HUMAN RIGHTS

"REMEMBER THE LADIES": A FEMINIST PERSPECTIVE ON BILLS OF RIGHTS

Caroline Morris*

I INTRODUCTION

Women have been admitted to the ranks of legislators only comparatively recently in the history of western democracies.[1] However, they have been seeking to influence the content of laws for several centuries. In this context, women early on recognised the importance of Bills of Rights. In 1776, Abigail Adams wrote to her Federalist husband John Adams:[2]

> I long to hear that you have declared an independency —and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticuliar care and attention is not paid to the Laidies we are determined to foment a Rebelion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.

---

* Lecturer in Law, Victoria University of Wellington. Thanks to Belinda Zhang, research assistant, Victoria University of Wellington, for help in locating New Zealand cases, and to Janet Arkinstall of the Human Rights Act Research Project, Doughty Street Chambers, London for help with United Kingdom cases.

1 Women were permitted to stand for legislative bodies in New Zealand in 1919, in the United Kingdom in 1918, in Canada in 1920 and in Australia in 1902. In the United States, women were permitted to stand in 1788, but could not vote until 1920.

2 Letter from Abigail Adams to John Adams (31 March 1776), published in Alice S Rossi (ed) *The Feminist Papers* (Northeastern University Press, Boston, 1988) 10–11 (spelling as in original).

She did not get very far, for her husband replied: "As to your extraordinary Code of Laws, I cannot but laugh … Depend upon it, We know better than to repeal our Masculine systems".[3] Abigail wrote again, but was unsuccessful in persuading her husband to provide for women's concerns in his legislative efforts.[4]

In the years since this interchange, the American and French revolutions and the Bills of Rights that followed, Bills of Rights have become increasingly popular throughout the world. However, no corresponding increase in the role played by women, nor, more importantly, any "perticuliar care and attention" paid to women's concerns, in their drafting appears to have been recorded.[5] While it is tempting to speculate what a modern Bill of Rights would look like if it had been drafted to take into account women's particular concerns that is not my purpose here.[6]

The three papers presented at the Human Rights session of the Roles and Perspectives in the Law conference all proceed on the assumption that rights are an unqualified good. This commentary questions that assumption. It articulates an often-unheard voice in the discussion on human rights in legislated form by asking the question: "How do Bills of Rights affect women?" I first consider the role and function of a modern-day Bill of Rights. However, since our current legislation cannot be understood without reference to its historical and philosophical underpinnings, I then assess from a feminist perspective,[7] the theory which underlines the New Zealand Bill of Rights Act 1990 (NZBORA) and Human Rights Act (UK) 1998 (UKHRA), and present the feminist critique of the nature of the rights sought to be protected by these Bills of Rights.[8] Finally, in order to test the conflicting claims that for women, (i) there are dangers in embracing legislated rights, and that (ii) there might be strategic advantages in doing so, I consider the impact of Bills of Rights on women in New Zealand and the United Kingdom by examining cases decided

---

3 Rossi, above, 11.

4 Rossi, above, 13–14.

5 It is not on record whether the drafters of modern Bills of Rights received any similar correspondence from their wives, although it would be interesting to see their replies if they had.

6 For an historical example, see Olympe de Gouges' 1791 version of the 1789 Declaration of the Rights of Man and Citizen, the *Déclaration des Droits de la Femme et de la Citoyenne*. See "Declaration of the Rights of Woman and Citizen" in Margaret Davies *Asking the Law Question* (Law Book Co Ltd, Sydney, 1994) 183 – 187.

7 In doing so, I recognise and acknowledge that there is not one single feminist perspective, nor are all women the same. For a useful discussion of the issues implicit in the phrase "feminist perspective" see Deborah L Rhode 'The 'Woman's Point of View'" (1988) 38 J Legal Education 39.

8 In this commentary, I use this term to refer to a discrete piece of legislation providing for the observance of rights.

under the NZBORA and UKHRA. I conclude by offering some explanations as to why women in both countries have made little use of their Bills of Rights to advance their interests.

II RIGHTS

Before embarking on any critique of Bills of Rights, we must first consider their origins and purpose. How do we explain them, and what are they for?

