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Gender Equality and Legal Mobilization in the United Kingdom: Using Rights for Lobbying, Litigation, Defense, and Attack

Susan Millns and Charlotte Skeet

Abstract

This article analyzes women's contemporary use of rights to mobilize and pursue claims for gender equality and gender justice in the United Kingdom. Empirically, the paper explores the growth of rights discourse and activity against the backdrop of a stronger constitutionalization of women's rights at national, European, and international levels. It does this through an exploration of individual and collective lobbying and litigation strategies in relation to violence against women. The paper first examines this in the context of the right to bodily integrity through examples of the ways in which sexual violence and domestic abuse are addressed within the criminal justice system. The paper then addresses the right to be free from violence for women seeking refuge and asylum. The research reveals the need for varied strategies that target all aspects of the legal and political systems in order to ameliorate the protection and implementation of women's rights.

Keywords: gender, equality, United Kingdom, asylum, sexual violence, human rights, Human Rights Act 1998

Résumé

Le présent article analyse l'utilisation contemporaine des droits des femmes pour se mobiliser et présenter des réclamations visant l'égalité entre les sexes et la justice sexospécifique au Royaume-Uni. Empiriquement, l'article explore la croissance du discours et des activités sur les droits dans le cadre d'une constitutionnalisation plus forte des droits des femmes aux niveaux national, européen et international. Pour ce faire, l'article explore des stratégies de lobbying et de procédures individuelles et collectives en relation avec la violence faite aux femmes. Il examine d'abord cela dans le contexte du droit à l'intégrité physique à l'aide d'exemples de moyens par lesquels la maltraitance sexuelle et la violence familiale sont réglées dans le système de justice pénale. L'article aborde ensuite le droit pour les femmes qui cherchent un refuge et un asile d'être à l'abri de la violence. L'étude révèle le besoin de diverses stratégies qui ciblent tous les aspects des systèmes judiciaire et politique afin d'améliorer la protection et la mise en œuvre des droits des femmes.

Mots clés : genre, égalité, Royaume-Uni, asile, violence sexuelle, droits de l'homme, Loi sur les droits de la personne (1998)

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Introduction

This article analyzes women's contemporary use of rights to mobilize and pursue claims for gender equality and gender justice in the United Kingdom. While the legal literature on women's rights in the United Kingdom has traditionally tended to focus on case law analysis, legal reform, and feminist legal theory,¹ literature from political science looks at women's mobilization in the context of political struggles for gender equality.² This article employs an interdisciplinary perspective with a view to understanding the impact of women's social mobilization around rights claims. In doing so, it examines the questions of which women use rights (for example, individuals, elites, and NGOs), and how they use rights (as lobbying tools, court-based challenges, shields, swords, or political mobilizers).

Research in this area is overdue in that the Human Rights Act 1998 (HRA) was implemented across the United Kingdom over ten years ago, and it is seven years since the ratification of the optional protocol to the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In that time there has been little study of the impact of these new rights tools for women.³ Similarly, outside the area of employment, there has been little overall assessment of the impact of rights emanating from the European Union. Yet the current rights regime in the United Kingdom is now being called into question as the Conservative/Liberal Democrat Coalition government has begun a consultation on the future of the HRA.⁴ Moreover, the last few years have seen considerable institutional change (both national and regional, judicial, and legislative). Little research has so far been carried out on the consequences of these changes for women's rights in the United Kingdom.

Empirically, the paper explores the growth of rights discourse and activity against the backdrop of a stronger constitutionalization of women's rights at national, European, and international levels. Utilizing an examination of women's mobilization around rights emanating from European Union (EU) law and the European

¹ See, for example, S. Atkins and B. Hoggett, *Women and the Law* (Oxford: Blackwell, 1984); H. Barnett, *Introduction to Feminist Jurisprudence* (London: Cavendish Publishing, 1998); J. Bridgeman and S. Millns, *Feminist Perspectives on Law—Law's Engagement with the Female Body* (London: Sweet and Maxwell, 1998); J. C. Conaghan, "Reassessing the Feminist Theoretical Project in Law," *JLS* 27/3 (2000): 351–85; J. Richardson and R. Sandland, eds., *Feminist Perspectives on Law and Theory* (London: Cavendish Publishing, 2000). An interesting recent addition to the literature on the framing of women's rights in the legal system is the Feminist Judgments project (R. Hunter, C. McGlynn, and E. Rackley, eds., *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010)) which seeks to write the "missing" feminist judgments in key decisions in English law.

² R. Lister, *Citizenship—Feminist Perspectives*, 2nd ed. (Basingstoke: Palgrave, 2003); J. Lovenduski and V. Randall, *Contemporary Feminist Politics* (Oxford: Oxford University Press, 1993); *Feminism and Equality* (Oxford: Basil Blackwell, 1987); A. Phillips, *Feminism and Politics* (Oxford: Oxford University Press, 1998).

³ The notable exception is two special issues of the journal *Feminist Legal Studies*: "Gender Sexuality and Human Rights," eds. J. Conaghan and S. Millns (2005) issue 13; "Encountering Human Rights: Gender/Sexuality, Activism and the Promise of Law," eds. E. Grabham and R. Hunter (2008) issue 16.

⁴ "Do we need a Bill of Rights?" Discussion Paper, Commission on a Bill of Rights (London: Ministry of Justice, August 2011). The first public consultation was established on 18 March 2011 and closed on 11 November 2011 the second was launched in July 2012 consultation closed on September 30, 2012. <http://www.justice.gov.uk/about/cbr>.

Convention on Human Rights (hereafter ECHR or Convention), as well as from international women's rights norms and the common law, it explores individual and collective lobbying and litigation strategies, including defensive actions, in relation to violence against women. The paper first examines mobilization and litigation in the context of the right to bodily integrity through the examples of sexual violence and domestic abuse and the consequent balancing of rights within the criminal justice system. The paper then addresses the right to be free from violence in the context of women seeking refuge and asylum. The paper highlights traditional feminist concerns about the nature of the public/private divide and the public invisibility of harms caused to women, while showing how claims for gender equality often fail to take account of women's difference and vulnerability especially in situations of persecution and victimization. This paper also argues that the legal responses to violence against women in relation to different groups in the United Kingdom is paradoxical and, therefore, that a mixed approach of legal and extrajudicial mobilization strategies seems most effective, particularly in relation to vulnerable groups. The remainder of this introduction briefly establishes the constitutional context for our analysis and highlights the particularities of the rights environment in the United Kingdom.

Women in Britain have a long history of mass and elite mobilization for rights using the political and legal tools of the day. Stronger support for legal rights use and formal lobbying was spurred by UK entry into the EU,⁵ which not only led to the creation of new rights, particularly in employment, and new legislation,⁶ but also to the creation of new institutions. The Equal Opportunities Commission (EOC) came into being in 1975 and alongside it a new pressure group, Rights of Women, formed to take advantage of the new legal opportunity structures presented.

Though the women's movement in the United Kingdom appeared to become more fragmented in the 1980s and 1990s, at this time women also made a greater entrance into mainstream politics of political parties, trade unions, and local authorities.⁷ In particular in the 1990s, a number of campaigns around women's representation were established in the areas of the United Kingdom seeking devolution.⁸ As a result, women are considerably better represented within the devolved Scottish Parliament and Welsh Assembly than in Westminster.⁹ The Acts that granted devolution contained in them gender equality provisions that placed an onus on the devolved legislatures and other public bodies to consider

⁵ E. Meehan and E. Collins, "Women, the European Union and Britain," in *Women in Politics*, eds. J. Lovenduski and P. Norris (Oxford: Oxford University Press, 1996); E. Meehan, "Women's Rights in Citizen Europe," *The Manchester Papers*: <http://www.charter88.org/pubs/manpaps/meehan.html>.

