁰⁹ Gregory and Lees (n 106) 5.

¹¹⁰ Kelly, Lovett and Regan (n 52) xi.

¹¹¹ Harris and Grace (n 52) 13.

prior to the alleged attack.¹¹² More than 50 per cent of cases without ‘evidence of any violence or injury’ resulted in no further action being taken.¹¹³

The study by Lea and others study found that the police and the CPS cumulatively took no further action in 61 per cent of cases. Like Harris and Grace, they found that 39 per cent of cases where reasons for given for not proceeding, this was due to insufficient evidence. A large number of cases, some 38 per cent, did not proceed because the victim retracted the complaint or refused to co-operate.¹¹⁴ Nevertheless, in half of these cases, police officers believed that the victim had been intimidated. These cases tended to involve attacks by intimates and police officers felt ‘that the victim was too afraid to continue due to fear of further violence’.¹¹⁵ In many of these cases, police officers ‘expressed their frustration’ at not being able to continue with a case.¹¹⁶ Where reasons were given for not continuing with a case, insufficient evidence was more likely to be given where the attack had occurred in a private place. The complaint was more likely to be thought false if the victim had willingly gone to the home of the perpetrator. Problems in relation to the processing of rape cases were identified by police officers as being the product of an unsatisfactory relationship between the CPS and the police, characterised by poor communication and information; and the outlook of legal professionals, particularly towards rape cases. In a reiteration of the views expressed by Russell’s US study, the authors argue that rapes involving intimates need to be considered ‘within a theoretical framework that takes account of social, political and economic factors. Many of the victims...appear to be

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ This is consistent with the recent findings by Kelly et al (n 52) that one third of cases lost at the investigative stages were as a result of victims not completing the investigative process and withdrawing complaints (xi).

¹¹⁵ Lea et al (n 52) 593.

trapped in an abusive relationship due to ... economic dependence ... especially when children were involved'.¹¹⁷

Temkin's 1997 qualitative study into the treatment of victims of rape in Sussex found that complainants were increasingly satisfied with the treatment they received by the police.¹¹⁸ They found that 57 per cent of interviewees were 'wholly or mainly positive about their experiences with the police', but that a significant number, 43 per cent, 'were wholly, mainly or partly negative'.¹¹⁹ However, six out of 23 women were unhappy with the disbelieving attitudes of police officers. Of those six, two believed that their investigation was less thorough as a consequence, and four were unhappy with oppressive questioning 'and harsh treatment'.¹²⁰ In all of these cases, the attacker had been known to the victim prior to the incident, and the officers concerned, who were all male except one, seem to have had problems 'interpreting what had happened as rape'.¹²¹ What is clear from this study is that this level of doubt among police officers as to the veracity of the victim's case had a very negative and sometimes very destructive impact on her. Interestingly, interviews carried out with those officers that victims claimed were disbelieving of their complaints revealed scepticism among them about rape complaints generally. Over 50 per cent of the officers that were interviewed believed that 25 per cent of rape cases 'reported to the police were false'.¹²²

¹¹⁶ *ibid.*

¹¹⁷ *ibid* 596.

¹¹⁸ Temkin 1997 (n 55).

¹¹⁹ *ibid* 518.

¹²⁰ *ibid* 515.

¹²¹ *ibid.*

¹²² *ibid* 516.

A similar study was conducted in London.¹²³ Most women were ‘dissatisfied or highly dissatisfied’ with the police investigation, with some believing that the police made insufficient attempts to investigate their case, and others experiencing disbelieving attitudes.¹²⁴ Like the Sussex study, women who felt positive about their experiences with the police were more likely to have reported the incident promptly and ‘have been violently raped by a stranger’, than those who did not.¹²⁵

Problems have also arisen in relation to medical evidence in rape cases.¹²⁶ Temkin found that there were difficulties in securing female doctors to perform examinations, variations in the level of training received by doctors engaging in these tasks, and problems in maintaining examination suites to an adequate standard. There were also important ethical issues arising about consent to conduct an examination, with many victims erroneously assuming that the ordinary rules of confidentiality between doctor and patient would apply. This left doctors facing a dilemma in deciding whether to inform the victim that the information would likely be disclosed to the defence. Doctors were found to ‘skim over or ignore the very strong ethical issues involved’.¹²⁷ Doctors also tended to adopt a similar attitude to the one they would adopt with other patients in terms of getting significant amounts of background information, including information about the complainant’s sexual history and contraception, which are not relevant to the charge and potentially compromise the complainant’s case. She also found that some samples taken from the victim were not sent for examination unless they were thought ‘to be meaningful’, and tended

¹²³ Temkin 1999 (n 55).

¹²⁴ *ibid* 26.

¹²⁵ *ibid* 33.

¹²⁶ Temkin 1998 (n 55).

¹²⁷ *ibid* 831.

eventually to be destroyed.¹²⁸ In view of the fact that doctor's reports would be disclosed to the defence, some doctors were concerned that the advice on what to include was inconsistent, leading to confusion. Perhaps most surprising of all was the finding that the disbelieving attitudes of doctors were more prevalent than those of the police.

(b) The CPS

The study by Harris and Grace found that half of the cases recorded as a crime and detected were presented to the CPS for a decision about prosecution.¹²⁹ The CPS discontinued 25 per cent of these cases. Harris and Grace highlight the evidential considerations commonly faced by the CPS in rape. These are that victims are often from vulnerable groups such as children or 'those with mental health problems or learning disabilities'.¹³⁰ The sexual history of the victim is also highlighted as an issue. In cases involving a former relationship, the victim can be unwilling to give evidence, and cases of rape where consent is an issue often turn on the victim's word against the defendant's. Discontinuance was least likely in cases involving those under 12 and those over 45. It was most likely in cases involving 13-15 year olds and 16-35 year olds.¹³¹ This is interesting given that, as indicated by the research, this age group is the most vulnerable to offences of this nature. The study by Kelly and others found that consultations between the police and the CPS 'rarely led to enhanced case-building'.¹³²

¹²⁸ *ibid* 835.

¹²⁹ Harris and Grace (n 52) ch 4.

¹³⁰ *ibid* 26.

¹³¹ *ibid* 27.

The behaviour of the victims after the alleged rape was something that prosecutors considered.¹³³ This included how soon after the incident the complaint was made, whether the victim could remember significant details, whether they attempted to get away from their attacker if they had the chance, and whether or not they co-operated with police inquiries. There was some anxiety that such decisions were being made with reference to a particular view as to how a victim should behave after an attack of this nature, and guidance on this issue was thought to be beneficial. Decisions to prosecute did not always appear consistent. In cases where victims had retracted their statements or refused to give evidence they suggested that more encouragement or protection may be needed. Prosecutors were not always certain of how to deal with victims who had learning disabilities.¹³⁴

(c) Trial of Rape Cases

The increase in reported cases of rape has been accompanied by a decrease in the proportion of convictions in recent years. In 1985, 24 per cent of all reported cases of rape resulted in a caution or conviction, but by 1997, this figure had fallen to only nine per cent.¹³⁵ In 2000, the figure was a mere 7 per cent.¹³⁶ In their study, Harris and Grace found that of 100 prosecuted cases, only 27 will result in convictions for rape.¹³⁷ This fall is not unique to rape. As we have seen, Grubin found that that in the six most common sexual offences against children, all cautions and convictions had decreased

¹³² Kelly, Lovett and Regan (n 52) xi.

¹³³ HMCPSI (n 52).

¹³⁴ *ibid* 53-59.

¹³⁵ Harris and Grace (n 52) Appendix A, 51.

¹³⁶ Lees (n 54) x; Kelly et al (n 52) found that it had reached an all time low of 5.6% in 2002 (ix).

¹³⁷ Harris and Grace (n 52) 30. A total of 36 cases resulted in the defendants being convicted for other offences and 22 were acquitted. Defendants were more likely to plead guilty to alternative offences if they were accused of the rape of an intimate or acquaintance. Additionally, 88 per cent of Crown Court

in recent years.¹³⁸ The problems associated with rape trials are considered in the next chapter.

This survey of the empirical issues presents a number of concerns for consideration on human rights grounds. Notwithstanding the large increases in the numbers of rape incidents reported to the police, it is clear that these figures continue to represent only a small number of the actual incidents that take place. The low reporting rate amongst victims of partner rape is worrying in view of the additional levels of violence involved in this type of attack. Incidents where the complainant and attacker are known to each other, and where there is little evidence of additional violence are less likely to be reported and less likely to be proceeded with. In addition, these types of cases appear to be the ones that generate the most suspicion towards complainants. Finally, the attrition rate for rape is appallingly high and may bring up issues as human rights considerations.

D. THE THEORY BEHIND BASIC HUMAN RIGHTS PROTECTIONS

As seen in chapter one, human rights doctrine is premised on Kantian notions of morality.¹³⁹ The liberal person espoused by Kant is imbued with the characteristics of autonomy, rationality and freedom.¹⁴⁰ According to Kant, this human rational self is not determined by elements of physicality and is transcendental.¹⁴¹ Reason dictates the ‘capacity for choice’, which guides the decision-making process of the

cases involving victims under 13 resulted in conviction, falling to 75 per cent for those between 16 and 25, and to 50 per cent for victims over 25 (32).

¹³⁸ Grubin (n 64).

¹³⁹ Ch one p 39–40.

¹⁴⁰ I Kant (1797) M Gregor (tr) *The Metaphysics of Morals* (Cambridge University Press Cambridge 1991).

individual.¹⁴² Kant's work has been criticized by feminists for mentioning women only when considering them as wives, treating them 'as non-persons'.¹⁴³ Additionally, these concepts have been criticized by feminists for engendering a false notion of neutrality, which does not take into account particularities of race and gender.¹⁴⁴ Furthermore, transcendentalism precludes elements of embodiment, specifically, how the exploitation of women is particularly associated with the body.¹⁴⁵ Inherent in these ideals of autonomy, rationality and freedom is the concept of dignity, which, while difficult to define,¹⁴⁶ forms the basis of human rights principles and has increasingly been invoked in cases of rape.¹⁴⁷ This section will examine this elusive concept and consider the manner in which it influences human rights protections.

1. Human Dignity and Human Rights

As indicated in chapter one, human rights doctrine is premised on notions of freedom, autonomy, rationality and dignity.¹⁴⁸ The Preamble to Universal Declaration of Human Rights (UDHR) refers to the 'inherent dignity and ... equal and inalienable rights of all members of the human family [as] the foundation of freedom justice and peace in the world', and later 'the dignity and worth of the human person and in the

¹⁴¹ *ibid* 42, 48.

¹⁴² *ibid* 42, 52.

¹⁴³ N Naffine 'The Body Bag' in N Naffine and RJ Owens (eds) *Sexing the Subject of Law* (Sweet and Maxwell London 1997) 79, 83; C Battersby *The Phenomenal Woman: Feminist Metaphysics and the Patterns of Identity* (Polity Cambridge 1998) 64.

¹⁴⁴ K O'Donovan 'With Sense, Consent or Just a Con? Legal Subjects in the Discourse of Autonomy' in N Naffine and RJ Owens (eds) *Sexing the Subject of Law* (Sweet and Maxwell London 1997) 47; ch one p 41.

¹⁴⁵ Frazer and Lacey (1993) 54; ch one p 43–44.

¹⁴⁶ EJ Eberle 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' [1997] *Utah L Rev* 963, 964.

¹⁴⁷ For example, in *SW v United Kingdom* Series A no 355-B; *CR v United Kingdom* Series A no 355-C (1996) 21 EHRR 363, the ECtHR referred to the 'very essence of [the Convention] which is respect for human dignity and human freedom' in relation to rape [44/42].

¹⁴⁸ Ch one p 29–31 and p 45–47.

equal rights of men and women'.¹⁴⁹ Article 1 says that '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience...' These principles are also reflected in the International Covenant of Civil and Political Rights (ICCPR) as well as the ECHR.¹⁵⁰

Feldman identifies three levels at which dignity can operate.¹⁵¹ These are firstly, the dignity attributed to the human race as a whole; secondly, the dignity attached to particular groups; and thirdly, the dignity ascribed to individuals. The first level is an objective aspect of dignity, and protects the particular 'status and integrity of the species', referring to, for example, the regulation of artificial methods of reproduction.¹⁵² The second aspect, containing both subjective and objective elements, refers to 'the way in which groups visualise and constitute themselves, and the way in which individuals relate to the group'.¹⁵³ This covers rules preventing discrimination and encompasses hate crimes such as genocide, apartheid and inciting racial hatred. The third aspect is essentially subjective and refers to individual autonomy. Feldman relates this aspect to Kant's theory of morality.¹⁵⁴ According to Kantian thinking, dignity is an essential component of the concept of treating people as ends in themselves.¹⁵⁵ Dignity of the person is of such "'incalculable" value' that it cannot be exchanged, even for the dignity of many.¹⁵⁶ Dignity is ascribed to a number

¹⁴⁹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR).

¹⁵⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁵¹ D Feldman 'Human Dignity as Legal Value-Part I' [1999] PL 682.

¹⁵² *ibid* 684.

¹⁵³ *ibid*.

¹⁵⁴ *ibid* 684-5.

¹⁵⁵ TE Hill Jr *Dignity and Practical Reason in Kant's Moral Theory* (Cornell University Press Ithaca 1992) 10.

¹⁵⁶ *ibid*.

of different but related things: ‘humanity (rational nature, human nature)’;¹⁵⁷ ‘morality (moral law...)’;¹⁵⁸ ‘persons (rational beings...)’;¹⁵⁹ ‘persons who conform to duty’;¹⁶⁰ and ‘moral disposition (to do duty for duty’s sake)’.¹⁶¹ While the last two might indicate that dignity is associated with personal morality, Kant in fact argues that humanity in all people has dignity, regardless of personal morality. Autonomy — ‘the property of the will of every rational being’ — is the basis of dignity that is attributed to “every rational being” and “rational nature”.¹⁶² Such dignity is also unconditional and incomparable.¹⁶³ Kantian notions of dignity have been criticized by feminists for inferring that dignity required ‘a bounded masculine body’.¹⁶⁴ Kant’s writings emphasized bodily separation between men in order to avoid “unnatural lust”.¹⁶⁵ His consideration of women comes when he considers the domestic sphere. While he is willing to accord the same rights to women in the confines of marriage as he does to men, away from this arena ‘a male form implicitly reasserts itself and is a form whose self-respect depends on bodily separation from other men and on a bodily difference from women’.¹⁶⁶ In relation to rape, O’Donovan argues that underlying the discrediting of rape victims ‘is an unstable notion of autonomy’ where women are represented as incapable of making rational choices about their sexuality.¹⁶⁷

¹⁵⁷ I Kant, H J Paton (tr) *Groundwork of the Metaphysics of Morals* (Harper and Row New York 1963) and I Kant, J Ellington (tr) *Metaphysical Principles of Virtue* (Bobbs Merrill Indianapolis 1964 cited in Hill (n 155) 47.

¹⁵⁸ Kant, Paton tr (n 157) and I Kant, L White Beck (tr) *Critique of Practical Reason* (Macmillan/Library of Liberal Arts New York 1985) cited in Hill (n 155) 47.

¹⁵⁹ Kant, Paton tr (n 157) and Kant, Ellington tr (n 157) cited in Hill (n 155) 47.

¹⁶⁰ Kant, Paton tr (n 157) cited in Hill (n 155) 47.

¹⁶¹ *ibid.*

¹⁶² *ibid.*

¹⁶³ Hill (n 155) 50.

¹⁶⁴ Naffine (n 143) 82.

¹⁶⁵ *The Metaphysics of Morals* cited in Naffine (n 143) 82.

¹⁶⁶ Naffine (n 143) 82.

¹⁶⁷ O’Donovan (n 144) 54.

Feldman argues that both the subjective aspect of dignity (the aspect associated with individual self-worth and choice) and the objective aspect of dignity (associated with societal and state attitudes towards the group) can exist in particular cases causing the ideals associated with ‘dignity to pull in several directions’.¹⁶⁸ In relation to individual subjective dignity, human rights are generally concerned to protect physical and moral integrity and self-respect. Articles 3 and 8 ECHR illustrate these. Furthermore, there is a greater correlation between dignity and autonomy in relation to individual dignity. Objective dignity usually requires more extensive legal protection, involving positive duties to maximize ‘the conditions for social respect and dignity’.¹⁶⁹ Feldman, referring to *Aydin and Turkey*¹⁷⁰ associates rape with a violation of the subjective form of individual dignity. “‘Ethnic cleansing’” is associated with a violation of (objective) group dignity.¹⁷¹ What is notable about this is the absence of the articulation of crimes against women, such as sexual violence, as an aspect of objective dignity. This argument becomes more pertinent when we consider the large number of women affected by it, and the way this absence may reinforce the idea of women as lacking in rights. This omission is mirrored in some human rights instruments, discussed further below.

2. Hierarchies of Rights and Jus Cogens

Some rights are considered ‘basic rights’, that is, those rights the enjoyment of which are imperative to the enjoyment of other rights, so that an attempt to exercise the other right by relinquishing the basic right would be ‘self defeating, cutting the ground from

¹⁶⁸ Feldman (n 151) 685.

¹⁶⁹ *ibid* 686-8.

¹⁷⁰ Appn no 23178/ 94 (1998) 25 EHRR 251.

¹⁷¹ Feldman (n 151) 692.

beneath itself'.¹⁷² These basic rights refer to the protection of physical integrity, which includes rape.¹⁷³ Consistent with Kantian thinking outlined above, basic rights are also absolute in that they cannot be violated, even to protect the same rights in another.¹⁷⁴ Other rights, which are not absolute in nature, are still essential to the enjoyment of other rights. An example of this is liberty.¹⁷⁵ In as much as liberty refers to freedom of physical movement, this can also be considered a basic right.¹⁷⁶ Outside the realm of these rights, there is little consensus about what should be regarded as a 'fundamental right'.¹⁷⁷ Some would argue that rights of due process are essential to the enjoyment of other rights, whilst others would suggest that 'the rights to food and other basic needs take precedence'.¹⁷⁸

This appears to indicate that rights are ordered in a hierarchical structure, although there is some controversy over the issue.¹⁷⁹ Shelton outlines a number of sources of positive international law that could give us an indication of the hierarchies used in the protection of rights.¹⁸⁰ What emerges from the analysis is that rights involving the protection of physical and moral integrity (the right to life, to be free from torture and slavery), and freedom from discrimination are 'winners', or regarded as the most important rights.¹⁸¹ The United Nations Charter emphasizes the protection of rights without discrimination on a number of grounds, including sex. The

¹⁷² H Shue *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn Princeton University Press Princeton New Jersey 1996) 19.

¹⁷³ *ibid* 20.

¹⁷⁴ A Gewirth 'Are There Any Absolute Rights?' (1981) 31 *The Philosophical Q* 1.

¹⁷⁵ Shue (n 172) 65-87.

¹⁷⁶ *ibid* 78-82.

¹⁷⁷ T Meron 'On a Hierarchy of International Human Rights' (1986) 80 *American J of Intl L* 1, 11.

¹⁷⁸ *ibid*.

¹⁷⁹ T Koji 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights' (2001) 12 *Eur J of Intl L* 917, 918-9. This is because of claims 'that the realization of each human right requires other human rights and, in this sense, all human rights are indivisible'.

¹⁸⁰ D Shelton 'Hierarchy of Norms and Human Rights: Of Trumps and Winners' (2002) 65

importance of non-discrimination is re-emphasized and carried through into a number of other international treaties including the Vienna Declaration and Program of Action on Human Rights;¹⁸² the International Convention on the Suppression and Punishment of the Crime of Apartheid;¹⁸³ the Convention on the Prevention and Punishment of the Crime of Genocide;¹⁸⁴ the Convention on the Elimination of All Forms of Racial Discrimination (CERD);¹⁸⁵ and, of course, CEDAW. Genocide and apartheid deny individuals their basic rights on the basis of race or ethnicity and Shelton argues that criminalizing these acts supports the idea ‘that freedom from systematic discrimination enjoys a high status in international law’ in relation to race.¹⁸⁶ This is to be compared to the situation in relation to discrimination on the basis of sex: CEDAW’s powers of enforcement are minimal and the treaty has the largest number of reservations of any international human rights document.¹⁸⁷

Another means of establishing hierarchies of rights is to look at those rights that are protected by international criminal laws, or require States to enact criminal laws to address them. This includes genocide and apartheid, torture,¹⁸⁸ war crimes¹⁸⁹ and ‘forced disappearances’.¹⁹⁰ These principles are further emphasized by the tribunals set up to address the atrocities in the Former Yugoslavia and Rwanda and

Saskatchewan L Rev 301, 310-319.

¹⁸¹ Also, Meron (n 177) 6 and Van Boven cited in that work.

¹⁸² UN High Commission for Human Rights, UN Doc. A/CONF.157/23.

¹⁸³ (adopted 30 Nov 1973, entered into force 18 July 1976) GA Res 3068 13 ILM 50.

¹⁸⁴ (adopted 9 December 1948, entered into force 18 July 1951) 78 UNTS 277.

¹⁸⁵ (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

¹⁸⁶ Shelton (n 180) 311.

¹⁸⁷ *ibid.*

¹⁸⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment GA Res 39/46 UN GAOR 39th Sess Supp No 51 UN Doc A/39/51 (1984).

¹⁸⁹ Geneva Conventions and Additional Protocols.

¹⁹⁰ Inter-American Convention on Forced Disappearances of Persons (entered into force 28th March 1996) OR OEA/SerP/AG/Doc3114/94 rev1 (1994) 33 ILM 1529.

more recently, by the Rome Statute of the International Criminal Court.¹⁹¹ These treaties and bodies are examined in greater detail in relation to rape in the next section. Finally, Shelton considers those rights that are regarded as absolute in a number of human rights instruments, including the ECHR. These rights include the right to life, freedom from torture and inhuman treatment, slavery and retroactive criminal laws.¹⁹² Non-derogable rights and those ‘having special status, such as non-discrimination’, can be given preference over other rights if there is a conflict.¹⁹³ In relation to rape in particular, the ECtHR has found that protection from a debasing act such as rape takes precedence over protection against retroactive criminal laws.¹⁹⁴ Additionally, this hierarchical nature of rights would indicate that protection of physical integrity, including rape, takes precedence over procedural guarantees.¹⁹⁵

The fundamental rights form part of the doctrine of *jus cogens*, which is essentially a set ‘of fundamental legal norms from which no derogation is permitted’.¹⁹⁶ The absence of discrimination on the basis of sex as part of these fundamental rights raises serious questions about the gendered nature of these norms.¹⁹⁷ In view of the special status accorded to non-discrimination in human rights treaties, it is perhaps surprising that the ECtHR has been reluctant to engage with it.

¹⁹¹ (adopted 17th July 1998, entered into force 1 July 2002) UN Doc A/CONF183/9 37 ILM 1002; Shelton (n 180) 312-3.

¹⁹² Shelton (n 180) 313-4.

¹⁹³ *ibid* 317 referring to *Selmouni v France* Appn no 25803/94 (1999) 29 EHRR 403.

¹⁹⁴ *SW* (n 147).

¹⁹⁵ This is developed in ch three.

¹⁹⁶ H Charlesworth and C Chinkin 'The Gender of *Jus Cogens*' (1993) 15 Human Rights Q 63, 63.

¹⁹⁷ *ibid* 70.

E. RAPE IN INTERNATIONAL LAW

As previously indicated, the development of rape as a violation of international human rights and humanitarian law has been a relatively recent development and has tended to emphasize acts perpetrated during times of conflict or by public authorities. Early human rights treaties did not make explicit reference to sexual violence because this was not uppermost in the minds of the men that drafted them.¹⁹⁸ The UDHR, adopted in 1948, does not make explicit reference to sexual violence. In 1949, attempts were made to tackle sexual violence in times of war after the extensive sexual violence used during the World War II and this is reflected in Article 27 (2) of the Fourth Geneva Convention prohibiting sexual violence on the part of enemy forces.¹⁹⁹ However, it was not until 1977 when Protocol 1 to the Geneva Conventions came into force that sexual violence was prohibited in all armed conflicts.²⁰⁰

While the ICCPR does not explicitly mention sexual violence, it is clear from the jurisprudence of the Human Rights Committee (HRC) that it is considered a violation of Article 7 of the Covenant, the protection against torture and inhuman or degrading treatment or punishment. Additionally the HRC has articulated sexual violence as an issue of equality under Article 3 to ‘the equal right of men and women to the enjoyment of all civil and political rights’. The HRC has stated that in order to give effect to Article 3 of the Covenant, States are required to provide information on

¹⁹⁸ Quinlivan (n 7); C Bunch 'Transforming Human Rights from a Feminist Perspective' in J Peters and A Wolper (eds) *Women's Rights Human Rights: International Feminist Perspectives* (Routledge New York) 11, 13.

¹⁹⁹ R Chowdhury 'Kadic v Karadic: Rape as a Crime Against Women as a Class' (2002) 20 *Law and Inequality* 91, 104.

²⁰⁰ Art 76 (1) of Protocol 1 states that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault' Protocol 1 Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of

their laws and practices in relation to violence in the home, and sexual violence.²⁰¹ The link to the equality provisions of Article 3 was also evident in the comments of the Committee in relation to the measures introduced by Korea to tackle violence against women, including sexual violence.²⁰² These involved provisions such as not requiring a complaint in cases where the perpetrator ‘was carrying a weapon’ or ‘acting jointly with one or more assailants’ and ‘measures to protect women during trial procedures’.²⁰³ Giving effect to Article 3 also obligates States to provide information on the trafficking of women and children to give them protection under Article 8 of the Covenant, the prohibition of slavery.²⁰⁴ Additionally, the right to protection of liberty under Article 9 of the Covenant requires States to report to the committee on laws or practices that may deny women their liberty in a manner that is arbitrary or unequal, for example by confining women at home.²⁰⁵ Finally, States are obligated to report on the ways in which the enjoyment of privacy rights under Article 17 of the Covenant may be impeded by inequality between men and women, such as when a woman’s private life or sexual history is used to determine the extent to which she is protected in law, exemplified in cases of rape.²⁰⁶ What is noticeable is the increased emphasis on preventative measures, even concerning acts perpetrated by private individuals. Indeed, the HRC has made it clear that States are obligated to take measures against Article 7 violations whether perpetrated by individuals acting in a

International Armed Conflicts (adopted 8th June 1977 entry into force 7th December 1979) 1125 UNTS 3.

²⁰¹ UN Human Rights Committee ‘General Comment no 28 Equality of Rights Between Men and Women (article 3)’ (29 March 2000) UN Doc CCPR/C/21/Rev1/Add10 [11].

²⁰² UN Human Rights Committee ‘Second Periodic Report of State Parties due in 1996: Republic of Korea’ (28 August 1998) UN Doc CCPR/C/114/Add.1.

²⁰³ *ibid* [53].

²⁰⁴ General Comment no 28 (n 201) [12].

²⁰⁵ *ibid* [14].

²⁰⁶ *ibid* [20].

public or private capacity.²⁰⁷ Nevertheless, many of the reports concerning sexual violence in individual countries continue to concentrate on acts perpetrated by soldiers or public authorities²⁰⁸ unless the acts are perpetrated against children.²⁰⁹ Furthermore, in the most recent reports from the HRC to the UK, no mention was made of sexual violence.²¹⁰

While the distinction between public and private actors is becoming less clear-cut in the jurisprudence of the ICCPR, it is a division that is still evident in other treaty instruments. For example, the Convention against Torture (CAT)²¹¹ is explicitly directed towards acts perpetrated by public officials ‘or any other person acting in an official capacity’.²¹² This is reflected in the jurisprudence of the Committee.²¹³ However, the acts of private individuals re-emerge in the Convention on the Rights of the Child (CRC).²¹⁴ Article 19 requires States to take all appropriate measures to protect children from abuse, including sexual abuse by parents, guardians or others carers. The Committee on the Rights of the Child has expressed concern in cases where the legal protections for children against acts of sexual violence were

²⁰⁷ UN Human Rights Committee ‘General Comment 20 Replaces General Comment 7 Concerning the Prohibition of Torture and Cruel treatment or Punishment (Art 7)’ (10 march 1992) 44th Session 1992.

²⁰⁸ UN Human Rights Committee ‘Concluding Observations of the Human Rights Committee: Mexico’ (27 July 1999) UN Doc CCPR/C/79/Add.109 para 16; UN Human Rights Committee ‘Concluding Observations of the Human Rights Committee: Algeria’ (18 August 1998) UN Doc CCPR/C/79/Add.95; UN Human Rights Committee ‘Concluding Observations of the Human Rights Committee: Haiti’ (3 October 1995) UN Doc CCPR/C/79/Add.79; A/50/40.

²⁰⁹ Mexico (n 208) [15].

²¹⁰ UN Human Rights Committee ‘Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland’ (6 December 2001) UN Doc CCPR/CO/73/UK;CCPR/CO/73/UKOT.

²¹¹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26th June 1987) 1465 UNTS 85 (CAT).

²¹² CAT art 1. Art 2 states that this ‘is without prejudice to any international instrument or national legislation which does or may contain provisions of a wider nature’.

²¹³ For example, Committee Against Torture ‘Summary Record of the 429th Meeting: Indonesia’ UN Doc 26/11/2001 CAT/C/SR.492.

²¹⁴ (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

inadequate,²¹⁵ where there are a large number of incidents of child sexual abuse within the family that tend not to be reported,²¹⁶ as well as where sexual violence is perpetrated against young girls by the army.²¹⁷

The jurisprudence associated with the treaties seeking to tackle discrimination has been more explicit in their articulation of sexual violence. Article 1 of CEDAW defines discrimination as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The CEDAW Committee has stated that discrimination ‘includes gender-based violence’.²¹⁸ This is defined as ‘violence that is directed at women because she is a woman or that affects women disproportionately’, including sexual violence.²¹⁹ They recommend that laws pertaining to violence against women, particularly in the home, give suitable protection to women, ‘and respect their dignity and integrity’.²²⁰ This includes the provision of support, protection, and training for the judiciary and the police.²²¹ Recommendations also include that States ensure effective legal measures are in place to protect women from all forms of violence including domestic, familial

²¹⁵ Committee on the Rights of the Child ‘Summary Record of the 402nd Meeting: Laos People’s Democratic Republic’ (17 December 1997) UN Doc CRC/C/SR.402.

²¹⁶ Committee on the Rights of the Child ‘Summary Record of the 754th Meeting: Greece’ (1 March 2002) UN Doc CRC/C/SR.754.

²¹⁷ Committee on the Rights of the Child ‘Summary Record of the 548th Meeting: Chad’ (13 January 2000) UN Doc CRC/C/SR.548.

²¹⁸ General Recommendation 19 (n 5).

²¹⁹ *ibid.*

²²⁰ *ibid* [24] (b).

²²¹ *ibid.*

and sexual violence.²²² Notwithstanding the provisions of CEDAW, the empirical evidence outlined above suggests that sexual violence against women continues to be a persistent problem. As seen by the attrition rates, measures in place to tackle rape and sexual violence cannot be said to be effective.²²³ Furthermore, judicial and police attitudes continue to be a concern.²²⁴

In 1993, the UN General Assembly passed the *Declaration on the Elimination of Violence Against Women* commenting on the lack of universal application of human rights to women in the areas of ‘equality, security, liberty, integrity and dignity’.²²⁵ They noted the impediments to the enjoyment of ‘equality, development and peace’ brought about by violence against women and the prolonged failure to respect and advance the rights and freedoms of women.²²⁶ The Declaration articulated the reasons for this violence as being the manifestation of the historical uneven distribution of power between women and men, leading to ‘dominance and discrimination’ as an instrument of subordination and impeding access to equality: politically, legally, socially and economically.²²⁷ This thinking resonates with Russell’s analysis of marital rape.²²⁸

According to the Declaration, violence against women is an act of violence on the basis of gender which causes or is likely to cause harm of a sexual, physical or psychological nature, and which includes threats that such acts will occur, coercion,

²²² *ibid* [24] (t) (i).

²²³ Text between n 102 and n 138.

²²⁴ *ibid*; ch three p175 – 195.

²²⁵ UNGA A/Res/48/104 (20th December 1993).

²²⁶ *ibid*.

²²⁷ *ibid*.

²²⁸ Text between n 86 and n 102.

and arbitrarily depriving women of their liberty in either public or private life.²²⁹ This type of violence thus includes violence perpetrated in the home, the community or by the State.²³⁰ The Declaration states that women are equally entitled to the enjoyment of other rights including the right to life, to freedom from torture or inhuman or degrading treatment, the right to liberty and security of person, to equal protection and freedom from discrimination.²³¹ States are required to adopt a number of strategies, including ‘just and effective remedies for the harm ...suffered’ and to guard against re-victimisation of women as a result of poor gender awareness in enforcement or other matters.²³² It seems that sexual violence continues to be a problem, even in countries with relatively well-developed equality policies.²³³ In relation to the UK, the CEDAW Committee has expressed concern about the low conviction rate for rape.²³⁴ Whilst commending the UK for the adoption of the Human Rights Act 1998, the Committee also expressed concern that the obligations under CEDAW to ensure rights to equality were not mirrored in the ECHR.²³⁵ In particular, the committee were concerned that the equality provisions of the ECHR did not mirror the rights enshrined in Article 1 of the Treaty with regard to protection from indirect discrimination,²³⁶ those in Article 2 enshrining the right to equality,²³⁷ nor those relating to temporary special measures stipulated in Article 4.1.²³⁸

²²⁹ (n 225) art 1.

²³⁰ *ibid* art 2.

²³¹ *ibid* art 3.

²³² *ibid* art 4 (d) and (f).

²³³ Committee for the Elimination of Discrimination Against Women ‘Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Norway’ (31 May 1995) UN Doc A/50/38 [452] – [495].

²³⁴ Committee on the Elimination of Discrimination Against Women ‘Concluding Observations of the Committee on the Elimination of Discrimination Against Women: United Kingdom of Great Britain and Northern Ireland’ (1 July 1999) UN Doc A/54/38 [154], [278] – [318].

²³⁵ *ibid* [300].

²³⁶ Text between n 217 and n 218.

²³⁷ Art 2 of CEDAW provides that ‘States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated

CERD recognizes that discrimination on the grounds of race can affect men and women in different ways and that discrimination of this nature will be unaddressed without explicit acknowledgement.²³⁹ The recommendations of CERD make particular reference to sexual violence perpetrated against women of particular ethnic groups whilst in detention or during conflict. Effects of racial discrimination that may only affect women include ‘racial-bias motivated rape’ and subsequent ostracization from communities. Additionally, gender bias in the legal system may impede ‘access to remedies and complaint mechanisms for racial discrimination’.²⁴⁰ This is consistent with the concerns expressed by Williams Crenshaw.²⁴¹

International criminal law has developed a number of important principles in relation to rape. Rape and sexual violence is explicitly classed as a war crime in the Rome Statute of the International Criminal Court (ICC)²⁴² and as a Crime Against Humanity in both the ICC and the Statute of the International Criminal Tribunal for

therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women’. Also referred to in ch one p 37 and p 54.

²³⁸ Art 4 (1) provides that ‘Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved’.

²³⁹ Committee on the Elimination of Racial Discrimination ‘General Recommendation XXV Gender Related Dimensions of Racial Discrimination: 20/03/2000’ [1].

²⁴⁰ *ibid* [2].

²⁴¹ Text between n 38 and n 51.

²⁴² Art 8 (2) (b) xxii prohibits ‘committing rape, sexual slavery, enforced prostitution, forced pregnancy...enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions’.

the Former Yugoslavia (ICTY).²⁴³ Rape has not been prosecuted as Genocide, although in *Akayesu*, the court said that measures to prevent births within a group may be psychological. The trauma associated with rape may mean that women will be reluctant to engage in sexual relationships, which can influence birth rates.²⁴⁴ The Chamber held that:

[M]easures intended to prevent births within the group may be physical but can also be mental. For instance, rape can be a measure intended to prevent births when the raped person refuses subsequently to procreate, in the same way that a member of a group can be led, through threats or trauma, not to procreate.²⁴⁵

The crime of Genocide also requires that a group be targeted on the basis of nationality, ethnicity, race or religion.²⁴⁶ This strategy, according to MacKinnon means that rape is ‘not grasped as either a strategy in genocide or a practice of misogyny, far less both at once’.²⁴⁷ This means that ‘[a]ttacks on women ... cannot define attacks on a people. If they are gendered attacks, they are not ethnic; if they are ethnic attacks, they are not gendered’.²⁴⁸

These ideas are further illustrated when examining rape as torture. In international law, mass rape tends to be articulated as an attack on an ethnic or

²⁴³ Art 7 of the Rome Statute of the International Criminal Court includes ‘[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’ (1 (g)) as Crimes against Humanity. The comparable provision in the Statute of the International Criminal Tribunal of the Former Yugoslavia (ICTY) concerning Crimes Against Humanity says that ‘The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder;(b) extermination;(c) enslavement;(d) deportation;(e) imprisonment; (f) torture; (g) rape;(h) persecutions on political, racial and religious grounds;(i) other inhumane acts’. Art 6 of the Rome statute defines Genocide as ‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such: [by] ... (d) imposing measures intended to prevent births within the group’.

²⁴⁴ *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T Ch I (2nd September 1998) [508].

²⁴⁵ *ibid.*

²⁴⁶ Art 4 Statute for the ICTY.

²⁴⁷ MacKinnon (n 34) 8.

²⁴⁸ *ibid* 10.

religious group as opposed an attack on women as a group. In *Delacic*, the Tribunal held that women were subjected to rape for the purpose of extracting information because they were women.²⁴⁹ This represented ‘a form of discrimination which constitutes a prohibited purpose for the offence of torture’.²⁵⁰ What makes rape an act of torture is thus an intention to discriminate against the victim on the basis of sex. However, in *Kunarac*, the court held that this intention to discriminate was on the basis of the victim’s ethnic or religious background, such as being Muslim.²⁵¹ The courts have thus flitted from one form of essentialism to another.²⁵² With regard to rape as torture, the international courts have vacillated between articulating it as an attack against women as a group, and an attack on women because of their ethnicity, nationality or religion. This vacillation between the two has the effect, according to Dixon, of failing ‘adequately to capture the actually lived experiences of victims of war crimes in Bosnia’.²⁵³ It does not reflect the fact that Muslim women during this conflict were victims of double sources of discrimination. Significantly, however, in *Kunarac* the Tribunal held that in terms of humanitarian law, the characteristics of torture are to be found less in the status of the perpetrator ‘as in the nature of the act committed’.²⁵⁴

²⁴⁹ *Prosecutor v Delacic* (Judgement) ICTY-96-21 (16th November 1998) [941], [963]; R Dixon ‘Rape as a Crime in International Law’ (2002) 13 Eur J of Intl L 697, 701.

²⁵⁰ *ibid* [941]. In this case, torture was defined as having three elements: act(s) causing severe pain and suffering initiated or acquiesced to by a public official for the purposes of punishment, extracting information or confessions, intimidation or discrimination. This definition is synonymous with that in Art 1 CAT.

²⁵¹ *Prosecutor v Kunarac, Kovac and Vukovic* (Judgement) ICTY-96-23T (22nd February 2001) 654 and 669; Dixon (n 249) 701.

²⁵² *ibid*.

²⁵³ *ibid*.

²⁵⁴ *Kunarac* (n 251) [495]; Dixon (n 249) 700.

Similar problems can be seen with regard to the way in which the international criminal courts have dealt with crimes against humanity.²⁵⁵ While sexual violence is regarded as a crime against humanity, in order for large-scale crimes to be articulated in this way, the act(s) need to be directed towards a particular group. When considering rape as a crime against humanity, the Tribunal in *Kunarac* held that these acts were committed as part of a number of attacks on the Muslim population, not on the female population of the Muslim community.²⁵⁶ The court in this case referred to the attack as an ‘attack on Muslim men as workers and soldiers, then on Muslim property, and only then on the sexual autonomy and integrity of Muslim women’.²⁵⁷ Rape on this scale will only be considered an attack on a civilian population when women ‘are attacked along with *other* forms of male “property”, rather than as women’.²⁵⁸ More positively, in *Kunarac*, the defendants were convicted of sexual enslavement as part of the crime of enslavement.²⁵⁹ Other components that were included to ground this offence were the restriction of freedom of movement, the removal of privacy, ‘domestic enslavement’, physical abuse, and trafficking in complainants.²⁶⁰ What these cases illustrate is the failure to develop principles which, like CEDAW, treat rape and sexual violence as an issue of discrimination against women and an attack on women as a group. The principles used to ground the offence of enslavement will be looked at when Article 4 of the ECHR on the prohibition of slavery is considered.

²⁵⁵ The offences under the Rome Statute and the Statute for the ICTY are set out at n 243.

²⁵⁶ *Kunarac* (n 251) [571] – [574].

²⁵⁷ Dixon (n 249) 701.

²⁵⁸ *ibid* 701-2; *Kunarac* (n 251) [571] – [574].

²⁵⁹ The Rome statute more explicitly recognizes sexual enslavement as a crime against humanity n 243.

²⁶⁰ Dixon (n 249) 702; *Kunarac* (n 251) [728] – [782] and [775] – [782].

The analysis so far elucidates a number of principles that will be considered further in the next section. Firstly, the characterization of rape as an affront to the subjective aspect of dignity (associated with individual self-worth and choice), as opposed to the objective aspect of dignity (associated with societal and state attitudes towards the group) is, to some extent, reflected in the international case law. In relation to women, rape is regarded as an affront to the subjective aspect of dignity. As we have seen, international human rights law places a significant emphasis on the importance of non-discrimination, even if the protections for women are less rigorous than for race and the objective group aspects outlined by Feldman are wanting. This is reflected in the thinking of the international criminal courts. However, CEDAW articulates sexual violence as an issue of discrimination against women and the HRC have increasingly articulated it as an issue of equality in relation to the ICCPR. Additionally, we have seen the distinction between public and private actors being steadily eroded in the reasoning of the HRC and the ICTY with definitions of human rights violations increasingly pertaining to the nature of the act. The HRC has, more and more, articulated violence against women as an issue of protection from torture or inhuman or degrading treatment, freedom from slavery and the protection of liberty. However, there has been a reluctance to accept that women in areas of conflict are likely to experience double sources of discrimination as has been recognized by CERD.

F. RAPE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

International human rights treaties have been influential in the development of ECHR jurisprudence and most recently, in relation to rape in particular. Both the ICCPR and the CAT were used in the case of *Soering v UK* to determine whether extradition of the applicant to another country would violate his rights under Article 3 ECHR.²⁶¹ The UDHR and the ICCPR were used to interpret Article 3 in *Ireland v UK*.²⁶² The CRC was referred to in the cases of *A v UK*²⁶³ and *Costello Roberts v UK*,²⁶⁴ and CERD has been used to interpret the extent to which racist speech should be permitted.²⁶⁵ Most recently, CEDAW and the principles developed in the ICTY have been used to interpret the obligations on States to protect people from sexual violence.²⁶⁶ The principles developed in these treaties will be further elucidated here to evaluate the way the ECtHR has interpreted rape and sexual violence.

1. Article 3 ECHR

There are a number of Article 3 cases that are relevant to the discussion about rape. After outlining the relevant case law, a number of themes for discussion will be identified. These are firstly, the nature of the right compromised by the act and thus the seriousness with which this crime is treated under the Convention; and secondly, whether, and to what extent, the severity of the crime is determined by the status of the perpetrator. The doctrine of positive obligations, including the obligation on States to

²⁶¹ 14038/88 (1989) 11 EHRR 439.

²⁶² 5310/71 (1978) 2 EHRR 25.

²⁶³ n 11.

²⁶⁴ n 11.

²⁶⁵ *Jersild v Denmark* Series A no 298 (1995) 19 EHRR 1.

²⁶⁶ *MC* (n 11).

secure rights between private individuals is highly significant in view of the fact that private individuals perpetrate most rapes. Thirdly, the effects of this doctrine on the handling of rape cases will be examined. Finally, the extent to which the substantive criminal law of rape is affected by ECHR jurisprudence will be considered.

The earliest case to examine rape, *Cyprus v Turkey*, was a product of the Turkish occupation of Cyprus, and a number of human rights violations that took place during that occupation, including violations under Articles 2, 3, 4, 5 and 14 of the Convention.²⁶⁷ In relation to sexual violence, the applicant government complained of ‘wholesale and repeated rape of women of all ages’, often accompanied by additional violence and stabbing and killing the victim. The Commission in this case found that such treatment violated Article 3 on the basis that it constituted inhuman treatment. In addition, the Commission found violations of Article 14 on the basis that such treatment was directed against members of the Greek Cypriot community.

In *Ireland v UK*, the ECtHR held that the ‘five techniques’ used to interrogate IRA suspects, including wall standing, hooding, deprivation of sleep and being subjected to loud noises, amounted to inhuman treatment under Article 3.²⁶⁸ The court held that in order to ground an Article 3 claim:

[I]ll-treatment had to attain a minimum level of severity ... the assessment of which was necessarily relative, depending on all the circumstances, including the duration of the treatment, its physical or mental effects and, sometimes, the sex, age or state of health of the victim.²⁶⁹

²⁶⁷ Appn nos 6780/74, 6950/75 (1982) 4 EHRR 482.

²⁶⁸ *Ireland* (n 262)

²⁶⁹ *ibid* [162].

This is important when considering how rape may be defined within the context of Article 3.

A line of recent cases have also established the positive duties owed by States under the Convention, important when considering conduct by private individuals who commit the majority of rapes. In *X and Y v Netherlands*, the applicants complained that Dutch law failed to provide protection under the criminal law for the mentally disabled who had been sexually assaulted. The court in this case held that the applicant's rights under Article 8 had been breached. Civil remedies were insufficient. Breaches of this nature required the protection of the criminal law. The court held that:

[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary state interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.²⁷⁰

The doctrine of positive obligations was developed further in *Osman*. In this case, the applicants complained that the United Kingdom had failed to protect the life of the first applicant's husband, and that of the second applicant who was shot in the same incident that had killed the deceased. The court in this case held that there had been no violation of either Articles 2 or 8, but that there had been violations of Articles 6 and 13. In relation to the positive obligation to protect life, the court held that States were obligated:

²⁷⁰ *X and Y* (n 11) [23].

[N]ot only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. Article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.²⁷¹

The court continued that these obligations must 'not impose an impossible or disproportionate burden on the authorities' and that the manner in which these duties were carried out must be in line with due process and other entitlements that may legitimately limit police action.²⁷² However, where it is alleged that authorities failed to protect life in the context of these obligations:

[I]t must be established to the Court's satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.²⁷³

This case was followed by the case of *A v United Kingdom*.²⁷⁴ In this case, a child had been severely beaten with a cane by his stepfather. The stepfather was charged with assault occasioning actual bodily harm, but relied on the defence of 'reasonable chastisement,' and was acquitted by the court. The ECtHR found that there had been a violation of Article 3. After re-stating the principle established in *Ireland* concerning the minimum level of severity that must be reached in order to

²⁷¹ *Osman* (n 11) [115].

²⁷² *ibid* [116].

²⁷³ *ibid*.

ground an Article 3 claim,²⁷⁵ the court held that beating a nine-year-old boy with a cane induced sufficient suffering to reach the threshold of Article 3. The ECtHR went on to hold that:

The obligation on the high contracting parties under Article 1 of the Convention to secure everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals in particular, are entitled to State protection, in the form of effective deterrence against such serious breaches of their personal integrity.²⁷⁶

Despite administering such treatment, the jury at the stepfather's trial had acquitted him. This amounted to a breach of Article 3.

There have been a number of other cases that have dealt with the effects of rape and the way it might be articulated within human rights jurisprudence. In *Aydin v Turkey*, a young woman had been raped and subjected to other humiliating acts whilst in custody.²⁷⁷ The court held that:

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 ... Against this background the court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of

²⁷⁴ n 11.

²⁷⁵ Text to n 269.

²⁷⁶ *A* (n 11) [22].

²⁷⁷ n 170.

