Gender Equality and the Judiciary

Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-child at the National Level

Edited by Kirstine Adams
and Andrew Byrnes

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Papers and Statements from the Caribbean
Regional Judicial Colloquium
Georgetown, Guyana
14 – 17 April 1997

edited by
Kirstine Adams
Andrew Byrnes

Commonwealth Secretariat

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PREFACE

The 1990s have seen a growing recognition of women's rights as human rights and as an integral and indivisible part of universal human rights. The promotion and protection of the human rights of women will, however, remain a challenge to all countries in the 21st Century. The need for nation states to play an active role in consolidating the gains made by women in the area of women's rights so that women fully enjoy their social, economic, political, civil and cultural rights on the same basis as men will be even greater.

Judges are strategically placed to provide leadership and effectively contribute towards advancing women's rights at the national level by ensuring that their decisions reflect governments' commitments to international human rights standards relevant to women's rights. Judges can make a significant impact by relying on international human rights standards when interpreting statutes and fundamental rights. International standards can then inform decision-making in litigation at all levels, whether or not they have been incorporated into domestic legislation.

As part of a strategy to support the role of the judiciary, in 1994 the Gender and Youth Affairs Division in collaboration with the Legal and Constitutional Affairs Division, the Commonwealth Magistrates and Judges' Association and the Commonwealth Foundation, initiated a series of judicial colloquia on using international human rights standards in domestic litigation. The Caribbean colloquium was the fourth and last in the series. It was attended by female and male Chief Justices; Judges of the Supreme Courts, Courts of Appeal, and High Courts; lawyers; academics; researchers; representatives of UN agencies; regional organisations; and NGOs. Participants adopted the Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child and also set up a Commonwealth Reference Group comprising of Chief Justices and senior judges from the four regions of Africa, Asia, Caribbean and the South Pacific to follow-up the implementation of the Georgetown Recommendations. A significant outcome of the judicial colloquia series is that some judges have been able to organise similar training for judges and magistrates in their jurisdictions.

This publication presents edited papers from the Caribbean regional judicial colloquium held in Georgetown, Guyana, 14–17 April 1997. It is intended to promote wider recognition and application of international and regional human rights norms relevant to the human rights of women and the girl-child by judges, magistrates, lawyers, and human rights activists.

Our thanks are due to The Hon. Madam Justice Desirée Bernard, Chief Justice of Guyana, and the staff of the CARICOM Secretariat and the Commonwealth Youth Programme, Caribbean Centre for their contribution towards the smooth organisation of the Caribbean colloquium. We are indebted to the Centre for Comparative and

Public Law, University of Hong Kong for their continued support for the judicial colloquia series especially Mr Andrew Byrnes, Associate Professor and Director, and Ms Kirstine Adams who have worked tirelessly at editing this publication. I would like to express gratitude and appreciation to Ms Eleni Stamiris, former Director, and the staff of the Gender and Youth Affairs Division for spearheading this programme, and to Roy Chalmers for his assistance in the production this publication.

Dame Veronica Sutherland, DBE, CMG
Deputy Secretary-General, Economic and Social Affairs

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Abbreviations

AC	Appeal Cases
AIR	All India Reporter
All ER	All England Law Reports
ALR	Australian Law Reports
AR	Alberta Reports
BVI	British Virgin Islands
CAFRA	Caribbean Association for Feminist Research and Action
CARICOM	Caribbean Community
CEDAW	Committee on the Elimination of Discrimination against Women
CIM	Inter-American Commission of Women
CLESA	Children and Law in Eastern and Southern Africa Network
CLR	Commonwealth Law Reports (Australia)
CMJA	Commonwealth Magistrates' and Judges' Association
CRC	Convention on the Rights of the Child
DAWN	Development Alternatives for Women in a New Era
D&R	Decisions and Reports of the European Commission on Human Rights
DLR	Dominion Law Reports
EHRR	European Human Rights Reports
EOC	Australia and New Zealand Equal Opportunity Law and Practice Reporter
HKPLR	Hong Kong Public Law Reports
HRLJ	Human Rights Law Journal
HRNZ	Human Rights Reports of New Zealand
ICCPR	International Covenant on Civil and Political Rights
ICDC	International Child Development Centre
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICLQ	International and Comparative Law Quarterly
IHRR	International Human Rights Reports
ILA	International Law Association
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IWRAW	International Women's Rights Action Watch
L Ed 2d	Lawyers' Edition, United States Supreme Court Reports, Second Series
LNTS	League of Nations Treaty Series
LRC	Law Reports of the Commonwealth
MLR	Modern Law Review

NGO	non-governmental organisation
NZAR	New Zealand Administrative Reports
NZBORR	New Zealand Bill of Rights Reports
NZCLD	New Zealand Current Law Digest
NZLJ	New Zealand Law Journal
NZLR	New Zealand Law Reports
OAU	Organization of African Unity
OAS	Organization of American States
OECS	Organization of Eastern Caribbean States
PNG	Papua New Guinea
PNGLR	Papua New Guinea Law Reports
QB	Law Reports, Queen's Bench Division
RADIC	African Journal of International and Comparative Law
SALR	South African Law Reports
SCC	Supreme Court Cases (India)
SCJ	Supreme Court Journal (India)
SCR	Supreme Court Reports (Canada)
SCR	Supreme Court Reports (India)
SILR	Solomon Islands Law Reports
UN ECLAC	United Nations Economic Commission for Latin America and the Caribbean
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNTS	United Nations Treaty Series
US	United States Supreme Court Reports
WILDAF	Women, Law and Development in Africa
WIR	West Indies Reports
WJEC	Western Judicial Education Center (Canada)
ZLR	Zimbabwe Law Reports

Victoria Falls Declaration of Principles for Promoting the Human Rights of Women as agreed by Senior Judges at the African Regional Judical Colloquium

Zimbabwe, 19 – 20 August 1994

1. The participants reaffirmed the principles stated in Bangalore, amplified in Harare, affirmed in Banjul, confirmed in Abuja, reaffirmed at Balliol, Oxford and reinforced at Bloemfontein. These principles reflect the universality of human rights – inherent in men and women – and the vital duties of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. These general principles are applicable in all countries, but the means by which they become applicable may differ.

2. All too often, universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. Civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights.

3. Universal human rights, are usually interpreted as applying to regulate the public sphere. Violations of human rights in the private sphere, including the family – the site of much of women's experience of violations – are usually perceived to be outside the reach of human rights. Although the state does not usually directly violate women's rights in the private sphere, it often supports or condones an exploitative family structure through various laws and rules of behaviour which legitimate the authority of male members over the lives of female members of the family and fails to act to protect women from private violations or tolerates or, indeed, encourages, a structure wherein private violations occur all too frequently.

4. Many of the existing international and regional human rights standards were formulated within a primarily male perspective and with insufficient gender sensitivity and therefore sometimes fail to provide protection for the gender specific interests of women. There is an urgent need for the formulation of further specific rights for women, particularly in the economic and social field. It is vital for women to be centrally involved in decision-making at all levels.

5. Discrimination against women can be direct or indirect. Indirect discrimination requires particular scrutiny by the judiciary. There is a need to ensure not only formal but also substantive equality for women and, for that purpose, affirmative action may be adopted if necessary.

6. Although international human rights are inherent in all humankind, very often such rights are perceived to be owned only, or largely, by men. Participants

emphasised that the human rights of women are as valuable as the human rights of men.

7. International human rights instruments, both generally and particularly with reference to women, and their developing jurisprudence enshrine values and principles long recognised as essential to the happiness of humankind. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. These constitutional guarantees should be interpreted with the generosity appropriate to charters of freedom. Particularly, the known discrimination guarantee should be construed purposefully and with a special measure of generosity.

8. It is essential to promote a culture of respect for internationally and regionally stated human rights norms and particularly those affecting women. Such norms should be applied in the domestic courts of all nations and given full effect. They ought not to be considered as alien to domestic law in national courts.

9. All Commonwealth governments should be encouraged to ratify the Convention on the Elimination of All Forms of Discrimination Against Women before the Fourth United Nations World Conference on Women to be held in Beijing in 1995. Those governments which have ratified the Convention with reservations, should examine the content of those reservations, with a view to their withdrawal.

10. All Commonwealth governments should ensure that domestic laws are enacted or adjusted to conform with the international and regional human rights standards.

11. The judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination Against Women when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions.

12. The speedy preparation of an optional protocol to enable individual petition under the Convention on the Elimination of All Forms of Discrimination Against Women should be encouraged.

13. All Commonwealth governments should subscribe to the principles contained in the Declaration on Violence Against Women, adopted by the UN General Assembly in December 1993. Violence against women is a form of discrimination and violation of human rights as stated in the Declaration.

14. All Commonwealth governments should offer appropriate assistance to the United Nations special rapporteur on violence against women.

15. There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional

instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments which particularly pertain to women.

16. New gender-sensitised initiatives in legal education, provision of material for libraries, programmes of continuing judicial discussion and professional training to lawyers and other interest groups in the protection of the human rights of women, and better dissemination of information about developments in this field to judges and lawyers should be undertaken for effective implementation of these principles.

17. There is a need to translate the international human rights instruments and the African Charter of Human and Peoples' Rights into local languages, in a form accessible to the people and governments should therefore undertake or support that task.

18. Governments should mount extensive awareness campaigns through diverse means to disseminate and impart human rights education and encourage and support efforts by non-governmental organisations in this context.

19. Non-governmental organisations play an important role in the dissemination of information about women's human rights and making women aware of those rights. Governments should therefore acknowledge and support the work of non-governmental organisations in promoting the human rights of women.

20. Non-governmental organisations should be enabled to provide *amicus curiae* briefs and other legal advice, assistance and representation to women in cases involving human rights issues. Free legal aid and advice should be provided to women at state cost for enforcement of their human rights.

21. Public interest litigation and other means of access to justice to litigants, especially women, who wish to complain of violations of their rights should be developed. Non-governmental organisations involved in women's issues should also be permitted to bring violations of the human rights of women before the courts for redress.

22. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.

23. Closer links and co-operation across national frontiers by the judiciary on the interpretation and application of human rights law should be encouraged.

24. Law schools should be encouraged to develop courses in human rights, which must include a module on the human rights of women.

Conclusions of Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights

Hong Kong, 20 –22 May 1996

Having regard to the central place of the Victoria Falls Declaration in the recognition and enforcement of the human rights of women, the participants in the Hong Kong Colloquium of judges, lawyers and law academics from the Commonwealth countries of the Asia/Pacific region reaffirmed the principles of the Victoria Falls Declaration and expressed their commitment to uphold and implement those principles.

Recalling the Declaration on the Elimination of Violence against Women, the discussions at the Commonwealth Heads of Government Meeting in New Zealand in 1995, the Beijing Declaration and Platform for Action and the conclusions of the meeting of Commonwealth Law Ministers in April 1996, the participants expressed their deep concern at the large-scale violence against women and the girl-child which is taking place in various forms in most countries of the Commonwealth. Violence against women is a manifestation of historical unequal power relations between women and men which have led to domination over and discrimination against women and is a social mechanism by which the subordinate position of women is sought to be perpetuated. All Commonwealth Governments should condemn violence against women and girls as a violation of fundamental human rights, including the right to personal security and the right to be free from discrimination on the basis of sex. No law, custom, tradition, culture or religious consideration should be invoked to excuse violence against women. Judges and judicial officers at all levels should be gender-sensitive and aware of the need to protect women against violence through a proactive interpretation of the law.

The participants expressed particular concern at the many forms of violence against women in the family. This violence is widespread, but frequently goes unnoticed and unrestrained because of oppressive social, cultural or religious traditions and values. These factors have led to the subordination of women and continue to dominate social attitudes because of lack of awareness of basic human rights of women, as well as their economic dependence on men. It is incumbent on law enforcement agencies, the legal profession and the courts to intervene appropriately in relation to violence in the family and not to allow its perpetuation through indifference or inadequate response.

Participants recognised the importance of custom, tradition, culture and religion as a part of individual and group identity. They recognised that these concepts were sometimes interpreted so as to be oppressive to women. They stressed the need to preserve and enhance worthy customs, while at the same time discouraging those that have an adverse impact on women and girls.

Participants recognised that a majority of the world's refugees and internally displaced persons are women and children and that these persons are an especially vulnerable group who are frequently denied their basic human rights and subjected to violence and sexual exploitation. The importance of judicial sensitivity to gender-specific violations of human rights in dealing with cases relating to physical or mental abuse and or claims to refugee status was underlined.

Recalling that the 1995 Meeting of Commonwealth Heads of Government at Auckland urged all Commonwealth governments to ratify the Convention on the Elimination of All Forms of Discrimination against Women and underlining the importance of accession, ratification and implementation of this Convention and other human rights treaties to the advancement at the national level of the human rights of women and the girl-child, the participants noted that it would be desirable if all States in the region became parties to and implemented the Convention.

The participants noted that many opportunities exist for judges and other judicial officers to draw on the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights instruments so as to interpret and apply creatively constitutional provisions, legislation, the common law and customary law. In so doing, they drew attention to the wealth of decisions from countries with shared jurisprudential traditions where judges had engaged in such creative interpretation and application. The importance of educating the judiciary and the legal profession with respect to international human rights standards and principles relevant to gender issues was stressed, as well as the need for national judiciaries to carry out studies on gender bias in the judicial process.

Participants noted that it was important that the judiciary reflect the population it serves. Accordingly, it encouraged the exploration of ways to ensure a gender balance in the judicial system.

Participants identified a number of areas where there are clear violations of the human rights of women which might be addressed by the utilisation of international norms in domestic decision-making. These included, in particular, discrimination in matters of nationality, citizenship, property and inheritance, which has serious implications for the exercise and enjoyment by women of other fundamental human rights. Participants also encouraged the review of legislation to ensure its consistency with international human rights obligations undertaken by individual countries.

Noting the complementarity between the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, participants drew attention to the special vulnerability of the girl-child to violations of human rights and identified this as a matter requiring particular judicial attention. They noted that the principle of the best interests of the child could be used to promote the full enjoyment by the girl-child of her rights.

Participants noted that litigation to advance the human rights of women was limited at both the national and international levels. They emphasised women's limited access to the judicial process to enforce their rights and they proposed the further development of a number of measures to increase women's access to justice, including legal literacy programmes and assisted legal advice and representation. Participants drew attention to the important role that the media could play in creating an awareness of the human rights of women. They suggested that consideration might also be given to encouragement of representative actions and relaxing traditional limitations on locus standi. They also supported the adoption of an optional complaints mechanism for the Women's Convention.

Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl Child issued by the Caribbean Regional Judicial Colloquium for Senior Judges

Georgetown, Guyana 14 – 17 April 1997

1. The participants reaffirmed the Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women (1994) and the Hong Kong Conclusions (1996) and commended these to States for acceptance and implementation.

2. The Colloquium welcomed the adoption of the Charter of Civil Society for the Caribbean Community by the Conference of Heads of Government at its 8th inter-sessional meeting in Antigua and Barbuda in February 1997.

3. The Colloquium underlined the fact that the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights, and they must be taken as forming part of mainstream human rights.

4. The Colloquium expressed concern that civil and political rights have received extensive attention within the mainstream human rights discourse while economic, social and cultural rights have been neglected. This has adversely affected women's concerns.

5. Traditional human rights theory primarily focuses on violations perpetrated by the State. This distinction between State responsibility in relation to public and private acts has contributed to a failure to recognise many violations of women's rights as human rights violations.

6. The Colloquium recognised that the fundamental duty of judges to ensure the fair and due administration of justice requires judges to be alert to manifestations of gender discrimination in the law and in the administration of justice, and to take such measures as lay within their power to redress or eliminate any such discrimination. The Colloquium also recognised that the community's understandings of fairness and equality may evolve over time and that judges had both the power and responsibility to adapt the common law or interpretations of constitutional provisions to meet the changing circumstances of society. The full enjoyment by women of their human rights could only be realised through the creative interpretation and effective enforcement of these rights by the courts. This can only occur if there is an independent and competent judiciary which enjoys the confidence of the people it serves.

7. The Colloquium noted with concern that some States in the Commonwealth support or condone an exploitative family structure through various laws and rules of behaviour which legitimise the authority of the male over the female and fail to protect women from private violations of their rights.

8. The Colloquium emphasised that culture, customary and traditional practices or religion should not be invoked as justification for violations of the fundamental rights and freedoms of women.

9. The Colloquium emphasised the goal of universal ratification of international human rights instruments and relevant international labour conventions, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. It underlined the obligation of States parties fully and effectively to implement their treaty obligations by bringing their constitutions and domestic law and practice into conformity with these human rights commitments. It also urged those States parties that had entered reservations to conventions to consider their withdrawal.

10. The Colloquium emphasised the utility of international human rights norms to domestic litigation, noting that in general there was no constitutional or other bar to referring to international human rights treaties. Among other uses, these norms might in appropriate cases provide a standard that could be used in order to elucidate the meaning of constitutional guarantees.

11. Both the United Nations Declaration on the Elimination of Violence against Women and General recommendation 19 of the Committee on the Elimination of Discrimination against Women recognised that violence against women takes many forms. These include domestic violence; rape (including rape within marriage); exploitation of girl children (including the disadvantaged); trafficking in women and girls; violence associated with prostitution and with pornography; dowry deaths; violence in the work place; and sexual harassment. The personal, economic and social costs of this violence are enormous. States must take effective measures in accordance with the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration on the Elimination of Violence Against Women, and, where applicable, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. States parties should fulfil their obligations to prevent and eradicate these and other forms of violence against women, as an indispensable part of the process of eliminating gender discrimination.

12. The Colloquium noted with satisfaction that some countries had enacted legislation addressing domestic violence and other forms of violence against women. The Colloquium recommended that other States in the Commonwealth consider the enactment of similar legislation, and stressed the need for such legislation to be regularly monitored and updated as appropriate.

13. The Colloquium expressed its concern with regard to the commercial sexual exploitation of women and girls, including trafficking for the purposes of prostitution. The Colloquium urged States throughout the Commonwealth to take effective measures to eradicate this phenomenon. These measures could include the enactment of legislation (including appropriate penal provisions), and administrative and other measures such as efforts to rehabilitate and re-integrate into society those subjected to these violations.

14. The Colloquium acknowledged the work that the Commonwealth Secretariat had done in developing publications and training materials relating to human rights, including the human rights of women, and urged the organisation to continue this work.

15. Judges participating in the Colloquium expressed their appreciation for the informative and constructive contribution made to the discussions by representatives of non-governmental organisations and noted the recommendations proposed by them.

Recommendations

The Colloquium adopted the following recommendations:

Information and publicity activities

16. States that become parties to international human rights treaties should publicise that fact widely among their community and ensure that copies of the treaties, reports of the country under the treaty and other relevant documentation (where possible in local languages) are made widely available.

17. The Gender and Youth Affairs Division of the Commonwealth Secretariat should ensure that copies of the Convention on the Elimination of All Forms of Discrimination against Women and *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women* (2nd ed. 1996) are made available to the judiciary and to the Bar Association in each State of the Commonwealth.

Access to information and exchange of information

18. The Commonwealth Secretariat, the United Nations and its agencies, and other bodies should explore ways of making available to judges, judicial officers and practitioners access to electronic sources of information on human rights, in particular relating to the human rights of women, and should ensure the availability of basic international and comparative materials in libraries accessible to the judiciary and the profession.

19. Judges in the Caribbean and other Commonwealth countries who render decisions in constitutional human rights cases, in cases in which international instruments are invoked or which significantly advance the rights of women under domestic legislation should, as far as possible, send copies of those decisions to:

a) the Commonwealth Secretariat, for inclusion in the *Commonwealth Law Bulletin*;

b) Interights, for inclusion, as appropriate, in the *Commonwealth Human Rights Law Digest*, in the Caribbean, to the CARICOM Secretariat and universities in the region for appropriate publication.

20. The Commonwealth Secretariat and the CARICOM Secretariat should endeavour to ensure that all judges in the Caribbean as well as in other regions are provided with access, either in electronic or hard copy format, to the *Commonwealth Human Rights Law Digest*, the *Commonwealth Judicial Journal*, the *Commonwealth Law Bulletin*, and the *Law Reports of the Commonwealth* and regional publications.

21. Judges, practitioners and academics should be encouraged to submit articles and other material for publication in the *Commonwealth Law Bulletin* and *Commonwealth Judicial Journal* and regional publications.

22. The Commonwealth Secretariat and the CARICOM Secretariat should explore ways of developing, either on their own or in conjunction with other suitable bodies or NGOs, a World-Wide Web (WWW) site which would contain human rights and related materials, including material on the gender dimensions of human rights, and which would complement the existing work in this area of bodies such as the United Nations, the ILO and United Nations High Commissioner for Human Rights.

Judicial studies programmes and continuing legal education on gender issues

23. Gender-sensitive training and information about women's human rights should be provided to the judiciary, lawyers, law enforcement agencies, court personnel, law students and community leaders. Legal literacy programmes to raise public awareness should also be undertaken.

24. Those bodies involved in judicial education seminars at the international, regional and national level should co-operate in and co-ordinate their activities in order to make best use of limited resources.

25. The Commonwealth Secretariat should explore ways in which the experiences of the two series of Judicial Colloquia on human rights which it had organised might be drawn on in order to ensure that gender issues are fully integrated in any future judicial training in which the Secretariat is involved.

26. The Commonwealth Secretariat, in liaison with the CMJA and other organisations with expertise in the area, should explore the need for the development of further training materials on international human rights, generally and as they relate specifically to women.

The operation of the legal system and reform of the law

27. The language used in human rights instruments, national legislation and in court proceedings and judgements should be non-sexist, and, as appropriate, gender-neutral language should be employed.

28. Where general or specific reviews of the law are undertaken by Law Reform Commissions or other bodies, the terms of reference of such reviews should ensure that the impact of existing and proposed laws on the human rights of women is fully taken into account in the process of review and reform of the law.

Operation of the courts and the court system

29. States should, where possible, put in place information systems for the production of gender disaggregated data on the operation of the courts for research, policy formulation and for planning timely interventions.

30. Notwithstanding the obligation to ensure a fair trial for all, judges and prosecutors are encouraged to be vigilant about the withdrawal of cases in order to ensure that the legal system fully protects the rights of women and girls.

Support services and programmes

31. States should, where possible, establish comprehensive legal aid programmes to ensure the availability of legal aid or *pro bono* legal assistance for court and administrative proceedings in which redress for violations of human rights, including those suffered by women and girls, is sought. States should also establish counselling programmes for women and girls who have suffered violations of rights, as well as special programmes for offenders.

32. States should establish specially trained units in the police force for the investigation of offences by and against women and girls, the functions of which should include counselling for those who have been subject to abuse.

The use of international and regional human rights

33. Lawyers should consider whether more effective use could be made of applicable international and regional complaint procedures to advance women's human rights, in cases in which a remedy was not available within the domestic system. These procedures include the procedures of the Organisation of American States, including those of the Inter-American Commission under the American

Declaration of the Rights of Man; the American Convention on Human Rights and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará); the procedures of the Council of Europe under the European Convention on Human Rights; and the procedure under the First Optional Protocol to the International Covenant on Civil and Political Rights, as well as applicable complaints procedures relating to the implementation of international labour conventions.

Enhancement of regional co-operation and exchange of information

34. The Commonwealth Secretariat, the CMJA, and other responsible international, regional or sub-regional agencies, should explore, in close collaboration with the judges of each region and taking into account existing institutions and programmes, the desirability of the establishment of a regional judicial studies institute or programme to facilitate continuing judicial education and the exchange of legal material among the judges of the region.

Follow up

35. The Colloquium recommended that a Reference Group be constituted to follow up the recommendations contained in this document, as well as assessing the impact of previous judicial colloquia on the domestic enforcement of international human rights norms through national courts.

36. The Colloquium recommended broad dissemination of the Victoria Falls Declaration, the Hong Kong Conclusions and the Georgetown Recommendations and Strategies for Action, as well as the reports of those Judicial Colloquia.

37. The Colloquium requested the Commonwealth Secretariat to transmit the Georgetown Recommendations and Strategies for Action to:

a) the Commonwealth Heads of Government meeting to be held in Edinburgh in October 1997;

b) the triennial meeting of the CMJA to be held in Capetown in October 1997; and

c) the next meeting of Commonwealth Law Ministers.

Welcome Remarks at the Opening of the Caribbean Regional Colloquium for Senior Judges on the Promotion of the Human Rights of Women and the Girl-Child through the Judiciary

Justice Desirée Bernard, CCH[★]

Honourable Chancellor, Honourable Chief Justices, Justices of the Court of Appeal of Guyana, Judges of the High Courts of the Caribbean, Honourable Attorney General and Minister of Legal Affairs, Honourable Minister Responsible for Women's Affairs, other delegates from overseas, specially invited guests, members of the Commonwealth Secretariat, Caribbean Community (CARICOM) and the Commonwealth Youth Programme, ladies and gentlemen:

It is my distinct pleasure to extend a warm and sincere welcome to all of our overseas visitors to Guyana, and a special welcome to everyone present at this opening ceremony of the Caribbean Regional Judicial Colloquium for Senior Judges on the Promotion of the Human Rights of Women and the Girl-Child through the Judiciary. It is my sincere hope and wish that our visitors from overseas will bask not only in the Guyanese sunshine but also in our hospitality which is of international renown, and that you will take with you on your departure fond memories of your short but hopefully enjoyable sojourn in our dear land.

This Colloquium is the last in a series of such colloquia arranged by the Commonwealth Secretariat in the various geographical regions of the world to encourage wider application of international and regional human rights standards at national level. The first colloquium was held in 1988 in Bangalore, India, under the auspices of the Legal Division of the Commonwealth Secretariat, where the *Bangalore Principles* were adopted.[1] *The Bangalore Principles* indicate the need for practical measures to be implemented to ensure that international human rights norms are given full effect in national courts and have been reaffirmed at the four subsequent colloquia.

★ Chief Justice of Guyana, Member of the Committee on the Elimination of Discrimination against Women.

[1] For the text of the *Bangalore Principles*, see *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms, Judicial Colloquium in Bangalore, 24 + 26 February, 1988* (London, Commonwealth Secretariat) at ix and Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988 – 92* (London, Commonwealth Secretariat, 1992) at 1.

In 1994, at the second colloquium held at Victoria Falls, Zimbabwe, for the African region and organised by the Gender and Youth Affairs Division of the Commonwealth Secretariat, in collaboration with the Commonwealth Magistrates' and Judges' Association, the *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women* was issued.[2] These were endorsed at a colloquium held during the NGO Forum of the United Nations Fourth World Conference on Women held in Beijing, China, in September 1995. This was followed in May 1996 by the *Hong Kong Conclusions* adopted at the colloquium held in Hong Kong for the Asia/South Pacific Region.[3]

The common theme of all of the principles and conclusions from all of the judicial colloquia reflects the universality of human rights which inhere in men and women, and imposes on an independent judiciary a duty to interpret national constitutions and apply national laws in the light of those principles and conclusions.

It is axiomatic that women's rights are human rights. The peoples of the United Nations have reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women with the Universal Declaration of Human Rights.[4] In order to give effect to the principles of equality affirmed in the Universal Declaration of Human Rights in 1979 the General Assembly of the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women[5] which sought to remove discrimination encountered by women in all aspects of life. As of April 1997, over 150 countries have ratified or acceded to this Convention, and have pledged by such ratification to remove all forms of discrimination in their national laws and constitutions.

In keeping with the Convention, the *Victoria Falls Declaration of Principles* and *the Hong Kong Conclusions* exhort all Commonwealth governments to ensure that their domestic laws are enacted or adjusted to conform with international and regional human rights standards, and encourage judicial officers in Commonwealth jurisdictions to be guided by the Women's Convention when interpreting and applying the provisions of their national laws in their decisions.

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[2] *Victoria Falls Declaration on the Promotion of the Human Rights of Women in the Commonwealth Secretariat, Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women,* Victoria Falls, Zimbabwe, August 1994 (London, Commonwealth Secretariat, 1995) at 8. The text of the *Declaration* is reproduced in this volume.

[3] *Conclusions of the Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights,* Hong Kong, May 1996, in A Byrnes, J Connors, Lum Bik (eds.), *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation,* (London, Commonwealth Secretariat, 1997) at 6. The text of the *Conclusions* is reproduced in this volume.

[4] GA Res 217A (III), adopted on 10 December 1948.

[5] 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981.

