Rape: the Situation in England and Wales

Thanks to feminist researchers such as Sue Lees, Jeanne Gregory, Jennifer Temkin and Susan Edwards, we now have a substantial body of research documenting the problems that are evident in rape cases in England and Wales. These problems include; male dominated criminal justice and legal systems, the difficulties in obtaining corroborative evidence, the way women are treated in court, problems with rape legislation, the use of sexual history evidence, issues around consent and the use of rape myths. These problems all contribute to the fact that very few men get convicted for rape. Research shows that up to one in four women will experience rape at some stage in their lives (Mooney, 1994, 2000; Painter, 1991) – in most cases by a man known to them (Myhill and Allen, 2002). Very few women report this to the police (Hall, 1985), and some do not recognise that what has happened to them is rape (Kelly, 1988). While the number of police recorded rape cases has more than doubled in the last decade (from 4,045 in 1991 to 9,008 in 2001/2002) (Simmons et al., 2002), the proportion of cases which reach court and result in a conviction for rape has steadily dropped. The most recent figures show that in a sample of rape cases reported to the police between 1996 and 2000 only 5% of cases resulted in a conviction for rape (Lea, Lanvers and Shaw, 2003).

So it is here that my research begins; with a social and very real problem for women: that if they are raped they are unlikely to see their attacker punished for this. Many of the reasons behind this lie within the rape laws of England and Wales and the way the legal system operate. While the changes that are passing through parliament at the moment are while welcomed, they are unlikely to be radical enough to change things to any great extent.
The Human Rights Act 1998

Although individuals in England and Wales have been able to take cases to the European Court of Human Rights in Strasbourg since 1966, the rights guaranteed in Europe were not incorporated into the domestic law of England and Wales until October 2000 with the introduction of the Human Rights Act 1998. All legislation that passes through parliament must, since 2000, be compatible with the Human Rights Act 1998 and any existing legislation may be challenged if it breaches an individuals guaranteed rights or fundamental freedoms. To publicise its introduction, the UK government told its citizens that it was at last ‘bringing rights home’, by which it meant that the rights that were previously guaranteed in Europe would now be guaranteed within the UK.

When I first started reading about human rights the first thing that I noticed was that most of the writing was very theoretically rather than empirically based. So how does the crime of rape fit into the overall human rights framework? Women’s rights theorists (see for example Copelon, 1994) claim that rape should be labelled as a human rights violation, highlighting that the acts associated with violence against women meet internationally accepted definitions of torture (see Figure 1. below).

![Figure 1. Rape as a form of Torture](image)

While this model is clearly true in theory, in practice it is not as clear-cut as this. As we know, in order to use the European Convention or the Human Rights Act, it is necessary to
show some form of state liability. This means that the ‘official involvement’ part is more complicated than the other parts of the definition.

In terms of rape, it is often difficult to identify state liability. When rape occurs within what is perceived as being a ‘private’ space, for example by a woman’s husband within the home, it has traditionally been seen as detached from the state and state actions. It is perceived as an act that the state can have little or no control over. A minority of rapes are perpetrated by strangers, meaning that most rapes are situated firmly within the private sphere. Some rapes may be perceived as ‘less private’, for example rapes which are perpetrated by strangers, but committed by non-state actors making them ‘non-political’ and hence outside of the boundaries of human rights legislation. Other forms of rape may be identified as being distinctly public, for example where rape is used as a weapon of war or for ‘ethnic cleansing’.

Rape, therefore, has traditionally been perceived as an act that runs along a continuum (as shown in Figure 2. below) from the very public to the very private, depending on the circumstances surrounding the rape. The way that human rights legislation can be used depends, for the most part, in how public or private the act of rape is perceived to be.

Figure 2. Traditional Model of Rape and State Liability

Alternatively, second wave feminists from the 1970’s onwards argued that the ‘personal is the political’, by which they meant that violence against women by men within a relationship should be treated just as seriously as any other form of violence. Because the public or political sphere defines the boundaries of what happens in the private sphere, this division was seen to be an arbitrary one. Additionally, the states duty of care means that they have a
positive obligation to protect their citizens human rights. Thus, a state can violate human rights through inaction – for example by failing to legislate against an act that breaches an individual’s human rights or by consistently failing to enforce legislation. From this perspective, all forms of rape can potentially have a political dimension (see Figure 3. below).

However none of this is particularly original; the last ten years have seen the development of theories around women, violence and human rights. What has been missing are systematic empirical studies that show exactly what does happen in practice, rather than relying upon what should happen in theory. We have a large body of empirical research about rape cases in England and Wales, however the little knowledge we have about rape and the European Convention and the Human Rights Act (1998) has been based upon descriptions and analyses of a handful of individual cases rather than a systematic analysis of all cases.