Article 3 ... Indeed the court would have reached this conclusion on either of these grounds taken separately.²⁷⁸

In *SW and CR v UK*, the applicants complained that the removal of the marital rape exception by the House of Lords in the case of *R v R*²⁷⁹ constituted a violation of their rights under Article 7 — the right against retrospective criminal liability. In that case, the ECtHR held that the UK had not breached the rights of the complainants by the pronouncement in the House of Lords that there was no longer a marital exemption for rape as this decision followed a perceptible line of jurisprudential development. It then went on to say that:

The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords — that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim — cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no-one should be subjected to arbitrary prosecution, conviction or punishment ... What is more, 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 civilized 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.²⁸⁰

There have also been a number of cases that have dealt specifically with rape and positive obligations. In the case of *E v UK*, the applicants had experienced sexual abuse at the hands of their stepfather over a period of years.²⁸¹ The court found that this amounted to ill-treatment and that social services ought to have known the children were at risk, and taken measures to protect them. There was thus a violation of Article 3. The doctrine of positive obligations was also developed in the recent

²⁷⁸ *ibid* [86].

²⁷⁹ n 93.

²⁸⁰ *SW* (n 147) [44/42].

²⁸¹ n 11.

‘date rape’ case of *MC v Bulgaria*.²⁸² Here, the authorities had discontinued a case of alleged rape because there was no evidence of additional force or threats, components that were necessary to ground a charge of rape in that country. The court held that these limitations violated the State’s obligations under Articles 3 and 8 of the Convention: the duty ‘to protect the individual’s physical integrity and private life and to provide effective remedies in this respect’.²⁸³ Article 8 was said to encompass the right to physical integrity and to summon obligations on the parts of States to conduct effective investigations and protect against potential violations (particularly against the young and vulnerable). The court stated again that obligations under Article 3 did not apply only to State officials and concluded that ‘States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution’.²⁸⁴

(a) Rape and the Definitions of the Nature of the Human Rights Violation

The ECtHR has given some indication of the nature of the right compromised by incidents of rape by articulating (inconsistently) the effects of the crime on the victims and thus, inconsistency with the purposes of the Convention. As we have seen, in *Cyprus*, the court found that extensive rape and forced prostitution perpetrated by Turkish soldiers reached the threshold of ‘inhuman treatment’ prohibited by Article 3, but offered no explanation as to why this was the case, or why the treatment complained of did not amount to torture.²⁸⁵ In view of the recent developments in the

²⁸² n 11.

²⁸³ *ibid* [109].

²⁸⁴ *ibid* [153].

²⁸⁵ n 267 [372] – [374].

jurisprudence of the ICTY and ICC, as well as the human rights bodies, this case would probably be decided differently today with treatment of this nature falling within the remit of torture. However, as noted by Zilli, this decision demonstrated a lack of understanding of the serious effects of rape.²⁸⁶ In the subsequent case of *Ireland* the Commission found that the five techniques used for interrogating IRA suspects amounted to torture under Article 3.²⁸⁷ While the court then disputed this finding, holding that these techniques amounted to inhuman treatment, what is evident is the confusion over where the line is drawn between torture and inhuman treatment.

The confusion is compounded by the subsequent case of *X and Y* where the absence of criminal laws protecting the mentally disabled from sexual assaults amounted to a violation of Article 8 of the Convention: 'the individual's right to respect for his or her sexual life'.²⁸⁸ These cases demonstrate a two-fold confusion. Firstly, they demonstrate an absence of understanding of the effects of rape. This is shown in two ways. Firstly, putting together abuses such as the five techniques and mass rape under the heading of 'inhuman or degrading treatment' does not adequately do credit to the distinction between levels of severity which ought to be made within Article 3. The extent and acuteness of the suffering associated with mass rape is more appropriately classed as torture. Secondly, sexual violence is primarily an attack on the physical and psychological integrity of the individual and therefore properly protected by Article 3 of the Convention. While it could also be seen as a violation of the privacy interest associated with Article 8, articulating rape as primarily an attack on this interest does not encapsulate the degree of suffering involved. The second area

²⁸⁶ L Zilli 'The Crime of Rape in the Case Law of the Strasbourg Institutions' (2002) 13 Criminal Law Forum 243, 253.

²⁸⁷ n 262.

²⁸⁸ n 11 [25].

of confusion in relation to the lack of understanding of the effects of rape is that the ECtHR appeared to be working under a sharp distinction that was made at the time between acts by public and private actors. It appears to be this that was responsible for the articulation of rape as a violation of Article 3 when perpetrated by a public official, and Article 8 when perpetrated by a private actor. Notwithstanding the important contribution made by the *X and Y* case to the idea that States were obligated to uphold rights between individuals under the doctrine of ‘positive obligations’,²⁸⁹ the difference between public and private actors apparently altered the nature of the violation at issue.

Subsequent cases on rape have shown a greater willingness on the part of the ECtHR to recognize the effects of rape and therefore articulate it as an attack on physical and psychological integrity protected by Article 3. The first case to suggest this was *SW v UK*.²⁹⁰ The references made to ‘the essentially debasing character of rape’ and to human dignity quoted above indicate that the court views rape as a violation of physical integrity.²⁹¹ Further articulation of the effects of rape came in the subsequent case of *Aydin*.²⁹² The court in this case held that the distinction between ‘torture’ and ‘inhuman or degrading treatment’ was made with reference to the severity of the acts, with torture being confined ‘to deliberate inhuman treatment causing very serious and cruel suffering’.²⁹³ As noted by Zilli, this case demonstrates that a single rape can be an act of torture and in this way, *Aydin* departs from the reasoning in *Cyprus*.²⁹⁴ Whilst this case concerned rape in detention and thus a

²⁸⁹ *ibid* [23].

²⁹⁰ *SW* (n 147).

²⁹¹ *ibid*; n 280 [44/42].

²⁹² n 170.

²⁹³ *ibid* [82].

²⁹⁴ Zilli (n 286) 261.

situation where the perpetrator ‘can exploit the vulnerability and weakened resistance of his victim’, the court’s subsequent comments on the lasting effects of rape and its associated debasement appear to refer to rape *per se*, regardless of the status of the perpetrator.²⁹⁵

However, subsequent cases suggest that rape is torture when perpetrated by State actors but inhuman treatment when perpetrated by private individuals. This is so even in cases where the number of acts far exceeded those in *Aydin*; and where the youth of the victim and their relationship to the perpetrator (their stepfather), make it highly likely that those power dynamics, combined with the length of time over which these acts took place, enabled him ‘to exploit the vulnerability and weakened resistance of his victim’. In the case of *E*, the court found that prolonged sexual abuse amounted to ill-treatment.²⁹⁶ No reference was made in this case to the extensive psychological suffering experienced by these children, which must have, at least, equalled the suffering of the applicant in *Aydin*. The notion that rape by a private individual constitutes inhuman treatment is re-stated in *MC v Bulgaria*. In this case, the court found that the obligations to protect rights under Article 3 and under Article 8 lead to obligations to conduct official investigations and effectively punish rape.²⁹⁷ This reasoning appears to indicate that both Articles 3 and 8 protect physical integrity.²⁹⁸ However, it may also be the case that there are some differences between the two articles when it comes to protecting against rape: the differences between the two may be found in the concurring opinion of Judge Tulkens. According to this judgement, ‘[r]ape infringes not only the right to personal integrity (both physical and

²⁹⁵ Text to n 278. Zilli (n 286) disagrees with this conclusion citing the references made by the court to the CAT and Amnesty International’s comments on the rape of female detainees in custody.

²⁹⁶ n 11.

²⁹⁷ *MC* (n 11) [149] – [153].

psychological) as guaranteed by Art 3 but also the right to autonomy as a component of the right to respect for private life guaranteed by Art 8'.²⁹⁹

(b) Standards of Severity within Article 3

The analysis of the case law suggests that rape is torture when perpetrated by a public actor and inhuman treatment if perpetrated by a private individual. This is so notwithstanding the result that rape over a period of years would be regarded as a lesser form of violation than a single incident, merely with reference to the status of the perpetrator and not the 'nature of the act' as recently stated by *Kunarac*. In his analysis of the ECtHR case law, Cassese argues that torture is regarded as a 'more serious or grave' form of suffering *and* that such suffering is carried out for a *purpose*.³⁰⁰ The descriptions regarding the nature of rape as a human rights violation articulated in *Aydin* indicate that rape in itself comes within the category of a violation causing particularly serious suffering. The purposes Cassese refers to can be the extraction of information, punishment or to discriminate against the tortured person (referring to CAT Article 1).³⁰¹

In view of the references to the CAT, which, as we have seen seeks to protect against acts perpetrated by public actors, and the emphasis on discrimination on the grounds of ethnicity evident in international criminal law, it seems unlikely that this meaning can be taken as encapsulating the discriminatory purpose of rape envisioned

²⁹⁸ *ibid* [149] – [153].

²⁹⁹ *ibid* [O-II].

³⁰⁰ A Cassese 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment' in RSJ MacDonald, F Matscher and H Petzold (eds) *The European System for the Protection of Human Rights* (Martinus Nijhoff Dordrecht 1993) 225, 241. Also, *Delacic* (n 249).

³⁰¹ Cassese (n 300) 241; *Delacic* (n 249).

by CEDAW.³⁰² To adopt the meaning advocated by CEDAW — that rape is a form of discrimination predominately affecting women and girls — would suggest that rape always has a discriminatory purpose: that of discriminating against women. To articulate the issue in this way would mirror the descriptions of rape given by victims of intimate sexual violence who say they feel they have been tortured.³⁰³ Furthermore, it could certainly be argued that rape is ‘deliberate inhuman treatment causing very serious and cruel suffering’ as accepted by the ECtHR in *Aydin*.

The absence of this aspect of discrimination analysis — rape as a form of discrimination against women — in the development of human rights jurisprudence is also evident in the jurisprudence of the ECtHR. The court has been reluctant to engage with arguments on the basis of discrimination if claims can be grounded under one of the substantive articles.³⁰⁴ In *MC*, while Article 14 arguments were raised on other grounds before the ECtHR, the argument that failure to tackle sexual violence could amount to a failure to secure rights under Articles 3 and 8 on the basis of sex were not placed before the court. The issue is limited further by Commission jurisprudence that fundamental rights are guaranteed ‘in absolute terms’ under the Convention and there cannot ‘be an “independent” violation of Article 14 in combination with [these rights]’.³⁰⁵ These factors limit the development of rape analysis in a manner that is consistent with international discrimination treaties.

³⁰² Text to n 218.

³⁰³ Russell (n 3) discusses torture in marriage at ch 20 of her book.

³⁰⁴ Text to n 382.

³⁰⁵ *East African Asians v United Kingdom* Appn no 4403/70 (1981) 3 EHRR 76 [227] cf *Cyprus* where it was held that there had been violations of inter alia art 3 in combination with art 14 because the Turkish authorities had failed to prevent such violations on the strength of the nationality of the applicants.

(c) The Effects of Positive Duties to Secure Rights on the Processing and Prosecuting of Rape Cases

The case law cited above illustrates the importance of the developing doctrine of positive obligations. The potential for the development of human rights arguments to address the human rights claims of rape victims comes from the recent development of this doctrine. As seen above, this principle was first stated in the case of *X and Y* and further developed in *A and Osman*.³⁰⁶ The sexual assault case of *E*, where a violation of Article 3 was found because social services knew or ought to have known of the risks to the complainants,³⁰⁷ not only has implications for children being abused in the home. It also has implications for the way in which the police deal with domestic rape and assault involving adults. The obligation not only includes effective enforcement machinery but also requires that measures to prevent violations be taken in certain circumstances. Additionally, compliance with Article 13 of the Convention, the right to an effective remedy, means that while the authorities are not bound to conduct investigations, there must be a means whereby the victim can challenge the ‘liability of State officials or bodies for acts or omissions involving the breach of their rights’.³⁰⁸

As we have seen, the doctrine of positive obligations was also developed in the recent ‘date rape’ case of *MC v Bulgaria* where the court held that Articles 3 and 8 required States to have in place effective measures to punish all forms of rape.³⁰⁹ What measures would States need to take in order to comply with the Convention in

³⁰⁶ n 11.

³⁰⁷ n 11.

³⁰⁸ *E* (n 11) [110]; *Aydin* (n 170) [103]; *Z* (n 11) [108] – [109] c.f. *MC* (n 11) where it was held that no separate issue arose under art 13.

³⁰⁹ *MC v Bulgaria* (n 11) [110].

cases of rape? The *MC* ruling indicates that positive obligations may involve employing more gender-sensitive methods in the ways that rape cases are processed. Indeed, the court stated that especially where there was little ‘direct’ evidence to substantiate a rape charge, ‘context-sensitive’ methods would need to be employed.³¹⁰

It is clear from the discussion that the positive obligations on States to secure rights have a number of implications for the treatment of rape cases. This two-fold duty which firstly, requires States to have effective laws in place to punish rape and to conduct effective investigations; and secondly, requires States to take reasonable preventative measures where they know or ought to know of the risks to individuals of violations of their rights, has a number of implications for police and CPS practice.³¹¹ In relation to the first duty as we have seen, research indicates that those known to the victim perpetrate the vast majority of cases of rape: partners, ex-partners, acquaintances and relatives.³¹² It is clear from the low levels of reporting that there is (not unreasonably) little confidence among victims that perpetrators can be brought to justice and that this influences the decision not to involve the police. Some of the problems with police and CPS practice, not least those that are based on excessive suspicion of complainants, are not consistent with the gender-sensitive methods advocated by the ECtHR. Furthermore, the *MC* case would suggest that it is incumbent on the police and the CPS to redouble their efforts to bring prosecutions in those cases that they are less likely to proceed with. The systemic problems identified in the empirical research³¹³ are not consistent with the idea of an effective

³⁰⁹ n 11.

³¹⁰ *ibid* [177] and [181] – [182].

³¹¹ The potential effects on the substantive criminal law are discussed from text to n 315 and in relation to court procedures, in ch three.

³¹² Text between n 73 and n 76; text between n 102 and n 105.

³¹³ Text between n 102 and n 138.

investigation that is capable of punishing those responsible. It seems as though only a rigorous articulation of women's human rights within this framework can tackle these issues, and it seems unlikely that this type of rigour can be achieved without addressing these violations as both one of physical integrity and an issue of equality.

The second part of the positive obligation to secure rights includes protecting individuals from violations at the hands of other individuals if there is or ought to be knowledge of risk of such an attack. This is pertinent not only in cases of child sexual abuse within the home but also in cases of domestic violence, which may or may not include sexual violence. The study by Russell indicated that rape within marriage may or may not be accompanied by other types of violence and that it was common for women to be victimized on more than one occasion.³¹⁴ Yet, these are the cases that are least likely to be reported to the police. It appears that far-reaching efforts will need to be made to encourage victims of marital rape in particular to come forward. This is crucial to ensure that women's physical integrity and dignity does not continue to be compromised in the private realm.

(d) Consent and the ECHR

The *MC* case may also have implications for the substantive law in relation to rape in the UK.³¹⁵ In this case, the ECtHR held that where the criminal law only protected

³¹⁴ Russell (n 3) text between n 96 and n 97.

³¹⁵ For discussions of the effects of the Human Rights Act on the substantive criminal law see J Rogers 'Applying the Doctrine of Positive Obligations in the European Convention on Human Rights to Domestic Substantive Criminal law in Domestic Proceedings' [2003] Crim L R 690; R Buxton 'The Human Rights Act and the Substantive Criminal Law' [2000] Crim L R 331; A Ashworth 'The Human Rights Act and the Substantive Criminal Law: a non-minimalist view' [2000] Crim L R 564; A Ashworth 'The European Convention and Criminal Law' in J Beatson (ed) *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Oxford 1999) 39.

victims of rape that had been exposed to force or threat of force, there might be a violation of Articles 3 or 8 of the Convention. References were made to expert opinion indicating that women, and especially minors ‘often did not resist rape either because they were physically unable to do so through paralysing fear or because they were seeking to protect themselves against the increasing level of force being used against them’.³¹⁶ Furthermore, the Interrights submissions stated the principle that ‘[r]ape was an offence against women’s autonomy and its essential element was lack of consent’.³¹⁷ References were made to developments in other countries that moved away from the idea that rape needed to be accompanied by force. Reliance was also placed on the principles encapsulated in international treaties and international criminal courts on the issue. The ECtHR referred to the *Recommendation Rec (2002) 5 of the Committee of Ministers of the Council of Europe on the Protection of Women Against Violence* which states that Member States should ‘penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance’.³¹⁸ *Kunarac* was also examined with regard to issues of consent. In this case, the ITFY held, in relation to consent, that:

The basic principle which is truly common to [the reviewed] legal systems is that serious violations of sexual *autonomy* are to be penalised. Sexual autonomy is violated wherever a person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.

In practice, the absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator.

³¹⁶ MC (n 11) [126].

³¹⁷ *ibid* [127].

³¹⁸ Council of Europe Committee of Ministers (adopted 30 April 2002) [35].

...[C]oercion, force or threat of force [are] not to be interpreted narrowly ... coercion in particular would encompass most conduct which negates consent...The Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by ... sexual penetration ... where [it] occurs without the consent of the victim. Consent for this purpose must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.³¹⁹

What the trial chamber envisages then is rape as a violation of 'sexual autonomy'. The absence of consent is defined as where someone 'has not freely agreed' to the act 'or is otherwise not a voluntary participant'. This definition does not appear to set limitations to the circumstances where consent could be regarded as absent; indeed, the use of the word 'otherwise' suggests that situations where consent could be absent are open-ended. Coercion, threats or force should not be interpreted in a narrow manner. Consent has to be voluntary, from the victim's 'free will' with reference to the surrounding circumstances. This envisages a broad notion of consent with no limits to the circumstances that could vitiate it.

In *MC*, the ECtHR also referred to General Recommendation 19 of CEDAW, which states that:

- (a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;
- (b) States parties should ensure that laws against ... abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity ...³²⁰

³¹⁹ *Kunarac* (n 251) [447] – [460].

³²⁰ n 5 [24].

This re-emphasizes the need for measures against sexual assaults to be ‘appropriate’, ‘effective’ and ‘adequate’ for all. This presents a challenge to a legal regime that largely fails to protect women from sexual violence.

The ECtHR also examined the law in relation to the United Kingdom, particularly the 1976 Sexual Offences Amendment Act and the *Olugboja* case, which established that non-violent coercion could vitiate consent, and that whether or not consent was present was a question of fact for the jury to determine.³²¹ As indicated by the ECtHR, some commentators have argued that in practice, the *Olugboja* decision has made little difference to prosecutions involving coercion in the absence of threats.³²² This is supported by the empirical research which suggests that cases of this nature are most likely to be discontinued.³²³

The Sexual Offences Act 2003 codifies a definition of consent. It is that ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’.³²⁴ It has been argued that the codification of consent will provide more consistency in determining whether consent was present than with the current law under *Olugboja* where the issue was left for the jury to determine.³²⁵ However, others have argued that concepts such as freedom and choice raise complex ‘philosophical issues’ with the result that ‘all the questions about how much liberty of action satisfies the “definition” remain at large’.³²⁶ The parameters of consent are not clear from the

³²¹ [1982] QB 320 (CA).

³²² *MC* (n 11) [141].

³²³ Text between n 110 and n 113.

³²⁴ S 74 Sexual Offences Act 2003.

³²⁵ G Dingwall ‘Addressing the Boundaries of Consent in Rape’ [2002] 13 King's College L J 31, 51.

³²⁶ J Temkin and A Ashworth ‘The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent’ [2004] Crim L R 328, 336.

definition.³²⁷ Indeed, Dingwall suggests that the notion of ‘free agreement’ upon which the new definition of consent is based, may itself be narrower than *Olugboja*. The jury under the new law may be called to determine whether a number of factors were sufficiently serious to compromise ‘free agreement’ whereas in *Olugboja* the jury were asked to establish whether genuine consent existed.³²⁸ However, if we compare the new statutory definition of consent, where the complainant agrees by ‘choice’ if they have the ‘freedom and capacity’ to do so; with the definition articulated in *Kunarac* that the complainant ‘has not freely agreed’ or is otherwise ‘not a voluntary participant’, there appear to be some slight differences in emphasis. The lack of a voluntary act appears to encompass situations where the complainant does not want to have intercourse, whereas ‘choice’ seems to encompass situations where the complainant does not want to have sexual contact but ‘chooses’ to do so. The definition by the Trial Chamber appears to capture a broader range of non-consensual acts than does the 2003 Act, and seems to accept that the complainant could be participating in a sexual act, on the face of it by ‘choice’, when in fact they would opt not to have sexual contact at all.

The 2003 Act lists a number of scenarios where there are evidential presumptions and a list of conclusive presumptions that consent does not exist.³²⁹

³²⁷ Also, Dingwall (n 235) 47-8.

³²⁸ *ibid* 51.

³²⁹ A number of situations are listed under s 75 which create evidential presumptions about consent. These are: ‘2)...(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him; (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person; (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act; (d) the complainant was asleep or otherwise unconscious at the time of the relevant act; (e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented; (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing

Evidential presumptions include cases such as where there is an immediate threat of violence, or fear of violence, against the complainant or another person.³³⁰ This is narrower than the existing law in relation to defences like self-defence and duress.³³¹ Given the narrow parameters of the list where consent is presumed not to exist, the concern must be that the parameters of non-consent under s 74 will also be interpreted narrowly.³³² An interpretation that would be consistent with the ECHR would need to be capable of ‘punishing all forms of rape’.³³³ Given the definitions outlined in the *MC* case, this likely to also include cases where consent was vitiated due to threats of non-immediate violence. In the absence of an interpretation that encompasses all types of rape, such as a narrow interpretation of the meaning of consent under s 74 of the 2003 Act, the victim would be entitled to seek a determination as to whether her human rights were violated in that instance. The law, in substance and in terms of investigative procedures, has to be capable of punishing all types of sexual activity where consent does not exist.

The 2003 Act also requires that the defendant’s belief in consent be reasonable, ‘determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents’.³³⁴ What is reasonable in the circumstances is for the jury to determine, and the concern is that old prejudices about women’s sexuality will inform jury decision-making.³³⁵ Concerns about the appropriateness of some jury

or enabling the complainant to be stupefied or overpowered at the time of the relevant act’. By s 76 (2), conclusive presumptions about consent exist where ‘(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant’.

³³⁰ *ibid* s 2 (a) and (b).

³³¹ Temkin and Ashworth (n 326) 338.

³³² *ibid*.

³³³ *MC* (n 11) [185].

³³⁴ S 1 (2) of the 2003 Act.

³³⁵ Temkin and Ashworth (n 326) 342.

decision-making with regard to what is reasonable, resonate with some of the concerns expressed in cases concerning the ‘reasonable chastisement’ of minors.³³⁶ Returning to *A*, the Commission in that case said of this defence:

[I]n its concluding observations [the]...UN Committee on the Rights of the Child expressed concern about the national legal provisions dealing with reasonable chastisement within the family, observing that the “imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner”...In the specific context of the present case, the Commission observes that, while directing the jury that under English law it was for the prosecution to prove that the beating of the applicant was not lawful correction, little guidance was provided as to the meaning of “reasonable and moderate chastisement”: in particular, no specific guidance was given as to the relevance of the age or state of health of the applicant, ... the frequency of the punishment, or the physical and mental suffering of the applicant...³³⁷

What is being tackled here is the potential for inconsistency and unpredictability that could be injected into the proceedings as a result of the use of the term ‘reasonable’. What the Commission is concerned about is that this use of what is reasonable may have the effect of failing to give victims adequate protection under the criminal law, without very clear direction on how this term is to be used. The potential exists in rape cases for old stereotypes to enter into the equation where a judge directs a jury as to what they believe would be ‘reasonable’.

The Commission’s reasoning is consistent with the decision in *Ireland* that treatment that is inhuman or degrading has to be determined with reference to the ‘duration of the treatment, its physical or mental effects and sometimes, the sex, age or

³³⁶ Generally, J Rogers ‘A Criminal Lawyer’s Response to Chastisement in the European Court of Human Rights’ [2002] Crim L R 98.

³³⁷ *A* (n 11) [52].

state of health of the victim'.³³⁸ Extrapolating from this to cases of rape, it seems evident that in directing the jury to determine whether the defendant's belief in consent is reasonable, a judge will have to instruct the jury that they will need to consider what is reasonable in light of factors such as the physical or mental effects of the act on the complainant and their 'sex, age or state of health'. The age and sex of the complainant is of crucial importance. As was stated in *MC* women, particularly young women, 'freeze' on the onset of a rape out of fear of further acts of violence from the man. Taking the age and sex of the victim into account will permit the jury to consider 'frozen fright' syndrome.³³⁹ The report that preceded the 2003 Act recommended that the new legislation include a standard direction on the meaning of consent to be given to the jury to the effect that they should not assume that consent was present because the complainant 'did not say or do anything', protest, resist or was not physically injured.³⁴⁰ The option of including this in the legislation was rejected by the government and the matter will be left to the Judicial Studies Board for consideration.³⁴¹ Were this direction to be adopted, the jury would also have to consider the age, sex and health of the victim, and the effects on the acts upon them, in the context of the absence of such assumptions. This would be a more prescriptive way of assessing the victim's state of mind vis-à-vis whether consent was present.

³³⁸ n 269 [162].

³³⁹ This was specifically mentioned in the *MC* case (n 11) [70].

³⁴⁰ Home Office *Setting the Boundaries: Reforming the Law on Sex Offences* (Home Office London 2000) 2.11.5.

2. Article 4 ECHR

Trafficking in women and children is increasingly recognized as an international problem.³⁴² They are often forced into the sex trade, experiencing threatened or actual physical and sexual abuse.³⁴³ Traditionally, the plight of women who were forced into prostitution was ignored on the basis that sex was supposedly consensual. However, there has been increasing awareness that trafficking is never a consensual activity.³⁴⁴ The HRC is more alert to this problem and, as we have seen, requires States to provide information on the trafficking of women and children in order to give them protection under Article 8 of the ICCPR, the prohibition on slavery.³⁴⁵ Article 6 of CEDAW requires States to ‘take all appropriate measures ... to suppress all forms of traffic in women and exploitation or prostitution of women’. General Recommendation 19 states that:

Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

Additionally, young girls who are lured into prostitution are particularly at risk from violence, including sexual violence, given that their unlawful status can marginalize

³⁴¹ Temkin and Ashworth (n 326) 336.

³⁴² H H Koh ‘Displacement, Asylum, Migration’ Oxford Amnesty Lecture delivered in Oxford on the 12th Feb 2004.

³⁴³ Anti-Slavery ‘What is Modern Slavery?’ downloaded on the 19th Feb 2004 from <http://www.antislavery.org/homepage/antislavery/modern.htm>

³⁴⁴ Koh (n 342).

³⁴⁵ General Comment no 28 (n 201) [12]; text to n 204.

them and prevent them from receiving the protection of the law.³⁴⁶ Furthermore, as we have seen in *Kunarac*, international criminal law is becoming increasingly willing to tackle sexual slavery as an aspect of slavery within the definition of crimes against humanity.³⁴⁷ In this case, the criteria used to determine whether an individual was held in slavery were that their freedom of movement was restricted, they had no privacy, were enslaved domestically, and were physically abused and trafficked about.

The case law under Article 4 ECHR does not appear to address specifically the risks to women and girls in this area. There is no definition of slavery in ECHR jurisprudence, although it is likely to be consistent with the 1926 Slavery Convention which states that slavery is ‘the status or condition of a person over whom any or all of the powers of ownership are exercised’.³⁴⁸ This is to be distinguished from servitude which does not have the same connotations of ownership but does involve the obligation to provide services, to live on the property of another, ‘and the impossibility of altering his condition’.³⁴⁹ Forced or compulsory labour refers to work or services not performed voluntarily or performed under risk of penalty.³⁵⁰ In situations such as the ones addressed here, there may well be violations of both Articles 3 and 4 although the latter refers to one’s general condition in life and the inability of the individual to alter it. This could be further differentiated from violations under Article 5, which

³⁴⁶ General Recommendation 19 (n 5) [15].

³⁴⁷ Text to n 259.

³⁴⁸ Art 1 (1) (adopted 5 September 1926 entry into force 9 March 1927); K Starmer *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group London 1999) 666.

³⁴⁹ *Van Droogenbroeck v Belgium* Appn no 7906/77 (1980) 17 DR 59 [3].

³⁵⁰ International Labour Organization C29 Convention concerning Forced or Compulsory Labour 1930 (entry into force 1 May 1932) Art 2; *Van der Musselle v Belgium* Series A no 70 (1984) 6 EHRR 163 [34].

could be grounded upon the single criterion of arbitrary interference with freedom of movement.³⁵¹

How do all of these issues bear on the discussion about rape? In circumstances where victims are held in conditions comparable to those in *Kunarac*, an interpretation of Article 4 which takes into account the particular ways in which women are held in slavery and servitude, and the sexual violence associated with it, as an alternative ground of complaint, would more accurately capture the whole situation of the complainant. An Article 3 claim may refer to an instance or instances of inhuman or degrading treatment without necessarily being able to capture the background conditions leading to sexual violence. Trafficking and forced prostitution is an area that should be developed under Article 4 jurisprudence as well as under Article 3.

Equally important is the development of Article 4 jurisprudence to tackle severe cases of domestic violence, which as we have seen, may include sexual violence.³⁵² As examined in chapter one, women were historically viewed as the property of their husbands.³⁵³ Russell argues that this forms the background to understanding marital rape, where women were regarded as the property, including the sexual property, of their husbands. She goes further and suggests that family structure and functioning is based on the exploitation of women, they can be abused and raped with impunity by their husbands, their freedom is curtailed, there is a significant power differential in the relationship and they are not remunerated for their domestic work.³⁵⁴ It is not difficult to imagine situations of domestic abuse, where women fear

³⁵¹ Text between n 355 and n 371.

³⁵² Text between n 75 and n 76.

³⁵³ Ch one p 13–14.

³⁵⁴ Text between n 86 and n 102.

for their lives and that of their children if they leave, where access to financial resources is seriously circumscribed, where their activities are closely monitored by controlling partners, and where they are raped and assaulted with impunity.

A modern-day articulation of slavery and servitude could be developed from the extent of the loss of personal autonomy in these situations. The circumstances in *Kunarac* serve to illustrate an extreme example of loss of personal autonomy, rightly articulated as slavery. However, in order to develop a more gendered concept of Article 4 that takes into account the developments in international human rights law, a modern-day analysis would need to incorporate the actions of private as well as public actors. Those who keep people in slavery or servitude are most likely to be private individuals and this would be consistent with the development of human rights jurisprudence under Articles 2 and 3. The extent of the violence used may be a factor in determining the extent of the loss of autonomy. If the level of violence or threats is such as to cause the victim to feel they have to surrender their autonomy or risk death, this gives the perpetrator a degree of power over the victim that is comparable to ‘ownership’. A more gendered analysis of Article 4 ECHR has not as yet materialized in the same way as has started under Article 8 of the ICCPR — the prohibition on slavery; and by the ICC in *Kunarac*.³⁵⁵ These developments might open up ideas of what situations are typically viewed as constituting slavery or servitude.

³⁵⁵ n 251.

3. Article 5 ECHR

As we have seen, the HRC has adopted an equality approach to the protection of liberty and security of person for women. In order to give effect to Article 3 of the ICCPR, States are obligated to provide information on laws or practices that may deny women their liberty in a manner that is arbitrary or unequal such as by confinement in the house.³⁵⁶ The Declaration of Elimination of Violence against Women states that women have an equal right to liberty and security of person, a right which may be denied them by either public or private actors.³⁵⁷ Depriving women of their liberty in private places them at an increased risk of violence, including rape. Gender-based violence impedes women's enjoyment of liberty and security of person.³⁵⁸

It is clear from the wording of Article 5 of the ECHR however, that what is envisaged is mainly deprivation of liberty by public authorities, particularly the police. Only public authorities are able to rely on the sections of Article 5 to justify a deprivation of liberty.³⁵⁹ Unlike other Articles of the Convention, Article 5 is articulated as a negative right. Article 5 (1) lists the circumstances under which States can interfere with that negative right. Although Article 1 ECHR is applicable to the interpretation of Article 5, the case law suggests that the positive obligations on States will be those that are listed in the Article, such as being informed of reasons for arrest and being brought before a court within a reasonable time. This means that as currently interpreted, there is no horizontal application of Article 5. The positive duty

³⁵⁶ Text to n 205.

³⁵⁷ Text to n 229.

³⁵⁸ CEDAW General Recommendation 19 (n 5) [7 (d)].

³⁵⁹ Starmer (n 348) ch 15. Art 5 is not concerned with restrictions on liberty, these being addressed in arts 2, 3 and 4 of Protocol 4 to the Convention.

on States to uphold rights does not extend, in the context of Article 5, to upholding rights between private individuals.

The term ‘security of person’ in this Article does not add anything to, for example, rights to physical integrity guaranteed by Article 3 and 8 of the Convention and at most, simply underlie the protection against arbitrary detention.³⁶⁰ The right to liberty is thought to mean essentially ‘the physical liberty of the person’.³⁶¹ Without liberty of this nature, the individual ‘is constantly faced with physical and/or psychological walls which generate a steady pressure of suffering’.³⁶² Being deprived of liberty means that the individual is not in a given place by their own free will, with an emphasis on the use or the threat of the use of physical coercion.³⁶³ It is argued that this approach underestimates the impact of psychological coercion such as being unable to leave for fear of ‘serious consequences’.³⁶⁴ Furthermore, this approach does not include ‘liberty’ as a means of acting towards one’s goals in life and the limitations placed on this type of liberty by factors such as poverty.³⁶⁵

The approach taken by the ECHR in determining if a deprivation of liberty has occurred is to start with applicant’s ‘concrete situation and account must be taken of a whole range of criteria such as type, duration, effects and manner of implementation of the measure in question’.³⁶⁶ Article 5 is to be distinguished from restrictions of

³⁶⁰ *Engels and Others v Netherlands* Series A no 22 (1976) [58]; *Winterwerp v Netherlands* Series A no 33 (1979-80) 2 EHRR 387 [37]; *Dyer v United Kingdom* Appn no 10475/83 (1984) 39 DR 246, 256.

³⁶¹ *Engels* (n 360) [58].

³⁶² S Trechsel ‘Liberty and Security of Person’ in RSJ MacDonald, F Matscher and H Petzold (eds) *The European System for the Protection of Human Rights* (Martinus Nijoff Dordrecht 1993) 277, 278.

³⁶³ *ibid* 286-7.

³⁶⁴ *ibid* 287.

³⁶⁵ Ch one p 12-13.

³⁶⁶ *Guzzardi v Italy* Series A no 39 (1981) 3 EHRR 333 [92].

movement, which are governed by Article 2 of Protocol 4 to the Convention.³⁶⁷ In *Guzzardi v Italy*, the applicant, who was suspected of belonging to the mafia, had been removed to a small island where he had few opportunities for social contact, was under constant supervision, and lived in accommodation that was in a state of disrepair. The ECtHR held that the applicant had been deprived of his liberty under Article 5.³⁶⁸ It is not difficult to imagine situations where women are living under these sorts of restrictions with regard to their home life. In addition, as we have seen, cases involving marital rape are often associated with other forms of domestic violence.³⁶⁹ In these circumstances, women exercising their entitlement to freedom of movement, including leaving their partner, may well be placed at actual physical risk of harm to themselves and their children.

While Article 5 is framed as a negative right, international treaties are starting to pay attention to the different ways in which women's liberty might be impeded. We have seen the development of jurisprudence under Article 9 of the ICCPR requires States to provide information on the arbitrary and unequal way in which women might be deprived of their liberty by, for example, confinement in the home, in order to give effect to Article 3. Giving effect to these provisions under the ICCPR also requires States to provide information on provisions or practices that restrict women's freedom of movement, such as 'the exercise of marital powers over the wife or of

³⁶⁷ Art 2 of Protocol 4 provides that 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 1. Everyone shall be free to leave any country, including his own. 2. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of 'ordre public', for the prevention of crime, for the protection of rights and freedoms of others. 3. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society'.

³⁶⁸ *Guzzardi* (n 366).

³⁶⁹ Text between n 75 and n 76.

parental powers over adult daughters'.³⁷⁰ In light of these developments, how might positive obligations to secure rights between private individuals be developed? Developing Article 5 in line with Articles such as 2 and 3 would require that effective measures be in place to secure the right to liberty as between private individuals. This could require effective measures to tackle domestic violence that go further than current criminal law liability for assault and false imprisonment, to measures that encapsulate the extent of, and the different ways in which, women are faced with restrictions on their liberty as a result of living in this type of environment. The development of human rights jurisprudence in this way could also lead to arguments for increased resources for refuges for women fleeing this type of abuse. It is unlikely that the concept of 'liberty' under Article 5 will be extended to include the broader notions of liberty that enable people to give effect to their own goals, examined in chapter one, due to the resource implications that this would have on States in terms of social welfare.³⁷¹

4. Bolstering Equality within Convention Jurisprudence

The potential to develop acts of rape and sexual violence as acts of discrimination against women can be developed from three sources under the ECHR. The first is grounded in Article 3 ECHR. An intention to discriminate is one of the 'prohibited purposes' for acts of sufficient severity to ground a claim of torture under Article 3. It will be argued here that rape between private individuals is a form of discrimination against women as women and could therefore, in principle, be classed as an act of torture. The second source is associated with the jurisprudence of Article 14 as a

³⁷⁰ General Comment No 28 (n 201) [16].

means of securing equivalence between groups in the protection of rights. The argument here is developed from the idea that the failure to protect women from acts of rape is also an act of discrimination because women are disproportionately victims of sexual violence and this failure impedes their enjoyment of other rights. It will be shown here that such an approach is consistent with the jurisprudence of the ICCPR. The third source within Convention jurisprudence is developed from Protocol 12, which is less well developed. This section examines these three sources of what we shall term ‘equality jurisprudence’ in terms of their application to cases of rape and sexual violence.

a) Discrimination as a Component of Article 3.

This chapter has argued that rape is considered ‘torture’ when perpetrated by agents of government with the purpose of punishment, intimidation, extracting information, or discrimination, but inhuman and degrading treatment when perpetrated by private actors, notwithstanding the duration of the treatment.³⁷² This chapter has also argued that the reasoning in *Aydin*, where a Turkish soldier had subjected the applicant to a single incident of rape, appeared to suggest that rape itself reached the threshold of suffering necessary to ground a claim of torture: ‘deliberate inhuman treatment causing very serious and cruel suffering’, with reference to the nature of the act.³⁷³ However, this has not been followed in cases concerning private individuals which have been articulated as inhuman and degrading treatment, even where the abuse took

³⁷¹ Similar arguments concerning socio-economic rights are made in ch five p 296 – 297.

³⁷² Text between n 245 and n 308.

³⁷³ n 170 and text to n 278.

place over a period of years and there is an unequal power relationship, such as between parental figure and child.³⁷⁴

This division between the actions of public and private actors overlooks the fact that private individuals perpetrate most acts of sexual violence. In the context of Article 14, it is unclear whether private actors can perpetrate acts of discrimination, unlike the equality provisions of other human rights treaties, which make direct references to acts of private individuals.³⁷⁵ However, there is some authority to suggest that serious acts of discrimination could reach the threshold of Article 3, and constitute one of the ‘prohibited purposes’ developed in Article 3 jurisprudence.³⁷⁶ This means that the development of the doctrine of positive obligations under Article 3 to secure rights between private individuals would place States under a duty to protect its citizens from serious acts of discrimination at the hands of private actors. If acts of rape were classed as acts of discrimination against women as women, it is, in principle, possible for private individuals to perpetrate these acts of ‘torture’.

Some incidents of sexual violence in the home can occur with the intention of punishing or intimidating a spouse, or as a means of exercising control. As discussed earlier in this chapter, Russell attributes rape in marriage to the historic view that women were regarded as the property — including the sexual property of their husbands.³⁷⁷ This is reinforced by CEDAW General Recommendation 19 which states

³⁷⁴ Such as *E* (n 11) and *MC* (n 11).

³⁷⁵ A McColgan 'Principles of Equality and Protection from Discrimination in International Human Rights Law' (2003) *Eur Human Rights L Rev* 157, 161-163.

³⁷⁶ *East African Asians v United Kingdom* Appn no 4403/70 (1981) 3 EHRR 76 [207]; *Hilton v United Kingdom* App no 5613/72 (5th March 1976); *Glimmerveen and Hagenbeek v Netherlands* Appn nos 8348/78, 8406/78 (1982) 4 EHRR 260 [19]; *Abdulaziz, Cabales and Balkandali v United Kingdom* Appn nos 9214/80, 9437/81, 9474/81 (1983) 6 EHRR 28 [113]; JA Goldston 'Race Discrimination in Europe: Problems and Prospects' (1999) 4 *Eur Human Rights L Rev* 462.

³⁷⁷ Text to n 88.

that '[t]raditional attitudes by which women are regarded as subordinate to men or having stereotyped roles perpetuate widespread practices involving violence or coercion'.³⁷⁸ This suggests that historic and stereotypical views of women are intrinsic to gender-based violence. Furthermore, women who experience rape in the home describe their experiences as 'torture'.³⁷⁹ Thus, introducing the language of discrimination into Article 3 analysis could provide a means for articulating the extent to which social prejudice and inequality are inherent characteristics of the crime of rape.

b) Article 14 ECHR as a source of 'equality jurisprudence'.

This chapter has shown that the HRC has developed jurisprudence in relation to sexual violence as an issue of equality under Article 3 ICCPR and Articles 7, 8 and 9. Giving effect to the provisions of Article 3 ICCPR: 'to ensure the equal right of men and women to the enjoyment of all civil and political rights' in the Convention, has meant that States are obligated to report on the ways in which laws or practices may be affecting women's enjoyment of these rights, including their right to protection from torture and inhuman or degrading treatment, slavery and arbitrary deprivations of liberty.³⁸⁰ However, the ECtHR has not followed this reasoning by developing violence against women as an issue of equality that engages Article 14 ECHR.

Article 14 is lacking at a number levels when it comes to addressing the violations that particularly affect women. Firstly, it is formulated in terms of formal

³⁷⁸ General Recommendation 19 (n 5) [11].

³⁷⁹ Russell (n 3); text to n 303.

³⁸⁰ Art 26 of the ICCPR also contains a free-standing right to non-discrimination whereas Art 14, at present, does not. The principles of equality are considered in ch one p 47 – 58.

equality and the development of its jurisprudence has been limited. It will not be engaged if a violation can be grounded under another Article.³⁸¹ Secondly, it suffers from the same shortcomings in tackling women's disadvantage seen in international criminal law.³⁸² None of the rape cases cited here was heard as an issue of equality for women. In *Cyprus*, the court found a violation of Article 3 in combination with Article 14 because Turkey had 'failed to secure the rights and freedoms ... without discrimination on the grounds of ethnic origin, race and religion'.³⁸³ In no other case has the ECtHR dealt with sexual violence as an issue of discrimination. The ECtHR did not consider these arguments under Article 14 in *MC*, notwithstanding its references to CEDAW and the committee's clear position that rape is a form of discrimination against women. The applicant argued that Bulgaria's criminal code, with its requirement that acts of rape include force or threats of force, violated her rights under Articles 3, 8 of the Convention. In addition, the applicant argued that in considering 'the age of consent for sexual activity' the Bulgarian Criminal Code offered better protection to homosexual youths than to heterosexual ones, violating the substantive articles in combination with Article 14.³⁸⁴ Notwithstanding the court's references to CEDAW, no reference was made in this case that the failure to protect the applicant from rape was a form of discrimination against women which raised arguments under Article 14. In view of the fact that the court had found violations of Articles 3 and 8, they did not believe it was necessary to examine arguments under Article 14.

³⁸¹ Although Protocol 12 provides a free-standing right to equality, providing that '[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground...' (art 1) (entered into force 1 April 2005).

³⁸² Text between n 241 and n 260.

³⁸³ *Cyprus* (n 267) [503].

³⁸⁴ *MC* (n 11) [188].

The HRC seems to have adopted the stance of tackling violence against women as an issue under the substantive articles as well as an issue of equality under Article 3 ICCPR. This is to increase awareness amongst States of the ways in which enjoyment of rights is impeded by gender. In this way, the extent to which sexual violence impedes women's equal enjoyment of rights, and the effects that this type of violence has on them socially and politically can be articulated. Treating rape or sexual violence purely as a violation of a substantive Article — such as inhuman and degrading treatment under Article 3 — does not reflect the fact that attacks of this nature are attacks on women because they are women. The group dimension is absent. The position of the ECtHR in relation to Article 14 limits the articulation of this pervasive, highly gendered type of abuse within the ECHR paradigm. In addition, on the rare occasions that Article 14 is engaged, it suffers from the limitations inherent in formal notions of equality. As seen in chapter one, Article 14 is based on the symmetrical approach to equality or 'equality as consistency'.³⁸⁵ The equality as consistency approach is inadequate in addressing the structural disadvantages faced by women. Furthermore, Article 14 does not make explicit provision for indirect discrimination, and is difficult to establish under this Article.³⁸⁶ The problems with Article 14 result in limits to the potential claims brought under Article 3. They also affect the manner in which women's rights under, for example, Articles 4 and 5 might be tackled from an equality perspective.

There is an additional difficulty, already identified, in that it is not clear whether private individuals can perpetrate acts of discrimination. If Article 14 is read

³⁸⁵ S Fredman 'Combating Racism with Human Rights: The Right to Equality' in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (Oxford University Press Oxford 2001) 9, 23. Protocol 12 of the Convention is framed in similar terms, as is art 3 ICCPR.

in conjunction with Article 1 of the ECHR, it becomes clear that, like the jurisprudence being developed by the HRC, the securing of rights without discrimination does carry with it positive obligations.³⁸⁷ Support for the proposition that Article 14 carries positive obligations is to be found in the *Belgian Linguistics Case*³⁸⁸ although, the principle could be interpreted as, at most, a positive obligation to secure the rights under the Convention without discrimination. As previously stated, Article 14 does not make explicit reference to acts of private individuals, unlike the equality provisions of other international human rights treaties.³⁸⁹ However, none of the Articles of the Convention does this. Article 1 in combination with the development of the doctrine of positive obligations generally, combined with the fact that violations of Article 14 cannot occur without a violation of another substantive right (that may carry with it positive obligations between private individuals) would tend towards States protecting individuals from violations of their rights where the additional dimension of discrimination is involved.

c) Protocol 12 ECHR as a source of 'equality jurisprudence'.

Protocol 12 to the ECHR provides a freestanding right to equality. Article 1 states that:

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 status.

³⁸⁶ *Abdulaziz, Cabales and Balkandali v United Kingdom* Series A no 94 (1985) 7 EHRR 471; ch one p 48-52.

³⁸⁷ McColgan (n 375) 160.

³⁸⁸ *Belgian Linguistics Case* Series A no 6 (23 July 1968) Special Section, 35-6 cited in KJ Partsch 'Discrimination' in RSJ MacDonald, F Matscher and H Petzold (eds) *The European System for the Protection of Human Rights* (Martinus Nijhoff Dordrecht 1993) 580.

³⁸⁹ McColgan (n 375) 161-3.

The Protocol also states that its provisions do not prevent States from taking steps to ‘promote full and effective equality’. In providing this freestanding right, the equality jurisprudence of the ECHR is being brought into line with Article 26 ICCPR, which provides for equality before the law, ‘equal protection of the law ... and effective protection against discrimination on any ground’. The freestanding right to equality under Protocol 12 and Article 26 ICCPR may provide a mechanism for addressing the structural disadvantages faced by women socially in view of its acceptance of measures to secure de facto equality. However, the Explanatory Report to the Protocol states that while the doctrine of positive obligations — including the obligation on States to secure rights between private individuals — ‘cannot be excluded altogether, the prime objective of Article 1 of Protocol 12 is to embody a negative obligation for the Parties’.³⁹⁰ This limits the development of arguments to secure rights to equality between private individuals. Furthermore, the development of jurisprudence in relation to violence against women as an issue of equality has not occurred under Article 26 ICCPR, and given the reluctance of the ECtHR to articulate sexual violence as an issue of equality in the first place, the use of this stand-alone right may well be limited in this context.