⁶ The Sex Discrimination Act 1975.

⁷ P. Byrne, "The Politics of the Women's Movement," in *Women in Politics*, eds. J. Lovenduski and P. Norris (Oxford: Oxford University Press, 1996) 57–72 at 58.

⁸ See A. Dobrowolsky and V. Hart, *Women Making Constitution: New Politics and Comparative Perspectives* (Basingstoke: Palgrave, 2003).

⁹ In the Westminster Parliament 22.2 percent of members are women. This figure compares with 46.7 percent in the Welsh Assembly and 34.8 percent in the Scottish Parliament (figures for March 2011). See Hansard Society, *Women at the Top: Politics and Public Life in the UK* (London: Hansard Society, 2012).

how their policies would impact on women. These also brought new opportunities to hold government to account.¹⁰

Very importantly in 2000, the Human Rights Act 1998 (HRA) came into force. This Act incorporates the European Convention on Human Rights and Fundamental Freedoms (ECHR) into domestic law and creates a duty for all public bodies in the United Kingdom to abide by ECHR provisions.¹¹ The Act allows claims based on ECHR rights to be brought against public authorities in the United Kingdom's domestic courts and provides for the interpretation of statutes and the development of the common law through these rights norms.¹² The significant practice of third party interventions in rights cases has developed at the same time, allowing interest groups (such as those promoting women's rights) to put forward their views and raise awareness.¹³ In 2004, the UK government ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, which grants the right to petition the CEDAW Committee.¹⁴ This new framework has ushered in a stronger constitutionalization of rights in the United Kingdom, and the HRA has acted as a portal for women's international rights norms.¹⁵ The acts that granted devolution to Scotland, Wales, and Northern Ireland contained gender equality provisions that placed an onus on the devolved legislatures and other public bodies to consider how their policies would impact on women. These also brought new opportunities to hold government to account.¹⁶

Partly in response to EU initiatives in extending the principles of equality, the United Kingdom passed the Equality Act 2006. This extended gender equality duties, previously existing only in Wales, to all public bodies across the United Kingdom. This seems to have great potential. The Fawcett Society¹⁷ used this new duty to argue that the Conservative and Liberal-Democrat Coalition's first budget was illegal because women bore the brunt of service and benefit cuts.¹⁸ Also in 2007, the UK Equality and Human Rights Commission (EHRC) replaced the highly praised and respected Equal Opportunities Commission.¹⁹ While some are very ambivalent

¹⁰ The Government of Wales Act 1998 and 2006, s.77, Standing Orders in the Scottish Parliament and s.75 of the Northern Ireland Act 1998.

¹¹ Human Rights Act 1998, chapter 42, section 6 creates a duty on public authorities.

¹² Since courts are also public authorities they are required to develop common law in line with Convention rights, and s.3 provides a duty to interpret legislation to be compatible with Convention rights "so far as is possible."

¹³ H. Samuels, "Feminist Activism, Third Party Interventions and the Courts," *FLS* 13 (2005): 15–42.

¹⁴ While women's groups had campaigned hard for the government to sign the option protocol to CEDAW, the government only adopted this as policy when their hand was forced by a determined minister for women who also held a cabinet portfolio. See C. Skeet, "Strengthening Women's International Rights Norms in the UK after the Human Rights Act 1998: Lessons From Canada" in *British and Canadian Perspectives on International Law* ed. C. P. M. Waters (Leiden: Martinus Nijhoff, 2006), 149–68 at 163.

¹⁵ Skeet, "Strengthening Women's International Rights Norms in the UK."

¹⁶ The Government Of Wales Act 1998 and 2006 s.77, Standing orders in the Scottish Parliament and s.75 of the Northern Ireland Act 1998.

¹⁷ The Fawcett Society, named after the suffragist Dame Millicent Fawcett, is a longstanding UK NGO that campaigns for women's equality.

¹⁸ [2010] EWCH 3522.

¹⁹ It also replaced the Commission for Racial Equality and the Disability Commission.

about this change, it does create new opportunities to mobilize for the recognition of intersectional discrimination. Finally, the Equality Act 2010 brought protection from nine different forms of discrimination together under one act.²⁰ Women's groups did not uniformly support the concept of the act, fearing a dilution of principles; however, now that the Equality Act is a reality groups are united in calling for its full implementation.²¹

Crucially, the current coalition, which came into government in 2010, has ushered in a new period of change and uncertainty. Some duties under the Equality Act 2010 that were due to come into force in April 2011 have been put on hold with no date for implementation.²² Government cuts on public spending have also had a serious impact on the women's movement. In June 2010 the Wales Women's National Coalition, which represented over fifty women's groups, was closed when the Welsh Assembly said it could no longer fund it. In December 2010, the Women's National Commission, a UK umbrella group representing women's groups in England, Scotland, Wales, and Northern Ireland, and which had been established in 1969, was forced to close. The government's recent announcement of a review of the human rights legislation in the United Kingdom has generated a fear that the HRA 1998 will be repealed.²³ The challenges that these recent changes pose for women's rights mobilization are considered in the sections that follow and in the conclusion.

Violence Against Women

“ . . . [V]iolence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms. . . ”²⁴

Under the Declaration on the Elimination of Violence Against Women (DEVAW), States have positive duties to condemn, punish, and protect women from violence whether it takes place in the private or public arena.²⁵ The CEDAW, through two general recommendations,²⁶ has also made it clear that the state has positive duties to protect and prevent violence against women.²⁷ Under the ECHR, violence against women has been found to violate Article 2 (the right to life²⁸), Article 3 (the right to be free from inhuman and degrading treatment²⁹), Article 8 (the right to privacy³⁰), and Article 14 (the right to be free from discrimination in relation to

²⁰ Age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation.

²¹ For instance, see the Fawcett Society campaign: <http://www.fawcettsociety.org.uk/index.asp?PageID=1025>.

²² For example, s.14, which provides for intersectional claims.

²³ See the responses to the public consultations by the UK Bill of Rights Commission: <http://www.justice.gov.uk/about/cbr>.

²⁴ Declaration on the Elimination of Violence Against Women—General Assembly Resolution 48/104 of 20th of December 1993. Preamble para. 5

²⁵ *Ibid.*, Art 1, 2, 4.

²⁶ Recommendation 19: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

²⁷ The United Kingdom ratified the Optional Protocol to CEDAW in 2004.

²⁸ For example, *Kontrova v. Slovakia* (2007) 4 E.H.R.R. 482.

²⁹ *MC v. Bulgaria* (2005) 40 E.H.R.R. 20.

³⁰ *Bevacqua and S. v. Bulgaria* (Application no. 71127/01), 12 June 2008.

the rights contained in the Convention³¹). Yet these broad injunctions to States need to be translated into specific understandings of what constitutes violence against women and into specific policies and legal provisions to prevent and punish such violence.³² The tenacity of women litigants, their lawyers, and the various support organizations that work to promote women's rights in the United Kingdom is well recognized in the fight to eradicate violence against women. By examining different strategies to address violence against women in several different contexts, this paper offers an intersectional analysis of the success of rights-based activity in this domain in the United Kingdom.