**Methodology**

This thesis is an attempt to discover how the European convention and the human rights act have actually been used in relation to rape (as opposed to theoretically i.e. how they could be used) and how this effects rape cases in England and Wales. I am using documentary analysis to analyse all cases taken to the European court of human rights against all countries involving rape (which resulted in a total of 24 cases at last search) and all cases taken to the higher courts of England and Wales concerning rape and human rights, searched as far back as 1980 (102 cases at last search).
Key findings

One of the first issues to emerge was that these cases were, quite simply, not what I expected them to be. They did not seem to fit with the theories I had been reading about. These cases were rarely about women who were claiming they had had their rights violated through rape. In fact, only two of the 24 European cases were from female applicants. Of the 22 cases with male applicants, only one of the males was a victim of rape, and one male’s daughter had been a victim of rape. This means that in 20 of the 24 cases heard at the European Court of Human Rights, it is the perpetrator or alleged perpetrator of rape who is arguing that they have had their human rights violated. A similar pattern has emerged in relation to the England and Wales cases – with 83 out of the 102 cases being taken by a male applicant.

The cases fall into four categories, and it is these that I will be describing in this paper, giving examples relating to the cases taken in England and Wales.

Protection from rape

The first set of cases refer to what I am describing as ‘protection from rape’. These cases refer most often to asylum claims where women are claiming that they will be at risk of rape if they are sent back to their country they have fled from. There have been 15 cases that refer to protecting individuals (most often women) from rape within the domestic courts of England and Wales. However, these cases do not claim that returning women to a country where they are at risk of rape would be in breach of Article 3 (Right to be free from torture, inhuman or degrading treatment). Rather, they refer to the Convention Relating to the Status of Refugees meaning that they do not fit neatly into the aims of this thesis because of its focus on the European Convention of Human Rights and the Human Rights Act 1998. As such, these cases are important in their own right but will not be analysed any further simply because they do not focus on the Convention and Act that are the focus of this thesis.

Prosecuting rape

19 England and Wales cases and 16 European cases were related to the prosecution process for rape. In light of the problems with the prosecution process in England and Wales which contribute to the problem of the low 6% conviction rate, it was unanticipated that only one of
the England and Wales cases involved a female challenging the prosecution system. In contrast, 18 of the 19 cases involved male applicants.

In 17 of the 18 cases with male applicants the men were arguing that their trial for rape had not been a fair one, and hence that they had had their rights under article 6 violated. The basis of these claims included: delays in going to court, not enough time to prepare, the admissibility of evidence, the compatibility of restrictions on sexual history evidence, judges directions and the failure to give the corroboration warning. An example of a case under this category is the case of the case of R v A (2001 UKHL 25). This is of most significance here as it was the first appeal relating to rape that was taken following the introduction of the Human Rights Act 1998 and was ruled upon by the House of Lords (the highest court a case can be taken to within England and Wales). The case is concerned with the admissibility of sexual history evidence in a rape trial.

Until 2000 feminist campaigners in England and Wales were arguing for nearly three decades for effective legislation to restrict the use of sexual history evidence in court, stating that it is irrelevant in a rape trial whether or not the woman had had consensual intercourse in the past with the defendant or with other men. Research showed that women were being asked questions about their sexual history in order to discredit them as a witness rather than to prove a legal point (Lees, 1994). Women reported that they found these experiences distressing and humiliating and this put many women off appearing in court (Lowe, 1984) or even reporting the rape in the first place (Adler, 1992). Although there was legislation in place aimed at curtailing the use of sexual history evidence (Section 2 of the Sexual Offences (Amendment) Act 1976) which meant that women could only be questioned regarding their sexual history if leave from the trial judge was obtained, it was found that judges continued to allow such evidence (Lowe, 1984; Adler, 1982).

In 2000 Section 41 of the Youth Justice and Criminal Evidence Act 1998 came into force which placed tight restrictions on when sexual history evidence could be introduced. It was aimed at reducing judicial discretion by outlawing all sexual history evidence with the exception of three very specific exceptions. Thus, Section 41 should have removed any judicial discretion relating to the admittance of sexual history evidence.

The case of R v A concerns the alleged rape of a woman in December 2000 on a towpath close to the river Thames. The woman alleged she had been pulled to the ground by the defendant who was the friend of her boyfriend and raped. The defendant claimed that the woman had initiated the intercourse as part of an ongoing relationship they were having and
read out a brief statement when interviewed by the police where he stated ‘she was never against this relationship that we were having’. His defence in court was that she consented, and that if she did not, then he thought she did.