It is to be hoped that the momentum started at Victoria Falls and continued in Hong Kong will reach its climax in Georgetown with the acceptance of the *Georgetown Recommendations and Strategies for Action in Promoting the Human Rights of Women and the Girl-Child.*[6]

Before I close, I would like publicly to extend heartfelt congratulations to my sister Chief Justice Joan Sawyer of the Bahamas and co-chairperson of this colloquium on her appointment as Chief Justice and my best wishes go out to her for a long and successful tenure.

I wish you all an enjoyable stay, and may our deliberations be fruitful and fulfilling.

[6] *Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child,* Caribbean Regional Judicial Colloquium for Senior Judges on the Promotion of the Human Rights of Women and the Girl-Child through the Judiciary, Guyana, April 1997, reproduced in this volume.

Introductory Speech by Eleni Stamiris, Director, Gender and Youth Affairs Division, Commonwealth Secretariat

It gives me great pleasure to welcome you to this Judicial Colloquium which is organised by the Gender and Youth Affairs Division and the Legal and Constitutional Affairs Division of the Commonwealth Secretariat, in collaboration with the Commonwealth Magistrates' and Judges' Association and the Caribbean Community Secretariat. It is an unprecedented honour for us to have judges from fourteen Commonwealth countries and four dependencies at this Caribbean meeting, to deliberate on strategies for promoting the human rights of women and the girl-child through the Judiciary. I am pleased to welcome representatives of the United Nations Development Fund for Women (UNIFEM) and the United Nations Division for the Advancement of Women, both organisations working in the area of women's human rights.

We are cognisant of the fact that, in many respects, non-governmental organisations (NGOs) initiate action to promote the rights of women and the girl-child. I therefore welcome NGOs such as the International Women's Rights Action Watch (Asia-Pacific), Women, Law and Development in Africa (WILDAF), Caribbean Feminist Research and Action (CAFRA), Development Alternatives for Women in a New Era (DAWN), the Bahamas Chapter, the Belize Human Rights Commission, Red Thread and the Federation of Women Lawyers Association in Guyana.

I wish to express sincere thanks to the Government and people of Guyana for agreeing to host this meeting. We are indebted to the Ministry of Justice, and particularly acknowledge the support and generosity extended to us by the Chancellor, the Honourable George Kennard, who graciously consented to open this Colloquium, and the Attorney-General and Minister of Justice, the Honourable Bernard dos Santos who has kindly agreed to close the Colloquium. Special thanks go to the Chief Justice of Guyana, the Honourable Justice Desirée Bernard, who has worked with us since the inception of this programme in 1994. We have benefited from her advice and attendance at colloquia and are particularly indebted to her for the dynamic role which she has played in making this Caribbean Colloquium a reality. I would also like to express my gratitude to the Honourable Indranie Chandarpal, Minister Responsible for Women's Affairs in Guyana, for her support of this programme which seeks to implement a mandate given to us at our recent meeting of Ministers Responsible for Women's Affairs. I wish to recognise the support provided by the Secretary-General of the Caribbean Community Secretariat (CARICOM) and the Director of the Commonwealth Youth Programme, Caribbean Centre. Their assistance has been critical in the organisation of this meeting and the warm hospitality accorded to participants is

deeply appreciated. I also wish to thank the Commonwealth Foundation for providing funds for NGO participation at the Colloquium.

In planning this Colloquium we had been guided by a vision of human rights which incorporates acceptance of equal and inalienable rights for all women and men. It is imperative that this vision also encompasses the principle that women's rights are an integral component of human rights. It was the recognition of this concept of women's rights which led to the prominence given to women's rights at the United Nations World Conference on Human Rights[1] and at the United Nations Fourth World Conference on Women in Beijing.[2] This Colloquium is part of the Commonwealth Secretariat's strategy to support respect for human rights which is one of the fundamental values of the Commonwealth as agreed in the *Singapore Declaration* in 1971[3] and the *Harare Declaration* in 1991.[4] This was reinforced by Commonwealth Heads of Government[5] at their meeting in Auckland in 1995 when they reaffirmed that women's rights were human rights and urged member governments to adopt legislation and develop national strategies to promote the advancement of women. The Heads of Government also urged ratification and implementation of the human rights covenants and other international human rights instruments including the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW Convention)[6] and the Declaration on the Elimination of Violence Against Women.[7] This was reiterated by Law Ministers when they met in Kuala Lumpur in April 1996 and expressed support for the promotion of women's human rights and the elimination of violence against women. When Ministers Responsible for Women's Affairs met in Trinidad and Tobago in November 1996, they emphasised the need for full and effective

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[1] See the *Vienna Declaration and Programme of Action,* adopted at the United Nations World Conference on Human Rights, held in Vienna in June 1993, UN Doc A/CONF.157/24 (25 June 1993).

[2] See *the Beijing Declaration and Platform for Action*, in the *Report of the Fourth World Conference on Women*, adopted at the United Nations Fourth World Conference on Women, held in Beijing in September 1995, UN Doc A/CONF.177/20 (17 October 1995), 35 ILM 401.

[3] The Declaration of Commonwealth Principles, 1971, issued at the meeting of Heads of Governments in Singapore. For background information and text see: http://www.thecommonwealth.org/about/history/history2.html.

[4] Harare Commonwealth Declaration, 1991, issued by Heads of Governments in Harare, Zimbabwe, 20 October 1991.

[5] Details of the Commonwealth Heads of Government Meetings, Law Ministers Meeting and Meetings of Ministers Responsible for Women's Affairs can be found on the Commonwealth Secretariat's web site at http://www.thecommonwealth.org.

[6] 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981.

[7] GA Res 48/104 (1994), IHRR 329.

implementation of international human rights instruments, in particular those relating to the realisation of the human rights of women and the girl-child. They urged governments to enact domestic legislation based on these international human rights instruments.

The Gender and Youth Affairs Division in collaboration with the Legal and Constitutional Affairs Division has focused attention on the CEDAW Convention, which 43 Commonwealth member countries had ratified or acceded to as of April 1997.[8] The first initiative was the production of an accession kit to encourage Commonwealth countries to accede to the Convention. Secondly, they encouraged effective reporting by Commonwealth countries by preparing a *Manual for Reporting* under the Convention. This manual, the second edition of which is now available,[9] has been widely used and has even attracted recognition by the Committee on the Elimination of Discrimination against Women (CEDAW), the monitoring committee established under the terms of the CEDAW Convention. The Division's efforts to encourage effective reporting by Commonwealth countries also included the organisation of regional training workshops for government officials responsible for preparing the periodic reports required by the Convention. We are currently developing a *Handbook on Good Practices* from Commonwealth countries for the implementation of the CEDAW Convention. It will facilitate the sharing of experiences in Commonwealth countries and also demonstrate to policy-makers, lawyers, judges, police and law enforcement officers how the CEDAW Convention has been used to advance women's interests at the national level.

This Colloquium is an attempt to broaden our approach by facilitating dialogue on the significance of domestic legislation in the implementation of international and regional laws. Although in many Commonwealth countries the domestic legal system allows for the observance of these laws, sometimes international standards are not sufficiently well-known, partly because until quite recently the legal training of most lawyers did not include adequate instruction in international and regional human rights norms. Also judges and lawyers cannot easily get access to materials on these norms or obtain advice about international and regional human rights norms and jurisprudence.

However, some enlightened judges have sought to interpret fundamental rights and obligations against the background of international and regional human rights norms and jurisprudence. To encourage this trend, the Commonwealth Secretariat

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[8] For an up to date list of States that have signed, acceded, ratified and succeeded to the Convention on the Elimination of All Forms of Discrimination against Women see http://www.un.org/womenwatch/daw/

[9] Jane Connors and Andrew Byrnes, *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women* (Commonwealth Secretariat and International Women's Rights Action Watch, 2nd ed 1996).

embarked on a series of judicial colloquia which have explored the domestic application of international human rights norms. The first colloquium was convened in Bangalore in 1988 by Justice P. N. Bhagwati,[10] whom I am delighted to have with us for this meeting. The judges agreed on the *Bangalore Principles* which confirmed the relevance of international and regional human rights jurisprudence for domestic courts and encouraged resort to such jurisprudence where domestic law – whether constitutional, statutory or common law – is uncertain or incomplete.[11]

Six other colloquia have been convened at which the *Bangalore Principles* have been affirmed.[12] Although these colloquia were undoubtedly effective, they did not explore the domestic application of international human rights norms from a gender perspective. The Gender and Youth Affairs Division, therefore, considered it a priority to embark on a series of colloquia so that senior judges from Commonwealth countries could discuss how far the international and regional framework can be used to advance the position of women. The first colloquium was convened in Africa where most countries have an entrenched bill of rights and a number of benches have already interpreted the guarantee of non-discrimination on the basis of sex in the light of international norms. This colloquium was organised in Zimbabwe in August 1994 by the Gender and Youth Affairs Division in collaboration with the Government of Zimbabwe and the Commonwealth Magistrates' and Judges' Association. A significant outcome of the colloquium was the adoption of the *Victoria Falls Declaration of Principles for Promoting the*

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[10] See *Developing Human Rights Jurisprudence: The Domestic Application of International Norms, Judicial Colloquium in Bangalore, 24–26 February 1988* (London, Commonwealth Secretariat, 1988).

[11] For the text of the *Bangalore Principles*, see *id* at ix and *Commonwealth Secretariat and Interights, Developing Human Rights jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988-92* (London, Commonwealth Secretariat, 1992) at 1.

[12] Commonwealth Secretariat, *Developing Human Rights Jurisprudence, Volume 2: A Second Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Harare, Zimbabwe, 19 – 22 April 1989*, (London, Commonwealth Secretariat, 1989); Commonwealth Secretariat, *Developing Human Rights Jurisprudence, Volume 3: A Third Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Banjul, The Gambia, 7 – 9 November 1990*, (London, Commonwealth Secretariat, 1991); Commonwealth Secretariat, *Developing Human Rights Jurisprudence, Volume 4: A Fourth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Abuja, Nigeria, 9 – 11 December 1991* (London, Commonwealth Secretariat, 1992); Commonwealth Secretariat, *Developing Human Rights Jurisprudence, Volume 5: A Fifth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium at Balliol College, Oxford, 21 – 23 September 1992* (London, Commonwealth Secretariat and Interights, 1992); Commonwealth Secretariat, *Developing Human Rights Jurisprudence, Volume 6: A Sixth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Bloemfontein, South Africa, 3 – 5 September 1993* (London, Commonwealth Secretariat, 1995); *Caribbean Colloquium on the Domestic Application of International Human Rights Norms, Georgetown, Guyana, 3 – 5 September 1996*, (1997) 23 (1–2) *Commonwealth Law Bulletin* 573.

Human Rights of Women.[13] The *Declaration* affirms the universality of human rights, which are equally relevant to women and men, and emphasises the role of an independent judiciary in integrating and applying national constitutions and laws in the light of this principle.

The issue was brought to a wider audience when the Gender and Youth Affairs Division and the Commonwealth Magistrates' and Judges' Association organised a Judicial Colloquium at the United Nations Fourth World Conference on Women at Beijing in 1995, at which participants expressed their support for the *Victoria Falls Declaration.* Since then, the *Victoria Falls Declaration* has been adopted by the Commonwealth Magistrates' and Judges' Association, endorsed by Commonwealth Law Ministers and by participants at the Asia/Pacific Regional Judicial Colloquium in Hong Kong in May 1996.[14] Participants at the Hong Kong Colloquium also adopted the *Hong Kong Conclusions on the Promotion of the Human Rights of Women.*[15] I hope that after reviewing the *Victoria Falls Declaration* and the *Hong Kong Conclusions* you will also endorse these two documents. I believe that this meeting will build on what has been achieved so far in the previous colloquia, and advance the process by reaching consensus on a Programme of Action for Promoting the Human Rights of Women through the Judiciary.

We are honoured to have as co-chairpersons two eminent Judges – the Honourable Justice Desirée Bernard, Chief Justice of Guyana, and The Honourable Justice Joan Sawyer, Chief Justice of the Bahamas. Justice Bhagwati will deliver the Keynote Address on "Creating a Judicial Culture to Promote Women's Human Rights". We are also privileged to have with us Justice A. R. Gubbay, Chief Justice of Zimbabwe, who attended our first Colloquium in Victoria Falls, and Justice Tracy Doherty of the Supreme Court of Papua New Guinea, who participated in our Colloquium in Hong Kong. We are looking to them to provide the experience and perspectives from their regions to this Colloquium. Finally, our able consultant is Mr Andrew Byrnes, Director of the Centre for Comparative and Public Law of the University of Hong Kong.

I have no doubt that the expertise of our co-chairpersons, speakers and participants will ensure that we have a successful meeting. I look forward to four days of

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[13] For text of the *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women*, see A. Byrnes, J. Connors, Lum Bik (eds) *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation*, (London, Commonwealth Secretariat, 1997) at 3.

[14] For the proceedings of the Judicial Colloquium held in Hong Kong in 1996, see A. Byrnes, J. Connors, and Lum Bik, *supra* note 13.

[15] See *Conclusions of the Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights, id* at 6.

I have no doubt that the expertise of our co-chairpersons, speakers and participants will ensure that we have a successful meeting. I look forward to four days of thought-provoking discussions that will be a significant step towards working together in the Commonwealth to promote the human rights of women and the girl-child through the judiciary.

Welcoming Speech by
Mrs Indranie Chandarpal,
Minister for Women's Affairs, Guyana

Madame Chairperson, Honourable Justice Desirée Bernard, Chief Justice of Guyana; Honourable Justice Cecil Kennard, Chancellor of the Judiciary; Honourable Attorney General Mr. Bernard De Santos; Distinguished Members of the Head Table, Chief Justices, Judges, Honourable Ministers; other distinguished participants, ladies and gentlemen:

It is my pleasure and honour to welcome you here to Guyana to discuss this very necessary and vital agenda to further our commitment to ensuring a world safe from fear and violence for women and girls and a world which respects and upholds their rights as human rights.

The roles of all in society are important if we are to ensure not only the safety of women and girls, but also their right to participate equally in all aspects of national life. The role of the judiciary cannot be overstated, and, in particular, the roles of senior judges, to send a powerful message that women and girls are entitled to the same rights as the other half of humanity. Gender does not in any way diminish this right.

The impact of this message, coming from such distinguished bodies, has the potential to have a positive impact on the lives of women and girls and equally so, on the attitudes, behaviour and action of the larger community.

I am particularly pleased with the pace of change and the action that is being taken globally and locally to further this agenda. Of course, at times it seems slow, but we are struggling with changing patterns of social relations and behaviours that are centuries old and deep-rooted. The last decades, however, have seen an unprecedented move to put right these unequal social patterns. With the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention),[1] referred to as the women's bill of rights, has come the awakening to the problems of the unequal and discriminatory status of women and the need to take action.

The Vienna Declaration and Programme of Action, adopted by the Vienna World Conference on Human Rights, solidifies this commitment by stating that the "rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights".[2]

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[1] 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981.

[2] Vienna Declaration and Programme of Action, June 1993, UN Doc A/CONF.157/24, at 33, para 18

The Platform for Action adopted by the United Nations Fourth World Conference on Women in Beijing[3] called for action by all governments to uphold women's human rights and to develop plans and action at the level of the nation to support women's human rights.

As we deliberate on our agenda over the next few days, it is important that we bear in mind a few of the principles reaffirmed in the *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women* adopted in Zimbabwe in 1994:[4]

1. That "all too often universal human rights were narrowly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. Civil and political rights and economic and social rights are integral and complimentary parts of one coherent system of global human rights."[5] Women's lives are such that all issues are interconnected, therefore their rights cannot be perceived in a piecemeal fashion. Poverty and the right to equal pay for work of equal value are interconnected issues for women.

2. The attempt to separate violations of human rights in women's lives into those in the private sphere and those in the public sphere, with those rights violated within the privacy of the home being deemed to be outside the domain of national human rights mechanisms. But we know now of the continuum and the interconnectedness of violence and inequities in women's lives – that the devaluing of women outside the home impacts on how she is treated inside and vice versa. We cannot afford this separation. The human rights of women are as important in the private sphere as they are in the public sphere.

Our challenge is to ensure that our commitment embodies the upholding of these rights in both spheres. Our particular agenda took its first steps in the form of *the Victoria Falls Declaration of Principles for Promoting the Human Rights of Women.* At the Fifth Meeting of Commonwealth Ministers Responsible for Women's Affairs, held in Port of Spain, Trinidad and Tobago, the United Nations Special Rapporteur on Violence against Women gave a few samples of random statistics which explained why the international community reacted in the way it did to the problem of violence

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(1993), 32 ILM 1661.

[3] Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women*, Beijing September 1995, UN Doc A/CONF.177/20 (17 October 1995), 35 ILM 401.

[4] *Victoria Falls Declaration on the Promotion of the Human Rights of Women in the Commonwealth Secretariat*, Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women, Victoria Falls, Zimbabwe, August 1994 (London, Commonwealth Secretariat, 1995) at 8. The text of the *Declaration* is reproduced in this volume.

[5] *Id*, at para 2.

why the international community reacted in the way it did to the problem of violence against women. She reported that every six minutes a rape occurs in the United States of America. In Bangladesh, malnutrition was found to be three times more common among girls than boys. In Africa, 80 million women have undergone female genital mutilation. In Pakistan, 99% of housewives are beaten by their husbands and in South Africa, in every one and a half minutes a female is raped, which amounts to about 380,000 each year. These are just a few statistics, but they are enough to cause us to become quite alarmed, especially when statistics show how vulnerable women are in relation to sexual harassment, trafficking, sexual slavery, bonded labour, dowry-related murder, genital mutilation and forced prostitution.

The issues are well documented and the awareness programme, started previously, is now intensifying. In 1988 the Commonwealth Secretariat undertook a number of judicial colloquia to encourage wider application of international and regional human rights standards at the national level. The Beijing Platform of Action[6] and the Commonwealth Platform of Action[7] identifies violence against women as one of the areas of grave concern.

The Inter-American Commission of Women (CIM) and the CARICOM Plan of Action also reiterated the need for an integrated approach to deal with the violation of the rights of women and girls.[8] Significantly, as of April 1997, 16 countries of the Americas and the Caribbean have ratified the Convention of Belém do Pará dealing with violence against women.[9] Guyana is a signatory to a number of conventions including the CEDAW Convention;[10] the Convention of the Rights of the Child;[11] and the Inter-American Convention on the Protection, Punishment and Eradication of

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[6] *Supra* note 2.

[7] Commonwealth Platform for Action on Gender and Development 1995 in *The 1995 Commonwealth Platform for Action on Gender and Development: A Commonwealth Vision* (London, Commonwealth Secretariat, 1995).

[8] For information on the Inter-American Commission of Women see http://www.oas.org/, and for information on the Caribbean Community (CARICOM) see http://www.caricom.org/

[9] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994 (Convention of Belém do Pará), 33 ILM 1534. For the text of the Convention see the Internet web site of the Inter-American Commission on Human Rights, Organization of American States, at http://www.oas.org/cim/homecim.htm and for related information see the University of Minnesota Human Rights Library web site at http://www.umn.edu/humanrts/

[10] *Supra* note 1.

[11] GA Res 44/25, UN Doc A/44/49, at 166 (1989), adopted on 20 November 1989, entered into force 2 September 1990.

Violence against Women.[12] We believe that lip service should not be paid to these conventions and as such initiatives were taken to give them effect.

In Guyana, two pieces of legislation, the Medical Termination of Pregnancy Act and the Domestic Violence Act 1996, are still very new in terms of implementation. Initiatives already undertaken have included the resuscitation of the Legal Aid Centre and the creation of Help & Shelter, a non-governmental organisation, to give counselling and training to people working in their sector.

Also, the Guyana Association of Women Lawyers played a very significant role in educating women about the laws that are in place to protect them. We still have a long way to go, but we believe that the state has a responsibility to its people, therefore it is absolutely necessary to enact appropriate laws and procedure to give women redress.

As we approach the new century we are faced with enormous challenges and possibilities that will demand from us a genuine commitment to work on behalf of those who are burdened daily with inequities ranging from poverty to terror, which denies them the freedom and opportunity to take their rightful places in society. Think of this great potential, of freeing up half of humanity from their shackles in search of a new world built upon equity, justice and freedom to enjoy the common human rights basic to all humanity. Together we can all make this dream a reality. I am sure the subjects that will be covered during the next four days will be of great benefit to the promotion of the human rights of women and the girl-child through the judiciary.

I wish the participants and sponsors of this Colloquium our very best wishes and sincere appreciation in their quest to further advance the cause of women and the world over.

Finally, to all our friends who are in our country for the first time, please enjoy our famous Guyanese hospitality and do come again.

I thank you.

[12] Convention of Belém do Pará, *supra* note 9.

Opening Remarks by the Representative of the Commonwealth Magistrates' and Judges' Association

Nicola Padfield[★]

Madam Chairman, Chief Justice of Guyana, Honourable Chancellor, Honourable Chief Justices, Honourable Judges, Ladies and Gentlemen:

It is a great honour to speak here on behalf of the Commonwealth Magistrates' and Judges' Association (CMJA), especially on behalf of our President, the Honourable Chief Justice Kipling Douglas. We are delighted to be involved with this important colloquium, and pay tribute to the work of Eleni Stamiris and her team at the Gender and Youth Affairs Division of the Commonwealth Secretariat. I come in the place of our Secretary-General, Vivienne Chin, who is sadly unable to be here, but sends her best wishes.

The Commonwealth Magistrates' and Judges' Association was set up more than 25 years ago:

- to advance the administration of law by promoting the independence of the judiciary;
- to advance education in law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth; and
- to disseminate information and literature on all matters of interest concerning the legal process within the various countries of the Commonwealth.

From the beginning, the Association has concerned itself with the rights of women. Allow me to read, briefly, from the Proclamation adopted by unanimous vote at the end of the Association's 1994 Triennial Meeting held at Victoria Falls in 1994:

> "The Rule of Law, which is the essential foundation of a just and responsive system of government, requires settled and just laws, fairly administered without fear or favour, for its observance and advancement. Such laws must offer protection to individual citizens and their rights, and especially to the rights of those who belong to minorities or are otherwise disadvantaged as well as opportunities for personal and national social and economic development."

★ Representative of the Commonwealth Magistrates' and Judges' Association (CMJA) at the Georgetown Colloquium.

The rule of law can only be observed if there is a strong and independent judiciary which is sufficiently equipped and prepared to apply such laws.

The CMJA wishes to be fully involved in assessing the status of women and in disseminating information in this area. In 1994, the CMJA set up the Women's Section of the CMJA. Mrs Justice Patricia Macaulay of Sierra Leone (on temporary secondment to the judiciary of The Gambia) was elected as chair of that section.

The CMJA seeks to achieve its objectives in a number of ways. First, by taking part in the discussions with inter-governmental organisations, non-governmental and national judicial bodies. Since the late 1970s, throughout the 1980s and into the 1990s, Commonwealth judicial officers have participated in human rights initiatives. The CMJA was an official observer at the Commonwealth Ministerial Meeting on Gender in Beijing 1995. The association has been fully involved in judicial colloquia in the current series: Victoria Falls in 1994;[1] Beijing 1995;[2] Hong Kong 1996.[3] The *Victoria Falls Declaration* was approved and reaffirmed by the Triennial Conference of the Association, itself in Victoria Falls in 1994.[4] At our next biennial conference in Cape Town in October of this year we will be building on the sure foundations to be established this week here in Guyana. I hope that several of you will be able to attend this.

Another way CMJA seeks to achieve its objectives is by training conferences. These have been organised in many different countries over the years, and several years ago the Association produced a training manual which may be adopted by judiciaries in different countries.[5] Since 1994 the Commonwealth Judicial Education Institute has been the main training arm of the CMJA, and gender issues have been a central part of programmes established in many different countries. Specifically, the seminars help to identify gender bias in courts and the attitudes of those concerned with the courts, including magistrates and judges, counsel and court administrators. The

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[1] See Commonwealth Secretariat, *Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women*, Victoria Falls, Zimbabwe, August 1994.

[2] Also held at the Non-Governmental Organisations Forum at the United Nations Fourth World Conference of Women, Beijing, supra at note 2.

[3] See Asia/Pacific Regional Judicial Colloquium Hong Kong, 20-22 May 1996, proceedings published in A Byrnes, J Connors, Lum Bik, (eds) *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* (London: Commonwealth Secretariat, 1997).

[4] *Victoria Falls Declaration on the Promotion of the Human Rights of Women in the Commonwealth Secretariat, Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women*, Victoria Falls, Zimbabwe, August 1994 (London, Commonwealth Secretariat, 1995) at 8. Reproduced in this volume.

[5] Commonwealth Training Manual, (CMJA and CLEA), available from the CMJA.

perception of gender bias is also discussed in open fora. An effective tool is the use of case studies and hypothetical examples.

A final way in which the CMJA can achieve its aims is through the pages of the *Commonwealth Judicial Journal*, which is distributed to the judiciary throughout the Commonwealth every six months, and by the Association's *Newsletter* which is also sent out twice a year.

I have edited the *Commonwealth Judicial Journal* for the best part of ten years, and hope that you all have the opportunity to read it. For example, the articles in the last issue by Sir John Muria, Chief Justice of the Solomon Islands on women's human rights in the South Pacific and by Justice Mokgoro of the Constitutional Court of South Africa are particularly relevant to us at this Colloquium.[6] We are especially interested to learn of ways in which you think we can better serve the needs of the judiciary through the pages of the journal.

On behalf of the CMJA, let me end by saying how grateful we are to all those who have worked so hard in setting up the colloquium and for the wonderful Guyanese welcome we have received.

We look forward to our role in promoting and developing a Commonwealth Programme for Action on the Promotion of the Human Rights of Women and the Girl-Child.

[6] *Commonwealth Judicial Journal* December 1996.

International Standards, National Courts and Gender Issues

Keynote Address

Justice P. N. Bhagwati[*]
Former Chief Justice of India

I must congratulate the Gender and Youth Affairs Division of the Commonwealth Secretariat for organising this Judicial Colloquium for the senior judges of the Caribbean region for discussing the domestic application of international women's human rights norms. You will be aware that the first Judicial Colloquium on the subject of domestic application of international human rights norms was convened by myself in Bangalore, India under the auspices of the Legal Division of the Commonwealth Secretariat, where predominantly South Asian and South-East Asian Judges of the superior courts met in order to discuss this important topic.[1] That Judicial Colloquium evolved a number of principles concerning the role of the judiciary in advancing human rights by reference to international human rights norms and these principles have now come to be known as "the *Bangalore Principles*".[2] They have inspired a good number of judges in the Commonwealth to develop human rights jurisprudence in conformity with the international human rights norms. Then came the Judicial Colloquium in Harare where Chief Justices and Judges from Commonwealth Africa participated[3] and this was followed by a Judicial Colloquium in Abuja where judges of the superior courts from West Africa participated.[4] We had then Judicial Colloquia in Oxford,[5] and in

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[*] Member of the United Nations Human Rights Committee; Member of the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations.

[1] See *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms, Judicial Colloquium in Bangalore, 24 – 26 February 1988* (London, Commonwealth Secretariat, 1988).

[2] For the text of the Bangalore Principles, see *id* at ix and Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988 – 92* (London, Commonwealth Secretariat, 1992) [hereinafter *Conclusions*] at 1.

[3] See Commonwealth Secretariat, *Developing Human Rights Jurisprudence, Volume 2: A second Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Harare, Zimbabwe, 19 – 22 April 1989* (London, Commonwealth Secretariat, 1989).

[4] See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 4:A Fourth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Abuja, Nigeria, 9 – 11 December 1991* (London, Commonwealth Secretariat, 1992).

[5] See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 5:A Fifth Judicial Colloquium on the Domestic Application of International Human Rights Norms,*

Bloemfontein,[6] in South Africa and lastly here in this city last year for Caribbean judges[7] where the *Bangalore Principles* were affirmed.

These judicial colloquia dealt generally with incorporation of human rights in domestic jurisprudence and there was no special emphasis on women's human rights.[8] As I shall presently point out, women's human rights stand in a distinct category by themselves and they merit special treatment. I was therefore very happy when Ms Eleni Stamiris, Director of the Gender and Youth Affairs Division of the Commonwealth Secretariat, decided to hold judicial colloquia for women's human rights in different parts of the Commonwealth for the purpose of sensitising judges to the human rights of women so that, while adjudicating on cases coming before them which involve women's issues, they remain keenly aware of women's human rights and interpret and apply the law in conformity with such rights. The first of these was held in Victoria Falls, Zimbabwe, in August 1994; the result of this meeting was the *Victoria Falls Declaration.*[9] The second colloquium, for judges of the Asia and Pacific region, was held in Hong Kong in May 1996; that meeting adopted the *Hong Kong Conclusions.*[10] This colloquium for senior judges in the Caribbean region is the third.