In modern times, the jurisprudential debate over rights, and in their written expression, Bills of Rights, has centred on their societal nature as devices for expressing certain social relations and priorities. Andrew Butler has said that rights are not entities in themselves, but rather, should be seen as instrumental, "a construct through which the needs, interests and values of human beings in society are expressed in moral, political and legal terms depending on context".[9] Bills of Rights can also be seen as a list of entitlements: social claims in legal form, which must be acknowledged by government. They can also be seen as symbolic – aspirational or encouraging declarations, or mandatory statements about the type of society we hope to have, or the way in which we ought to behave towards on another. These may, in turn, serve as a springboard for policy and legislative action to promote compliance with the standards set forth in the Bill.

Others, notably Critical Legal Studies scholars, have questioned the whole concept of rights, claiming that while they sound impressive, rights are, in fact, unhelpful abstractions and useless reifications that impede social progress, and should be done away with in favour of focussing on real experiences or actual needs.[10]

While the debate about rights — their role, their function, their usefulness or otherwise — can proceed from this point alone, I suggest that in order to understand fully the import of Bills of Rights on women, it is important to examine the original theories which address the nature of civil society and underpin modern Bills of Rights.

A Understanding and critiquing Bills of Rights

The Bills of Rights of New Zealand and the United Kingdom have a common heritage in social contract theories. These theories attempt to explain and legitimise civil government by postulating the prior existence of a "state of nature", ie, one without government. Because of the threat to personal liberty and security inherent in this state, free and equal individuals come together and agree to enter by contract into civil or political society. As part of this contract, these individuals agree to delegate their own

---

9 Andrew Butler "Limiting Rights" (2002) 33 VUWLR, 537, 555.

10 Mark Tushnet "An Essay on Rights" (1984) 62 Texas L Rev 1363, 1382 – 1392.

individual power of government over themselves to a representative institution. This institution may thereby legitimately exercise power over them all. Government's role is also to guard them from the arbitrary exercise of power by others. Social existence is thus divided into two spheres: public society, created by contract and existing under law, and private society, outside contract and without law.

Working in parallel with this notion of legitimating government through consent is the idea of rights. Individuals who contract in to civil society bring with them their natural rights or freedoms, and yield up to that society only the portion of these rights necessary to secure the ends of government.[11] Accordingly, Bills of Rights represent a form of written guarantee to the individual that, having given up one's own power, agreed to enter into civil society and be governed by others, that transferred power will not be abused by the governors (now institutionalised in the form of modern-day government). As Judge Posner has characterised it: "[t]he men who wrote the Bill of Rights were not concerned that government might do too little *for* the people but that it might do too much *to* them".[12] Bills of Rights therefore, are intended to create a sanctuary for individuals into which government may not intrude, and it if may, only with good reason.[13]

The gendered and exclusionary nature of social contract theories was soon highlighted by early feminists (whose work has only recently been admitted to the canon of political thought).[14] More recently, Carole Pateman's classic work *The Sexual Contract* systematically exposed the sexualised nature of the social contract, "where women cannot be incorporated into civil society on the same basis as men because women naturally lack the capacities required to become civil individuals".[15] Since women are not parties to this contract, it follows that they may not, at this level, benefit from the guarantees of a Bill of Rights. Compounding this exclusion, it is unsurprising therefore that a Bill of Rights would not deal with women's specific concerns.

---

11 Martin Loughlin "Rights, Democracy, and Law" in Tom Campbell, Keith D Ewing and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) 42.

12 *Jackson v City of Joliet* (1983) 715 F 2d 1200, 1203 (emphasis added). Mark Tushnet puts it this way: "We fear that others with whom we live will act so as to crush our individuality, and thus we demand negative rights". Tushnet, above, 1392.

13 On this question of legitimate restriction of individual rights, see Andrew Butler "Limiting Rights" (2002) 33 VUWLR, 537.

14 For contemporary critique of Locke's *Two Treatises of Government* (1690), see the works of Mary Astell (1666 – 1731) in Patricia Springborg (ed) *Astell – Political Writings* (Cambridge University Press, Cambridge, 1996). For a contemporary critique of Rousseau's *Emile* (1762), see Mary Wollenstonecraft (1759 – 1797) "A Vindication of the Rights of Woman" in Janet Todd (ed) *Mary Wollenstonecraft – Political Writings* (University of Toronto Press, Toronto, 1993).

15 Carole Pateman *The Sexual Contract* (Stanford University Press, Stanford, 1988) 94.

Women were not excluded, Pateman claims, on the basis of inferior strength or innate ability, but because they were, according to social contract theorists "naturally deficient in a specifically *political* capacity, the capacity to create and maintain political right".[16] This conclusion led to a two-fold consequence: first, women were to be relegated to the private sphere where the law would not intrude; and second, there and in the public sphere, dominion could legitimately be exercised over them by men.[17]

It is at this point that the theory and practice of Bills of Rights come together: as women, they are not the concern of the original theories; thus they are excluded from civil society, and so, remain outside the doors of the protective sanctuary that a Bill of Rights represents. At the same time, under this model, women remain vulnerable to harm in the private sphere.