The questions over whether the equality provisions of the Convention are applicable between private individuals are unfortunate. As has been argued here, other international human rights instruments, such as CEDAW, make specific reference to acts of discrimination on the part of private individuals. Furthermore, the failure of the ECtHR to treat acts of sexual violence as acts of discrimination is inconsistent with

the approach taken by the HRC. These limitations prevent the articulation of sexual violence as one that is endemic, and highly gendered. A more effective approach would be one that addresses sexual violence as an issue of discrimination against women, as is the case in other human rights instruments.

d) Consent under the ‘equality jurisprudence’ approach

Developing human rights jurisprudence along the lines suggested above would be significant. Articulating rape as an act of torture with the purpose of discriminating against a woman because she is a woman — as opposed to acts of inhuman or degrading treatment without references to the broader inequalities that bring it about — is a means of introducing the language of inequality into acts of sexual violence. The structural disadvantages faced by women when it comes to giving genuine consent are thus more effectively introduced into human rights analysis. It has been shown that there is some concern over the new definition of consent under the Sexual Offences Act 2003 being interpreted narrowly.³⁹¹ Under s 74, a person ‘agrees by choice’ if they have ‘the freedom and capacity’ to do so. With this new statutory regime, the jury may be called upon to determine whether a number of factors compromising ‘free agreement’ existed, whereas the previous approach under *Olugboja* required the jury to determine whether genuine consent existed.³⁹² In addition, the Sexual Offences Act 2003 lists a narrow number of scenarios where there are evidential presumptions, and a list of conclusive presumptions that consent did not

³⁹⁰ ‘Protocol 12 Convention on Human Rights and Explanatory Report’ available from: <http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm> (7.9.05) [24].

³⁹¹ Temkin and Ashworth (n 326) 338; text between n 329 and 333.

³⁹² Case cited at n 321; Dingwall (n 325) 51; text between n 321 and 328.

exist. It has been shown that there is concern that this will also mean that s 74 will be interpreted narrowly as well.³⁹³

An interpretation of voluntary consent of this nature is at odds with the broader ‘equality’ conception of the ECHR suggested here. A complainant could be participating in a sexual act — on the face of it by ‘choice’ — when in fact they would opt not to have sexual contact at all.³⁹⁴ This type of scenario best illustrates the predicament of women/girls experiencing sexual abuse in the home where various acts of coercion — financial dependence or threats of non-immediate violence — would mean that consent is not a voluntary act. Were the language of equality developed in ECHR jurisprudence, it might provide a means of articulating the many historical, structural and social disadvantages faced by women in giving genuine agreement to sexual intercourse, particularly in the context of the home where beliefs about stereotypical roles of women are likely to be at their most intense.

G. CONCLUSIONS

At the beginning of this chapter, some of the feminist arguments about rape and the problems associated with dealing with sexual violence as a human rights issue were examined. While the gender neutrality associated with liberal feminism masks the extent to which rape is a crime against women as women, the radical feminist perspective does not sufficiently problematize the intersections of race and gender with regard to this crime. Williams Crenshaw argues that there is a hierarchy where white female bodies are held in higher regard than others, black women are more

³⁹³ Temkin and Ashworth (n 326) 338; text between n 329 and 333.

likely to be regarded as untruthful witnesses and perceptions of black women involve highly sexualized ideas of race.³⁹⁵ In relation to addressing sexual violence as a human rights issue, radical feminists argue that the torture of women in the domestic environment is not regarded as a human rights violation.³⁹⁶

This is something that this chapter has sought to redress in the context of rape. This chapter also outlined the empirical studies about rape to determine the nature and extent of the problem. The BCS conducted in 2000 suggests that in England and Wales, three quarters of a million women have been raped at least once since the age of 16, with the biggest risk factor being age.³⁹⁷ Most incidents of rape were likely to be perpetrated by current/ex partners or acquaintances.³⁹⁸ Recent studies in England and Wales suggest that only one fifth of rape cases are reported to the police and the conviction rate for rape is continuing to decline.³⁹⁹ The empirical studies suggest that the most common types of rape — those involving perpetrators known to the complainant — are the ones that are least likely to be proceeded with.⁴⁰⁰ These problems raise serious questions about the ways in which women's rights are protected. The concept of dignity and its influence on human rights principles was considered, as was hierarchies of rights and the principles of *jus cogens*. Drawing on the arguments by Feldman, it suggested that there is a notable absence when it comes to articulating these crimes as crimes against women as a group. Rape is classed as a violation of individual rights associated with self-worth and choice, and not as an

³⁹⁴ Text between n 323 and n 329.

³⁹⁵ Williams Crenshaw (n 39) 368-9; text between n 45 and n 47.

³⁹⁶ MacKinnon (n 34) 6; text between n 33 and n 38.

³⁹⁷ Myhill and Allen (2002); text to n 72.

³⁹⁸ Text between n 73 and n 76; text between n 102 and n 105.

³⁹⁹ Text between n 80 and n 82; text between n 102 and n 134.

⁴⁰⁰ Text to n 112.

attack on the objective dignity of women.⁴⁰¹ This is so despite the importance placed by international human rights treaties on the principle of non-discrimination.⁴⁰²

The chapter then outlined how rape is viewed in international human rights treaties: CEDAW, CERD, the ICCPR, the CAT and CRC, as well as international criminal law. The trend in international human rights jurisprudence increasingly erodes the distinction between acts of private and public figures. Furthermore, the HRC and CEDAW treat rape and acts of sexual violence as acts of discrimination against women. The international criminal courts have vacillated between treating rape in conflict as an attack against women because they are women, and as an attack against women because of their ethnicity.⁴⁰³

The jurisprudence of Article 3 ECHR was considered. This showed that there is some confusion in ECHR jurisprudence over the nature of the right violated by acts of rape; and over where the line between torture and inhuman and degrading treatment should be drawn. While the absence of criminal law provisions to tackle sexual assaults between private individuals were originally found to be a violation of the right to privacy under Article 8, subsequent decisions have found abuses of this nature to fall within the realm of Article 3 as well as Article 8. Rape is classed as torture when perpetrated by a public official, and inhuman or degrading treatment when perpetrated by a private actor. The ECtHR seems to be operating under a sharp distinction between the actions of public and private actors, thus, apparently, altering the nature of the violation at issue. This distinction holds notwithstanding the duration of the treatment, so prolonged sexual abuse in the home on the part of a parental figure will

⁴⁰¹ Text between n 150 and n 172.

be regarded as a ‘lesser’ violation than a single incident of rape by a public official on a detainee.

The positive obligations emerging from Article 3 to have in place effective enforcement machinery and to take preventative measures in certain circumstances has implications for women and children experiencing this type of abuse in the home. This may require a more interventionist approach in cases of domestic violence that are known to the police. Also, in view of the fact that rapes in the home are least likely to be proceeded with, the jurisprudence of Article 3 may require that the CPS and police re-double their efforts to bring prosecutions. It is also probable that human rights jurisprudence might have an effect on the substantive criminal law of rape. In determining whether a defendant’s belief in consent is reasonable, the judge may be required to instruct the jury to take into account the physical and mental effects of the act on the complainant, their ‘sex, age or state of health’.⁴⁰⁴ In addition, an overly narrow interpretation of the new consent provisions of the Sexual Offences Act 2003 — one that does not accommodate all forms of non-voluntary acts — might fall foul of a broader ‘equality’ approach to the ECHR. Whilst trafficking in women and children is increasingly recognized as an aspect of slavery under the ICCPR and other human rights instruments, this has not come before the ECtHR to determine whether the provisions of Article 4 would apply. Article 5 is similarly underdeveloped. Unlike Articles 2 and 3 of the Convention, there is no authority to suggest that States are obligated to uphold the right to liberty between private individuals. Although Article 1 ECHR is applicable to the interpretation of Article 5, the wording of the Article suggests that what is envisaged is deprivation of liberty on the part of public

⁴⁰² Text between n 178 and n 195.

authorities. As currently interpreted, there is no horizontal application of Article 5 and the positive duty on States to uphold rights does not extend, in this context, to upholding rights between private individuals.

It is clear that while considerable progress has been made, what is still missing from human rights instruments are the violations of women's rights addressed as issues of discrimination. Although the potential exists to develop rights analysis in ways that would benefit women, the will to do this appears to be lacking both in international and regional human rights instruments. CEDAW has not had as much of an impact on the ECHR jurisprudence as other human rights instruments. Articulating rape as torture would provide a mechanism to articulate the extent to which inequality and prejudice are part of sexual crimes. Furthermore, it might provide a way to articulate the extent to which social inequality inhibits genuine agreement.

Furthermore, Article 14 continues to be interpreted in a very limited way. If the pervasive nature of sexual violence is to be tackled effectively, it would need to be tackled as an issue of equality with a more imaginative notion of equality within the Convention than has hitherto been the case. Engaging Article 14 in cases of rape provides a means of articulating the extent to which violence against women impedes their enjoyment of rights and the effects on them socially and politically. While Protocol 12 provides a freestanding right to equality, this provision is likely to be limited in the context of sexual violence in view of the reluctance of the ECtHR to engage with these issues as issues of equality. Having established the substantive limitations of the ECHR in its consideration of the crime of rape; the following chapter

⁴⁰³ Text between n 241 and n 260.

will develop human rights arguments in relation to the procedural aspects of rape trials and endeavour to resolve the tension between victims' rights and defendants' rights in cases of this nature.

⁴⁰⁴ *Ireland* (n 262) [62]; text to n 269.

3.

**TOWARDS A NEW PROCEDURAL FRAMEWORK:
SUBJECTIVE RIGHTS AND THE RECONILIATION OF
POSITIVE DUTIES**

A. INTRODUCTION

The treatment of rape victims in court has often been justified as the protection of the accused's right to a fair trial¹ at common law, and most recently under Article 6 of the European Convention on Human Rights (ECHR).² Commentators have expressed a number of concerns about the conduct of rape trials, including the use of sexual history evidence, the practice of maligning the victim's dress and clothing at the time of the attack, and the way in which the victim could be interpreted as having consented to sexual intercourse, even if she had not actually done so.³ Other concerns have included the extent to which the accused could malign the character of the victim without losing his shield under s 1 of the Criminal Evidence Act 1898,⁴ the remnants of the corroboration requirements, and the recent complaint doctrine.⁵ Since the Human Rights Act 1998 (HRA), victims' rights have entered into the equation, and

¹ S Lees *Carnal Knowledge: Rape on Trial* (Women's Press London 2002) 110 – 111, 128; B Brown M Burman and L Jamieson *Sex Crimes on Trial: The Case of Sexual History Evidence in Scottish Courts* (Edinburgh University Press Edinburgh 1993).

² *R v A* [2001] UKHL 25; (2001) 2 Cr App R 21; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

³ C Smart *Feminism and the Power of Law* (Routledge London 1989); N Naffine 'Possession: Erotic Love in the Law of Rape' [1994] 57 MLR 10, 27; S Duncan 'The Mirror Tells Its Tale: Constructions of Gender in Criminal Law' in A Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish London 1996) 173; A McColgan 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 OJLS 275; J Temkin 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 J of L and Society 219; J Temkin *Rape and the Legal Process* (2nd edn Oxford University Press Oxford 2002) ch 2 and 4; Lees (n 1).

⁴ S 101 (1) (g) of the Criminal Justice Act 2003 permits 'evidence of the defendant's bad character' if 'the defendant has made an attack on another person's character'; text between n 130 and n 237.

this has led to arguments for the restriction of the use of some types of evidence such as medical records,⁶ and hostile and intrusive questioning in court.⁷ This chapter will argue that rape trials constitute a competition between liberty, protected by Articles 5 and 6 of the Convention; and integrity of the type protected by Article 3 ECHR. It seeks a framework to resolve this competition and thus to resolve the conflict between the court's obligations under Article 3 and Articles 5 and 6 in cases of rape. It will also examine how Article 14 or the principle of non-discrimination can be used to advance the argument. In addition, this chapter will suggest that the court's obligations in reference to the dignity of the victim can come in at three levels: the obligation associated with the effective prosecution of rape cases in general under Article 3; the potential for procedural rights under Article 6 to be extended to encompass some notions of fairness for the victim; and that related to particular types of questioning in court, associated with Articles 3, 5 and 8 of the Convention. The purpose of this chapter will be to suggest a new theoretical grounding for the handling of rape cases in court.

As seen in the previous chapter, some argue that rights are premised on a hierarchy, with the protection of physical integrity and freedom from discrimination classed as among the most important rights.⁸ Outside the realm of these rights, there is

⁵ McColgan (n 3) 300; Temkin 2002 (n 3) ch 4; Lees (n 1) 131-2.

⁶ *Z v Finland* Appn no 22009/93 (1998) 25 EHRR 371. The HMCPSI review into the handling of rape cases found that prosecutors were still failing to balance the need to disclose medical records as far as is strictly necessary under the Criminal Procedures and Investigations Act 1996, and the need to balance the complainant's entitlement to privacy with regard to their medical histories HM Crown Prosecution Service Inspectorate *A Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape* (HM Crown Prosecution Service Inspectorate London 2002) 65.

⁷ *Doorson v Netherlands* Appn no 20524/92 (1996) 22 EHRR 330; *M v United Kingdom* (unreported) 1999; *R v A* (n 2) [1] [27] [51] among others. Also, generally in relation to victims human rights: C de Than 'Positive Obligations under the European Convention on Human Rights: Towards the Human Rights of Victims and Vulnerable Witnesses?' (2003) 67 J of Criminal L 165.

⁸ A Gewirth 'Are There Any Absolute Rights?' (1981) 31 The Philosophical Q 1; T Meron 'On a Hierarchy of International Human Rights' (1986) 80 American J of Intl L 11; H Shue *Basic Rights*:

little consensus about which rights should be classed as fundamental, with some arguing that due process rights, such as those enshrined in Article 6 of the ECHR, should fall into this category.⁹ Procedural rights are easier to defend as fundamental rights when viewed as a mechanism for the protection of the right to liberty.¹⁰ Liberty, when classed as freedom of movement, can also be regarded as a basic right.¹¹ These principles can inform our thinking about the structure of Convention rights.

In relation to the ECHR, Ashworth argues that there are three tiers to the hierarchy: absolute rights, strong rights and prima facie rights. Absolute rights include the right to life, and the right to be free from torture or inhuman or degrading treatment or punishment. Strong rights include those rights to liberty and due process under Articles 5 and 6, and the right to have rights secured without discrimination.¹² Prima facie rights include rights such as the right to privacy under Article 8.¹³ Absolute rights are subsequently articulated as ‘non-derogable’, which ‘indicates that they are the most basic of the fundamental rights in the Convention’.¹⁴ Unlike Article 2, Article 3 does not permit exceptions.¹⁵ In contrast to the right to liberty, a violation of

Subsistence, Affluence, and US Foreign Policy (2nd edn Princeton University Press, Princeton New Jersey 1996) 19 – 20; T Koji ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights’ (2001) 12 Eur J of Intl law 917; D Shelton ‘Hierarchy of Norms and Human Rights: Of Trumps and Winners’ (2002) 65 Saskatchewan L Rev 301; ch two p 89 – 92.

⁹ Meron (n 8).

¹⁰ The strongest exponent of this position is arguably Ronald Dworkin who argues not only that the protection against wrongful imprisonment ought to be a fundamental right, but that the procedures to give effect to this right ought to be supported by significant financial resources R Dworkin *A Matter of Principle* (Harvard University Press Cambridge Mass 1985) ch 3.

¹¹ Shue (n 8) 78-82; ch two p 90.

¹² This reflects some differences between the standing of non-discrimination provisions in international law and under the ECHR, text between n 76 and n 84; ch two p 89 – 92.

¹³ A Ashworth *The Criminal Process: An Evaluative Study* (2nd edn Oxford University Press Oxford 1998) 48.

¹⁴ A Ashworth *Human Rights, Serious Crime and Criminal Procedure* (Sweet and Maxwell London 2002) 75. Art 15 (2) of the Convention provides that ‘[n]o derogation from Art 2, except in respect of deaths resulting from lawful acts of war, or from Art 3, 4 (paragraph 1) and 7 shall be made under this provision’.

¹⁵ Although the European Court of Human Rights has occasionally held that art 3 is subject to the same limitations as art 2 in cases such as, for example, self-defence *Rivas v France* Appn no 59584/00

the right to physical integrity protected by the Convention cannot be justified on any ground. Thus, while one's right to liberty is qualified — it can be removed under certain conditions and with certain stipulations laid out in the ECHR — one does have an absolute right to be free from torture and inhuman or degrading treatment or punishment. However, in the realm of positive duties to secure the right, a duty that can be fulfilled in a number of ways, specific obligations may be reconciled with other interests of equal importance.¹⁶

The disagreement over the status of process rights is reflected in ECHR jurisprudence. The right to a fair trial in general terms has been interpreted by the UK courts as an absolute right.¹⁷ There is some disagreement between commentators over whether the express rights set out in the paragraphs of Article 6 are absolute.¹⁸ However, the jurisprudence of the ECtHR would suggest that this is not the case.¹⁹ As well as express rights under Article 6, there are a number of implied rights that can be balanced against other interests.²⁰ Freedom from retrospective criminal liability under Article 7 is also an absolute non-derogable right.²¹ There is a clear difference between Article 7, which is non-derogable, and Article 6, which is derogable if Article 15 applies.

(1/4/04). Art 2 is not violated if someone is killed 'in defence of any person from unlawful violence' (Art 2 (2) (a)); 'in order to give effect to lawful arrest or to prevent the escape of a person lawfully detained' (Art 2 (2) (b)); or 'in action lawfully taken for the purpose of quelling a riot or insurrection' (Art 2 (2) (c)).

¹⁶ Text between n 25 and n 76; text after n 331.

¹⁷ *R v A* (n 2) [90]; *Brown v Stott* [2003] 1 AC 681, 719 (PC).

¹⁸ cf R Clayton and H Tomlinson *Fair Trial Rights* (Oxford University Press Oxford 2001) [11.183] and I H Dennis *The Law of Evidence* (2nd edn Sweet and Maxwell London 2002) 38.

¹⁹ *Brandstetter v Austria* Appn nos 11170/84, 12876/87 and 13468/87 (1993) 15 EHRR 378; *Doorson* (n 7); *Z v Finland* (n 6).

²⁰ Clayton and Tomlinson (n 18) [11.184].

²¹ n 14.

In the previous chapter, we saw how the development of the doctrine of positive obligations under Article 3 requires States to provide effective remedies for and protections against violations of the rights of individuals at the hands of private actors. There have been a number of cases establishing this principle. This has the potential to significantly affect the way that the criminal justice system deals with serious crimes against the person, including sexual crimes. In the ‘date rape’ case of *MC v Bulgaria*, the court held that in relation to rape, States were obligated ‘to enact criminal-law investigations effectively punishing rape and to apply them in practice through effective investigation and prosecution’.²² This would involve the use of more ‘context-sensitive’ methods, particularly where there is little direct evidence, typically in situations where the victim and defendant are known to each other prior to the attack.²³ This goes further than the suggestion that positive duties translate into an obligation to prosecute where there is sufficient evidence.²⁴ The reasoning in the *MC* case challenges both the ways in which evidence is collated and the way that rape cases are conducted. The case law on positive duties and the *MC* case in particular places an additional obligation on public authorities that has hitherto not been rigorously applied by the courts — that is the right of the victim to effective prosecution of cases of rape *capable of leading to the conviction of the offender*. Not only does this have the potential to alter the way that trials are conducted by the courts as the upholder and adjudicator of rights, it could also give the victim a legal interest in the way the case is conducted. This is re-emphasized by the jurisprudence of

²² Appn no 39272/98 (2005) 40 EHRR 20 [153].

²³ *MC* (n 22) [177] [181] – [182]; ch two p 117.

²⁴ B Emmerson and A Ashworth *Human Rights and Criminal Justice* (Sweet and Maxwell London 2001) [18] – [50].

Article 13.²⁵ It is here that rights under Article 3 and the principle of non-discrimination may clash with the traditional interpretation of procedural rights.

B. THE EFFECTS OF THE OVERARCHING POSITIVE DUTIES UNDER ARTICLE 3

How are the positive obligations to secure rights to be reconciled with the traditional negative emphasis of Convention rights, or indeed other rights under the Convention? Answers to these questions can be provided to some extent by the arguments and models espoused by Alexy.²⁶ Although based on the German constitution, Alexy's theory can be used to analyse and develop positive duties under the ECHR. Alexy draws distinctions between narrow and broad negative rights and narrow and broad positive rights. Narrow negative status is the arena 'of unprotected legal liberties'.²⁷ Broad negative status refers to rights to non-action on the part of the state to protect the narrow status — so called defensive rights. Broad positive rights encompass entitlements to positive as well as negative action.²⁸ Thus, it could be said that the Convention in general terms embraces positive status in the broad sense for example, in containing rights to positive and negative actions. Narrow positive rights however only refer to 'rights to positive actions'.²⁹ Narrow positive rights, or 'social constitutional rights' Alexy defines as including rights to education, employment, welfare and accommodation.³⁰ These are only included in the ECHR in a very limited

²⁵ *Z v United Kingdom* Appn no 29392/95 (2002) 34 EHRR 3; *E v United Kingdom* Appn no 33218/96 (2003) 36 EHRR 31; ch two p 116.

²⁶ R Alexy J Rivers (tr) *A Theory of Constitutional Rights* (Oxford University Press Oxford 2002).

²⁷ *ibid* 171-2.

²⁸ *ibid*.

²⁹ *ibid*.

³⁰ *ibid* 334-5.

way, such as in the right to education, and are generally more associated with socio-economic rights such as those encompassed in treaties like the International Covenant on Economic Social and Cultural Rights (ICESCR).³¹

Entitlements to positive acts can be wide-ranging, from protecting people from the acts of others through the criminal law, to enacting ‘organizational and procedural norms’ to providing ‘money and other goods’.³² The protection of rights that exceed ‘factual performance’ (an entitlement to a factual act such as an existential minimum³³) is important in order to provide protection via the criminal law or to enact organizational or procedural norms.³⁴ Thus, positive rights or entitlements in the broad sense include the right to protection, ‘rights to organization and procedure’, and narrow positive rights.³⁵ As indicated, the ECHR embraces the first two types of rights, but tends to shy away from the third. In contrast to negative rights, positive rights generally require States to adopt a particular purpose or objective to be pursued.³⁶ In this way, all entitlements to positive actions by the State carry with them the question of how, and the extent to which, such rights should be associated with ‘constitutional subjective rights of the citizen’.³⁷

³¹ Art 2 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol 11; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

³² Alexy (n 26) 294.

³³ *ibid* 126.

³⁴ *ibid* 294.

³⁵ *ibid* 296.

³⁶ *ibid*.

³⁷ *ibid*.

German constitutional jurisprudence distinguishes between objective law and subjective rights.³⁸ The distinction is one of norms in contrast to ‘the positions or relations of legal persons’.³⁹ Subjective constitutional rights enable an individual who believes that his or her rights have been violated to seek review of that act. Objective law, on the other hand, may require State bodies to perform certain duties but this does not give rise to an individual cause of action.⁴⁰ Alexy argues that ‘protective rights are subjective constitutional rights against the state to positive factual or normative acts’ and that they are ‘concerned with defining the spheres of equally ranked legal persons, along with the enforceability and enforcement of this delimitation’.⁴¹ They are therefore ‘constitutional rights that the state structure and maintain the legal system as it affects the interrelationship of equally ranked legal subjects in a certain way’.⁴² This is, in essence, what this chapter seeks to achieve. It attempts to set out a blueprint for the structure and maintenance of a legal system that protects victims of rape and effectively punishes perpetrators, through the vehicle of positive duties under Article 3, and by developing notions of procedural fairness for the victim under Article 6.

The substantive issues of the existence of protective rights raise questions of what exactly is to be protected and in what way. Problems of the existence of protective rights can thus be articulated as two questions: whether there are ‘subjective rights ... or only norms which require the state to protect individuals without giving those individuals rights’; and whether there are differences between protective rights

³⁸ J Rivers ‘A Theory of Constitutional Rights *and the British Constitution*’ in Alexy (n 26) xvii, xxiii.

³⁹ *ibid* xxiii.

⁴⁰ *ibid* xxiv.

⁴¹ Alexy (n 26) 300.

⁴² *ibid*.

and traditional negative rights.⁴³ In relation to the first point, while German constitutional jurisprudence has developed principles of objective law in response to a particular historical context,⁴⁴ this has not been followed in Convention jurisprudence, and is unlikely to find favour within UK law, which has traditionally treated rights with scepticism.⁴⁵ Under ECHR jurisprudence, protective rights have developed from principles of subjective rights without an obvious grounding in objective law.

1. Subjective rights and the ECHR

In relation to the first question, Alexy argues that a preferable approach is to consider that the individual has a right against the State to be protected from third parties, requiring a subjectification of such a right. He continues that there is no uncertainty surrounding the idea that the State is obligated to protect its citizens from murder or manslaughter through the use of the criminal law, but that the key concern is whether an individual has a right to this in a subjective sense, and how this right is justified. The extent to which a right should be realized to the highest possible degree is the justification for the subjectification of rights, which ultimately involves a higher level of realization. Thus, argues Alexy, ‘it is only the subjectification of constitutional rights which will satisfy the “original and ongoing point of constitutional rights” as individual rights’.⁴⁶ The ability of a victim to bring a case before the ECtHR and now under the HRA involves the subjectification of these rights. Rivers argues that a subjective interpretation of the HRA would suggest that the interpretative obligation

⁴³ *ibid* 301.

⁴⁴ L Lazarus *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (Oxford University Press Oxford 2004) 26-8.

⁴⁵ *ibid* 26; also T Campbell, K Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press Oxford 2001).

⁴⁶ Alexy (n 26) 303 citing BVerfGE 50, 290 (337).

under s. 3 (1), and the requirement that public authorities act compatibly with Convention rights under s 6 (1), are ‘subject to the victim test’ under s 7.⁴⁷ This means that only victims can argue that the Convention be interpreted in a particular way or that public authorities have acted illegally, so that the only modifications to the law brought about by the Human Rights Act are ‘that there is a new overriding obligation not to breach subjective Convention rights’.⁴⁸

The provisions of the HRA, and the potential for victims to seek judicial review of the acts of the courts as public authorities in particular, has the potential to shift the dynamics of a criminal trial. Parties to a criminal trial are the accused and the State, and victims have only a very limited status as witnesses. The subjective model of enforcing human rights allows victims a mechanism to challenge trial procedures (the strength of the substantive human rights arguments notwithstanding), if these procedures failed to prosecute effectively a breach of the victim’s human rights.⁴⁹ This is new to English criminal law. Given the vague and non-prescriptive nature of positive duties, the extent to which a trial has failed in its efficacy is something that must be determined by examining the proceedings as a whole.

⁴⁷ Rivers (n 38) xiv.

⁴⁸ *ibid* xxv.

⁴⁹ This is a stronger position than the new entitlement given to prosecutors under the Criminal Justice Act 2003 ss 57-67 to appeal against a ruling that effectively terminates proceedings or if a ‘qualifying evidential ruling significantly weakens the prosecutors case’ (s. 63); Editorial ‘The Criminal Justice Act 2003: Part 2’ [2003] Crim LR 251-252. The standing of victims is also considered in the Council Framework Decision of 15th March 2001 on the Standing of Victims in Criminal Proceedings OJ 22.3.2001 L82/1 (2001/220/JHA) which lays out the ways in which victims should be treated in the criminal justice system. There has been some concern about the extent to which the UK has transposed this decision into UK law: Commission of the European Communities *Report from the Commission on the Basis of Article 18 of the Council Framework Decision of the 15th March on the Standing of Victims in Criminal Proceedings* SEC [2004] 102 Brussels 16.02.2004 COM(2004)54 final/2 available from http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0054en02.pdf (27.07.04); European Scrutiny Thirteenth Report 7 *HO (25371) Standing of victims in criminal proceedings* available from <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/42-xiii/4202.htm> (27.07.04). Notwithstanding the measures adopted, the provisions do not go as far as imposing ‘an obligation on

Challenges to the defendant's human rights can be raised in the criminal proceedings itself.⁵⁰ The victim witness on the other hand is not a party to the proceedings, and the prosecution is not a victim of a human rights violation.⁵¹ The question must be whether the requirements of effectiveness can be met if a review of the proceedings is conducted after the trial. The subjectification of rights could be an argument in favour of giving victims more of a direct procedural interest by, for example, allowing them to raise human rights issues during the course of the trial.

2. Are there differences between positive and negative rights?

The second problem to be addressed when considering the existence of protective rights is whether there are any differences between protective rights and traditional negative rights. In relation to this question, Alexy argues that differences between positive and negative rights are more evident in the structure of protective rights.⁵² A '*prohibition* on destroying or adversely affecting something' means that '*every* act which represents or brings about destruction or an adverse effect is prohibited'.⁵³ In contrast to this, a positive right involves '*a command* to protect or support something, then *not every* act which represents or brings about protection or support is required'.⁵⁴

Member States to ensure that victims will be treated in a manner equivalent to that of a party to the proceedings' [9]. Such a course would be stronger than what is being suggested here.

⁵⁰ G Nardell 'Collateral Thinking: The Human Rights Act and Public Law Defences' [1999] Eur Human Rights L Rev 293.

⁵¹ There have been moves in recent years to increase the role of victims within the criminal justice system as evidenced by, for example, the new provisions for victims set out in the new Domestic Violence and Crime and Victims Act 2004. Moves towards giving victims a direct procedural interest have been resisted by some commentators such as A Ashworth 'Victims' Rights, Defendants' Rights and Criminal Procedure' in A Crawford and J Goodey (eds) *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate Dartmouth Aldershot 2000) 185. The rights of victims as witnesses in a criminal trial are examined at text between n 236 and n 259.

⁵² Alexy (n 26) 307.

⁵³ *ibid* 308.

⁵⁴ *ibid*.

There is a degree of discretion in the ways in which the command is to be satisfied.⁵⁵ This discretion can be seen in the somewhat vague requirement that violations of dignity, including rape, be effectively punished. The ECtHR has not said how this is to be achieved, merely that it must be achieved and that legislation or practice which has the effect of prosecuting only incidents involving additional violence does not meet this requirement.⁵⁶

The essential difference between positive and negative rights is that all acts that interfere with 'the prohibition on destruction and adverse effect' on negative standing must be excluded, whereas satisfying the command for protection or indeed entitlements generally only requires one appropriate act. Alexy continues that if there are a number of acts that could be used to secure the protective interest, no single one is necessary unless it is the only means whereby protection can be achieved. In this scenario, where only one act could support a protective interest, 'the structure of the entitlement' matches that of negative rights.⁵⁷ However, additional distinctions have to be drawn because the ways in which rights can be protected are not readily divided into those that are effective and those that are not. As protective rights 'have the character of principles, they require maximally extensive protection relative to what is factually and legally possible, which means that they can compete with other principles'.⁵⁸ Alexy sets out a model for resolving these tensions. He argues that where a positive duty (P_1) can be protected by a number of mechanisms (M_{1-5}), M_5 is ineffective and M_1 and M_2 are as effective as each other, as are M_3 and M_4 , but M_1 and M_2 are more effective than M_3 or M_4 , then the positive duty, P_1 , requires that either M_1

⁵⁵ *ibid.*

⁵⁶ *MC* (n 22).

⁵⁷ Alexy (n 26) 309.

or M_2 be performed. However, if there is a competing principle, P_2 , and this is most adversely affected by M_1 or M_2 , the competing principles have to be balanced against one another to establish if P_1 is so important as against P_2 that the use of M_1 or M_2 is still justified, or whether M_3 or M_4 must be used.⁵⁹ The principles involved may be illustrated by an example. Let us say that P_1 represents an entitlement on the part of a rape victim to procedures capable of punishing the offender. M_{1-5} represents a number of measures that could be used in order to bring that about. M_1 and M_2 might represent matters of procedure that are thought to be responsible for the high acquittal rate:⁶⁰ M_1 could be restrictions on the use of evidence of ‘bad character’ thought to prejudice rape trials,⁶¹ and M_2 could be the admission of evidence of a previous sexual relationship between the victim and the accused.⁶² M_3 and M_4 could represent issues of substantive criminal law such as the new measures under the Sexual Offences Act 2003. M_3 could be the new requirement that belief in consent be reasonable and M_4 the new statutory definition of consent.⁶³ M_5 could be the previous statutory regime governing the use of sexual history evidence under s 2 of the Sexual Offences Amendment Act 1976.⁶⁴ In order for fair trial guarantees under the Convention — the entitlement of the accused to a full and effective defence — to be classed as a competing value, P_2 , they would need to be articulated as *equivalent* to the weighty duties that arise under Article 3. In other words, Article 6 would need to be articulated as a mechanism to defend the right to liberty, or to avoid the inhuman and degrading treatment associated with wrongful imprisonment. Seen in these terms, the rights of

⁵⁸ *ibid.*

⁵⁹ *ibid* 310.

⁶⁰ J Temkin and A Ashworth ‘The Sexual Offences Act 2003 (1) Rape, Sexual Assaults and the Problems of Consent’ [2004] Crim L R 328, 346; Temkin 2002 (n 3) ch 4.

⁶¹ Text between n 168 and n 187.

⁶² Text between n 187 and n 230.

⁶³ This is discussed in ch two p 118 – 125.

⁶⁴ Text between n 187 and n 196.

the victims are at least equal to, and not secondary to, the defendant's right to a fair trial. In *R v A*, while mention is made of the duties of the courts in relation to the third level of obligations towards victims — i.e. the obligation arising from the duty to ensure that their rights are not violated in the process of giving evidence⁶⁵ — no mention is made of the positive duties owed to the victim under Article 3 of the Convention to conduct an effective investigation capable of leading to the punishment of the offender.⁶⁶ This is so despite the somewhat throwaway comments made about 'protecting the woman',⁶⁷ and how historic depictions of 'women as sexually available have been exposed as an affront to their fundamental rights'.⁶⁸ This exclusion from the reasoning of the House of Lords has the result of permitting some slippage in the language used in relation to Article 6, to the point where one is left with the impression that one procedural entitlement, that of adducing evidence of a previous sexual relationship, is synonymous with the underlying objectives of Article 6, thus bolstering its status. This concern mirrors the arguments by Galligan about the extent to which procedure is contingent.⁶⁹ He argues that:

No one procedure or set of procedures is necessarily required, and it will often be that fair treatment could be achieved from a number of different procedures or combinations of procedures. The worth of any procedure depends on its contribution to standards of fair treatment; each procedure

⁶⁵ Lord Hope, for example, states 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* (n 2) [51].

⁶⁶ Furthermore, no references to the duties under Art 3 are made by the leading academic literature supporting this decision D Birch 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] Crim L R 531; N Kibble 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2001) 32 Cambrian L R 27 cited approvingly in the House of Lords. For an analysis of *R v A* see P Mirfield 'Human Wrongs' (2002) 118 LQR 20.

⁶⁷ *R v A* (n 2) [5].

⁶⁸ *R v A* (n 2) [27]. Additionally, Lord Hope in his dissenting judgement makes reference to the extensive problems associated with victims who allege they have been raped by someone known to them, and the alarmingly low conviction rate for rape [52] – [54].

⁶⁹ DJ Galligan *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Oxford 1996) 62.

is in that sense instrumental and contingent upon standards of fair treatment.⁷⁰

This concern is also consistent with feminist arguments that the ECHR would reinforce protections that already assist those in a position of advantage, in this case, defendants in rape cases.⁷¹ As we shall see, this conflation is not borne out in Convention jurisprudence where individual procedural entitlements are reconcilable with other interests.⁷² The balancing exercise adopted by the court is one that places the defendant's interests against the 'public interest' and the rights of witnesses, with reference to the principles of proportionality.⁷³ This type of triangulation has been criticized by Ashworth who argues that questions of public policy cannot be used to restrict strong rights, and that the principles of proportionality are only applicable to *prima facie* rights such as those under Articles 8 and 10.⁷⁴ The model used by the House of Lords also marginalizes the victim's interest, failing to give due weight to their entitlements under Article 3. If we accept that procedural rights can adopt the status of fundamental rights, the more appropriate basis for reconciling these rights, it is submitted, is the framework developed here. This framework precludes arguments based on issues of public policy and proportionality principles, and endeavours to reconcile competing positive duties to secure strong rights.

Establishing rights emerging from Article 3 and the underlying rationale of Article 6 as comparable is only half of the exercise because, if we follow Alexy's

⁷⁰ *ibid.*

⁷¹ S Palmer 'Critical Perspectives on Women's Rights: The European Convention on Human Rights and Fundamental Freedoms' in A Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish London 1996) 223, 226; A McColgan 'Women and the Human Rights Act' (2002) 51 Northern Ireland L Q 417, 417; ch one p 51-53.

⁷² Text between n 236 and n 332 particularly from n 310.

⁷³ *R v A* (n 2) [5], [38], [51], [91] – [94].

model, the various mechanisms need to be balanced against each other. If, on considering the mechanisms and rights involved, one concludes that the most effective mechanisms of securing the protective duty P_1 , M_1 and M_2 , represent too much of an infringement on the counteracting protective right P_2 , and M_3 or M_4 are used, the discretion in determining which measure to adopt can be further curtailed. If M_3 or M_4 are equally effective as regards to P_1 but M_3 interferes with P_2 more than M_4 , this means that M_4 is justified as M_3 would represent an undue interference with P_2 . In this situation, there is no longer any discretion as to the means to adopt even though there are several different ones, some of which are as effective as each other.⁷⁵ This is the model that I will be considering when attempting to resolve the positive duties between the victim and the accused in cases of rape.⁷⁶

C. DO THE EQUALITY PROVISIONS OF THE CONVENTION INVOKE POSITIVE DUTIES?

As seen in the previous chapter, the principle of non-discrimination is an important one in international law. It is classed alongside the right to life and physical integrity, and there are a number of international treaties dedicated to the elimination of discrimination.⁷⁷ However, as we have also seen, the principle of non-discrimination in relation to women is underdeveloped in terms of enforcement. In terms of Convention jurisprudence, there are now two sources of equality provisions. Article 14 provides that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground...' including sex.

⁷⁴ Ashworth (n 14) ch two.

⁷⁵ Alexy (n 26) 310.

⁷⁶ Text from n 331.

⁷⁷ Shelton (n 8) 310-319; Meron (n 8) 6; ch two p 89 – 92.

Protocol 12 creates a freestanding right, providing that ‘[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground...’⁷⁸ This section will consider how each of these may be enhanced by the discussion on positive duties.

As we have seen, Article 14 ECHR is underdeveloped generally, and is not a freestanding right.⁷⁹ The parasitic nature of the Article means that it can only be used in conjunction with another Article, and can therefore only assist a single claim to a positive right. It cannot form the basis of a claim to a positive act by the State standing alone.

The equality provisions of the Convention are, as are other articles, subject to the positive standing in the broad sense — entitlements to positive and negative actions — outlined by Alexy and reflected in Article 1 of the Convention. This means that they are to be interpreted as an entitlement to positive or negative actions, albeit in conjunction with another right. Furthermore, s 6 of the Human Rights Act 1998 could be interpreted as incorporating positive duties.⁸⁰ However, as indicated in chapter one, both Article 14 and Protocol 12 are premised on the model of formal equality.⁸¹ In relation to Article 14, this means that, at best, there is a positive right to non-discriminatory acts on the part of the state in securing Convention rights. It is not a positive duty to secure equality. Article 14 thus enshrines the status quo and inhibits the development of equality as a part of dignity in itself. Positive duties to secure

⁷⁸ Art 1 (entered into force 1 April 2005).

⁷⁹ Ch one p 47-59; ch two p 136 – 141.

⁸⁰ Ch one p 57.

⁸¹ Ch one p 47-59, although Protocol 12 explicitly states that the equality provisions do not prevent States from implementing measures to promote substantive equality.

rights are applicable to violations perpetrated by State and non-State actors, but as pointed out by McColgan, whether the Article 14 principle of non-discrimination applies to non-state actors is less clear.⁸²

Protocol 12 gives a freestanding right to non-discrimination. This would then ground a claim for a positive right to non-discrimination (as a negative action). Without re-working the notions of formal equality,⁸³ it will not lead to a positive duty to secure equality as a positive action in the narrow sense as defined by Alexy.

D. PRINCIPLES OF PROCEDURAL GUARANTEES

As we have seen, the broad positive rights articulated by Alexy include not only a right to protection but also a right ‘to organization and procedure’.⁸⁴ The right to procedure has been the source of some controversy. Essentially, the debate is over the extension of procedural rights as a mechanism to enforce constitutional rights, to a right to procedure *per se*. Craig differentiates between these purposes by referring to the instrumental and non-instrumental rationales for procedural rights.⁸⁵ The instrumental function helps to establish ‘an accurate decision in the substance of the case’.⁸⁶ The non-instrumental justifications enhance values such as the rule of law and formal justice because ‘the principles of natural justice help to guarantee objectivity

⁸² A McColgan ‘Principles of Equality and Protection from Discrimination in International Human Rights Law’ (2003) *Eur Human Rights L Rev* 157, 161-163.

⁸³ S Fredman ‘Combating Racism with Human Rights: The Right to Equality’ in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (Oxford University Press Oxford 2001) 9.

⁸⁴ Alexy (n 26) 21.

⁸⁵ P Craig *Administrative Law* (5th edn Sweet and Maxwell London 2003) 408.

⁸⁶ *ibid* 408 citing J Resnick ‘Due Process and Procedural Justice’ in J Pennock and J Chapman (eds) *Due Process* (Nomos 1977) 217.

and impartiality'.⁸⁷ This form of justification is regarded 'as protecting human dignity by ensuring that the individual is told why he is being treated unfavourably and by enabling him to take part in that decision'.⁸⁸ Galligan articulates these differing functions with reference to tiers of values. He argues that the first tier of normative foundations of procedures is for the production of particular outcomes: such as upholding the standards of the criminal law. The second tier refers to normative standards that might 'qualify, modify or augment' the first tier, such as the principle of equality between the parties in court which may compromise truth or accuracy. These normative standards are termed 'outcome based standards'.⁸⁹ The third tier of standards, which are 'non-outcome values' include protecting a suspect from abuse whilst in custody regardless of whether it contributes to an accurate outcome. Another example is the value of being heard or giving reasons.⁹⁰ Attempts to differentiate between these standards to class those that relate to outcomes as 'substantive' and those which do not as 'procedural' are problematic. Whilst some values are more obviously associated with outcomes, others, which might be classed as procedural, cannot be completely divorced from issues of substance. As such, 'no sound analytical distinction can be made between so-called substantive values and so-called procedural values'.⁹¹ The procedures that facilitate outcome-based standards vary, and include decisions by voting, decisions by agreement, decisions by applying legal standards and decisions by discretion.⁹²

⁸⁷ *ibid* 408 citing HLA Hart *The Concept of Law* (Clarendon Press 1961) 156, 202 and J Rawls *A Theory of Justice* (Oxford University Press 1973) 209-210.

⁸⁸ *ibid* 408 citing F Michelman 'Formal and Associational Aims in Procedural Due Process' in *Due Process* (n 86) ch 4.

⁸⁹ Galligan (n 69) 34.

⁹⁰ *ibid* 36.

⁹¹ *ibid* 50.

⁹² *ibid* 38-48.

Some have argued that constitutional documents are overwhelmingly concerned with procedural rights. In his famous work, John Ely argued that the American constitution is largely concerned with procedure:

[T]he selection and accommodation of substantive values is left almost entirely to the political process and instead the ... [Constitutional] document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capriciously be designated process writ large ... with ensuring broad participation in the processes and distributions of government.⁹³

The ECHR is notably less influenced by procedure and instead reflects a commitment to substantive values, increasingly articulated as ‘human dignity’,⁹⁴ which States in the post-war period sought to enshrine. What Ely defines as process writ large, political participation, is far more evident in other human rights treaties, which tend to reflect substantive and both types of procedural values.⁹⁵ In the ECHR itself, the only reference to ‘process writ large’ was the requirement for an independent and impartial tribunal under Article 6 (1).⁹⁶

⁹³ J Ely *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press Cambridge Mass 1980) 87.

⁹⁴ This is particularly the case in relation to the most important rights under the Convention *SW v United Kingdom* Series A no 355-B Appn no 20166/92; *CR v United Kingdom* Series A no 355-C Appn no 20190/92 (1996) 21 EHRR 363, 402; D Feldman ‘Human Dignity as Legal Value – Part I’ [1999] PL 682.

⁹⁵ For example, the International Covenant on Civil and Political Rights (adopted 16th December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); the Convention on the Elimination of All Forms of Discrimination Against Women (opened for signature 1st March 1980, entered into force 3rd September 1981) (1980) 19 ILM 33 (CEDAW) and also the European Charter of Fundamental Rights [2000] OJ C364/1.

⁹⁶ Art 3 to Protocol 1 of the Convention provided that ‘[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. This is more vague than the provisions of art 21 of the UDHR which provides that ‘1. Everyone has the right to take part in the government of his country, directly or indirectly or through freely chosen representatives 2. Everyone has the right of equal access to public service in his country 3. The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be universal and [by] equal suffrage and shall be held by secret vote or by equivalent voting procedures’. These differences were thought to reflect the concerns of Colonial powers whose democratic processes were by no means uniform throughout their territories AM Simpson *Human Rights and the End of*

However, as we have seen, separating issues of procedure from issues of substance is not clear-cut, and some would argue that procedural rights do form a part of substantive values. In the context of criminal law, additional issues are involved — the prevention of the treatment of people ‘as though they were objects’ — which often comes ‘at some cost to the efficacy and accuracy of fact-finding’.⁹⁷ This is how a procedural right can take on the status of a fundamental right under Articles 5 and 6 of the ECHR. In situations where the substantive right can be characterised as, for example, the right to be heard, the entitlement to procedure becomes substantive, as this ‘is part of what it means to be a person’.⁹⁸ Alexy argues that:

[p]rocedures are systems of rules and/or principles for the production of outcomes. If the outcome is produced in observance of the rules or having regard to the principles, then it is from a procedural perspective to be treated positively. If it is not produced in this way, then it is from a procedural perspective faulty and so to be treated negatively...Norms of procedure and organization should be formulated in such a way that the outcome is with adequate probability and to an adequate extent constitutional.⁹⁹

Alexy classifies procedural entitlements as positive rights as these rights involve a positive entitlement to keep them in force. ‘[R]ights to procedural positions are rights that certain things should exist which require positive acts to bring them into being’.¹⁰⁰ They are thus ‘not powers but rights to powers’ and therefore more plausibly associated with positive rights.¹⁰¹ The jurisprudence that suggests that the provisions of Article 6 can be reconciled with other duties is consistent with this reasoning.

Empire: Britain and the Genesis of the European Convention (Oxford University Press Oxford 2001) 758.

⁹⁷ LH Tribe ‘The Puzzling Persistence of Process-Based Constitutional Theories’ (1980) 89 Yale L J 1063, 1070 citing H Packer ‘Two Models of the Criminal Process’ (1964) University of Pennsylvania L R 1, 6-23.

⁹⁸ *ibid* 1070-1.

⁹⁹ Alexy (n 26) 316.

¹⁰⁰ *ibid* 320.

¹⁰¹ *ibid* 320.

In terms of the ECHR, what is meant by the idea that outcomes should be ‘with adequate probability and to an adequate extent constitutional’? What exactly is the outcome that is being sought? Ashworth provides some answers to this question.¹⁰² In tackling serious crime, one might argue that what is sought in the context of a criminal trial is an accurate outcome — one that convicts the guilty and acquits the innocent. Challenging the Benthamite view, that accuracy is best achieved by allowing all kinds of evidence to be admissible in court, Ashworth argues that this type of system does not always achieve accuracy for a number of reasons. Firstly, a reliance on the decision-making of lay people in the criminal justice system means that there is some justification for limiting admissible evidence in view of the prejudicial effect that type of evidence will have, notably the use of a defendant’s previous convictions. Once this point is conceded, the notion of overall accuracy is better served by a different system of trial than one characterized by complete disclosure on the part of the defendant. Secondly, factual guilt may not take into account any defences to the crime or mental elements of the offence that the prosecution have failed to establish. Certain types of evidence may be unreliable such as identification evidence, confessions, and even scientific evidence. Thirdly, the Benthamite system does not recognize the effects of power differentials between the police and prosecuting authorities and the defendant. The police exercise considerable power over the suspect and without some procedural guarantees there is the possibility that his relatively weak position will be exploited, compromising the reliability of the evidence obtained under those conditions.¹⁰³ It should be noted however that in cases of sexual violence, other dynamics enter into the equation. The police have

¹⁰² Ashworth (n 14); Galligan (n 69) ch 1 and 2.

traditionally been less than willing to act in cases of rape.¹⁰⁴ Fourthly, Ashworth argues that the Benthamite system does not attach sufficient importance to issues of fairness; whether the inclusion of evidence obtained in particular ways or adverse inferences from a defendant's refusal to answer questions should be included in view of the unfairness to the defendant of such a course.¹⁰⁵ These arguments reflect the Anglo-Saxon approach to procedural rights, where 'fairness is a goal in itself',¹⁰⁶ a position that is favoured in Convention jurisprudence.¹⁰⁷

The requirement under Article 3 of the ECHR that procedures be effective and capable of leading to the punishment of the offender¹⁰⁸ does at least reaffirm a commitment to accurate outcomes, although the manner in which these outcomes are achieved is less elucidated and, in view of the other types of dignity at stake, unlikely to involve the more extreme position adopted by Bentham. In cases of rape however, what the ECtHR in the *MC* case appeared to recognize is that the widely accepted methods of ensuring accurate outcomes and upholding the standards of the criminal law are failing to succeed in cases of rape. Even when taking into account some legitimate compromises to accuracy that come from ensuring fairness, rape cases are particularly poor at delivering accurate outcomes. It is in this way that the outcome of rape cases can be said to be unconstitutional. This claim has to be qualified in relation

¹⁰³ Ashworth (n 14) 6-9.