Before I deal with the specifics of human rights of women, let me make a few general observations so far as the role of the judiciary vis-à-vis human rights is concerned, as it has relevance equally in relation to women's human rights so far as identification, protection and preservation of such rights is concerned.

Judicial Colloquium at Balliol College, Oxford, 21 – 23 September 1992 (London, Commonwealth Secretariat and Interights, 1993).

[6] See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 6:A Sixth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Bloemfontein, South Africa, 3 – 5 September 1993* (London, Commonwealth Secretariat, 1995).

[7] See Commonwealth Secretariat and Interights, *Report of the Judicial Colloquium on the Domestic Application of International Human Rights Norms in Georgetown, Guyana 2 – 5 September 1996* (London, Commonwealth Secretariat, 1996).

[8] For the conclusions of the Colloquia up to and including the fifth colloquium held in Oxford, see *Conclusions, supra* note 2.

[9] *Victoria Falls Declaration on the Promotion of the Human rights of Women* in Commonwealth Secretariat *Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women*, Victoria Falls, Zimbabwe, August 1994 (London, Commonwealth Secretariat, 1995) at 8. The text of the *Declaration* is reproduced in this volume.

[10] *Conclusions of the Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights*, Hong Kong May 1996, in A. Byrnes, J. Connors, Lum Bik, (eds.) *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation*, (London, Commonwealth Secretariat, 1997) at 6. The text of the *Conclusions* is reproduced in this volume.

Human rights are as old as human society itself, for they derive from every person's need to realise his essential humanity. They are not ephemeral, not alterable with time and place and circumstances. They are not the products of philosophical whim or political fashion. They have their origin in the fact of the human condition, and because of this origin, they are fundamental and inalienable. More specifically, constitutions, conventions or governments do not confer them. These are the instruments, the testaments, of their recognition. They are important, sometimes essential, elements of the machinery for the protection and enforcement of human rights but they do not give rise to human rights. Human rights were born not of humans, but with humans.

The judiciary has to administer justice according to law. But the law must be one that commands legitimacy with the people, and legitimacy of the law would depend upon whether it accords with justice. The concept of justice has no universally accepted definition. It has meant different things to different people, in different societies, at different times. It is, therefore, necessary to have a standard of values specifically of justice, against which a law can be measured. Such a standard must necessarily be superior to the law itself and would, therefore, constitute the highest rank in the legal hierarchy. There was a time when the standard of divine law, as revealed by God to man in some Holy Scriptures, was widely applied and served to confer legitimacy upon laws enacted by rulers. But over the years, religion as a standard of values began to lose its vitality and significance. Morality, though undoubtedly important and certainly complementary, was also found unable to solve the complicated problems of modern society and to provide a standard against which to judge the laws enacted by rulers. Some other ground had to be found to support a standard against which to judge the rulers' laws and this ground was provided by the concept of human rights which for the first time found its formulation conceptually in the US Bill of Rights and was then developed as a universal concept in the Universal Declaration of Rights[11] and elaborated in the various international human rights instruments which followed the Declaration. The great principles set out in these documents may be summarised as follows:

1. *the principle of universal inherence*: every human being has certain rights, capable of being enumerated and defined, which are not conferred on him by any ruler, nor earned or acquired by purchase, but which inhere in him by virtue of his humanity alone.

2. *the principle of inalienability*: no human being can be deprived of any of those rights, by the act of any ruler or even by his own act.

[11] GA Res 217A (III), adopted 10 December 1948.

3. *the rule of law*: where rights conflict with each other, the conflicts must be resolved by the consistent, independent and impartial application of just laws in accordance with just procedures.

Most of these human rights as formulated in the various international human rights instruments are rights against the state, representing the Western liberal philosophy which sees "rights"' as the duty of the state not to interfere with the freedoms and liberties of the individual. These human rights are common to men and women but there is a large catena of human rights inhering in women which are unfortunately not recognised as human rights, and are therefore neglected.

Consequently, it is necessary to inject a gender perspective into the concept of human rights, for whatever violations of human rights women suffer are usually shaped by gender. The development of a gender perspective in the human rights context facilitates an understanding of how the exercise and enjoyment of human rights by women is adversely influenced by social construction of the female and male roles in which woman is always subjected to a subordinate position. It calls for reconstruction of relations between men and women that are not based on inequality, domination and exploitation of women.

The concepts of equality and non-discrimination lie at the heart of a gender-sensitive perspective. Now obviously there are some aspects of life that are common to women and men and clearly women should be accorded equal opportunity in those areas. In many ways, however, women and men lead different lives and the human situation is not always gender-neutral. But a relevant human rights regime must not only guarantee equality in areas that are common to both sexes, but must also promote social justice to women in areas of private and civil life. The human rights which reflect the realities of women's situation must therefore include, *inter alia*, autonomy within the family, reproductive rights and conditions suitable for healthy reproduction and sufficient economic resources to sustain women and their families. It is a lack of education, inequality in access to employment, economic dependence on the husband and his family and above all social attitudes which are responsible for the denial of social justice to women.

I may also point out that women have a fundamental right to information, education and access to family planning and other reproductive health services, including AIDS prevention. Motherhood must result from a free and informed decision by each woman. Women have a right to their bodily integrity even against their husbands. The English Courts have held there can be rape of a wife by her husband, as a failure by the law to recognise the wrong would be a violation of her human rights.[12]

[12] *R v R* [1991] 4 All ER 481, [1991] 3 WLR 767, overruling *R v Miller* [1954] QB 281, [1954] 2 All ER 529.

It is also necessary for us to bear in mind that human rights of women cannot be allowed to be violated on the ground of cultural or religious values. Cultural relativism or misconceived religious dogmas cannot be an excuse for violations of human rights. This is something that has to be borne in mind by judges when women's issues come up for consideration

There has been neglect of women's human rights in the mainstream of human rights. There are three reasons:

1. First, mainstream human rights bodies are overwhelmingly male;

2. Second, there is an underlying schism over the relative importance of civil and political rights versus economic, social and cultural rights. Despite the rhetoric about the indivisibility of human rights, traditional civil and political rights have received the bulk of attention within the mainstream human rights discourse. Human rights theorists from the West, particularly the United States, see "rights" as the duty of governments not to interfere with the civil and political liberties of the citizens. By contrast, many Third World countries argue for the primacy of economic and social rights, guarantees that create a positive obligation on the state governments to meet basic human needs. Since many women's issues emanate from their position as the majority of the vulnerable sections of the society, the general neglect of economic and social rights means that women's concerns are further neglected.

3. Thirdly, the mainstream's insistence on a division between public and private responsibility is also responsible for this situation. Traditional human rights theory primarily focuses on violations perpetrated by the state against individuals like torture, arbitrary arrest, wrongful imprisonment, etc. Under this framework, mainstream theorists do not recognise wife assault and other forms of violence against women as human rights violations because private individuals and not the state perpetrate such acts. Violence against women is the touchstone that illustrates the mainstream limited concept of human rights. The dichotomy between public and private responsibility when applied to the reality of a woman's life leads to absurd distinctions. Rape by a police officer, for example, becomes a violation, while rape by a stranger, husband or acquaintance does not. The state should be held responsible for failing to protect the woman on the ground that the physical integrity of the woman is violated. Is it not a violation of the human rights of the woman?

There is need for revision of the concept of human rights. The most important of all human rights is the right to life set out in article 6 of the International Covenant of Civil and Political Rights,[13] forming part of customary international law. The right is concerned with the arbitrary deprivation of life through public action, i.e.

[13] 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

state action. But protection from arbitrary deprivation of life or liberty through public action, important as it is, does not address how being a woman is in itself life-threatening and the special ways in which women need legal protection to be able to enjoy their right to life. From conception to old age, womanhood is full of risks that are not attendant upon men. The risks of abortion and infanticide because of the social and economic pressure to have sons in some cultures; of malnutrition because of social practice of giving husbands and sons priority in food distribution; of less access to healthcare than the men; and of endemic violence against women in all states. There is overwhelming evidence of violence against women but this high level of documented evidence around the world is unaddressed by the international notion of the right to life, because this international norm is focused on public actions by the state. So also the right to be free from torture, has failed to encompass domestic violence or violence in the family or sexual harassment in the work place or genital mutilation, again because the focus of international notion of freedom from subjection to torture is public action by the state. Further, human rights practice has failed to address adequately, as violations of human rights of women, acts of violence directed at women in situations of economic, civil or political turmoil or during international or internal conflicts. These are regarded as appropriate subjects of concerns of international humanitarian law and not of international human rights law.

Violence against women is violation of women's human rights, though, as I have earlier pointed out, it is not regarded as such by the human rights activists trained in the Western liberal thought. Some areas of violence may be set out as follows:

1. domestic violence and rape;
2. genital mutilation or traditional practice of female circumcision;
3. trafficking in women;
4. gender-based violence against women refugees and asylum-seekers;
5. violence associated with prostitution and pornography;
6. violence in the work place, including sexual harassment; and
7. dowry deaths in India, and some other countries.

These are the types of violence that need to be addressed by the judiciary. It is the duty of the state in all its departments + the executive, legislature and the judiciary – to take steps to prevent such violence, since it constitutes a violation of women's human rights, and to punish the guilty and direct payment of compensation to the women victims. Judicial sensitivity is most essential for protection and enforcement of women's human rights.

I may also point out that the language used in human rights instruments and court proceedings and judgements is unfortunately not gender-neutral. It is always male-oriented and is reflective of a world where the male is the only representative of the human species. One of the most regrettable uses, humiliating to women, is what we find in the General Clauses Acts of many of Commonwealth countries

defines and perpetuates reality. At present, the continuing use of male-defined language, which is androcentric, stereotypical, discriminatory and exclusionary, maintains the current imbalance in power relations and contributes to a situation in which women are unable to exercise and enjoy their human rights. It painfully conditions all thinking about social problems and processes. It has the further effect of obscuring women, their experiences and their social value and contributing to the perpetuation of a society in which women are regarded as lesser beings. The use of sexist language must therefore be avoided and I would like to impress upon the judiciary always to use gender-neutral language. That will help to create a judicial culture of respect for women's human rights.

Many judges may not be aware that some of women's human rights are recognised in the Convention on the Elimination of All Forms of Discrimination against Women.[14] However, this Convention does not specifically prohibit gender-based violence or place any explicit responsibility on State Parties to eliminate or at least to reduce it. However, there is an impressive body of jurisprudence, both international and national, concerning women's human rights. This jurisprudence is of practical relevance and value to judges and lawyers generally. Of course, where the language of the law is clear, then the judge must give effect to it. However, there are many cases where the domestic law – whether constitutional, statutory or common law – is ambiguous, uncertain or incomplete or capable of bearing an interpretation consistent with the international norms of women's human rights. In such cases, the *Bangalore Principles* require that the national courts should have regard to these international norms and must mould and develop the law consistent with these norms. Judges have a creative function. They cannot afford to just mechanically follow the rules laid down by the legislature; they must interpret the rules so as to reconcile them with the wider objectives of justice which are encapsulated in the international norms of women's human rights. So long as judges are sensitive to women's human rights and are prepared boldly to advance the law through a process of creative interpretation, women's human rights will be safe. Judges must remember that with changing human consciousness and renovation of social reconstruction of human relationships, the law cannot afford to stand still. It must move forward and satisfy the hopes and aspirations of women who constitute half the world's population. The Goddess of Justice is shown blindfolded in Anglo-Saxon jurisprudence, but I do not agree with this image. The Goddess of Justice, in my view should keep her eyes wide open to see the injustice and inequality from which women suffer. If she does not, she will lose her credibility and the vulnerable sections of the community, like women, will lose faith in her capacity to give justice.

I will now close with the famous words of the great American judge, Benjamin Cardozo "the inn that shelters for the night is not the journey's end: law like the traveller must be ready for the morrow."

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[14] 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981.

I will now close with the famous words of the great American judge, Benjamin Cardozo "the inn that shelters for the night is not the journey's end: law like the traveller must be ready for the morrow."

Using General Human Rights Instruments to Advance the Human Rights of Women

Jane Connors[*]

Introduction

The purpose of this paper is to examine the general human rights standards – frequently described as the "mainstream" human rights standards – and their relevance to women. At the outset, I would like to put the material I am about to discuss in context and secondly, I would like to point to a number of problems which have been identified as presenting obstacles so far as the application of the general human rights standards to women is concerned. These obstacles, which are evident at the international level, will recur as themes in our discussion of the domestic application of the general standards of human rights for the benefit of women.

Since the beginning of this decade it has been increasingly recognised that the vision of human rights and the mechanisms that exist to concretise this vision, although framed as available to women and men on the basis of equality, have profited women less than men. In response to this recognition, many human and women's rights activists have worked to redefine the meaning of human rights to encompass the specific experiences of women.[1] This work has been repaid by remarkable advances over the last few years:

- In June 1993, at the Vienna World Conference on Human Rights, the international community openly acknowledged that the body of international law and mechanisms established to promote and protect human rights had not properly taken into account the concerns of over half the world's population. States formally recognised the human rights of women as "an inalienable, integral and indivisible part of human rights" and expanded the international human rights agenda to include gender specific violations.[2]

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[*] Chief, Women's Rights Unit, United Nations Division for the Advancement of Women, New York. (The views expressed in this paper are thge author's personal views and do not necessarily reflect the views of the United nations Division for the Advancement of Women).

[1] See generally Felice Gaer, "And Never the Twain Shall Meet? The Struggle to Establish Women's Rights as International Human Rights" in *The International Human Rights of Women: Instruments of Change* (Washington, DC, ABA, 1998) at 1.

[2] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, June 1993, UN Doc A/CONF.157/24, p at 33, para 18 (1993), 32 ILM 1661.

- In December 1993, the United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women.[3] This Declaration categorises gender-based violence against women as an issue of human rights generally, and as one of sex discrimination and inequality in particular.

- In March 1994, the United Nations Commission on Human Rights agreed to appoint its first gender-specific human rights mechanisms, the *Special Rapporteur on violence against women, its causes and consequences.*[4]

- In September 1994, the international community underscored the importance of the right to health, including reproductive choice for women, at the International Conference on Population and Development in Cairo.[5]

- In September 1995, the Beijing Declaration and Platform for Action,[6] adopted at the United Nations Fourth World Conference on Women, confirmed women's rights as human rights and the human rights of women and the girl-child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms. The Platform underlined the human rights implications of violence against women, particularly in armed conflict, and focused on violations of the human rights of women, resulting in refugee flows and the vulnerability of refugee women to further violations of their human rights.

Work to bridge more fully the acknowledged gap between women and the mainstream human rights framework has not stopped at these very visible advances, but has also included resolutions manifesting political commitment passed by the General Assembly, the Economic and Social Council, the Commission on the Status of Women and the Commission on Human Rights, as well as the revision of working methods by a number of key human rights treaty

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[3] Declaration on the Elimination of Violence against Women, GA Res 48/104 (1994), 1 IHRR 329. The text of the Declaration is also reproduced in Jane Connors and Andrew Byrnes, *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women* (Commonwealth Secretariat and International Women's Rights Action Watch, 2nd ed 1996).

[4] CHR Res 1994/45, UN Doc E/CN.4/1994/132, at 140 (1994). In 1997 the mandate of the Special Rapporteur was renewed for a further three years: CHR Res 1997/44.

[5] *Report of the International Conference on Population and Development,* UN Doc A/CONF.171/13 (1994).

[6] Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women, Beijing, September 1995,* UN Doc A/CONF.177/20 (1995), 35 ILM 401.

bodies. It also included the formulation, in 1995, of guidelines to incorporate a gender perspective into the international human rights system.[7]

The limitations of the existing international human rights system

These developments are clearly pleasing. At the same time, they do raise my second preliminary inquiry: what are the factors which have seemed to prevent the international human rights system – framed as available without discrimination on the basis of sex, as we shall see – from working effectively to improve the situation of women? These factors can be summarised as follows:

- The process by which human rights were conceptualised and defined did not involve significant participation by women. This may explain why the definition of substantive human rights rarely incorporates an element of gender. Indeed, core human rights are defined "gender neutrally" and so prevent an immediate recognition that equal treatment of persons in unequal situations will operate, frequently to perpetuate rather than alleviate injustice.

- Many issues of central concern to women – under-development, illiteracy, the adverse impact of structural adjustment programmes, gender segregation, systematic violence – have not been defined as human rights issues or made the subject of legally binding norms. Principal human rights bodies and procedures have thus failed to address these issues.

- International human rights law effectively excludes many actions occurring at the hands of non-state actors and those which take place in the private sphere + in particular, that most private of spheres – the family. This has served to exclude the numerous violations which are committed against women in their communities, their workplace and in their own families from the purview of international human rights.

- Both *de jure* and *de facto* discrimination against women and other violations of their rights – in areas such as family law, nationality, bodily integrity, freedom of expression and liberty of movement – are justified by governments on the basis of culture, religion and ethnicity. These justifications not only obscure violations against women, but inhibit firm responses from the international human rights framework.

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[7] For a recent review of the steps taken towards integration of women's human rights into the human rights activities of the United Nations, see Anne Gallagher, "Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System" (1997) 18 *Human Rights Quarterly* 283. See generally *The United Nations and the Advancement of Women 1945 – 1996*, The United Nations Blue Books Series, vol VI (New York: United Nations, rev ed 1996).

While these factors are worthy of detailed examination, I mention them here merely to provide a backdrop to my discussion of how the general framework has responded to women's concerns. Necessarily, these factors are of relevance to a determination of whether the response of international bodies can be improved.

The guarantees of non-discrimination on the basis of sex

The principle of non-discrimination on the basis of sex (defined and applied with reference to men) is specifically included in the United Nations Charter[8] and the Universal Declaration of Human Rights.[9] It is also guaranteed in the International Covenant on Civil and Political Rights (ICCPR)[10] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[11] each of which contains in article 3, in almost identical terms, a special provision binding states parties to ensure the equal rights of men and women in the enjoyment of the rights enumerated in the instrument.[12]

Both covenants also include a general non-discrimination article, which includes "sex" among the prohibited heads of differential treatment.[13] The ICCPR, moreover, incorporates in article 26 a guarantee of equality and equal protection

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[8] Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, articles 2, 3 and 55.

[9] See in particular article 2 of the Universal Declaration of Human Rights, GA Res 217A (III), adopted on 10 December 1948.

[10] 999 UNTS 171.

[11] 993 UNTS 3.

[12] Article 3 of the ICCPR [ICESCR] provides:

> "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights [all economic, social and cultural rights] set forth in the present Covenant."

[13] Article 2(1) of the ICCPR provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction or discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 2(2) of the ICESCR provides:

> "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

before the law which guarantees individuals equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[14] The non-discrimination norm is also found in the Convention on the Rights of the Child (the CRC)[15] and is elaborated most fully in the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention).[16] Each of these instruments, and most particularly the CRC and the CEDAW Convention, contain specific provisions relating to the human rights of women and/or the girl-child. Neither the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention)[17] nor the International Convention on the Elimination of All Forms of Racial Discrimination (the Racial Discrimination Convention)[18] contain any reference to the principle of non-discrimination on the basis of sex. However, as both are based on the Universal Declaration of Human Rights, non-discrimination clearly underlies both.

The role of the human rights treaty bodies

Monitoring of the implementation by states parties of their obligations under each of the treaties is the work of expert committees which are usually provided for under the terms of the individual treaty.[19]

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[14] Article 26 of the ICCPR provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[15] Convention on the Rights of the Child, GA Res 44/25, UN Doc A/44/49 (1989) at 166, reprinted in 28 ILM 1448 (1989). Article 2(1) of the Convention provides:

> "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

[16] 1249 UNTS 13.

[17] 1465 UNTS 85.

[18] 660 UNTS 195.

[19] See generally the chapters on each of the treaty bodies in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 2nd ed forthcoming). See also Michael O'Flaherty, *Human Rights and the UN Practice before the UN Treaty Bodies* (London: Sweet & Maxwell, 1996).

The monitoring of States parties' performance occurs in a number of ways. First, each treaty body is empowered to examine the reports that States parties are obliged to submit under the respective treaties. This examination initiates dialogue between the Committee and the State party and provides a forum for the elaboration of the meaning of substantive rights in the individual treaties. Following its discussion with the State party, each treaty body also formulates "concluding observations" or "comments" relating to individual state reports, thus allowing it to make specific suggestions for improvement. Each is also empowered to formulate "general comments" or "general recommendations", which usually take the form of detailed explanations by the relevant treaty body of the content of a particular right established by the convention or of the impact of these rights in a particular context, thereby contributing to the development of an international jurisprudence of human rights.

Three of the treaty bodies – the Human Rights Committee, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee against Torture (CAT) – are able to receive and act upon allegations of violations made by individuals against state parties and/or by states parties against other states parties – provided the relevant state party has agreed to subject itself to such a procedure. It is hoped CEDAW will soon have such a procedure.[20]

The specific gender-integration mandate of the United Nations is relatively recent, but a number of the treaty bodies have developed a significant jurisprudence relating to women. The Human Rights Committee, the oversight body of the ICCPR, has been advantaged by the existence of the First Optional Protocol to the Covenant,[21] which permits it to examine complaints from individuals alleging violation of human rights. Under the treaty, discrimination on the basis of sex is prohibited and equality in the enjoyment of rights set forth in the convention is guaranteed. Non-discrimination or special provisions on the basis of sex is mentioned in articles other than articles 3 and 26, for example, relating to derogation of rights in times of public emergency (article 4), the death penalty (article 6), family (article 23), the rights of the child (article 24), public life (article

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[20] On the development of an Optional Protocol, see generally Andrew Byrnes, "Slow and Steady wins the Race? The Development of An Optional Protocol to the Women's Convention", paper presented at *Panel on Compliance with the International Human Rights of Women,* American Society of International Law, 91st Annual Meeting, Washington, DC, 9 – 12 April 1997; Andrew Byrnes and Jane Connors, *ASIL Newsletter*, June–August 1996, 10; and Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination against Women?", 21(3) *Brooklyn Journal of International Law* 679 (1996). Elizabeth Evatt, "The Right to Individual Petition: Assessing its Operation before the Human Rights Committee and Its Future Application to the Women's Convention on Discrimination" in *Proceedings of the 89th Annual Meeting of the American Society of International Law* (1995) 227. Latest information on the current draft and developments can be obtained from the website of the UN Division for the Advancement of Women: http:// www.un.org/womenwatch/daw.

[21] 999 UNTS 301.

25) and as noted earlier, equality before the law and equal protection of the law (article 26).

Other articles to which a gender perspective may be especially important include – right to life (article 6), torture (article 7), slavery (article 8), liberty of movement and choice of residence (article 12) and recognition as a person before the law (article 16).

The Human Rights Committee has shown particular willingness to deal with the concept of discrimination and to extend the prohibition of discrimination on the basis of sex to other rights protected in the Covenant.[22] It has formulated a general comment on the meaning of non-discrimination[23] and is currently working on expanding its early comment on article 3.[24] A number of its other general comments show a level of gender sensitivity, e.g. *General comment 19(39)* on marriage and the family adopted in 1990.[25] Gender discrimination has featured as an issue in a number of the complaints the Committee has resolved – on the whole to the advantage of women – under the Optional Protocol.[26] The Committee regularly questions States about the *de facto* and *de jure* position of women, and

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[22] For a comprehensive discussion of the Covenant and the jurisprudence and practice of the Committee up to 1993, see Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N. P. Engel, 1993). See also Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991) and Torkel Opsahl, "The Human Rights Committee" in Philip Alston (ed), *The United Nations and Human Rights* (Oxford: Clarendon Press, 1992) 369 at 422–423.

[23] Human Rights Committee, *General comment 18(37)*(adopted in 1989), UN Doc HRI/GEN/1/Rev.3, at 26 (1997).

[24] *General comment 4(13)* (adopted in 1981), UN Doc HRI/GEN/1/Rev.3, at 4 (1997). See *Follow-up action on the Conclusions and Recommendations of the sixth meeting of persons chairing the treaty bodies*, UN Doc HRI/MC/1996/2 (1996).

[25] *General comment 19(39)*, UN Doc HRI/GEN/1/Rev.3, at 29 (1997).

[26] *Aumeeruddy-Cziffra v Mauritius*, Communication No 35/1978, *Selected Decisions under the Optional Protocol (Second to sixteenth sessions)* (New York, United Nations, 1985), vol 1, p 67 [hereinafter *Selected Decisions, vol 1*], (1985) 67 ILR 285, 2 HRLJ 139; *Lovelace v Canada*, Communication No 24/1977, *Selected Decisions, vol 1*, p 83, 68 ILR 17, 2 HRLJ 158; *Zwaan de Vries v Netherlands*, Communication No 182/1984, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol 2 (1990) [hereinafter *Selected Decisions, vol 2*], p 209; *Ato del Avellanal v Peru*, Communication No 202/1986, *Report of the Human Rights Committee in 1989*, UN Doc A/44/40, Annex X.C., p 411; *Broeks v Netherlands*, Communication No 172/1984, *Selected Decisions, vol 2*, p 196; *Vos v Netherlands*, Communication No 218/198, UN Doc A/44/40, Annex XI.G, p 232; *J A M B-R v Netherlands*, Communication No 477/1991, UN Doc A/49/40, Annex X.J, p 294, (1994) 1(3) IHRR 39.

amended its reporting guidelines in 1995 to request States parties to provide gender-specific information in this respect.[27]

However, many of its general comments – for example, those dealing with torture and the right to bodily integrity,[28] the right to life,[29] and freedom of thought, conscience and religion[30] + do not examine substantive rights through the lens of gender, and thereby preclude the elaboration of the meaning of substantive rights to provide states and domestic decision-makers (including judges) with guidance as to the measures required to ensure women equal opportunity in the enjoyment of rights. Moreover, where complaints under the Optional Protocol are concerned, the Committee is more comfortable with facially discriminatory provisions, which generally it will have no hesitation in finding a violation of the ICCPR. It is less willing to look behind complex or apparently neutral legislation, such as social security provisions which may involve indirect discrimination. The Committee is, however, clearly committed to incorporating gender in its work and is taking serious steps to do so.

The Committee on Economic, Social and Cultural Rights (the Economic Committee) is charged with overseeing the implementation of the ICESCR.[31] As is the case with the ICCPR, the ICESCR contains a specific prohibition of sex-based discrimination (article 2) and extends this to all rights protected under the Covenant (article 3). Special provisions relating to discrimination on the basis of sex also found in two other articles: right to equal remuneration (article 7) and in relation to marriage and the family (article 10). Other articles of particular relevance to women include the right to work (article 6), the right to social security (article 9), the right to health (article 12) and the right to education (article 13). Unlike the Human Rights Committee, the Economic Committee has no communications mechanism, although

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[27] For the revised guidelines of the Committee, see Guidelines regarding the Form and Contents of Periodic Reports from States Parties, UN Doc CCPR/C/20/Rev.2 (1995), and Guidelines regarding the Form and Contents of Initial Reports from States Parties, UN Doc CCPR/C/5/Rev.2 (1995).

[28] *General comments 7(16)* and *9(16)* (both adopted in 1982), UN Doc HRI/GEN/1/Rev.3, at 8 and 10 respectively (1996). These general comments were, however, replaced in 1992 by *General comments 20(44)* and *21 (44)*, UN Doc HRI/GEN/1/Rev.3 at 31 and 34 respectively (1996). In the former of these the Committee, although not adopting a comprehensive gender analysis of the guarantee, made explicit that States parties were under an obligation to address the infliction of torture or cruel, inhuman or degrading treatment by private actors: *id* at 30, paras 2 and 13.

[29] *General comment 14(23)* (adopted in 1984), UN Doc HRI/GEN/1/Rev.3, at 18 (1996).

[30] *General comment 10(19)* (adopted in 1983), UN Doc HRI/GEN/1/Rev.3, at 11 (1996).