Bills of Rights, which are exemplars of social contract theory, generally grant primacy to rights that can be claimed by individuals against the state.[18] They focus on rights which can be linked to State acts or involvement in the political process, such as the right to vote, to liberty, to free speech, to justice, and a number of rights relating to criminal procedure. The major reference document for rights of this nature is the 1966 International Covenant on Civil and Political Rights.

Both the NZBORA and the UKHRA grant pre-eminence to civil and political rights, often termed "first generation" rights.[19] By legislating for these rights, and not others, a subtle hierarchy is created, symbolically (at the very least) elevating some rights above others, as worthy of governmental and judicial protection. The NZBORA and the UKHRA are not concerned with economic, social and cultural rights ("second generation" rights)

---

16 Pateman, above, 96 (emphasis in original).

17 See further on this point, Hilary Charlesworth and Christine Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000) 30–31. See also Margaret Thornton "The Public/Private Dichotomy: Gendered and Discriminatory" (1991) 8 J of L and Society 448, 449, and Celina Romany "State Responsibility Goes Private" in Rebecca Cook (ed) *Human Rights of Women* (University of Pennsylvania Press, Philadelphia, 1994) 92–96.

18 Although see the following on the "horizontal effect" of the NZBORA and UKHRA (ie, the applicability of these rights to the private sector): Grant Huscroft, Scott Optican and Paul Rishworth *The Bill of Rights: Getting the Basics Right* (NZLS, Wellington, 2001) 28–29; Anthony Lester QC "The Magnetism of the Human Rights Act" (2002) 33 VUWLR, 477, 497 in this volume.

19 For example, the NZBORA protects electoral rights (s 12); rights to freedom of thought, conscience and religion (s 13); freedom of peaceful assembly (s 16); the right to be free from unreasonable search and seizure (s 21); and adumbrates the rights of those arrested or detained (ss 22 and 23); and the minimum standards of criminal procedure (s 25). The UKHRA incorporates the following rights from the European Convention on Human Rights: the right to liberty and the security of the person (Art 5); the right to a fair trial (Art 6); and freedom of expression (Art 10).

such as the rights to health, housing, and education found in the International Covenant on Economic, Social and Cultural Rights. Nor do they concern themselves with the collective rights ("third generation" rights) to peace, development, and self-determination usually asserted by indigenous peoples.[20]

It has been said that civil and political rights themselves are inherently gender-biased. Ken Karst argues that these rights represent a privileging of the male values of separation and autonomy.[21] As Barbara Stark notes, "civil and political rights … represent the privileged, 'male' half of human rights discourse".[22] As noted, by their very nature, civil and political rights operate in the public sphere, in the realm of State action. They do not generally reach into the areas where women's particular interests and needs play out:[23] reproductive and sexual rights; freedom from violence (sexual and otherwise); and rights to just and favourable working conditions (and, as a corollary, to gain recognition for the concept of "women's work").[24]

Furthermore, some feminists have questioned the value of any form of rights for women. It has been claimed that that women's relational and inter-connected experience of life cannot be translated into the individualised language of rights;[25] and even if they

---

20 See Hilary Charlesworth "The Silences of Human Rights" (Paper presented to the Humanities Research Centre Conference, Australian National University, Canberra, Australia, 1 June 2001) 2–3. The White Paper on the New Zealand Bill of Rights proposed the incorporation of the Treaty of Waitangi in the NZBORA, but this provision did not survive select committee scrutiny: see *Final Report of the Justice and Law Reform Committee on a White Paper on A Bill of Rights for New Zealand* [1988] AJHR I. 8C. The NZBORA does protect minority rights (s 20), but focuses on their exercise by individuals, not their communal nature.

21 Ken Karst "Woman's Constitution" (1984) Duke LJ 447, 462. Catharine MacKinnon makes similar points about the purported objectivity of law's male standpoint epistemology: Catharine MacKinnon "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635.

22 Barbara Stark "International Human Rights Law, Feminist Jurisprudence and Nietzche's 'Eternal Return': *Turning the Wheel*" [1996] 19 Harv Women's LJ 169, 193. See also Hilary Charlesworth and Christine Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000) 231– 237.