Sexual Violence and Sexual Assault in the Domestic Context

Within the private sphere, there has historically been little legal interest in the protection of the female body from “domestic” violence inflicted within the family and often hidden from the attention of public authorities.³³ In UK law, for example, women who had been subjected to years of physical and mental abuse and who subsequently killed their violent partner were for many years unable to benefit from the defense of provocation, which would have reduced a conviction of murder to one of manslaughter.³⁴ Campaigns to change the law on this mobilized around the individual cases of *Ahluwalia* and *Thornton*.³⁵ Justice For Women, a group that supports women who have fought back against violent partners, sprang up in 1990 in response to the *Ahluwalia* case and those coming after it.³⁶ Campaign groups contrasted the position of these battered women who had killed with that of men who have been “provoked” to kill their partner following her nagging³⁷ or taunts about sexual prowess.³⁸ Men appeared more apt to fulfill the “objective” conditions attached to the legal definition of provocation through their immediate and physical reaction to the provocative word or deed and therefore had benefited to the detriment of women. By contrast women, following sustained abuse over what is often many years, and being usually of a slighter physical stature than their tormenter, would tend to wait for the “right moment” before killing him, thus giving their action the appearance of premeditation.

Only in 2000 did the then House of Lords (now the Supreme Court) accept the need to modify the definition of provocation to include a more subjective

³¹ *Opuz v. Turkey* (2010) 50 E.H.R.R. 28.

³² Beijing, Platform of Action 1995.

³³ A. Howe, “The Problem of Privatized Injuries: Feminist Strategies for Litigation,” in *At the Boundaries of Law: Feminism and Legal Theory*, eds. M. A. Fineman and N. S. Thomadsen (New York: Routledge, 1991), 148–67.

³⁴ See M. Fox, “Legal Responses to Battered Women who Kill,” in *Law and Body Politics: Regulating the Female Body*, eds. J. Bridgeman and S. Millns (London: Sweet & Maxwell, 1997), 79–104; A. McColgan, “In Defence of Battered Women who Kill,” *OJLS* 13 (1993): 508–29; K. O’Donovan, “Defences for Battered Women who Kill,” *JLS* 18 (1991): 219–40; K. O’Donovan, “Law’s Knowledge, the Judge, the Expert, the Battered Woman, and her Syndrome,” *JLS* 20 (1993): 427–37.

³⁵ *R v. Ahluwalia* [1992] 4 All ER 889; *R v. Thornton* [1992] 1 All ER 306. Southall Black Sisters ran a long campaign for *Ahluwalia*.

³⁶ J. Bindel, K. Cook, and L. Kelly, “Trials and Tribulations—Justice For Women: A Campaign for the 1990s,” in *Feminist Activism in the 1990s*, ed. G. Griffin (Oxon: Taylor and Francis, 1995).

³⁷ *R v. Singh*, *The Times*, 30 January 1992.

³⁸ *R v. Toi*, *The Times*, 10 May 1995; *R v. Greech*, *The Times*, 22 February 1994.

perspective, which allows for the “slow burn” effect of domestic abuse to be fully considered.³⁹ Concern still remains, however, that despite this new approach, women who kill a violent partner continue to be treated more harshly than their male counterparts by the courts, this being now evidenced in gender-biased sentencing practices.⁴⁰ This mirrors the problem raised by Judy Fudge in her analysis of the early use of Canadian Charter litigation by feminists—that changing the law without changing dominant discourses is ultimately ineffective in challenging social relations of power that subordinate women.⁴¹

As far as the crime of rape is concerned, this too has provided opportunities for mobilization of the women’s movement as well as preoccupying feminist thought. Because of the difficulty for victims in proving that they did not consent to an assault, it is apparent that judges and juries may simply presume that consent did or did not exist based upon their appreciation of the status and identity of the victim. Following a study of prosecutions and sentencing decisions in cases of sexual assault in Scotland, Sue Moody identified an “ideal profile” of the victim of rape.⁴² According to this construction, the more the woman complied with a form of correct, innocent, and feminine behavior, the easier it was to establish the guilt of the defendant and the greater his sentence. The findings of Moody’s study are confirmed by other research that has identified the prevalence of “rape myths” in legal discourse, which have resulted in the proliferation in law of stereotypes of male and female sexual behavior.⁴³ Among such myths is the presumption that women are less likely to have sexual relationships with people they have known for only a short while. In light of this, it is not surprising that judges and juries are willing to accept that a victim has not consented when the attacker was unknown to her. A telling example to this effect is the move by the International Criminal Tribunal for the Former Yugoslavia to include rape within the definition of crimes against humanity, it being readily accepted that female Bosnian Muslims would not consent to sexual relations with their Serb aggressors.⁴⁴

The flip side of the coin of quasi-presumption of a lack of consent in cases of rape by a stranger is the difficulty for victims of establishing a similar absence of consent in cases where their aggressor was already known to them. Despite the

³⁹ *R v. Smith* [2000] 4 All ER 289; see Burton M., “Intimate Homicide and the Provocation Defence: Endangering Women? *R v. Smith*,” *FLS* 9 (2001): 247–58.

⁴⁰ M. Burton, “Sentencing Domestic Homicide Upon Provocation: Still ‘Getting Away With Murder.’ *R v. Suratan*, *R v. Humes* and *R v. Wilkinson* (Attorney General’s Reference No. 74, No. 95 and No. 118 of 2002) [2002] E.W.C.A. 2982; *FLS* 11 (2003): 279–89.

⁴¹ J. Fudge, “The effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada” *International Journal of the Sociology of Law* (1989): 445–63 at 460.

⁴² S. Moody, “Images of Women: Sentencing in Sexual Assault Cases in Scotland,” in *Law and Body Politics: Regulating the Female Body*, eds. J. Bridgeman and S. Millns (London: Sweet & Maxwell, 1997), 1, 213–39.

⁴³ M. W. Stewart, S. A. Dobbin, and S. I. Gatowski, “Definitions of Rape: Victims, Police and Prosecutors,” *FLS* 4 (1996): 159–77; J. Temkin and B. Krahé, *Sexual Assault and the Justice Gap—A Question of Attitude* (Oxford: Hart Publishing, 2008).

⁴⁴ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic* judgment IT-96-23-T & IT-96-23/1-T (22 February 2001); D. Buss, “Prosecuting Mass Rape: *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* judgment IT-96-23-T & IT-96-23/1-T (22 February 2001)” *FLS* 10 (2002): 91–99.

decision of the House of Lords in *R v. R*,⁴⁵ which put an end to the marital rape exemption, judges and juries are notoriously less likely to believe that there was no consent in cases involving sexual relationships between parties who already knew one another.⁴⁶

A number of women have now turned to the civil law to seek justice following rape and sexual assault. Until recently, a block to this was the rigid limitation period of six years imposed for intentional torts. In contrast, negligently inflicted personal injury was subject to a three-year limitation period, but victims could appeal to the court to have the time period extended. The law on this was changed in January 2008 when a number of victims of rape and sexual assault appealed to the House of Lords. In the most prominent case, *A v. Hoare*⁴⁷ (termed the “lotto rape case”), the victim had been raped in 1989, but at the time she did not sue because the rapist had very little money. Later, in 2004, he bought a lottery ticket while on day release from prison and won seven million pounds. Her attempt to sue for the lasting damage caused by the rape was stopped by the six-year limitation period. On appeal to the House of Lords, limitation periods for intentional torts were brought in line with injuries caused through negligence. The recommendation given was that the more serious the assault the greater the presumption of flexibility in the limitation period. Other related appeals heard at the time included victims who had been raped or abused when they were children and were similarly time-barred from pursuing claims.

A further interesting development in the context of litigation strategy was the first private prosecution for rape brought in 1995 with support from Women Against Rape and the English Collective of Prostitutes.⁴⁸ The Crown Prosecution Service refused to prosecute the rapes, beatings, and imprisonment of the victims because they were sex workers, and it believed they would not be credible witnesses. The jury believed otherwise, and as a result of the prosecution, the rapist was sentenced to fourteen years imprisonment. Concurrent with the prosecution, a report on other failures to prosecute was published by *Legal Action for Women and Women Against Rape*.⁴⁹ As a result, an enquiry was launched into the code of practice on prosecuting perpetrators used by the Crown Prosecution Service.