[31] On the work of the Committee, see generally Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995).

one has been under consideration in recent years.[32] However, in the same way as the Human Rights Committee, the Economic Committee regularly questions States parties on women's enjoyment of the rights in the Covenant, a task facilitated by its innovative methods and procedures, incorporating discussion days, soliciting information from different sources and non-governmental organisation participants, which have allowed it to gain a greater insight into problems affecting women in their enjoyment of rights. The concluding observations of the Economic Committee regularly make reference to discrimination against women in the enjoyment of economic, social and cultural rights and its revised reporting guidelines require coverage of women's interests. Its general comments suggest a serious attempt to introduce a gender perspective, and its commitment to a gendered interpretation of its Covenant is manifested in its current work to elaborate a general comment on that theme. When completed, this comment, as well as the existing general comments of the Committee, will be instructive for national decision-makers.

The Committee on the Elimination of Racial Discrimination (CERD) and the Committee against Torture have done less than other treaty bodies to reflect the importance of gender considerations. The former, established to oversee the Racial Discrimination Convention, has done little to address discrimination against women. The Racial Discrimination Convention does not refer explicitly to women and there has been no reference either in its general comments to gender discrimination generally or the interplay of race and sex discrimination in particular. Although there is some consideration of the position of women members of racial minorities in the reporting system, this has not been extensive.

CERD has considered one communication from a woman under its optional communication procedure relating to race discrimination in *Yilmaz-Dogan v Netherlands*.[33] The complainant was a Turkish national living in the Netherlands whose employment had been terminated because of her pregnancy. She alleged that she had been subjected to racial discrimination since she claimed that her employer was of the view that foreign women (unlike Dutch women) do not give up work on having children, but rather continued to work and take extended sick leave. Her case was that, had she been Dutch and not Turkish, she would not have been dismissed and that her dismissal constituted a violation of several articles of

[32] For the result of the latest discussions of the Committee on the issue and the recommended text of a draft protocol, see Committee on Economic, Social and Cultural Rights, "Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications concerning non-compliance with the International Covenant on Economic, Social and Cultural Rights", *Report on the Fourteenth and Fifteenth Sessions*, UN Doc E/1997/22, Annex IV.

[33] Communication No 1/1984, UN Doc A/43/18, Annex IV (1988).

the Convention.[34] The Committee concluded that Ms Yilmaz-Dogan had not been afforded protection in respect of her right to work and directed the Netherlands to ascertain whether she was currently gainfully employed and, if not, to provide her with alternative employment.

The Committee against Torture (CAT) has yet to focus significantly on the gender dimensions of torture.[35] CAT, like CERD, was however, represented at the Glen Cove meeting of the human rights treaty bodies at which the human rights aspects of women's rights to health were discussed and the responsibility of all treaty bodies to reflect a gender approach in their interpretation of rights was stressed at the Roundtable.[36] However, in May 1998, after the Roundtable, the CAT decided that one of its members should be a thematic rapporteur on gender issues. As with CERD there has been growing appreciation of the impact of gender in its concluding observations.[37]

A comprehensive coverage of the general human rights standards and their relevance to women would entail a survey of the regional human rights systems – European,[38] Inter-American,[39] and African[40] – the first two of which have devoted significant attention to women, the last less so. Suffice it to say that each relies on the general norm of non-discrimination on the basis of sex rather than entrenching specific human rights for women. The European Convention on Human Rights and the American Convention on Human Rights, unlike the ICCPR, contain no equality before the law or equal protection of the law clause. (The African Charter on

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[34] These included article 5(a)(i), which obliges a State party to ensure that a person enjoys the right to gainful work and protection against unemployment without discrimination on the ground of race, article 6, which requires a State party to ensure protection against racial discrimination, including the provision of legal remedies for discrimination.

[35] See Andrew Byrnes, "The Convention against Torture" in D. Koenig and K. Askin (eds), *Women's International Human Rights Law* (Transnational Publishers, forthcoming 1999).

[36] *Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health, with a Focus on Reproductive and Sexual Health Rights*, Glen Cove, New York, December 1996.

[37] *Integrating the Gender Perspective into the Work of the UN Human Rights Treaty Bodies, Report by the Secretary-General*, UN Doc HRI/MC/1998/6.

[38] See the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 221. The European system underwent major institutional reform in early 1999: the amended text of the Convention and the protocols adopted to date are reproduced at 15 HRLJ 102.

[39] See the American Convention on Human Rights 1969 ("Pact of San José, Costa Rica"), 1144 UNTS 123.

[40] See the African Charter on Human and Peoples' Rights 1981 ("Banjul Charter"), OAU Doc CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 ILM 58 (1982).

Human and Peoples' Rights contains guarantees similar to those of the ICCPR.[41]) Litigation is thus confined to claims of discrimination in the enjoyment of the substantive rights guaranteed by the two Conventions.[42] Despite this limitation, there have been a number of gender-based complaints from women brought before the Strasbourg organs under the European Convention.[43] Not all of these have been formulated as claims of discrimination and, even where they have been, not all of them have been decided on that basis, the Commission and the Court appearing to be of the view that if violation of a Convention right is established as such, an added claim for discrimination simply gilds the lily and does not need to be determined.[44] There have also been a number of cases brought before the Inter-American Commission and Court of Human Rights raising similar issues.[45] Several cases are also in preparation under the Inter-American Convention on Violence against Women (Convention of Belém do Pará).[46]

It is impossible to categorise neatly the litigation, but suffice it to say that it has included complaints of disparate treatment of unmarried mothers vis-à-vis their children,[47] state failure to provide a remedy in the face of private violence,[48] sex

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[41] African Charter on Human and Peoples' Rights, articles 2 and 3.

[42] Article 14 of the European Convention provides:

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

Article 1 of the American Convention on Human Rights (and article 2 of the African Charter) are in similar terms.

[43] See generally Maud Buquicchio de Boer, *Equality between the sexes and the European Convention on Human Rights: A Survey of Strasbourg Case Law*, Human rights files No. 14 (Strasbourg, Council of Europe, 1995).

[44] See D. J. Harris, M. O'Boyle and C. Warbrick, *The Law of the European Convention on Human Rights* (London, Butterworths, 1995) at 468 – 469.

[45] See, eg, *Baby Boy case*, Inter-American Commission of Human Rights, case 2141 (United States of America), Resolution No 23/81, 6 March 1981, (1981) 2 HRLJ 110 (permissibility of abortions in the light of the right to life); *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No 4, 79 ILR 282, 5 HRLJ 161.

[46] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), opened for signature, 9 June 1994, entered into force 5 March 1995, 33 ILM 1534. For the text of the Convention see web site of the Organization of American States at http://www.oas.org.

[47] *Marckx v Belgium*, Judgement of 13 June 1979, Series A, No 31, 2 EHRR 330.

[48] *X and Y v Netherlands*, European Court of Human Rights, Judgement of 26 March 1985, Series A,

discrimination in paternity rights,[49] differential treatment of the foreign husbands of female citizens,[50] claims of self-determination in reproductive choice,[51] discrimination in taxation,[52] and requirements regulating the adoption of a family name or the retention by a woman of her maiden name.[53] A number of cases which have been decided on the basis of substantive rights, and not on the ground of discrimination, have been important from the point of view of women's human rights; one of the most important of these held that restrictions on women's access to information about abortion services available abroad were an impermissible restriction on freedom of expression.[54] Of similar importance was the Court's judgement rejecting a challenge brought against the decisions of the English courts in which the applicants were found guilty of marital rape.[55] Two cases have also concerned rape in war and civil unrest, where rape was characterised as torture or cruel, inhuman or degrading treatment.[56]

No 91, 81 ILR 91, 8 EHRR 235 (gap in national law which meant that criminal sanctions were not available against person who sexually assaulted mentally handicapped girl a violation of the Convention).

[49] *Rasmussen v Denmark*, European Court of Human Rights, Judgement of 28 November 1984, Series A, No 87, 7 EHRR 371.

[50] *Abdulaziz, Balkandali and Cabales v United Kingdom*, European Court of Human Rights, Judgement of 28 May 1985, Series A, No 94, 81 ILR 139; 7 EHRR 471.

[51] See, e.g. *Paton v United Kingdom*, European Commission of Human Rights, Application No 8416/78, decision on admissibility of 13 May 1980, 19 D&R 224, 3 EHRR 408 (finding that national court's denial of alleged right of unmarried father of child to prevent mother from obtaining an abortion did not involve violation of the father's rights under the Convention). But see also *Brüggeman and Scheuten v Federal Republic of Germany*, Application No 6959/75, European Commission of Human Rights, Report of 12 July 1977, 10 D&R 100, 3 EHRR 244 (upholding restrictions on access to abortion).

[52] *Lindsay v United Kingdom*, European Commission of Human Rights, Application No 11089/84, decision on admissibility of 11 November 1986, 49 D&R 181, 9 EHRR 555.

[53] *Burghartz v Switzerland*, European Court of Human Rights, Judgment of 22 February 1994, Series A, No 180-B, 18 EHRR 101.

[54] *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. v Ireland*, European Court of Human Rights, Judgement of 29 October 1992, Series A, No 246, 15 EHRR 244.

[55] *SW v United Kingdom, CR v United Kingdom*, European Court of Human Rights, Judgements of 22 November 1995, Series A, Nos 335-B and 335-C, 21 EHRR 363.

[56] *Cyprus v Turkey*, European Court of Human Rights, Applications No 6780/74 and 6950/75, 4 EHRR 482, 62 ILR 4, paras 358 – 374 (rape by soldiers constituted inhuman treatment); *Aydin v Turkey*, European Court of Human Rights, Application No 2317/94, Judgement of 25 September 1997, (1998) 25 EHRR 251, 3 BHRC 300.

The results of this litigation have been mixed, but like the matters that have come before the international bodies, the issues dealt with have been relatively easy analytically, raising in the main facial discrimination issues rather than indirect discrimination claims.

Relevance of the international practice to domestic advancement of women's human rights

There has been much exploration of the relevance to adjudication by domestic courts of the pronouncements of international bodies + whether in the form of treaty provisions or guarantees contained in other international instruments, binding judgements, non-binding views, general comments or recommendations and concluding observations. The series of Judicial Collloquia organised by the Commonwealth Secretariat on exactly this theme has contributed significantly to the discussion of the possibilities and problems of drawing on international jurisprudence to enhance the interpretation of national constitutions and laws and to develop the common law generally.[57] Many of the same issues arise in the context of utilising international norms to advance women's human rights at the domestic level and, indeed, a number of the significant cases in which international standards have been drawn on have involved women's human rights.[58]

There is no doubt that, despite the orthodox doctrine that obtains in many Commonwealth countries that unincorporated treaties do not form part of domestic law, they can legitimately be drawn on to inform the process of domestic adjudication. Many Commonwealth courts have shown themselves open to these influences and it is to be hoped that others will follow suit, supported by the legal profession.

Conclusion

This brief review of the mainstream mechanisms indicates that this framework has very often responded positively to promote the interests of women. Nonetheless, the value of this framework in this regard is limited by the fact that it has been more able to address claims of women which involve allegations of violations identical to those

[57] See generally Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988 – 92* (London, Commonwealth Secretariat and Interights, 1992).

[58] See Andrew Byrnes, "Human rights instruments relating specifically to women, with particular emphasis on the Convention on the Elimination of All Forms of Discrimination against Women", in this volume.

men might suffer, as well as claims by women to rights, entitlements or privileges they would enjoy if they were men. Moreover, the framework is far more responsive to "public" rather than "private" violations of rights, such as rights to nationality and legal personality. In addition, the litigation has involved little complex gender analysis and continues to reflect an androcentric model of women's entitlements by virtue of human rights guarantees.

Recent years have seen significant progress in the approach of the mainstream procedures to issues of gender. Reflective of the fact, however, that public attention at the international level has focused predominantly on issues of gender-based violence, it is this issue that has attracted the greatest response from these mechanisms. It is only now that a pro-active gender analysis of general norms has begun in earnest. Pro-active analysis, combined with gender mainstreaming, will ensure that the past approach of "just add women" is now being substituted by a reappraisal so as to achieve a qualitative change in the relevant institutions, laws and procedures.

Using Gender-specific Human Rights Instruments in Domestic Litigation: the Convention on the Elimination of all Forms of Discrimination against Women

Andrew Byrnes[*]

Introduction

International concern with the position of women and the reflection of that concern in treaties regulating particular fields of social activity is no new phenomenon, going back in some instances to the end of the 19th century (or even earlier). The first half of the 20th century saw the adoption of treaties which address particular social problems such as trafficking in persons or which sought to regulate the participation by women in the labour force. Since the second world war a number of instruments have been adopted which address discrimination against women in public and private life and which seek to advance the equality of women and their full enjoyment of fundamental human rights and freedoms.

The purpose of this paper is to examine the ways in which international conventions which explicitly address gender issues can be drawn on in domestic litigation to help advance the human rights of women.[1] The major focus of the discussion is the Convention on the Elimination of All Forms of Discrimination against Women ("the Convention" or "the CEDAW Convention").[2]

The first section of the paper gives a brief overview of international legislation relating to women. The second outlines the structure and content of the Convention, describes the monitoring system established under it, and highlights the output of the Convention system that may be of use in proceedings before national courts. The third section reviews the status of treaties in common law

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[*] Associate Professor and Director, Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong. I am grateful to Ms Lum Bik for research assistance and her work in compiling a collection of materials for the Caribbean Colloquium, upon which I have drawn in the preparation of this paper. This collection of materials drew heavily upon the earlier compilation prepared for the Hong Kong Colloquium by Jane Connors, Scott Wilkens, Victoria Medd and myself.

[1] For a discussion of the relevance of general human rights instruments to advancing women's human rights, see Jane Connors, "General human rights instruments and their relevance to women", in this volume.

[2] 1249 UNTS 13.

number of domestic cases in which the Convention has been invoked by the parties or by national courts.

A. International concern with issues particularly affecting women or with sex discrimination

The gender-specific international conventions that have been adopted over the years reflect a variety of stances with respect to the proper role of women in society and their entitlement to participate fully in all fields of social activity.[3] Times and attitudes have changed considerably since the early part of the century and these changes have been reflected in the adoption of new instruments and the revision or abandonment of older ones that are no longer felt to be appropriate to modern times. Nevertheless, international legislative activity is a slow process and takes place on many fronts. Older conventions which reflect ideas that have had their day in the view of many members of the international community may coexist with instruments reflecting a more modern outlook: not all international legislators necessarily share the same views about the roles of women as other institutions, and the slow process of adoption and adhesion to international treaties can mean that conceptions that are a generation old continue to prevail by default. The nature of treaty regimes may lead to an overhang of older treaties, with some States being party to older treaties while others have moved on to be governed by more modern treaties.

A typology of gender-specific international conventions

One scholar, Natalie Kaufman Hevener, has developed a typology of international conventions and other instruments addressing gender-specific issues adopted in the period since 1945. She has classified these conventions into three categories (while recognising that some conventions may contain provisions from one or more of the categories): *protective* conventions; *corrective* conventions; and *non-discriminatory* conventions.[4] These categories are equally applicable to those treaties adopted before 1945.

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[3] See the list of gender-specific treaties in Annex A.

[4] See generally Natalie Kaufman Hevener, *International Law and the Status of Women* (Boulder, Co: Westview, 1983)[hereinafter *International Law*]. For an earlier discussion, see Hevener, "International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women" (1978) 1 *Harvard Women's Law Journal* 131. See also Betty G. Elder, "The Rights of Women: Their Status in International Law" (1986) 25 *Crime and Social Justice* 1, and Anne M. Trebilcock, "Sex Discrimination" in Rudolf Bernhardt (Gen ed), *Encyclopedia of public*

Protective instruments are those "which reflect a societal conceptualization of women as a group which either should not or cannot engage in specified activities", the protection "normally [taking] the form of exclusionary provisions, articles which stipulate certain activities from which women are prohibited".[5] Conventions which prohibit or limit women's participation in night work or underground work are examples of this type of convention, as are provisions which limit women's participation in activities for reasons related to women's reproductive capabilities.[6]

Corrective instruments also "identif[y] women as a separate group which needs special treatment, but corrective provisions are significantly different from protective ones. The aim of the corrective provisions is to alter and improve specific treatment that women are receiving, without making any overt comparison to the treatment of men in the area."[7] Conventions which address trafficking in women, those which seek to remedy the disadvantages which women historically faced in the realm of nationality upon marriage to a person of another nationality, and conventions which seek to ensure that women enter into marriage only with their free and full consent are the primary examples of this type of convention.[8]

Non-discriminatory instruments "reject a conceptualization of women as a separate group, and rather reflect one of men and women as entitled to equal treatment . . . These provisions treat women in the same manner as men. When women are specifically referred to as a class, it is only with the aim of ending existing separation or special treatment".[9] Examples of such instruments or provisions are the Charter of the United Nations, the Universal Declaration of Human Rights, the equality provisions of the two International Covenants, and ILO instruments on equal remuneration for equal work by men and women workers.[10]

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international law (Max Planck Institute for Comparative Public Law and International Law), vol 8, at 476 (Amsterdam: North-Holland, 1985).

[5] Hevener, *International Law*, *supra* note 4, at 4.

[6] *Id*, at 6–9.

[7] *Id*, at 4.

[8] *Id*, at 9–12.

[9] *Id*, at 4.

[10] *Id*, at 12–18.

As Hevener points out, some instruments may contain elements of different approaches,[11] thereby reflecting unresolved tensions about the position of women in society or the view that genuine equality for women can only be achieved by a combination of different approaches tailored to the context of specific problems. Hevener considers that the CEDAW Convention contains elements of all three approaches, though she notes that the Convention is overwhelmingly based on a model of non-discrimination.[12]

Areas of concern

The following are the principal subject areas that have been addressed by gender-specific international instruments adopted in the last 100 years:[13]

- *trafficking conventions*: those conventions originally directed at the so-called "white slave trade" (although it may be noted that the earlier anti-slavery conventions also addressed violations of human rights of which women were victims). From the 19th century conventions there has been a fairly regular re-enactment of prohibitions on or regulation of various aspects of trafficking in women, including prostitution and the exploitation of others within national boundaries as well as across them.

- *international labour conventions*: these conventions, adopted within the framework of the International Labour Organisation, have sought to regulate the working conditions of women workers specifically as a group; they include conventions relating to night work by women, underground work by women, maternity protection, equal remuneration, and non-discrimination in employment and occupation.

- *conventions dealing with specific issues of civil and political rights and status*: these conventions adopted after the Second World War within the United Nations by the Commission on the Status of Women, address areas where women may face particular problems because of discriminatory national laws and need corrective action to be taken to bring women's position substantively into a position similar to that of men. These include instruments relating to the

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[11] *Id,* at 18-21.

[12] *Id,* at 28-45.

[13] See the list of conventions at Annex A.

nationality of married women, the political rights of women, and conventions relating to the minimum age for marriage and registration of marriage.

- *comprehensive sex discrimination instruments*: these instruments call on States to eliminate discrimination against women across a broad range of areas, including both civil and political rights as well as economic, social and cultural rights. The main examples of this type of instrument are the Declaration on the Elimination of Discrimination against Women 1967[14] and the Convention on the Elimination of All Forms of Discrimination against Women 1979.

- *instruments dealing with violence against women*: these instruments reflect the growing concern with violence against women at the international normative level; while issue-specific conventions, these conventions represent an important change in perspective in a number of respects. The most important instruments are the Declaration on the Elimination of Violence against Women[15] and the Inter-American Convention on Violence against Women.[16]

This paper focuses on the 1979 Convention on the Elimination of all Forms of Discrimination against Women since it is the most comprehensive international treaty dealing with gender equality issues and incorporates many of the standards contained in the earlier, more focused conventions.

B. The Convention on the Elimination of All Forms of Discrimination against Women

In the early 1970s the UN Commission on the Status of Women decided to embark on the elaboration of what was to become the Convention on the Elimination of all Forms of Discrimination against Women. The proponents of the Convention considered that the time had come for a comprehensive statement of women's entitlements to equality in a form that would be legally binding for States which became parties to a treaty which contained those guarantees. The Convention thus moved beyond the 1967 Declaration on the Elimination of Discrimination against

[14] GA Res 2263 (xxII), adopted 7 November 1997.

[15] GA Res 48/104 (1994), 1 IHRR 329.

[16] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), opened for signature, 9 June 1994, entered into force 5 March 1995, 33 ILM 1534.

Women, which had been a broad statement, in non-binding form, of women's rights to equality and non-discrimination in many areas of life.

The Convention on the Elimination of All Forms of Discrimination against Women was finally adopted in 1979 and entered into force in September 1981.[17] As of 2 September 1998 there were 162 States Parties to the Convention, including all States in the Latin American and Caribbean region.[18]

The Convention contains guarantees of equality and freedom from discrimination by the State and by private actors in all areas of public and private life. To a large extent, it codifies the existing gender-specific and general human rights instruments containing guarantees of freedom from discrimination on the ground of sex, though it adds some significant new provisions.[19] It thus requires equality in the fields of civil and political rights, as well as in the enjoyment of economic, social and cultural rights.

The problem the Convention addresses is that of discrimination against women, rather than discrimination on the basis of sex. For the purposes of the Convention

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[17] Two recent book-length commentaries on the Convention are Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Dordrecht: Martinus Nijhoff, 1993); and Japanese Association of International Women's Rights, *Commentary on the Convention on the Elimination of All Forms of Discrimination Against Women* (Bunkyo: Japanese Association of International Women's Rights, 1995). See also Andrew Byrnes, "The Convention on the Elimination of All Forms of Discrimination against Women" in W. Benedek, D. Gierycz, M. Nowak and G. Oberleitner (eds), *Human Rights of Women – International and African Perspectives* (forthcoming,) and Andrew Byrnes, "The Committee on the Elimination of Discrimination against Women" in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 2nd ed, forthcoming,). See also the sources listed in Annex B to this paper. For a detailed bibliography on the Convention and related matters, see Rebecca J. Cook and Valerie L. Oosterveld, "A Select Bibliography of Women's Human Rights", (1995) 44 *American University Law Review* 1429. This bibliography is updated and made available on-line through the Internet by the Laskin Law Library at the University of Toronto. The URL is http://www.law.utoronto.ca/pubs/h_rghts.htm. See also the list of resources prepared by the International Women's Rights Project at the Centre for Feminist Research at York University: http://www.web.net/~marilou/resources.htm.

[18] See the list in Annex B.

[19] The Convention's explicit application to discrimination in the field of private life as well as public life (as in the International Convention on the Elimination of All Forms of Racial Discrimination), its requirement in article 5 that States must eliminate traditional and stereotyped notions of the roles of the sexes, and article 14's explicit concern with rural women are innovative provisions.

article 1 defines "discrimination" in the following terms (which draw on the similar definition in the Racial Discrimination Convention):

> "For the purpose of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[20]

Both *direct* and *indirect* discrimination are covered by the Convention.

Under the Convention States parties assume different types of obligations with respect to the elimination of discrimination in a number of fields.[21] A number of provisions of the Convention require immediate steps to be taken to guarantee equality, while other provisions are of a more programmatic nature, under which States parties oblige themselves to take "all appropriate measures" or "all necessary measures" to eliminate particular types of discrimination.[22]

In addition to the substantive obligations accepted by States which become parties to the Convention, States also accept an obligation under article 18 of the Convention to submit regular reports on the steps they have taken to give effect to their obligations under the Convention. These reports are to be submitted within one year after the entry into force of the Convention for the State concerned and

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[20] The Human Rights Committee has interpreted the guarantees against discrimination contained in the International Covenant on Civil and Political Rights in similar terms: see *General Comment 18 (37)* (1989), UN Doc HRI/GEN/1/Rev.3, at 26 (1997). The general comments of the Human Rights Committee are also available on the website of the United Nations High Commissioner for Human Rights: http://www.unhchr.ch/.

[21] Many States have entered reservations to the Convention limiting their obligations in quite fundamental ways (by general reservations) or in relation to specific articles.

[22] For a legal analysis of the different types of obligations under the Convention see Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination Against Women?", (1996) 21(3) *Brooklyn Journal of International Law* 679, 707–732; Rebecca J. Cook, "State Accountability under the Convention on the Elimination of All Forms of Discrimination Against Women", in Rebecca J. Cook (ed), *The Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 228.

every four years thereafter. The record of Commonwealth Caribbean States has, overall, been rather poor so far as timely submission of reports is concerned; a number of states have not yet submitted their initial reports (more than 10 years after ratification, and most others are well behind in the submission of subsequent reports.[23] These reports are examined by the Committee on the Elimination of Discrimination against Women (CEDAW) a body established pursuant to article 17 of the Convention and consisting of 23 independent experts elected to serve in their personal capacity by the States parties to the Convention. The reporting procedure is the only monitoring or enforcement procedure established under the Convention which is obligatory for States parties,[24] though work is presently proceeding on an optional protocol to the Convention that will establish an individual complaints and inquiry procedure.[25]

C. Committee on the Elimination of Discrimination against Women and its output

As of the end of July 1998, the Committee on the Elimination of Discrimination against Women had held 19 sessions since it began its work in 1982.[26] During

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[23] See the details in Annex D.

[24] Though it should be mentioned that article 21 provides for reference of a dispute over the interpretation of the Convention to the International Court of Justice, a provision to which many States parties have entered reservations and which has never been used.

[25] For the history and content of the draft optional protocol, see generally Aloisia Wörgetter, "The Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women", (1997) 2 *Austrian Review of International and European Law* 261; Andrew Byrnes, "Slow and Steady wins the Race? The Development of An Optional Protocol to the Women's Convention" in *Proceedings of the 91st Annual Meeting of the American Society of International Law* (1997) 383; Ursula O'Hare, "Ending the 'Ghettoisation': The Right of Individual Petition to the Women's Convention" [1997] 5 *Web Journal of Current Legal Issues*; Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination Against Women?", (1996) 21(3) *Brooklyn Journal of International Law* 679; and Elizabeth Evatt, "The Right to Individual Petition: Assessing its Operation before the Human Rights Committee and Its Future Application to the Women's Convention on Discrimination" in *Proceedings of the 89th Annual Meeting of the American Society of International Law* 227 (1995).

[26] The reports of the Committee on the work of its sessions are contained in the report of the Committee to the General Assembly, issued as a supplement (generally Supplement No. 38) to the Official Records of the General Assembly, and are obtainable in the official languages of the United Nations from the Division for the Advancement of Women, United Nations, New York. Documents from the earlier sessions of the Committee are to be found in United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume I (1982–1985)* (New York: United Nations, 1989), UN Sales No. E.89.IV.4, and United Nations, *The*

those sessions the Committee has reviewed dozens of reports submitted by States parties to the Convention on the measures that they have taken to give effect to their obligations under the Convention. In addition, the Committee has carried out a considerable amount of other work, contributing to international conferences focusing on women as well as on other themes, and the elaboration of suggestions and general recommendations under the Convention.

As with the other treaty bodies, in the work of the Committee four types of documentation are of particular importance:[27]

- the Convention itself;
- the *General recommendations* of the Committee;
- the *Concluding comments* of CEDAW on individual countries;
- the reports of individual countries to the Committee (and the record of discussion of those reports between the Committee and government).

While the Convention itself may be reasonably well known to many, the other output of the Committee and of States parties to the Convention are not. Yet it is these documents that provide detailed content to the generally-worded provisions of the Convention (in the case of the *General recommendations*), show the relevance of the Convention's provisions to the situation in a particular country (the *Concluding comments* adopted following a country's report), and provide a source of comparative information about how other States parties (and one's own) have gone about implementing the Convention.

Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 2 (1986-1987) (New York: United Nations, 1990), UN Sales No. E.90.IV.4. For a review of the work of the Committee up to the Beijing Fourth World Conference on Women, see *Report of the Committee on the Elimination of Discrimination against Women (CEDAW) on the progress achieved in the implementation of the Convention*, UN Doc. CEDAW/C/1995/7 (1995), reproduced as Document 115 in *The United Nations and the Advancement of Women 1945*-1995, United Nations Blue Books Series, vol 6 (New York: United Nations, 1995), at 511. Many recent documents of the Committee and information about the Committee and its members can be found on the WWW site of the Division for the Advancement of Women. The URL is http://www.un.org/womenwatch/daw/cedaw/.

[27] While the present discussion is concerned primarily with the CEDAW Convention, the experience under the major UN human rights treaties has been similar and much can be learnt from examining the strategies employed under those treaties.

General recommendations

Under article 21 of the Convention CEDAW has the power to make "suggestions and general recommendations" to States parties. The Committee has used its power to make general recommendations to elaborate its understanding of particular articles of the Convention, or of how the Convention applies to thematic issues (such as violence against women). The more recent *General recommendations* of the Committee and its future ones are likely to provide useful material to support arguments based on the Convention in and out of court.