23 As Nadine Taub and Elizabeth Schneider point out "The fact that the law in general has so little bearing on women's day-to-day concerns reflects and underscores their insignificance". Nadine Taub and Elizabeth Schneider "Perspectives on Women's subordination and the Role of Law" in David Kairys (ed) *The Politics of Law* (2 ed, Pantheon, New York, 1990) 156.

24 See Marilyn Waring *Counting for Nothing: What Men Value and What Women are Worth* (Allen & Unwin, Wellington, 1988).

25 See Frances Olsen "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 Texas L Rev 387, 389: "[R]ights theory conceptualises a society composed of self-interested individuals whose conflicting interests are mediated by the state …".

could be, rights can contradict each other, rendering them unhelpful.[26] Related to this concern is the fear that exercises in rights-balancing will see women's interests accorded less weight.

Many also argue that a reliance on rights in any form is overly simplistic and in any case, their promise cannot take effect in the face of complex power and structural inequalities weighted against women. In addition, feminists make the point that not all rights are to be embraced: some rights, such as protection of the family, some minority and cultural rights, freedom of religion, and freedom of speech can, in fact, be employed to justify women's oppression.[27]

Notwithstanding these criticisms, there have been a number of reasons put forward as to why women should employ rights-talk, as part of a balanced strategy to advance the position of women. First, the very criticism that has been levelled against rights discourse by the CLS school that rights are an abstraction and therefore unnecessary and unhelpful — can be turned to women's advantage. Precisely *because* they are couched in abstract terms, they are not limiting: women can count themselves included in their protective sphere.[28] Added to this strategic value, rights also have some social value. Since the protection of rights is one of the functions of government, and in itself, serves to legitimate government, those who call in aid rights to their cause are, as Nancy Fraser notes, "in the main not stigmatised".[29] This is perhaps also because they are using a language that those with the power to protect the interests represented by rights are familiar with and can understand. Some theorists have also seen rights-claims as symbolic: they allow the claimant to assert her rightful place in the legal and social community, and for this purpose alone, should not be discarded.[30]

---

26 Olsen, above, 390.

27 Hilary Charlesworth and Christine Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000) 208 – 212. See also Catherine Iorns "A Sexed Bill of Rights for New Zealand?" (1987) 17 VUWLR 215, 218 – 221.

28 See for example, Ginevra Conti Odorisio "Natural Law and Gender Relations: Equality of all People and Differences between Men and Women" in André-Jean Arnaud and Elizabeth Kingdom (eds) *Women's Rights and the Rights of Man* (Aberdeen University Press, Aberdeen, 1990) 26, arguing the classic liberal position that it was the neutral casting of rights in abstract language that made it a useful weapon in the armoury of feminist struggle in the 1960s and 1970s.

29 Nancy Fraser *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Polity Press, Oxford, 1989) 151.

30 Patricia Williams *The Alchemy of Race and Rights* (Harvard University Press, Cambridge, 1991) 153–154.

Celebrated victories by (feminist) lawyers using more established Bills of Rights to secure gains for women lend weight to these views. For example, rights to contraception,[31] and abortion[32] were won in the United States Supreme Court by calling in the aid of the right to privacy implicit in the "penumbra" of the fourteenth amendment. In Canada, the Supreme Court agreed that legislation heavily restricting access to abortion breached the liberty guarantee in the Charter of Rights and Freedoms.[33] The Canadian Supreme Court has also resisted a number of attempts to cut back abortion rights by granting legal personality (and thus rights) to the foetus, using section 7 of the Charter.[34]

III BILLS OF RIGHTS IN PRACTICE: THE NEW ZEALAND AND UNITED KINGDOM EXPERIENCE

Whether it is the feminist critique, or the claims about the positive value of rights, which holds true can be tested by looking at actual cases decided under Bills of Rights. Overseas experience shows that the impact of a Bill of Rights on women seems to have been two-fold: on the one hand, women have been able to claim the protection of the guarantees in a Bill of Rights to advance their interests; yet on the other, rights-claims have also been used (generally by men) in order to strike down or restrict women's gains.[35] This part tests these hypotheses in New Zealand and the United Kingdom by examining cases decided under the NZBORA and the UKHRA to see what impact rights legislation and rights litigation have had on women.[36]

A Using Rights Litigation to Advance Women's Interests

It might be thought that New Zealand's twelve years of experience with the NZBORA would provide a number of cases where the potential good of a Bill of Rights for women

---

31 *Griswold v Connecticut* (1965) 381 US 479; *Eisenstadt v Baird* (1972) 405 US 438 (extending the right to unmarried couples).