More worryingly for the advancement of women’s rights and litigation is the tendency for the generation of counterclaims once rights are asserted. Where balancing of opposing claims is required within the criminal justice system, very often women’s claims are not prioritized. For instance, one of the earliest rulings by the House of Lords under the Human Rights Act 1998 in the area of gender equality, *R v. A* [2001] 3 All ER 1, engaged precisely in this type of balancing exercise to the detriment of women victims of sexual assault. In the context of a rape trial and a conflict between the assertion of the rights of the (male) defendant over

⁴⁵ *R v. R* [1991] 4 All ER 481.

⁴⁶ *R v. Diggle* (1995) 16 Cr App R (S) 163.

⁴⁷ *A v. Hoare*; *C v. Middlebrough Council*; *X v. London Borough of Wandsworth*; *H v. Suffolk County Council*; *Young v. Catholic Care and Others* [2008] UKHL 6.

⁴⁸ International Collective of Prostitutes, *Some Mother’s Daughter: Hidden Movement of Prostitute Women Against Violence* (London: Crossroads Books, 1999).

⁴⁹ *Ibid.*, 45.

those of the (female) complainant, the Law Lords showed a worrying tendency to replicate the Canadian Supreme Court's early example of striking down statutory "rape shield" law reforms.⁵⁰ Although citing the later Canadian case of *R v. Darrach*⁵¹ with some approval, and recognizing the right of the victim to dignity and freedom from damaging rape myths, the House of Lords, because of the way the English provision was drafted, followed the earlier case of *Seaboyer*⁵² in finding the rape shield provision to be incompatible with the HRA.⁵³

Thus, in *R v. A* it was found by the House of Lords that s.41 of the Youth Justice and Criminal Evidence Act 1999, which prohibits the giving of evidence and cross examination about any sexual behavior of the complainant except with the leave of the court, could amount to a violation of the defendant's right to a fair trial under Article 6 of the Convention. The case redraws the balance previously struck by parliament towards the protection of rape complainants from harassment during the rape trial. This is concerning in light of evidence showing the reluctance of women to report rape, the brutal nature of their treatment by defense lawyers aimed at undermining their credibility and character, and the disinclination of juries to convict.⁵⁴

The decision in *R v. A* is disturbing also in that it demonstrated a distinct incompatibility in national and European interpretations of the Convention in the area of sexual violence, and a partial sightedness on the part of the national judiciary in its willingness to look to decisions of the European Court of Human Rights when interpreting Convention rights (despite the instruction to do so in s.2, HRA).⁵⁵ There lay at the time within the jurisprudence of the European Court the possibility of drawing a different conclusion upon the correct balance between the rights of the defendant and those of the complainant in cases of sexual violence. In the case of *SW v. United Kingdom* and *CR v. United Kingdom* (1996) 21 EHRR 363, dealing with the end of the marital rape exemption that had existed in the United Kingdom until the landmark decision of the House of Lords in *R v. R* [1991] 4 All ER 481, the European Court found that defendants convicted of the new offense could not rely on Article 7 of the Convention (the principle of non-retroactivity of the criminal law) in order to challenge their conviction. Furthermore, the decision of the European Court recognized that sexual violence is inherently contrary to the spirit of the Convention, "the very essence of which is respect for human dignity and human freedom" (*SW v. UK* and

⁵⁰ K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases," *Canadian Journal of Women and the Law* 9 (1997): 148-77; T. Murphy and N. Whitty, "What is a Fair Trial? Rape Prosecutions, Disclosure and the Human Rights Act," *FLS* 8 (2000): 143-67.

⁵¹ *R v. Darrach* [2000] 2 SCR 443.

⁵² *R v. Seaboyer and Gayme* [1991] 2 SCR 577.

⁵³ Skeet, "Strengthening Women's International Rights Norms in the UK after the Human Rights Act 1998: Lessons from Canada," in *British and Canadian Perspectives on International Law*, ed. C. P. M. Waters (Leiden: Martinus Nijhoff, 2006), 149-68 at 157.

⁵⁴ L. Kelly and L. Regan, *Rape: Still a Forgotten Issue* (London: Child and Women Abuse Studies Unit, 2003); S. Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (Buckingham: Open University Press, 1997); C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

⁵⁵ But note that the ECt.HR places Art. 6, the Right to Fair Trial, above the rights of victims to justice. See *Al-Khawaja and Tahery v. UK* Chamber (2009) 49 E.H.R.R.1 and Grand Chamber [2011] 15 December, apps. 26766/05 and 2228/06.

CR v. UK (1996) 21 EHRR 363, paras. 44 and 42, respectively). The decision in *R v. A* seemed, therefore, to represent an initial loss for women's rights in the new HRA culture, and this despite the existence of legal precedents to support a more sympathetic interpretation and parliamentary intention to protect claimants from harassment at trial. Similarly, the experience of Canada immediately after the Charter shows us that it is especially in cases of sexual violence that women's rights are most at risk. While the victims in due process cases were usually women,⁵⁶ court cases focused on the conflicting rights of the state and the defendant and tended to ignore the victim.⁵⁷

Yet if there is a positive side to *R v. A*, it is the role played by the women's groups Rape Crisis Federation, Campaign to End Rape, the Child and Woman Abuse Studies Unit, and Justice for Women, as third party interveners in the case. The potential for feminist activists to influence judicial decision making through third-party interventions is of increasing importance, as such interventions offer the opportunity to build a litigation strategy that can help shape the development of case law under the HRA.⁵⁸ So much had already been recognized in the pre-HRA case of *R v. Smith* [2001] AC 146, which concerned the defense of provocation to murder and in which a coalition of feminist groups successfully made a written intervention in the House of Lords in order to represent the interests of battered women.⁵⁹ In this regard, the participation of feminists and women's groups in the litigation process may be seen as a good in itself with success not being measured purely in terms of winning or losing a specific case but rather in raising public awareness of the extent of sexual violence against women and the need to tackle gender-based harms.

Sexual Violence, Asylum, and Refuge

Asylum and refuge provisions are not always examined as preventative measures in relation to violence against women, yet the experience or threat of violence is implicit in the concept of "persecution." The intersection of non-citizen status, race, and religion with gender in relation to women seeking asylum make asylum-seeking women one of the most vulnerable groups in the United Kingdom.⁶⁰ This also makes women seeking refuge and asylum more vulnerable to violence within

⁵⁶ M. Mandel, *The Charter of Rights and the Legalisation of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994), 389.

⁵⁷ See C. Dauvergne, "A Reassessment of the Effects of a Constitutional Charter of Rights on the Discourse of Sexual Violence in Canada," *International Journal of the Sociology of Law* 22 (1994): 291–308, 305; F. Morten and A. Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada," *Canadian Journal of Political Science* 34 /1 (2001): 55–84.

⁵⁸ H. Samuels, "Feminist Activism, Third Party Interventions and the Courts," *FLS* 13 (2005): 15–42.

⁵⁹ M. Burton, "Intimate Homicide and the Provocation Defence—Endangering Women? *R v. Smith*," *FLS* 9 (2001): 247–58.

⁶⁰ See K. Crenshaw, "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Feminist Theory, and Anti-racist Politics," *University of Chicago Legal Forum* (1989): 139; P. Aspinall and C. Watters, *Refugees and Asylum Seekers: A Review from an Equality and Human Rights Perspective* (Equality and Human Rights Commission Research Report 52, p. 134). The authors argue that there has been insufficient attention paid to these intersectional characteristics.

their domestic relationships, particularly where their status in the United Kingdom is dependent on a partner's asylum claim. Therefore it is important that persecution against women is recognized when the Convention is applied to claims, and that women make claims in their own right. Moreover, the need for economic and social support for women seeking refuge is recognized as a necessary tool to protect against domestic violence in the United Kingdom.