As of July 1998 the Committee had adopted 23 *General recommendations.*[28] While a number of the earlier *General recommendations* are useful, they are brief, and in 1992 the Committee began to adopt more detailed recommendations. The three most detailed *General recommendations* adopted up to mid-1998 were *General recommendation 19* (1992) dealing with violence against women, *General recommendation 21* (1994) dealing with equality in marriage and the family (including nationality issues), and *General recommendation 23* (1997) dealing with women's equality in political and public life. Each of these *General recommendations* set out in detail the Committee's understanding of the meaning of articles of the Convention and make detailed recommendations to States parties about the steps that need to be taken in order to fulfil their obligations under the treaty.

Although as a formal matter of international law these general recommendations are not binding on States parties, nevertheless they are considered as particularly persuasive interpretations of it;[29] they have been invoked before courts and tribunals,[30] though less frequently than the *General comments* of the Human Rights

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[28] The text of these *General recommendations* appears at UN Doc HRI/GEN1/Rev.3, at 117–157 (1997) and on-line at http://www.wun.org/womenwatch/daw/cedaw (as well as various other websites), and *General recommendations 1–22* in International Women's Rights Action Watch and the Commonwealth Secretariat, *Assessing the Status of Women* (2nd ed. 1996), Appendix E, at 72 and 76.

[29] See Byrnes & Connors, *supra* note 25, at 766–767; *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37, 57–58 (New Zealand High Court, Cartwright J) (noting the relevance of general comments and recommendations as "essential points of reference" for domestic courts, but also that they do not bind New Zealand courts). See also *Wellington District Legal Services Committee v Tangiora* (1997) 4 HRNZ 136, 3 BHRC 11 (New Zealand Court of Appeal) (noting the non-binding status of views of the Human Rights Committee under the First Optional Protocol to the ICCPR).

[30] See also *Quilter v Attorney-General* [1998] 1 NZLR 523, at 553, per Thomas J. (New Zealand Court of Appeal) (referring to *General recommendation 21*); and *Vishaka v State of Rajasthan*, AIR

Committee, which have been often invoked before courts, both in jurisdictions in which the ICCPR has been incorporated (such as Hong Kong[31] and Japan[32]) and in jurisdictions in which it has not (such as Australia).

Reports of States parties

Each State party to the Convention accepts an obligation to submit reports to the Committee on a regular basis. These provide a useful source of comparative information, both about what States consider to be the extent of their obligations under the Convention and about the various ways in which the Convention can be implemented. In relation to one's own country, the national report provides an authoritative (though not always satisfying) statement of the government's position on various issues. Often they will contain commitments by governments to undertake particular actions, commitments to which a government may subsequently be referred in order to ensure that promises made are in fact carried out.[33] In some cases they may be relied on by the courts or tribunals of other countries as credible statements of the existence of discrimination in another country (for example, in an asylum case).[34]

1997 SC 3011, at 3015, (1998) 3 BHRC 261 (Supreme Court of India) (citing *General recommendation 19* in relation to sexual harassment).

[31] See generally Andrew Byrnes, "And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights", in Philip Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Clarendon Press, 1998), chapter 9, and Johannes Chan, "Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence" (1998) 47 *International and Comparative Law Quarterly* 928.

[32] See generally Yuji Iwasawa, "The Domestic Impact of Acts of International Organizations Relating to Human Rights", in Philip Alston and James Crawford (eds), *The Future of the UN Human Rights Treaty System* (Cambridge: Cambridge University Press, forthcoming).

[33] For an example of the relevance of statements in reports to domestic litigation, see *Re B and B: Family Law Reform Act 1995* (1997) FLC 92–755, at p 84,227 (Full Court of the Family Court of Australia) (referring to Australia's initial report under the Convention on the Rights of the Child).

[34] See e.g. Case N97/19046, (Australian) Refugee Review Tribunal, 16 October 1997, available through http://www.austlii.edu.au (reference to the initial report submitted under the Convention by Nigeria in support of a claim for asylum status based on claimant's fear that her daughter and she would be subjected to female circumcision, if returned to Nigeria).

The Committee's consideration of reports and its concluding comments

One of the major sources for elucidating the meaning of the Convention has been the questions put by members of the Committee to States parties and the views members have expressed on the extent to which the State has given effect to its obligations under the Convention.[35] Recently, however, the Committee has adopted the practice of adopting concluding comments, which express the collective view of the Committee on the extent to which the Convention has been implemented in a given country, rather than the views of individual members. The purpose of these concluding comments is to highlight the areas in which the Committee considers action is required as a matter of priority. Sometimes they will include the Committee's view that there is a violation of the Convention. In its concluding comments the Committee has decided to follow the structure used by a number of the other treaty bodies.[36] This standard format consists of an introduction, a section on positive aspects (organised in the order of the articles of the Convention), a section "on factors and difficulties affecting the implementation of the Convention", and a section identifying principal areas of concern, and a final section containing concrete suggestions and recommendations in response to the problems identified by the Committee.

This material can prove useful on a comparative basis, but its most useful application tends to be in relation to the country about which the comments are made. These concluding observations can provide useful support for efforts to bring about compliance with the Convention, in a formal legal context (such as litigation) or in a more political context.[37]

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[35] For an overview of the types of questions asked, see *Assessing the Status of Women*, *supra* note 28.

[36] Decision 16/I, *CEDAW 1997 Report, supra* note 1. For the latest statement in relation to structure and content of concluding comments, see *Report of the Committee on the Elimination of Discrimination against Women in 1998*, UN Doc. A/53/38 (Part II).

[37] For a general discussion of the domestic use of the output of the treaty bodies, see Andrew Byrnes "Uses and Abuses of the Treaty Reporting Procedure: Hong Kong Between Two Systems" in Philip Alston and James Crawford (eds), *The Future of the UN Human Rights Treaty System* (Cambridge: Cambridge University Press, forthcoming).

D. The relevance of the convention and similar instruments to domestic litigation

The status of treaties generally in common law jurisdictions

The position in nearly all Commonwealth and common law countries is in formal terms fairly similar: unincorporated treaties may not generally be relied on before domestic courts directly to found a cause of action, but they may nevertheless have an indirect impact on the interpretation and application of law. The presumption that the legislature does not intend to legislate in a manner that is inconsistent with international law is well-accepted in common law jurisdictions, and has as its corollary a principle of statutory interpretation – of uncertain practical importance – that statutes should be interpreted in a manner which is consistent with international law.[38] International treaties and customary international law are also recognised as relevant sources for the development of the common law. [39] Examples of how unincorporated treaties have been used by courts include:[40]

- as an aid to constitutional or statutory interpretation, either generally or in order to resolve an "ambiguity";[41]

- a relevant consideration to be taken into account in the exercise of an administrative discretion by a decision-maker (and thus subject to judicial review);[42]

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[38] The issue can be complicated somewhat in relation to treaties. As a strictly logical proposition it might be maintained that, in general, a legislature can only be presumed to have legislated consistently with treaties which were in force for the State concerned (or at least in contemplation) at the time when the statute was passed.

[39] See generally Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997).

[40] For a recent overview in the Australian context, see *Re B and B: Family Law Reform Act 1995* (1997) FLC 92–755, at pp 84, 223–84, 231 (Full Court of the Family Court of Australia). See also James Maurici, "10 Ways to Rely on the Human Rights Convention" [1996] *Judicial Review* 29.

[41] See e.g. *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana) (consideration of various international instruments in deciding whether constitutional guarantee of equality included discrimination based on sex).

[42] See e.g. *R v Director of Immigration, ex parte Simon Yin Xiang-jiang* (1994) 4 HKPLR 264 (Hong Kong Court of Appeal) (existence of treaty obligation not to expel a stateless person except on grounds of national security or public morals should be taken into account by decision-maker

- as giving rise to a *legitimate expectation* that the provisions of the treaty will be applied by a decision-maker unless a hearing is given to the person affected;[43]

- a factor that may be taken into consideration in the development of the common law, where the common law is unclear,[44]

- a factor that may be taken into account when identifying the demands of public policy.[45]

The extent of utilisation of unincorporated treaties depends largely on the approach adopted by the judiciary: a judiciary which is prepared to be open to international influences and to draw on international jurisprudence has some scope for doing so in most common law systems.[46] The task is probably easier where the judge is interpreting a constitutional or statutory Bill of Rights (in which there may be similar or identical guarantees to those contained in treaties by which the State is bound or which form part of customary international law). This is the case for the vast majority of Commonwealth countries which became independent after the Second World War; many of these countries have constitutions which trace their parentage to the European Convention on Human Rights.[47] This makes reference to

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considering whether to expel such a person on other grounds), citing *Tavita v Minister of Immigration* [1994] 2 NZLR 257, [1994] NZAR 116 (New Zealand Court of Appeal).

[43] *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273, 128 ALR 353 (High Court of Australia) (relevance of guarantees in the Children's Convention to decision to deport a parent).

[44] *Rantzen v Mirror Newspapers* [1994] QB 670 (English Court of Appeal) (guarantee of freedom of expression and its relation to applicable standard for review of jury awards in defamation cases).

[45] *Canada Trust Co. v Ontario Human Rights Commission* (1990) 69 DLR (4th) 321 (Ontario Court of Appeal) (international treaties on non-discrimination, including CEDAW Convention taken into account in determining whether a sexist, racist and classist charitable trust was against public policy).

[46] See generally Andrew Byrnes, "Using International Human Rights Norms in Constitutional Interpretation to Advance the Human Rights of Women", paper presented at the 50th Anniversary Conference, Faculty of Law, University of Colombo, Sri Lanka, 23–26 July 1998.

[47] See the classic statement of Lord Wilberforce in *Minister of Home Affairs and Another v Fisher* [1980] AC 319, at 328–330; (1979) 44 WIR 107 (Privy Council).

international jurisprudence under the European Convention[48] (and the ICCPR[49]) particularly easy to justify in formal terms, if any justification is needed. For those countries that have accepted the competence of the Human Rights Committee under the First Optional Protocol to the ICCPR to consider individual complaints, the relevance of international case law is even more immediate.[50]

In recent years, a number of Commonwealth courts (especially those in Southern Africa) have energetically embraced international jurisprudence in the interpretation of national constitutional guarantees, including treaties to which the State concerned is not a party as well as those by which it is bound.[51] A similar approach has been in evidence at the series of judicial colloquia organised by the Legal Affairs Division of the Commonwealth Secretariat and Interights since 1988 in the statements adopted by those colloquia.[52] The Gender and Youth Affairs Division of the Commonwealth Secretariat has also held four regional judicial

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[48] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 221.

[49] International Covenant of Civil and Political Rights, adopted on 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

[50] See the views of Brennan J of the High Court of Australia in *Mabo v Queensland (No. 2)* (1995) 175 CLR 1, at 42: "The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imposes."

[51] See e.g. *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] RC (Const) 623 (Court of Appeal of Botswana); *State v Ncube*, 1990 (4) SA 151 (Supreme Court of Zimbabwe); *In re Corporal Punishment*, 1991 (3) SA 76 (Namibian Supreme Court); *Rattigan v Chief Immigration Officer of Zimbabwe* (1994) 103 ILR 224, [1994] 1 LRC 343, 1995(2) SA 182 (Supreme Court of Zimbabwe). See generally John Dugard, "The Role of Treaty-Based Human Rights Standards in Domestic Law: The Southern African Experience", Philip Alston and James Crawford (eds), *The Future of the UN Human Rights Treaty System* (Cambridge: Cambridge University Press, forthcoming).

[52] See generally Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988–92* (London, Commonwealth Secretariat and Interights, 1992). For the most recent colloquium, see the *Georgetown Conclusions*, from the *Caribbean Colloquium on the Domestic Application of International Human Rights Norms, Georgetown, Guyana, 3–5 September 1996*, (1997) 23(1–2) *Commonwealth Law Bulletin* 573. See also Hunt, *supra 39*, at 35–38 and Margaret Allars, "International Law and Administrative Discretion" in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne: Melbourne University Press, 1997) 232, 248–250 (discussion of Bangalore Principles).

colloquia focusing on the use of international human rights standards in domestic litigation to advance the rights of women (Victoria Falls, Zimbabwe in 1994; NGO Forum, Beijing, China in 1995; Hong Kong in 1996; and Georgetown, Guyana in 1997).[53] A number of judges in the Commonwealth have drawn on these statements and colloquia as helpful statements of the relevance of international human rights norms to the tasks facing national judges.[54]

There are, of course, a number of reasons why judges may wish to be cautious in drawing too enthusiastically on treaties which have not been incorporated as part of domestic law, even though they are binding on the State as a matter of international law. Justice Michael Kirby (now of the High Court of Australia) has identified a number of matters that may influence judges to take a less expansive approach to the use of treaty norms.[55] They include the fact that the ratification of a treaty is generally an executive act, which may or may not reflect the views of the populace or the Parliament; or, in federal states, concern that the federal government may use the power to ratify treaties (and associated legislative power to implement them) to expand federal power at the expense of the power of the States.[56] Other concerns are that the process of judicial development of the law

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[53] See the *Victoria Falls Declaration*, and the *Hong Kong Conclusions*, in Andrew Byrnes, Jane Connors and Lum Bik (eds), *Advancing the Human Rights of Women: Using International Instruments in Domestic Litigation: Papers and statements from the Asia/South Pacific Regional Judicial Colloquium, Hong Kong, 20–22 May 1996* (London: Commonwealth Secretariat, 1997) at 3, 6. The *Hong Kong Conclusions* also appear at (1997) 23 (1–2) *Commonwealth Law Bulletin* 575. The *Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child* appear in this volume.

[54] See e.g. Cartwright J in *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37, 57–58, [1998] 2 NZLR 218 (New Zealand High Court). See also *Attorney-General of Botswana v Unity Dow* [1992] LRC (Const) 623, 671 per Aguda JA (Court of Appeal of Botswana).

[55] See Michael Kirby, "The Role of International Standards in Australian Courts" in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia* (Sydney: Federation Press, 1995), at 81. These concerns have a special relevance to the case of Australia, where the decision of the High Court in *Teoh* (holding that the ratification of the Convention on the Rights of the Child by Australia gave rise to a legitimate expectation that its principles would be adhered to by decision-makers in immigration decisions). This gave rise to considerable objections by the government, generating a joint statement by the Attorney-General and Minister for Foreign Affairs of the Labour government (10 May 1995), which was subsequently reiterated by the same Ministers in the coalition government that succeeded them: see Minister for Foreign Affairs and the Attorney General and Minister for Justice, *Joint Statement: The Effect of Treaties in Administrative Decision-Making*, 25 February 1997, *Commonwealth of Australia Gazette, Special Gazette*, 26 February 1997, No. S 69 (stating that the ratification of a treaty should not be taken as giving rise to a legitimate expectation that would permit an administrative decision to be challenged).

[56] *Id*, at 86–87.

may divert attention from the more open and democratic adoption of such norms by way of statutory or constitutional Bills of Rights, suspicion about the composition and competence of international bodies, and a concern that the drive towards international conformity not lead to a neglect of the relevant national, local, social and historical context.[57]

E. Some examples of the invocation of the convention or similar instruments in domestic courts – does it make a difference?

The Convention has been cited to and by courts in an increasing number of cases in recent years. These cases include instances in which the Convention is an authoritative national rule and determinative of the outcome of a case (sometimes in conjunction with other constitutional or statutory provisions), a relevant source to be taken into account in the interpretation of a constitutional or statutory provision, or a statement of values relevant to the decision-making process, as well as cases in which it may be cited simply as background material without any apparent significant impact on the decision. [58]

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[57] *Id,* at 87–88.

[58] In some cases the Convention and CEDAW's work may provide little more than background for the courts. See eg *Coburn v Human Rights Commission* [1994] NZLR 323, 328 (New Zealand High Court); *Chan v Canada* (1995) 128 DLR (4th) 213, 248 (Supreme Court of Canada), per La Forest J; *Brink v Kitshoff NO*, 1996 (4) SA 197, 214-215 (South African Constitutional Court); *Re B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755 (Full Court of the Family Court of Australia). The Convention has also often been cited in asylum cases, in which the applicant is relying on gender discrimination in the country from which she has fled to bring herself within the definition of "refugee" in the 1951 Refugee Convention. See e.g. the discussion of the New Zealand experience in this regard in Rodger P. G. Haines, "Gender-Based Persecution: New Zealand Jurisprudence", *International Journal of Refugee Law, Special Issue – Autumn 1997, UNHCR Symposium on Gender-Based Persecution*, 129, 141–142. For two Australian examples, see Refugee Review Tribunal, Case N97/19046, 16 October 1997; and Refugee Review Tribunal, Case N95/07780, 4 September 1997 (reference to Convention and other instruments in context of claim for refugee status based on fear of violence from husband and the likely failure of the Indonesian authorities to provide redress in particular case).

Violence against women – sexual harassment

- *Aldridge v Booth* (Federal Court of Australia)[59]
  The Federal Court dismissed a challenge to the constitutionality of the sexual harassment provisions of the federal Sex Discrimination Act, holding that article 11 of the Convention imposed a very clear obligation on Australia to eliminate sex discrimination in employment, and that sexual harassment was a form of sex discrimination within the meaning of the Convention. Accordingly, the provisions were constitutionally valid under the power to legislate "with respect to external affairs", which included the power to implement treaty obligations.

  That the court's conclusion was correct in terms of the Convention can been seen from CEDAW's view as expressed in its *General recommendation 19* (1992), paras 17–18, in which the Committee makes clear its view that sexual harassment is a violation of article 11 of the Convention and is a form of gender-specific violence.[60]

- *Vishaka and others v State of Rajasthan* (Supreme Court of India)[61]
  This case arose out of an alleged gang rape and the failure of officials to investigate complaints of rape (the women who were raped were State employees). A writ was lodged with the Supreme Court requesting it to direct the State to form a Committee to frame guidelines for the prevention of sexual harassment and abuse of women. The terms proposed to the court by counsel for the

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[59] (1988) EOC 92-222, 80 ALR 1.

[60] See also *Victoria v Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416, 138 ALR 129, in which a number of sections of federal legislation relating to equal remuneration of men and women workers and parental leave were held to be valid by the High Court of Australia, since they involved the implementation of obligations under ILO Conventions, the CEDAW Convention and the International Covenant on Economic, Social and Cultural Rights.

[61] AIR 1997 SC 3011, (1998) 3 BHRC 261. The Supreme Court of India has referred to the Convention in a number of other cases in recent years. See e.g. *Madhu Kishwar v State of Bihar,* AIR 1996 SC 1864. The case involved a challenge to sex discriminatory inheritance rights under customary law. The court cited extensively from the Convention and noted that "article 2(e) of CEDAW enjoins this Court to breath life into the dry bones of the Constitution ... to prevent gender discrimination and to effectuate right to life including empowerment of economic, social and cultural rights." See also *Gaurav Jain v Union of India,* AIR 1997 SC 3021 (citing, among other international instruments, the CEDAW Convention and the Convention on the Rights of the Child).

petitioners were in part drawn directly from certain passages in CEDAW's *General recommendation 19* dealing with violence against women.

While the decision of the court was based on a number of guarantees of fundamental rights under the Constitution of India[62] and the court's jurisdiction under article 32 of the Constitution to enforce fundamental rights, the court referred to article 11 of the Convention and to *General recommendation 19*. It commented:

> "In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of the interpretation of the guarantee of gender equality, the right to work with human dignity in acts 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."[63]

The Court then went on to quote from the Convention and from the *General recommendation* to inform its interpretation of the constitutional guarantees; the guidelines and norms laid down by the Court in an order agreed between the parties also drew directly on those instruments.[64] This is one of the few cases in which the Committee's *General recommendations* have been cited.[65]

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[62] The court placed primary emphasis on the guarantees of the right to equality, the right to life and the right to liberty; however, it also noted the relevance of the right to practice any profession or to carry on an occupation, and the right to just and humane conditions of work.

[63] AIR at 3013-3014, 3 BHRC at 264.

[64] AIR at 3015-3016, BHRC at 267–268.

[65] See also *Quilter v Quilter* [1998] 1 NZLR 523, at 553, (1997) 4 HRNZ 170 (per Thomas J) where reference was made to CEDAW's *General recommendation 21*, as part of a general discussion of the nature of the "family" protected by international law and the guarantees of equality of spouses within marriage.

- *Ruka v Department of Social Welfare*[66]
  In this case the appellant had been convicted of welfare fraud for claiming benefits available only to persons who were not married or who were not living in a relationship in the nature of marriage. Ruka had been living with a man in a relationship in which she suffered frequent beatings and rape; her partner made no financial contribution to the household. The appellant succeeded in her appeal against the conviction, a majority of the court concluding that there was no relationship in the nature of marriage because of the lack of financial interdependence, and (in the view of one judge) also because of the lack of mental and emotional commitment by her to the relationship as she suffered from battered women's syndrome. Counsel who appeared as *amicus curiae* submitted a brief making extensive reference to the CEDAW Convention, CEDAW's *General recommendation 19* and other international instruments relating to violence against women, as well as general human rights instruments in support of her case.[67] However, only one judge, Thomas J, referred to this material, noting:

  > "the extensive work being undertaken at an international level to ensure that violence towards women is recognised as a major barrier to women achieving fundamental human rights and freedoms.... While the importance of this work [CEDAW's work, among other sources] is recognised, it is not necessary to traverse the reports in this judgment. It is sufficient to acknowledge that they emphasise the disastrous effects of violence against women and the extensive impact which it has on the basic rights of women."[68]

- *Re Robert Southern and Department of Education, Employment and Training,* (Australian Administrative Appeals Tribunal)[69]

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[66] [1997] NZAR 15, [1997] 1 NZLR 154 (New Zealand Court of Appeal).

[67] "Submissions of Amicus Curiae,", Ruka v The Queen, CA No 45/96, Court of Appeal,Wellington.

[68] [1997] NZAR at 32, [1997] 1 NZLR at 171.

[69] No A92/87 AAT, No 8533, 17 February 1993, (1993) EOC 92-491.

In this case the Administrative Appeals Tribunal upheld a refusal to disclose documents containing complaints of sexual harassment, which would have permitted the respondent to identify the persons who had lodged those complaints. The Tribunal stated (at para 27) that:

> "27. It is not only a matter of public interest and importance to maintain a workable sexual harassment complaints and elimination system, it is a fulfilment of the legal responsibilities of any agency under the Act. The Act itself is a fulfilment of Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women, as appears in s 3(a) of the Sex Discrimination Act. These are substantial public interest considerations. It is important, in my view, that complainants or potential complainants be assured of confidentiality when they invoke the mechanism established by their employing agency to complain of sexual harassment. They should be free to withdraw formal complaints without proceeding to a formal hearing (at which of course some of the matters alleged must be made known to the alleged offender) without fear that their identity or the substance of their complaint would be made public. It is in the public interest, not only that justified complaints be treated sensitively and in confidence, but also that other complaints, which may or may not be justified, may be withdrawn without fear of recrimination. To facilitate a different result would be to cause a substantial adverse effect on the management of personnel."

Legal capacity

- *Ephrahim v Pastory* (High Court of Tanzania)[70]
  The High Court of Tanzania relied on the Convention (as well as the ICCPR and the African Charter on Human and Peoples' Rights) in holding that the guarantee of equality contained in the Bill of Rights overrode the customary law rules which prevented women from selling clan land, while permitting men to do so (subject to the

[70] (1990) 87 ILR 106, [1990] LRC (Const) 757.

condition that any other clan member could repurchase the land from a purchaser).

Discrimination in political and public life – citizenship and access to public office

- *Attorney-General of Botswana v Unity Dow* (Court of Appeal of Botswana)[71]
  The High Court and Court of Appeal of Botswana upheld a challenge to provisions of Botswana's nationality law, which did not permit a Botswana woman married to a non-Botswana national to pass on her citizenship to the children of the marriage. The Convention, along with other human rights instruments, has been relied on in a number of cases to interpret constitutional guarantees of equality.

- *Voto No 716-98, Constitutional Chamber of the Supreme Court of Justice of Costa Rica*[72]
  In this case the Supreme Court of Justice of Costa Rica upheld a challenge to the failure of the executive government to include any women in the list of candidates forwarded to the legislature for appointment to the Board of Directors of the Monitoring Body for Public Services (*Junta Directiva de la Autoridad Reguladora de los Servicios Públicos*), a body which monitors government's functioning in regards to its public services such as public transport, hospitals, schools, water and services. The court took the view that both the guarantees of equality under national law and the obligation embodied in article 7 of the Convention to take appropriate measures to ensure that women enjoyed equality in public life meant that the government had to take active steps to achieve this goal – and this included nominating a similar number of women and men to public posts (assuming that there were sufficient qualified candidates of each sex). The court ordered the government to ensure that future nominations contained a representative number of women.

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[71] [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal).

[72] 6 February 1998, *Boletín de la Sala Constitucional de la Corte Suprema de Justicia*, No 59, April 1998, 10. I am grateful to Ms Alda Facio for providing me with information about this case.

Discrimination in inheritance law

- *Dhungana and another v Government of Nepal* (Supreme Court of Nepal)[73]
  A challenge was made to the Nepali law that provided that, while a son was entitled to a partition share of his father's property at birth, a daughter was only entitled to obtain a share when she reached the age of 35 and was still unmarried. Under Nepali law, ratified treaties form part of the law of Nepal and an action was brought challenging this law on the ground that it violated both the guarantee of equality in the Constitution and article 15 of the CEDAW Convention. The court appeared to consider that there was a violation of these guarantees, but was reluctant to declare the law unconstitutional with immediate effect. The court eventually ordered the government to "introduce an appropriate Bill to Parliament within one year . . . by making necessary consultations as to this matter with the recognised Women's Organisations, sociologists, the concerned social organisations and lawyers . . . and by studying and considering also the legal provisions made in other countries in this regard."[74]

Discrimination in the family

- *Supreme Court of India, Writ Petition (Civil) No. 684 of 1994*[75]
  This action was a response to the declaration entered by India when it ratified the CEDAW Convention and the government's apparent failure to take steps to determine the views of the different communities on repealing discriminatory personal laws. When India ratified the Convention in 1993, it entered a declaration in these terms:

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[73] Writ No 3392 of 1993, 2 August 1995, unreported. I am grateful to Ms Sapana Pradhan Malla, of Development Law Associates, Kathmandu, counsel in the case, for providing me with an English translation of the judgement. This was one of a number of cases brought to challenge sex discriminatory laws in reliance on the Convention; in each case the court referred the matter to the government with an order to introduce conforming legislation within a year.

[74] *Id*, at 17.

[75] Reproduced in Rani Jethmalani, "WARLAW's Petition in the Supreme Court of India at New Delhi (Civil Original Jurisdiction) Writ Petition (Civil) No. 684 of 1994) in Rani Jethmalani (ed), *Kali's Yug: Empowerment, Law and Dowry Deaths* (New Delhi: Har-Anand Publications, 1995) 107–119. I am grateful to Ms Rani Jethmalani of WARLAW, counsel in the case, for information about it.

> "With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent."

The petitioners sought an order from the court directing the government of India to show what steps it had taken to ascertain the views of the Hindu community on whether it was appropriate to repeal discriminatory personal laws with a view to ensuring equality for women. The case is still pending.

- *In the marriage of Mahony and McKenzie*[76]

  This case involved a dispute between two divorced parents over the surname by which their child should be known, Warnick J referred to the provisions of article 16(1)(g),[77] noting that by the incorporation of this guarantee into national law by the Sex Discrimination Act 1984, the legislature had "demonstrated a commitment to equal rights to husbands and wives in the choice of a family name, at least for themselves".[78] Warnick J continued:

> "31. I do not see that the Act affects the discharge of this court's judicial responsibilities, but in the absence of argument do not express a concluded view. Even should the Act have application in this case, I cannot see that it would impinge upon my decision-making process, which must be to

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[76] (1993) FLC 92-408, (1993) 16 Fam LR 83 (Family Court of Australia).

[77] Article 16(1)(g) provides:

> "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: . . .
> (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation."

[78] (1993) FLC 92-408 at p 80,185 (Warnick J). However, see also the later decision of the same judge in *Fooks v McCarthy* (1994) ¶FLC 92-450, in which he stressed that in such cases the paramount consideration was the welfare of the child rather than giving effect to the principle of equal status of the spouses by mandating the use of hyphenated family names where each parent wished the child to bear his or her family name.