¹⁰⁴ J Temkin 'Reporting Rape in London: A Qualitative Study' (1999) 38 *The Howard J* 17; J Temkin 'Plus Ça Change: Reporting Rape in the 1990's' (1997) 37 *British J of Criminology* 507; Temkin 2002 (n 3) ch 1.

¹⁰⁵ Ashworth (n 14) 9

¹⁰⁶ S Trechsel 'The Right to Liberty and Security of the Person - Article 5 of the European Convention on Human Rights in the Strasbourg Case Law' (1980) 1 *Human Rights L J* 88, 90.

¹⁰⁷ The inquisitorial systems on the continent are less concerned with procedure, as can be evidenced by the violations of Arts 5 and 6 found against countries such as France J Murdoch *Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person* (Council of Europe Publishing 2002) 9.

¹⁰⁸ *A v United Kingdom* Appn no 25599/94 (1998) 25 EHRR 611; *Osman v United Kingdom* Appn no 23452/94 (1998) 28 EHRR 245; *E* (n 25); *MC* (n 22).

to the UK. If one accepts the definition of ‘constitution’ essentially as a descriptive term — ‘an expression of the laws, institutions and practices which make up the tradition of governing’ — influential in UK constitutional thought,¹⁰⁹ then in as far as the ECHR forms part of those laws, institutions and practices, the outcome of rape trials can be described as unconstitutional. If the term constitution is used to relate to a document that exists prior to a government that is the creation of that constitution, deriving its authority from the people, laying ‘down the principles of political engagement’ and determining ‘the relationship between citizen and the state’,¹¹⁰ then, notwithstanding the illegality of the act, the maintenance of the doctrine of parliamentary sovereignty under the HRA would undermine a claim that a violation of the ECHR was unconstitutional.

E. FAIR TRIAL GUARANTEES AT COMMON LAW

Before the enactment of the Human Rights Act 1998, procedural rights were governed by common law and, by a number of statutory provisions. Rights under Article 5 (the protection of liberty) are strongly influenced by Anglo-Saxon ideals that protected the individual from state interference.¹¹¹ This tradition is based on the civil libertarian perspective, which characterised an individual’s constitutional standing in the UK.¹¹² Civil liberties were important in determining the relationship between citizens and State, and in enabling them to participate in the way the State functioned. An example of this would be political expression. These liberties also indicated that States were

¹⁰⁹ M Loughlin ‘Constitutional Law: The Third Order of the Political’ in N Bamforth and P Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Oxford 2003) 27, 43.

¹¹⁰ *ibid* 45.

¹¹¹ Murdoch (n 107) 9.

under a particular duty to protect these freedoms ‘as a matter of political morality or as a matter of law’.¹¹³ This went further than freedom from interference, and included positive obligations for state help, although the extent of this help varied.¹¹⁴ As we have seen in chapter one, for women however, these ideals were circumvented by the fact that women’s ability to participate was impeded by abuses of their rights at the hands of private actors, and the fact that they bore the brunt of child-rearing responsibilities.¹¹⁵

The importance of protecting an individual’s relationship with the State is reflected in the law pertaining to criminal procedure in two important ways: the principle against wrongful conviction and the principle that the accused is entitled to a fair hearing.¹¹⁶ This reflects both theoretical procedural principles outlined above: to have one’s liberty effectively safeguarded and to be heard in a fair trial. The principle against wrongful conviction is illustrated by the duty on the Court of Criminal Appeal to quash unsafe convictions.¹¹⁷ It is on this basis that rules of evidence have developed — to prevent conviction of the innocent.¹¹⁸ As we have seen above, the principle of accuracy has sometimes to be compromised in order to secure fairness, even if this means acquitting the guilty.¹¹⁹ However, there are limitations on the extent to which such balances can be made given the social difficulties associated with acquitting the guilty and because of the rights of the victim.¹²⁰ In recent years, there

¹¹² D Feldman *Civil Liberties and Human Rights in England and Wales* (2nd edn Oxford University Press Oxford 2002).

¹¹³ *ibid* 5.

¹¹⁴ *ibid*.

¹¹⁵ Ch one p 14, 27-47.

¹¹⁶ Dennis (n 18) 30.

¹¹⁷ *ibid* 32.

¹¹⁸ *ibid* 33.

¹¹⁹ *ibid*; Ashworth (n 14) 6-9.

¹²⁰ Dennis (n 18) 33; Ashworth (n 13).

has been an increased awareness of the social consequences of sexual violence.¹²¹ Furthermore, there has also been an increased awareness of the rights of victims and how they have been mistreated by the criminal justice system in particular contexts, most pertinently in relation to sex offences.¹²² For example, the abolition of the corroboration requirements against children and rape complainants was justified on the basis that these provisions were failing to convict those guilty of serious sexual offences and in relation to women, for suggesting that they were an inferior form of witness.¹²³

In English common law, there was no established list of what a fair trial entailed, however, it did provide ‘a number of protections and safeguards which, taken together, form the basis of a common law “right to a fair trial”’.¹²⁴ This was, essentially, a historical piecemeal approach to fair trial rights. The duty to provide the defendant with a fair trial was regarded as an ‘elementary right of every defendant’ which, under the unwritten constitution of the UK, required ‘special protection by the courts’.¹²⁵ These historical and piecemeal rights included having sufficient notice of the case with adequate facilities for the preparation of one’s defence, disclosure of the material on which the charge is grounded, a hearing, legal advice and representation,

¹²¹ L Kelly *Surviving Sexual Violence* (Polity Press Cambridge 1988) especially ch 8; D Russell *Rape in Marriage* (Indiana University Press Bloomington and Indianapolis 1990) ch 14; BL Katz ‘The Psychological Impact of Stranger Versus Nonstranger Rape on Victims’ Recovery’ in A Parrot and L Bechhofer (eds) *Acquaintance Rape: The Hidden Crime* (Wiley-Interscience New York 1991) 251; CA Gidycz and MP Koss ‘The Effects of Acquaintance Rape on the Female Victim’ in A Parrot and L Bechhofer (eds) *Acquaintance Rape: The Hidden Crime* (Wiley-Interscience New York 1991) 270; J Morgan and L Zedner *Child Victims: Crime, Impact and Criminal Justice* (Clarendon Oxford 1992) ch 3; JA Allison and LS Wrightsman *Rape: The Misunderstood Crime* (Sage London 1993) ch 8; P Johnson ‘In Their Own Voices: Report of a Study on the Later Effects of Child Sexual Abuse’ [2001] 7 J of Sexual Aggression 41; A Clarke, J Moran-Ellis and J Sleney *Research Report - 2: Attitudes to Date Rape and Relationship Rape: A Qualitative Study* (Sentencing Advisory Panel London 2002) <<http://www.sentencing-advisory-panel.gov.uk/research/rape/page4.htm>> (10 November 2003) 4.3.

¹²² Dennis (n 18) 34.

¹²³ *ibid*; text to n 130; text between n 130 and n 144.

¹²⁴ Clayton and Tomlinson (n 18) 26, 32.

the ability to call and cross-examine witnesses, and the ‘consideration of evidence and submissions’.¹²⁶ This gives us an indication of some of the positive duties involved, including legal representation (which can be classed as a positive entitlement in the sense as outlined by Alexy), the obligation to disclose, and the facilitation of the cross examination of witnesses.

These principles, in particular the determination of the individual’s relationship to the State and the associated development of the rules of evidence, have presented some specific problems in cases of rape. It is in the common law rules of evidence that the sexism that characterizes rape trials has been at its most stark,¹²⁷ and where the lack of equality provisions in the field of criminal justice have been most evident. International human rights treaties have been alert to the ways in which women have been treated in the criminal justice system. For example, the United Nations General Assembly Declaration on the Elimination of Violence against Women states that States are obligated to ensure that ‘the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions’.¹²⁸ Additionally General Recommendation 19 of the Committee on the Elimination of Violence against Women requires ‘[g]ender-sensitive training of judicial and law enforcement officers’.¹²⁹ Despite the fact that some 10 years have passed since these requirements were laid down, little progress has been made in this area. In cases of rape, there appears to be confusion between the legitimate interests of

¹²⁵ *R v Brown (Winston)* [1998] AC 367, 374 (HL); *R v Brown (Winston)* (1995) 1 Crim App R 191, 198 (CA).

¹²⁶ Clayton and Tomlinson (n 18) 32 [11.70].

¹²⁷ Particularly in relation to character evidence Lees (n 1) 132; text between n 168 and n 187; text between n 196 and n 204.

¹²⁸ UNGA ‘Declaration on the Elimination of Violence Against Women’ 48/104 (20 Dec 1993); ch two p 97 – 98.

¹²⁹ CEDAW ‘General Recommendation No 19’ (11th Session 1992).

the defendant and the startling sexism that pervades the process and impedes women's constitutional interest in the functioning of the criminal law.

F. THE TREATMENT OF SEXUAL OFFENCES AT COMMON LAW AND STATUTORY INTERVENTIONS

As we have seen, the decision in the *MC* case represents a reaffirmation of accurate outcomes in view of the poor delivery of such outcomes in cases of rape. Less associated with cases of rape are the moves towards accurate outcomes evident in recent statutory provisions: the Criminal Procedure and Investigations Act 1996 (CPIA) and the Criminal Justice Act 2003 (CJA). These have not generally been developed to tackle the serious problems of 'accuracy' in the criminal justice system in relation to rape and sexual violence. In cases of this nature, procedural measures have undermined the effective trials of rape cases. This section will examine a number of evidential provisions that have caused concern in relation to rape trials: the corroboration requirements, the recent complaint doctrine, the final collateral rule, the rules of disclosure and most importantly, issues of character and credibility including sexual history evidence.

The requirement that a victim's evidence in sexual offences be corroborated (unlike the victim's evidence in other non-sexual offences) was based on the idea that women's testimony in sexual offences might be motivated by 'jealousy, spite, revenge, or because of a tendency to tell lies and fantasize'.¹³⁰ It was perceived that men

¹³⁰ Temkin 2002 (n 3) 256.

needed to be protected from these malign tendencies in women.¹³¹ These warnings were administered despite the lack of evidence that women do make false allegations of sexual offences, with claims of this nature grounded in nothing more than 'supposition and myth'.¹³² Comments of this nature, which appear to have the status of conventional wisdom, are problematic for a number of reasons. Firstly, they infer a degree of dishonesty by virtue of one's membership of a particular group. Secondly, and more specifically, as Temkin points out, they suggest that characteristics of this group cause them to lie about particular issues, in this case, sex.¹³³ This is something that ultimately impugns the character of all members of the group, in this case, women. In contrast to the empirical evidence concerning the extent to which women are sexually assaulted and the low rate of reporting,¹³⁴ there is scant credible, objective, empirical evidence to support these judicial assertions. Furthermore, judicial claims of this nature are superfluous in systems that value the presumption of innocence. Studies in the United States have found that false complaints to the police account for only two per cent of reported rape cases and that '*actual* false reports in rape may be as low or lower than most other crimes'.¹³⁵ The recent study in the UK by Kelly and others found that, excluding cases where there was some concern over

¹³¹ *ibid* 257.

¹³² *ibid* 258.

¹³³ *ibid* 257.

¹³⁴ Russell (n 121); A Myhill and J Allen *Rape and Sexual Assault of Women: The Extent and Nature of the Problem. Findings from the British Crime Survey (Home Office Research Study 237)* (Home Office London 2002); P Tjaden and N Thoennes *Prevalence, Incidence, and Consequences of Violence against Women: Findings from the National Violence against Women Survey* (US Department of Justice Washington DC 1998); P Tjaden and N Thoennes *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence against Women Survey* (US Department of Justice Washington DC 2000).

¹³⁵ S Katz and M Mazur *Understanding the Rape Victim: Synthesis of Research Findings* (John Wiley New York 1979) 213.

whether the police had complied with Home Office counting rules, the rate of false complaints was as little as three per cent.¹³⁶

The effects of these warnings may well have provided some of the explanation behind the high acquittal rate in rape cases.¹³⁷ The corroboration requirements were abolished by s 31 (1) (b) of the Criminal Justice and Public Order Act 1994. While there is no absolute prohibition, it is very much discouraged save in the most extreme type of case.¹³⁸ Nevertheless, in cases where the warning is administered, it continues to be laced with comments about women making false allegations, with fanciful reasons as to why this might be the case and displaying a blatant bias against the complainant.¹³⁹ The issue, according to Lees, is not that women make false allegations, but that most victims of rape do not report at all. Those that do report the rape and go to trial 'are subjected to a process of character assassination which leaves them bewildered'.¹⁴⁰ The absence of legal representation for complainants further undermines their testimony.¹⁴¹

One of the side effects of abolition has been the restriction on the use of the evidence corroborating the victim's distress at the time of the complaint.¹⁴² The Court of Appeal has held that the use of this type of corroborative evidence should be limited.¹⁴³ Temkin argues that in view of the serious lack of evidence in sexual offence cases, and the weight attached in an adversarial system of justice as well as 'in

¹³⁶ L Kelly J Lovett and L Regan *A Gap or Chasm? Attrition in Reported Rape Cases* (HORS 293 London Home Office 2005) 53.

¹³⁷ Temkin 2002 (n 3) 260.

¹³⁸ C Tapper *Cross and Tapper on Evidence* (10th edn LexisNexis London 2004) 275.

¹³⁹ Lees (n 1) 110-11.

¹⁴⁰ *ibid* 124.

¹⁴¹ *ibid* 128.

¹⁴² Temkin 2002 (n 3) 264.

¹⁴³ *Keast* [1998] Crim L R 748.

ordinary life to a person's demeanour', the reasoning behind this appears difficult to comprehend, and is indicative of a retrograde step in this area of procedural law.¹⁴⁴

Additional difficulties are faced in rape cases by the 'recent complaint doctrine'. In evidential law there is a "rule against self-corroboration" that is, using statements made previously as evidence of consistency.¹⁴⁵ Complainants in sexual offences are exceptions to the rule against self-corroboration because their evidence is regarded with great suspicion.¹⁴⁶ A complainant is permitted to substantiate her version of events by saying that she complained of rape in order to rebut the assumption often made in rape cases that her version of events is fabricated.¹⁴⁷ This forms the basis of the idea that the evidence of complainants who delay reporting the offence to a third party is less likely to be truthful, a presumption that is particularly strong in cases of rape.¹⁴⁸ The different way that these principles were applied to sex offences was rationalized on the basis that issues of credibility are more important in such cases in view of the fact that sexual activity does not tend to be a public activity and is often kept secret, thus limiting the other evidence that might be available to the court.¹⁴⁹ However, by virtue of the Criminal Justice Act 2003, this has been widened to include any type of offence.¹⁵⁰ Being unable to introduce expert evidence on issues

¹⁴⁴ Temkin 2002 (n 3) 264.

¹⁴⁵ Tapper (n 138) 578.

¹⁴⁶ Temkin 2002 (n 3) 187; Lees (n 1) 232.

¹⁴⁷ Temkin 2002 (n 3) 187.

¹⁴⁸ *ibid* 187-190.

¹⁴⁹ C Tapper *Cross and Tapper on Evidence* (9th edn Butterworths London 1999) 274.

¹⁵⁰ S 120 of the Criminal Justice Act 2003 provides that '[i]f a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible' (2). S 120 (4) provides that 'previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if--' three conditions are fulfilled. These include '(a) the witness claims to be a person against whom an offence has been committed, (b) the offence is one to which the proceedings relate, (c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence, (d) the complaint was made as soon as could reasonably be expected after

such as rape trauma syndrome to explain delays in reporting the rape are thought by practitioners to hamper the prosecution of rape cases.¹⁵¹

If a victim does not complain promptly, she will be rigorously cross-examined about this by the defendant's counsel and judges may make adverse inferences in their summing up.¹⁵² This is indefensible in view of what we now know about rape trauma syndrome,¹⁵³ and may well offend against the principle that the victim is entitled, under Article 3 ECHR, to an effective investigation capable of leading to the conviction of the offender; and that States have in place procedures capable of punishing all forms of rape.¹⁵⁴ Furthermore, the proper construction of Article 3 may require judges to make juries aware of rape trauma syndrome as part of the 'context-sensitive assessment of the evidence'.¹⁵⁵ However, care should be taken to ensure that if abolished, it does not give the defence more opportunity to prejudice unfairly the complainant's testimony.¹⁵⁶ In New South Wales and Victoria, measures designed to prevent adverse inferences being drawn from the failure to complain promptly whilst retaining the advantages to victims of being able to bolster their testimony have been undermined by judicial attitudes that continue to seek to question the veracity of late complaints.¹⁵⁷

the alleged conduct, (e) the complaint was not made as a result of a threat or a promise, and (f) before the statement is adduced the witness gives oral evidence in connection with its subject matter' s 120 (4).

¹⁵¹ Temkin 2000 (n 3) 224.

¹⁵² *ibid* 189.

¹⁵³ *ibid* 190.

¹⁵⁴ *MC* (n 22) [185]; ch two p 116 – 125.

¹⁵⁵ *MC* (n 22) [161]; ch two p 116 – 125.

¹⁵⁶ As has been the case in Canada and Australia where the judge was prevented from drawing adverse inferences but the defence was unhindered in questioning the victim about the late complaint Temkin 2002 (n 3) 193.

¹⁵⁷ *ibid* 194.

This chapter touches briefly on the ‘final collateral rule’: the principle whereby answers given by witnesses in cross-examination concerning credibility as opposed to an issue in the case, are treated as final.¹⁵⁸ Exceptions to this are if the witness has a criminal conviction, if they are ‘biased in favour of the party’ that has called them, or if they had ‘previously made a statement inconsistent with his present testimony’.¹⁵⁹ This has been challenged in sex offences where it has been argued that the rule should be inapplicable. A number of cases have sought to circumvent this and there is a concern that undermining this provision in sexual offence cases would ‘permit further oppressive treatment of complainants’.¹⁶⁰

The interplay between the move towards accurate outcomes and the specific measures used in sexual offences can be seen in the rules of disclosure. The belief that the burden of disclosure on the part of prosecutors and the police was being exploited by defendants led to the enactment of the Criminal Procedure and Investigations Act 1996.¹⁶¹ The Act requires the police to record and keep relevant information, and the prosecution to make a primary disclosure of material that it does not propose to use, but which may undermine the prosecution’s case. The accused must then disclose his defence and the prosecutor make a secondary disclosure of material, which in light of the defendant’s disclosure, might reasonably be expected to assist him. However, prosecutors will not know the basis of the defence arguments in advance, and so have little opportunity to prepare arguments to counter false allegations made by the defence; such as where forensic advocates can ‘create red-herring tales about

¹⁵⁸ Tapper (n 138) 339-340.

¹⁵⁹ *ibid* 341.

¹⁶⁰ Temkin 2002 (n 3) 225; *Nagrecha* [1997] 2 Crim App R 401; *Neale* [1998] Crim L R 737; *David* [1999] Crim L R 909; critiqued by Birch [1998] Crim L R 65-7.

¹⁶¹ Tapper (n 138) 299.

supporting evidence'.¹⁶² In cases of rape, diversionary tactics about the supporting evidence might involve material such as the victim's medical or social service history.¹⁶³ The rules governing disclosure have been altered by ss 32-40 of the Criminal Justice Act 2003. Ss 33-36 provide a new statutory framework governing defence disclosure. The new regime closes the distinction between primary and secondary disclosure, introduces an objective test for prosecution disclosure and broadens the criteria for the material that needs to be disclosed.¹⁶⁴ In relation to defence statements, the CPIA was thought to work poorly — defence statements lacked detail and yet judges were reluctant to permit adverse inferences to be drawn. Under the new provisions, defence statements will need to be more detailed, although Redmayne questions whether in practice, adverse inferences will be drawn in the way the legislation appears to envisage.¹⁶⁵

It is in cases of rape that issues of character and credibility are most pertinent. Significant concerns have been expressed about the nature of cross-examination in cases of rape.¹⁶⁶ While judges are responsible for limiting cross-examination that is unnecessary, they have been reluctant to do so,¹⁶⁷ particularly in light of the fact that the victim lacks representation.¹⁶⁸

¹⁶² Lees (n 1) 113.

¹⁶³ HMCPSI (n 6); text between n 299 and n 309.

¹⁶⁴ M Redmayne 'Criminal Justice Act 2003 (1) Disclosure and its Discontents' [2004] Crim LR 441, 444.

¹⁶⁵ *ibid* 445-7.

¹⁶⁶ Temkin 2000 (n 3) 232.

¹⁶⁷ A Ashworth 'Victims' Rights, Defendants' Rights and Criminal Procedure' in A Crawford and J Goodey (eds) *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate Dartmouth Aldershot 2000) 185, 187; Tapper (n 138) 335.

¹⁶⁸ Tapper (n 149) 229.

Until recently, while the victim could be cross-examined about their previous convictions,¹⁶⁹ the defendant's convictions were not allowed to be put into evidence. S 1 of the Criminal Evidence Act 1898 provided the accused with a shield to prevent cross-examination about previous offences/convictions and/or bad character unless the defence sought to discredit 'the character of the prosecutor'.¹⁷⁰ Nevertheless, considerable latitude was permitted before there was a risk to the defendant's shield. The practice of maligning the character of the complainant is, argues Temkin, a regular occurrence in rape trials where consent is the issue.¹⁷¹ These tactics include maligning the victim's behaviour at the time of the attack, her clothes and her sexual character. This is a further example of the way that rape cases are treated differently to other offences. Where consent is the issue, the shield is not jeopardised by impugning the character of the complainant, regardless of whether this discredits the victim.¹⁷² In *Turner* the defendant relied on the defence of consent and alleged that the complainant had 'committed a gross indecency with him'.¹⁷³ It was held that while this impugned the character of the complainant, this was aimed at the question of proof of consent and the accused did not therefore relinquish his protection under s 1 of the Criminal Evidence Act, so that a previous conviction could not be admitted. In other non-sexual cases, maligning the victim's character, even where necessary to establish the accused's defence will lose him his shield unless the judge exercises his discretion to permit such evidence. This, suggests Temkin, portrays 'blatant discrimination in favour of the accused', something which is a factor in the high acquittal rate.¹⁷⁴

¹⁶⁹ Evidence Act 1843 (UK).

¹⁷⁰ S 1 (f) (ii).

¹⁷¹ Temkin 2002 (n 3) 245-248.

¹⁷² *ibid* 246.

¹⁷³ [1944] KB 463 (CA).

¹⁷⁴ Temkin 2002 (n 3) 246.

The Criminal Justice Act 2003 relaxes the law pertaining to the admission in evidence of the defendant's previous convictions and bad character. Ss 98 – 113 of the Criminal Justice Act 2003 provide a new statutory framework for the admissibility of the defendant's bad character — or misconduct — other than 'to do with the alleged facts of the offence with which the defendant is charged', or 'misconduct in connection with the investigation or prosecution of that offence'.¹⁷⁵ 'Misconduct' is subsequently defined as 'the commission of an offence or other reprehensible behaviour'.¹⁷⁶ There are a number of situations where such evidence will be admissible. These include if the evidence is important explanatory evidence,¹⁷⁷ and if it is relevant to an important matter in issue between the defendant and the prosecution.¹⁷⁸ Matters at issue between the defendant and prosecution include questions whether the defendant has a propensity to commit such offences, or a propensity to be untruthful. Other situations where evidence of this nature could be adduced include if it has substantial probative value in relation to an important issue between a defendant and co-defendant, if it is to correct a false impression given by the defendant,¹⁷⁹ or if the defendant has made an attack on the character of another person.¹⁸⁰ In relation to previous convictions, it has recently been held in *Hanson* (a number of appeals brought together) that a previous indecent assault was relevant in a case involving subsequent indecent assaults and rape.¹⁸¹ In one of the cases, the judge

¹⁷⁵ S 98 Criminal Justice Act 2003(UK).

¹⁷⁶ S 112

¹⁷⁷ S 101 (1) (c).

¹⁷⁸ S 101 (1) (d).

¹⁷⁹ S 101 (1) (f).

¹⁸⁰ S 101 (1) (g).

¹⁸¹ *Hanson* and others [2005] EWCA Crim 824. The Court of Appeal held that the admissibility of previous convictions had to be determined with reference to three questions: '1. Does the history of conviction(s) establish a propensity to commit offences of the kind charged? 2. Does the propensity make it more likely that the defendant committed the offence charged? 3. Is it unjust to rely on the

admitted evidence of a previous conviction of indecent assault by a defendant who had been charged with indecent assault and rape of his stepdaughter. The defence alleged that the complainant had made up the allegations in order to be able to return home after having being placed with foster parents, and the Court of Appeal held that this was an attack on the character of another for the purposes of s 101 (1) (g). Whether these changes to the law on admissibility of previous convictions are applied where the defendant is alleging consent in a rape case remains to be determined.

In the *MC* case, specific reference was made to the credibility of statements made by defendants in relation to cases of sexual violence in view of the paucity of supporting evidence. In this case, the respondent State was criticized for not examining the inconsistency of the claims of the defendant and his witnesses. When the applicant claimed that witnesses had perjured themselves, they were not able to question them on the subject. Nor did the prosecution attempt to establish exactly the timing of events.¹⁸² This represents not only a shift to context sensitive approaches in the examination of cases of sexual violence, but also moves towards notions of fairness *for the victim*. The *MC* decision notwithstanding, given the unfair practices used by courts in rape cases, effects are unlikely to be dramatic unless prosecutors rigorously articulate these provisions.

In practice, evidence of previous misconduct had only been allowed if it was ‘exactly replicated rather than very similar’ such as where a man had a highly specific manner of attack.¹⁸³ Further problems arose from the fact that if a number of charges

conviction(s) of the same description or category; and in any event, will the proceedings be unfair if they are admitted?’ [7].

¹⁸² *MC* (n 22) [177].

¹⁸³ *Lees* (n 1) 189.

are levelled against the same man, all cases have to be heard separately because judges interpreted “‘similar fact’” cases in a manner which requires them effectively to be ‘exactly replicated’.¹⁸⁴ This affects sentencing in that if they are only convicted of one offence, their sentence will reflect that and not serial crimes.¹⁸⁵ The situation was altered somewhat by the decision in *Z*.¹⁸⁶ In this case, the defendant had been charged with rape. The prosecution wished to introduce testimony of four women who had previously complained of being raped by *Z*. The cases had been tried separately, but in three of the cases, the defendant was acquitted. The court in this case appeared to relax the rules on similar fact evidence by allowing the testimony of the four women to be put into evidence in order to establish guilt on the subsequent charge of rape. The principle of this case appears to be mirrored in s 98 of the Criminal Justice Act 2003.¹⁸⁷

Altering the old common law rule that a woman’s sexual history was admissible as evidence of her credibility was the impetus behind the Sexual Offences (Amendment) Act 1976.¹⁸⁸ S.2 provided that the complainant was not to be questioned about any sexual experience other than with the defendant without leave from the judge, and that leave could only be granted if to exclude it ‘would be unfair to that defendant’.¹⁸⁹ While well intentioned, this Act was interpreted in such a way as to completely undermine the mischief it set out to address. In *Viola*, the court held that ‘if questions are relevant to the issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent, as opposed merely to credit,

¹⁸⁴ *ibid* 189.

¹⁸⁵ *ibid* 206-7.

¹⁸⁶ *R v Z* [2000] 2 AC 483 (HL).

¹⁸⁷ C Tapper ‘The Criminal Justice Act 2003 (3) Evidence of Bad Character’ [2004] Crim L R 533,547.

¹⁸⁸ J Temkin ‘Sexual History Evidence-the Ravishment of Section 2’ [1993] Crim L R 3, 4.

¹⁸⁹ S 2 (1) and (2) of the Sexual Offences Amendment Act 1976 (UK).

they are likely to be admitted'.¹⁹⁰ This left the door open to past sexual history evidence being admitted as relevant to the issue of consent.¹⁹¹ The courts and some commentators thus took a different view to the drafters of the legislation as to the relevance of such evidence.¹⁹² Relevance is not a sufficiently objective concept and the judges interpreting s.2 failed to define the degree of relevance thought necessary 'to qualify for admissibility in this context'.¹⁹³ This left the interpretation of relevance open to all sorts of stereotypes and prejudices.¹⁹⁴ A narrow criterion of 'promiscuity' was used to allow evidence of sexual history and used to support the assertion that the victim, if she had had a number of previous sexual relationships, was either more likely to consent or more likely to fabricate an allegation of rape.¹⁹⁵ In relation to human rights principles, it is worth noting that the ECtHR declared inadmissible a claim against the UK that s 2 prevented the applicant from having a fair trial because it inhibited questioning on the complainant's sexual history with other men.¹⁹⁶

It is in relation to sexual history, argues Lees, that the rules of evidence are most discriminatory, where judges have used their discretion to reinforce sexist attitudes.¹⁹⁷ Credibility for men and women is assessed in different ways: for women, issues of credibility tend to centre on whether she is 'chaste'; for men the issue of credibility tends to centre around whether he is 'professionally sound'.¹⁹⁸ On this basis, sexist assumptions already permeate the rules of evidence in relation to credit.

¹⁹⁰ (1982) 75 Cr App R 125, 130.

¹⁹¹ Temkin (n 188) 5.

¹⁹² *ibid.*

¹⁹³ *ibid* 6.

¹⁹⁴ *R v Seaboyer* [1991] 2 SCR 577.

¹⁹⁵ Temkin (n 188) 6-11; *Brown* (1989) 89 Cr App R 979 (CA); *Bogie* [1992] Crim L R 301 (CA).

¹⁹⁶ *Oyston v United Kingdom* Appn no 42011/98 (22 January 2002). The reasons for this were the fact that the questioning of witnesses is not unlimited under the Convention and have to be reconciled with other interests, such as those of complainants; text between n 299 and n 327.

¹⁹⁷ Lees (n 1) 131.

¹⁹⁸ *ibid.*

While the defendant's lack of previous convictions is brought in to support him, the complainant is not able to bring in similar information to support her.¹⁹⁹ Juries are told to give more credence to the defendant's version of events if he has no criminal record, however, having no previous convictions does not enhance the credibility of the complainant as it is regarded as irrelevant. This leaves the jury to assess the victim on the basis of the evidence produced at trial and which involves the two different sets of criteria. Furthermore, the defendant's sexual behaviour is not called into question – '[h]is past sexual history is not allowed to be brought up'.²⁰⁰

Lees' study found that defence barristers manipulate lack of resistance to infer consent, and argue that failure to resist meant that the defendant could not have known that the victim did not consent. In her monitoring of rape trials, Lees found 'that the perfectly normal behaviour of young women is presented as evidence that they provoked the man's attack or asked for it'.²⁰¹ Intimate questions, such as questions pertaining to menstrual cycles and the handing round of undergarments, were designed to humiliate the victim. All these factors hamper the effective trials of rape cases. The use of alcohol is often 'used to discredit the complainant' although the defendant is seldom asked about his alcohol consumption.²⁰² Temkin argues that the justification for engaging in cross-examination which humiliates or degrades the victim, but which does not accurately resolve any issue is at best, slight. Tactics, which involve dredging up the complainant's clothing or sexual behaviour are a manifestation of sexism, which preclude and disallow the sexuality and welfare of women, suggesting that particular clothing or actions disqualify them from legal protection. In particular,

¹⁹⁹ Even though, as Lees points out, the low attrition rate in rape means that a defendant's lack of previous convictions may be seriously misleading.

²⁰⁰ Lees (n 1) 132.

²⁰¹ *ibid.*

the practice of maligning the victim's behaviour or dredging up their sexual history can create a false 'impression of existing cultural and social mores'.²⁰³ From the human rights perspective being developed here, this type of questioning undermines women's entitlement to sexual autonomy. In the *MC* case, specific reference was made to cases involving lack of resistance as a result of 'frozen fright' or 'traumatic psychological infantilism syndrome' where victims 'terrorised, often adopted a passive response model of submission'.²⁰⁴ This indicates that the ECtHR has been more receptive to the issues surrounding rape than the UK courts.

However, Ellison has argued that the focus on sexual history evidence in 'the literature on rape, is too narrow'.²⁰⁵ She challenges the cause of these features of rape trials and argues that the treatment of rape victims in court is attributable to two core factors — factors which exist in criminal trials for all offences. The first of these has been touched on above; the 'inadequate restrictions imposed upon cross-examination as to credit in criminal trials'.²⁰⁶ The second is the inevitable effects of cross-examination in an adversarial system of trial, which is at the root of 'the bullying and browbeating of rape complainants'.²⁰⁷ She disputes the claims made by some commentators that rape cases are treated differently to other offences and after reviewing empirical studies on the experiences of witnesses in the criminal justice system,²⁰⁸ concludes that complainants in other cases also experience gruelling attacks on their character and credibility. Similarly, Birch argues that notwithstanding the

²⁰² *ibid* 145.

²⁰³ Temkin 2000 (n 3) 244.

²⁰⁴ *MC* (n 22) [70].

²⁰⁵ L Ellison 'Cross-Examination in Rape Trials' [1998] *Crim L R* 605, 605.

²⁰⁶ *ibid* 606.

²⁰⁷ *ibid*.

²⁰⁸ Such as P Rock *The Social World of the English Crown Court* (Clarendon, Oxford 1993) and D Brereton 'How Different are Rape Trials? A Comparison of the Cross-examination of Complainants in Rape and Assault Trials' (1997) 37 *British J of Criminology* 242.

significant problems with encouraging victims to come forward and with the processing of rape cases, the offence will:

still have to be investigated...the files reviewed, and the prosecution of the alleged offender still has to take place with the onus on the prosecution to establish guilt beyond reasonable doubt. At all of these stages, it is inevitable that the complainant's account will, to the extent that it is controverted by the accused, be the subject of detailed scrutiny. In many cases it will also happen that, however sensitive the investigation and however well-treated the complainant, at the end of the trial a jury has little more to go on than one person's word against another's...Even if all the popular stereotypes regarding "real rape" could be debunked at once, the need to satisfy the criminal burden of proof will ensure that the outcomes of cases turning on credibility remains inherently unpredictable...²⁰⁹

A number of comments can be made here. There have been a number of evidential measures, such as the corroboration requirements, which were unique to sexual offences. Judicial pronouncements on the veracity of complainant's evidence are unique to sexual offences and are not easily attributable simply to the negative features of adversarial criminal trials. Additionally, rigorous cross-examination can and should be differentiated from cross-examination which plays to, and causes distress as a result of, its inherent sexism. Furthermore, sexual offences can be distinguished from other offences because of the intimate nature of the crime and the additional distress that will be caused to complainants in the process of giving evidence. There are a number of features of rape cases which, it will be argued here, cannot be defended with reference to the defendant's right to a fair trial.

It is in response to the deficiencies of s 2 and criticism from the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated

Witnesses in the Criminal Justice System²¹⁰ that the government enacted the Youth Justice and Criminal Evidence Act 1999 (YJCEA). It prohibits questioning on the sexual behaviour of the complainant except with leave from the court.²¹¹ Leave can only be given if one of the circumstances under ss 3 or 5 applies. Under s 3, leave can only be given 'if the evidence or question relates to a relevant issue in the case and either' the issue is not one of consent;²¹² the issue is one of consent 'and the sexual behaviour of the complainant is alleged to have taken place at or about the same time as the event which is the subject-matter of the charge', or if the sexual behaviour of the complainant is said to be 'so similar' to the behaviour which took place at the time of the alleged incident 'that the similarity cannot reasonably be explained as a coincidence'.²¹³ Where the issue is one of consent, such questioning cannot be established simply for impugning the credibility of the witness.²¹⁴ Sexual history evidence may be adduced to rebut evidence presented by the prosecution.²¹⁵ The HM Crown Prosecution Service Inspectorate review did not feel that the new YJCEA provisions had had the effect of curbing unnecessary hostile and intrusive questioning into the victim's sexual history, and the CPS, and those representing victims and witnesses, shared this perspective.²¹⁶

In the International Criminal Court, sexual history evidence in cases of rape is more circumscribed. The Rules of Procedure of the International Criminal Court also adopt measures to prohibit the use of sexual history evidence. The Rules state that

²⁰⁹ D Birch 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' [2003] Crim L R 370, 371-2.

²¹⁰ Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System '*Speaking up for Justice*' (June 1998).

²¹¹ S 41 (1).

²¹² S 41 (3) (a).

²¹³ S 41 (3) (c).

²¹⁴ S 41 (4).

²¹⁵ S 41 (5).

‘[c]redibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness’.²¹⁷ Additionally, Rule 71 prohibits evidence pertaining to ‘the prior or subsequent sexual conduct of a victim or witness’, although this is limited to the types of crimes ‘within the jurisdiction of the court’.²¹⁸ It is also subject to a discretionary proviso under Article 69 (4) of the Rome Statute, which permits the court to rule on the admissibility of evidence ‘taking into account ... the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of the witness’. These sentiments are echoed in Council Framework Decision on the Standing of Victims in Criminal Proceedings which requires Member States to ‘take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings’.²¹⁹ This is reflected in the new provisions of the Criminal Justice Act 2003, which introduced a requirement of leave to introduce evidence of bad character of a non-defendant, and for there to be substantial probative value of the evidence before allowing its admission.²²⁰ However, in relation to sexual offences where

²¹⁶ (n 6) 75.

²¹⁷ Rule 70 (d) of the Rules of Procedure and Evidence of the International Criminal Court ICC-ASP/1/3 ([http://www.icc-cpi.int/library/basicdocuments/rules\(e\).pdf](http://www.icc-cpi.int/library/basicdocuments/rules(e).pdf) (25.05.04))

²¹⁸ Rule 71 of the Rules of Procedure.

²¹⁹ (n 49) art 3.

²²⁰ S 100 of the Criminal Justice Act 2003 says that ‘ (1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if (a) it is important explanatory evidence, (b) it has substantial probative value in relation to a matter which (i) is a matter in issue in the proceedings, and (ii) is of substantial importance in the context of the case as a whole, or (c) all parties to the proceedings agree to the evidence being admissible. (2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and (b) its value for understanding the case as a whole is substantial. (3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant) (a) the nature and number of the events, or other things, to which the evidence relates; (b) when those events or things are alleged to have happened or existed; (c) where (i) the evidence is evidence of a person's misconduct, and (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct; (d) where (i) the evidence is evidence of a person's misconduct, (ii) it is suggested that that person is also responsible for the misconduct charged, and (iii) the identity of the person responsible for the misconduct charged is

consent is an issue, what constitutes probative may still be determined by reference to old stereotypes.

Until recently, the provisions excluded evidence of previous sexual relationships with the accused, this being similar to the regimes in Michigan and New South Wales.²²¹ In the UK, this was changed by *R v A*, bringing the legislation in line with the regime in Canada.²²² The concern must be that such evidence is not always relevant to the issue of consent,²²³ and judges have historically taken a questionable stance on what is relevant. The fact that leave is required for the defendant to cross-examine on this issue and not for the prosecution is thought to potentially compromise the principle of equality of arms.²²⁴ The YJCEA excluded evidence of a previous sexual relationship between the accused and the victim, although this was read down via the so-called 'similar fact gateway' of s 41 (3) (c) on the basis that in a recent or ongoing relationship, the victim is more likely to have consented.²²⁵ This undermines the protection afforded to women in such relationships. Nevertheless, Birch claims that '[i]t is still perfectly possible, even after accepting that there was a prior relationship, to conclude that the complainant did not consent on this occasion'.²²⁶

In practice, this does not appear to be borne out. A recent construction of a mock jury found that the effects of hearing evidence of a previous sexual relationship between the accused and the victim were that the victim's credibility was seriously

disputed, the extent to which the evidence shows or tends to show that the same person was responsible each time. (4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court'.

²²¹ Temkin 2002 (n 3) 207.

²²² *ibid*; text after n 339.

²²³ *ibid* 207.

²²⁴ Birch (n 66) 534; text between n 292 and n 328.

²²⁵ *R v A* (n 2).

undermined; she was more likely to be regarded as culpable in some way, and less likely to be believed in her claim that she had not consented to intercourse.²²⁷ There are a number of studies which suggest that myths surrounding rape between those known to each other are still prevalent and that only 'stranger rape' is regarded as real rape.²²⁸ Women attacked by those known to them, particularly partners and former partners, are significantly less likely to report the incidents to the police, even though they reported the greatest feelings of distress following the incident.²²⁹ This is undoubtedly influenced by the fact that these are the types of cases that are less likely to be proceeded with by the police, and less likely to result in a conviction.²³⁰

These factors suggest that the criminal process reflects social attitudes and has tended to regard only rapes perpetrated by 'strangers' as true rapes. Apart from police and CPS decision-making, the existence of this perception has been further evidenced by the ways in which the courts have traditionally sentenced the different sorts of rape — generally being more lenient in cases where the victim and perpetrator were known to each other.²³¹ The recent decision by the Court of Appeal in *Milberry*, following the advice of the Sentencing Advisory Panel, revised the guidelines for sentencing in rape, so that rape perpetrated by those known to the victim and rape perpetrated by

²²⁶ Birch (n 66) 542.

²²⁷ R A Schuller and P A Hastings 'Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions' (2002) 26 *Psychology of Women Quarterly* 252.

²²⁸ C A Ward *Attitudes Towards Rape* (Sage London 1995); P W Eastal 'Beliefs about Rape: A National Survey' in P W Eastal (ed) *Without Consent: Confronting Adult Sexual Violence* (Australian Institute of Criminology Canberra 1993) 21-34; Sentencing Advisory Panel *Attitudes to Date Rape and Relationship Rape: A Qualitative Study* Research Report no 2 (May 2002) [5.8].

²²⁹ Myhill and Allen (n 134) 41, 50.

²³⁰ J Harris and S Grace *A Question of Evidence? Investigating and Prosecuting Rape in the 1990's Home Office Research Study 196* (Home Office London 1999); Kelly and others (n 136) xi. It may well be that part of the reason that cases of this nature are proceeded with less is because the police and the CPS are anticipating the decisions of the court. According to the study by Lees, in contrast to the convictions secured in cases involving strangers, most of the cases involving parties where there had been a previous sexual relationship resulted in acquittals unless there had been extensive physical injuries caused to the victim Lees (n 1) 105.

strangers were to be treated as of equal seriousness.²³² Nevertheless, it is clear that social prejudice and myth continue to influence the thinking of those involved in the criminal justice system, and this affects their ability to protect women effectively from those who are most likely to rape them. It reinforces the clear message that women who have been raped by their partners and boyfriends need not bother seeking justice. Additionally, it is likely that defendants will make false assertions as to a previous sexual relationship with the victim. These claims will need to be assessed for their credibility if the trial is not to be prejudiced.

Defence claims that complainants have previously made false allegations are not uncommon.²³³ Many women who have experienced sexual abuse have experienced it more than once and cases of this nature are notorious for being unable to proceed.²³⁴ Furthermore, the research suggests that actual incidents of false complaints in rape cases are very low, possibly lower than for other crimes.²³⁵ In view of the stark number of incidents of rape and sexual violence that take place, this type of questioning must be very misleading without definite evidence that such allegations are false. This is a reflection of the failures on the part of the State and legal systems to protect women effectively from this type of abuse, or bring perpetrators to justice, and it seems misguided to say the least, to blame the victim for these failures. States such as Michigan have introduced bans on this type of questioning without evidence that such allegations are false.²³⁶

²³¹ Temkin 2002 (n 3) 41-44.

²³² *Milberry, Morgan and Lackenby* [2002] EWCA Crim 2891, (2003) 1 Crim App R 25; Sentencing Advisory Panel *Rape: The Panel's Advice to the Court of Appeal* (Sentencing Advisory Panel 2002) available from http://www.sentencing-guidelines.gov.uk/c_and_a/advice/rape/advice.pdf (27.07.04).

²³³ Temkin 2002 (n 3) 209.

²³⁴ *ibid.*

²³⁵ Text to n 135 and 136.

²³⁶ Temkin 2002 (n 3) 209.

This brief analysis of the procedural shortcomings in cases of rape indicates that provisions that were introduced to assist victims can only scratch the surface of the difficulties involved. It seems as though in order to make further inroads, victims need to have a greater procedural interest in the way the case is conducted.

G. RIGHTS UNDER ARTICLE 6 ECHR AND THE EMERGENCE OF VICTIMS' RIGHTS

As we have seen, there is some debate over whether the due process rights under Article 6 of the Convention are fundamental or absolute rights, with some arguing that due process rights are not only a mechanism for securing constitutional rights, but have value in themselves. Alexy argues that procedural rights are properly classed as positive duties, encompassing as they do, an entitlement to something.²³⁷ Fair trial rights generally could be classed as absolute (i.e. when they encompass rights against wrongful conviction) but the details of the right may be balanced with other positive duties to secure rights. In relation to criminal trials, the provisions of Article 6 (3) can be regarded as a list of (non-exhaustive) positive duties, which can be reconciled with other rights. As we have seen, Article 6 arguments in the UK have tended to attempt to triangulate rights under this article with public policy considerations, and the rights of witnesses, something that is strongly criticized by Ashworth.²³⁸ However, what is being suggested here is the reconciliation of these positive duties with positive duties under Article 3 of the Convention. As with common law rights, Article 6 has been

²³⁷ Alexy (n 26) 294-6; text between n 98 and n 101.

²³⁸ Ashworth (n 14) ch 2; A Ashworth 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) 120 LQR 263, 291; text to n 74.

articulated in terms of the individual's relationship with the State – what the ECtHR has described as '[t]he prominent place held in a democratic society by the right to a fair trial'.²³⁹ However, as we shall see, these descriptions more accurately define men's relationship with the State.

With regard to criminal trials, notions of 'fairness' tend to be framed in terms of the entitlements of the accused.²⁴⁰ Notions of procedural fairness for the victim have been underdeveloped. Recent developments however suggest a significant shift in thinking. The positive duties developed under Article 3 to maintain effective criminal law systems capable of punishing the offender may give the victim more of an interest in the way the case is conducted.²⁴¹ Additionally, some international treaties seem to be increasingly alert to the role of the victim in a criminal trial. The United Nations' *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states not only that '[v]ictims should be treated with compassion and respect for their dignity', but also that '[t]hey are entitled to access to the mechanisms of justice and to prompt redress...for the harm they have suffered'.²⁴² Additionally, the *Council Framework Decision on the Standing of Victims in Criminal Proceedings* makes a number of provisions. Paragraph 5 states that '[v]ictim's needs should be considered and addressed in a comprehensive, coordinated manner, avoiding partial or inconsistent solutions which may give rise to secondary victimisation'.²⁴³ This provision, however, falls short of obligating 'Member States to ensure that victims will

²³⁹ *Pretto v Italy* Series A no 71 (1984) 6 EHRR 182 [22]; *Delcourt v Belgium* Series A no 11 (1979-80) 1 EHRR 355 amongst many others.

²⁴⁰ *Kurup v Denmark* Appn no 11219/84 (1985) 42 DR 287, 291.

²⁴¹ Text between n 25 and n 76.

²⁴² Adopted by General Assembly Resolution 40/34 of 29th November 1985, art 4.