Asylum and refuge provisions are based on the premise that states within the international community should provide protection for human rights even where rights breaches take place outside their state control.⁶¹ Despite the fact that women equal or exceed men in relation to global refugee populations,⁶² UK figures for asylum applications show that far fewer women than men make applications for asylum under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (hereafter the Refugee Convention).⁶³ To claim official refugee status a person must fit within Article 1.A (2) of the Convention. This article provides that anyone who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic] nationality and is unable or, owing to such fear, is unwilling to avail himself [sic] of the protection of that country" shall be considered a refugee.⁶⁴

Despite its clear application to both men and women, Article 1. A. (2) makes no explicit reference to gender, and historical and prevailing perceptions of asylum claimants have been narrowly drawn as male.⁶⁵ Understandings of political activity or religious opinion have excluded women's experiences. This is an area where women are at a particular disadvantage, because their experiences do not conform to the "dominant perception of a refugee within the meaning of the [refugee] Convention,"⁶⁶ and within the refugee system, women have been viewed at best as secondary claimants dependent on those defined as refugees. Berkowitz and Jarvis suggest that the relative dearth of applications from women in their own right is due to two factors: firstly, that there is a lack of jurisprudence that examines claims from the female experience, and that women may therefore not be encouraged to apply, and secondly because "procedural and evidential

⁶¹ S. F. Martin, "Gender and the Evolving Refugee Regime," *Refugee Survey Quarterly* 29 /2 (2010): 104–21; see also A. Edwards, "Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination Against Women," Legal and Protection Policy Research Series: PPLAS/2009/02: <http://www.unhcr.org/refworld/docid/4a8aa8bd2.html>.

⁶² Women make up around 50 percent of refugee populations globally (figures from the Refugee Council UK: http://www.rcis.org.uk/asylum_process/women).

⁶³ The figures for 2009 are 16,065 applications from men and 8,225 applications from women (Control of Immigration Statistics United Kingdom 2009; Supplementary tables, table 2 j: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/hosb1510/>).

⁶⁴ Convention and Protocol Relating to the Status of Refugees: <http://www.unhcr.org/3b66c2aa10.html>.

⁶⁵ P. Goldberg, "Where in the World Is There Safety For Me? Women Fleeing Gender-Based Persecution," in *Women's Rights, Human Rights: International Feminist Perspectives*, eds. J. S. Peters and A. Wolper (London: Routledge, 1994), 345.

⁶⁶ H. Crawley, "Gender, Culture and the Asylum Determination Process: The Experiences of Refugee Women," in *Rights of Women Bulletin* (Autumn 2002): 5–9 at 5.

requirements of the domestic asylum process are not equally accessible to both men and women.⁶⁷

In 1991, in an effort to redress some of these inequalities, the UNHCR produced Gender Guidelines⁶⁸ to be read alongside the Refugee Convention as an aid to interpretation and process. These introduce gender awareness in several ways: by discussing the specific situations that might bring women under the different heads of the Convention; by asking countries to recognize that a “particular social group” can be constructed along gender lines; and by directing countries to examine their procedures and processes, including recognizing the additional difficulty that women may encounter in providing documentary or other evidence. While there is acceptance of the failure to properly take gender into account in considering claims for refuge and asylum, there is some controversy in relation to both the concept and consequence of Gender Guidelines. For instance, some authors argue that guidelines promote a focus on women as a social group and underplay the recognition of women’s political and religious persecution, thus encouraging a view of women as passive victims rather than political actors.⁶⁹

In 1998, following the example of Canada, the United States, and Australia, as well as recommendations by the European Parliament, the UK Refugee Women’s Legal Group produced *Gender Guidelines for the Determination of Asylum Claims in the UK*.⁷⁰ Despite a campaign by the Refugee Women’s Legal Group, the guidelines were never adopted by the Home Office. Yet the House of Lords Judicial Committee recognized the value of these guidelines in the appeal case *R. v. IAT. Ex p Shah*⁷¹ (known as *Shah and Islam*). *Shah and Islam* involved asylum appeals by two women from Pakistan who had been subjected to violence by their husbands.⁷² One of the applicants was given advice in her application by the women’s group Southall Black Sisters, and this group continued to support the legal team and to campaign on behalf of the women. The court drew on an Amnesty International report on Pakistan, which gave general evidence on the parlous position of women without family protection in some parts of Pakistan and on the seriousness of accusations of infidelity against women.

Both women were unsuccessful in claiming political persecution, but the House of Lords Judicial Committee did find that they could claim membership of

⁶⁷ N. Berkowitz and C. Jarvis, *Immigration Appeal Authority: Asylum Gender Guidelines* (2000). These can be found at <http://www.rcis.org.uk/resources/pages/Asylum+process+resources/Asylum+gender+guidelines>. C. Harvey, “Engendering Asylum Law: Feminism, Process and Practice,” in *Feminist Perspectives on Public Law*, eds. S. Millns and N. Whitty (London: Cavendish Publishing, 1999). Harvey also argues that the failure to explicitly refer to gender as a ground of persecution is a problem and refers to the neglect of women’s experience as “systematic” (“Engendering Asylum Law,” 222–23).

⁶⁸ *Guidelines on the Protection of Refugee Women Prepared by the Office of the United Nations High Commissioner for Refugees* (Geneva, July 1991): http://cgrrs.uchastings.edu/documents/legal/gender_guidelines/UNHCR_Guidelines_Protection_Refugee_Women.pdf. The UNCHR subsequently published guidelines in relation to sexual violence in 1995. The current guidelines were produced in 2002 and are complementary to both these documents.

⁶⁹ S. M. Akram, “Orientalism Revisited in Asylum and Refugee Claims,” *International Journal of Refugee Law* 12 (2000): 7–40.

⁷⁰ Found at <http://www.nadir.org/nadir/initiativ/linksrhein/archiv/c/c000205.htm>.

⁷¹ [1999] 2 AC 629.

⁷² A summary of the facts is given by Lord Steyn at 636–38.

a particular “social group” comprising “all women in Pakistan.” There is no doubt that gender guidelines were significant in the determination of this case. The UNHCR, as a third party, provided submissions based on the UNHCR gender guidelines, and these were praised by the court.⁷³ All the individual judgments also referred to the Canadian case of *Attorney General of Canada v. Ward*,⁷⁴ which had recognized that gender and sexual orientation could form the basis of a “social group” for the purposes of the Refugee Convention. In accepting the concept of social group status based entirely on gender, Lord Hoffman also referred explicitly to the gender guidelines for the United Kingdom drawn up by the Refugee Women’s Legal Group. The case gave explicit support for the campaign for gender guidelines to be officially adopted. In November 2000, Berkowitz and Jarvis produced and issued gender guidelines on behalf of the Immigration Appellate Authority. The Refugee Women’s Legal Group was credited as providing the basis for this official guidance. Yet the status of these guidelines remained unclear. Although they were placed on the Immigration Appellate Authority website, there was no obligation on adjudicators to use them and no training given. Further campaigning eventually led to the issue of a “watered down”⁷⁵ version in 2004 that was just twenty pages long⁷⁶ (the original guidelines produced in 2000 were over sixty pages).