> weigh those factors bearing upon the best interests of the child, except insofar as the Act might require me not to give preference to the position of one party as against the other, on the basis that one party has an exclusive or more significant parental right in relation to choice of the child's surname, than does the other party.
>
> 32. In this regard I note sub-paragraph (d) of Article 16 of the Convention provides for measures to ensure:
>
> > 'the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount'."[79]

Discrimination in criminal law

- *Case No 936-95* (Constitutional Court of Guatemala)[80]

  The Constitutional Court of Guatemala also relied on the Convention in considering a challenge to various provisions of the Guatemalan penal code relating to adultery and concubinage which treated women and men differently. The petitioners invoked both the equality guarantees of the Guatemalan constitution and international treaties to which Guatemala was party (including the CEDAW Convention, the American Convention on Human Rights and the Inter-American Convention on Violence against Women). The court held the articles unconstitutional, reasoning that to hold the impugned articles valid would not only render nugatory the constitutional mandate to eradicate inequality but would also represent a failure by Guatemala to fulfil its obligations under the conventions mentioned above which, according to article 46 of the Guatemalan Constitution, prevailed over the provisions of the Penal Code.[81]

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[79] (1993) ¶FLC 92-408 at p 80,185.

[80] Case No 936-95, Constitutional Court of Guatemala, judgement of 6 March 1996. I am grateful to Ms Elizabeth Abi-Mershed for providing me with a copy of this decision.

[81] *Id* at 7. See also the decision of the Constitutional Court of Colombia, in which it considered article 11 of the Convention in relation to a claim of unlawful and unconstitutional employment discrimination against a female pilot who was unable to undertake flying duties due to treatment for reproductive health difficulties: Case No T-341/94, 27 July 1994. I am grateful to Ms Adriana de la Espriella for providing me with a copy of this judgement.

The difference it makes: the question of temporary special measures

- *Re Australian Journalists' Association* (Australian Conciliation and Arbitration Commission)[82]
  The Commission refused to permit a change to the rules of the Australian Journalists' Association which was designed to ensure that there was at least one-third representation of women members on the Association's governing body. Boulton J found that the provision was discriminatory and did not fall within section 33 of the Sex Discrimination Act, which permitted measures to be taken which are intended to ensure equality of opportunity.[83]

  Boulton J held that women had the same opportunity formally to stand for election and that therefore the section did not apply. He did not consider article 4 of the CEDAW Convention (which s 33 was intended to reflect); otherwise, it is difficult to see how he could have come to any conclusion other than finding the proposed rule was a permissible temporary special measure and therefore not unlawful.[84]

- *Re Municipal Officers' Association of Australia: Approval of Submission of Amalgamation to Ballot* (Australian Industrial Commission)[85]
  In this case the Australian Industrial Commission considered a similar issue and, after referring to article 4 of the Convention and other international cases dealing with the concept of discrimination, took the view that a union rule providing that each union branch have to

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[82] (1988) EOC 92-224.

[83] Section 33 provides:

> "Nothing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act."

[84] The union subsequently applied for and was granted an exemption under the legislation. In its decision granting the exemption the Human Rights and Equal Opportunity Commission stated that it did not necessarily agree with the interpretation of Boulton J: *Re an application for an exemption by the Australian Journalists' Association* (1988) EOC 92-236, at p 77, 209 (Australian Human Rights and Equal Opportunity Commission).

[85] (1991) EOC 92-344, (1991) 12 ILLR 57.

have at least one female vice-president was covered by s 33 of the Sex Discrimination Act.

ANNEX A*

- International Convention Respecting the Prohibition of Night Work for Women in Industrial Employment 1906, 2 Martens Nouveau Recueil, Ser 3, 861; 4 AJIL Supp 328
- Convention Concerning the Employment of Women Before and After Childbirth 1919, ILO 3, 38 UNTS 53
- Convention Concerning Employment of Women During the Night 1919, ILO 4, 38 UNTS 68
- International Convention for the Suppression of Traffic in Women and Children 1921, 9 LNTS 415; and Protocol 1947, 53 UNTS 39
- International Convention for the Suppression of the Traffic in Women of Full Age 1933, 150 LNTS 431; and Protocol 1947, 53 UNTS 49
- Inter-American Convention on the Nationality of Women 1933, PAUTS 37; 28 AJIL Supp 61
- Convention Concerning Employment of Women During the Night (Revised 1934), ILO 41, 40 UNTS 33
- Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds 1935, ILO 45, 40 UNTS 63
- Inter-American Convention on the Granting of Civil Rights to Women 1948, PAUTS 23
- Inter-American Convention on the Granting of Political Rights to Women 1948, PAUTS 3
- Convention Concerning Night Work of Women Employed in Industry (Revised 1948), ILO 89, 81 UNTS 147
- Convention Concerning Migration for Employment (Revised 1949), ILO 97, 120 UNTS 71
- Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others 1950, 96 UNTS 271 & Final Protocol 1950, 96 UNTS 316
- Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951, ILO 100, 165 UNTS 303
- Convention Concerning Maternity Protection (Revised 1952), ILO 103, 214 UNTS 321
- Convention on the Political Rights of Women 1953, 193 UNTS 135
- Convention on the Nationality of Married Women 1957, 309 UNTS 65
- Convention Concerning Discrimination in Respect of Employment and Occupation 1958, ILO 111, 362 UNTS 31
- UNESCO Convention on Discrimination in Education 1960, 429 UNTS 93

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* Originally prepared by Jane Connors and Victoria Medd.

- Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages 1962, 521 UNTS 231
- Migrant Workers (Supplementary Provisions) Convention 1975, ILO 143, 1120 UNTS 323
- Workers with Family Responsibilities Convention 1981, ILO 156, 1331 UNTS 295
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994 (Convention of Belém do Pará), 33 ILM 1534

ANNEX B

Some Useful Sources on the Convention on the Elimination of All Forms of Discrimination against Women

WWW site of the Division for the Advancement of Women: http:// www.un.org/womenwatch/daw/cedaw

Philip Alston, "The Purposes of Reporting", in Office of the High Commissioner for Human Rights, United Nations Institute for Training and Research and United Nations Staff College Project, *Manual on Human Rights Reporting under Six Major Human Rights Instruments* (New York: United Nations, 2nd ed. 1997) 19–24

Cecil Bernard and Petter Wille, "The Preparation and Drafting of a National Report", in Office of the High Commissioner for Human Rights, United Nations Institute for Training and Research and United Nations Staff College Project, *Manual on Human Rights Reporting under Six Major Human Rights Instruments* (New York: United Nations, 2nd ed. 1997) 25–36

Noreen Burrows, "The 1979 Convention on the Elimination of All Forms of Discrimination Against Women", (1985) *Netherlands International Law Review* 419–457

Rebecca Cook and Valerie Oosterveld, "A Select Bibliography of Women's Human Rights", (1995) 44 *American University Law Review* 1429–1471 [This bibliography is updated and made available on-line through the Internet by the Bora Laskin Law Library at the University of Toronto. The URL is http://www.law.utoronto.ca/pubs/h_rghts.htm]

Rebecca Cook (ed.), *International Human Rights Law and Women's Human Rights* (Philadelphia: University of Pennsylvania Press, 1994)

Zagorka Ilic and Ivanka Corti, "The Convention on the Elimination of All Forms of Discrimination Against Women", in Office of the High Commissioner for Human Rights, United Nations Institute for Training and Research and United Nations Staff College Project, *Manual on Human Rights Reporting under Six Major Human Rights Instruments* (New York: United Nations, 2nd ed. 1997) 305–366

Japanese Association of International Women's Rights, *Commentary on the Convention on the Elimination of All Forms of Discrimination Against Women* (Bunkyo: Japanese Association of International Women's Rights, 1995)

Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Dordrecht: Martinus Nijhoff, 1993)

United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 1 (1982–1985)* (New York: United Nations, 1989), UN Sales No. E.89.IV.4

United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 2 (1986-1987)* (New York: United Nations, 1990), UN Sales No. E.90.IV.4

ANNEX C

The CEDAW Convention in the Commonwealth Caribbean**

Country	*Signature*	*Ratification/accession*
Antigua and Barbuda		1 August 1989 a
Bahamas		6 October 1993 a
Barbados	24 July 1980	16 October 1980
Belize	7 March 1990	16 May 1990
Dominica	15 Sep 1980	15 Sep 1980
Grenada	17 July 1980	30 August 1990
Guyana	17 July 1980	17 July 1980
Jamaica	17 July 1980	19 October 1984
Saint Kitts and Nevis		25 April 1985 a
Saint Lucia		8 October 1982 a
Saint Vincent and the Grenadines		4 August 1981 a
Trinidad and Tobago	27 June 1985	12 January 1990
Dependent Territories		
British Virgin Islands	22 July 1981	7 April 1986[i]
[Netherlands Antilles/Aruba	17 July 1980	23 July 1991][ii]

[i] By virtue of signature and ratification by the United Kingdom. The United Kingdom has not extended the Convention to either the Cayman Islands or Bermuda.

[ii] By virtue of ratification by the Netherlands.

ANNEX D

SUBMISSION OF REPORTS BY CARIBBEAN STATES UNDER THE CONVENTION (AS OF 1 AUGUST 1998)[i]

Country	*Report due*	*Date submitted*	*Considered*
Antigua and Barbuda	**Initial:** 31 August 1990	21 Sept 1994[ii]	1997
	Second: 31 August 1994	"	1997
	Third: 31 August 1998	"	1997
Bahamas	**Initial:** 5 November 1994	*Overdue*	
Barbados	**Initial:** 3 September 1982	11 April 1990	1992
	Second: 3 September 1986	4 Dec 1991[iii]	1994
	Third: 3 September 1990	"	1994
	Fourth: 3 September 1994	*Overdue*	
Belize	**Initial:** 15 June 1991	19 June 1996[iv]	
	Second: 15 June 1995	"	
Dominica	**Initial:** 3 September 1982	*Overdue*	
	Second: 3 September 1986	*Overdue*	
	Third: 3 September 1990	*Overdue*	
	Fourth: 3 September 1994	*Overdue*	
Grenada	**Initial:** 29 September 1991	*Overdue*	
	Second: 29 September 1995	*Overdue*	
Guyana	**Initial:** 3 September 1982	23 Jan 1990	1994
	Second: 3 September 1986	*Overdue*	
	Third: 3 September 1990	*Overdue*	
	Fourth: 3 September 1994	*Overdue*	

[i] United Nations document symbols for the reports that have been submitted can be obtained from the annual report of CEDAW and, in the case or more recent reports, the United Nations websites of the Division for the Advancement of Women and the Office of the High Commissioner for Human Rights.

[ii] Combined 1st, 2nd and 3rd reports.

[iii] Combined 2nd and 3rd reports.

[iv] Combined 1st and 2nd reports.

Jamaica	**Initial:** 18 November 1985	12 Sept 1986	1988
	Second: 18 November 1989	17 Feb 1998[v]	
	Third: 18 November 1993	"	
	Fourth: 18 November 1993	"	
Saint Kitts and Nevis	**Initial:** 25 May 1986	*Overdue*	
	Second: 25 May 1990	*Overdue*	
	Third: 25 May 1994	*Overdue*	
	Fourth: 25 May 1998	*Overdue*	
Saint Lucia	**Initial:** 7 November 1983	*Overdue*	
	Second: 7 November 1987	*Overdue*	
	Third: 7 November 1991	*Overdue*	
	Fourth: 7 November 1987	*Overdue*	
Saint Vincent & the Grenadines	**Initial:** 3 September 1982	27 Sept 1991[vi]	1997
	Second: 3 September 1986	"	1997
	Third: 3 September 1990	"	1997
	Fourth: 3 September 1994	*Overdue*	
Trinidad and Tobago	**Initial:** 11 February 1991	*Overdue*	
	Second: 11 February 1995	*Overdue*	

[v] Combined 2nd., 3rd and 4th reports.

[vi] Combined 1st, 2nd and 3rd reports.

Gender and the Judiciary: Confronting Gender Bias

Kathleen E. Mahoney[★]

Introduction

Society expects a great deal from its judges. It expects them to be objective, knowledgeable, independent, discerning, practical, sensitive and above all it expects them to be fair.[1] These expectations exist because judges have such an important and crucial role. They make decisions which affect people's lives, their livelihoods, their safety, their freedom and their humanity. But what has been discovered in Canada, the United States and other countries through numerous studies, commissions, task forces, research papers, statistical data and the like, is that despite the good intentions of the judiciary, unconscious and pervasive biases permeate the judicial system and, by anyone's standards, this is not fair.[2]

Underpinning the expectation of neutrality is the value and goal of equality – that all persons are entitled to be equal before and under the law and to receive equal benefit and equal protection of the law.[3] Research on fairness in the courts[4]

★ Professor of Law, Faculty of Law, University of Calgary.

[1] Hon Rosalie Abella, "The Dynamic Nature of Equality", in S Martin and K Mahoney (eds), *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) [hereinafter *Equality and Judicial Neutrality*] 4.

[2] In 1986, the Faculty of Law at The University of Calgary convened a national interdisciplinary conference entitled, "The Socialization of Judges to Equality Issues", resulting in the first major book on the subject in Canada, Martin and Mahoney (eds), *Equality and Judicial Neutrality, supra* note 1. This was followed by the inclusion of gender, race and class bias issues in judicial continuing education programmes throughout the country. Groups such as The Manitoba Association of Women and the Law began to research gender bias in the Courts and in November, 1988, published the first provincial report, *Gender Equality in the Courts*. In 1991, the Law Society of British Columbia established a Gender Bias Committee, which in turn formed a task force to thoroughly investigate gender bias in British Columbia Courts. They issued a 600-page report in September 1992 describing endemic gender bias in law as well as legal practice. The Western Judicial Education Center, through its Western Workshop, included gender and race bias topics in all its meetings since 1989. Both the Canadian Judicial Council and the Canadian Judicial Center developed written and video course materials dealing with bias issues, making them available to all Canadian judges and held three national conferences in 1992 – 93 for federally-appointed (superior court) judges throughout Canada. See also citations of studies listed in footnote 5. For a bibliography of American task forces on gender bias in the courts, see, J. Resnick, "Revising the Canon" (1993) 61 *Cinncinati Law Review* 1197, Appendix I. See also, S Scasnecchia, "State Responses to Task Force Reports on Race and Ethnic Bias in the Courts" (1992) 16 *Hamline Law Review* 923.

[3] These guarantees of equality are in section 15 of the Canadian Charter of Rights and Freedoms in the Canadian Constitution (Constitution Act, 1982) part I Schedule B of the Canada Act, 1982, chapter 1 schedule B (Eng).

consistently and ironically shows that, where judge-made law is biased, the adverse impact falls most often on the historically disadvantaged groups which equal rights guarantees are designed to protect.[5]

This paper looks specifically at how judge-made legal doctrine and principles affect women as a group, including women of colour. First, the composition and role of the judiciary and the methods of analysis used by the courts is examined. As the proliferation of laws continues to expand the judicial role, a greater diversity of judges to reflect the pluralistic nature of the population and the life experiences of minorities is argued to be necessary to maintain public confidence in the administration of justice.[6] The second section discusses alternative forms of analyses which can lead to more improved results towards equality and fairness in the courts. It is argued in the third section of the paper that while it is important that the judiciary be properly representative of all the population, merely putting more women or members of minorities on the bench will not remove doctrinal bias or perceived bias in the administration of justice. What is ultimately required is a changed sensibility with respect to difference, which can only be achieved by

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[4] For a list of the Supreme Court Task Forces set up to identify impartiality problems and generate some solutions, see Resnick *supra* note 2, appendix 1.

[5] *Equality and Judicial Neutrality*, *supra* note 1; M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990); L. Finley, "A Break in the Silence: Including Women's Issues in a Torts Course" (1989) 1 *Yale Journal of Law & Feminism* 41; D. Greene, "Justice Scalia and Tonto, Judicial Pluralistic Ignorance and the Myth of Colorless Individualism in Bostick v Florida" (1993) 67 *Tulane Law Review* 1979; J. McCalla Vickers, "Memoirs of an Ontological Exile" in A. Miles & A. Finn (eds), *Feminism in Canada: From Pressure to Politics* (Montreal: Black Rose Books, 1982); A. T. Strauss, "The Myth of Color Blindness" (1986) *Supreme Court Review* 99; L. Lewis & J. Gladstone, *Racism in the Criminal Justice System: A Bibliography* (Toronto Center for Criminology, 1994); D. Baker (ed), *Reading Racism and the Criminal Justice System* (Toronto: Canadian Scholars Press, 1994); C. R. Mann, *Unequal Justice: A Question of Color* (Bloomington: Indiana University Press, 1993); M. Jackson, *Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (Vancouver: The Association, 1988); S. Abrahamson, "The Woman Has Robes: Four Questions" (1984) 14 *Golden Gate Law Review* 489; J. Resnick, "On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges" (1988) 61 *S California Law Review* 1877. The Hon. Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 *Osgoode Hall Law Journal* 507; A. T. Wald, The Role of Morality in Judging: A Woman Judge's Perspective" (1986) 4 *Law & Inequality* 3; *Cawsey Report, Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton Task Force, 1991); *Commissioner's Report: Royal Commission on the Donald Marshall Jr., Prosecution* (Halifax: The Commission, 1989); *Canadian Bar Association Task Force on Gender Equality in the Legal Profession Touchstones for Change: Equality, Directory and Accountability* (Ottawa: Canadian Bar Association, 1993).

[6] Canadian Bar Association, *The Appointment of Judges in Canada* (Ottawa: Canadian Bar Association, 1985) at 9; A. T. Russell and J. Zeigel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) *41 University of Toronto Law Journal 4* at 19 and 33; *Touchstones for Change*, *supra* note 5; *Equality and Judicial Neutrality*, *supra note* 1; Ontario Law Reform Commission, *Appointing Judges, Philosophy, Politics and Practice* (Toronto, Ontario, Law Reform Commission, 1991).

effective, rigorous and on-going gender-based analysis which is best taught and learned in judicial education programs on gender, race and class issues.[7]

The role of the judge

Do judges simply interpret the law, or do they make law? Although oversimplified, this is an important question to ask in the context of accountability and fairness in judicial processes. In terms of their relative roles, judges and other legal officials clearly do not make law in the same sense that legislatures or cabinets do. But when they perform their interpretative role, the question is whether they simply extract the meaning of the framers from a document to some other source of value and meaning?

The notion of precedent, the idea that the law is discovered, not made, is at the core of the English common law upon which much of Canadian law and law in other Commonwealth countries is modelled. The primary place where it is discovered is in the written reasons for judgement of other common law judges. For years, the principles of precedent and stare decisis were strictly observed,[8] and the accepted view was that judges had no legitimate law-making function. This view largely removed judges from controversies over their decisions, as the judicial role was to merely identify the applicable principles and apply them to the case at hand. Today, it is widely accepted from all sides of the political spectrum, as well as from the judiciary itself, that judges clearly do have a law-making function. When the law is unclear, the judge is expected to fill in the gaps. As a result, the most important part of the judge's written reasons are the definitions he or she creates to clarify the law. The more vague and general the law, the more the judge "makes" law in the clarifications. In constitutional matters, judges play a more overtly political role, often striking down legislation or amending it to make it conform with the judicial interpretation of constitutional rights and freedoms and a particular vision of society.[9]

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[7] As Richard Devlin points out in his comment, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racilized Perspectives in R v RDS" (1996) *Dalhousie Law Journal* 408 at 409, while there has been some modest numerical progress towards the goal of achieving a more inclusive judiciary, significant qualitative, institutional and ethical problems remain.

[8] See Pollock and Maitland, History of English Law, at 561; and J. Smith, "Surviving Fictions", (1917+1981) 27 *Yale Law Journal* 147 & 317.

[9] For a strong denunciation of the law-making role, see *Vriend et al* v *Alberta* [1996] 34 CRR (2d) 243, 181 AR 16, 116 WAC 16, [1998] 50 CRR (2ed) 1, (1998) 4 BHRC (Can SC) 140, per McClung J, who took great exception to the idea that a judge could "read in" sexual orientation to a list of prohibited grounds of discrimination in the Alberta Individual Rights Protection Act (p 261 of 34 CRR, p 29 of AR, p 21 of 50 CRR).

A good example of judicial law-making in this sense, was the decision of the Supreme Court of Canada in *R v Morgentaler*.[10] The case involved a challenge to the constitutionality of the abortion law which stipulated that abortion was a criminal offence unless the woman seeking the abortion had her request approved by a hospital committee. In finding the law to be unconstitutional, the court held that Canadians wanted a broad interpretation of the constitutional guarantee of life, liberty and security of the person. The effect of the court's decision was the same as if Parliament had repealed the law.

In England, Lord Reid acknowledged the law-making function of the British judiciary in a speech in 1972 where he said:

> "There was a time when it was thought almost indecent to suggest that judges make law + they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words, 'open sesame'. Bad decisions are given when judges muddle their passwords and the wrong doors open. But we do not believe in fairy tales anymore."[11]

The former Chief Justice of Australia likewise rejected the "old fairy tales", saying:

> "Sometimes, judicial initiative is inevitable ... It is no longer feasible for courts to decide cases by reference to obsolete or unsound rules which result in injustice and await future reform at the hands of the legislature. There is a growing expectation that courts will apply rules that are just, equitable, and soundly based except insofar as the courts are constrained by statute to act otherwise."[12]

The great American jurist, Benjamin Cardozo, in comparing the legislative role of the judge to that of the legislator saw their law-making roles as complementary:

> "If you ask how he is to know when one interest outweighs another, I can only answer that he [sic] must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other each indeed is legislating within the limits of his competence. No doubt the limits for the

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[10] [1988] 1 SCR 30.

[11] "The Judge as Lawmaker" (1972) 12 *Journal of Society for Public Teachers of Law* 22.

[12] Sir Anthony Mason, "The Australian Judiciary in the 1990s", address to the Sydney Institute, 15 March 1994, at 9.

> judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without travelling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art."[13]

The former Chief Justice of Australia, in a 1991 decision of the High Court, stated that:

> "the purpose of judicial development of legal principle is to keep the law in good repair as an instrument of resolving disputes according to justice as it is understood in contemporary society, subject to statute ... In a society where values change and where the relationships affected by law become increasingly complex, judicial development of the law is a duty of the courts – more especially when legislative law reform languishes."[14]

When judges make law, they place themselves right in the middle of controversies over their decisions, subject to questions such as: what kind of law do judges make; how much of it; in what manner; within which self-imposed limits; with what intended results; and with what unintended consequences?[15] Further questions are asked concerning judges' sensitivity to the various, increasingly insidious forms of discrimination, their ability to critically re-evaluate existing concepts of equality and their capacity to formulate the new methods of thought and understanding. All of these questions and concerns have led to courtrooms becoming critical arenas for political demands of inclusion.[16]

The composition of the judiciary

It is beyond question that the judiciary as a group is demographically imbalanced. The vast majority of judges are well-educated, middle class, middle-aged, male, able-bodied, Christian, white, of European ancestry, married, apparently heterosexual and most often supported by wives with less demanding careers or

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[13] Benjamin N Cardozo, "The Judge as a Legislator," in *Cardozo on the Law* (Birmingham: Legal Classics Library, 1982) 98 at 113–114.

[14] *Gala v Preston* (1991) 172 CLR 243 at 262, per Brennan J (as he then was).

[15] Sturgess and Chubb, *Judging the World, Law and Politics in the World's Leading Courts* (Sydney: Butterworths, 1988) 41– 42.

[16] Martha Minow, "Justice Engendered" (1987) 101 *Harvard Law Review* 10 at 93. See also sources cited *supra* at notes 4 to 6.

with no careers outside the home.[17] In Canada where the composition of the judiciary is much the same as in other western countries, men comprise about 84% of superior court judicial positions and 87% of the trial court bench. White judges comprise about 98% of the judicial population.[18]

The race, sex, age, religious and class uniformity of the judicial population is by no means a recent phenomenon or a new concern. For many years commentators have noticed that strong links existed between the judiciary and similarly constituted unrepresentative groups such as business and the major political parties. Jeremy Bentham for example, expressed concerns about the composition of the judiciary, particularly from the point of view of class exclusivity. As a result of his and others' criticisms, attempts were made to reduce the influence of the ruling class, to which all the judges belonged, by expanding the law-making function of parliament to ensure that the elected officials gave effect to the will and interests of the broader community, at least as perceived by the majority.[19] Prior to these changes, the legitimacy of the law totally depended upon public acceptance of the "enlightened paternalism" of a "natural" ruling class.

Systemic partiality

In more recent times, there is a greater concern that given the role and composition of the judiciary, judges are more likely to reflect and represent identity-based experiences in their thinking and decisions on social, moral and economic issues rather than that of groups of which they are not a part. Minority groups and women say that because of the uniformity of judicial life experiences, the information available to the courts to enable them to determine the public interest, or to choose between conflicting public interests is incomplete, and the opportunity to ascertain the effects of their decisions is limited. This is especially serious when laws laid down in resolutions of disputes bind the whole community without anyone other than the litigating parties being heard.

Concerns about partiality or bias in judicial decision-making, however, most often contemplate individual cases involving a judge's financial interest, close personal friendship or relationship or previous partisanship. [20] It is clear that the law of bias

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[17] Peter McCormick and Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lorimer and Co., I 1990) at 61–70. See also, *CBA Taskforce Report, supra* note 5, at 186, and George Adams and Paul Cavaluzzo, "The Supreme Court of Canada: A Biographical Study"' (1969) 7 *Osgoode Hall Law Journal* 61, where it is stated that only two of the first fifty Supreme Court of Canada judges were born into working-class families.

[18] McCormick and Greene, *supra* note 17, at 66 – 67.

[19] Sturgess and Chubb, *supra* note 15, at 5.

[20] R. M. Sedgewick Jr, "Disqualification on the Ground of Bias as Applied to Administrative Tribunals"

does not easily contemplate systemic bias having discriminatory impacts on individuals because of their group membership.[21] The accepted wisdom is that judges as a collective are impartial and that occasionally, an individual judge may "slip up". When this happens, judges can be overturned on appeal, reprimanded or, in extreme cases, impeached.

The presumption that judges as a group are impartial in all their work,[22] affects even those whose job it is to criticise and evaluate the judiciary. Lawyers and law professors have historically limited their inquiry and critiques of judgements to the logic and sensibility of the legal analysis they contain and their relationship to precedent. Occasionally, the social, economic or policy implications of judgements are discussed or evaluated, but rarely, if ever, are judgements or groups of judgements ever scrutinised for discriminatory practices and attitudes. Questions are seldom asked about judicial use of socially-induced assumptions and untested beliefs, or about the use of stereotypes which judge individuals on their group membership rather than on their individual characteristics, abilities and needs. Law review articles are rarely written about judges who view issues solely from the dominant perspective, who neglect to consider alternative views or who over-simplify or trivialise the problems of women. The importance of variability, of cultural, racial and gender perspectives; of context, contingency and change are neither discussed in classrooms nor in courtrooms.

But notwithstanding the rhetoric of neutrality and the presumption of impartiality, judges themselves express concern about partiality to certain values and ways of thinking which may affect their judgements. Lord MacMillian described the difficulty of achieving judicial impartiality when he said:

> "The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by their possessor ... every legal mind is apt to have an innate susceptibility to particular classes of arguments."[23]

(1945) 23 *Canadian Bar Review* 453.

[21] For a thorough discussion of cases concerning bias see Devlin, *supra* note 7.

[22] There is an implicit understanding that assumes good faith and impartiality on the part of judges. For example, see W. Blackstone, *Commentaries On the Laws of England III* (Oxford: Clarendon, 1788) 361, where he states:

> "The law will not suppose a possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."

[23] As quoted in G. Winters (ed), *Handbook for Judges* (The American Judicature Society, 1975) 62.

Lord Justice Scrutton made similar comments:

> "... the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish."[24]

Justice Cardozo argues that judges are shaped by "the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man [sic]...The great tides and currents which engulf the rest of men do not turn aside in their course, and pass judges by."[25]

And Justice Jerome Frank argues:

> "In addition to those acquired social value judgments, every judge, however, has many unavoidable idiosyncratic 'leanings of the mind', uniquely personal prejudices which may interfere with his fairness ... Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man [sic] ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."[26]

Justice Rosalie Abella voices similar concerns when she says:

> "Every decision-maker who walks into a courtroom to hear a case is armed not only with relevant legal texts, but with a set of values, experiences and assumptions that are thoroughly embedded. The decision-making process takes place in a cultural context, and that context may require a degree of 'imperturbable disinterestedness' of which not all are consistently capable."[27]

The possibility that legal doctrines and principles may be determined by class, gender and race-based values, deserves much-needed and more careful examination than it presently receives. It is obviously legitimate in a dynamic, multicultural democracy to ask whose values and what values are involved in the decision-making process.