32 *Roe v Wade* (1973) 410 US 113.

33 *Morgentaler v R* [1988] 1 SCR 30. Although see Aileen McColgan "Women and the Human Rights Act" (2000) 51(3) Nth Ire L Qly 417, 421, arguing that the US and Canadian cases represent a mixed victory for women. See also Mary Eberts "The Canadian Charter of Rights and Freedoms: A Feminist Perspective" in Philip Alston (ed) *Promoting Human Rights through Bills of Rights* (Oxford University Press, Oxford, 1999).

34 *Borowski v AG* [1989] 1 SCR 342; *Tremblay v Daigle* [1989] 1 SCR 530.

35 Elizabeth Kingdom *What's Wrong with Rights?* (Edinburgh University Press, Edinburgh, 1991) 1 characterises this as "an immediate dilemma for feminists."

36 Of course, an assessment of these paths that rights litigation can take itself raises the question of the wisdom of relying on the judiciary, rather than Parliament, to protect and advance women's interests through the mechanism of Bills of Rights. See below, on Parliament's response to *Daniels*.

has been acknowledged, if not acted upon. However, research into the numerous cases decided under the NZBORA has revealed only one case where women have relied on the NZBORA's rights to advance or protect their interests, and even then they secured a only a phyrric victory.

In *Daniels v Thompson*,[37] the Court of Appeal stated that section 26(2) NZBORA (prohibition on double punishment) did not bar an award of exemplary damages for actions where allegations of sexual offending had been made. However, the positive use of the NZBORA in this decision was of no effect, since the Court also held that where the acts complained of had been subject to the criminal process, there was to be an absolute bar on claims for exemplary damages.[38]

The Human Rights Act 1998 (UK) did not come into effect until October 2000; consequently, there have not been many cases to examine. Of those, there have been only two where the UKHRA and women's concerns have intersected favourably. Neither case resulted in any major advancement for women; rather, they should be seen as indications of the regard the English judiciary has paid, and might pay, towards women and their rights under the UKHRA.

In the first, the House of Lords considered that the Prison Service Policy of separating women prisoners from their babies at eighteen months, while lawful, had been over-rigidly applied.[39] In light of its UKHRA obligations, the Prison Service was to proceed on an individual basis. It must first acknowledge the right to family life afforded to women and their children under Article 8(1) of the European Convention on Human Rights, and only then proceed to consider whether the interference with that right was permissible under Article 8(2).[40]

In the second, which centred on a crucial concern for women: the right to control one's sexual and reproductive life, the Society for the Protection of Unborn Children sought to have regulations permitting the over-the-counter sale of emergency contraception (the "morning-after pill") declared ultra vires.[41] Munby J recognised the potential relevance of the UKHRA, and opined, unprompted, that counsel could have argued that "a fertilised

---

37 *Daniels v Thompson* [1998] 3 NZLR 22 (CA).

38 However, it is to be noted that Parliament legislatively effectively overruled the result of *Daniels v Thompson*, above, through the introduction of s 396 to the Accident Insurance Act 1998. (A mirror provision exists in the Injury, Rehabilitation and Prevention Act 2001.)

39 *R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151.

40 *P and Q*, above, paras 101 – 102.

41 *R (Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin) (18 April 2002).

ovum has a right to life under Article 2",[42] or that "the right to respect for private and family life protected by Article 8 extends to confer the kind of privacy interest protected right to distribute and use contraceptives which has been recognised by the Supreme Court of the United States of America".[43] In the event, argument on the UKHRA was not canvassed, since the case turned on a point of statutory interpretation. However, Munby J concluded his judgment with this encouraging coda:[44]

> I cannot help thinking that personal choice in matters of contraception *is* part of that "respect for private and family life" protected by Article 8 of the Convention. The reasoning of the Supreme Court of the United States of America in *Griswold*, *Eisenstadt* and *Carey* no doubt reflects a different constitutional background, but are not the underlying principles the same?