²⁴³ 15th March 2001 (2001/ 220 JHA).

be treated in a manner equivalent to that of a party to proceedings'.²⁴⁴ Nevertheless, the measures envisaged for victims include 'a real and appropriate role' in criminal justice; 'due respect for the dignity of the individual during proceedings';²⁴⁵ 'specific treatment' for victims that are especially vulnerable;²⁴⁶ restrictions on questioning except 'insofar as necessary for the purpose of criminal proceedings';²⁴⁷ rights to protection of the personal safety and privacy of victims and their families;²⁴⁸ and measures to protect victims 'from the effects of giving evidence in open court'.²⁴⁹

The *Recommendation of the Committee of Ministers to Member States on the Protection of Women against Violence* goes even further.²⁵⁰ The Appendix to the Recommendation makes specific reference to Article 6 of the ECHR and its applicability to women who have been victims of violence. It states that they are entitled 'to fair and equitable treatment, in particular to objective and considerate examination'; respect for their privacy, dignity and confidentiality, including 'the right to a hearing in camera'; 'to be heard in the best possible conditions so that the damage suffered may be established accurately'; to be informed about the progress of proceedings and their outcome; and 'the right to legal assistance'.²⁵¹ The Recommendation itself says that Member States should 'ensure that all victims of violence are able to institute proceedings as well as, where appropriate, public or private organisations with legal personality acting in their defence; either together with the victims or on their behalf'.²⁵² This appears to broaden the test of standing

²⁴⁴ *ibid* [9].

²⁴⁵ *ibid* art 1.

²⁴⁶ *ibid* art 2.

²⁴⁷ *ibid* art 3.

²⁴⁸ *ibid* art 8.

²⁴⁹ *ibid* art 8 (4).

²⁵⁰ Council of Europe Rec (2002) 5 adopted on 30th April 2002.

²⁵¹ *ibid* [84], Appendix.

²⁵² *ibid* [38].

which is usually used to determine human rights cases. States are also required to ‘make provisions to ensure that criminal proceedings can be initiated by the public prosecutor’,²⁵³ and to ‘encourage prosecutors to regard violence against women and children as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest’.²⁵⁴

Member States are also asked to put into place effective measures which take into consideration victims’ ‘medical and psychological state’;²⁵⁵ to ‘envisage the institution of special conditions for hearing victims or witnesses or violence in order to avoid the repetition of testimony and to lessen the traumatizing effects of proceedings’;²⁵⁶ to ‘ensure that rules of procedure prevent unwarranted and/or humiliating questioning for the victims or witnesses of violence, taking into due consideration the trauma that they have suffered in order to avoid further trauma’;²⁵⁷ to protect victims ‘against threats and possible acts of revenge’, and to ‘take specific measures to ensure that children’s rights are protected during proceedings’.²⁵⁸ All of these measures emphasize the development of procedural fairness for victims, particularly those of violent crime. These developments notwithstanding, notions of fairness for the victim are underdeveloped in ECHR jurisprudence.

So what, in ECHR terms, are the criteria used to determine whether a trial is fair? The concern of the courts in determining this question is to go beyond formal

²⁵³ *ibid* [39].

²⁵⁴ *ibid* [40].

²⁵⁵ *ibid* [41].

²⁵⁶ *ibid* [42].

²⁵⁷ *ibid* [43].

²⁵⁸ *ibid* [44] and [45].

appearances and examine ‘the realities of the situation’.²⁵⁹ The ECtHR will be less interested in the specific details of whether rights under Article 6 have been complied with, but will examine the proceedings as a whole.²⁶⁰ Article 6 sets out a number of rights. Article 6 (1) provides that:

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.

It also provides for public pronouncement of judgement however:

[T]he 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.

Paragraph 6 (2) provides for the presumption of innocence in criminal proceedings and 6 (3) lists some express rights as a ‘minimum’ including the ability ‘to defend himself in person or through legal assistance of his own choosing’, with such assistance being provided if the defendant cannot pay for it; and ‘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’. The rights implied into Article 6 include the rights of access to a court;²⁶¹ to be present at an adversarial hearing;²⁶² the right to equality of arms;²⁶³ the right to fair presentation

²⁵⁹ *Van der Sluis, Zuiderveld and Klappe v Netherlands* Series A no 78 (1991) 13 EHRR 461 [43].

²⁶⁰ *Ekbatani v Sweden* Series A no 134 (1991) 13 EHRR 504 [27]; *Jan-Ake-Andersson v Sweden* Series A no 212-B (1993) 15 EHRR 218 [22]; *Fejde v Sweden* Series A no 212-C (1994) 17 EHRR 14 [26].

²⁶¹ *Golder v United Kingdom* Series A no 18 (1979-80) 1 EHRR 524.

²⁶² *Colozza v Italy* Series A no 89 (1985) 7 EHRR 516 [27]; *Monnell and Morris v United Kingdom* Series A no 115 (1988) 10 EHRR 205 [58]; *Ruiz-Mateos v Spain* Series A no 262 (1993) 16 EHRR 505 [63]; *Brandstetter* (n 19) [66], [68]; *Zana v Turkey* Appn no 18954/91 (1999) 27 EHRR 667 [68].

²⁶³ *Delcourt* (n 239) [28]; *Feldbrugge v Netherlands* Series A no 99 (1986) 8 EHRR 425 [44]; *Dombo Beheer BV v Netherlands* Series A no 274-A (1994) 18 EHRR 213 [33]; *De Haes and Gijssels v Belgium*

of the evidence; to cross examine witnesses and to a reasoned judgement.²⁶⁴ This section will be focussing on the most pertinent aspects of Article 6 in relation to trials involving sex offences, including the right to an impartial tribunal, the cross-examination of witnesses, equality of arms, and a fair presentation of the evidence.²⁶⁵

1. Democratic Values and Impartiality

The entitlement to an impartial tribunal is one of the express rights in Article 6. In cases of rape however, as we have seen, the courts, and the evidential rules they have been applying have often appeared to demonstrate partiality in favour of the defendant.²⁶⁶ This view is reinforced by empirical analysis.²⁶⁷ These biases in favour of the defendant (which are further evidenced by the high acquittal rate), present difficulties in giving effect to women's democratic interest in procedural fairness.

In their decisions on the impartiality of tribunals under Article 6, the ECtHR has emphasized a number of important principles. In *Gregory v UK* the court said that:

[I]t is of fundamental importance in a democratic society that the courts inspire confidence in the public, and in criminal proceedings, in the accused. To that end, a tribunal ... must be impartial from a subjective, as well as an objective point of view.²⁶⁸

Appn no 19983/92 (1998) 25 EHRR 1 [53]; *Ankerl v Switzerland* Appn no 11748/91 (2001) 32 EHRR 1[38].

²⁶⁴ *Hadjianastassiou v Greece* Series A no 252-A (1993) 16 EHRR 219 [33].

²⁶⁵ In relation to reverse burdens of proof and the new Sexual Offences Act 2003 see Temkin and Ashworth (n 60) 342-4.

²⁶⁶ Text between n 129 and n 237.

²⁶⁷ Particularly Lees (n 1); Temkin 2000 (n 3).

²⁶⁸ Appn no 22299/93 (1998) 25 EHRR 577 [43]; Also, *Hauschildt v Denmark* Series no 154 (1990) 12 EHRR 266 [46]-[48]; *Fey v Austria* Series A no 225 (1993) 16 EHRR 387[28]-[36]; *Pullar v United Kingdom* Appn no 22399/93 (1996) 22 EHRR 391 [30]-[32]; *Ferrantelli and Santangelo v Italy* Appn

In determining whether the tribunal is subjectively impartial, the court will examine the ‘personal conviction and behaviour of a particular judge’.²⁶⁹ The impartiality of a judge is assumed unless there is ‘proof to the contrary’.²⁷⁰ In *Sander*, the ECtHR found this test to have been satisfied when jurors trying an Asian defendant in the criminal courts were heard to be making openly racist remarks and jokes, and the judge failed to discharge them. However, the court took the opposite view in *Gregory* where racial overtones in one juror led the judge (after hearing submissions from prosecution and defence) to give the jury a ‘firmly worded redirection’ that had been clear, forceful and understood. This case was distinguished from the earlier case of *Remli v France*.²⁷¹ Here, lawyers representing the applicant on charges based on him killing a warder, asked the court to take note of a racist comment made by one of the jurors. The court dismissed this application without hearing the evidence. The ECtHR held that there had been a violation of 6 (1). Although there was no obligation to discharge jurors who have made racist comments, the ECtHR will examine whether the judge’s actions are sufficient to ‘dispel the reasonable impression and fear of a lack of impartiality’.²⁷² This is the objective aspect of the test.²⁷³ In determining this aspect of the test, the court will seek to ascertain whether fear of impartiality is ‘objectively justified’.²⁷⁴ To that end, ‘the standpoint of the accused is important but not decisive’.²⁷⁵ Even where the ‘personal impartiality’ of the judge is not called into

no 19874/92 (1997) 23 EHRR 288[56]-[58]; *Sander v United Kingdom* Appn no 34129/96 (2001) 31 EHRR 44 [22] –[27] amongst others.

²⁶⁹ *Ferrantelli* (n 268) [56].

²⁷⁰ *Hauschildt* (n 268) [47].

²⁷¹ Appn no 16839/90 (1996) 22 EHRR 253.

²⁷² *Sander* (n 268) [30].

²⁷³ *Gregory* (n 268)[45] – [46].

²⁷⁴ *Remli* (n 271) [46]; Also *Hauschildt* (n 268) [46]-[48]; *Ferrantelli* (n 268) [58]; *Sander* (n 268) [27].

²⁷⁵ *Remli* (n 271) [46]; Also *Hauschildt* (n 268) [46]-[48]; *Ferrantelli* (n 268) [58]; *Sander* (n 268) [27].

question, fears of impartiality may be legitimate on the basis of ‘ascertainable facts’ about the judge or tribunal.²⁷⁶

It is clear from the statistics in relation to the number of unreported sexual crimes, that there is precious little confidence among women who have experienced this type of abuse. As we have seen, in cases of rape, judges regularly make comments based on stereotype and myth that could lead a victim to, quite reasonably, question their impartiality.²⁷⁷ Additionally, a number of procedural measures work against women in court, such as the irrelevant use of sexual history, which could bring into question whether the hearing really was an objective one. As victims have not had any form of redress, it has been difficult to apply these principles to them in cases of this nature. However, procedural interests for the victims could lead to comments such as these being challenged on human rights grounds.

In cases where the personal conduct of the judge is not called into question, the impartiality of the tribunal is unlikely to be able to be challenged solely on the basis of the gender, ethnicity, class background of a judge or other criteria of this nature for the purposes of Article 6.²⁷⁸ Nevertheless, there are problems in relation to public confidence when members of the judiciary are taken from a very limited section of the population. O'Donovan argues that the idea of democracy is usually grounded in notions of accountability to the public, part of which includes its representativeness so that citizens may see ‘their concerns presented as significant’.²⁷⁹ These ideals have

²⁷⁶ *Ferrantelli* (n 268) [58].

²⁷⁷ Text to n 130; text between n 130 and n 157; text to n 197.

²⁷⁸ Emmerson and Ashworth (n 24) 372.

²⁷⁹ K O'Donovan 'A New Settlement between the Sexes? Constitutional Law and the Citizenship of Women' in A Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish London 1996) 243, 246 citing S E Finer *Comparative Government* (Penguin 1970) 63.

spurred on feminist insistence that there be more women on the benches and in the Houses of Parliament.²⁸⁰ Furthermore, these principles were the inspiration behind the submissions to the House of Lords by the Fawcett Society in the case of *R v A*. The Fawcett Society argued that a tribunal made up exclusively of men should not have taken a decision of that nature,²⁸¹ although they were not successful in persuading the House of Lords of the strength of this argument.²⁸² Mary Stephenson, Director of the Fawcett Society stated of *R v A*:

Not surprisingly, how to strike this balance [between the defendant's right to a fair trial and the entitlement of the complainant to be protected from humiliating questioning] is a question on which there has always been a strong divergence of views between men and women. Yet, when the Court of Appeal decided this case, three male judges appealed to "common sense" and "human nature" to justify their decision.²⁸³

The concern expressed here is consistent with the concerns raised by feminists that human rights adjudication, whilst claiming to be universal, is, in fact, male-centred.²⁸⁴ Appearances are as important as the quality of decision-making and, in view of the problems associated with rape cases, the all male composition of the House of Lords in this case cannot inspire confidence that women's interests are effectively represented.

²⁸⁰ *ibid* 246.

²⁸¹ S Palmer 'Feminism and the Promise of Human Rights: Possibilities and Paradoxes' in S James and S Palmer (eds) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Hart Oxford 2002) 91, 102.

²⁸² The Society were refused permission to intervene in *R v A* on the basis of concerns over the representativeness of the judiciary in a case of this nature, without having the opportunity to persuade the law lords 'at an oral hearing' M A Stephenson 'Bad Judgement. A critical issue in rape trials is being decided by male law lords. Can't they see it is unacceptable?' *The Guardian* Tuesday 27th March 2001.

²⁸³ *ibid*.

²⁸⁴ Ch one p 10 – 60.

Article 7 of CEDAW requires States to ‘take all appropriate measures to eliminate discrimination against women in the political and public life of the country’. General Recommendation 23 states that this is a ‘broad concept’, which includes ‘the exercise of legislative, judicial, executive and administrative powers’.²⁸⁵ The Recommendation goes on to say that:

[s]ocieties in which women are excluded from public life and decision-making cannot be described as democratic. The concept of democracy will have real and dynamic meaning and lasting effect only when political decision-making is shared by women and men and takes equal account of the interests of both.²⁸⁶

The low proportion of women holding top ranking positions in political life and ‘in the judiciary and justice systems’ continues to be a problem.²⁸⁷ Furthermore, in their last report on the United Kingdom, the CEDAW committee noted ‘with concern that the numbers and percentage of women in public and political life, in the judiciary ... remain far from equal with men’.²⁸⁸ McGlynn considers the links between the makeup of the judiciary and the ways in which it carries out its constitutional responsibilities.²⁸⁹ Referring to the work of Griffiths²⁹⁰ about the class background of the judges and the ways in which this impacts upon their decision-making — reflecting a ‘concern to protect certain values and institutions’ — McGlynn suggests that a judiciary with a greater spread of social, gender and ethnic backgrounds ‘will bring

²⁸⁵ UN Committee for the Elimination of All Forms of Discrimination Against Women ‘General Recommendation 23’ 16th Session 1997 [5].

²⁸⁶ *ibid* [14].

²⁸⁷ *ibid* [30].

²⁸⁸ ‘United Nations Report of the Committee on the Elimination of Discrimination Against Women’ Twentieth Session (19th Jan – 5th Feb 1999); Twenty-first session (7-25 June 1999) GA Official Records 54th Session Supplement no 38 (A/54.38/Rev.1) [302]

²⁸⁹ C McGlynn ‘Judging Women Differently; Gender, the Judiciary and Reform’ in S Millns and N Whitty (eds) *Feminist Perspectives on Public Law* (Cavendish London 1999) 87, 87.

²⁹⁰ J A G Griffith *The Politics of the Judiciary* (London Fontana Press 1997).

different experiences to bear on its judgements'.²⁹¹ The make up of the judiciary will become a more pressing issue with their determination of human rights cases due to '[t]he inevitable increase in the public's interest' in how these cases are decided.²⁹²

In summary, the democratic values and impartiality protected by Article 6 are undermined in a number of ways. Some judicial attitudes towards rape complainants could be interpreted lacking impartiality, and may well, in some instances, pass the test for bias set out by the ECtHR. Some of the procedural mechanisms which exist and that are seen to work against complainants could also call into question the impartiality of proceedings. Furthermore, the democratic values underlying Article 6 are undermined by the fact that members of the judiciary are overwhelmingly male.

2. The Examination of Witnesses and Equality of Arms

The right to examine witnesses is one of the express rights set out in Article 6 (3). Cross-examination of witnesses is also a feature of the notions of fairness articulated in 6 (1).²⁹³ The right to equality of arms seeks to establish parity between the parties to a criminal trial.²⁹⁴ As we have seen, in rape cases much of the trial consists of the cross-examination of the victim, and it is in this context that the right under 6 (3) (d) needs to be considered.

²⁹¹ Although as McGlynn points out, there is some contradictory evidence on whether increasing the numbers of female judges will have an impact on the quality of decision-making McGlynn (n 289) 103.

²⁹² *ibid* 106.

²⁹³ Clayton and Tomlinson (n 18) 88-9.

²⁹⁴ *Delcourt* (n 239); *Jaspers v Belgium* Appn no 8403/78 (1982) 27 DR 61; *Bulut v Austria* Appn no 17358/90 (1997) 24 EHRR 84; *De Haes and Gijssels* (n 263) among others.

The principle of equality of arms is one aspect of the right to a fair trial guaranteed by Article 6 (1).²⁹⁵ The principle requires that ‘each party ... be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent’.²⁹⁶ This involves the prosecution disclosing ‘all material for or against the accused to the defence’.²⁹⁷ This notion of equality in the courtroom however, masks significant inequalities between victims and defendants in cases of rape. The victim’s testimony is regarded with suspicion, judges regularly undermine their testimony, and the defence is able to malign the victim’s character with relative impunity. As we have seen, it is now possible for the defendant’s previous convictions to be put into evidence,²⁹⁸ and this would not seem to fall foul of the Convention.²⁹⁹ A complainant in a rape case faces significant disadvantages, which are not addressed as issues of equality in the courtroom because the victim is not a party to the proceedings. Extending notions of fairness to include the victim would permit challenges on such issues to be made. Additionally, this would permit arguments to be made on the basis of Articles 6 and 14 in view of the inherent sexism associated with this type of procedural unfairness.

The right to cross-examine witnesses is not an absolute right, and it does not provide an ‘unlimited right to use arguments in defence’.³⁰⁰ Such a state of affairs:

[W]ould overstrain the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be

²⁹⁵ *Delcourt* (n 239) [28].

²⁹⁶ *Bulut* (n 294) [47].

²⁹⁷ *Edwards v United Kingdom* Series A no 247-B (1992) 15 EHRR 417.

²⁹⁸ Text between n 174 and n 187.

²⁹⁹ *X v Denmark* Appn no 2518/65 (1966) (18) CD 44.

³⁰⁰ *Brandstetter* (n 19) [50] – [54].

prosecuted when, in the exercise of that right, they intentionally aroused false suspicions of culpable behaviour on the part of a witness.³⁰¹

However, this perceived entitlement has been thought to justify the treatment of women in the courtroom, including tactics such as the use of sexual history evidence and the practice of maligning the complainant's behaviour at the time of the attack.³⁰² From a human rights perspective, this perception is misguided. The jurisprudence of the ECtHR has clearly indicated a number of situations where the positive duty to permit questioning of witnesses has been, and can be, limited to give effect to other positive duties owed to the complainant under the Convention. The ECtHR has found that these positive duties under Article 6 need to be reconciled with other positive duties under Articles 3, 5 and 8. In *Z v Finland*, the ECtHR held that very weighty reasons must exist before States compromise the confidentiality of medical data.³⁰³ In this case, the court recognized that:

[t]he interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime and in the publicity of court proceedings, where such interests are shown to be of even greater importance.³⁰⁴

The *Z* case involved the disclosure of medical records of a woman whose husband had been charged with sexual offences. Both were HIV positive and the prosecuting authorities were seeking to establish whether the defendant knew of his condition in order to ground charges for manslaughter. Given the 'very weighty public interests' involved, the court held that disclosure in this case did not breach the applicant's

³⁰¹ *Brandstetter* (n 19).

³⁰² Text between n 187 and n 216.

³⁰³ Appn no 22009/93 (1998) 25 EHRR 371.

³⁰⁴ *ibid* [97].

rights under Article 8.³⁰⁵ However, when read in combination with the decision in *Brandstetter*, this case does not give licence for the general disclosure of medical records of witnesses as a matter of course in criminal trials. In particular, reliance should not be placed on ‘stereotypes or unspoken and unproven assumptions about female or child complainants’.³⁰⁶ So, for example, using medical evidence that the complainant had had psychiatric problems years before the attack in order to discredit her testimony would be a violation of her rights under Article 8 of the Convention. Medical evidence concerning the victim’s sexual behaviour such as previous abortions or use of contraceptives would also appear to fall foul of the Convention.³⁰⁷ Nevertheless, it appears that in rape cases, this continues to occur. The review conducted by HMCPS Inspectorate discovered examples, albeit infrequent ones, of the CPS failing to balance the need to disclose with the need to adequately protect the victim’s privacy in relation to previous sexual history.³⁰⁸ Furthermore, victims have not had the right to be told that their medical records are being sought for disclosure purposes, nor any way of ensuring that their wishes on the subject can be considered.³⁰⁹

Limitations on the entitlement to question witnesses have also been allowed in sexual offence cases where the victim remains anonymous due to fear of reprisals.³¹⁰ This is because while:

³⁰⁵ *ibid* [102].

³⁰⁶ J Temkin ‘Digging the Dirt: Disclosure of Records in Sexual Assault Cases’ (2002) 61 *Cambridge LJ* 126, 134.

³⁰⁷ Issues such as the examples given here are now precluded by the YJCEA.

³⁰⁸ HMCPSI (n 6) 65.

³⁰⁹ Temkin (n 306) 135.

³¹⁰ *Baegen v Netherlands* (Appn no 16696/90).

Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration...their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases, the interests of the defence are balanced against those of witnesses or victims called upon to testify.³¹¹

This case offers support to victims of rape in cases of, for example, domestic violence where the victim has moved away to protect herself from further attacks. However, in the subsequent case of *Van Mechelen v Netherlands* it was held that the balancing exercise articulated in *Doorson* had tipped too far against the defendant.³¹² The defendant's convictions had been grounded mostly on the evidence of anonymous police officers and the defendant's lawyers had to question them through a sound link so that their demeanour could not be observed. The ECtHR held that there had been an insufficient assessment of the threat to the police officers and their families, and were not persuaded that the operational needs of the police justified this action, particularly in light of the fact that giving evidence in court was part of a police officer's duties.³¹³

It appears that in relation to sexual offences, the ECtHR is prepared to allow limitations on the ability to cross-examine, even where a subsequent conviction is based largely on that evidence. In *SN v Sweden* the victim, a minor, did not give evidence in court – the evidence that was submitted was by way of statements made

³¹¹ *Doorson* (n 7) [70].

³¹² (1998) 25 EHRR 647.

³¹³ A similar conclusion was reached in relation to the evidence of a social worker in *Re W (Children) (Care Proceedings: Witness Anonymity)* [2002] EWCA Civ 1626; [2003] 1 FLR 329.

during police interview.³¹⁴ Neither the defendant nor his counsel was able to put questions directly to the complainant. The ECtHR held that no violation of Article 6 had occurred. They held that:

Having regard to the special features of a criminal proceedings sexual offences ... [Article 6 (3) (d)] could not be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means.³¹⁵

The court appeared to be influenced by the fact that the defendant had accepted the way the police interview was conducted. The defendant's counsel was not present but was able to have questions put to the complainant by the police officer conducting the interview. The court held that while the evidence of witnesses given in circumstances where the defence is not able to exercise their normal entitlements should be treated with caution, the Swedish courts had taken into account that the evidence of the complaint was vague in some respects. The ECtHR was satisfied that in this case, sufficient care was taken with the statements given by the complainant.³¹⁶ This is to be contrasted with *PS v Germany*.³¹⁷ In this case, the defendant had been convicted of a sexual offence against an 8-year-old girl. The evidence relied upon was that given by the complainant's mother of the girl's account of the event, and a police officer who had interviewed the girl. There was no opportunity for questions to be put directly to the girl. The ECtHR held that there had been a violation of Article 6 (3) (d) in this case. These cases give some Convention support for measures taken to protect complainants in sexual offences from the trauma of giving evidence in court.

³¹⁴ Appn no 34209/96 (2004) 39 EHRR 13.

³¹⁵ *ibid* [52].

³¹⁶ *ibid* [49] – [50], [53].

³¹⁷ Appn no 33900/96 (2003) 36 EHRR 61.

There is also the potential that some types of treatment towards victims in cases of sexual offences might offend against the principles of Article 3. Unlike the other articles discussed in this section, Article 3 is an absolute right. As we have seen, the *Recommendation of the Committee of Ministers to Member States on the Protection of Women Against Violence* has suggested that measures be put in place which take into consideration victims' 'medical and psychological state';³¹⁸ to 'envisage the institution of special conditions for hearing victims or witnesses of violence in order to avoid the repetition of testimony and to lessen the traumatising effects of proceedings';³¹⁹ and to 'ensure that rules of procedure prevent unwarranted and/or humiliating questioning for the victims or witnesses of violence, taking into due consideration the trauma that they have suffered in order to avoid further trauma'.³²⁰ Some Article 3 jurisprudence has indicated that the minimum level of severity needed to ground claims under Article 3 can be reached by acute psychological suffering. In *Ireland* the ECtHR held that the level of severity needed to ground an Article 3 claim is 'necessarily relative, depending on all the circumstances, including the duration of the treatment, its physical or mental effects and, sometimes, the sex, age or state of health of the victim'.³²¹ This means that the acute psychological trauma experienced by victims who are questioned in this manner, particularly in light of the trauma they have already experienced, might reach the minimum level of severity needed for Article 3. In order for treatment to reach Article 3 severity, it would need to cause intense mental suffering arousing 'feelings of fear, anguish and inferiority capable of humiliating and

³¹⁸ n 250 [41]; text between n 250 and n 259.

³¹⁹ *ibid* [42].

³²⁰ *ibid* [43].

³²¹ *Ireland v United Kingdom* Series A no 25 (1979-80) 2 EHRR 25 [162].

debasing them and possibly breaking their moral or physical resistance'.³²² It was Article 3 that grounded a claim to the ECtHR by Julia Mason after her attacker questioned her in person in the witnesses box for days.³²³ Additionally, as we have seen, tactics such as harassing the victim,³²⁴ asking them intimate questions pertaining to menstrual cycles and handing round undergarments are designed to humiliate the victim.³²⁵ The effect of this on someone who has experienced the trauma of rape³²⁶ is likely to be greater³²⁷ and it is therefore arguable that it would fall within the criteria given to ground an Article 3 claim.

3. The Fair Presentation of Evidence

The fair presentation of evidence is another right that has been implied into the provisions of Article 6. This, along with the ability to question witnesses, is pertinent in the discussion of whether the defendant should be able to adduce evidence of a previous sexual relationship with the victim to assist his defence, despite the fact that consent should be sought anew on each occasion of intercourse. In *R v A* the court held that the failure to be able to adduce evidence of this nature would breach the defendant's 'absolute' right to a fair trial because consent to sexual intercourse on previous occasions goes to the complainant's state of mind.³²⁸ Emmerson and Ashworth argue that this decision is consistent with the provision that the accused

³²² *ibid* [167].

³²³ *M v United Kingdom* (n 7).

³²⁴ Temkin 2000 (n 3) 232.

³²⁵ Lees (n 1) 143.

³²⁶ The literature of the effects of rape on its victims is listed at n 121.

³²⁷ As acknowledged by *The Recommendation of the Committee of Ministers to Member States on the Protection of Women Against Violence* (n 250).

³²⁸ n 2; text between n 220 and n 226.

have ‘an adequate and effective ... defence’ as required by the Commission decision in *Kremers*.³²⁹

As with other positive duties, the decision in *Kremers* leaves open the question of exactly how this objective is to be achieved. In that case, the Commission held that the inability to ask the complainant questions that were distressing and had already been answered at other stages of the proceedings was not a violation of the defendant’s rights under Article 6.³³⁰ The positive duty towards the victim, which counterbalances claims of the defendant’s right to adduce evidence of a previous sexual relationship, is the obligation under Article 3 to instigate investigations capable of leading to the punishment of the offender. This obligation suggests that evidence of a previous sexual relationship could prejudice trials where the victim and the offender had had a previous sexual relationship. As we have seen, the criminal process has tended to regard ‘stranger’ rape as the only true rape, and is considerably less likely to proceed and convict in cases of this nature.³³¹ This compromises the ability to prosecute effectively in cases that are, by far, the most common type of sexual assault. If consent should be sought anew on each occasion, the requirement of an adequate and effective defence is not furthered by questions pertaining to previous sexual intercourse.

³²⁹ Emmerson and Ashworth (n 24) citing *Kremers v Netherlands* Appn no 26596/95 (19th October 1995).

³³⁰ *Kremers* (n 329) [5].

³³¹ Text between n 226 and n 230; ch two p 78 – 85.

H. RECONCILING POSITIVE DUTIES UNDER THE CONVENTION

At the beginning of this chapter, a formula developed by Alexy to resolve positive duties to secure rights was outlined. To briefly summarise these arguments, Alexy argues that entitlements to positive action are ‘subjective constitutional rights against the state to positive, factual or normative acts’.³³² The entitlements are ‘concerned with defining the spheres of equally ranked legal persons, along with the enforceability and enforcement of this delimitation’.³³³ These rights are essentially ‘rights that the state structure and maintain the legal system as it affects the interrelationship of equally ranked legal subjects in a certain way’.³³⁴ This is what this chapter seeks to achieve: the structure and maintenance of a legal system that protects victims of sexual violence and punishes its perpetrators.

Alexy argues for the subjectification of rights — particularly those which require a high level of protection. Only this ‘will satisfy the “original and ongoing point” of constitutional rights’.³³⁵ In the previous chapter we saw that freedom from sexual violence is a right that requires a high degree of protection. In terms of the ECtHR, rape is (mostly) classed as a violation of Article 3 of the Convention. This chapter has sought to make the case for the subjectification of violations of Article 3 by giving the victim additional rights within the criminal process. Alexy argues that the difference between positive and negative rights is more evident in the structure of protective rights.³³⁶ A prohibition on destroying or adversely affecting something

³³² Alexy (n 26) 300.

³³³ *ibid.*

³³⁴ *ibid.*

³³⁵ *ibid* 303.

³³⁶ *ibid* 307.

means that every act that represents or brings about that destruction is forbidden.³³⁷ This is mirrored in the absolute prohibition on inhuman or degrading treatment or punishment; there is no justification in ECHR law for an infringement of this prohibition. This negative structure is to be compared to the positive duty, which involves ‘a command to protect or support something’, but ‘not every act which represents or brings about that protection or support is required’.³³⁸ Once in the realm of positive duties, the formula looks a little different. If the rights that are being considered are of equivalent value, a balancing exercise has to be conducted between the acts considered to ascertain their effectiveness and whether they present an undue interference with the competing duty.

The above is an example of the rights that may be invoked. This chapter has identified three sources from which victims’ rights might be extrapolated. The first is the victim’s right to challenge the failure to try the accused in a manner that is capable of punishing them for their crimes as required by Article 3. The second potential source of victims’ rights is to ensure that the fair trial guarantees that exist for the defendant can also apply to victims. This would involve developing the jurisprudence of Article 6 so that victims do have some procedural interest in the criminal law. The third source is the rights of victims that arise in the course of their involvement in the criminal justice system, such as those under Articles 5 and 8. Certain measures could be classed as forming part of the positive duty under Article 3 and also the positive duty under Article 6. For example, measures that need to be employed in order to effectively investigate cases of rape (positive duty under Article 3), cannot be carried out if women have no confidence in the criminal justice system (Article 6 (1)), as

³³⁷ *ibid* 308.

suggested by the statistics. This in itself seriously undermines the ability to effectively investigate cases of rape.

How can these tensions be resolved? It is difficult in light of the aforementioned discussion to give P_2 — the positive entitlement to a full and effective defence - so much weight against P_1 that it justifies some of the strategies used in rape cases. For example, the remains of the corroboration warnings and the claims regularly made by judges that women make false allegations are damaging to all women, have scant credible empirical grounding, and is based purely on stereotype.³³⁹ It seems difficult, in these circumstances, to say that a defendant is entitled to rely on something based in falsehood or unchecked discrimination to secure an acquittal. Similar conclusions could be drawn from the reluctance displayed by the judiciary to accept cases of late complaints and the adverse inferences often made in cases of this nature. More and more cases of historical abuse are coming to light (particularly within the family), and the adverse inferences drawn about late complaints seem difficult to justify on the basis of the right to a fair trial. It is another example of seeming to ground procedural guarantees on empirical distortions.

The most difficult area in relation to reconciling positive duties under the Convention in cases of rape is the question of whether the accused should be able to adduce evidence of a previous consensual, sexual relationship to advance his full and effective defence. It has been argued here that in order to establish this entitlement as an equivalent value to the duty under Article 3 to conduct effective prosecutions, it would need to be articulated as a mechanism for protecting a strong right to liberty

³³⁸ *ibid.*

under Article 5 or protecting the defendant from the inhuman and degrading treatment associated with Article 3. However, it is the duty towards the complainant under Article 3 which has been insufficiently articulated and which must ground the debate in relation to the respective rights in, at least, equivalent terms. Partners/ex-partners most often perpetrate sexual violence and yet cases of rape that result in convictions tend to be those where a stranger attacked the victim. Societal perspectives about what constitutes ‘real rape’ influence decision-making in this area, and it seems clear that evidence of this nature is likely to seriously prejudice the victim’s case.

The prejudicial effect of the use of evidence of previous sexual history with the defendant was acknowledged in *R v A* when Lord Slynn stated that:

Evidence of previous sex with the accused also has its dangers. It may lead the jury to accept that consensual sex once means that any future sex was with the woman’s consent. This is far from being necessarily true and the question must always be whether there was consent to sex with the accused on this occasion and in these circumstances.³⁴⁰

Furthermore, women who have been victimized are far less likely to report the case to the police. It appears difficult to argue in these circumstances that the right to be protected from wrongful conviction is furthered by relying on something that appears to hamper the processing of rape cases so significantly. Furthermore, it goes against the principles of the elements of the offence. What has been proposed here is a human rights justification for limiting questioning which goes to suggesting that the defendant is entitled to rely on a previous consensual, sexual relationship to inform his reasonable belief that consent existed on the occasion in question.

³³⁹ Text between n 131 and n 136.

³⁴⁰ n 2 [4].

Some of the analysis here has been directed towards measures that are difficult to justify. However, the treatment of the respective positive duties as equivalent in value can challenge much of the questioning that victims have had to endure even where a corresponding duty to the defendant could plausibly be grounded. Claims that the complainant had previously made false allegations are usually based on extremely tenuous evidence and mask the state's responsibility for historically failing to protect women's fundamental rights. This is something that needs to be acknowledged if the obligations to punish perpetrators of sexual crimes are to be effective. The defendant's right to an effective defence could arguably be engaged where there is convincing evidence that the victim had previously made allegations that were false, but this is not conclusive in light of the corresponding obligation to protect physical integrity, regardless of the character of the complainant. Issues of this nature would need to be examined as issues of fairness between the parties. The more gender sensitive approach to investigations of rape cases advocated by *MC* could enable evidence of distress after the alleged event to be introduced. Measures such as this could shift the dynamics of a rape trial quite significantly. Finally, if notions of procedural equality — the principle of equality of arms — were extended to the victim, this might have implications for pre-trial disclosure and the use of character evidence in criminal trials.

I. CONCLUSIONS

This chapter has sought to challenge the procedures that compromise rape trials by the use of positive duties under Article 3 and developing notions of procedural fairness for the victim. There are deeper constitutional factors at work in this discussion: the

representation of women on the benches, questions of confidence in the criminal justice system, and women's relationship to the State in general terms. Nevertheless, this chapter aims to challenge entrenched views about procedural fairness in order to redirect the criminal justice system to deliver justice for victims of rape.

PART TWO

HUMAN RIGHTS AND WOMEN IN PRISON

4.

**THE HUMAN RIGHTS OF WOMEN PRISONERS:
SUBSTANTIVE CASE LAW UNDER THE ECHR AND THE
TREATMENT OF WOMEN IN PRISONS**

A. INTRODUCTION

Chapter one outlined the feminist critique of human rights doctrine. The basis of human rights doctrine in liberal political and legal theory has failed to tackle the oppressive conditions experienced by women, and has marginalized their experiences of human rights violations.¹ This part of the thesis will consider these issues as they relate to female prisoners. Chapter 5 will seek to develop a new paradigm for evaluating human rights claims for women in prisons. This chapter will consider the substantive case law under the European Convention on Human Rights (ECHR) and examine the extent to which it addresses the particular needs of female prisoners.² Mirroring the arguments put forward by MacKinnon, it will suggest that penal institutions can be seen in the same way as the law, designed with men in mind, and where notions of equality mean treating women like men.³ This chapter will examine some of the decisions of the European Court of Human Rights (ECtHR) on prisoners in general and see how they can be applied to the needs of female prisoners, particularly in relation to Articles 2, 3, 8 and 14. It will argue that while many of these

¹ Ch one p 10 – 60.

² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR).

³ C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press Cambridge Mass 1987) 73, 167-8; B Hudson 'Punishment and Control' in M Maguire, R Morgan and R Reiner (eds) *Oxford Handbook of Criminology* (3rd edn Oxford University Press Oxford 2002) 233.

decisions concern the plight of male prisoners, there is some scope for the development of human rights arguments to assist female prisoners.

B. FEMINIST THEORY AND PENALITY

The weaknesses in liberal feminist thought discussed in chapter one are highlighted by the plight of female prisoners. MacKinnon criticizes liberalism's neutrality which makes that which is available to men available to women, for being based on 'the assumption that sex inequality does not really exist in society'⁴ and the judicial preference for the status quo, be it economic, gendered or legislative.⁵ These factors maintain sexualized gender inequality so that, for example, the law will not intervene in the buying and selling of women as prostitutes and permits the continued impoverishment and therefore dependence of women making them 'available for sexual or reproductive use'.⁶ She suggests that this 'gender neutral approach...obscures...the fact that women's poverty, financial dependency, motherhood, and sexual accessibility...substantively make up women's status *as women*'.⁷ Evidence of MacKinnon's criticisms can be seen in the manner that the penal system makes available the same punishments (such as imprisonment) for women, whilst overlooking the relationship between poverty, family difficulties and much female offending,⁸ and in obscuring the disproportionate effects of imprisonment on women and their families.⁹ The principles of formal, equal treatment

⁴ MacKinnon (n 3) 163.

⁵ *ibid* 167.

⁶ *ibid* 168.

⁷ *ibid* 73.

⁸ Text to n 33.

⁹ Text between n 134 and n 136; text after n 200.

also mask pre-existing inequalities.¹⁰ This can be illustrated by, for example, the pre-existing financial dependence that may prevent women from paying fines,¹¹ or the extensive victimization that women in prison have already experienced.¹²

The prison system itself is said to be organized and in terms of 'masculinities', what we might term 'structured masculinities', manifested in the hierarchical cultures and in its organization and management.¹³ Herein lies the problem. The prison system is designed to cater for male offenders and fails to take 'account of the distinctive features of women's patterns of offending and needs'.¹⁴ There appears to be a 'mismatch between the present state of women's prisons and the needs of women currently being sent to them'.¹⁵ Women suffer a double blow. Large numbers of the female population have experienced severe victimization and the emotional problems appear, in no small part, to stem from these experiences. The prison regime was not designed to cater for them and therefore has a disparate impact on their family lives in comparison to their male counterparts. It is in this way that the 'structured masculinities' argument can be said to mirror the 'structured male' argument advanced by MacKinnon. Penal institutions, by applying the same principles to male prisoners as to female prisoners, fail to acknowledge gender inequalities that exist both in life and within the penal system. This masks the manner in which the penal system may exacerbate these inequalities. This is further illustrated by the decisions of the ECtHR, which, while equally applicable to female prisoners, are brought mostly by, and appear

¹⁰ C Sunstein 'Feminism and Legal Theory' (1988) 101 Harvard L Rev 826, 829.

¹¹ Ch five p 289 – 290.

¹² Text between n 73 and n 79; text between n 91 and n 96.

¹³ E Carrabine and B Longhurst 'Gender and Prison Organisation: Some Comments on Masculinities and Prison Management' (1998) 37 The Howard J 161.

¹⁴ Prison Reform Trust *Justice for Women: The Need for Reform. Report of the Committee on Women's Imprisonment* (Prison Reform Trust London 2000) 15.

¹⁵ P Carlen *Sledgehammer* (MacMillan Basingstoke 1999) ix.

to address issues that arise for, male prisoners with little attention to those issues that relate to female prisoners.

Other branches of feminist thought are also instructive. A more socialist feminist perspective might place more emphasis on the interplay between gender and poverty, articulated by, for example, Pat Carlen.¹⁶ As examined in chapters one and two, black feminists argue that discrimination on the bases of race and gender intersect, producing particular disadvantage for women from ethnic minority groups.¹⁷ This is of particular importance in view of the high numbers of ethnic minority women in prison as a proportion of their numbers in the population.¹⁸

C. WOMEN IN PRISON

1. Numbers

There is some statistical evidence to back up the claims made by feminists. Whilst the number of female prisoners remains small in comparison to male prisoners, their numbers have increased dramatically in recent years. In 1992, female prisoners represented 3.4 per cent of the national average prison population.¹⁹ In 2002, this figure was 6.1 per cent.²⁰ In 1992, the annual average female prison population was

¹⁶ *ibid* 56.

¹⁷ Ch one p 25 – 26; ch two p 68 – 70.

¹⁸ Text between n 33 and n 43.

¹⁹ Home Office *Prison Statistics in England and Wales 2002* (Home Office London 2002 Cm 5996) 7; Home Office *Statistics on Women and the Criminal Justice System: A Home Office Publication under S 95 of the Criminal Justice Act 1991* (Home Office London 2004) available from <http://www.homeoffice.gov.uk/rds/pdfs2/s95women03.pdf> (26.6.04).

²⁰ *Statistics on Women and the Criminal Justice System* (n 19) 33; *Prison Statistics in England and Wales* (n 19) 7.

1,577. This rose by 173% to 4,299 in 2002. The male prison population increased by 50% during this time.²¹

A little in excess of 43 per cent of females sentenced in the Crown Court received prison sentences in comparison to fewer than 30 per cent in 1994.²² This is so despite the fact that the numbers of women sentenced by the Crown Court has remained stable. One possible conclusion that could be drawn 'is that the rise in sentenced prison receptions for females is being driven by a *more severe* response to *less serious* offences'.²³ Whilst the proportions sentenced to custody at the Magistrate's Court remain low, the rates at which the use of imprisonment have increased are significant. Custody was three times more likely to be used in 2002 than in 1994.²⁴

Of the adult female prison population, the most common length of sentence was between one year and four years.²⁵ The Home Office report on women in the criminal justice system states that most receptions into female prisons are for the offence

²¹ *Statistics on Women and the Criminal Justice System* (n 19) 33; *Prison Statistics in England and Wales* (n 19) 7.

²² *Statistics on Women and the Criminal Justice System* (n 19) 21.

²³ *ibid.*

²⁴ *ibid* 22.

²⁵ This was followed by sentences of between four years and less than ten years, and sentences of less than one year *Prison Statistics in England and Wales* (n 19) 18. According to the prison statistics, there were 3,339 females prisoners under sentence on 30th June 2002. This is to be compared to the above figure, which is the average number of female prisoners under sentence for the whole year. Of these women already in prison, 230 had received sentences for burglary, 310 for robbery, 462 for 'theft and handling' and 122 for fraud and forgery. One thousand three hundred and thirty one women had received sentences for drugs offences. This means that those who had committed non-violent property crimes accounted for the second highest number of female prisoners – some 1, 053. This number is the total number of custodial sentences received for females convicted of burglary, theft and handling, fraud and forgery, motoring offences, criminal damage, blackmail, perjury, libel or perverting the course of justice, breach of a court order, 'other', 'offence not recorded' and those 'in default in payment of a fine'. However, these statistics provide only a snapshot of the current female prison population at a particular point in time *Prison Statistics in England and Wales* (n 19) 22.

category of 'theft and handling'.²⁶ Forty per cent of women received into prison under sentence in 2002 were for this type of offence, 19 per cent for 'other' offences, 13 per cent for drugs related offences, and twelve per cent for offences of violence.²⁷ Higher proportions of women were received into prison under sentence for the offence categories of theft and handling, fraud and forgery and drugs related offences than men.²⁸

The numbers of women in prison for burglary have seen a dramatic increase from 51 in 1992, to 230 in 2002 (350 per cent). In addition, the numbers of women in prison for robbery have gone up in the last 10 years from 56 in 1992, to 310 in 2002 (453 per cent). The numbers of women in prison for theft and handling have increased from 190 in 1992 to 462 in 2002. For fraud, these figures are 53 in 1992, to 122 in 2002. Imprisonment of women for drugs related offences has increased from 259 in 1992, to 1,331 in 2002 — an increase of 414 per cent.²⁹

All sentence lengths have seen considerable increase in the past ten years.³⁰ However, the number of fine defaulters in prison appears to buck the trend of ever-increasing numbers. On 30th June 1992, there were 382 male and female fine defaulters in prison. Females accounted for 23 of these. The number of males and females in prison for fine default then started to decrease dramatically after 1995. There were five female fine defaulters in prison on 30th June 1996 and 136 male fine

²⁶ *Statistics on Women and the Criminal Justice System* (n 19) 34.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *Prison Statistics in England and Wales* (n 19) 26.

³⁰ In 1992, there were 227 women sentenced to custody for periods of less than 12 months. By 2002, this has increased to 610. In 1992, 467 women were serving prison terms of between 12 months and less than 4 years. By 2002, this had increased to 1,394. In 1992, there were 481 women serving prison terms of between 4 years and life. By 2002, this had increased to 1,335. The largest increases appear to be in sentences of over 12 months (*ibid* 28).

defaulters. The number of female fine defaulters in prison has stayed at that rate, and the numbers of male fine defaulters sent to prison has continued to decline.³¹

Research by Woodbridge and Frostega suggests that three factors interact with each other to produce the increases in the numbers of women in prison.³² These factors are the increase in the number of female defendants before the courts, increases in the numbers of convicted women sent to prison, and increases in the length of sentences imposed. The influence of these factors on the higher numbers of women in prison varies over time. For example, they argue that before 1996, half of the increase was due to an increase in the use of custody for women, whereas post 1996, 95 per cent of the increases could be accounted for by the higher number of women appearing before the courts. Reflecting the socialist feminist perspective, Carlen argues that the increases in the number of women being sent to prison in the 1990's is due to the increases in the numbers of women in disadvantaged social and economic groups who are more likely to be imprisoned, combined with 'the increased punitiveness of the courts towards female offenders in general'.³³

2. Women from the ethnic minorities

The study by Walmsley *et al* found that ethnic minorities were over-represented in the prison population.³⁴ In 1991, when this study was conducted, 15 per cent of male and 23 per cent of female prisoners described themselves as Black or Asian. These groups

³¹ *ibid* 28.

³² J Woodbridge and J Frosztega *Recent Changes in the Female Prison Population* (London Home Office 1998) cited in F Heidensohn 'Gender and Crime' in M Maguire, R Morgan and R Reiner (eds) *Oxford Handbook of Criminology* (3rd edn Oxford University Press Oxford 2002) 493, 505.

³³ Carlen (n 15) 56.

only represented five per cent of the general population.³⁵ On 30th June 2002, 29 per cent of the female prison population comprised members of ethnic minority groups.³⁶ In 2002, black female prisoners made up the largest ethnic minority population, accounting for 24 per cent of the female prison population.³⁷

The biggest increase in prison numbers has been in foreign nationals. Their numbers in the prison population has increased 120 per cent since 1993 in comparison to a 55 per cent increase amongst British nationals. A considerable part of the increase in foreign nationals within the UK prison population has been since 2000.³⁸ Foreign nationals account for a greater proportion of prisoners from ethnic minorities than white prisoners. In 2002, sixty per cent of the black female prison population were foreign nationals in comparison to five per cent of the white female prison population.³⁹ Amongst the white female prison population, 27 per cent had been convicted for drugs offences, whereas 75 per cent of the black female prison population had been convicted for drugs offences.⁴⁰

Despite the greater number of foreign nationals, the amount of British ethnic minority women in prison remains dramatically high in comparison to their white counterparts.⁴¹ These higher numbers in relation to race can be attributed to more

³⁴ R Walmsley, L Howard and S White *The National Prison Survey 1991: Main Findings* (HORS 128 HMSO London 1992).

³⁵ *ibid* vii.

³⁶ *Prison Statistics in England and Wales* (n 19) 114.

³⁷ Those from South Asia and 'Chinese and others' made up 1 and 5 per cent of the female prison population respectively (*ibid* 115).