While the finding in *Shah and Islam* had an impact on decision making by asylum adjudicators, particularly in relation to cases involving female genital mutilation (FGM), Asylum Aid noted that the Immigration Appeal Tribunal was often overturning these decisions and adopting a much more restrictive interpretation of “particular social group” than was given in *Shah and Islam*.⁷⁷ Similarly, in 2004, the Court of Appeal recognized problems with government appeals to the Immigration Appeal Tribunal (IAT). For instance, in *P and M v. Secretary of State for the Home Department*,⁷⁸ a case that involved the appeals of Kenyan women fearing FGM in one case and domestic violence in another, the Court of Appeal restored the decisions taken in the women’s favor by the adjudicator and stressed the importance of appellate bodies “not seeking to determine appeals to the adjudicator afresh.”⁷⁹ They also warned against an “overly technical approach” to the Refugee Convention.⁸⁰ Despite this positive finding, a year later, a differently composed Court of Appeal appeared to set back any progress. In *Fornah*,⁸¹ the male majority of the Court of Appeal found that a woman who fled Sierra Leone fearing that she would be subjected to FGM was not “persecuted,” since if she underwent

⁷³ One of the claimants and her legal team had been supported and advised by Southall Black Sisters: <http://www.southallblacksisters.org.uk/history.html>.

⁷⁴ [1993] 2 SCR 689.

⁷⁵ Argued by Women’s Asylum News (WAN) 100 (March 2011): http://www.asylumaid.org.uk/data/files/publications/157/WAN_March_2011.pdf.

⁷⁶ Gender Issues in the Asylum Claim found on the UK Borders Agency website: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissueintheasylum.pdf?view=Binary>.

⁷⁷ WAN 41–48.

⁷⁸ *P and M v. Secretary of State for the Home Department* EWCA civ [2004] 1640.

⁷⁹ *Ibid.*, para. 48.

⁸⁰ *Ibid.*, para. 45.

⁸¹ *Secretary State for the Home Department v. Fornah* [2004] EWCA civ 986 and 680.

the procedure it would lead to her complete acceptance in that society. The Court explicitly rejected the concept of a “social group” made up of all Sierra Leonean women, since 80 percent of them had already undergone FGM, and therefore not all women in Sierra Leone feared FGM. They also rejected social grouping based on “intact” Sierra Leone women, since if subjected to FGM, a woman would no longer be a member of that group. In her minority judgment Lady Justice Arden disagreed, rejected the majority findings, and rejected the Home Office appeal.

The decision caused widespread alarm within women’s groups, and their concerns were supported by a debate on FGM in the legislative chamber of the House of Lords that was dominated by the female members of that second chamber.⁸² The Court of Appeal decision was described by Baroness Kennedy, herself a QC, as an “appalling decision” and “a return to a technocratic application of the law.”⁸³ The Home Office tried to blame the Court, but it was argued by several of the contributors that the Home Office could not “hide behind the failures of the judiciary” since it had instigated the appeal.⁸⁴ Baronesses Rendell and Kennedy urged the Home Office to review its position, called for clear gender guidelines as were in use in Canada, and urged the Judicial Committee of the House of Lords to reverse the *Fornah* decision. For the government, Lord Bassam claimed that guidelines on gender issues in the asylum process *were* in use.⁸⁵

On appeal to the House of Lords Judicial Committee in 2006, their lordships upheld *Fornah*’s appeal and clarified the separation between the requirement of individual persecution and membership of a “particular social group.” It was stressed that the shared characteristic of the social group must reflect the “reason for persecution,” but that it could include persons who were not persecuted.⁸⁶ Therefore, a social group need not be cohesive in the way that the Court of Appeal had suggested. The UNHCR intervened as a third party to the case, and in addition to the UNCHR Guidelines, the judgments referred to a range of international case laws examining the issue. The judgment also drew on the Home Office’s own advice and a parliamentary statement from Anne Widdecombe, then a government minister, stating that FGM should be considered torture for the purposes of asylum.⁸⁷ Finally it referred to EU Council Directive 2004/83/EC of 29 April 2004⁸⁸ setting out minimum standards for refugees across member states.

While this represented a legal victory in relation to FGM, in the very same year a report by Black Women’s Rape Action Project and Women Against Rape found that few Immigration Judges (formerly called Adjudicators) ever referred to guidelines, and that women were being denied asylum status even where there was good evidence to support their case. Research by Asylum Aid also found that women’s

⁸² House of Lords, Hansard Debates, 8 December 2005, cols. 844–868.

⁸³ *Ibid.*, col. 855.

⁸⁴ *Ibid.*, per Baroness Kennedy, col. 856.

⁸⁵ *Ibid.*, col. 857.

⁸⁶ *Fornah v. Secretary of State for the Home Department* [2006] UKHL.

⁸⁷ Lord Bingham of Cornhill, para. 26.

⁸⁸ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>.

claims were still very poorly dealt with and that the revised gender guidelines were not being properly applied.⁸⁹ The report found that where the guidelines were referred to, women felt they had been given a fairer hearing.⁹⁰

In response to this dossier, Lord Hylton raised a parliamentary written question asking the government whether they could ensure that the Immigration Appellate Authority (IAA) Gender Asylum Guidelines 2000 were always referred to where rape was put forward as a form of persecution.⁹¹ Baroness Scotland of Asthal for the government replied that the 2000 Gender Guidelines were out of date and had been replaced by a body of jurisprudence, and that this was supplemented by the Judicial Studies Board Equal Treatment Bench Book. No reference was made to the shorter guidelines on gender issues that had been revised and reissued only the year before. Baroness Scotland's comments appear to have misunderstood the role of the guidelines since they reach beyond jurisprudence and act as a training aid, which helps caseworkers to identify general issues in relation to interviewing techniques and the treatment of claimants. In light of the government's response, it was perhaps unsurprising that research by Asylum Aid in 2010 found evidence of continuing problems in the handling of women's claims. This report was supported by the United Kingdom Border Agency's (UKBA) own disaggregated figures, which showed that a disproportionate number of women's claims were refused at first instance and then allowed on appeal.⁹²

The ECHR provides an additional protection from return to a "home" country for a woman who fears violence (where there is a "real risk" of a "serious breach" of an ECHR right).⁹³ The introduction of the Human Rights Act 1998 in the United Kingdom allowed this principle and surrounding ECHR jurisprudence to be applied in UK domestic courts. Section 6 of the Human Rights Act states that it "is unlawful for any public body to act in a way that is incompatible with a Convention right." Moreover, Article 14 of the ECHR also supports the need for a gender-sensitive asylum process. Thus, the HRA 1998 itself was a spur to the production of the IAA Guidelines, issued in 2000 just a month after the Act came into force. The Immigration and Asylum Act 1999 s.65, drafted in response to the HRA 1998, also provided that whenever a human rights issue was raised in an asylum application, an appeal should automatically be heard.

So the potential to effect positive change in this area is strengthened by the capacity of ECHR jurisprudence to recognize the state's responsibility for private actors and to allow indirect horizontal application. The cases of *Morven Marcia McPherson v. Secretary of State for The Home Department*,⁹⁴ *Klondiana Kacaj v.*

⁸⁹ S. Ceneda and C. Palmer, "'Lip Service' or Implementation? The Home Office Gender Guidelines and Women's Asylum Claims in the UK" (Asylum Aid, March 2006): http://www.asylumaid.org.uk/data/files/publications/38/Lip_Service_or_Implementation.pdf. Often this was because their claims were being fast-tracked, though fast-tracking was contrary to official guidance.

⁹⁰ Black Women's Rape Action Project and Women Against Rape, *Misjudging Rape: Breaching Gender Guidelines and International Law in Asylum Appeals* (London, 2006).

⁹¹ House of Lords, Hansard, Written Questions, 5 February 2007, col. WA93.

⁹² WAN 98 (December 2010): 2.