B Using Rights Litigation to Restrict Women's Interests

1 The experience abroad

Overseas commentators have warned against embracing rights with unchecked enthusiasm as a means of advancing the place and interests of women in society. They note that rights litigation has often been used to the contrary end of cutting down or removing the gains made by women. In other cases, where the rights of women and the rights of men conflict, it appears that the rights advanced by men win out.[45]

For example, in the United States, the anti-pornography ordinance framed by feminists Catharine MacKinnon and Andrea Dworkin for the city of Indianapolis, was challenged and struck down for breaching the constitutional guarantee of freedom of speech contained in the First Amendment.[46] Women there have also found that the Supreme Court, capable in the early 1970s of liberalising abortion laws, was, by the late 1980s and early 1990s, actively rolling back the protections granted to women seeking abortions and upholding as constitutional new restrictions on their access to abortion.[47]

---

42 *Smeaton*, above, para 61.

43 *Smeaton*, above, para 61.

44 *Smeaton*, above, para 398 (emphasis added).

45 Mary Eberts "The Canadian Charter of Rights and Freedoms: A Feminist Perspective" in Philip Alston (ed) *Promoting Human Rights through Bills of Rights* (Oxford University Press, Oxford, 1999) 252 - 253.

46 *American Booksellers Association v Hudnut* (1985) 771 F 2d 323 (7th Cir).

47 See *Webster v Reproductive Health Services* (1989) 492 US 490; *Rust v Sullivan* (1991) 500 US 173; *Planned Parenthood v Casey* (1992) 505 US 833. For commentary on this phenomenon, see Ken Karst "Women's Roles and the Promise of American Law" in Norman Dorsen and Prosser Gifford (eds) *Democracy and the Rule of Law* (CQ Press, Washington DC, 2001) 83 – 85.

The framing of rights as negative guarantees, rather than a positive exhortation, can also be problematic. Attempts in Canada to use the Charter's equality provision to force the State to take positive action were rejected in the early days of the Charter. Furthermore, when governments have attempted to take positive action in favour of women to address long-term structural inequalities such as the gender wage gap,[48] these too have been struck down on the basis that benefits or protections must be conferred in a non-discriminatory way.

It is in sexual (violence) cases that gender issues most typically intersect with rights.[49] In these cases, the accused routinely claims that legislation or judicial rulings aimed at protecting the complainant (such as preventing cross-examination of the complainant on her prior sexual history) conflicts with his right to a fair trial. Where the constitutionally protected rights of the (typically male) accused must be weighed against the unprotected and possibly unacknowledged rights of the (typically female) complainant, courts have tended to look favourably on the claims made by men. The Canadian cases of *R v Seaboyer*[50] and *Hess and Nguyen*,[51] exemplify this. In *Seaboyer*, the Supreme Court considered that the rape-shield provisions of the Canadian Criminal Code breached the accused's rights to life, liberty, and security, as guaranteed by section 7 of the Charter, while in *Hess and Nguyen*, the Court concluded that legislation providing that mistake about the age of the complainant could not be a defence to a charge of statutory rape was also in breach of the Charter.

2 New Zealand and United Kingdom experiences

Thomas J recently acknowledged the gendered nature of the criminal process and the judiciary's part in overlooking women's particular interests in rights cases in *Daniels v Thompson*, saying:[52]

> While accepting that progress has been made, mainly by Parliament, it is my firm but respectful view that in the largely male-dominated context of a criminal proceeding, recognition of the rights and interests of the victim has yet to reach maturity. The reality is that women still feel alienated and slighted by the criminal process, including sentencing. To

---

48 *Manitoba Council of Health Care Unions v Bethesda Hospital* (1992) 88 DLR (4th) 60 (Man QB).

49 On the gendered nature of crime in New Zealand, see *Regional Offender Forecasts to 2013* (Department of Corrections, Wellington, 2001) at <http://www.corrections.govt.nz/publications/index.asp?document_id=654> (last accessed 8 July 2002); see also *Crime in New Zealand* (Statistics NZ, Wellington, 2001) 15.

50 *R v Seaboyer* [1991] 2 SCR 577.

51 *R v Hess; R v Nguyen* [1990] 2 SCR 906.

52 *Daniels v Thompson* [1998] 3 NZLR 22 (CA).

> claim that the progress made in accommodating the victims in the criminal process justifies a restriction on their rights is to wear blinkers in the dark.

Thomas J's words remain salient today. While the New Zealand and United Kingdom courts have on occasion shown sensitivity to women's interests in Bills of Rights cases, the courtroom has also seen a number of successful rights-based challenges to women's interests of the type made overseas.