³⁸ Sixty per cent of female foreign nationals in UK prisons were West Indian, 18 per cent were European, 11 per cent were African, and four per cent were from Asia.

³⁹ *Prison Statistics in England and Wales* (n 19) 117.

⁴⁰ *ibid* 118.

⁴¹ C Phillips and B Bowling 'Racism, Ethnicity, Crime and Criminal Justice' in M Maguire, R Morgan and R Reiner (eds) *Oxford Handbook of Criminology* (3rd edn Oxford University Press Oxford 2002) 579, 602.

punitive sentencing in relation to members of the ethnic minorities, the fact that the ethnic minority population tends to be younger (and thus more likely to belong to a section of society that is more likely to offend) 'and the effects of discrimination in the criminal justice system'.⁴² Once this is combined with the factors that are said to influence the greater numbers of women being sent to prison, then the high numbers are, to some extent explicable.

3. Women with Dependants

Figures provided by HM Prison Service suggest that approximately 55 per cent of women in prison have at least one child under the age of 16, and more than one-third have a child under the age of five.⁴³ Women are therefore more likely to have been the primary carers of children or other relatives before their imprisonment. This role does not end once a woman is imprisoned. The Prison Service reports a higher incidence 'of ongoing housing problems and child custody hearings' for female prisoners.⁴⁴ The most recent in depth study in 1997 by Caddle and Crisp found that of the 1,766 women that they questioned, 61 per cent were mothers of a child under 18 years of age or were pregnant.⁴⁵ Mothers in prison were also more likely to be single parents (27 per cent as opposed to eight per cent in the general population). The women interviewed had a total number of 2,168 children between them, nearly one-third of them less than five years of age. Nearly 75 per cent of the children lived with their mothers before

⁴² *ibid* 602.

⁴³ B Ash (ed) *Working with Women Prisoners* (4th edn Women's Estate Policy Unit; HM Prison Service London 2003) <http://www.hmprisonservice.gov.uk/resourcecentre/publicationdocuments/> (16.09.04).

⁴⁴ *ibid*.

⁴⁵ D Caddle and D Crisp *Mothers in Prison* (Home Office Research Findings 38 Home Office London 1997); D Caddle and D Crisp *Imprisoned Women and Mothers: A Research and Statistics Directorate Report* (HORS 162 Home Office London 1997).

imprisonment, and 'some with their mothers only'.⁴⁶ This meant that 'most of the children lost their principal carer and a third their only carer when their mother was imprisoned'.⁴⁷ This differed from the situation for male prisoners whose partners generally cared for the children when they were in prison.⁴⁸ Women were more likely to rely on temporary carers to take care of their children, usually grandparents and other female relatives (41 per cent). The financial implications for the temporary carers were significant, and they were often poorly equipped to meet these additional financial burdens.⁴⁹ The study by Richards and McWilliams found that those who cared for the children of female prisoners had to cope with part or full time work in addition to their care responsibilities. Forty-three per cent of such carers had jobs, and 25 per cent were already caring for others. This is in contrast to the carers of male prisoner's children. Only two had full time jobs or other caring responsibilities.⁵⁰

The Caddle and Crisp study found that the fathers of the children were only taking care of them in nine per cent of cases, and in eight per cent of cases, children were placed in the care of local authorities. Forty-four per cent of children whose mothers had been imprisoned experienced behavioural problems and 30 per cent

⁴⁶ *Mothers in Prison* (n 45) 2.

⁴⁷ *ibid* 2.

⁴⁸ This is consistent with the findings by M Richards and B McWilliams 'Imprisonment and Family Ties' Home Office Research Bulletin 38 (Home Office Research and Statistics Directorate London 1996) 3 who found that the majority of the male prisoners with children were living with a partner before imprisonment whereas 67 per cent of female prisoners with children were lone parents. This meant that the children of male prisoners tended to stay with their partners whereas the children of female prisoners were more likely to be cared for by other family members. Furthermore, whilst the children of male prisoners were able to stay in the family home, the children of female prisoners were more likely to face 'considerable disruption'. In addition, the *National Prison Survey* found that the proportions of prisoners who had dependants living with them prior to imprisonment was higher for women (47 per cent) than men (32 per cent). Over 90 per cent of male prisoners with dependants said that their partners or former partners were involved in caring for the children. This is in contrast to 25 per cent of female prisoners (viii).

⁴⁹ *Mothers in Prison* (n 45) 2.

⁵⁰ Richards and McWilliams (n 48) 3.

became withdrawn. Most children (over 60 %) knew that their mother was in prison.⁵¹ This mirrors the findings by Richards and McWilliams who found that the behavioural problems experienced by children whose mother was in prison were significantly greater than those experienced by children whose fathers were in prison. The children of the former reported 'being angry and rejected or upset and tearful', whereas the children of the latter reported difficulties that seemed quite minor such as cheekiness and naughtiness — often associated with the loss of the father's disciplinary role.⁵² This in turn appeared to have an effect on the quality of the relationships between parent and child, with women significantly 'less likely to describe it as good/very good than were the men and were likely to report more difficulties'.⁵³ This was reflected further in the quality of relationships upon release. Mothers found it far more difficult to re-establish good relationships with their children following their release, whereas the children of male prisoners were able to adjust with relatively few problems.⁵⁴

The qualitative study conducted by Angela Devlin reinforces these findings.⁵⁵ She joins groups such as the Howard League in questioning the benefit to the State of imprisoning mothers in view of the 'psychological, emotional and material damage done' to the children of female prisoners and ultimately, to society as a whole.⁵⁶ A number of reform groups consider the imprisonment of women who are mothers 'a barbaric practice'.⁵⁷ Women in this study reported anxiety over being sent to prison without having the opportunity to make proper childcare arrangements, or even

⁵¹ *ibid* 2.

⁵² *ibid* 4.

⁵³ *ibid*.

⁵⁴ *ibid* 5.

⁵⁵ A Devlin *Invisible Women: What's Wrong with Women's Prisons?* (Waterside Press Winchester 1998).

⁵⁶ *Prison Mother and Baby Units* Howard League (1995) cited in Devlin (n 55).

⁵⁷ Devlin (n 55) 56 referring to the Howard League and the Royal College of Midwives.

contact their children beforehand, causing them acute distress. Women who had no friends or family to support them had to allow their children to reside with their fathers, who 'they may despise and may in the past have abused them'.⁵⁸ Devlin argues that:

'[I]t is often the *manner* of separation that is so devastating. There is now a general consensus among childcare experts that children cope much better with a period of separation from their parents ... if there is careful preparation and the child is told the true situation well in advance'.⁵⁹

Many of the difficulties could be resolved if women were allowed home shortly after the beginning of their sentence to check on their children's welfare. Women are disadvantaged in relation to the rules granting a temporary licence for home leave often because their sentences are too short. Nevertheless, the disruption caused to women's families as a result even of short sentences is significant. The rules on temporary release were modified after escapes from male prisons HMP Parkhurst and Whitemoor and these rules were applied to women.⁶⁰ Many women in this study were also concerned about the continued accumulation of debt (which may have had a bearing on their original offence) whilst in prison. In addition, none of the women received advice on the best way of reducing the impact of imprisonment upon their children. Many women reported exacerbated feelings of guilt and failure as a result of not being able to look after their children on a daily basis. Attempting to run the family home and the needs of their families were uppermost in their minds, in contrast

⁵⁸ Devlin (n 55) 46.

⁵⁹ *ibid* 47.

⁶⁰ Also, *Justice for Women* (n 14) 22-4.

to male prisoners who were simply concerned with 'their baccy, their meals and whether they're top dog in prison'.⁶¹

4. Suicide in Women's Prisons

According to the Prison Statistics, there were 94 self-inflicted deaths of prisoners (85 male and nine female) in 2002, up from 72 in 2001.⁶² The rate per 1,000 prisoners increased from 1.1 in 2001 to 1.3 in 2002. Of the 94 deaths in 2002, 75 (or 80 per cent) were in adult male establishments, nine (or 10 per cent) were in female establishments, and 10 (or 11 per cent) were in young offender institutions.⁶³ In 2003, there were 14 deaths of female prisoners, and in 2004, there were 11 deaths for the period until June.⁶⁴ The Thematic Review conducted by HM Chief Inspector of Prisons found that in excess of 40 per cent of women interviewed for the study said that they had intentionally harmed themselves or attempted suicide. The reasons for this varied, and included 'histories of physical and/or sexual abuse, family and relationship problems, depression and stress'.⁶⁵ In addition, testing of psychiatric morbidity among prisoners found that the rates of suicidal thoughts and suicide attempts were greater among female prisoners than among male prisoners.⁶⁶

⁶¹ Devlin (n 55) 54.

⁶² *Prison Statistics England and Wales* (n 19) 194. 'The Prison Service classifies prisoners' deaths as self-inflicted for all coroners verdicts of suicide, death by misadventure, open verdicts and accidental deaths'.

⁶³ *ibid.*

⁶⁴ The Howard League *Another Woman Dies in Prison, Bringing the Total to 61 in just 10 Years* <http://www.howardleague.org/press/2004/300704.htm> (21.09.04). In 1994-2003, there were nine suicides in New Hall, nine in Holloway and eight in Styal.

⁶⁵ Her Majesty's Inspectorate of Prisons for England and Wales *Women in Prison: A Thematic Review by HM Chief Inspector of Prisons* (Home Office London 1997) 14.

⁶⁶ N Singleton, H Meltzer and R Gatward *Psychiatric Morbidity Amongst Prisoners: A Summary Report* (Office of National Statistics London 1998) available from http://www.statistics.gov.uk/downloads/theme_health/Prisoners_PsyMorb.pdf (21.09.04) 18.

The Howard League argues that self-harm in women and girls is more common in prisons with ‘the most transient and uncertain populations’, with local prisons such as Holloway having the greatest number of incidents.⁶⁷ There was a fairly even spread between self-harmers that were on remand and those that were under sentence. Twenty-seven per cent of incidents were among girls aged 15 to 20, and 41 per cent of self-harmers were between 21 and 29 years old. Most self-harm incidents occur within the first six months of imprisonment.⁶⁸ Despite the underlying problems of those who self-harm, it is often treated as a punishable offence, with women sent “down the block” for engaging in this type of activity.⁶⁹ Others see it as an inconvenience or as mere attention seeking. Furthermore, women who self harm often receive no help.⁷⁰

Whilst the suicide rate per 100,000 of the prison population may be comparable between male and female prisoners,⁷¹ when compared with suicide rates outside prison there is a significant discrepancy. The suicide rate for men is three times higher in the general population than for women.⁷² The Howard League offers a number of reasons for this difference. Women in prison are more likely to self-harm because separation from their children has a greater impact on them than on men (cited as a reason for self-harm in view of the distances of female prisons from a woman’s family). A

⁶⁷ The Howard League for Penal Reform *Suicide and Self-Harm Prevention: Repetitive Self-Harm among Women and Girls in Prison* (Howard League London 2001) 4. Holloway (local prison) had the highest number of self-harming incidents in 2001, followed by New Hall (closed training YOI) at 181 and Brockhill (local) at 109 (source HM Prison Service Safer Custody Group 2001).

⁶⁸ *ibid.* The majority of women harmed themselves by ‘cutting/scratching’ (435), hanging (229) or ‘noose/ligature’ (source HM Prison Service Safer Custody Group 2001).

⁶⁹ Devlin (n 55) ch 12.

⁷⁰ *ibid.*

⁷¹ G Sattar *Rates and Causes of Death among Prisoners and Offenders under Community Supervision* (HORS 231 Home Office London 2001) 36; A Liebling ‘Suicide among Women Prisoners’ (1994) 33 *Howard Journal* 1.

⁷² Howard League of Penal Reform *Desperate Measures: Suicides and Their Prevention* (The Howard League London 1999) 10.

number of female prisoners have a history of abuse; they are more likely to have problems with drugs or more likely to be remanded in custody whilst waiting for a psychological or psychiatric report.⁷³

Liebling also offers reasons for the discrepancy. She argues that, in the first instance, the prison population represents ‘a highly selected and specifically “at risk” group’.⁷⁴ Whilst this selection might also be applicable to the male prison population, it may be more pointed in the case of women prisoners. The female prison population is far more likely to exhibit characteristics associated with suicide risk such as a history of treatment for psychiatric problems, suicide attempts, abuse of alcohol or drugs, social and financial disadvantage, and histories of physical and sexual abuse.

Liebling has argued that these characteristics are so common among the female prison population, that it is hard to distinguish those who would attempt suicide from the general female prison population. This is in contrast to the male prison population where those who had these characteristics could be distinguished from the male prison population.⁷⁵ Additionally, Liebling cites the specific gender effects of imprisonment on women in relation to the impact that it has on them and their families. She suggests that in view of the concerns that women express about family issues, regime changes may not go far enough to tackle this source of distress and thus the suicide problem. Other measures such as better provision for visits, and being imprisoned nearer home may be equally important. Specific issues mentioned by female prisoners causing distress include children being taken into local authority care, the loss of their homes,

⁷³ *ibid.*

⁷⁴ Liebling (n 71) 3.

⁷⁵ Differences between male and female prisoners in relation to suicide are discussed in A Liebling *Suicides in Prison* (London Routledge 1992) ch 7.

‘sexist and racist practices, closer surveillance and control by drugs and the frustration of dependence on outside agencies for help’.⁷⁶ Furthermore, many women enter prison with emotional problems and difficulties that the prison service is not equipped to address. Liebling also argues that self-harmers tend to attract ‘pseudo-psychiatric diagnoses’ which may create the ‘false assumption that the behaviour is irrational, meaningless, and unrelated to suicide’.⁷⁷ She argues that ‘[p]eople who injure themselves are far more likely to go on to commit suicide at some later stage, without help, or without some change to their life situation’.⁷⁸ The situation that women prisoners find themselves in, and the prison environment have a part to play in suicides.⁷⁹

5. Mental Illness

The report by the Office of National Statistics found that 40 per cent of female prisoners had received treatment or help for ‘mental or emotional problems’ in the 12 months before imprisonment, in comparison to 20 per cent of male prisoners.⁸⁰ Additionally, female prisoners were more than twice as likely as male prisoners to have been admitted into a mental hospital: 22 per cent in comparison to eight per cent.⁸¹ Fifty per cent of female prisoners suffered from a personality disorder, in comparison to 78 per cent of male remand prisoners, and 64 per cent of male sentenced prisoners. Psychosis was higher in the female prison population (14 per cent in comparison to seven per cent of male sentenced and 10 per cent of male

⁷⁶ Liebling (n 71) 5.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ *ibid* 6.

⁸⁰ Singleton, Meltzer and Gatward (n 66).

⁸¹ *ibid* 9. These figures include prisoners on remand as well as sentenced prisoners.

remand prisoners). Women were also more likely to exhibit symptoms of neuroses (particularly within the sentenced population). Additionally, large proportions of prisoners exhibited symptoms of more than one disorder.⁸²

Mental health care concerns continue to be ‘a major problem at Holloway and Eastwood Park’, with ‘unacceptably low’ levels of staff in wings housing mentally ill prisoners and ‘no female psychiatrists’.⁸³ Furthermore, the practice of over medicating distressed prisoners has been criticized, especially in view of the ‘outmoded’ and ‘addictive’ nature of the drugs prescribed.⁸⁴ Concerns have been expressed about the lack of training in self-harm and suicide awareness for prison staff at Highpoint North.⁸⁵ There is also limited access to mental health services at this prison.⁸⁶ The high number of inmates with substance abuse and acute mental health difficulties at Eastwood Park has led the Chief Inspector of Prisons to state that ‘such damaged individuals ... should have been placed elsewhere’.⁸⁷ Holloway has caused particular concern in the provision of healthcare, especially in relation to ‘the lack of training in mental health matters for officers’.⁸⁸ Self-harm continues to be a problem with around 1,000 incidents each year, insufficient training in basic first aid and more of ‘an emphasis on observation rather than active engagement and care’.⁸⁹ Furthermore, the most recent inspection found that ‘[u]nfurnished accommodation and “strip

⁸² M O'Brien, et al. *Psychiatric Morbidity among Women Prisoners in England and Wales* (Office for National Statistics London 2001) 29.

⁸³ Her Majesty's Inspectorate of Prisons for England and Wales *Follow-up to Women in Prison: A Thematic Review by HM Chief Inspector of Prisons* (Home Office London 2001) [2.103].

⁸⁴ *Justice for Women* (n 14) 21.

⁸⁵ HM Chief Inspector of Prisons *Report on a Full Announced Inspection of HM Prison Highpoint North 30 September - 4 October 2002* (HM Inspectorate of Prisons London 2002) 47 – 51.

⁸⁶ *ibid* [4.61] – [4.67].

⁸⁷ HM Chief Inspector of Prisons *Report on an Announced Inspection of HMP Eastwood Park 22 - 26 September 2003* (HM Inspectorate of Prisons London 2003) 4.

⁸⁸ *Follow-up to Women in Prison* (n 83) [2.98].

⁸⁹ HM Chief Inspector of Prisons *Report on a Full Unannounced Inspection of HMP/YOI Holloway* (HM Inspectorate of Prisons London 2005) [HP10].

conditions” were used inappropriately for very vulnerable women, rather than a more therapeutic approach’.⁹⁰ The mental health care needs of vulnerable prisoners were ‘poorly catered for’.⁹¹

6. History of Abuse and Neglect

The Thematic Review conducted by the Chief Inspector of Prisons found that 20 per cent of female prisoners had been in local authority care and nearly 50 per cent had experienced physical or sexual abuse.⁹² Of these, 40 per cent had experienced this type of abuse as children and a further 22 per cent were abused both as children and as adults.⁹³ Furthermore, 40 per cent of female prisoners were found to engage in heavy drug use with little help or counselling available, and 40 per cent were found to have engaged in self-harm or attempted suicide.⁹⁴ The National Prison Survey also found that high numbers of prisoners had experienced time in care. They found that 62 per cent of prisoners had lived with both of their parents up until the age of 16 and 19 per cent with one parent. Eight per cent of prisoners had spent most of their childhood in an institution. Over one quarter of prisoners (26 per cent) had been taken into the care of local authorities at some point before the age of 16. For prisoners under 21, the figure was higher: 38 per cent reported spending time in local authority care before the age of 16. In the general population, only two per cent will have spent time in the care of local authorities (under and over 21 years of age).⁹⁵

⁹⁰ *ibid.*

⁹¹ *ibid* [4.54].

⁹² *Women in Prison* (n 65) 14.

⁹³ *ibid.*

⁹⁴ *ibid* 14-15.

⁹⁵ Walsmley, Howard and White (n 34) vii, 14.

The study by Singleton, Meltzer and Gatward found that one-quarter of female and one third of male prisoners in their sample had spent time in local authority care. Women in the study were more likely to have reported suffering violence and sexual abuse in the home. Roughly 50 per cent of women and 25 per cent of men suffered from violence in the home and one third of women had experienced sexual abuse in comparison to 1 in 10 men.⁹⁶

7. Drug Addiction

The Thematic Review found considerable numbers of women prisoners with drug problems. More than 25 per cent reported using a variety of drugs and 40 per cent reported 'heavy use or addiction'.⁹⁷ The study into prisoner morbidity found that the majority of inmates had used illegal drugs at some point in their lives. Less than one-fifth of men and one-third of women said that they had never used illegal drugs. Over fifty per cent of the prisoners in all the sample groups reported having used drugs in the year before coming to prison. Women on remand were the most likely to have injected drugs, 40 per cent said they had done so at some point and 34 per cent said they had done so regularly. In addition, 28 per cent said that they had injected drugs within one month of coming to prison. Furthermore, considerable numbers of prisoners reported a degree of dependence on drugs in the 12 months preceding custody.⁹⁸

⁹⁶ Singleton, Meltzer and Gatward (n 66) 27.

⁹⁷ Of these, 25 per cent had used cocaine or crack, 20 per cent amphetamines and 10 per cent reporting intravenous use. Ten per cent said that they were addicted to tranquillisers. One quarter of women with drug dependency said that they continued to take drugs in prison and would carry on doing so upon release *Women in Prison* (n 65) 14.

⁹⁸ Forty one per cent of females under sentence, 43 per cent of males under sentence, 54 per cent of women on remand, and 51 per cent of men on remand reported drug dependence in the 12 months before custody Singleton, Meltzer and Gatward (n 66) 21.

The study into psychiatric morbidity in women prisoners found that 71 per cent had used illegal drugs at some point in their lives.⁹⁹ In addition, the study by Borrill and others found that the numbers of women reporting that they had used drugs in the 12 months before custody were greater amongst white women than black/mixed-race women (77 per cent in comparison to 63 per cent). They also found that 60 per cent of white women were dependent on drugs in comparison to 29 per cent of black/mixed-race women.¹⁰⁰ Significant links have been found between dependence on drugs and mental health problems.¹⁰¹

The research suggests that a number of issues arise for consideration as possible human rights claims. Imprisonment has a markedly greater impact on a woman and her family life in terms of the loss to her children of their primary carer and the possible loss of her family home and structure, exacerbated by the likelihood that detention is more likely to be some distance from her home. The security measures employed for women could be regarded as excessive and inappropriate and should be examined in terms of human rights claims. Furthermore, issues arise in terms of medical provision. Women in prison are more likely to be suffering mental health problems and there are concerns about the maternity care that they receive.

⁹⁹ O'Brien et al (n 82) 110.

¹⁰⁰ J Borrill, et al. 'Substance Misuse among White and Black/Mixed-Race Female Prisoners' in M Ramsey (ed) *Prisoners Drug Use and Treatment: Seven Research Studies* (Home Office London 2003) 49, 52.

¹⁰¹ Home Office Development and Practice Report *The Substance Misuse Treatment Needs of Minority Prisoner Groups: Women, Young Offenders and Ethnic Minorities* (Home Office London 2003); Singleton, Meltzer and Gatward (n 66) 23-4.

D. THE STATUS OF PRISONERS' RIGHTS IN THE UK AND UNDER THE CONVENTION

Throughout this thesis, the role that positive duties have to play in developing human rights claims for women has been examined. However, in relation to prisoners' rights, there are additional difficulties with regard to the division between positive and negative rights. Whilst the jurisprudence of the ECHR and the UK has accepted that prisoners retain as many of their (negative) rights as possible in line with the 'ordinary and reasonable requirements of imprisonment';¹⁰² there are no well-defined rationales against which to assess the purpose of imprisonment, what it should accomplish and the way it should be managed.¹⁰³ There are no obvious principles to determine the legitimate restrictions on negative rights associated with imprisonment, or a meaningful basis for the evolution of specific positive rights that apply administratively. Instead, the courts either consider their decisions by analysing them in relation to the narrow purpose of each measure; or the references that are made as to the functions of imprisonment are too diffuse to provide meaningful direction. Under UK and ECHR law, there is no attempt to determine the 'ordinary and reasonable requirements of imprisonment'.¹⁰⁴ In the absence of this positive rights conception, there is nothing that can cut across other purposes of imprisonment such as public protection and security.¹⁰⁵

¹⁰² *Golder v United Kingdom* Series A no 18 (1979-80) 1 EHRR 524 [45]; *Raymond v Honey* [1983] 1 AC 1, 10.

¹⁰³ L Lazarus *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (Oxford University Press Oxford 2004) 196.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

Some assistance on the purposes of imprisonment can be gleaned from other international human rights instruments. Article 10 (1) of the International Covenant on Civil and Political Rights (ICCPR) requires that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.¹⁰⁶ Furthermore, Article 10 (2) (b) states that 'the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. As we have seen, the ICCPR can influence the decision-making of the ECtHR.¹⁰⁷ Furthermore, the Basic Principles for the Treatment of Prisoners state that 'except for those limitations that are demonstrably necessitated by the fact of incarceration', prisoners shall retain the rights encapsulated in treaties such as the Universal Declaration on Human Rights (UDHR),¹⁰⁸ the ICCPR and the International Covenant on Economic Social and Cultural Rights (ICESCR).¹⁰⁹ The Standard Minimum Rules for the Treatment of Prisoners provide that:

The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.¹¹⁰

¹⁰⁶ International Covenant on Civil and Political Rights (adopted 16th December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁰⁷ *Ireland v United Kingdom* Series A no 25 (1979) 2 EHRR 25; *Soering v United Kingdom* Appn no 14038/88 (1989) 11 EHRR 439; *Costello Roberts v United Kingdom* Series A no 247-C (1995) 19 EHRR 112; *A v United Kingdom* Appn no 25599/94 (1999) 27 EHRR 611.

¹⁰⁸ Universal Declaration on Human Rights (adopted 10 December 1948 UNGA Res 217 A (III)) (UDHR).

¹⁰⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16th December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990 s 5.

¹¹⁰ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 s 58.

The European Charter of Fundamental Rights (ECFR) provides for the ‘inviolability’ of human dignity,¹¹¹ and in relation to criminal processes, that ‘[t]he severity of penalties must not be disproportionate to the criminal offence’.¹¹² However, women prisoners are hardly mentioned in these treaties. Therefore, not only is it difficult to make an assessment about what imprisonment should achieve, it is difficult to measure the extent to which these purposes may be hampered by the imprisonment of women who are particularly vulnerable.

Assistance in fleshing out the difficulties here can be found if we return to the work of Alexy.¹¹³ As seen in chapter three, Alexy argues that broad positive rights include rights to ‘organization and procedure’.¹¹⁴ Rights to organization and procedure encompass procedural entitlements or rights to effective legal protection and entitlements to ‘organizational state measures’.¹¹⁵ Organizational and procedural rights go together because their common characteristic is that they serve as mechanisms for producing particular constitutional outcomes.¹¹⁶ Rights to organization and procedure are rights against the legislature and are rights to powers, as opposed to powers per se. They may therefore be associated with a positive status. The example given by Alexy is that of voting, which would be impossible without some degree of organization. German constitutional law gives the individual an entitlement against the State that matters be organized to facilitate voting. The types of right to organization and procedure are, according to Alexy ‘(1) private law powers,

¹¹¹ Charter of Fundamental Rights of the European Union [2000] OJ C364/1 entered into force 7 Dec 2000 (European Charter of Fundamental Rights) (ECFR) art 1.

¹¹² Art 49 (3).

¹¹³ R Alexy J Rivers (tr) *A Theory of Constitutional Rights* (Oxford University Press Oxford 2002) .

¹¹⁴ *ibid* 21; ch three p 153 – 154. Broad positive rights are rights that encompass entitlements to positive as well as negative action whereas narrow positive rights only refer to entitlements to positive actions or ‘social constitutional rights’ such as education, employment, welfare and accommodation (Alexy 334-5).

¹¹⁵ Alexy (n 113) 316.

(2) court and administrative procedures (procedure in the narrow sense), (3) organization in the narrow sense, and (4) state decision-making'.¹¹⁷

Here we are concerned with organization in the narrow sense. Organization in the narrow sense is directed towards the regulation of substantial numbers of people who share common objectives and are arranged in such a way as to facilitate those objectives.¹¹⁸ It provides an individual right against the legislature that particular organizational norms should be in place.¹¹⁹ Alexy argues that 'individual organizational rights in the narrow sense addressed to the legislature are individual rights that the legislature pass certain organizational norms consistent with the constitution'.¹²⁰ He returns to the division between subjective rights and objective norms, and suggests that the degree to which 'constitutionally required organization' gives rise to subjective rights depends on the reasons behind 'organizationally related constitutional norms'.¹²¹ The extent to which such norms are required to be subjective depends on:

[T]he significance of the organization required by the constitutional rights norm for the *individual*, to his situation in life, his interests, his freedom. Reasons in the second group relate to the significance of the organization required by constitutional rights for the *collectivity*, that is, for common interests or collective goods.¹²²

¹¹⁶ In relation to procedural rights, this is discussed in ch three p 165 – 171.

¹¹⁷ Alexy (n 113) 323. Court and administrative procedures and the ways in which individuals may give effect to their subjective rights is discussed in ch three p 153 – 158. In Germany, not only is the prisoner's entitlement to vote protected, prison administrators are also required to help prisoners exercise this entitlement Lazarus (n 103) 242.

¹¹⁸ Alexy (n 113) 328.

¹¹⁹ *ibid.*

¹²⁰ *ibid* 328-9.

¹²¹ *ibid* 329. The difference between subjective rights and objective norms is discussed at ch three p 153 – 158.

¹²² *ibid.*

Whilst prisoners can claim that the Prison Service in the UK has breached their human rights (consistent with procedure in the narrow sense), they cannot make a claim against the State that the prison system should be organized in a particular way. They have no claim against the legislature in relation to the organizational norms that the Prison Service should adopt. This is so despite the significant effects that imprisonment has on a person's life situation, interests and liberty. Furthermore, as stated by Lazarus, despite managerial attention to the aims and objectives of the Prison Service in the UK, there is little jurisprudence on what the aims and purposes of punishment should be. As it stands, prisoners have to rely on their procedural entitlements to ensure that individual instances of human rights violations are remedied and in this way influencing organizational norms.

E. FEMALE PRISONERS' RIGHTS AND THE COMMITTEE FOR THE PREVENTION OF TORTURE

Few cases before the European Court of Human Rights (ECtHR) have involved female applicants in prison, and there is little that directly addresses the issues that most particularly affect women prisoners. While the decisions of the ECtHR concerning prisoners' rights are equally applicable to female prisoners, some of these decisions are of less relevance to the particular issues they face. There are a number of important ECtHR decisions in relation to prisoners. For example, there is a requirement to review the justification for the continued detention of discretionary life sentence prisoners after the tariff period has expired in view of the risk they pose.¹²³

¹²³ *Thynne, Wilson and Gunnell v United Kingdom* Series A no 190 (1990) 13 EHRR 666; *R (D) v Secretary of State for the Home Department* [2002] EWHC 2805, [2003] 1 WLR 1315; *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837; *Stafford v United*

They retain their right to privileged legal advice upon imprisonment.¹²⁴ They are entitled to the ‘fair trial’ guarantees of Article 6 for disciplinary hearings if the charges against them can be characterized as criminal, including legal representation.¹²⁵ While these decisions are important for prisoners’ rights, the numbers of women serving long sentences is small and they do not tackle the issues that are most pertinent for women in prison.

The Convention was only designed to provide ‘a *minimum* standard’ as to the protections afforded and was not designed with the rights of prisoners in mind, so these rights must therefore be developed from general ECHR principles.¹²⁶ ECtHR decisions have enshrined the idea that prisoners should retain as many of their rights as possible.¹²⁷ ECHR principles have, according to Livingstone, enshrined the idea ‘that prisoners are sent to prison as and not for punishment’.¹²⁸ They do this by providing a set of externally validated measures against which to assess the extent to which certain privations are necessary and machinery to enforce prisoners’ rights when limitations cannot be justified.¹²⁹ Nevertheless, the ECtHR has traditionally been reluctant to address general conditions and has preferred to address particular issues, such as censoring of letters and availability of legal advice.¹³⁰ That the ECtHR is able to preside over a significant disparity between contracting States concerning prisoners’

Kingdom Appn no 46295/99 (2002) 35 EHRR 32; *Benjamin v United Kingdom* Appn no 28212/95 (2003) 36 EHRR 1.

¹²⁴ *Golder* (n 102); *Campbell and Fell v United Kingdom* Series A no 80 (1985) 7 EHRR 165.

¹²⁵ *Campbell and Fell* (n 124); *R (Greenfield) v Secretary of State for the Home Department* [2001] EWHC Admin 129, [2001] 1 WLR 1731; *Ezeh v United Kingdom*, *Connors v United Kingdom* (2002) 35 EHRR 28; *Ezeh v United Kingdom* Appn no 39665/98, *Connors v United Kingdom* Appn no 40086/98 (2004) 39 EHRR 1.

¹²⁶ C Wilson ‘European Convention on Human Rights: Bringing Rights Home’ in M Leech and D Cheney (eds) *The Prisons Handbook 2002* (6th edn Waterside Press Winchester 2002) 544, 546.

¹²⁷ Such as *Golder* (n 102).

¹²⁸ S Livingstone ‘Prisoners’ Rights in the Context of the European Convention on Human Rights’ (2000) 2 *Punishment and Society* 309, 311-312.

¹²⁹ *ibid.*

rights¹³¹ is perhaps testament to this minimalist approach. However, the work of the European Committee for the Prevention of Torture (CPT) may have a part to play in harmonizing European Criminal Justice policy and encouraging greater accountability within a human rights framework.¹³²

In relation to female prisoners, the CPT has focussed on establishing equitable regimes and facilities so that for example, women should have the same opportunities for education, employment, and sports facilities as male prisoners.¹³³ In relation to mothers and babies, they have found that taking a child from its mother and putting it into foster care moments after birth to be 'a flagrant example of inhuman and degrading treatment'.¹³⁴ However, there is no 'clear statement of principle' about whether women who give birth in prison should be able have their children with them and for what length of time.¹³⁵ With regard to contact with the outside world, the CPT has criticized prisons for the practice of not allowing prisoners to make a telephone call to their families when they arrive at the institution,¹³⁶ and for having inadequate telephone facilities.¹³⁷ In view of the issues highlighted here, this is of particular relevance to female prisoners. The CPT have also advocated the accruing of visit time where relatives live some distance from the institution, or being able to substitute this

¹³⁰ *Golder* (n 102); *Campbell and Fell* (n 124); *Natoli v Italy* Appn no 26161/95 (2003) 37 EHRR 49; *Ezeh* (n 125); *Wilson* (n 126) 546.

¹³¹ D Downes *Contrasts in Tolerance: Post War Penal Policy in the Netherlands and England and Wales* (Clarendon Press Oxford 1988) Ch 6 comparing imprisonment in The Netherlands and the UK.

¹³² R Morgan 'Another Angle on European Harmonisation: The Case of the European Committee for the Prevention of Torture' in V Ruggero, et al (ed) *The New European Criminology: Crime and Social Order in Europe* (Routledge London 1998) 156-7.

¹³³ *Cyprus* 1 [87] cited in R Morgan and M Evans 'CPT Standards: An Overview' in R Morgan and M Evans (eds) *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (Oxford University Press Oxford 1999) 75.

¹³⁴ *Luxembourg* 1 [44] quoted in Morgan and Evans (n 133) 76.

¹³⁵ Morgan and Evans (n 133) 76.

¹³⁶ *Spain* 1 [175]-[176] cited in Morgan and Evans (n 133) 64.

¹³⁷ *Bulgaria* 1 [159] cited in Morgan and Evans (n 133) 64.

with telephone calls,¹³⁸ or assisting in travel arrangement where this is the case¹³⁹ and ‘extended’ ‘family’ or ‘conjugal’ visits.¹⁴⁰ This is important if women are successfully to maintain their relationships with their children whilst in prison. The CPT has also advocated that prisoners should receive the same level of medical treatment as those in the community.¹⁴¹ These issues are important because the CPT and the ECtHR interact so that a violation found by the CPT may instigate human rights proceedings against the state in question¹⁴² although the courts have been slow to pick up on CPT recommendations.¹⁴³

F. ARTICLE 2 AND SUICIDES IN CUSTODY

Article 2 ECHR protects the ‘right to life’ and brings with it positive obligations upon States to protect life where there is a ‘real and imminent risk’; although the ECtHR is concerned not to impose ‘an impossible or disproportionate’ burden on States.¹⁴⁴ The ECtHR has held that those in custody are in a particularly ‘vulnerable position and the authorities are under a duty to protect them’.¹⁴⁵ If a prisoner goes into custody in good health and then subsequently dies, the ECtHR places a ‘particularly stringent’ requirement on the authorities to account for this.¹⁴⁶ The ECtHR has recently upheld a complaint under Article 2 from the parents of a mentally ill prisoner who was killed by another mentally ill prisoner where the ‘protective mechanisms’ had all but broken

¹³⁸ Gen Rep 2 [51] cited in Morgan and Evans (n 133) 64.

¹³⁹ Finland 1 [135] cited in Morgan and Evans (n 133) 64.

¹⁴⁰ Portugal 1 [149] cited in Morgan and Evans (n 133) 65.

¹⁴¹ Gen Rep 3 [38] cited in Morgan and Evans (n 133) 68.

¹⁴² Morgan and Evans (n 133) 33.

¹⁴³ See, for example, in relation to ‘conjugal visits’ (Morgan and Evans 65) that have not been supported by the ECtHR (*X and Y v Switzerland* Appn no 8166/78 13 DR 241).

¹⁴⁴ *Osman v United Kingdom* Appn no 23452/94 (2000) 29 EHRR 245.

¹⁴⁵ *Salman v Turkey* Appn no 21983/93 (2002) 34 EHRR 17 [99].

¹⁴⁶ *ibid* [99].

down, including breakdowns in communication and record keeping.¹⁴⁷ In *Edwards*, the ECtHR found that information had been held on the prisoner who had perpetrated the killing — information which identified him as violent — thus identifying the risk that he posed to others. This meant that the authorities ‘knew or ought to have known’ of the significant risks that he posed.¹⁴⁸ The Court also held that ‘[t]he screening process of new arrivals in prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision’.¹⁴⁹ In relation to the investigation of the death, the court held that proceedings characterized by ‘the lack of power to compel witnesses and the private character of the proceedings from which the applicants were excluded save when they were giving evidence’ failed to comply with the ‘procedural obligations’ of Article 2.¹⁵⁰

In relation to self-inflicted deaths, in *Keenan* the court found that there had been no violation of Article 2 where a prisoner who had committed suicide was being regularly monitored by the prison authorities, the court holding that the imminence of the risk to his life could not have been foreseen.¹⁵¹ This indicates that Article 2 will not be engaged unless there is an immediate and perceptible risk that the prisoner will take his or her own life. The withdrawal of lifesaving treatment or treatment that may advance the death of a terminally ill prisoner may violate the Article.¹⁵² It seems then that Article 2 is engaged only where the threat is imminent or if the prison authorities

¹⁴⁷ *Edwards v United Kingdom* Appn no 46477/99 (2002) 35 EHRR 19.

¹⁴⁸ *ibid* [58] – [62].

¹⁴⁹ *ibid* [62].

¹⁵⁰ *ibid* [87]. Further examples of the procedural obligations under Art 2 are *Jordan v United Kingdom* Appn no 24746/94 (2003) 37 EHRR 2; *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653; *R (Middleton) v West Somerset Coroner and another* [2004] UKHL 10; [2004] 2 AC 182.

¹⁵¹ *Keenan v United Kingdom* Appn no 27229/95 (2001) 33 EHRR 38.

¹⁵² *D v United Kingdom* Appn no 30240/96 (1997) 24 EHRR 423.

fail to respond in an appropriate way to a mentally ill prisoner who may be at risk from suicide. However, the (male) applicants in these cases suffered from serious mental illnesses. Female prisoners with illnesses such as ‘psychosis’¹⁵³ are in the minority in comparison to those who suffer from ‘personality disorder’ and ‘neurotic disorder’.¹⁵⁴ The latter in particular is regarded as reactive, or as more a product of the circumstances of imprisonment than the other categories of illness,¹⁵⁵ and the temptation may be to regard them as less pressing. In view of the high suicide rate among female prisoners, and the different ways that mental illness manifests itself in women, an appropriate response may require the authorities to be more aware of the different (and arguably less obvious) ways that these dangers present themselves in women.¹⁵⁶ The receptivity of the ECtHR to such arguments remains to be seen however; as yet, no case of this kind has been brought.

G. INHUMAN AND DEGRADING TREATMENT IN PRISON

Article 3 prohibits ‘torture or...inhuman or degrading treatment or punishment’. It is a fundamental rights of the Convention and non-derogable.¹⁵⁷ The test for Article 3 is that the treatment reach a ‘minimum level of severity’, that minimum being ‘relative...[depending] on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of

¹⁵³ Kennedy-Herbert describes this condition as including ‘illnesses such as schizophrenia, bipolar affective disorder...and psychosis induced by substance abuse’ J Kennedy-Herbert ‘The Healthcare of Women Prisoners in England and Wales: A Literature Review’ (1999) 38 *The Howard J* 54, 56.

¹⁵⁴ *ibid* 56-7.

¹⁵⁵ *ibid*.

¹⁵⁶ Kennedy- Herbert argues that more training is needed ‘in the recognition and appropriate treatment of this group of women’ 56 – 7.

¹⁵⁷ Ch three p 150 – 151; art 15 ECHR.

health of the victim'.¹⁵⁸ By making decisions in relation to the circumstances and sex of the victim, the court has left open the possibility that particular forms of inhuman and degrading treatment may be pertinent for women, and for situations to be judged with reference to their impact on women *as women* although a 'minimum level of severity' would have to be reached. Additionally, as we have seen, States are under a positive obligation under Article 1 of the Convention to secure rights to all individuals within their territories, and to secure such rights as between private individuals.¹⁵⁹

Treatment is inhuman if it causes 'intense physical and mental suffering', and degrading if it causes 'feelings of fear, anguish and inferiority capable of humiliating and debasing [the victim]'.¹⁶⁰ While a criminal conviction may in itself be humiliating, this is not regarded as degrading treatment for the purposes of Article 3.¹⁶¹ For a punishment to be humiliating, it would have to be in the context of 'the method and manner of its execution', and Article 3, by differentiating between "inhuman" and "degrading" punishment, implies ...a distinction between such punishment and punishment in general'.¹⁶² This indicates that the ECtHR and the jurisprudence originating from it are unlikely to address the question of whether imprisonment itself is appropriate.

There appear to be particular policy considerations in the application of Article 3 to those convicted of a crime in that the ECtHR has generally given considerable

¹⁵⁸ *Ireland* (n 107) [106].

¹⁵⁹ *X and Y v Netherlands* Series A no 91 (1986) 8 EHRR 235; *A* (n 107); *Osman* (n 144); *E v United Kingdom* Appn no 33218/96 (2003) 36 EHRR 31; *MC v Bulgaria* Appn no 39272/98 (2005) 40 EHRR 20; ch one p 29 – 32, 37 – 38; ch two especially p 106 – 108, 139; ch three p 164.

¹⁶⁰ *Ireland* (n 107) [167]

¹⁶¹ *Tyrer v United Kingdom* Series A no 26 (1979-80) 2 EHRR 1 [30].

¹⁶² *ibid* [30]

discretion to States in view of the discretionary nature of much of penal policy.¹⁶³ This has ‘the effect of discounting the potential breaches of Article 3 or of raising the threshold of the state’s permissible activity’.¹⁶⁴ Recent cases before the ECtHR appear to indicate a willingness to find breaches of Article 3 on the basis of the cumulative effects of poor conditions.¹⁶⁵ Nevertheless, the treatment has to go beyond an ‘inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment’.¹⁶⁶ Sexual assaults by State officials will be regarded as inhuman and degrading.¹⁶⁷

Consistent with the views expressed by the CPT, the Commission has recently held admissible a claim from a female defendant remanded in custody for alleged involvement in the importation of cocaine, that separation from her newborn baby as a result of the unavailability of Mother and Baby units for category A prisoners violated Article 3 of the Convention.¹⁶⁸ In this case, the applicant relied on ‘the bond between mother and a new born baby’, ‘her vulnerable and emotional state’ and ‘the emotional

¹⁶³ M Addo and N Grief ‘Is There a Policy Behind the Decisions and Judgements Relating to Article 3 of the European Convention on Human Rights?’ (1995) 20 European L Rev 178.

¹⁶⁴ *ibid.*

¹⁶⁵ *Kalashnikov v Russia* Appn no 47095/99 (2003) 36 EHRR 34 where it was held that the length of detention combined with cramped and unsanitary conditions were cumulatively, a violation of Art 3. The complainant had been held in overcrowded accommodation, with poor sleeping conditions and because of this, he had contracted fungal infections and skin diseases. In *Peers v Greece* Appn no 28524/95 (2001) 33 EHRR 51 it was held that conditions where there is no ventilation and it becomes unbearably hot, combined with a lack of privacy when using the toilet would violate Art 3. In *Napier v Scottish Ministers* 2004 SLT 555 (OH) it was held that ‘to detain a person along with another prisoner in a cramped, gloomy and study cell which is inadequate for the occupation of two people, to confine them there for at least 20 hours on average per day, to deny him overnight access to a toilet throughout the week and for extended periods at the weekends and thus expose him to both elements of the slopping out process, to provide no structured activity other than other than daily walking exercise for one hour and one period of recreation lasting an hour and a half in a week, and to confine him to a “dog box” for two hours or so each time he entered or left the prison was, in Scotland in 2001, capable of attaining the minimum level of severity necessary to constitute degrading treatment and thus to infringe Article 3’ [75]. Also, S Foster ‘Prison Conditions, Human Rights and Article 3 ECHR’ [2005] PL 35.

¹⁶⁶ *Valasinas v Lithuania* Appn no 44558/98 12 BHRC 266 [102].

¹⁶⁷ *Cyprus v Turkey* Appn nos 6780/74 and 6950/75 (1982) 4 EHRR 482.

¹⁶⁸ *Togher v United Kingdom* Appn no 28555/95 (1998) 25 EHRR CD99.

and physical consequences' as a result of the separation.¹⁶⁹ Cases that have involved the separation of female prisoners and their young children in the UK have subsequently been brought under Article 8 of the Convention, permitting reconciliation between these interests and those of the State in imprisoning offenders.¹⁷⁰ Article 3 appears not to be engaged in relation to being imprisoned near one's family, as it has been held that a decision not to transfer a prisoner to a prison near his fiancée was not in violation of Article 3.¹⁷¹ However, the case law on prison conditions could also suggest that the emotional effects of separation from children may form part of a claim that cumulatively, conditions are poor.

The criteria for Article 3 also leave open the possibility that intimate searches may, in certain circumstances, violate the Article. In *McFeeley*, the Commission held that in relation to intimate searches, the steps taken by the UK to reduce the level of humiliation involved and prevent abuse such as a senior officer being present, using a mirror 'to avoid physical contact' and a 'medical examination if the prisoner is suspected of concealing something,' were sufficient to prevent a violation of Article 3.¹⁷² The Commission was also influenced by the fact that the prisoners were engaging in a protest that involved a security risk,¹⁷³ the implication being that where no security risk is posed, these measures may indeed violate Article 3.¹⁷⁴ In *Valasinas v Lithuania* it was held that the prisoner's rights under Article 3 had been violated as a

¹⁶⁹ *ibid* 102.

¹⁷⁰ *R (P, Q and QB) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 2 FLR 1122; *R (CD, AD) v The Secretary of State for the Home Department* [2003] EWHC 155, [2003] 1 FLR 979; *Claire F v Secretary of State for the Home Department, Lia-Jade F (a Minor by her litigation friend the Official Solicitor)* [2004] EWHC 111, [2004] 2 FLR 517; text between n 184 and n 199.

¹⁷¹ *Wakefield v United Kingdom* Appn no 15817/89 66 DR 251; In *McCotter v United Kingdom* Appn no 8632/91 (1993) 15 EHRR CD 98 a similar conclusion was reached under Art 8 discussed further at text between n 184 and n 199.

¹⁷² *McFeeley v United Kingdom* Appn no 8317/78 (1980) 3 EHRR 161 [61].

¹⁷³ *ibid*.

result of the prison authorities '[o]bliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and then food with bare hands'.¹⁷⁵ Handcuffing may violate Article 3 if not reasonably necessary in light of the security risk posed.¹⁷⁶

The Article 3 criteria would appear to leave open the possibility of developing arguments that take into account the characteristics of vulnerable female prisoners, although it would be important that arguments are framed in relation to their histories of abuse. The sliding scale nature of Article 3 means that these difficulties could be taken into account when determining whether suffering has reached the minimum needed to ground a claim under this Article. It also leaves open the possibility of arguing for less physically intrusive measures if there is less of a security risk posed by female prisoners. This is especially the case in relation to women that are handcuffed on the way to and from hospital for maternity visits and in relation to home visits.

The mental state of a prisoner is relevant to whether a violation of Article 3 is found.¹⁷⁷ This is of particular importance in relation to the previously discussed high numbers of female prisoners that have mental health difficulties and the higher number at risk from suicide in comparison to women in the general population.¹⁷⁸ In relation to those suffering from mental health difficulties, Article 3 does not require that the prisoners be released, but that their detention be 'compatible with respect for human dignity' so that they are not subjected 'to distress or hardship of an intensity exceeding

¹⁷⁴ P Kaufmann 'Prisoners' in *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group London 1999) 464.

¹⁷⁵ (n 166) [117].