⁹³ *Soering v. United Kingdom* (1989) 11EHRR 439; see the partly dissenting opinion of Judges Bratza, Bonello, and Hedigan in *Mamatkulov and Askarov v. Turkey* (2005) 41 EHRR 494.

⁹⁴ [2001] EWCA Civ 1955, 19 December (Threat of domestic violence if returned to Jamaica).

Secretary of State for the Home Department,⁹⁵ and the case of *Z and A*, in *Secretary of State for the Home Department v. Z, A, and M*⁹⁶ showed early successes in UK courts based on HRA 1998 appeals heard through the s.65 procedure. Even in the *Fornah* case, discussed above, the Secretary of State recognized that to return Fornah to Sierra Leone where there was a real threat of FGM would breach Article 3 of the ECHR.⁹⁷

Moreover, *M (Lebanon) v. Secretary of State for the Home Department*⁹⁸ suggested that the UK House of Lords was willing to go beyond the scope of ECHR jurisprudence. This went against the usual position of Strasbourg jurisprudence that “aliens cannot claim. . . entitlement under the Convention. . . to escape the discriminatory effects of family law in their country of origin.”⁹⁹ Other cases currently on appeal to the Grand Chamber of the ECtHR might also suggest that the House of Lords in *Fornah* took a leading stance on Article 3 rights in this area.¹⁰⁰

Yet as Lord Hope recognized in *Fornah*, where other claims are available, refugee status under the Refugee Convention is not just “of theoretical importance.”¹⁰¹ A decision granting refugee status provides greater benefit and protection than a decision under Article 3 not to allow a return in the current climate.

If the campaigning by women’s groups and guidance through case law has not ensured clear use of gender guidelines, a recent civil action has shown that the failure can have financial consequences for government. In *ELS v. Home Office*,¹⁰² a Moldovan woman who had been trafficked to the United Kingdom, subsequently deported, then raped and trafficked back to the United Kingdom, sued the Home Office for breaching Article 3 and Article 4 of the ECHR¹⁰³ when they failed to properly examine her asylum claim before deporting her.¹⁰⁴ The case was supported by the Poppy Project, a women’s group supporting trafficked women. The government initially fought the case, but following fierce publicity by the Poppy Project,

⁹⁵ [2002] EWCA Civ 314, 14 March (Threat of forced abduction and rape if returned to Albania).

⁹⁶ [2002] EWCA Civ 952, 5 July (Threat of violence to homo-sexual men if returned to Zimbabwe, and loss of society of partner in the case of A).

⁹⁷ It is accepted in ECtHR jurisprudence that where there is a real risk of FGM it would breach Article 3 to return.

⁹⁸ [2008] UKHL 64.

⁹⁹ *EM (Lebanon) v. Secretary of State for the Home Department* [2008] UKHL 64, para. 7, per Lord Hope of Craighead.

¹⁰⁰ For instance in *Collins and Akaziebie v. Sweden*, Application no. 23944/05 (2007), the ECtHR found the claimant’s assertion that she had wrongly been refused leave to remain inadmissible. The ECtHR suggested that because the applicant was resourceful enough to get herself and her daughter to Switzerland, she was “strong enough” to protect them both from FGM if they were returned to Nigeria (at p. 14). A number of cases are currently pending. *Izeubhai v. Ireland* (no. 43408/08) and *Amerado v. Austria* (0969/10) concern appeals against return where there is threat of FGM, and *N v. Sweden* relates to an appeal against return by an Afghan woman who had been living in Sweden and having an extramarital affair with a Swedish man. She alleges fear of state-sanctioned domestic violence if returned. In relation to pending appeals, see ECHR press release: http://www.echr.coe.int/NR/rdonlyres/39C38938-2E29-4151-9280-D5AC063DD02E/0/FICHES_Violence_femmes_EN.pdf.

¹⁰¹ *Fornah* [2006], per Lord Hope, at para. 35.

¹⁰² Claim no. HQ09X01333.

¹⁰³ Article 3 ECHR is the right to be free from inhuman and degrading treatment and torture. Article 4 is the right to be free from slavery and servitude.

¹⁰⁴ H. Wistrich and C. Kilroy, *ELS v. Home Office* Casenote: www.airecentre.org/.../Advanced_Immigration_-_ELS_v_Home_Office_Casenote.pdf.

good news coverage,¹⁰⁵ and the parliamentarians Anthony Steen, Baroness Nicolson, and Jack Dromey raising the issue in the House of Lords and House of Commons,¹⁰⁶ the government decided to relinquish the fight and settled out of court for 130,000 pounds.¹⁰⁷ This example of the role of the press and parliamentary debate in the settlement illustrates the importance of discursive opportunity structures in the activation of women's rights, as discussed by Gesine Fuchs in her contribution to this collection.

A second focused campaign relates to the economic and social rights of female refugee and asylum seekers, their access to services and support, and their freedom from violence in the United Kingdom as host country. In 2007, a joint campaign was launched by over forty leading NGOs for women's rights and human rights groups, opposing the application of the "no recourse to public funds rule" for women who are victims of domestic violence. Lobbying against the "no recourse" policy has been happening since the 1990s. Early, successful lobbying led to changes in the law so that women who were dependents of asylum seekers would no longer be deported—provided that there was evidence of domestic violence—in situations where their relationship broke down within the "probationary period."¹⁰⁸ Prior to this, the threat of deportation had forced women to remain in abusive relationships. In practice, though, the real benefit of this change in the law was negated by the fact that women who leave their partners in those circumstances have no recourse to "public benefits" while their individual claims are being determined—though they may be entitled to local government support or support from the National Asylum Support Service. While this "no recourse" rule applies to all asylum seekers, it creates particular problems for victims of domestic violence, because the nature of the assistance can mean that "women and children are often isolated in accommodation/removal centres or other inappropriate housing and designated areas, where they are easily targeted by violent spouses/partners or relatives, and lack access to essential safe and specialist refuge and support services."¹⁰⁹ Though Oxfam was not a member of this campaign, it also released a report in 2008 on the impact of this rule on South Asian women in the United Kingdom and raised human rights concerns around the policy.¹¹⁰

Problems have been compounded by very mixed practice among councils. Some local authorities were effectively preempting the asylum process by stating that, where women could get family support in their home country, they would be offered an air ticket home but no other support. A 2010 judicial review hearing

¹⁰⁵ T. Rayment, "Trafficked, Raped, Deported: Story of a Sex Slave," *Sunday Times* (3 April 2011): 15.

¹⁰⁶ J. Dromey, 5 April 2011, Hansard Commons Debate, col. 884.

¹⁰⁷ <http://www.guardian.co.uk/law/2011/apr/19/sex-trafficking-uk-legal-reform>; Press Release From Legal Team Representing Trafficked Woman In Ground Breaking Claim Against the Home Office, 11 April 2011.

¹⁰⁸ See Southall Black Sisters, The Two Year Rule Campaign, http://www.southallblack SISTERS.org.uk/campaign_oneyearrule.html. (accessed May 2011).

¹⁰⁹ Southall Black Sisters, Executive Summary of Proposed Amendments to Domestic Violence, Crime and Victims Bill 2003—Report Stage, 4, 9, and 11 March 2004, House of Lords at p. 2.

¹¹⁰ S. Anitha, P. Chopra, W. Farouk, Q. Hag, and S. Khan, *Forgotten Women: Domestic Violence, Poverty and South Asian Women with No Recourse to Public Funds*, 2008 <http://www.oxfam.org.uk/resources/ukpoverty/downloads/forgottenwomen.pdf>.