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[24] *Ibid.*

[25] B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) 167 – 168.

[26] *Re J A T Lindhan*, 138 F 2d 650 at 651 – 653(2d Cir 1943). See also M. Minow, "Stripped Down Like a Runner or Enriched by Experience: Bias and Impartially of Judges and Jurors" (1992) 33 *William and Mary Law Review* 1201.

[27] *Equality and Judicial Neutrality, supra* note 1, at 8 – 9.

While members of the judiciary are evidently of the view that the values they hold in common represent the public interest,[28] the former Chief Justice of British Columbia recently pointed out,[29] to those who hold memberships in labor unions, minority groups and underprivileged classes, such values may not be in the public interest at all.[30] Similarly, women's groups have challenged these same beliefs as being far from their values and their view of the public interest.[31] Professor Minow's observation that "court judgments endow some perspectives rather than others, with power" underscores the ability of judges to either promote or reduce opportunities for true social equality in the choices they make.[32]

A further difficulty in dealing with systemic bias in judicial processes is its invisibility. Some judges do not expressly disclose the criteria behind their decisions or if they rely on precedents and are not cognisant of the original values embedded in them. When this happens, the judicial pronouncements are very difficult to analyse or appeal and often result in unstated or hidden discriminatory values being perpetuated.[33]

Gender bias in the common law

Gender bias takes many forms. One form is behaviour or decision-making by participants in the justice system which is based on, or reveals reliance on, stereotypical attitudes about the nature and roles of men and women or of their relative worth, rather than being based upon an independent valuation of individual ability, life experience and aspirations. Gender bias can also arise out of myths and misconceptions about the social and economic realities encountered by both sexes. It exists when issues are viewed only from the male perspective, when problems of women are trivialised or over-simplified, when women are not taken seriously or given the same credibility as men. Gender bias is reflected not only in actions of

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[28] O. W. Holmes, "The Path of the Law" in *Collected Legal Papers* (1952) 184; B Cardozo, *The Nature of the Judicial Process* (1960) 135–136.

[29] Nemetz, "The Concept of an Independent Judiciary" (1986) 20 *University of British Colombia Law Review* 290 at 286.

[30] J. Griffith, *The Politics of the Judiciary*, (Manchester : Manchester University Press, 1977).

[31] This view has been put forward since the era of Elizabeth Cady Stanton and the Declaration of Sentiments at the Seneca Falls Convention, July, 1848, *History of Women's Suffrage*, vol 1, 1848–1861, at 70–71 (Elizabeth Cady Stanton, Susan B. Anthony and Matilda Joslyn Gage (eds) (reprint ed. 1985) (1881–1922) until today. See e.g. *Equality and Judicial Neutrality*, *supra* note 1.

[32] Minow, *supra* note 16, at 93.

[33] Sir Anthony Mason, "The Role of A Constitutional Court in a Federation" (1986) 16 *Federal Law Review* 5.

individuals, but also in cultural traditions and in institutional practices. To the extent that judges labour under certain biased attitudes, myths and misconceptions about women and men, the law itself can be said to be characterised by gender bias.

In this section, examples of gender bias in principles of tort, family law, criminal law are discussed as a result of gender-biased attitudes and thinking.

In tort law you see gender bias in the content of certain causes of action and in the assessment of damages. For example, *actio per quod consortium et servitium amisit*,[34] the most notorious of tort suits, recognised a husband's claims when his wife was injured. The action treated the marital relationship as one of master-servant. When a wife was injured, the husband was compensated for the loss of his wife's services including home-making and sexual relations. At the same time, the action was not available to wives whose husbands were injured. This gender-biased approach laid the foundation for the present day tort law. In personal injury damage assessments, evaluation of the female marital role illustrates that equal interdependency in marriage is a notion in its infancy. It is only very recently that judges in Canada have recognised that impairment of home-making capacity can be a compensable loss to the home-maker, rather than her spouse. But even where assessments have been granted, they have been pathetically meagre, especially when compared to damages awarded for impairment of working capacity outside the home. On the other hand, where the action for compensation is based on wrongful death of a wife, the damages assessments are much higher.[35] This is because the husband's claim is on a basis similar to the old *actio per quod* and the cost of a market replacement for the wife must be calculated. Judges who are more used to being "home-makers" rather than homemakers,[36] recognise that a husband whose wife has been killed will have to hire a child-care worker, a cook, a chauffeur and a housekeeper and award damages accordingly.

In family law, gender bias exists in underlying assumptions and stereotypes which affect alimony, maintenance, child support and custody awards. Researchers have traced the "feminisation of poverty" phenomenon directly to judicial misinformation and misunderstanding about the economic and social realities of women and men and have concluded that inadequate support awards have created an entire underclass of Canadian women and children.[37] Some of the

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[34] For an account of the common law doctrine of *actio per quoad consortium et servitium amisit* (sometimes referred to as *actio per quoad*), formerly applicable in Canadian law, see A. Linden, *Studies in Canadian Tort Law* (Toronto, Butterworths, 1968) at 517.

[35] Ken Cooper-Stephenson, "Past Inequities and Future Promise: Judicial Neutrality in Charter Constitutional Tort Claims", in *Equality and Judicial Neutrality*, *supra* note 1, at 226.

[36] *Ibid.*

[37] In the American context see Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and*

misinformation includes inaccurate economic assumptions about the costs of raising children and unrealistic expectations about women's ability, especially middle-aged and older women's abilities, to earn future income. On the custody issue, the case law indicates that judges are sometimes influenced by traditional sex role stereotypes which disadvantage non-traditional women who work outside the home. They assume children raised in homes where the mother, or mother replacement, is a full-time home-maker are better off. The limits this places on the aspirations and goals of women affects their independence, economic security and equality in a way that does not affect men. It also fails to recognise that more often than not, the mother is the primary parent notwithstanding the fact that she may have responsibilities outside the home,[38] and that removing children from her custody does them more long-term harm than the lack of an idealised, stereotypical home life.

In criminal law, gender bias is found in many areas, but probably most notoriously in the judicial treatment of sexual assault and wife abuse. Until overturned by statutory amendment, Canadian common law displayed a sweeping uncritical acceptance of the view that rape complainants were inherently suspect and may well make false accusations.[39] In sentencing practices, gender bias in mitigation principles allows punishment of male sexual violence to be partially or sometimes totally excused through a "blame the victim" ideology, which limits women's freedom to dress as they like, walk when and where they choose, and drink as much as they want. Victims of wife abuse face serious gender bias due to widespread judicial misunderstanding of the dynamics and seriousness of a battering relationship. This often leads to unjust conclusions being drawn about victims who are reluctant to leave a battering relationship or who do not co-operate in testifying.[40] When a woman is multiply disadvantaged because of her race, disability or other immutable characteristic, the harmful effects are magnified.

Economic Consequences for Women and Children in America (New York: The Free Press, 1985). For the Canadian context, see E. Diane Pask and M. L. McCall, "How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support", Canadian Research Institute for Law and the Family, 1989.

[38] See Phyllis Chesler, *Mothers on Trial: The Battle for Children and Custody* (New York: Four Walls, Eight Windows, 1986).

[39] J. A. Wigmore, *Evidence in Trials at Common Law* (Rev ed) (1970) 924a at 736. Wigmore's view that women contrive false charges of sexual offences by men and that accusations of sexual assault are to be regarded with deep suspicion, were legalised through judge-made laws which allowed a woman to be extensively questioned about her past sexual history, which required corroboration (or at least a warning of the dangers of convicting on the uncorroborated evidence of a rape complainant) or which required evidence of a recent complaint to support the credibility of the victim. In 1983, Bienen attacked Wigmore's views as being unscientific, based on manipulated authorities and selectively and untruthfully used. See L. B. Bienen, "A Question of Credibility: John Henry Wigmorets Use of Scientific Authority in Section 924a of the Treatise on Evidence" (1983), 19 *California West Law Review* 235.

[40] Mona G. Brown, Monique Bicknell-Danaker, Caryl Nelson-Fitzpatrick, Jeraldine Bjornson, "Gender Equality in the Courts: Criminal Law, A Study by the Manitoba Association of Women and the Law"

Gender fairness requires empathy and understanding of the life experiences gender creates. But crossing the gender barrier has always been a formidable task. Can a male judge really imagine what it is like to be pregnant? To be a victim of sexual assault? To experience sexual harassment or spousal abuse? To be vilified and sexually objectified in pornography? To be a woman of colour or a disabled woman in any or all of the above categories? On the other hand, most male judges likely could imagine themselves as a father of a child, as an accused rapist, as a batterer or as a consumer of pornography. When most judges are men, women's life experiences tend to be objectified. When balancing competing gender-based interests and values, too often insufficient weight or no weight at all is assigned to women's interests. This leaves them less protected or even unprotected by laws which protect men + laws which affect their equality, economic opportunities, independence and personal freedom.

These are but a few examples of gender bias. Many more could be offered to illustrate its existence. For the most part, gender bias in the common law is a form of subtle but potent sex discrimination. What must be understood is that the gender bias in the application and interpretation of laws is important not only for individual women before the courts. To the extent that the justice system suffers from gender bias, the system fails in its primary societal responsibility to deliver justice impartially. As a consequence, the administration of justice as a whole suffers. The legitimacy of the entire system is brought into question.

Gender bias and legal analysis

What follows is a case study of gender bias – an investigation of how stereotypes and incorrect assumptions work their way into fundamental doctrinal principles in the law and how only a gender-based analysis can remove them. Six case studies examine three areas of the law: discrimination law; the doctrine of "reasonableness"; and the legal concept of harm in sexual assault. What is evident in the examples is that values and attitudes can affect fact-finding and the exercise of judicial discretions in addition to judicial law-making.

The meaning of "discrimination"

The case of *Bliss v Attorney General of Canada*[41] is an example of how a seemingly neutral legal doctrine becomes gender-biased when a male standard is adopted as the norm in discrimination cases. The Supreme Court of Canada was asked to consider whether or not an employment benefit provision was

(Manitoba Association of Women and the Law, March 1991) at 3–51.

[41] [1979] 1 SCR 183.

discriminatory when it required pregnant workers to meet more stringent requirements to qualify for unemployment benefits than it required of men and non-pregnant workers. The court held that there was no sex discrimination – for the reason that "discrimination on the basis of pregnancy does not amount to discrimination on the basis of sex". The court said if the government treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is because they are pregnant and not because they are women.

The Aristotelian rule which informed the court's reasons, states that discrimination occurs when people who are the same, or similarly situated, are treated differently from one another. If people are different from the standard, it is quite all right to treat them differently. To determine whether Ms Bliss was similarly situated or not, the court used a male comparator. Not surprisingly, compared to men (or non-pregnant women who in that respect are similar to men), pregnant women were found to be different. Consequently, the court concluded that even though pregnant women were treated differently, the differential treatment did not amount to justiciable discrimination.

The use of a male standard to determine discrimination is gender-biased because it assumes maleness is the norm when it is not. Its use limits women's equality rights to situations where they are the same as men. Under this regime, legal treatment of sexual harassment, prostitution, sexual assault, reproductive choice and pornography could never be characterised or treated as sex equality issues because the male comparators have no comparable disadvantage or need. Women will always be "different". Regardless of whether governmental action or inaction furthers women's disadvantage in these sex-specific areas, it is not discrimination.

As Catharine MacKinnon has observed, in practice this approach means that "if men don't need it, women don't get it".[42]

A similar approach in a different context would have discrimination against the blind or against Sikhs illegal, but discrimination against the users of guide dogs or wearers of turbans, quite acceptable. Rather than contextualising and understanding the effects of gender difference between women and men, in Bliss the court abstracted and objectified gender to the extent that the components or consequences of gender in real terms were overlooked. In other words, the fact that pregnancy is a fundamental component of femaleness, went unrecognised.

In a landmark case in 1989, the Supreme Court of Canada threw out the similarly situated test saying it is so unprincipled it could justify Hitler's Nuremberg laws. The court found that neither the "similarity" nor the "difference" components in the test had content which was grounded in principle.[43] The Court replaced the

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[42] C. A. MacKinnon, "Reflections on Sex Equality Under Law" (1991), *Yale Law Journal* 1281 at 100.

[43] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 166.

similarly situated test with a test which corrects the gender bias problem and has a much greater chance of achieving real equality. The new test determines discrimination in terms of disadvantage. If a person is a member of a persistently disadvantaged group and can show that a law or policy or behaviour continues or worsens that disadvantage in comparison with the larger society, it violates the equality guarantee in the Constitution. No male comparator is necessarily required.

The test of "disadvantage" as opposed to the test of "similarity and difference" requires judges to look at women in their place in the real world, to confront the reality that the systemic abuse and deprivation of power women experience is because of their place in the sexual hierarchy.[44] It is remarkable how the disadvantage test changed the analysis when applied to a pregnancy discrimination case ten years later.

The case was *Brooks v Canada Safeway*,[45] where pregnant women workers had received disfavoured treatment in comparison with males and other non-pregnant women in terms of benefit provisions in the employer's group sickness policy. The issue was whether or not discrimination on the basis of pregnancy amounted to discrimination on the basis of sex. This time, the court not only found it unnecessary to find a male equivalent to the condition of pregnancy, it specifically held that the disadvantage the pregnant women suffered came about because of their difference from men. The Chief Justice, unlike the court in *Bliss*, looked at pregnant women in their societal context. He said:

> ".... Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children, no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one-half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women."[46]

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[44] See *R v Turpin* [1989] 1 SCR 1296 at 1331, where the Supreme Court of Canada held that s 15 was designed to advance the purposes of "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society".

[45] [1989] 1 SCR 1219.

[46] *Id* at 1235.

Using the disadvantage approach to determine discrimination made a profound difference when the sex specific rule was evaluated contextually in terms of its effect on the women plaintiffs.

Such an approach would be beneficial to women in other areas where gender-specific laws disadvantage them. For example, consider laws limiting women's access to abortion. If they are examined in terms of whether or not they exacerbate the disadvantaged status of women, they would likely be found to do so. Similarly, if statutory provisions or common law rules requiring women victims to meet evidentiary requirements not demanded of other victims of violent crime or sentencing patterns which show wife-batterers treated more leniently than other assaulters were scrutinised in this manner, a finding of discrimination would likely follow. The key element of the analysis which avoids gender bias in the result is making the female gender a relevant factor.

The meaning of "reasonableness"

Gender bias also arises in the application of seemingly objective, neutral tests which determine civil liability or criminal culpability. For example, two recent Canadian cases dealing with wife-battering raise the issue of gender bias in the content of the test of "reasonableness". The first decision contexualises reasonableness. It acknowledges alternate views and it recognises actual inequities and the real life experience of battered women. On the other hand, the second decision demonstrates how sex-discriminatory stereotypes can skew results in a gender-biased way such that violent treatment of women by men is partially or totally legitimised.

The first case, *Lavallee v R*, [47] was a criminal case involving a woman who was charged with second degree murder after she shot her partner in the back of the head with a rifle. The shooting occurred after an altercation in which the appellant had been physically abused. The court found she was fearful for her life, as she was taunted with the threat by her common-law husband that if she did not kill him first, he would kill her. The accused was a frequent victim of her partner's physical abuse, requiring medical treatment for various fractures and other injuries. At trial, Ms Lavallee was acquitted by a jury of second degree murder on the basis of self-defence. The Manitoba Court of Appeal set aside her acquittal because they said the facts of the case failed to establish the essential ingredients of the defence. The trial court's decision was subsequently restored by the Supreme Court of Canada where the substantive meaning of self-defence was subsequently altered as a result of a gender-based inquiry and analysis.

[47] [1990] 1 SCR 852.

The essential ingredients the Manitoba Court of Appeal found lacking were evidence of imminent attack and reasonable apprehension of death or grievous bodily harm. The Supreme Court of Canada, however, said while the imminence of death or grievous bodily harm are essential ingredients of the defence, the common law interpretation comprehends only a male concept of reasonableness in a combative situation. The court concluded that battered women who kill their partners do not fit into the law's traditional concept of self-defence. The court said the requirements of the defence evolved out of a bar-room brawl model – a male concept envisioning combatants of relatively equal size and strength. When applied to battered women who fight back, the model doesn't work.

The court explained it this way:

> "If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'."[48]

In other words, the court found that gender was germane to the question of reasonableness and decided that in order to be fair to women, it was necessary to reconsider the defence by taking evidence of the situation of the battered woman into consideration. The court concluded that the method of defending against the threat of death may be different for a woman than it is for a man. Changing the configuration of the self-defence doctrine this way corrected gender bias in the law. By making gender relevant to the concept of reasonableness in *Lavallee*, the court arguably opened the door to the reconstruction of many other legal doctrines based on reasonableness such as the defence of provocation, duress and necessity.

In contrast to *Lavallee,* consider the case of *A L v The Crimes Compensation Board (Saskatchewan),*[49] which also raised the issue of the legal content of the reasonableness concept. The facts of the case were that, after a history of abuse during marriage, A L was severely assaulted by her husband. The assault occurred after an argument during which the husband threatened to leave her and the children without financial support. The wife then said she would pack his suitcase and went to the bedroom to do so. He followed her there and assaulted her. She sustained serious physical injuries, including a broken back. The husband susequently pleaded guilty to the assault and was convicted.

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[48] *Id* at 874.

[49] Crimes Compensation Board Award, 2 June 1998, Award No. 1901/88: Crimes Compensation Board (Sask) Award, 15 March 1990, Award No. 2511/90.

At the time of the event, the victim was 45 years of age, had been married for 25 years and had 9 children, 4 of whom were dependent on her.

Following her husband's conviction for the assault, A L applied to the Crimes Compensation Board for compensation for her injuries because the back injury prevented her from continuing her employment. The Board denied her application on the grounds that she "knowingly put herself into circumstances that caused injury to herself", a situation which was found to fall within an exemption under the Criminal Injuries Compensation Act.[50] Furthermore, the Board found that her actions in going to the bedroom to pack his suitcase amounted to provocation stating "the applicant should have been aware that her actions on the date in question would aggravate him and lead to his violent behaviour".[51]

The Act, like the common law of self-defence, relies on the concept of "reasonableness". Here, it was used in two ways: first, to determine whether the injury was a reasonably foreseeable consequence of the complaint's behaviour that should have been avoided; and second, to determine whether the ordinary reasonable man would be deprived of self-control in the circumstances of the case.

If the Board was correct in the way it applied the reasonableness standard to foreseeability in A L, a woman's mere presence in a place where violence is foreseeable could disentitle her to compensation benefits. Would this mean that if a woman goes to a bar alone or goes for a walk alone at night and is assaulted, she is contributing to her own assault?

What about hitchhiking alone or inviting a male to her apartment? In Canadian and American societies, violence against women is a reality and it is foreseeable in such places, but should women be blamed for it? In addition to blaming victims, this approach penalises women for doing things that men freely do without any penalty or restriction. It is gender-biased because it gives credence to the stereotype that women who are beaten are partially or wholly responsible for violence directed against them. Moreover, the Board's decision implies that the solution to the foreseeability problem for women is to leave the abusive setting in which they live if they wish to be compensated for their injuries. If this is correct, one could argue by analogy that victims of sexual harassment at their place of work or victims of crime in high crime neighbourhoods, must be partially to blame for their victimisation unless they quit their employment or move away.

The Board's assumption that women like A L can leave their abusive husbands but unreasonably refuse to do so, is also gender-biased because it makes the assessment from a dominant, male perspective and fails to take into account the dynamics of wife abuse and the general context of inequality within which women

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[50] Section I I(a) of Criminal Injuries Compensation Act.

[51] Crimes Compensation Board Award, 31 July 1990, Award No. 2511/90

live. First-hand accounts by many battered women demonstrate that they are often trapped in their relationships. A decision to stay with an abusive husband is perfectly reasonable if, from the wife's point of view, there is no other place to go. Financial and emotional dependence on their husbands, concern for the welfare and their custody of the children, lack of emergency housing and day-care, lack of support from law enforcement agencies, the fear of public exposure, inadequate social support networks, the fear of greater injury and the tendency of society to blame women rather than their assailants are some of the reasons battered women cite for staying in violent relationships.[52] All are related to the unequal social position of women, which the Board failed to take into account when interpreting the "reasonably prudent person" test.

On the provocation issue, the reasonableness test once again tilts against women's interest. The Board in the A L case found that the wife contributed to her injuries by packing her husband's suitcase after he announced he would leave. The Board saw this conduct as a provocative act which precipitated the husband's act of violence.

The defence of provocation has a reasonableness requirement. In order to exculpate an accused from responsibility for an offence or reduce his culpability, the provocation must be such that it deprives an ordinary reasonable person of self-control. In concluding that packing the husband's suitcase in response to his threat to leave amounted to provocation, the Board must have concluded that his rage in response to such an act was reasonable and that breaking his wife's back was an act that should be partially forgiven. Legitimising these attitudes and reactions is clearly gender-biased in the most discriminatory, damaging and dangerous of ways. For the law to accommodate the violent enforcement of male dominance and female subordination, permits more powerful members of society to prey with impunity upon more vulnerable members. It implies that a battered woman must adopt a submissive and subordinate role in relation to the batterer in order to remain eligible for full compensation under the Act. The decision effectively says a battered wife cannot protest her husband's actions or do something that may cause him to become angry and beat her again, such as challenging his authority or control over her. It also suggests that the victim of domestic violence has control over her victimisation. If she would stop provoking her assailant, she would not get hit. In a contextualised analysis, this case perpetuates women's disadvantage, justifies male dominance and denies women

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[52] *Women in Transition,* a Canada Works Project, Thunder Bay, Ontario (1978) cited in L. MacLeod, *supra* note 3, at 29. See also R. E. Dobash and R. Dobash, *Violence Against Wives: A Case Against Patriarchy* (New York: Free Press, 1979); L. Chalmers and A. T. Smith, "Wife Battering: Psychological, Social and Physical Isolation and Counteracting Strategies" in A. T. McLaren (ed), *Gender and Society,* (Toronto: Copp Clark Pitman Ltd., 1988) 221; Lisa Freedman, "Wife Assault" in S. C. Guberman and M. Wolf (eds), *No Safe Place: Violence Against Women and Children* (Toronto: The Women's Press, 1985) 41; L. A. Hoff, *Battered Women as Survivors* (London: Routledge, 1990).

equal benefit and equal protection of the law. Even if the woman's conduct is not exemplary in the judge's eyes, it is surely not legal justification for her to be assaulted and battered, "the author of her own misfortune".

The nature of "harm"

The final two cases to illustrate gender bias are the trial and appeal decisions in the case of R *v McCraw.*[53] The accused was charged with three counts of threatening to cause serious bodily harm contrary to the Criminal Code. He had written anonymous letters to three women graphically detailing various sexual acts which he wished to perform upon them and concluded each with a threat that he would have sexual intercourse with them even if he had to rape them. The evidence of the victims was that the letters frightened them to the extent that they no longer felt safe when they were alone and would not leave their homes without escorts.

The Court was required to address two issues: whether or not the letters constituted a threat, and whether the letters threatened serious bodily harm. The trial judge acquitted the accused. He did so on the reasoning that the letters were not really threats, but if they were, they were not threats of serious bodily harm. On the threat issue, the judge found that in the accused's mind, the letters were more "adoring fantasies" than threats. On the harm issue, he decided that rape does not necessarily result in serious harm or even any harm to the victim because the threat to rape is no more than a threat to have non-consensual sexual intercourse, not a threat to cause serious bodily harm.

The trial decision can be analysed for gender bias on a number of grounds. First, one of the requirements of judicial decision-making, the ability to empathise, seems to be totally gender-biased in favour of the male defendant. It is common knowledge that detachment is the posture from which judges render their final decisions, but it should only be assumed after the judge has exercised his or her ability to empathise with the parties to the lawsuit.[54]

Here, as far as the threat issue was concerned, no empathy whatsoever with the victims is apparent. Had their perception of the letters been considered by the judge, it is highly unlikely he would have characterised them as "adoring fantasies". Not only was the judge's empathy limited to the imagined mental state of the accused, his choice of the words "adoring fantasy" is inappropriate. Both the words "adoring" and "fantasy" connote love, caring and pleasure and completely disguise and misrepresent the ugly reality of sexual violence. Moreover, the idea

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[53] Ontario District Court, 8 November 1988, unreported.

[54] National Judicial Education Programme, "Judicial Discretion: Does Sex Make a Difference?" (New York: NOW Legal Defense and Education Fund, 1981) at 9. See also K. Mahoney, "R v McCraw: Rape Fantasies v Fear of Sexual Assault" (1989) 21 *Ottawa Law Review* 207.

that a threatened sexual assault could simultaneously be an adoring fantasy trivialises violence against women and blurs the distinction between voluntary, normal sexual relations and hostile, coerced violations of bodily integrity. More than condemning and deterring sexual violence, which one would think is an appropriate thing for a judge to do, the tone of the judgement legitimates sexual domination of women by men, eroding the most basic of all rights, that of inviolability of the person. This same sensibility carries over into the analysis of the harm issue.

In the judge's opinion, the requirement of threatening "serious bodily harm" was not met in the case. In fact he went further, suggesting that sexual assault generally does not itself necessarily involve any kind of physical harm to the victim. To a non-legal person, this view would be absurd. The question must be asked, why would a judge hold such a view? The reason probably is because his views are grounded in the legally created, gender-biased stereotype that women lie about sexual assault. It goes back to the days when a women victim's evidence of rape was not believed unless it was corroborated, either by other witnesses or by indicia of wounding which would corroborate non-consent. As a result, the "harm" of sexual assault came to be associated with the corroborative evidence, the evidence of wounding, kicking, stabbing, strangling etc, rather than the act of unconsented-to intercourse.

By saying that forced sexual intercourse is not necessarily harmful, the judge failed to consider the victim's perspective. The judge obviously viewed rape as a sexual act. To view it as such empathises with the rapist. As the rapist sees it, rape is an expression of sexual desire, a source of sexual pleasure for him, albeit forced. This gender-biased mind-set leads to the conclusion that harm to the victim occurs only if she resists. In other words, she is in control of the harm. The trial judge's analysis gives the accused the benefit of assuming no resistance and in effect renders the threatening provision almost meaningless for women. In order to meet the requirements of the criminal law according to this case, the perpetrator would have to threaten to do more than rape.

When this case reached the Supreme Court of Canada, a contextual analysis was adopted which resulted in a more just and gender-balanced conclusion. Addressing the harm issue, the Supreme Court of Canada recognised that gender bias occurs when issues are viewed only from a male perspective. The court said, "to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women, rape under any circumstance must constitute a profound interference with their physical integrity".[55] The court stressed that the threat issue must be determined on the basis of what a reasonable person would think, then added,

[55] *McCraw v R* [1991] 3 SCR 72 at 83. For a more extensive commentary on the case, see K E Mahoney, *supra* note 54.

"bearing in mind that at least 50 per cent of the ordinary reasonable people in our society are women".[56] The court said that rape is a crime committed against women which has a dramatic, traumatic effect and to ignore the fact that rape frequently results in serious psychological harm to the victim would be a retrograde step, contrary to any concept of sensitivity in the application of the law.[57]

The effect of this decision was not only to bring a woman's perspective into the law of sexual assault and threats of serious bodily harm, it changed the notion of serious bodily harm doctrinally. Until this decision, psychological harm, particularly in sexual assault cases, was not a factor in deciding what charges would be laid or in the sentencing of the accused. Where there was no evidence of wounding, prosecutors would charge rapists with simple sexual assault - the least serious of all the sexual assault crimes. Now that psychological harm is recognised as serious bodily harm, rapists can be, and are being, charged under the more serious sexual assault provisions - of sexual assault causing bodily harm.

The foregoing is intended to provide some insights into the nature and effects of gender bias in judicial decisions and to stimulate discussion on in this important matter. Once the conversation begins, it inevitably leads to discussions about solutions. In Canada, judicial education programmes on gender and race issues have been developed in a number of provincial jurisdictions as well as at the federal level as a means of dealing with pervasive gender and race bias in the law. The following section describes the content and methodology of some judicial education initiatives.