In *R v Griffin*,[53] the accused was convicted of unlawful sexual intercourse with a severely subnormal woman.[54] At the time of the offences, the complainant was attending a special needs class at a local secondary school and had been assessed by the Crown psychologist as having the communication skills of a child of 5 years 8 months, and the socialisation skills of a child of 10 years and 4 months.[55] She had also been assessed for the purposes of receiving the Invalid's benefit as having an incapacity for work of 85%. Mr Griffin claimed that he was unaware that the complainant was mentally impaired. However, the Court did not view the case as one of the sexual exploitation of a subnormal girl by an older man, but rather, characterised the issues before it as a dry examination of Mr Griffin's rights at trial. He successfully appealed his conviction on the ground that a pre-trial order refusing to allow his psychologist to examine the complainant on the issue of her level of subnormality, despite the level of evidence before the court, was in breach of his right to adequate facilities to prepare his defence (section 24(d) of the NZBORA).[56]

In *Attorney-General v Hewitt*,[57] the Court of Appeal held that an unlawful arrest pursuant to a local police policy of automatic arrest in domestic violence cases was arbitrary, and therefore, in breach of section 22 of the NZBORA.[58] The case law, as it stood at that point stated that subject to a few exceptions (none of which, the Court accepted, applied) arbitrary arrest was unlawful arrest.[59] However, the Court expanded the boundaries of arbitrariness in the NZBORA context to include a failure to exercise discretion in making the arrest. This decision effectively constrains the operation of the

---

53 *R v Griffin* (2001) 6 HRNZ 393 (CA).

54 Crimes Act 1961, s 138.

55 *R v Griffin*, above, 401.

56 Mr Griffin also relied on the NZBORA, s 25(a) (right to a fair trial), but the Court of Appeal considered that the fair trial issue largely overlapped with the adequate defence claim.

57 *Attorney-General v Hewitt* [2000] 2 NZLR 110 (CA).

58 NZBORA, s 22: "Everyone has the right not to be arbitrarily arrested or detained."

59 *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA).

automatic arrest policy aimed at sending the message that domestic violence (typically perpetuated by men against women) is to be taken seriously.

In the United Kingdom, Aileen McColgan recently assessed the implications for women in incorporating European Convention rights into domestic law by conducting an analysis of the caselaw of several Convention rights.[60] In particular, she predicted that it would not be long before the provisions of the Youth Justice and Criminal Evidence Act 1999 (UK) (YJCE Act) preventing cross-examination on a complainant's sexual behaviour with the accused would be challenged on the basis that they infringed the accused's right to a fair trial contained in Article 6 of the UKHRA. The provisions were designed as an extension of the already-existing rape-shield legislation, which prohibited cross-examination of the complainant on her sexual behaviour with third parties. Rape-shied provisions typically assist women in obtaining a fair trial by preventing counsel being able to cross-examine woman on her sexual history and consequently infer that "a woman who has had sex with one man is more likely to consent to sex with other men and that the evidence of a promiscuous woman is less credible".[61]

Two months after the UKHRA took effect, her prediction came to pass. The challenge was made in the context of a prosecution for rape. At trial, the judge relied on the YJCE Act in refusing the accused leave to cross-examine the complainant on an alleged sexual relationship between them, but also opined that the provisions were prima facie in breach of the Article 6 guarantee. The question for the House of Lords in *R v A*,[62] was whether a declaration of incompatibility should be made in relation to Article 6 and these provisions. The House of Lords declined to make such a declaration. However, it did hold that the YJCE Act provisions must be interpreted and applied in light of the fair trial guarantee in the UKHRA. This will likely have the effect of lessening the protection for women previously legislated for in the YJCE Act.

IV WHY DO WOMEN NOT USE BILLS OF RIGHTS?

As demonstrated, rights cases concerning women are few. The question then arises of why have women chosen (consciously or otherwise), on the whole, to disregard the NZBORA and the UKHRA as a means of pursuing women's interests, and more generally, their claims for equality, in these societies?

A considerable obstacle to women being able to call in aid Bills of Rights is that the UKHRA and NZBORA are, in the main, silent on issues that are important to women.

---

60 Aileen McColgan "Women and the Human Rights Act" (2000) 51(3) Nth Ire L Qly 417.

61 *R v A* [2001] UKHL 25, para 3, Lord Slynn of Hadley.

62 *R v A*, above.

They do not mention a right to be free from sexual violence, sexualised violence in the form of pornography, a right to keep one's sexual past out of the courtroom, or reproductive rights. It is, therefore, difficult to construct a case for women within a Bill of Rights framework when the rights women hope to rely on are outside the frame. When these rights are mentioned, they come up against rights such are freedom of speech and criminal procedure rights – rights which are already named and acknowledged, and which are set squarely within the law's purview.