Referring to the new provisions within Section 41 the Judge at the preparatory hearing refused the defendants counsel leave to cross-examine or use evidence relating to the alleged previous sexual intercourse with either the defendant or his friend. This also meant that the prepared statement read at the police statement could not be used as evidence because it alleged they had had consensual intercourse prior to the incident in question. In refusing leave to use this sexual history evidence, the judge recognised that that this ruling might result in a breach of the defendants right to a fair trial (Article 6). The defendant was given leave to appeal to the Court of Appeal.

At the Court of Appeal Lord Justice Rose ruled that the evidence and questioning about the defendants alleged previous sexual relationship with the complainant was, in fact, admissible under Section 41 and that the judge’s ruling in excluding such evidence had been incorrect. This was because while sexual history evidence is not admissible on the issue of consent, it is admissible in relation to belief in consent. As the defence was that the complainant was consenting, and if she was not, that the defendant believed that she was, this would have resulted in a ruling to the jury that they must consider the evidence only in terms of whether he believed she was consenting and not in terms of whether she actually did consent to intercourse. Lord Justice Rose gave the opinion that a direction such as this may lead to an unfair and very confusing trial.

Leave was granted to appeal to the House of Lords and the following question was certified by the Court of Appeal:

‘May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?’

A decision was therefore needed as to whether Section 41 could be read down (using Section 3 of the Human Rights Act 1998) to be compatible with article 6 of the Human Rights Act 1998 or whether a declaration of incompatibility would be required (using Section 4).
To briefly summarise the Law Lords discussions, they considered a number of different ways in which Section 41 could be ‘read down’ to allow sexual history evidence to be used to allow a fair trial to take place. However, the discussion about whether not allowing sexual history evidence would in fact result in an unfair trial was considered in little depth by four of the five Law Lords. It was concluded that the decision whether or not to allow sexual history evidence should be down to the individual trial judge to take into account the circumstances of the particular case and that Section 41 should be ‘read down’ in order to ensure a fair trial for the defendant.

The case of R v A therefore ‘watered down’ what Section 41 intended - giving judges the discretion to allow sexual history evidence without the House of Lords giving proper consideration to the relevancy of such evidence and how this relates to a fair trial. Research is currently being conducted to ascertain what effect Section 41 is having on the use of sexual history evidence.

The one case with a female applicant (R v Director of Public Prosecutions, ex parte C) was an application for judicial review whereby it was argued that the Crown Prosecution Service had been wrong to discontinue a prosecution for rape without consulting the complainant. Indeed, in this case the applicant was not even informed by the CPS that all charges had been dropped and only discovered this when her family telephoned the police to report a breach of bail conditions.

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

Counsel for the defence highlighted that to continue prosecution of a case it must pass both the evidential test and be in the public’s interest to prosecute. The decision in this case was not regarding the public interest, but because it did not, in the CPS’s view pass the evidential test. Counsel for the applicant contended that had Miss SC been consulted about the discontinuance of the case there may have been more evidence available. Miss SC had been too distressed to complete the second police interview, and had she known she had not provided enough evidence for the case to progress to court it is possible that she may have
offered to complete this second interview. He also argued that consultation would have reduced the distress caused by the discontinuation of the case.

Lord Justice Rose and Mr Justice Alliott rejected the application for judicial review, ruling that although it was ‘regrettable’ that Miss SC had not been informed by the CPS about the decision to discontinue the prosecution (described as being common courtesy at the time in the Code of Practice for Crown Prosecutors and in the Victims Charter), that there was no entitlement for Miss SC to be consulted before this decision was made.

**Sentencing and Imprisonment of convicted rapists**

4 European cases and 21 England and Wales cases relate to the sentencing and imprisonment of men found guilty for rape. For example, whether a man is still a risk to women, what their risk of re-offending is, appeals against life imprisonment for a second serious offence.

An example of a case falling into this category is R v Cathra (R v Cathra [2001] EWCA Crim 2478). In 2001 Mr Cathra was sentenced to ten years imprisonment for offences occurring between November 1970 and 1983 (when Mr Cathra was aged between 14 and 26 years old) against his half-nieces and half-nephews: one count of rape, one case of buggery, nine counts of indecent assault on a female and three counts of indecent assault on a male. Mr Cathra took the case to the Court of Appeal, arguing that the sentence for the rape offence was in breach of his rights under Article 7 (No punishment without law).

At the Court of Appeal Mr Dunning, counsel for Mr Cathra, argued that the seven year sentence given for rape was excessive. He acknowledged that it was a reasonable sentence in view of the Billam rape sentencing guidelines (R v Billam [1986] 1 All ER 985, [1986] 1 WLR 349) set down by Lord Lane, however argued that the Billam guidelines should not apply in this case. The second sentence of Article 7 (1) of the European Convention on Human Rights reads ‘…nor shall a heavier sentence be imposed than the one that was applicable at the time the criminal offence was committed.’ Mr Dunning argued that if Mr Cathra had been sentenced for the offences shortly after they had been committed (i.e. long before the Billam guidelines were in force) he would have received a substantially shorter sentence for the rape offence.