¹⁷⁶ *Raninen v Finland* Appn no 20972/92 (1998) 26 EHRR 563.

¹⁷⁷ *Zhu v United Kingdom* Appn no 36790/97 (2001) 2 Eur Human Rights L Rev 231, 233.

¹⁷⁸ Text between n 61 and n 79; text between n 79 and n 91.

the unavoidable level of suffering inherent in detention'.¹⁷⁹ Nonetheless, when adequate medical facilities are available and the prisoner is able to avail himself of them, it is unlikely that a violation will be found.¹⁸⁰

In *Keenan* it was found that the disciplinary segregation of a prisoner known to be mentally ill, and at risk of committing suicide, was incompatible with Article 3; and the court criticized 'the lack of effective monitoring... and the lack of informed psychiatric input into his assessment and treatment'.¹⁸¹ Furthermore, in *Peers* it was held that housing a prisoner suffering from withdrawal symptoms in a segregation unit was contrary to the Article.¹⁸² However, in *Bollan* it was held that the confinement of a prisoner, who had shown no inclination towards suicide, to her cell for a few hours to calm down was not inhuman or degrading.¹⁸³ It is argued that although the intention in this case was not to 'degrade or humiliate', 'a similar punishment...with a different victim and slightly different circumstances might reach the level of severity required by the court'.¹⁸⁴ This might be used to argue that practices such as those of using punishment cells and segregation for distressed, suicidal, or self-harming prisoners could violate Article 3. These cases have implications not only for the treatment of the large numbers of women suffering from mental difficulties in prison, but also in relation to staff training and awareness in female prisons.

¹⁷⁹ *Kudla v Poland* Appn no 30210/96 (2002) 35 EHRR 11 [94].

¹⁸⁰ *ibid.*

¹⁸¹ (n 151).

¹⁸² (n 165).

¹⁸³ *Bollan v United Kingdom* Appn no. 42117/98 (2000) 6 Eur Human Rights L Rev 664. It has also been held that the detention of a person as a mental health patient would 'only be "lawful" for the purposes of Art 5 (1) (e) if effected in a hospital, clinic or some other appropriate institution' *Aerts v Belgium* Appn no 25357/94 (2000) 29 EHRR 50 [48]; *Ashingdane v United Kingdom* Series A no 93 (1985) 7 EHRR 528.

¹⁸⁴ Case Commentary *Bollan* (n 183) 665.

H. ARTICLE 8 AND THE DEVELOPMENT OF RESPECT FOR PRIVATE LIFE FOR FEMALE PRISONERS

A number of rulings significant for female prisoners have been grounded under Article 8. In *Golder* the ECtHR found that the interference with prisoners' rights under Article 8 has to be necessary 'having regard to the ordinary and reasonable requirements of imprisonment'.¹⁸⁵ This means that interference with prisoners' rights must be justified in line with Convention standards.¹⁸⁶ This is a potential, although tentative foundation, for women's human rights in prison. However, the 'ordinary and reasonable requirements of imprisonment' is a vague test and leaves open the question of what prisons are for.¹⁸⁷ The standard is complicated further by the significant disparity between men and women in the consequences of imprisonment. Nevertheless, the importance of maintaining family relationships has been emphasized by the Court, although a balance needs to be struck between that and issues of security and administration for the prison:

...[W]hile detention...is, by its nature a limitation on private and family life, it is an essential part of a prisoner's right to respect for private and family life that prison authorities assist him in maintaining effective contact with his close family members...however, it has also to be recognised that visiting facilities in prison create a heavy administrative and security burden for prison administration. It would not be feasible, therefore, to require that prisons provide unlimited visiting facilities to prisoners.¹⁸⁸

This may be particularly problematic for female prisoners. As we have seen, many female prisoners are imprisoned far away from home in view of the small

¹⁸⁵ *Golder* (n 102) [45].

¹⁸⁶ Kaufmann (n 174) 477.

¹⁸⁷ Livingstone (n 128) 321; Lazarus (n 103) 196; text between n 101 and n 123.

number of establishments housing female prisoners, creating problems for visits from their families. The case law of the ECtHR to date has not been encouraging in relation to violations of Article 8 where prisoners were housed some distance from their families.¹⁸⁹ Obligations to assist in the maintenance of family relationships rarely involve moving a prisoner from one institution to another in view of the financial resources that would be required to expand rights in this way.¹⁹⁰ Nevertheless, some movement has been made in this area.

As seen above, the issues arising from the separation of women and their children have started to be developed under Art 8.¹⁹¹ The courts in the UK have started to take into account the problems of women's imprisonment in their sentencing decisions. In relation to the imprisonment of women in institutions some distance from their home, the Court of Appeal has indicated that in the case of women with children, there should not be too much emphasis on previous decisions of the ECtHR as 'special considerations are always likely to apply'.¹⁹² In *R v Sarah Jane Witten* the appellant, who was the primary carer of three young children, was sentenced to three and a half years imprisonment for attempting to smuggle heroin into a prison where her partner was being held for drugs offences. In reducing the sentence to two years, the court took into account the pressure which she had been under from her partner to commit this offence, and the fact that she had three young children 'at an extremely vulnerable age'.¹⁹³ The Court of Appeal went on to hold that:

¹⁸⁸ *X v United Kingdom* Appn no 9054/80 (1983) 5 EHRR 260, 263.

¹⁸⁹ *Campbell v United Kingdom* Appn no 7819/77 Decision 6th May 1978 [30]-[32] (unreported) cited in Kaufmann (n 174); *Ouinis v France* Appn no 13756/88 (1990) 65 DR 265.

¹⁹⁰ *Ouinis* (n 189).

¹⁹¹ (n 170).

¹⁹² *R (P, Q and QB)* (n 170) [77].

¹⁹³ [2002] EWCA Crim 2628; [2003] 2 Crim App R (S) 8 [5].

The court has to take into account the effect of this sentence on the family, including the three young children. It has to take into account the fact that, particularly in the case of female prisoners, the prisoner service is under huge stress in adequately coping with the prison population.¹⁹⁴

In *P and Q* it was held that the balancing exercise of Article 8 was engaged in when deciding whether to imprison mothers at all. In this case, the Court of Appeal held that:

If the passing of a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound by s 6 (1) [of the Human Rights Act 1998] the court is required to carry out the balancing exercise ... before deciding the seriousness of the offence justifies the separation of mother and child ... It will no longer be permissible (if it ever was) for a court to choose a custodial sentence merely because the mother's want of means and her commitments to her children appear to make a fine or community sentence inappropriate, if the seriousness of the offence does not itself warrant a custodial sentence. In such circumstances, it must ensure that the relevant statutory authorities and/or voluntary organisations provide a viable properly packaged solution designed to ensure that the mother can be punished adequately for her offence without the necessity of taking her into custody away from her children.¹⁹⁵

Furthermore, there have been encouraging developments in cases where women have had young babies staying with them in Mother and Baby Units. In *P and Q* the court held that a rigid application of the rule that toddlers could only stay with their mothers until the age of 18 months may violate Article 8. This is because a decision of this nature may be taken regardless of:

[H]owever catastrophic the separation may be in the case of a particular mother and child, however unsatisfactory the alternative placement available for the child, and however attractive the alternative solution of

¹⁹⁴ *ibid* [6].

¹⁹⁵ *R (P, Q and QB)* (n 170) [79].

combining day care outside prison with remaining in prison with the mother.¹⁹⁶

The rigid application of this rule might also compromise the Prison Service policy of putting the welfare of the child first. The balancing exercise conducted under Article 8 requires that an interference with the private lives of mothers and children fall into three categories: the necessary limitations on the mother's rights and freedoms brought about by her imprisonment; the extent to which any relaxation would cause problems within the prison or the prison service generally; and the welfare of the individual child. This third element would be determined by 'the extent of the harm likely to be caused by separation from the mother...the extent of the harm likely to be caused by remaining in the prison environment ... [and] the quality of the alternative arrangements'.¹⁹⁷ This was hailed as a significant decision.¹⁹⁸ In a subsequent case, it was held that a decision to remove a baby of 6 months from an MBU and the care of his mother after concern about her behaviour, without proper consideration about whether such a measure was proportionate in these circumstances, violated Article 8.¹⁹⁹

¹⁹⁶ *ibid* [100].

¹⁹⁷ *ibid* [103] – [105].

¹⁹⁸ V Munro 'The Emerging Rights of Imprisoned Mothers and Their Children' (2002) 14 *Child and Family L Q* 303. However, cf: *Claire F* (n 170).

¹⁹⁹ *R (CD, AD)* (n 170).

I. THE DEVELOPMENT OF ARTICLE 14 IN THE CONTEXT OF IMPRISONMENT

The jurisprudence under Article 14 discussed in previous chapters is said to be more pointed in relation to prisoners' rights where 'an effective anti-discrimination clause' may 'be of considerable significance in the prison context'.²⁰⁰ However, an equality provision that is based on formal equality is likely to reinforce the status quo of the male standard, particularly in a prison context that is 'structured male'. Nevertheless, it is possible for a claim to succeed when combined with Article 14 even if the substantive right has not been violated.²⁰¹ If we are serious about tackling the disproportionate effects of imprisonment on women, in maintaining contact with their families and in addressing the effects of that separation, it should be possible to regard their claims as indirect discrimination with respect for the woman's family life. However, given the attention given by the ECtHR to resource implications of such measures,²⁰² moves in this direction are likely to continue to be tentative.

J. CONCLUSIONS

What emerges from this discussion is the need to frame the issues that female prisoners face as human rights violations. Male applicants bring many of the cases cited here and there are still relatively few cases that relate to the particular issues that women face. Some of the experiences that female prisoners have appear to be brought about by the notion of equality that treats women (prisoners) as men (prisoners),

²⁰⁰ Livingstone (n 128) 312.

²⁰¹ *Rasmussen v Denmark* Series A no 87 (1985) 7 EHRR 371; *Abdulaziz Cabales and Balkandali v United Kingdom* Series A no 94 (1985) 7 EHRR 471; *Schuler-Zgraggen v Switzerland* Series A no 263 (1993) 16 EHRR 405.

without much consideration of the different responsibilities and problems that women face and that have affected their lives. However, the Articles referred to here, particularly Articles 3 and 8, do present some possibilities for addressing these rights within the Convention framework, and some of these cases have made important inroads into framing steps of this nature.

²⁰² *Quinas* (n 189).

5.

TOWARDS A NEW HUMAN RIGHTS PARADIGM FOR ASSESSING IMPRISONMENT FOR WOMEN

A. INTRODUCTION

In this final chapter, a new paradigm, based on human rights principles, is developed to evaluate the use of imprisonment for women. It will suggest that the disproportionate effects of imprisonment for women and their families should limit the use of custody for women in all but the most serious offences. This chapter will argue that the European Convention on Human Rights (ECHR)¹ needs to be developed further in relation to the *substance* of penal policy, as opposed to the procedural mechanisms that bring it about. The higher rates of mental illness amongst female prisoners, and the disproportionate effects on their family structure will form the basis of arguments under Articles 3, 5, 8 and 14 of the Convention.

In relation to those at the receiving end of criminal investigations, the ECHR is predominantly concerned with the procedures that bring about various outcomes rather than the outcome itself. Article 5 provides a number of safeguards from arbitrary deprivations of liberty, such as the requirement that detention occur only after trial by a competent court,² that suspects are informed of the charges against them,³ and that

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR).

² ECHR art 5 (1) (a).

³ ECHR art 5 (2).

trial occurs within a reasonable time.⁴ Article 6 provides a number of minimum requirements for criminal trials such as the presumption of innocence,⁵ the entitlement to legal representation,⁶ to cross-examine witnesses,⁷ and the principle of equality of arms.⁸ With regard to post-conviction procedures, the European Court of Human Rights (ECtHR) has been keen to separate the tariff period of a sentence from the period of detention associated with protecting the public from any continued risks posed by the offender.⁹ This latter consideration requires regular review under Article 5 (4).¹⁰ The judiciary and not the Home Secretary determine lengths of sentence (of both types).¹¹ The ECtHR has had much less to say on the use of imprisonment post-conviction per se and the length of sentences imposed.

This chapter attempts to address these issues from a human rights perspective. It will take as its basis the fundamental principle articulated by van Zyl Smit and Ashworth that disproportionate sentences represent a violation of fundamental rights on a number of grounds. Firstly, custodial sentences are, on the face of it, a violation of a person's right to liberty. Secondly, such a measure can only be justified where the conviction is for a serious offence. Thirdly, in the interests of circumscribing arbitrary State power and respecting fundamental rights, substantial limitations on a person's freedom should only be permitted if the offence in question is very serious. Finally, if States were able to impose custodial sentences in cases where the offences were not serious, this would be to permit the use of individuals 'as a means to an end, which is

⁴ ECHR art 5 (3).

⁵ ECHR art 6 (2).

⁶ ECHR art 6 (3) (c).

⁷ ECHR art 6 (3) (d).

⁸ *Delcourt v Belgium* Series A no 11 (1979-80) 1 EHRR 355; *Jaspers v Belgium* Appn no 8403/78 (1982) 27 DR 61; *Bulut v Austria* Appn no 17358/90 (1997) 24 EHRR 84; *De Haes and Gijssels v Belgium* Appn no 19983/92 (1998) 25 EHRR 1 among others; ch three p 205 – 212.

⁹ *Thynne, Wilson and Gunnell v United Kingdom* Series A no 190 (1990) 13 EHRR 666.

¹⁰ *ibid.*

inconsistent with fundamental respect for the dignity of each human being'.¹² To these statements of principle, the effects of gender are added and developed. As discussed in chapter four, the number of women in prison has increased by 173% in the period 1992–2002.¹³ The most common offence for which women are imprisoned is 'theft and handling'.¹⁴ Additionally, the female prison population includes large numbers of black women.¹⁵ Many women have children, and a number are single parents.¹⁶ The effects of imprisonment on the children can be acute.¹⁷ Women prisoners are also more vulnerable to suicide and self-harm.¹⁸ In addition, there are higher rates of mental illness amongst the female prison population,¹⁹ with considerable numbers reporting physical and sexual abuse as children and as adults.²⁰

This chapter will start by returning to the analysis of liberty and the public/private divide discussed in chapter one. This chapter argued that the commitment to negative freedom disguises women's social, political and economic

¹¹ *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837.

¹² D van Zyl Smit and A Ashworth 'Disproportionate Sentences as Human Rights Violations' (2004) 67 MLR 541, 541 – 2.

¹³ Home Office *Statistics on Women and the Criminal Justice System: A Home Office Publication under S 95 of the Criminal Justice Act 1991* (Home Office London 2004) available from <http://www.homeoffice.gov.uk/rds/pdfs2/s95women03.pdf> (26.6.04) 7.

¹⁴ *ibid* 34.

¹⁵ Home Office *Prison Statistics in England and Wales 2002* (Home Office London 2002 Cm 5996) 114.

¹⁶ B Ash (ed) *Working with Women Prisoners* (4th edn Women's Estate Policy Unit; HM Prison Service London 2003) available from <http://www.hmprisonservice.gov.uk/resourcecentre/publicationdocuments/> (16.09.04); D Caddle and D Crisp *Mothers in Prison* (Home Office Research Findings 38 Home Office London 1997); D Caddle and D Crisp *Imprisoned Women and Mothers: A Research and Statistics Directorate Report* (HORS 162 Home Office London 1997).

¹⁷ M Richards and B McWilliams *Imprisonment and Family Ties* (Home Office Research Bulletin 38) (Home Office Research and Statistics Directorate London 1996) 3.

¹⁸ G Sattar *Rates and Causes of Death among Prisoners and Offenders under Community Supervision* (HORS 231 Home Office London 2001) 36; A Liebling 'Suicide among Women Prisoners' (1994) 33 Howard Journal 1; Howard League of Penal Reform *Desperate Measures: Suicides and Their Prevention* (The Howard League London 1999) 10.

¹⁹ N Singleton, H Meltzer and R Gatward *Psychiatric Morbidity Amongst Prisoners: A Summary Report* (Office of National Statistics London 1998).

²⁰ Her Majesty's Inspectorate of Prisons for England and Wales *Women in Prison: A Thematic Review by HM Chief Inspector of Prisons* (Home Office London 1997); Her Majesty's Inspectorate of Prisons

marginalization, and that non-interference in the private arena masks power relations in the home, depoliticizing women and inhibiting their ability to participate in public life.²¹ The argument presented in this chapter will suggest that failures to recognize adequately the extent of women's private roles lead to greater hardship in their public roles. Decisions to imprison are public functions that the State carries out in response to crime. Nevertheless, these functions often fail to take into account the disproportionate hardship to women and their families as a result of incarceration. The doctrine of proportionality in sentencing will be examined. The extent to which these principles can be developed to ensure equality of treatment or equality of outcome will be considered. The jurisprudence of the ECtHR distinguishes between punishments that are always inhuman and degrading and thus never permitted, and those which are inhuman and degrading if imposed for one sentence but not another.²² This chapter argues that once the effects of gender are taken into account, the distinction is far from clear-cut in the case of female offenders. This chapter will also consider whether the principles of proportionality in human rights doctrine can influence the imprisonment of women. The jurisprudence of Article 3, 5 and 8 is examined in this context to evaluate whether the extent of the use of imprisonment of women can be justified from a human rights perspective. Finally, the influences of the principles of equality in criminal justice are discussed with reference to the Convention on the Elimination of Discrimination against Women (CEDAW),²³ the Convention on the Elimination of All Forms of Racial Discrimination (CERD),²⁴ and Article 14 ECHR.

for England and Wales *Follow-up to Women in Prison: A Thematic Review by HM Chief Inspector of Prisons* (Home Office London 2001); Singleton, Meltzer and Gatward (n 19).

²¹ Ch one p 27 – 29 and p 33 – 37; N Lacey *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing Oxford 1998) 77-8.

²² Van Zyl Smit and Ashworth (n 12) 544.

²³ Convention on the Elimination of all Forms of Discrimination against Women (opened for signature 1st March 1980, entered into force 3rd September 1981) (1980) 19 ILM 33 (CEDAW).

²⁴ Convention on the Elimination of All Forms of Racial Discriminations (adopted 21st December 1965, entered into force 4 Jan 1969) 660 UNTS 195 (CERD).

Chapter four looked at the treatment of women *whilst in prison*. This chapter questions the extent of *the use of imprisonment* for women, given the disproportionate effects on them, demonstrated by the statistics. Despite the controversy over the use of imprisonment for women, there has been no gendered analysis of disproportionate sentences as human rights violations.

B. LIBERTY, CITIZENSHIP, THE PUBLIC/PRIVATE DIVIDE AND THE USE OF IMPRISONMENT FOR WOMEN

Chapter one examined the liberal concept of liberty as articulated by writers such as Berlin²⁵ and Green.²⁶ These traditional negative concepts have been replaced with notions of positive freedom: the idea that positive resources are needed in order for people to give effect to their life choices.²⁷ For feminists, the commitment to negative freedom as the absence of State coercion disguises women's economic, political and social marginalization, particularly in the domestic realm. Chapter one also examined the criticisms that have been made of the division between public and private by feminist commentators.²⁸ Classical liberalism's commitment to non-interference in the 'private' arena has enabled it to disguise power relations in the domestic realm.²⁹ This depoliticizes those who inhabit the private sphere by inhibiting their ability to

²⁵ I Berlin *Four Essays on Liberty* (Oxford University Press Oxford 1969); ch one p 11 – 13.

²⁶ TH Green, (D Bagnoli) *Lectures on the Principles of Political Obligation* (Cambridge Scholars London 2002) ch one especially p 4.

²⁷ MJ Sandel *Liberalism and the Limits of Justice* (2nd edn Cambridge University Press Cambridge 1998) ch 2, 66; J Rawls *A Theory of Justice* (Revised edn Oxford University Press Oxford 1999) ch 5; M Freedman *The New Liberalism: An Ideology of Social Reform* (Clarendon Oxford 1978) ch 2; Lacey (n 21) 52; S Fredman *Women and the Law* (Clarendon Oxford 1997) 18; ch one p 11-13.

²⁸ Ch one p 33 – 37.

²⁹ Lacey (n 21) 77-8.

participate in the public arena.³⁰ For example, many women continue to shoulder responsibility for childrearing in the home. These traditional roles inhibit women's ability to participate in the economic and political life of a country. Failure to recognize the emotional and social burdens placed on women in the private realm can increase the hardship to women in the public realm. Imprisonment, for example, is a public obligation imposed on those who are found guilty of certain types of crime. It is the failure to recognize adequately the extent of women's private roles, which is, in part, responsible for the disproportionate effects of imprisonment for women. This should form the basis of questions about whether the extent of its use is defensible.

The argument that the failure to recognize adequately the extent of women's private obligations, leading to the disproportionate effects that imprisonment has on them, can be seen as evidence of the ambiguity or incompleteness of women's citizenship. Pateman argues that the ambiguity of women's citizenship is a product of the difficulties associated with simply adding women to the ideal of the free individual entering into the social contract.³¹ The free individual entering into the social contract was a patriarchal construction that has left a host of problems in articulating women's inclusion as citizens. These historical problems require a reconstruction of the notions of citizenship, as opposed to treating women in the same way as men.³² Standard texts omit analyses of citizenship with regard to gender, and this omission forms the basis of feminist theorizing on the subject.³³ Standard theorizing about citizenship presumes a uniform ideal that masks the systematic 'exclusion of women from full participation in

³⁰ *ibid.*

³¹ C Pateman *The Sexual Contract* (Polity Press Cambridge 1988) ch 1.

³² *ibid.*

³³ E Kingdom 'Citizenship and Democracy: Feminist Politics of Citizenship and Radical Democratic Politics' in S Millns and N Whitty (eds) *Feminist Perspectives on Public Law* (Cavendish London 1999)

public affairs'.³⁴ Pateman's analysis highlights a dilemma faced by feminists in their demands that citizenship be seen as a patriarchal construct: if they ask for the same rights as men, they are inheriting a notion of citizenship characterized by male traits, abilities and activities in the public realm. Women in this way adopt citizenship by becoming an inferior form of the male version. However, if they ask for their specific needs, responsibilities and abilities in the private realm to be recognized, they are again construed as dependant on men and lesser citizens.³⁵

However, the formal equality in public life approach fails to articulate women's massive social obligations. As was seen in chapter four, feminists have criticized gender-neutrality and the assumptions that it makes about the absence of inequality in society.³⁶ Principles of gender-neutrality disguise the relationship between poverty, family difficulties and female criminality, and the disproportionate effects that imprisonment has on women and their families. Carlen, for example, argues that the increases in the numbers of women sent to prison are due to an increase in the numbers of women in disadvantaged socio-economic groups and increased punitiveness on the part of the courts towards women offenders.³⁷ CEDAW also emphasizes poverty as a motive for female offending.³⁸ Yet, as we have seen, the

149, 154.

³⁴ *ibid.*

³⁵ C Pateman 'The Patriarchal Welfare State' in L McDowell and R Pringle (eds) *Defining Women: Social Institutions and Gender Divisions* (Polity/Open University Press Cambridge 1992) 236. Also IM Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' in A Phillips (ed) *Feminism and Politics* (Oxford University Press Oxford 1998) and R Lister *Citizenship and Feminist Perspectives* (Palgrave Macmillan Basingstoke 2003).

³⁶ p 222 – 224.

³⁷ P Carlen *Sledgehammer* (MacMillan Basingstoke 1999) 56; ch four p 224.

³⁸ Concluding observations of the Committee on the Elimination of Discrimination Against Women: United Kingdom of Great Britain and Northern Ireland 01/07/99 A/54/38 paras [278] – [318] 21st Session [312].

emphasis on narrow positive rights or ‘social constitutional rights’³⁹ is largely missing from the Convention.⁴⁰ How many of these factors should the courts therefore take into account when determining length of sentence?

C. PROPORTIONATE SENTENCING, EQUAL TREATMENT AND EQUALITY OF OUTCOME

Not all sentencing rationales are concerned with equality but of those that are — most notably in the just deserts model that advocates sentences be proportionate, judged by reference to harm and culpability — sentencing decisions seek to adhere to the principle of equality before the law.⁴¹ Factors not related to offence seriousness, such as race and gender are regarded as ‘superfluous’ so discrimination on these grounds can be avoided.⁴² However, there has been increasing acceptance that equal treatment in sentencing may disguise different impact on different offenders. For example, Ashworth and Players argue that a pregnant woman in the final stages of pregnancy may suffer more as a result of a custodial sentence, especially if she gives birth in prison and has to be separated from her baby. This points to the possible impact of imprisonment on the child who is separated from its mother.⁴³ However, some have argued that pleas in mitigation that emphasize childcare issues may reinforce the notions of women’s dependence and domesticity, exacerbating gender stereotyping

³⁹ R Alexy J Rivers (tr) *A Theory of Constitutional Rights* (Oxford University Press Oxford 2002) 334-5.

⁴⁰ Ch three p 153 – 154.

⁴¹ A Ashworth *Sentencing and Criminal Justice* (3rd edn Butterworths London 2000) ch 4, p 82 and ch 7.

⁴² *ibid* 198.

⁴³ A Ashworth and E Player ‘Sentencing, Equal Treatment, and the Impact of Sanctions’ in A Ashworth and M Wasik (eds) *Fundamentals of Sentencing Theory: Essays in Honour of Andrew Von Hirsch* (Clarendon Press Oxford 1998) 251, 257-8.

and inequalities.⁴⁴ Furthermore, some feminist commentators have argued that pleas to difference may have the effect of accepting or leaving unaddressed the socially subordinate status of women.⁴⁵ The financial and social issues surrounding much female offending could illustrate this here.

Nevertheless, Hudson argues for a notion of equality in sentencing that punishes in relation to 'equivalent severity or leniency, and of equivalent relevance to circumstances, for offences of *equal culpability given knowledge of circumstances*, rather than simplified sameness, let alone a "same as men" standard'.⁴⁶ She believes that notions of culpability 'should take into account the...pressures which lead women towards crime in real-life situations'.⁴⁷ Difference in this way 'becomes not a special pleading for leniency but for a "woman wise" penal strategy which does not increase female offenders' oppression *as women*', with such gendered considerations possibly leading to the removal of imprisonment for women on the basis of the low numbers that commit serious or violent offences.⁴⁸ However, 'setting aside the claims of the tariff for women in poverty...means prioritising help over punishment, and prioritising people over acts'.⁴⁹ Daly has argued that ideals of equal treatment raise questions of whether to decrease sentences for men, increase sentences for women (punishing them like men), or find an average between them with the possible result of increased

⁴⁴ M Eaton *Justice for Women: Family, Court and Social Control* (Open University Press Milton Keynes 1986) ch 4 and 7. Also S Edwards *Women on Trial: A Study of the Female Suspect, Defendant and Offender in the Criminal Law and Criminal Justice System* (Manchester University Press Manchester 1984); A Worrall *Offending Women: Female Lawbreakers and the Criminal Justice System* (Routledge London 1990).

⁴⁵ C Sunstein 'Feminism and Legal Theory' (1988) 101 Harvard L Rev 826, 829.

⁴⁶ B Hudson 'Doing Justice to Difference' in A Ashworth and M Wasik (eds) *Fundamentals of Sentencing Theory: Essays in Honour of Andrew Von Hirsh* (Clarendon Press Oxford 1998) 223, 246.

⁴⁷ *ibid* 247.

⁴⁸ *ibid*.

⁴⁹ B Hudson *Penal Policy and Social Justice* (Macmillan Basingstoke 1993) 180.

punishment for female defendants.⁵⁰ Her arguments appear to indicate that parsimony in sentencing, the principle ‘that all punishment is pain and ought therefore be avoided or minimized where possible’,⁵¹ may be better served if the female standard were adopted.⁵²

Ashworth and Player ground their arguments for equality of impact in sentencing decisions within the principles of desert theory. For most part, the courts have not taken into account the “ordinary” effects that imprisonment has on an offender’s family and children.⁵³ This is seen as a consequence attendant upon the fact of imprisonment, and further justification as to why custody should only be handed down in serious offences. They argue that aiming ‘for equality in the impact of custodial sentences’ can be complex.⁵⁴ Firstly, excluding cases of pregnant women and those with young children, determining an offender’s sensibilities toward custody is imprecise and uncertain, especially at the time that the decision about sentence is made. In relation to medical conditions, this ‘may require a *prediction* of the sentence’s impact’, something which tends to be more difficult in cases involving psychological problems.⁵⁵ As we have seen in the previous chapter, this is particularly pertinent in relation to female prisoners, many of whom have suffered serious abuse before going into prison.⁵⁶ Secondly, distinctions ‘can be drawn between the effect of

⁵⁰ K Daly *Gender, Crime and Punishment* (Yale University Press New Haven 1994) 10-11.

⁵¹ Ashworth (n 41) 83-4.

⁵² Daly (n 50) 11.

⁵³ Ashworth and Player (n 43) 258.

⁵⁴ *ibid.*

⁵⁵ *ibid* 258-9.

⁵⁶ Ch four p 238 – 239.

a medical condition on the experience of imprisonment, and the effect of imprisonment on the medical condition'.⁵⁷

Reducing a prison term is more justifiable if there is strong evidence of the damaging effects of imprisonment on that condition, as was the case in *Green*,⁵⁸ and this is how the courts should approach the sentencing of pregnant women. In *Green*, a sentence of 18 months for a man who suffered from a severe form of sickle cell anaemia was reduced so that 14 months of the sentence was suspended on the basis that it was difficult to manage this serious condition within the prison environment. A third argument that supports equal impact sentencing decisions is in relation to 'the *nature and scale of the costs or deprivations*'.⁵⁹ A prisoner facing a life-threatening condition is more likely to feel the pains of imprisonment in terms of time lost, than someone with no such condition. Finally, Ashworth and Player argue that differences in the impact of sentencing should only be taken into consideration when 'significantly outside the normal range of responses to a given sentence' and legitimately includes 'physical and psychological illness and significant physical and mental abuse' that the prison fails to guard against.⁶⁰ Conversely, however, this should not include the effects of hardening to the prison environment as justification for increasing sentences.⁶¹ It could be argued at this point that the determination of the 'normal range of responses' to imprisonment has been determined with reference to the male characteristics of the overwhelming majority of the prison population. Equality of

⁵⁷ Ashworth and Player (n 43) 259.

⁵⁸ (1992) 13 Cr App R (S) (CA) 613.

⁵⁹ Ashworth and Player (n 43) 259.

⁶⁰ *ibid* 260.

⁶¹ *ibid*.

impact is something that will be re-examined in the subsequent discussion on Article 3.

D. PROPORTIONALITY, PUNISHMENT UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE INFLUENCE OF GENDER

The substance of penal policy might be influenced by the principles of proportionality from two sources. Firstly, as Ashworth and van Zyl Smit argue, while the ECtHR has been reluctant to interfere in cases where sentences were not grossly disproportionate, the European Charter of Fundamental Rights (ECFR) prohibits sentences that are simply 'disproportionate'.⁶² Secondly, Articles 8, 9, 10, 11 and 14 of the ECHR require that interference with these rights have a legitimate aim and be proportionate to that aim. Proportionality can thus influence 'the form of law'.⁶³ However, as seen in chapter three, the principles of proportionality should only be engaged when reconciling *prima facie* rights — Articles 8 to 11 — with the express limitations set out in those Articles. The principles of proportionality are not applicable in relation to fundamental rights.⁶⁴

From the basis of engagement with fundamental rights, van Zyl Smit and Ashworth argue that the basis for the prohibition of gross disproportionality in sentencing is various constitutional principles that forbid 'cruel, unusual, inhuman or

⁶² Charter of Fundamental Rights of the European Union [2000] OJ C364/1 entered into force 7 Dec 2000 (European Charter of Fundamental Rights) (ECFR) Art 49; Van Zyl Smit and Ashworth (n 12). The status of the charter is uncertain in view of the fact that a number of countries rejected the European Constitution.

⁶³ P Sales and B Hooper 'Proportionality and the Form of Law' (2003) 119 LQR 426.

⁶⁴ A Ashworth *Human Rights, Serious Crime and Criminal Procedure* (Sweet and Maxwell London 2002); Ch three p 162 and p 195.

degrading punishments'.⁶⁵ They also emanate from 'the prohibition on arbitrariness in criminal procedure,' although these two principles tend to be used interchangeably to prevent grossly disproportionate sentences.⁶⁶ The protection from arbitrariness in criminal procedure stems from Article 5 of the Convention protecting the right to liberty, as was the case in *Offen*.⁶⁷ In addition, Canadian jurisprudence suggests that sentences might be cruel and unusual because they are arbitrary.⁶⁸ In the Canadian case of *Smith* the assessment of whether a sentence was grossly disproportionate was conducted with reference to 'the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public'.⁶⁹ More pertinent to the analysis being developed here is the judgement of McIntyre J who said that punishment would be cruel and unusual if it had any of the following characteristics: a) that it was 'of such a character or duration as to outrage the public conscience or be degrading to human dignity'; b) that the punishment went 'beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives'; or c) '[t]he punishment is arbitrarily imposed in the

⁶⁵ Van Zyl Smit and Ashworth (n 12) 543. These principles emerge from a number of sources. Art 5 of the Universal Declaration on Human Rights and Art 7 of the International Covenant on Civil and Political Rights states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. The same wording appears in the American Covenant on Human Rights and the African Charter on Human and People's Rights. Art 3 of the ECHR states that 'no one shall be subjected to or to inhuman or degrading treatment or punishment'.

⁶⁶ *ibid* referring to the case of *R v Offen (No 2)* (2001) 1 Cr App R (S) (CA) 10 where Art 5 and 3 were relied upon.

⁶⁷ (2001) 1 Cr App R (S) (CA) 10; text between n 97 and n 108.

⁶⁸ Van Zyl Smit and Ashworth (n 12) 544; *R v Smith* [1988] 40 DLR (4th) 435, [1987] 1 SCR 1045; D Stuart *Charter Justice in Canadian Criminal Law* (3rd edn) (Toronto Carswell 2001) 392-393.

⁶⁹ Lamer J *R v Smith* [1987] 1 SCR 1045, 1073.

sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards'.⁷⁰

The constitutional provisions that prohibit certain types of punishment may be interpreted in either or both of the following ways.⁷¹ The first would be to say that certain types of punishment are always 'inhuman and degrading' and should always be prohibited, so that the seriousness of the crime is not a consideration. The second way is to determine whether a particular form of punishment is acceptable in relation to the seriousness of the offence so that one type of punishment might be barbaric or cruel and degrading if imposed for one type of offence but not for another.⁷²

Van Zyl Smit and Ashworth argue that in practice, 'the two interpretations are often interwoven and that, even where they are distinguished, they may operate in combination'.⁷³ An example of this is US jurisprudence where the death penalty may only be imposed for the most serious offences, or would be regarded as 'cruel and unusual'.⁷⁴ In terms of ECHR jurisprudence however, the death penalty falls squarely into the first type of punishment.⁷⁵ Further examples of the types of punishment that fall within the first type include corporal punishment, lobotomization or castration of sexual offenders.⁷⁶ Examples of this are found in ECHR jurisprudence, which, for example, prohibits the sentence of corporal punishment.⁷⁷ As seen in the previous chapter, treatment within prison may well fall foul of Article 3 provisions, such as the

⁷⁰ McIntyre J in *Smith* 1097-98 although he concluded that the sentence length – a minimum of seven years for drugs related offences - was not degrading to human dignity.

⁷¹ Van Zyl Smit and Ashworth (n 12) 544.

⁷² *ibid*; P Hogg *Constitutional Law of Canada* (4th edn Carswell Toronto 1997) 1213.

⁷³ Van Zyl Smit and Ashworth (n 12) 544.

⁷⁴ *ibid*.

⁷⁵ Protocol No 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, as amended by Protocol No 11.

⁷⁶ Hogg (n 72) 1213.

handcuffing of women during labour, or the separation of a female prisoner and her newborn baby.⁷⁸

In the determination of sentence however, the situation in relation to sentences that are inhuman or degrading is far less clear-cut. It will be recalled that in determining whether the ‘minimum level of severity’ needed to ground an Article 3 claim has been reached, the courts will take into account a number of factors including the ‘sex, age and state of health’ of the victim.⁷⁹ For example, in *Price v UK*, the ECtHR held that sentencing a severely disabled woman to seven days in prison without ensuring that the facilities to detain her were adequate violated Article 3.⁸⁰ It could therefore be argued that the separation of, for example, a woman from her young family for the purposes of incarceration would reach the minimum level of severity to ground an Article 3 claim if it could be established that the psychological suffering involved was sufficient to ground such a claim. As we have seen in previous chapters, in order for psychological trauma to reach the ambit of Article 3, it would need to cause in the victim intense mental suffering arousing ‘feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their moral or physical resistance’.⁸¹ There is considerable discretion allowed to States in relation to the treatment of prisoners, and this has the effect of upping the threshold of ‘permissible activity’ with regard to prisoners.⁸² However, the threshold for Article 3 will more readily be reached in the young and those with mental illness in view of the fact that their capacity to resist the suffering involved is likely to be lower. The

⁷⁷ *Costello Roberts v United Kingdom* Series A no 247-C (1995) 19 EHRR 112.

⁷⁸ Ch four p 250 – 255.

⁷⁹ *Ireland v United Kingdom* Series A no 25 (1979) 2 EHRR 25 [162].

⁸⁰ Appn no 33394/96 (2002) 34 EHRR 1285.

⁸¹ *Ireland* (n 79) [167]; ch three p 211 – 212; ch four p 251.

psychological harm caused to the children of single mothers sent to prison is certainly acute, as is the distress caused to the mothers themselves.⁸³ The 'sliding scale' nature of Article 3 would thus also appear to ground arguments for restrictions on the use of imprisonment in cases of mental illness that appear to be greater amongst the female prison population⁸⁴.

Different treatment in the upholding of Convention rights could itself amount to inhuman or degrading treatment. In *East African Asians v United Kingdom*, the European Commission of Human Rights held that:

...publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.⁸⁵

In cases of this nature, the failure to conduct an effective investigation into a prima facie case of discrimination which resulted in degrading treatment would in itself constitute a violation of Article 3 given the procedural entitlements emerging from that Article.⁸⁶ Rights under Article 5 in relation to security of person, as with the rights under Article 3 are guaranteed 'in absolute terms' under the Convention and the Commission has held that there cannot 'be an "independent" violation of Article 14 in

⁸² M Addo and N Grief 'Is There a Policy Behind the Decisions and Judgements Relating to Article 3 of the European Convention on Human Rights?' (1995) 20 European L Rev 178.

⁸³ Ch four p 229 – 233.

⁸⁴ Ch four p 236 – 238 .

⁸⁵ *East African Asians v United Kingdom* Appn no 4403/70 (1981) 3 EHRR 76 [207]; *Hilton v United Kingdom* App no 5613/72 (5th March 1976); *Glimmerveen and Hagenbeek v Netherlands* Appn nos 8348/78, 8406/78 (1982) 4 EHRR 260 [19]; *Abdulaziz, Cabales and Balkandali v United Kingdom* Appn nos 9214/80, 9437/81, 9474/81 (1983) 6 EHRR 28 [113]; JA Goldston 'Race Discrimination in Europe: Problems and Prospects' (1999) 4 Eur Human Rights L Rev 462.

⁸⁶ Also, *Assenov and Others v Bulgaria* Appn no 24760/94 (1999) 28 EHRR 652.

combination with this right'.⁸⁷ Article 14 is seldom engaged where fundamental rights are at issue. Most cases that have involved Article 14 have concerned rights under Articles 6 – 11 or Protocol 1 of the Convention.⁸⁸ This is presumably because there can be no justification for violating a fundamental right. Differential treatment and proportionality arguments, such as can be used to defend discrimination under Article 14 may not be used to defend the violation of a fundamental right. This means that it falls to the sliding scale nature of Article 3 to articulate the different effects of such sentences on different groups. Nevertheless if this position is accurate, it does leave unanswered the question of whether positive actions to secure fundamental rights — which as we have seen, can be reconciled with other interests⁸⁹ — would also be interpreted as precluding, by their nature, Article 14 principles. The preclusion of Article 14 from rights guaranteed by Articles 3 and 5 makes it difficult to articulate violations of fundamental rights that particularly affect specific groups, such as women and the black community.

Whether the types of punishment discussed here fall within the category of punishment that is always inhuman and degrading and should never be permitted, regardless of the nature of the offence, is another matter. In relation to the determination of whether one type of sentence might be cruel or inhuman if imposed

⁸⁷ *East African Asians* (n 85) [227]. This is to be contrasted with *Cyprus v Turkey* Appn nos 6780/74, 6950/75 (1982) 4 EHRR 482 where it was held that there had been violations of inter alia art 3 in combination with art 14 because the Turkish authorities had failed to prevent such violations on the strength of the nationality of the applicants.

⁸⁸ *Rasmussen v Denmark* Series A no 87 (1985) 7 EHRR 371; *Inze v Austria* Series A no 126 (1988) 10 EHRR 394; *McMichael v United Kingdom* Series A no 308 (1995) 20 EHRR 205; *Canea Catholic Church v Greece* (1997) 27 EHRR 521; *Petrovic v Austria* Appn no 20458/92 (2001) 33 EHRR 14; *Magee v United Kingdom* Appn no 28135/95 (2001) 31 EHRR 822; *Chapman v United Kingdom* Appn no 27238/95 (2001) 10 BHRC 48; *Sommerfeld v Germany* Appn no 31871/96 (2002) 1 FLR 119. In *Schmidt v Germany* Series A no 291-B (1994) 18 EHRR 513 it was held that a requirement that adults serve as fireman was discriminatory because the provision was not applicable to women. The court found a violation of art 4 (3) (d) and 14. As seen in ch three of this thesis, it is possible to derogate from

for one offence but not for another, van Zyl Smit and Ashworth look for a constitutionally based rationale preventing grossly disproportionate sentences. Why, they ask, ‘should a sentence that is excessive or grossly disproportionate in relation to the offence ... be regarded as contrary to a person’s fundamental rights?’⁹⁰ In seeking to answer this, they rely on statements of the South African Constitutional Court in *S v Dodo* where the judgement stated that:

The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue...To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which is at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.⁹¹

This introduces proportionality of sentence into the determination of whether some sentences can be inhuman or degrading. With this reasoning, a single mother who is imprisoned and therefore separated from her young family for property offences could argue that there has been a disproportionate violation of her fundamental rights under, for example, Article 8 of the Convention. However, as will be seen in the next section, the ECtHR has been timid in its use of human rights principles to question the proportionality of sentence length.

4 (3) (d) so it does not share the status of ‘fundamental’ right held by some of the other articles. Again, this position is to be contrasted with *Cyprus* (n 87).

⁸⁹ Ch three p 158 – 163.

⁹⁰ Van Zyl Smit and Ashworth (n 12) 546.

⁹¹ (2001) (3) SA 382 (CC) at 403-4.

This chapter has also referred to the concept of proportionality as a human rights principle that could be used to develop substantive penal policies. These concepts emerge as a result of the *prima facie* rights under Articles 8, 9, 10, 11 and 14 of the Convention. In order to justify interferences with these Convention rights, States must be acting in accordance with the law, the interference must be necessary in a democratic society and proportionate to a legitimate aim.⁹² Similar requirements of proportionality are made of Article 14 in order to defend differential treatment.⁹³ In relation to particular laws, Sales and Hooper argue that fact sensitive laws are more likely to be proportionate than fact insensitive ones. Fact insensitive laws are those that are ‘expressed in simple and rigid terms’; whereas laws can be made more fact sensitive by allowing more detail so that a wider range of issues become pertinent to how laws might be applied in a particular case, or by increasing the amount of discretion available to those who apply it.⁹⁴

In the case of criminal justice, if a sentence were regarded as, for example, a disproportionate interference with privacy rights under Article 8, this would involve increasing discretion to sentencers to take into account more factors that might have a bearing on whether the defendants’ rights will be compromised by a particular sentence. One counter-argument to this is that such a move might compromise legal certainty.⁹⁵ Excessive discretion on the part of the judiciary is resisted by the proponents of proportionate sentencing in view of the potential for significant variations in sentence.⁹⁶ Nevertheless, a fact sensitive approach could lead to

⁹² *Handyside v United Kingdom* Series A no 24 (1979-80) 1 EHRR 737.

⁹³ *Belgian Linguistics Case (No 2)* Series A no 6 (1979-80) 1 EHRR 252; *Abdulaziz, Cabales and Balkandali* (n 85); *Wandsworth LBC v Machalak* [2002] EWCA Civ 271, [2003] 1 WLR 617.

⁹⁴ Sales and Hooper (n 63) 429.

⁹⁵ *ibid* 437-9.

⁹⁶ For example Ashworth (n 41) ch 1.

arguments that female offenders experience a disproportionate interference with their fundamental rights as a result of imprisonment. It would also appear to provide the basis for introducing arguments that question the legitimacy of the aim of imprisonment in view of the effects on these families.

E. THE DEVELOPMENT OF PENAL POLICY IN LINE WITH ARTICLES 3 AND 8

1. Sentencing and Articles 3 and 5 of the Convention

There are few ECtHR decisions or more recently, domestic decisions under the HRA concerning sentence length, and even fewer that could be applied to the sentencing of female offenders. Article 5 of the Convention relates to deprivations of liberty such as detention or a comparable restriction of movement.⁹⁷ This may preclude a number of non-custodial sentences from consideration under this Article although they may form part of an argument under Article 8.⁹⁸ In relation to sentence length, the domestic case of *Offen* established that a life sentence imposed for a second violent offence may violate Articles 3 and 5 where the defendant did not pose ‘a significant risk to the public’.⁹⁹ Additionally, in *Weeks* the ECtHR held that a punitive sentence of life imprisonment for armed robbery could contravene Article 3.¹⁰⁰ Nevertheless, it has been held that to sentence children to imprisonment is not in itself a violation of Article 3.¹⁰¹ In *Dalia* the applicant, an Algerian national, was convicted and had

⁹⁷ K Starmer *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (London Legal Action Group 1999) 96-98.

⁹⁸ *Craig Daniel T and Others* (1999) 2 Crim App R (S) 304 (CA); text between n 116 and n 119.

⁹⁹ *Offen* (n 67) [96].

¹⁰⁰ *Weeks v United Kingdom* Series A no 114 (1988)10 EHRR 293 [47].

¹⁰¹ *T and V v United Kingdom* Appn nos 24724/94, 24888/94 (2000) 30 EHRR 121.

served a prison sentence for drugs offences and appealed a decision to impose an exclusion order upon her for this offence.¹⁰² The applicant had conceived and given birth to a child after her prison sentence.¹⁰³ Her child, who was six at the time of the hearing, had French citizenship and she argued that the deportation order, forcing her to go back to Algeria and separating her from her child would contravene Article 3.¹⁰⁴ However, the court held that the suffering caused would not reach the necessary level of severity for this Article.¹⁰⁵ The court was influenced by the severity of the offence, the fact that the applicant could choose which country she went to, and that such an order did not necessarily mean separation from her child.¹⁰⁶ These cases deal with offences (and sentences) at the more severe end of the scale and, as we have seen, most female offending is at the less serious end. Furthermore, these cases confirm that the ECHR has only addressed decisions concerning sentence if they were severely disproportionate.

2. Developing Respect for Family Life?

Article 8 protects ‘private and family life’ from ‘interference’, unless ‘in accordance with the law’, ‘necessary in a democratic society’ and to protect the interests prescribed in 8 (2) of inter alia ‘the prevention of disorder or crime’, or ‘the protection of health or morals’. These interests then are the ‘legitimate aims’ that can justify the interference, and the list provided in 8 (2) is exhaustive.¹⁰⁷ As we have seen, the

¹⁰² *Dalia v France* Appn no 26102/95 (2001) 33 EHRR 625 [7] – [32].

¹⁰³ *ibid* [17].

¹⁰⁴ *ibid* [7] – [32].

¹⁰⁵ *ibid* [65] – [69].

¹⁰⁶ *ibid* [C48] and [63], [67].