In addition, neither New Zealand nor the United Kingdom has an organisation similar to the United States' NOW (National Organization for Women), the Feminist Majority or Canada's LEAF (the Women's Legal Education and Action Fund). LEAF is devoted to running and supporting test cases under the Canadian Charter of Rights to promote women's equality, while the others include constitutional rights litigation as part of a multi-faceted strategy for improving women's position. The lack of a similar organisation in New Zealand and the United Kingdom may in part stem from the fact that unlike the Canadian Charter, neither country's Bill of Rights contains a right to equality.[63] While both the NZBORA (s 19) and the UKHRA (Art 14) prohibit discrimination on the basis of sex, this negative guarantee is not the same as a positive commitment to equality. This naturally truncates opportunities for women to use rights litigation as a means to advance their interests since broadly expressed equality guarantees are much more amenable to use in challenging law, practices and policies over anti-discrimination provisions which focus on the harm done to an individual in a particular situation.

To this, I would add that the non-entrenched nature of the rights in the NZBORA and the UKHRA means that other "ordinary" statutes may be seen as (more) appropriate vehicles for recognising the needs and interests of women over rights litigation. Where rights are not entrenched, there is less riding on the outcome of the case. Litigation therefore becomes less attractive. This is particularly so, when we consider that unlike litigation, which must focus on the facts of an individual case, legislation may be drafted from scratch, address the particular and the general, and take into account a wide range of circumstances and situations.

In each of the cases discussed in this commentary, the Courts have taken an individualistic stance and focussed on the rights of the accused in the criminal process. Little regard has been had for the wider societal position of the female complainant vulnerable to male aggression (sexualised or otherwise).[64] In part, this viewpoint is

---

63 Canadian Charter of Rights and Freedoms 1982, s 15.

64 Although there was some welcome recognition of the falsity of rape-myths and the need for rape-shield evidence in *R v A*, above, they did not prevail over the UKHRA fair trial guarantee. In *R v Griffin* (2001) 6 HRNZ 393 (CA), only Justice Thomas focussed on the complainant and

directed by the individualised rather than communal focus of Bills of Rights. The focus on the public sphere, rather than the private also directs the Courts' attention to the relationship between the accused and the State, rather than the social context and actual facts of the relationship between the accused and the complainant.

Another barrier, particularly in the criminal justice field, to women using Bills of Rights effectively, lies in their conceptual foundation. Designed as they are to protect the individual accused from the State, rights are a platform from which defendants may launch an attack on other laws designed to protect women. As a corollary, they generally cannot be employed by the State to intervene on women's behalf. An attempt to do so in the United Kingdom in the case of *R v Weir*[65] (prosecution for rape) where the Director of Public Prosecution's (DPP) petition for leave to appeal was one day out of time, the House of Lords considered that they did not have power to extend the time limit for appeals. The DPP claimed that not to do so would deny him access to a court, contrary to Article 6, and would compromise the interests of the complainant he represented, protected by Articles 3 (prohibition of inhuman and degrading treatment) and 8 (respect for a person's physical integrity).[66]

In dismissing the petition, the Court relied on the traditional underpinnings of Bills of Rights, saying that the rights in the UKHRA were there to protect the rights of private citizens against an abuse of power by the State and could not therefore be relied on by the State.[67] While it is an orthodox and not unexpected decision, *R v Weir* exemplifies the philosophical and practical limitations of Bills of Rights for women.

V CONCLUSION

As Sir Ivor Richardson remarked in the early days of the New Zealand Bill of Rights: "The Courts have a major influence in achieving justice for all".[68] This commentary has considered the impact of Bills of Rights on women, examining both the philosophical foundations of the NZBORA and the UKHRA, as well as the cases concerning women decided under those Bills of Rights.

---

characterised the case as one of sexual exploitation, rather than being about Mr Griffin's criminal procedure rights.

65 *R v Weir* [2001] 1 WLR 216 (HL). The facts of the case are reported at *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91 (HL).

66 *R v Weir*, above, para 18.

67 *R v Weir*, above, para 17.

68 Sir Ivor Richardson "Rights Jurisprudence – Justice for All?" in Phillip Joseph (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995) 80.

If achieving justice has been their goal, then for women, the Courts have yet to live up to their promise. Where rights and women are concerned, in the words of Abigail Adams, it is time to "remember the ladies".