In his judgement, Mr Justice Silber reported that there had been no breach of Article 7 on account of the maximum sentence – both prior to and following Billam – being life
imprisonment. This meant that the seven-year sentence given to Mr Cathra following Billam could have been given at the time the offence was committed, prior to Billam. Although it was possible that the guidelines would have indicated a reduced sentence if he had been convicted prior to the Billam guidelines, the court would still have been entitled to pass the sentence of seven years as given post-Billam. (N.B. Mr Cathra’s sentence was reduced during this Appeal, but for reasons unrelated to the Human Rights Act).

Managing risk in the community

1 European case and 11 England and Wales cases fell into the category of managing risk in the community – what happens when men who rape are released from prison. The eleven England and Wales cases were split broadly into two groups. The first group was as I expected – for example how serious does a breach of bail conditions have to be to be re-imprisoned, whether the public have a right to know there is a rapist or paedophile living close to them, whether a new employer has a right to know they have employed a man who has been convicted for rape or whether a rapists right to a private life is more important (Article 8).

The cases I was surprised at were the second group – where rapists felt that they were at risk in the community. An example of this is the case of WB v H Bauer Publishing Ltd ([2002] EMLR 8). In this case the man had broken into an old woman’s house, assaulted and raped her before locking her in a cupboard for 12 hours until she was found. Swabs were taken from the woman following the rape and the results were placed on the national DNA database. From this database, a suspect was identified. The suspect was already on the DNA from a case in which he was a suspect for burglary (but found not guilty) when he had had saliva swabs taken. The frequency of the occurrence of such a match, if the DNA on the swabs had come from someone other than the Claimant, would have been 1 in 17,000,000. However, despite the strength of this evidence, the case was dismissed. This was because the suspect’s DNA should have been destroyed after he had been acquitted for burglary. The DNA evidence had therefore been obtained as a result of improper retention.

The case was reported in the Times newspaper where the applicant was named, and following this the rape survivor took part in an interview with Take a Break (a popular women’s magazine) and agreed to have her identity revealed. All articles named the suspect – there was an order from the House of Lords banning this – which the publishers claimed they were unaware of.
The applicant claimed that by making public the fact that he had, effectively, got away with rape despite compelling evidence against him, that this made him vulnerable and that he had had his fundamental rights breached as guaranteed by the European Convention. Specifically, he argued that a number of his rights had been breached: his right not to be subjected to inhuman or degrading treatment (art 3), arguing that readers of the magazine may take the law into their own hands; his right to respect for private and family life (art 8), arguing the state should have a ‘duty of confidence’; his right to life (art 2), again, that readers may take the law into their own hands; his right to be presumed innocent until found guilty according to law (art 6) arguing that he had not actually been found guilty of rape; and his right to an effective remedy (art 13) although the UK has not actually ratified this article.

In this case the appeal was stuck out by the Queens Bench Division in 2001, however it is still an interesting case because the attempts were made to use the Human Rights Act 1998 for these purposes.

**Conclusions**

In revisiting the theoretical ways in which women could use human rights legislation in relation to rape, it appears from the analysis of the nature of the cases that in practice they are not being used in accordance with their theoretical potential. European Human Rights legislation has, as yet, seldom been used to advance the human rights of women in relation to rape - with most of the cases relating to men as defendants. There are a number of possible reasons why this may be the case, including the possibility that women may be too distressed to continue engaging with the legal system after being raped or that they do not have the financial means to do so.

This paper has painted a very pessimistic case for the use of European Human Rights legislation for women who have been raped. Although there are a handful of cases where women have successfully used human rights legislation in relation to rape, it is also the case that they are not attempting to use such legislation to the same extent that men who are on trial or have been found guilty of rape are.

Examples have been given in this paper of cases where men have attempted to use the European Human Rights Legislation to introduce sexual history evidence in a trial, to get a more lenient sentence for rape, and to gain protection after not being convicted for a rape in
which the chances of him not having committed the rape were 1 in 17,000,000. The women’s voices, in contrast, are for the most part silent.

References


Acts cited

Youth Justice and Criminal Evidence Act 1999, (1999 c.23)

Sexual Offences (Amendment) Act 1976 (1976 c. 82)

Cases cited


R v Billam [1986] 1 All ER 985
R v Billam [1986] 1 WLR 349

R v Cathra [2001] EWCA Crim 2478

R v Director of Public Prosecutions ex parte C [2000] CO/1450/99

WB v H Bauer Publishing Ltd [2002] EMLR 8

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