¹⁰⁷ *Golder v United Kingdom* Series A no 18 (1979-80) 1 EHRR 524.

interference must also be proportionate to that necessary aim.¹⁰⁸ The rights guaranteed under Article 8 have been linked to the ideals of ‘autonomy, dignity or moral integrity, which are central to liberalism’,¹⁰⁹ and which have brought within it ‘freedom of action and lifestyle’.¹¹⁰ Article 8 secures an area of life free from state interference,¹¹¹ and within which the development of the human personality can occur.¹¹² Feldman elaborates on these arguments by suggesting development of the concept of ‘moral integrity’ whereby people who try to live ‘in accordance with [their] ethical standards’ could result in the respect for private life being impinged if States significantly limit people’s ‘range of choices’.¹¹³ This could, he argues, ‘compel the state to give practical assistance to those who lack the physical (or, perhaps, financial) capacity to give effect to their moral choices’.¹¹⁴ This may in turn result in the development of arguments under Article 8 for ‘social and economic rights imposing positive obligations on the state’.¹¹⁵ This is significant for the development of women’s human rights given the link between poverty and female offending, although in relation to Article 8 and sentencing, a less enterprising picture emerges.

Article 8 provisions require that conviction for a particular offence does not violate the Convention and sentence ‘must show respect for the right concerned, and should not be disproportionate’ to the aim pursued.¹¹⁶ In the pre-2000 case of *T*, the court was called to consider whether a community sentence for a conviction of gross

¹⁰⁸ *Handyside* (n 92).

¹⁰⁹ D Feldman ‘The Developing Scope of Article 8 of the European Convention on Human Rights’ (1997) 3 Eur Human Rights L Rev 264, 264.

¹¹⁰ *ibid* 267.

¹¹¹ *Starmer* (n 97) 125.

¹¹² *Niemietz v Germany* Series A no 251-B (1993) 16 EHRR 97.

¹¹³ Feldman (n 109) 270.

¹¹⁴ *ibid*.

¹¹⁵ *ibid*.

¹¹⁶ Ashworth (n 41) 128.

indecent following homosexual acts between a number of men in private, was excessive.¹¹⁷ The complainants argued that in view of the Convention jurisprudence concerning Article 8, the court could only find a sentence of an absolute or conditional discharge appropriate, and while this argument was rejected, the court found the original sentences too severe and reduced them to probation.¹¹⁸ The court in this case was influenced by an apparent breach of Article 8 that was involved in the criminalization of this activity.¹¹⁹ It is accepted that this argument cannot be applicable for activity that is criminalized without violating the Convention. However, the requirement that sentences be proportionate to the ‘legitimate aim’ may enable limited consideration to be given to the excessiveness of sentence including (and in contrast to the ‘detention’ requirements of Article 5) non-custodial sentences.

Consideration of the excessiveness of sentence is one of the interpretations that could be put on to the decision of the ECtHR in *Laskey*.¹²⁰ Here, the court found that convictions for consensual sado-masochistic activities did not violate the right to private life under Article 8.¹²¹ The Court also held that the sentences imposed on the defendants of eighteen months, six months and three months imprisonment following convictions for various offences including offences under the Offences Against the Person Act 1861— reduced from three years, two years and nine months and twelve months by the Court of Appeal — were not disproportionate to the legitimate aim of the ‘protection of health’ under the Convention.¹²² Nevertheless, the inference of this

¹¹⁷ *Craig Daniel T and Others* (n 98).

¹¹⁸ *ibid* 310-312.

¹¹⁹ *ibid* 310.

¹²⁰ *Laskey, Jaggard and Brown v United Kingdom* Appn nos 21627/93, 21826/93, 21974/93 (1997) 24 EHRR 39.

¹²¹ *ibid*.

¹²² *ibid* [49] – [50].

case could be that if the UK courts had upheld the original sentences, the ECtHR might have taken a different view.¹²³ However, the ECtHR has held that the decision to deport a woman convicted of drugs offences, who was the mother of a French child conceived after the exclusion order had been made, was not a disproportionate interference with her private life.¹²⁴ The Court here appeared to be influenced by the seriousness of the offence, the timing of conception (after the making of the order), and the fact that the applicant had social and family ties in her home country.¹²⁵ While Article 8 appears to provide a doorway to arguing that sentences are excessive in particular cases, the case law suggests that in practice, the approach is likely to be a cautious one. Furthermore, on its own, Article 8 does not seem sufficient for arguments concerning the particular circumstances of female offenders to be made.

F. EQUALITY IN CRIMINAL JUSTICE

As seen in the previous chapter, international human rights treaties have little to say on the purposes of imprisonment, and there is scarce mention of women prisoners.¹²⁶ There is even less on the conditions under which imprisonment should be used. The CEDAW committee, in its concluding comments on the United Kingdom, expressed concern about ‘the high number of women in prison, particularly those from ethnic minorities’.¹²⁷ They commented on the high instances of women imprisoned for drugs offences or due to ‘minor infringements, which in some instances seem indicative of

¹²³ Ashworth (n 41) 129.

¹²⁴ *Dalia* (n 102) [43] – [64].

¹²⁵ *ibid* [61] – [64].

¹²⁶ Ch four p 243.

¹²⁷ Concluding observations of the Committee on the Elimination of Discrimination Against Women: United Kingdom of Great Britain and Northern Ireland (n 38) [312].

women's poverty'.¹²⁸ They recommended that 'the Government intensify its efforts to understand the causes for the apparent increase in female criminality and to seek alternative sentences and non-custodial strategies for minor infringements'.¹²⁹ As we have seen, the European Charter of Fundamental Rights provides that sentences 'must not be disproportionate to the criminal offence'.¹³⁰ These principles provide a foundation, albeit a tentative one, for the development of human rights analysis within ECHR jurisprudence. This section will argue that the sentencing of women could be addressed from the perspective of equal protection of their fundamental right to liberty, or to freedom from inhuman or degrading treatment or punishment, or to privacy as examined in D above.

The principles of equality enshrined in documents such as CEDAW and CERD could be used to develop this analysis. Article 1 (1) of the CERD treaty states that 'racial discrimination' involves:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms'.

Article 1 (4) states that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental

¹²⁸ *ibid.*

¹²⁹ *ibid* [313].

¹³⁰ Ch VI Art 49 (3) Charter of Fundamental Rights of the European Union [2000] OJ C364/1 entered into force 7 Dec 2000 (European Charter of Fundamental Rights) (ECFR). This is in contrast to the principle articulated in ECHR jurisprudence that sentences should not be *grossly* disproportionate *D van Zyl Smit and A Ashworth* (n 12) 542.

freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2 (c) requires States to 'take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists'. Article 5 (a) requires States to guarantee 'equal treatment before the tribunals and all other organs administering justice'. This means that States in which black people are treated more harshly by the criminal justice system are likely to be falling foul of this treaty.¹³¹ However, the definitions of racial discrimination do not explicitly refer to practices, and would thus appear to be less able to tackle the institutionalized nature of prejudice.¹³² 'Practices' are however included in the language of the Race Directive.¹³³ The difficulties faced by ethnic minorities and women in the criminal justice system differ. Those from ethnic minorities generally appear to be under greater scrutiny by criminal justice agencies, (for example, in relation to stop and search);¹³⁴ and receive harsher treatment at the hands of the criminal justice system.¹³⁵ While there is some evidence to suggest that the criminal justice system treats women more harshly,¹³⁶ their activities are generally not as

¹³¹ TD Johnson 'Unbridled Discretion and Color Consciousness: Violating International Human Rights in the United States Criminal Justice System' (2003) 56 (1) Rutgers L Rev 231.

¹³² L Lustgarten 'The Future of Stop and Search' [2002] Crim L R 603.

¹³³ Council Directive 2000/43/EC of June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22 (The Race Directive).

¹³⁴ A Sanders and R Young *Criminal Justice* (2nd edn Butterworths London 2000); Lustgarten.

¹³⁵ Lustgarten (n 132); Sanders and Young (n 133) ch 2; C Phillips and B Bowling 'Racism, Ethnicity, Crime and Criminal Justice' in M Maguire, R Morgan and R Reiner (eds) *Oxford Handbook of Criminology* (3rd edn Oxford University Press Oxford 2002) 579; R Hood *Race and Sentencing: A Study in the Crown Court* (Clarendon Press Oxford 1992).

¹³⁶ C Hedderman and L Gelsthorpe *Understanding the Sentencing of Women Home Office Research Study 170* (Home Office London 1997); Hudson (n 46) 228 arguing that higher percentages of women are sentenced to imprisonment for property offences than men and that more women are sentenced to imprisonment without previous convictions.

scrutinized by the police as the black population, and their numbers in the prison population are small in comparison to males. The main problem in relation to the female prison population is that the *effects* of imprisonment are greater. Thus, while black people face a criminal justice system that appears to treat them more harshly, women seem to suffer more in relation to conditions that are apparently neutral. The 25th General Recommendation made by the CERD committee explicitly recognizes the ‘gender-related dimensions of racial discrimination’,¹³⁷ such as may be operating in relation to the increased numbers of women in prison.¹³⁸ Given the over-representation of black women in the female prison population, they may well be suffering the effects of both forms of prejudice: harsher treatment from the pre-investigative and investigative phases of the criminal justice process, *and* suffering more as the result of imprisonment.

The CEDAW treaty couches the principles of equality in similar terms. Article 1 states that ‘discrimination against women’ involves the application of:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This, on the face of it, would appear to embrace the concept of gender-neutrality, which makes the *effects* difficult to articulate in this paradigm. Article 4 (1) however states that:

¹³⁷ CERD General Recommendation 25 ‘Gender-Related dimensions of racial discrimination:.. 20/03/00’

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

This issue is taken up in the report *Building Blocks for a General Recommendation on Article 4 (1) of the CEDAW Convention*. In it, it is said that the right not be discriminated against is double faceted. At one level, it involves treating like cases alike; and on the other, if circumstances are ‘dissimilar...they should be treated differently’.¹³⁹ The report states that the emphasis in relation to equality legislation tends to be excessively on treating like cases alike, and goes on to say that:

Formal equal treatment of differently situated people results too often in inequality in social and economic life. Therefore, some unequal treatment is necessary to achieve a true state of equality. Implementing the second part of the classical formula of (legal) equality thus at times calls for “special” measures that are appropriate and necessary to prevent inequality in social life.¹⁴⁰

As discussed in chapter one, the only anti-discrimination provision that is applicable in the field of criminal justice for women is Article 14 and Protocol 12 ECHR, which are framed in terms of formal equality.¹⁴¹ However, what this does is give us a basis for thinking about the double disadvantages faced by the female prison population that may start to be addressed to limit women’s disadvantage in social life. Research suggests that a number of factors already come into play in relation to the sentencing of women. Magistrates tend to regard theft committed by females as being

56th session [5].

¹³⁸ Ch four p 227 – 229.

¹³⁹ R Holtmatt *Building Blocks for a General Recommendation on Article 4 (1) of the CEDAW Convention* 9 (Report of the Expert Meeting in Maastricht (Valkenburg) 10-12 October 2002).

¹⁴⁰ *ibid.*

influenced by their family commitments, whereas this is not the case for male defendants.¹⁴² Women tend to be regarded as influenced by male partners, especially in relation to the more serious or drugs-related offences.¹⁴³ Women facing charges for not having a TV licence have been of particular concern, with single mothers and women whose partners would not give them the money for the licence being most at risk of facing charges.¹⁴⁴ Questions about family income are raised when considering fines and many sentencers suppose that women do not have money of their own.¹⁴⁵ Sentencers seem to be reluctant to fine women and this may lead to treatment that is either more lenient or harsher in terms of non-custodial sentences.¹⁴⁶ While the concern to keep women with childcare responsibilities out of prison tends to lead to mitigation in this respect, the reluctance to impose a fine in view of the limited financial resources for women with children could result in more severe non-custodial penalties such as probation.¹⁴⁷

However, there is some evidence to suggest that women are treated more leniently in sentencing than men. Men are more likely to receive custodial sentences than are women, including custodial sentences where there were no previous convictions.¹⁴⁸ Nevertheless, it has been argued that this may disguise different aspects of offending that are not immediately apparent from court records.¹⁴⁹ Some

¹⁴¹ The new Equality Bill would expand obligations on public authorities to refrain from discriminating on the grounds of sex and to promote equality, but is limited in the area of criminal justice: ch one p 56.

¹⁴² Hedderman and Gelsthorpe (n 136) 26.

¹⁴³ *ibid* 28-9.

¹⁴⁴ *ibid* 29.

¹⁴⁵ *ibid* 50 – 1.

¹⁴⁶ *ibid* 21.

¹⁴⁷ *ibid* 50.

¹⁴⁸ C Flood-Page and A Mackie *Sentencing Practice: An Examination of Magistrates' Courts and Crown Court in the Mid-1990's: Hors 180* (Home Office London 1998)122; Hedderman and Gelsthorpe (n 136) 9 – 22.

¹⁴⁹ Daly (n 50) 7; *Statistics on Women and the Criminal Justice System* (n 13) 21.

commentators have argued that higher percentages of women are imprisoned for property crimes than men,¹⁵⁰ and there is some statistical evidence to support this. In 1999, the greater majority of women sent to prison were sent there for ‘theft from shops’ than for other offences.¹⁵¹ Research conducted into those sentenced to custody has suggested that 61 per cent of female prisoners have children, and of these, 58 per cent were under five years of age.¹⁵² Most of these children ‘lost their principal carer and a third their only carer’ when their mothers were imprisoned.¹⁵³ The fundamental rights that are impaired (in comparison to the fundamental rights of male prisoners) are: the right to liberty; where, for example, black women are treated more harshly by the criminal justice system; the disproportionate effects of the right not to be subjected to torture or inhuman or degrading treatment or punishment, and the right to privacy. However, as we have seen, the ECtHR has been reluctant to articulate abuses of fundamental rights that might disproportionately affect particular groups as issues of discrimination.¹⁵⁴

Article 14 is not a ‘free-standing’ right and ‘can be invoked only in conjunction with’ another Convention right.¹⁵⁵ As a result, Article 14 has been criticized for limiting discrimination protections and for precluding from consideration issues of inequality typically outwith the Convention, employment, housing and welfare benefits that are so important in the Council of Europe.¹⁵⁶ A violation of Article 14 in

¹⁵⁰ Hudson (n 46).

¹⁵¹ This figure was 2,350 sent to prison for ‘theft from shops’, followed by ‘other wounding’ (480), ‘other fraud’ (460), drugs related offences (410), ‘summary motoring’ offences (400), burglary (300) and ‘handling stolen goods’ (300) *Statistics on Women and the Criminal Justice System* (n 13) 21.

¹⁵² *Mothers in Prison* (n 16) 1.

¹⁵³ *ibid* 2.

¹⁵⁴ n 87; ch two p 115.

¹⁵⁵ Starmer (n 97) 684.

¹⁵⁶ S Livingstone ‘Article 14 and the Prevention of Discrimination in the European Convention of Human Rights’ [1997] *Eur Human Rights L Rev* 26, 26.

combination with another Article can be found even if there would have been no violation of that Article standing alone.¹⁵⁷ The only requirement is that the violation ‘[falls] within the ambit’ of another right.¹⁵⁸ It is, to that extent, autonomous.¹⁵⁹ Typically, however, the ECtHR has been reluctant to find violations under Article 14 where it has been possible to ground them within another substantive right.¹⁶⁰ This is altered by Protocol 12 which provides a freestanding right to equality which, while framed in terms of formal equality, should, in principle, enable more socio-economic arguments to be made.

Notwithstanding the limitations of the discrimination provisions of the Convention, Article 8 and the requirement of proportionality in the interference with private life, in combination with Article 14, provides the best opportunity for raising questions over the use of imprisonment for women.¹⁶¹ This is because ‘assumptions relating to gender or sexuality play such a prominent part in the construction of family policy of most states’.¹⁶² This would seem to lead the way for arguments to be made that would question the use of imprisonment of women, large numbers of whom have young families, in all but the most serious of cases. Elements of possible arguments in relation to indirect discrimination in sentencing can also be seen in the provisions of Article 5 in conjunction with Article 14. In *Nelson* the Commission held that ‘where a settled sentencing policy appears to affect individuals in a discriminatory

¹⁵⁷ *Belgian Linguistics Case (No 2)* (n 93) [9]; *Abdulaziz Cabales and Balkandali v United Kingdom* Series A no 94 (1985) 7 EHRR 471; *Schuler-Zgraggen v Switzerland* Series A no 263 (1993) 16 EHRR 405.

¹⁵⁸ *Rasmussen* (n 88).

¹⁵⁹ *Thlimmenos v Greece* Appn no 34369/97 (2001) 31 EHRR 411.

¹⁶⁰ See for example *Dudgeon v United Kingdom* Series A no 45 (1982) 4 EHRR 149.

¹⁶¹ *Livingstone* (n 156) 27.

¹⁶² *ibid.*

fashion...this may raise issues under' these two articles.¹⁶³ This offers the potential to expand rights under Article 5 with the use of Article 14.¹⁶⁴

Discrimination under the Convention occurs if persons are treated differently with 'no objective and reasonable justification'; and if this difference in treatment does not 'pursue a legitimate aim', and is not proportionate to that aim.¹⁶⁵ It has been held that a failure to treat differently people whose situations are substantially different violates the Convention.¹⁶⁶ The ECtHR scrutinizes differential treatment on the grounds of sex carefully in view of the importance attached by the Council of Europe to equality between the sexes.¹⁶⁷ The ECtHR has held that indirect discrimination would be regarded as discrimination for the purpose of the Convention.¹⁶⁸ Unlike domestic discrimination provisions, both direct and indirect discrimination may be justified under the Convention.¹⁶⁹ This may have the effect of being able to justify positive discrimination.¹⁷⁰ The Commission has held that tax advantages that benefit married working women were justified on the basis of encouraging them to work and thus advance 'the equality of the sexes'.¹⁷¹ Monaghan argues that the incorporation of Article 14 may thus have the effect of widening domestic definitions and descriptions of discrimination.¹⁷² This appears to suggest, at the very least, that the

¹⁶³ *Nelson v United Kingdom* (1986) 49 DR 170, 174

¹⁶⁴ Livingstone (n 156) 27, although as we have seen, the ECtHR is reluctant to engage art 14 in the context of fundamental rights: text between n 86 and n 89.

¹⁶⁵ *Belgian Linguistics Case (No 2)* (n 93) 284; *Abdulazis* (n 157) [72].

¹⁶⁶ *Thlimmenos* (n 159).

¹⁶⁷ *Schuler-Zraggen* (n 157) [67].

¹⁶⁸ *Marckx v Belgium* Series A no 31 (1979) 2 EHRR 330, 346.

¹⁶⁹ K Monaghan 'Limitations and Opportunities: A Review of the Likely Domestic Impact of Article 14 ECHR' (2001) 2 Eur Human Rights L Rev 167, 174.

¹⁷⁰ *ibid.* Such a move would not be in breach of the Convention as Protocol 12 explicitly states that equality measures therein do not prevent states from taking steps to promote substantive equality.

¹⁷¹ *Lindsay v United Kingdom* [1986] 48 DR 181, 190.

¹⁷² Monaghan (n 169) 174. There is some evidence that this may have already happened. The new Equality Bill currently before the House of Lords extends discrimination protections to religious belief and conscience, and extends protection against sex discrimination to acts of public authorities.

disproportionate impact of some sentences on women with families could lead to the development of arguments using Protocol 12 or Article 14, in conjunction with other rights such as Articles 8 and 5. It could plausibly be argued that the problems faced by the women facing custodial sentences are substantially different to their male counterparts. The use of Article 14 in the UK context was developed by the Court of Appeal in the case of *Wandsworth LBC v Machalak* where Brooke LJ put forward the following test to assist in determining whether a breach of Article 14 had taken place.¹⁷³ These were that:

(i) Do the facts fall within the ambit of one of the more substantive convention provisions...? (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison (“the chosen comparators”) on the other? (iii) Were the chosen comparators in an analogous situation to the complainant’s situation? (iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate policy aim and did the differential treatment bear a reasonable relationship of proportionality aim sought to be achieved?

If any one of the answers to these questions is no, the claim is unlikely to succeed.¹⁷⁴ As we have seen, it can plausibly be argued that the effects of particular sentences are greater on some women in comparison to the prison population as a whole. Furthermore, while the prevention and punishment of crime is undoubtedly a legitimate policy aim, it could be questioned whether the use of custody for some women with regard to less serious crime is proportionate.

¹⁷³ [2002] 4 All ER 1136 [20].

¹⁷⁴ *ibid.*

As we have seen, analogies can be drawn between the ‘goal orientated’ nature of socio-economic rights and Articles 8-11 of the Convention as ‘they are designed to prompt an evaluation of the scope of certain freedoms with direct reference to societal goals’.¹⁷⁵ The limitations placed on these rights illustrate this point, and demonstrate the extent to which such rights are ‘progressive rather than absolute’.¹⁷⁶ These goals prompt an assessment about the extent to which individual rights can be realized, taking into account wider social objectives. In addition, it has been argued that even with regard to an essentially negative right like Article 14, the principles of equality cannot be divorced from social policy decisions about the allocation of particular benefits.¹⁷⁷ Some references to economic issues can be seen in the decisions of the ECtHR. In *Lindsay*, the Commission emphasized the importance of encouraging women in the workplace as justification for tax benefits.¹⁷⁸ In *Schuler-Zgraggen*, the applicant had had her disability benefit cut after giving birth to a child.¹⁷⁹ The courts in Switzerland upheld this decision ‘based on experience of everyday life’ that mothers ‘give up their jobs for as long as the children need full-time care’.¹⁸⁰ The court held that, notwithstanding the fact that there had been no violation of the applicant’s rights under Article 6 (1), there had been a violation of 6 (1) in conjunction with Article 14.¹⁸¹ The court, in its decision, referred to the importance of the goals of the Council of Europe in relation to equality between the sexes.¹⁸² The links between the Council of Europe and ECtHR decision-making offer the possibility of being able to develop socio-economic rights within this framework, although it should be

¹⁷⁵ T Novitz ‘Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter’ (2002) 1 Eur Human Rights L Rev 50, 61.

¹⁷⁶ *ibid*.

¹⁷⁷ S Fredman ‘Providing Equality: Substantive Equality and the Positive Duty to Provide (Paper for Wits Conference July 2004)’ South African J on Human Rights (forthcoming, copy with author).

¹⁷⁸ *Lindsay* (n 171).

¹⁷⁹ *Schuler-Zgraggen* (n 157) [15].

¹⁸⁰ *ibid* [29].

¹⁸¹ *ibid* [61] – [67].

emphasized that in the jurisprudence of the ECtHR links with this and issues of poverty and offending have yet to be made within the sphere of criminal justice.

G. CONCLUSIONS

There are particular problems with the development of women's human rights under the Convention within the context of sentencing. A sentence of imprisonment can have a disparate effect on female defendants and upon their family life in comparison to male prisoners. Furthermore, it may be the case that female defendants are sentenced more harshly for not fitting in with traditional gender stereotypes, or because they are perceived as not having sufficient financial resources to pay a fine.¹⁸³ As we also saw above, the cases of the ECtHR in relation to Article 14 prohibit decisions based on gender stereotypes.¹⁸⁴ Decisions that indirectly discriminate against a particular group would violate Article 14.¹⁸⁵ It remains to be seen what the effects of Protocol 12 on ECHR case law will be. The influence of the Council of Europe may also widen the discussion to include socio-economic rights, which may in turn have an impact on female offending. It has been argued that one of the impediments to the use of imprisonment is the punitive tendencies of the judiciary, which Hudson describes as the 'judicial addiction to punishment'.¹⁸⁶ It seems that the ECtHR has yet to interpret rights in a way that can shift this fixation. This appears, on the face of it, to inhibit questions concerning the use of imprisonment for female offenders. Nevertheless, Article 8 in combination with Article 14 or the development

¹⁸² *ibid* [67].

¹⁸³ Text between n 141 and n 147.

¹⁸⁴ *Schuler-Zraggen* (n 157).

¹⁸⁵ *Marckx* (n 168).

¹⁸⁶ Hudson (n 49) 184.

of Protocol 12 could provide a way to examine the appropriateness of the use of imprisonment for women and generally for less serious offences in view of the impact that it has on prisoners' lives.

CONCLUSIONS

This thesis has sought to reconstruct and develop human rights analysis in order to further women's legitimate interest in this new framework of rights. In so doing, it has sought to enhance the universality of human rights principles. This has been made possible to some extent by the fast evolving and dynamic nature of the Convention, and more pertinently, the developing doctrine of positive obligations. In addition, the influence of other international human rights instruments on Convention case law is significant, particularly with regard to notions of equality and how these might be more dynamically understood. This analysis has been developed from the perspective of the importance of articulating human rights principles in a manner that is more inclusive of women's claims. Whilst accepting the criticisms made of the human rights paradigm and its inherent limitations, the arguments developed here seek interpretations that might further women's interests. Women's rights have, for many years, existed on the margins of human rights discourse. This thesis has endeavoured to bring women's claims into the mainstream.

Chapter one demonstrated the weaknesses of classical ideals of freedom as the absence of State interference in assisting those who could not put this freedom to meaningful use: the poor, the illiterate and the underprivileged.¹ The commitment to negative freedom masked the extent to which women were excluded economically,

¹ Ch one p 10 – 60 and therein p 11 – 13; I Berlin *Four Essays on Liberty* (Oxford University Press Oxford 1969) 118-172. For the development of positive freedom: T H Green D Bagnoli *Lectures on the Principles of Political Obligation* (Cambridge Scholars Press London 2002) 4; JG Merquior *Liberalism Old and New* (Twayne Publishers Boston 1991) 2-13; MJ Sandel *Liberalism and the Limits of Justice* (2nd edn Cambridge University Press Cambridge 1998) ch 2, 66; J Rawls *A Theory of Justice* (Oxford University Press Oxford 1999).

socially and politically, particularly in the domestic arena.² For women, private individuals are most likely to be the source of coercion. Historically, human rights doctrine has tended towards the protection of negative liberty. However, recent years have seen moves towards the development of rights that are more socio-economic in nature; and towards the doctrine of positive obligations — obligations on States to secure rights, in some cases between private individuals.³

The focus on formal equality has been a source of concern to feminists for ignoring structural inequality, and requiring that women emulate their male counterparts in order to acquire rights.⁴ This formal equality approach is mirrored in Article 14 of the European Convention on Human Rights (ECHR).⁵ Other anti-discrimination provisions have hitherto been inapplicable in the field of criminal justice. However, in line with trends in Convention jurisprudence, there have been moves towards positive duties to secure equality mostly in employment, education and the provision of services.⁶ The failure of formal equality to tackle structural

² Ch one p 27 – 29 and 33 – 37; K O'Donovan *Sexual Divisions in Law* (Weidenfeld and Nicholson London 1984); C Pateman 'Feminist Critiques of the Public Private Dichotomy' in C Pateman *The Disorder of Women: Democracy, Feminism and Political Theory* (Oxford Polity Press 1989); S Fredman *Women and the Law* (Clarendon Oxford 1997) 16-17; N Lacey *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing Oxford 1998) 77-8.

³ Ch one p 29-33; Council of Europe ETS no 35 European Social Charter Turin 18 X 1961; Charter of Fundamental Rights of the European Union [2000] OJ C364/1 entered into force 7 Dec 2000 (European Charter of Fundamental Rights) (ECFR); *X and Y v Netherlands* Series A no 91 (1986) 8 EHRR 235 [23]; *Costello Roberts v United Kingdom* Series A no 247/C (1995) 19 EHRR 112; *A v United Kingdom* Appn no 25599/94 [1999] 27 EHRR 611; *Osman v United Kingdom* Series A 1998 VIII 3124 (2000) 29 EHRR 245 [115]; *Z v United Kingdom* Appn no 29392/95 (2002) 34 EHRR 3; *E v United Kingdom* Appn no 33218/96 (2003) 36 EHRR 31; *MC v Bulgaria* Appn no 39272/98 (2005) 40 EHRR 20.

⁴ Ch one p 47 – 53; Lacey (n 2) ch 1; S Fredman 'Combating Racism with Human Rights: The Right to Equality' in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (Oxford University Press Oxford 2001) 10 - 26; S Easton 'Feminist Perspectives on the Human Rights Act: Two Cheers for Incorporation' (2002) 8 Res Publica 21, 23.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR).

⁶ Ch one p 53 – 57; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 Amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions [2002] OJ L 269/15 paras [4] [14] [15] and arts 1(A) 2(5) and 8

disadvantage has led to a broader critique of rights which are seen as inherently 'individualistic' and 'competitive'.⁷

Whilst the fluid language of rights itself may give cause for optimism that the sources of female oppression could be articulated within the ECHR framework, the current adjudicative model combined with a reliance on a largely male judiciary,⁸ could impede the progress of developing ECHR jurisprudence in a manner which assists women's claims. The shortcomings of rights discourse is that they fall short of addressing the structural disadvantages that are intrinsic to women's lives.⁹ Nevertheless, the thesis has adopted the perspective that rights discourse cannot be abandoned as a strategy for change.¹⁰ Furthermore, the positive obligations emerging in human rights discourse and in equality law present opportunities to articulate and develop women's human rights. This thesis has sought to accomplish this in the under-analysed areas of the potential influence of ECHR principles on rape cases, and on female prisoners' rights.

Chapter two brought out a number of themes in defining rape under the ECHR.

This chapter demonstrated that notwithstanding the recent developments to secure

(The Gender Directive); Also Council Directive 2000/78/EC of 27 November 2002 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16 (The Equal Treatment Directive); Council Directive 2000/43/EC of June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22 (The Race Directive); arts 21 and 23 ECHR; arts 2 and 4 Convention on the Elimination of all Forms of Discrimination against Women (opened for signature 1st March 1980, entered into force 3rd September 1981) (1980) 19 ILM 33 (CEDAW); Race Relations (Amendment) Act 2000 (UK); Disability Discrimination Act 1995 (UK).

⁷ Ch one p 51; Lacey (n 2) 27.

⁸ S Palmer 'Critical Perspectives on Women's Rights: The European Convention on Human Rights and Fundamental Freedoms' in A Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish London 1996) 223, 226.

⁹ *ibid* 225, ch one p 52.

rights between private individuals, including in the domestic realm, traditional human rights doctrine has yet to reflect the specific reality of rape. The development of human rights principles to address rape has tended to focus on times of conflict and has only recently started to be developed within human rights jurisprudence. Feldman's distinction between objective and subjective dignity was examined.¹¹ By his analysis, rape is a violation of subjective dignity — associated with individual autonomy and choice. Objective dignity is the aspect of dignity that is associated with societal and state attitudes towards particular groups, seen in the manner that discrimination on the grounds of race is articulated.¹² 'Ethnic cleansing' for example, is regarded as a violation of the objective dignity of the group being cleansed.¹³ In contrast, rape (even mass rape in time of war) is not considered an attack against women because they are women.¹⁴

Also examined was the evidence of a hierarchical structure in international law, where rights such as the protection against torture and against discrimination were regarded as the most important rights.¹⁵ The Human Rights Committee (HRC) articulates rape as a violation of Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and as an issue of equality under Article 3.¹⁶ Furthermore, trafficking in women and children is a violation of Article 8 and the different ways in which women's liberty might be impeded forms part of the jurisprudence of Article

¹⁰ Introduction p 2; Palmer (n 8); P Williams 'Alchemical Notes: Reconstructed Ideals from Deconstructed Rights' (1987) 22 *Harvard Civil Rights – Civil Liberties L R* 401.

¹¹ D Feldman 'Human Dignity as Legal Value – Part I' [1999] *PL* 682; ch two p 87 – 89.

¹² *ibid.*

¹³ *ibid* 692; ch two p 89.

¹⁴ Ch two p 67, p 99 – 103.

¹⁵ Ch two p 89 – 92; D Shelton 'Hierarchy of Norms and Human Rights: Of Trumps and Winners' (2002) 65 *Saskatchewan L Rev* 301.

¹⁶ (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); ch two p 93 – 95.

9.¹⁷ Notwithstanding the fact the CEDAW articulates rape as an act of discrimination; this analysis has not filtered through into the thinking of the European Court of Human Rights (ECtHR).¹⁸

Cases determined by the International Criminal Tribunal of the Former Yugoslavia (ICTY) and the International Criminal Court (ICC) have adopted the definition of torture used in the Convention Against Torture (CAT).¹⁹ This definition requires that the act(s) cause particularly acute pain and suffering, are perpetrated by a public official for the purpose of extracting information or confessions, punishment, intimidation or discrimination.²⁰ In the analysis of rape cases that have come before the ECtHR, a number of issues were highlighted.²¹ Firstly, it is not always clear where the line is drawn between acts that constitute torture, and acts that constitute inhuman or degrading treatment. Secondly, there has also been come question over whether rape is properly classed as a violation of Article 3 or of Article 8 of the Convention.²² What is apparent is the importance placed by the ECtHR on the role of the actor (public or private) in determining the nature of the right compromised. In particular, the reasoning of the ECtHR suggests that a single act of rape in detention would constitute torture, whereas rape over a period of time by a private individual constitutes inhuman and degrading treatment.²³ If the definition of rape provided by CEDAW — that rape is an act of discrimination predominantly affecting women and

¹⁷ *ibid.*

¹⁸ CEDAW General Recommendation 19 (11th Session 1992) UN Doc CEDAW/ C/1992/L1/Add 15 [4] [6] [11] [12] [23].

¹⁹ (adopted 10 December 1984, entered into force 26th June 1987) 1465 UNTS 85 (CAT).

²⁰ *Prosecutor v Delacic* (Judgement) ICTY-96-21 (16th November 1998) [941]; CAT art 1; ch two p 101 esp n 250.

²¹ Ch two from p 104.

²² cf eg *X and Y v Netherlands* Series A no 91 (1986) 8 EHRR 235 and *MC* (n 3).

²³ cf eg *Aydin v Turkey* Appn no 23178/94 (1998) 25 EHRR 251 and *E v United Kingdom* Appn no 33218/96 (2003) 36 EHRR 31.

girls — were adopted, this would suggest that rape always had a discriminatory purpose: that of discriminating against women.

The positive obligations under Article 3 to have in place effective laws to deter and punish offenders, and to take reasonable preventative measures, suggests that it is incumbent on the police and the CPS to go ahead with cases that they are least likely to proceed with — those involving intimates or acquaintances.²⁴ The preventative obligations emerging from Articles 2 and 3 have implications for child sexual abuse in the home and domestic violence. Human rights jurisprudence might also have an effect on the substantive criminal law, notably the meaning of consent.²⁵ There is some concern that the new meaning of consent under the Sexual Offences Act 2003 will be interpreted narrowly,²⁶ and this may be inconsistent with human rights jurisprudence.²⁷ Nevertheless, the jurisprudence of Article 3 suggests that a number of factors will need to be considered in determining issues of consent — age, sex and state of health of the complainant, the duration of the treatment and its effects.²⁸ A number of other Articles might also affect the ways in which the criminal law addresses these issues. With regard to trafficking and forced prostitution, a modern-day interpretation of Article 4 could be developed from the extent of the loss of personal autonomy associated with these activities.²⁹ In comparison to international jurisprudence, Article 5 causes problems in that it is framed as a negative right and the obligations to secure liberty between private individuals has not been developed. This

²⁴ Ch two p 73, 74, 78–81, 83.

²⁵ Ch two p 118 – 125.

²⁶ J Temkin and A Ashworth 'The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent' [2004] Crim L R 328, 338.

²⁷ Ch two p 121 – 123.

²⁸ Ch two p 123 – 125; These principles are developed from *Ireland v United Kingdom* Series A no 25 (1979-80) 2 EHRR 25; *Costello Roberts* (n 3); *A* (n 3); *MC* (n 3).

²⁹ Ch two p 126 – 129.

impedes arguments about the different ways in which women's liberty is impeded in the home.³⁰

The biggest difficulty in addressing rape as a human rights issue within Convention and UK law is the failure to treat the act of rape, and the problems associated with bringing perpetrators to justice, not only as a violation of the physical integrity and autonomy of the person but as an issue of inequality. This absence is surprising. Rape is a violation of fundamental rights, and within the context of the home, is often accompanied by other forms of physical and sexual abuse. If women are truly to attain equality, to focus equality provisions mainly on education, employment and the provision of services is surely to limit the extent to which true equality can be achieved. Even if equality provisions are expanded to include public authorities, as proposed by the Equality Bill, to curtail their applicability in the field of criminal justice — the branch of law that has to tackle the most flagrant abuses of women's rights — seems to seriously undermine this goal. While Protocol 12 provides a freestanding right to equality that is applicable in all spheres³¹ the limited use of Article 14 generally, and in tackling violence against women in particular, means that there is good reason to be cautious about the effects of this provision. Notwithstanding the provisions of Protocol 12 that allow measures to secure full and effective equality, it is the failure to articulate violence against women within the ECHR and UK law as an issue of equality at all that impedes the development of human rights jurisprudence in this area. Introducing the language of equality into this area of law could permit arguments concerning, for example, the structural

³⁰ Ch two p 130 – 133.

³¹ Protocol 12 to the European Convention on Human Rights (entered into force 1 April 2005).

disadvantages faced by women in giving genuine consent, particularly in the context of intimate relationships.

Chapter three argued that rape trials can be seen as a competition between liberty, protected by Articles 5 and 6 of the Convention, and integrity of the type protected by Article 3.³² It sets out a framework to resolve this competition and therefore to resolve the conflict between the court's obligations under Articles 3 and Articles 5 and 6 of the Convention. It is argued that the court's obligations in relation to the complainant come in at three levels: the obligation associated with the effective prosecution of rape cases in general under Article 3; the potential for procedural rights under Article 6 to be extended to encompass some notions of fairness for the complainant; and that relating to the restriction of particular types of questioning in court.³³

Alexy argues that entitlements to positive acts can be wide-ranging, and that rights of this nature are subjective constitutional rights that are 'concerned with defining the spheres of equally ranked legal persons, along with the enforceability and enforcement of this delimitation'.³⁴ This is what chapter three sought to achieve. It sought a blueprint for the structure and maintenance of a legal system that protects victims of rape and effectively punishes perpetrators through the vehicle of positive duties under Article 3, and by developing notions of procedural fairness for the complainant under Article 6. Alexy argues that the extent to which a right should be

³² Ch three p 153 – 163, 165 – 171, 214 – 218.

³³ Ch three p 153 – 163, 195 – 213.

³⁴ R Alexy J Rivers (tr) *A Theory of Constitutional Rights* (Oxford University Press Oxford 2002) 300.

realized is the extent to which that right ought to be subjective.³⁵ The ability of a victim to bring a case before the ECtHR and now under the Human Rights Act 1998 (HRA) involves the subjectification of these rights.³⁶ This has the potential to shift the dynamics of a criminal trial. The subjective model of enforcing human rights allows victims a mechanism to challenge trial procedures if these procedures failed to prosecute effectively a breach of the victims' rights.

The difference between a positive and negative right is that in relation to negative rights, all acts which destroy or adversely affect that right are prohibited, whereas satisfying a command for protection or indeed entitlements generally does not require that all acts which bring that about be performed.³⁷ In the field of positive obligations, protective rights can compete with other protective rights. This means that the positive obligations under Article 6 (when articulated as a mechanism for protecting the right to liberty) can compete with the positive under Article 3. In *R v A* no mention is made of the court's obligations under Article 3 to effectively prosecute cases of rape.³⁸ Furthermore, one procedural entitlement (to adduce evidence of a previous consensual sexual relationship), was seen as synonymous with the underlying purposes of Article 6. However, commentators have argued that any one set of procedures are *contingent*.³⁹ Whilst it is argued that they have value in themselves,⁴⁰ they could also be regarded as mechanisms for ensuring a particular type of (accurate)

³⁵ *ibid* 303.

³⁶ J Rivers 'A Theory of Constitutional Rights *and the British Constitution*' in Alexy (n 34) xiv – xxv.

³⁷ Alexy (n 34) 308; ch three p 158 – 159.

³⁸ *R v A* [2001] UKHL 25; (2001) 2 Cr App R 21.

³⁹ DJ Galligan *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Oxford 1996) 62.

⁴⁰ R Dworkin *A Matter of Principle* (Harvard University Press Cambridge Mass 1985) ch 3; A Ashworth *Human Rights, Serious Crime and Criminal Procedure* (Sweet and Maxwell London 2002); P Craig *Administrative Law* (5th edn Sweet and Maxwell London 2003) 408.

outcome.⁴¹ This emphasis on accuracy of outcome is affirmed by the obligation under Article 3 that mechanisms be in place that are capable of leading to the punishment of the offender. Chapter three concludes by arguing that once the balancing exercise is viewed as a competition between positive obligations, many of the strategies in rape cases become difficult to justify. There are significant problems associated with perceptions of what constitutes ‘real rape’, and in encouraging victims of intimate partner sexual assault — arguably the most common type of sexual assault — to come forward. What is proposed is a human rights justification for limiting questioning which goes to suggesting that the defendant is entitled to rely on a previous consensual sexual relationship to inform his reasonable belief that consent existed on the occasion in question.

In relation to female prisoners’ rights, what is evident is the effects not only the marginalization of women from a human rights document that was not designed with their needs in mind, but also the way in which the ECHR was set up without the needs of prisoners in mind. Chapter four examined the substantive case law of the ECHR in relation to prisoners’ rights and the extent to which it tackles the particular needs of female prisoners. Mirroring the arguments put forward by MacKinnon, it argued that the prison system is structured in terms of ‘masculinities’, designed to cater for the overwhelmingly male prison population, and failing to acknowledge the gender inequalities that exist both in life and within the prison system.⁴² This masks the manner in which the prison system might exacerbate these inequalities. While the

⁴¹ Ashworth (n 40) 6-9; Alexy (34) 316.

⁴² Ch four p 222 – 224; C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press Cambridge Mass 1987) 73, 167-8; B Hudson ‘Punishment and Control’ in M Maguire, R Morgan and R Reiner (eds) *Oxford Handbook of Criminology* (3rd edn Oxford University Press Oxford 2002) 233.

cases brought before the ECtHR are equally applicable to female prisoners, mostly male prisoners have brought them.

In the discussions about rape, the role that positive obligations have had to play in developing women's human rights claims has been examined. However, in relation to prisoners' rights, there are additional difficulties in this regard. While the jurisprudence of ECHR and UK law has held that prisoners retain as many of their negative rights as possible, consistent with 'the ordinary and reasonable requirements of imprisonment',⁴³ there are no well-defined rationales against which to assess the purposes of imprisonment, what it should accomplish and the way it should be managed.⁴⁴ There are no obvious principles to determine the legitimate restrictions on negative rights associated with imprisonment, or a meaningful basis for the evolution of specific positive rights that apply administratively. No attempt has been made to define what are 'the ordinary and reasonable requirements of imprisonment'.⁴⁵ Whilst prisoners can claim that the Prison Service in the UK has breached wither human rights, they cannot make a claim against the State that the prison system should be organized in a particular way. This is so despite the significant effects that imprisonment has on a person's life situation, interests and liberty.⁴⁶ Prisoners' rights are under-theorized generally and human rights and constitutional principles should be used to develop the aims and objectives of penal policy.

⁴³ *Golder v United Kingdom* Series A no 18 (1979-80) 1 EHRR 524 [45]; *Raymond v Honey* [1983] 1 AC 1, 10; ch four p 241.

⁴⁴ L Lazarus *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (Oxford University Press Oxford 2004) 196.

⁴⁵ *ibid.*

⁴⁶ Ch four p 243 – 245.

In relation to State obligations under Article 2 of the Convention, the high suicide rate amongst female prisoners and the different ways in which mental illness may manifest itself may require the authorities to be more aware of the different ways in which these dangers present themselves in women.⁴⁷ In relation to Article 3, the requirement that the ‘age, sex and state of health’ of the victim be taken into account has left open the possibility that particular forms of inhuman and degrading treatment may be judged on their impact on women as women. It also leaves open the possibility of taking into account that characteristics of vulnerable female prisoners, although it would be important to frame these arguments in relation to their histories of abuse. The sliding scale nature of Article 3 means that these difficulties could be taken into account in determining whether suffering has reached the minimum needed to ground an Article 3 claim.⁴⁸ Interference with prisoners’ (negative) rights have to be justified in accordance with Convention standards.⁴⁹ There is, however, a significant disparity between men and women of the consequences of imprisonment.⁵⁰ In relation to Article 8, the courts in the UK appear to be increasingly willing to take into account the particular effects that imprisonment has on women’s family life.⁵¹ The use of Article 8 in combination with Article 14 or the development of Protocol 12, could lead to arguments (albeit negatively framed) for a reduction in the use of imprisonment for women.

⁴⁷ Ch four p 248 – 250.

⁴⁸ Ch four p 250 – 255.

⁴⁹ *Golder v United Kingdom* Series A no 18 (1979-80) 1 EHRR 524.

⁵⁰ Ch four p 224 – 240.

⁵¹ Ch four p 256 – 259; *R v Sarah Jane Witten* [2002] EWCA Crim 2628; [2003] 2 Crim App R (S) 8 [5]; *R (P, Q and QB) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 2 FLR 1122; *R (CD, AD) v The Secretary of State for the Home Department* [2003] EWHC 155, [2003] 1 FLR 979.

This theme is developed in chapter five. It argues that the ECHR needs to be developed further in relation to the substance of penal policy as opposed to the procedural mechanisms that bring it about. For those at the receiving end of criminal investigations, the ECHR is predominantly concerned with the procedures that bring about various outcomes rather than the outcome itself. The ECtHR has had little to say on the length of sentences imposed. The arguments presented in the chapter are based on those developed by van Zyl Smit and Ashworth that disproportionate sentences represent a violation of fundamental rights.⁵² From the perspective of fundamental rights, van Zyl Smit and Ashworth argue that the basis for the prohibition of grossly disproportionate sentences is various constitutional principles that forbid ‘cruel and unusual punishments’ and from the prohibition of arbitrariness in criminal procedure.⁵³ The ECHR distinguishes between punishments that are always inhuman and degrading and thus never permitted, and those which are inhuman and degrading if imposed for one type of crime but not another.⁵⁴ These arguments are developed to take into account the effects of gender. Once the effects of gender are taken into account, these distinctions are far from clear-cut in the case of female offenders.

Failures to recognize adequately the extent of women’s private roles leads to greater hardship in their public roles. Sentencing decisions are public functions that the State carries out in response to a crime. Nevertheless, these functions often fail to take into account the disproportionate hardship to women and their families are a result of incarceration. It is this that should form the basis of questions concerning the defensibility of the use of incarceration of women. The disproportionate hardship can

⁵² D van Zyl Smit and A Ashworth 'Disproportionate Sentences as Human Rights Violations' (2004) 67 MLR 541.

⁵³ *ibid* 543; ch five p 273 – 276.

be seen as a product of ambiguity concerning women's citizenship.⁵⁵ The formal equality in public life approach fails to articulate women's massive social obligations. Although Article 14 is limited, the equality provisions of CEDAW and CERD would permit arguments to be made that the substantive effects of imprisonment on women are greater.

These arguments tend towards the development of penal policy in line with Articles 3, 8 and 14 of the Convention. In relation to Article 3, it could be argued that a sentence that involves the separation of a woman from her young family could reach the level of suffering necessary to ground an Article 3 claim. Furthermore, this threshold will more readily be reached in the young and those with mental illness. Article 8 arguments could be expanded to include socio-economic rights. This is pertinent in view of the fact that much female offending is associated with poverty.⁵⁶

The thesis has demonstrated the considerable potential for ECHR principles to be developed to be more inclusive of women's claims. It has sought to develop principles to make women's procedural entitlements as victims and as offenders fairer, using rights analysis to develop a better articulation of women's claims in regard to the legal system, and a more responsive relationship vis-à-vis the State. It is also possible for human rights jurisprudence to impact upon the substantive law in ways that benefit women, both victims of sexual crime, and in determining the substance of penal policy. Equally, there is a need for women's claims to be rigorously articulated within

⁵⁴ *ibid* 544; ch five p 275 – 276.

⁵⁵ C Pateman *The Sexual Contract* (Polity Press Cambridge 1988) ch 1; ch five p 265 – 269.

that framework. While the ECtHR has shown itself to be receptive to arguments that are more inclusive of women's claims, it is essential that these claims be pressed, in particular with regard to the structural disadvantages faced by women in securing rights. It is only in this way that women's claims will more comprehensively be brought into mainstream human rights jurisprudence.

⁵⁶ Concluding observations of the Committee on the Elimination of Discrimination Against Women: United Kingdom of Great Britain and Northern Ireland 01/07/99 A/54/38 [312]; ch five p 283, 291, 295 – 6.

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