(with the NGO Shelter intervening) of just such “assistance” by Birmingham City Council,¹¹¹ made it clear that this was unacceptable. Now, councils must offer local support to women while their asylum claims are ongoing, unless the claims are believed to be “abusive or hopeless.”¹¹² Despite this success, there has been little movement by the government on other aspects, but the campaign continues to grow.¹¹³

Pulling together both issues and highlighting discrimination against non-national women in the United Kingdom is the Every Single Woman campaign. *The Rights of Women Seeking Asylum: A Charter*¹¹⁴ was launched in 2008¹¹⁵ by a number of different women’s groups under the coordination of the Refugee Women’s Resource Project. It refers to the right of all UK asylum seekers to be treated fairly under domestic and international obligations, and in relation to this, it highlights gender equality duties incumbent on the United Kingdom under CEDAW, the Treaty on European Union, the HRA 1998, and the Equality Act 2006. Among other things, the Charter calls for the implementation of gender guidelines,¹¹⁶ effective management of gender mainstreaming by the United Kingdom Border Agency, “accommodation, support and healthcare appropriate to their needs as women,” and specifically “the alleviation of the gender impact of policies which lead to destitution.”¹¹⁷ It also refers to the need “to ensure that those who may have been trafficked into the United Kingdom have full and appropriate access to the asylum determination system.”¹¹⁸ Two years on from its launch, it is supported by 211 groups in the United Kingdom.¹¹⁹ It seems that this level of coordinated mobilization has had a real impact. For instance, the UKBA appointed a Gender Champion in March 2010 and has reviewed its procedures.¹²⁰ The experience of earlier campaigns shows that successes can never be taken for granted and that pressure must be kept up to ensure there are no slippages.

Conclusions

This article demonstrates the growing number of ways in which women have mobilized around key legal and social issues in the United Kingdom. The aim, too, has been to illustrate mobilization around both individual legal cases and legislative change. These two possibilities are inevitably interlinked and often feed off

¹¹¹ *R v. Birmingham City Council ex parte Clue* [2010] EWCA Civ 390.

¹¹² Some local authorities have established a network to share best practice. No Recourse to Public Funds Network, *Social Services Support to People With No Recourse to Public Funds: A National Picture* (March 2011): http://www.islington.gov.uk/DownloadableDocuments/CommunityandLiving/Pdf/equalitydocs/NRPF_national_picture_final.pdf.

¹¹³ Women’s Aid Joint Statement—One Year On: <http://www.womensaid.org.uk/page.asp?section=00010001001000020001>

¹¹⁴ <http://www.asylumaid.org.uk/data/files/charter.pdf>.

¹¹⁵ Launched initially in June 2008 and then given a Parliamentary launch on 22 October 2008.

¹¹⁶ *The Rights of Women Seeking Asylum: A Charter*, 6.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ <http://www.asylumaid.org.uk/data/files/charter.pdf>.

¹²⁰ Asylum Aid, *Charter of Rights of Women Seeking Asylum. Two Years On: Impacts and Actions* (July 2010): <http://www.asylumaid.org.uk/data/files/publications/133/WomensAsylumCharter2Yearson.pdf>.

each other. The paper has aimed also to take account of the impact upon mobilization of constitutional change, the political and economic climate, and the construction of structures, groups, and institutions to deliver fairer outcomes for women. Our conclusion is that progress on gender equality issues has undoubtedly taken place in the United Kingdom, particularly in the last forty years. It does, however, remain slow and requires that constant offensive and defensive strategies be deployed by feminist activists and women litigants. In this respect, it is heartening to see that elite women within Parliament, government, and the courts are providing support and publicity for the wider mobilization of women. This highlights the importance of women's participation in formal political institutions and of women's representation in the higher courts in the United Kingdom.

What stands out in the UK experience is the scope and range of legal mobilization around rights, be they derived from the common law, criminal law, private prosecution, the ECHR, EU law, or lobbying using CEDAW. While women's rights implementation everywhere requires the passage of specific legislation to be most effective,¹²¹ a distinctive feature in the United Kingdom is the need for mixed strategies that do not just focus exclusively on either parliamentary or court-based activity. This is in part because of the nature of parliamentary sovereignty in the United Kingdom. Even after the Human Rights Act, the courts cannot strike down problematic legislation in the same way as other Supreme or Constitutional Courts in Europe and elsewhere. It is also apparent from the UK experience that there is an interrelationship between the courts and parliament. The impact of these unified approaches in relation to the rights of asylum seekers seems clear.

Also important has been the role of institutional bodies. For instance, the Women's National Commission has brought together a number of partnerships over the years and acted to publicize campaigns. In view of the limited resources available to many women's groups who are struggling to provide basic services, it is not clear what impact the loss of this coordinating group will have on future campaigns. Moreover, in attempting to meet commitments to provide support for women victims of violence, the government is choosing to contract with less radical groups. For instance the Poppy Project, which supported trafficked women, has lost its funding, and support for traumatized women who have been trafficked or raped is now contracted to the Salvation Army, an institution that has no expertise in the area and that has religious affiliations. Though the Commission for Equality and Human Rights has intervened in a number of cases it, shows no appetite to support litigation strategies. Yet, it seems clear that the key cases discussed here have provided much-needed support for campaigns. What is also clear is that the courts might not have reached their decisions were it not for the persistence of women's groups in providing guidelines, drawing on national and international rights discourses, and evidencing the problems for women caused by the current system.

Also specific to the United Kingdom in comparison to other European countries is the influence of Canadian as well as European experience on domestic law.

¹²¹ See E. M. Schneider, "The Dialectic of Rights and Politics: Perspectives From the Women's Movement," in *Feminist Legal Theory: Readings in Law and Gender*, eds. K. T. Bartlett and R. Kennedy (Boulder: Westview Press, 1991).

In this sense, the HRA acts as a conduit for women's international rights norms beyond the ECHR.¹²² The Canadian Gender Guidelines provided a model for the UK development of guidelines, and Canadian case law has been influential in the UK courts. For instance, the House of Lords drew on *Attorney General v. Ward* in the ground-breaking UK case of *Shah and Islam*, and looked to Canadian jurisprudence when examining the rape shield provisions in *R v. A*. Unfortunately, in the latter case, the legislation had not been drafted with reference to the Canadian jurisprudence, and the case was unsuccessful from a women's rights standpoint. Similarly, with the ECHR there is some ambiguity for women in the way in which European Convention rights are being incorporated into the domestic sphere.

We have revealed, too, how intersectional approaches to women's rights claims can produce varied outcomes. Women who are subjected to violence and who encounter the legal system as asylum seekers or refugees have a different experience and different hurdles to surmount when compared to those women whose encounters are through the criminal justice system. Both of these situations also reveal differences in the treatment of women seeking rights as compared to men. Above all, rights themselves are not everything in the pursuit of gender justice and gender equality.¹²³ Our research reveals the need for mixed methods and varied strategies that target all aspects of the legal and political systems. Mobilization works best when there is an alignment of feminist interests and a strong motivation to address injustice across a range of institutions. Campaigners, lawyers, and litigants have to be vigilant to protect hard-won gains and to spot opportunities for advancement. Rights are indeed both swords and shields and require skillful and strategic deployment in the courts, but this is done best alongside lobbying, campaigning, and efforts to raise political awareness and public attention.

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¹²² C. Skeet, "Strengthening Women's International Rights Norms in the UK after the Human Rights Act 1998: Lessons from Canada," in *British and Canadian Perspectives on International Law*, ed. C. P. M. Waters (Leiden: Martinus Nijhoff, 2006), 149–68

¹²³ See H. Irving, "More Than Rights," in *Constituting Equality: Gender Equality and Comparative Constitutional Law*, ed. S. Williams (New York: Cambridge University Press, 2009) and B. Baines and R. Rubio-Marin, ed., *The Gender of Constitutional Jurisprudence* (Cambridge: Cambridge University Press, 2005).