Race, gender and culture

Understanding the interconnections between race, gender and class is essential to the understanding of oppression and power. Without an appreciation of the relations between white men and women and men and women of color, the analysis of biases in the administration of justice is incomplete. Sherene Razak for example, argues that both women of colour and aboriginal women are obliged to talk about culture and violence within the context of white supremacy.[58] Whiteness is adopted as the norm for women in the same way maleness is used as the norm for humans.

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[56] [1991] 3 SCR at 85.

[57] *Ibid*

[58] Sherene Razack, "What is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence" (1994) 19 *Signs* 894.

Without fully understanding the intersections of race, gender and culture, white judges trying to become "culturally sensitive" sometimes fall into the trap of using culture and historical specificities to doubly disadvantage women. In rape cases of Aboriginal women for example, judges take into account the impact of the history of colonisation and its present-day legacy as mitigating factors in sentencing of the Aboriginal male offenders.[59] Absent is any discussion or analysis of the effects of colonisation of Aboriginal women and its legacy on them as victims of sexual assault. As a result, Aboriginal women are devalued compared to both Aboriginal men and white women, whose assailants receive far more severe penalties.

Judicial education

That white, male perspectives of women's role, capacities and potential have influenced the content of judge-made law is beyond dispute. Tests of discrimination, reasonableness and harm have assumed the values of men, excluding and marginalising women's experience in a wide range of areas of the law, from torts to sexual harassment to self-defence and wife-battering.

If gender, race and class biases are to be eradicated from judicial decision-making, judges must be given the necessary knowledge to enable them to appreciate the perspectives of minorities and women, the consequences of stereotyping and the complications of intersecting characteristics such as race and gender, which can compound disadvantages. On-going social context education, a concept which many players in the administration of justice have endorsed,[60] is an obvious way to address perspectives that are too limited.

One of the most active participants in judicial education in Canada is the Western Judicial Education Center (WJEC), a project of the Canadian Association of Provincial Court Judges. It organises continuing education programmes for Provincial and Territorial Court Judges from Western and Northwestern Canada. The WJEC is built on a co-operative model. It works in very close co-operation with the chairpersons of provincial and territorial education programmes to ensure that provincial court judges receive a full range of continuing education programmes. Since 1988, by internal agreement, the members of this co-operative group have focused on developing programmes dealing with delivery of justice to Aboriginal people, gender equality in judicial decision-making and racial, ethnic

[59] *R v T(1989) 8; R v Whitecap and Whitecap (1989); R v Okkuatsuak (1987), 234; R v J E (1991).* In these cases, mitigating factors ranged from difficult social and economic conditions to sexual abuse in residential schools.

[60] The Justice Minister of Canada convened a national conference on Gender Bias in the Law and the courts in June 1991. She stated that ridding the judicial system of gender bias was firmly on the government agenda. The President of the Canadian Bar Association underscored her remarks and stated a similar commitment from the bar and two justices of the Supreme Court of Canada in a recent judgement identified gender bias as an endemic problem, and reform efforts have now begun.

and cultural equality. In addition, a "participatory" model of programme delivery has been adopted which is capable of implementation in any part of the country at any level of court. This model includes a close association with law schools and continuing legal education societies in Western Canada as well as non-legal professionals and private citizens. Advice and direct resource commitment of these organisations and individuals is obtained, often at no charge. As a result, a strong community support base as well as a high quality product has been created.

One of the key elements of judicial education programmes is peer leadership. Judges are trained by other judges and "outsiders" to instruct and lead other judges. This method of delivery challenges judges to participate and to take responsibility for their own continuing education while respecting the fundamental principle of judicial independence. At the same time, members of the broader community interested and concerned with improving the quality of justice delivery, participate in the workshops and other sessions. Women, aboriginal people, children, racial, cultural and ethnic minority group members, and other people very unlike judges, supply knowledge that judges require but seldom receive. They describe and discuss the problems they experience in their daily lives as well as in the courts. They lead discussions, present papers, participate in social events and sometimes provide entertainment to educate judges about their cultural and social reality.

The WJEC workshop held in June 1991 in Yellowknife, Northwest Territories is a good example of the pedagogy and philosophy of the programme. The theme for the workshop was "Equality and Fairness: Accepting the Challenge". It dealt exclusively with Aboriginal justice and gender equality, assigning equal time to the two topics. The Aboriginal programme included police, Crown counsel, defense counsel, native court workers and correction officials as speakers and contributors. They addressed issues on two major topics: the identification of systemic discrimination against Aboriginal people and the values that Aboriginal people hold; and an examination of the ways in which the justice system can more adequately respond to Aboriginal offenders.[61] An important aspect of the Yellowknife programme was the presence of elders and translators from members of native communities including the Dene, Metis and Inuit. Their importance to the proceedings was programmatically acknowledged in both the substantive sessions as well as in the ceremonial aspects of the session. For example, each day an elder from one of the communities offered a prayer at both the opening and closing sessions.

The gender equality portion of the workshop was two days in duration and was designed around three thematically-linked analytical approaches. The first was an exploration of the principles of equality in the substantive law; the second, an investigation of the systemic social and economic consequences of sex

[61] Norma Wickler, "Educating Judges About Aboriginal Justice and Gender Equality", *The Western Workshop Series,* 1989, 1990, 1991 (Department of Justice Canada, 1991).

discrimination, particularly in terms of violence and poverty; and third, an expose of the consequences individuals experience because of gender inequality and gender bias in the courts.

Survivors of sexual assault as well as crisis centre workers provided the judges with first-hand information about consequences of poverty and violence against women. Other topics on the programme looked at the issues of sexist language and credibility of men as a group compared to women as a group.

Throughout the seven-day workshop, a variety of teaching techniques were used including lectures, dramatisations, panels and question-and-answer sessions. In the small groups, other techniques such as discussions, brainstorming, buzz groups, videos and video commentary were used. Previously prepared papers on gender equality issues were distributed in the workshop, including materials which also contained two videotapes on the topic, "A Judicial Approach to Gender Bias". A written guide to the video material was provided, setting out questions for discussion and other explanatory material. Each judge was provided with a full set of materials in advance of the workshop.

It is noteworthy that a three-day "training the trainer" workshop on "Gender Neutrality in Decision-Making" was held three months prior to the Yellowknife meeting for the judge facilitators. The purpose was to give them a deeper understanding and awareness of gender issues, as well as to provide some pedagogical training in delivery formats, and facilitation skills.

Evaluations were done by the judges on a daily basis. This enabled the administrators to collect highly specific data on their reactions to the content, presentation skills, teaching methods, stated objectives and new knowledge they felt they gained.

Conclusion

The Canadian experience in identifying and correcting gender and race bias in the courts is in its formative years. The acknowledgement that unequal and unfair treatment of women and racial minorities occurs within the judicial system was the important and crucial first step. The second step was the recognition that in order to remove these biases judges need to better understand the impact of poverty, race, illiteracy, disabilities, discrimination, alcohol and drug abuse, sexual and physical abuse on social behaviour. This led to the further recognition that legal principles must be linked to the social context in order to achieve complete justice and fairness within the legal system. By virtue of the fact that judges have taken a leadership role in opening up the channels of communication, they have not only removed artificial barriers to the acquisition of important knowledge required to address issues previously unaddressed, they have set an important example to other actors in the legal system about self-examination and improvement. What is

innovative and exciting about the new judicial education initiatives in Canada is the idea that the community as well as judges have a direct connection to and investment in the work that judges do.

Notwithstanding some considerable progress, however, much remains to be done. If gender, race and other forms of bias are to be eradicated from judicial decision-making, the education of judges on these issues must be comprehensive, consistent, systematic and of high quality. At the present time, there is no comprehensive long-term Canadian plan for judicial education, no clearinghouse for materials nor any consistent evaluative process providing reliable, comparative results. Empirical data must be collected as an on-going facet of judicial education in order to support and validate the programmes as well as to document specific problems and trends. Judicial education must also strive to be more inclusive to incorporate a broader array of values and opinions. For example, in the Aboriginal programmes, the views of elders have predominated. It has been suggested that in addition to the views of elders, other Native groups - young and old, male and female, traditional and non-traditional - should be heard. In addition, interrelationships between gender and Aboriginal justice as well as the role of Native women in light of the Charter of Rights and Freedoms, is still unexplored as are the potential consequences for different social groups of "alternative" or community-based justice programmes.[62]

In the gender programme, the views of minority as well as white, able-bodied women must be heard. Although gender issues affect all women, the interrelationships between gender equality, disability, diverse cultural values and practices must be understood in order to achieve a full understanding of women's experience.[63]

In June of 1992, the WJEC co-sponsored the fourth of the Western Workshops and addressed many of these concerns. By building on the success of the 1991 Workshop, the organisers were able to focus on issues of racial and ethnic discrimination and their compounding effects on gender discrimination. Special attention was given to the problem of spousal assault within the multicultural context, urban natives and the justice system, and views of Aboriginal women. In addition to the teaching techniques described above, one day of the workshop was held at an Indian Reserve where hosted by the native people, the judges learned about aboriginal cultural beliefs and values and perceptions about the delivery of justice. Other optional trips included a Metis settlement visit to learn about Metis

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[62] *Id* at 77.

[63] For example, see K Mahoney, "International Project to Promote Fairness in Judicial Processes: Report on the Geneva Workshop on Judicial Treatment of Domestic Violence", 5 February 1992, Palais des Nations, Geneva Switzerland.

history, culture and present concerns and visits to various social service agencies and community resources which support the poor, the disadvantaged, victims of violence and young offenders.

While all of the problems and challenges of gender and race bias education have yet to be entirely resolved, the process of judicial reform has begun. It is important to understand that it is an internal voluntary reform movement rather than an imposed one. One can only hope that this development will continue and flourish within the Canadian judiciary such that the ultimate objective, equal justice for all, will be achieved.

What is surprising is that it has taken so long for gender and race bias to make its way onto the judicial agenda. Since the 1960s, the modern concept of equality has been on government agendas throughout the western world: human rights commissions, affirmative action programmes, equality opportunity legislation, labor codes, charters of rights and freedoms and other equality tools have been created to identify and remedy intentional and systemic discrimination. Members of disadvantaged groups have described and documented the nature, extent and consequences of discrimination in almost every social institution and profession. Gender and other forms of bias were found embedded in the business world, in the religious establishment, in higher education, and in government often operating in multiple ways. But ironically, the judiciary - the very institution which was determining the effectiveness of efforts to achieve equality and which could undermine even the most progressive legal reforms through the exercise of judicial discretion and through court-room behaviour - was not itself scrutinised by social reformers and analysts. Why? Probably the main reason lies in the unquestioned and commonly held belief that judges are completely objective, disinterested and impartial in all their work. Another reason is the courts themselves. Until recently, the judicial arm of government has been loathe to accept any culpability with regards to the disadvantaged status of women or other minority groups. The idea that courts could be acting in a manner prejudicial to a specific group in society is generally rejected outright. The failure to entertain this possibility of course precludes any attempts to begin to rectify or redress the situation. To further complicate matters, the issue of bias is often personalised and reduced to assertions of individual judges denying prejudice on their part or on the parts of their associates. This reaction is inappropriate because it confuses the concepts of overt discrimination with systemic discrimination. While there may still be some incidents of overt prejudice, they are relatively easy to identify and rectify. Systemic discrimination, on the other hand, is far more pervasive and insidious and is much more difficult to eradicate. It often exists without the cognisance of either the individuals or institutions where it is practised. Inequality is tangible and real for all women, yet equality has always been a very difficult concept for judges, lawyers, law professors and other students of the law to define or describe. The reason for this difficulty, as Justice Rosalie Abella of the Ontario Court of Appeal puts it, is that:

> "equality is evolutionary, in process as well as in substance. It is cumulative, contextual, and it is persistent. At the very least, equality is freedom from adverse discrimination. But what constitutes adverse discrimination changes with time, with information, with experience and with insight. What we tolerated as a society one hundred, fifty or even ten-years ago is no longer necessarily tolerable. Equality is thus a process, a process - of constant and flexible examination, if vigilant introspection, and of aggressive open-mindedness. If in this on-going process we are not always sure what 'equality' means, most of us have a good understanding of what is fair."[64]

Without additional sources of information, judges' understanding of social, moral and economic factors remain limited by their own knowledge or by information of variable quality provided by one or more of the parties in the context of disputes where the parties define the issues.

[64] R Abella, *supra* note 1, at 4.

International and Regional Standards of Women's Rights: Their Importance and Impact on the Domestic Scene - The Position in Zimbabwe

Justice A. R. Gubbay
Chief Justice of Zimbabwe

Theme

The theme of this paper will be to affirm the importance and value of international and regional standards of women's rights in relation to the effect they can have on the domestic scene. In so doing, I will identify the major international standards which many countries have adopted and, will endeavour to illustrate how far they have been accepted into legislation, how far they have been enforced or applied by the courts, and how far they have been put into practice in the Zimbabwean experience.

What are women's rights?

The assertion is sometimes made that there is, if you like, a separate collection of rights known as "women's rights". This is of course not strictly correct, for women's rights are no more nor less than human rights. However, women often do not enjoy human rights to the same extent as men do and the assertion of "women's rights" has thus arisen out of the need to address and counter-balance the denial of human rights to women. Asma Jahangir puts it succinctly this way:

> "For centuries women's rights were considered a gender issue, to be taken up by women themselves and aloof from the mainstream human rights struggle. But in fact women's rights put the question of the universality of human rights to test."[1]

This will not be the place to examine in depth all the reasons or causes for this situation for they are many and they are complex, and some go back into the depths of history. It may be helpful, however, to refer to just three which have led to, and which maintain, this inequality: religion, custom and tradition.

[1] Asma Jahangir, Chairperson, Human Rights Commission of Pakistan in "Women's Rights are Human Rights" (unpublished).

"Religion", it has been pointed out by Cecilie J. Rushton, "has not been kind to women".[2] Three major religions: Christianity, Judaism and Islam, whilst in principle according equality to women, or at least condemning oppression of women, for the major part through their history, have been interpreted by men. This had led to a stress or focus on men's rights and the subjugation of women's rights.

Custom and tradition too, over the ages have been used to exclude women trom decision-making and from positions of influence. This is the situation in many countries and societies and the origins are often lost in the mists of history. A custom or tradition may indeed have begun for the best of reasons. Such as the desire or necessity by men to protect women who at times may require special support, for example, during pregnancy. Or the custom or tradition may have arisen from a less justifiable reason, for example, the aggressive nature of men in a particular society. Whatever the reason or origin, the custom or tradition, somehow or other, it is eventually applied oppressively. The result is discrimination against women.

This paper, as I have said, will not dwell on the causes or reasons for discrimination, which is a subject that is more properly within the province of the sociologist or historian. I think we can all take it as a fact the phenomenon or practice of discrimination.

The more pertinent question before us is what can be done to redress this imbalance. This leads to an examination of the question of the international expression of women's rights and the effect it has.

Importance of international statements

Because discrimination against women is prevalent and because the existence of it is often not appreciated or is ignored in many societies, it is of considerable importance that international statements of the fundamental rights of women should be made and published. The international expression of these rights serves three main purposes:

- it awakens countries concerned to the fact of discrimination within their society;

- it encourages countries concerned to initiate reform because discrimination against women is expressed to be unacceptable internationally; and

[2] Cecilie J. Rushton, "Realising Human Rights – The Constraints", presented to the Tenth Commonwealth Law Conference held in Nicosia, Cyprus, May 1993.

- it sets a standard which can be aspired to and adopted by countries concerned in the process of reform.

International standards of women's rights: where they can be found and how they can be put into effect in the domestic scene

There are several international statements of the right of all persons to be treated without distinction on the grounds of sex. However, as the most profound and comprehensive international expression of the rights of women is to be found in the Convention of the Elimination of All Forms of Discrimination against women (the CEDAW Convention).[3] I shall, in this paper, take it as the basic statement. Another reason for taking the CEDAW Convention as the basic statement is that it has been adopted by very many countries, including Zimbabwe.[4] In its sixteen core articles, the Convention covers the full range of issues relating to the role and position of women both in public and private life, and declares the obligation of States parties to ensure the full enjoyment and exercise of human rights and fundamental freedoms by women on the basis of equality with men.

Article I of the Convention

This article sets out a basic definition of discrimination against women as being any distinction made on the basis of sex which has the effect or purpose of impairing the enjoyment by women of human rights and fundamental freedoms.[5]

Prior to Zimbabwe's accession to the Convention, the Constitution of Zimbabwe[6] prohibited discrimination based on a number of grounds, but omitted the ground of sex. After Zimbabwe acceded to the Convention, the Constitution was amended so that section 23 now provides that no law shall discriminate, and no person shall be treated in a discriminatory manner by any person acting under a law or in an official capacity, on the grounds of the gender of that person.[7] The fundamental importance of this provision now being included in the Constitution cannot be over-stressed. It ensures in the most significant way that, in future, discrimination against women by legislation or by official treatment is outlawed and prohibited

[3] 1249 UNTS 13, adopted I March 1980, entered into force 3 September 1981.

[4] Zimbabwe acceded to the CEDAW Convention on 13 May.

[5] *Supra* note 3. See also http://www.un.org/womenwatch/daw/cedaw.

[6] The Consitution of Zimbabwe Amendment (No 14) Act 1996, which was promulgated on 6 December 1996.

[7] The Constitution of Zimbabwe, section 23 states:

because the Constitution in Zimbabwe, being the supreme law, prevails over all other laws. The point will not be missed, however, that the accession of Zimbabwe to the Convention must have been instrumental in bringing about this change to the Constitution.

Article 2 of the Convention

This article condemns the discrimination of women and enjoins the signatory countries to adopt legislative and administrative measures to eliminate discrimination.[8]

As I have noted, there is now a basic statement in section 23 of the Zinibabwe Constitution that outlaws discrimination against women.[9] It is, however, in a sense, a negative provision. Article 2 of the CEDAW Convention enjoins States to go further and to positively eliminate discrimination against women.

As a matter of fact, even before acceding to the Convention, Zimbabwe had already enacted several pieces of legislation taking positive steps to outlaw discrimination. I would like to mention a few examples to show how Zimbabwean law conforms with this particular article.

(a) The Legal Age of Majority Act 1982 (which is now incorporated in the General Law Amendment Act)[10] gives both men and women majority status at the age of 18 years. Prior to this, African women were regarded in many ways by law and by custom as perpetual minors. Now, all women of whatever race who are above 18 years may marry without the consent of their guardians and they have the legal capacity to sue and to be sued in their own right.

(b) The Matrimonial Causes Act[11] allows for the equitable distribution by the courts of the matrimonial property of spouses on divorce and, importantly, obliges the court to take into account a woman's domestic contribution to the property acquired during the marriage. The Act applies to the dissolution of all registered marriages and constitutes a considerable legal advance because, prior to its enactment, the rights of African women to a fair allocation of the matrimonial property were unsatisfactory upon divorce men were in a more favourable position.

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[8] *Supra* note 5.

[9] *Supra* note 7.

[10] Chap 8:07.

[11] Chap 5:13.

(c) The Maintenance Act[12] allows a woman to claim maintenance from the father of her child. As women are often economically disadvantaged, this law, which is enforceable through magistrates' courts established throughout the country, is of substantial benefit. It was reported in 1995 that almost 70,000 women were then claiming maintenance from responsible fathers.

(d) The Deeds Registry Act[13] was amended in 1991 to remove an impediment that had occurred when a married woman wished to transfer immovable property in the Deeds Office. Women are now able to execute deeds and documents without the assistance of their husbands.

(e) The Sex Disqualification Removal Act (now incorporated in the General Law Amendment Act)[14] provides that women may hold public offices on the same conditions as men and there is to be no discrimination between men and women who hold the same qualifications for any public office.

(f) The Electoral Act[15] enables women to vote and stand for election on equal terms with men.

(g) The Labour Relations Act[16] prohibits employers from discrimination against women employees and also prohibits discrimination in advertising vacancies for jobs.

(h) The Deceased Persons Family Maintenance Act[17] allows a surviving spouse (effectively, the woman) and children to continue to occupy the family home and household goods and effects, on the death of the other spouse, and to apply to the court for maintenance from the estate of the deceased, whether the deceased died intestate or not.

(i) The Infanticide Act[18] creates the offence of infanticide for the intentional killing of a child within six months of its birth. In the past, such cases were dealt with as murders and attracted the death penalty. The Act was introduced amid

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[12] Chap 5:09.

[13] Chap 20:05.

[14] Chap 8:07.

[15] Chap 2:01.

[16] Chap 28:01.

[17] Chap 6:03.

[18] Chap 9:12.

concern that women were paying for a crime that both men and women should pay for, as often deserted or divorced women and schoolgirls were the ones most likely to be driven into abandoning or killing their babies. The penalty for this offence is less than murder (a maximum of five years' imprisonment) as it takes into account the balance of the accused woman's state of mind, that she was under stress and fear.

The above are some examples of laws which have been passed in accordance with international standards applicable to women. Apart from this, the Government has also set up various institutions to deal especially with women's affairs. Until 1988 there was a Ministry of Community Development and Women's Affairs. This has now been transferred to the Ministry of National Affairs, Employment Creation and Co-operatives.

It has a Women's Affairs Unit and encourages and supports a number of organisations. In 1995, it was reported that about 100 registered non-governmental organisations in Zimbabwe had programmes on women's advancement, and at least 50 have specific programmes for women,such as Women's Action Group, Women and Law in Southern Africa, Women in Law and Development in Africa, and the Zimbabwe Association of University Women.

The post of Ombudsman, which is a constitutional post and which confers on the officeholder the right to investigate and report on irregularities in public administration, is currently held by a woman. Regrettably, the Ombudsman can only recommend corrective action and has no enforcement powers. The Government is currently considering recommendations for the extension of the powers of the Ombudsman to include investigations of alleged violations of human rights.[19] If approved, the office could be taken advantage of by women to achieve full protection, implementation and promotion of their rights.

Currently, two High Court judges are women and many women are magistrates and prosecutors.

Article 3 of the Convention

This article requires all states to take measures to ensure full development and advancement of women guaranteeing them human rights and fundamental freedom on an equal basis with man. To a large extent, this article overlaps with the previous article. I have already indicated how Zimbabwe has adjusted its laws and supports programmes to conform with its international obligations.

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[19] The powers of the Ombudsman have subsequently been reformed under the Ombudsman (Amendment) Act 1993, effective from 13 June 1997.

Article 4 of the Convention

This article requires States to take temporary affirmative action in favour of women's advancement to adjust any imbalance.

A number of administrative measures have already been taken to give effect to this requirement. For example, the Ministries of Education and Culture and Higher Education have adopted a policy of discrimination in favour of females in respect of school placements in order to correct a historical inequality in the schools. Recently, the University of Zimbabwe, the oldest and largest of the country's four universities, introduced with immediate effect an affirmative action policy when admitting female students. This policy is designed to reduce the gender imbalance in higher education. Women entering university through the "A" level qualification, will have their cut-off point set at two points below that of men.

In the public service, measures have also been taken to advance women. It is reported that it is the Government's target to have at least 33% of the senior public posts held by women by the Year 2000. It is government policy to equip women with the necessary skills for management positions in the Public Service through the Management Development Programme for civil servants, which is run by the Zimbabwe Institute of Public Administration and Management.

Article 5 of the Convention

This provides that social and cultural patterns which discriminate against women should be modified.

This requirement will, of necessity, take some time to fulfil for, as mentioned earlier, tradition runs deep. Many traditional and cultural practices that directly or indirectly hamper women's advancement remain. For example, the pledging of girls or marrying them off at tender ages which is practised by some communities, mainly religious, and in some cases as a customary practice, tends to militate against their rights as human beings and deprive them of care, education, and proper marriage. The customary position of women as perpetual minors and inferior to men also predisposes families to minimising the advancement of women and girls. Advancement in such areas as education, politics, health care and inheritance of property, tends to be diverted to boys and men who are regarded as permanent and major members of families, especially in patriarchal cultures. Further administrative and legislative measures are under way to comply with this article.

Article 6 of the Convention

This Article requires all appropriate measures to suppress sexual exploitation of women. Zimbabwe has a series of laws already on the statute book which deal with this. They range from the recognition and enforcement of common law crimes, such as rape, through to statutory offences under the Criminal Law Amendment Act[20] which specifies a number of offences designed to protect women and Young Girls from sexual exploitation and from falling into prostitution. These offences are vigorously prosecuted and severely punished in the courts.

In addition, the Government is currently working on measures to introduce "victim-friendly courts" for vulnerable witnesses (such as women and young girls) and other administrative reforms such as more sympathetic investigation of reports of sexual offences.

Article 7 of the Convention

This deals with the elimination of discrimination against women in political and public life.

It has already been explained that domestic law affords protection in this regard (for example, the Electoral Act and the Sex Disqualification Removal Act) and that affirmative action for the advancement of women in public office is being undertaken.

Article 8 of the Convention

This article requires that equal opportunities are afforded to women to represent their goverments internationally and to participate in international organisations.

Zimbabwean women continue to hold several ambassadorial posts and other high offices at international level. However, the numbers are few in comparison with men. More needs to be done for women in this sphere.

Article 9 of the Convention

Women are required to be granted equal rights with men to acquire change or retain their nationality.

The Constitution of Zimbabwe until recently contained an imbalance. A foreign female married to a Zimbabwean male had the right to obtain citizenship by

[20] Chap 9:05.

registration. The converse was not true. A foreign male married to a Zimbabwean female had no such right. Recently, the playing field was made level. The Constitution was amended and now neither foreign men nor women have this special right to citizenship: both have to apply for citizenship.[21] The impact of this section on the rights of women and their spouses will be discussed further when considering the role of the courts in relation to discrimination.

Article 10 of the Convention

This requires the elimination of discrimination against women in the field of education.

The impact of the Convention on the domestic scene in this respect has already been discussed under article 4 where, it will be recalled, reference was made to the fact that the Government has already adopted a policy of advancement of women in this field.

Article 11 of the Convention

This requires the elimination of discrimination of women in the field of employment.

Once again the impact of the Convention in this respect has already been discussed above under article 2.

Article of 12 of the Convention

This article calls for the elimination of discrimination in the field of health.

In this connection, Zimbabwe has taken considerable steps towards improving health-care for the people. The Ministry of Health and Child Welfare has proclaimed a national health policy which is in line with the World Health Organisation goal of "Health for All by 2000".[22] Several measures have been adopted to improve the health care services in rural areas where women predominate. There are free health services for the poor, community health-workers are spread throughout the country, and there are programmes on AIDS control and programmes for children's health.

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[21] *Supra* note 6.

[22] See http://www.who.org

Article 13 of the Convention

This seeks the elimination of discrimination against women in other areas of economic and social life.

Many programmes have been established and are in operation to better the economic status of women. No law exists that prohibits women from acquiring loans from financial institutions. Government parastatals make loans to women in appropriate cases to enable them to enter and compete in the financial sector. Taxation is governed mainly by the Income Tax Act.[23] This Act was previously discriminatory. It was amended in 1990. Married women are now taxed separately from their husbands and also receive rebates as individuals. Prior to the amendment, a married woman's income was taxed as part of her husband's income and thus tended to prejudice her. As a result, women ended up with little money. Allowances, such as children's allowances, were credited to men.

Women, be they single or married, have the same rights as men regarding, for example housing and housing allowances, health and insurance benefits offered by employers, as well as other benefits offered by government. However, the relevant authorities consider income as the primary factor in determining whether one qualifies for a house or a stand to build one. Although there are schemes for low-income earners, those who are unemployed or earn very little are often disadvantaged; and this group is comprised mainly of women.

Government has created a statutory body, the Sports and Recreation Commission, to co-ordinate, control, develop and foster activities of sport and recreation, and to endeavour to ensure that opportunities are made available to all persons throughout Zimbabwe.

Article 14 of the Convention

This article requires States to address the problems of rural women.

As indicated under article 12, much is being done to improve the position of 'women in rural areas who are probably the most deprived, both economically and socially. Many government and NGO programmes are being carried out in respect of matters like health, education, community co-operation and organisation of rural women.

[23] Chap 3:06.

Article 15 of the Convention

'I'his requires States to ensure women equality with men before the law.

As stated earlier, the most significant breakthrough in achieving this objective in Zimbabwe was the Legal Age of Majority Act. As a result of the passing of that Act, women may now sue and be sued in their own right and have equal contractual capacity with their male counterparts. Apart from this, various support organisations, such as the Law Development Commission, have proposed legal reforms to the Government which will ensure greater access to justice for the disadvantaged.[24] For instance, it has suggested the introduction of laws providing for a class action whereby one person representing a class of persons with similar claims, may bring action in the courts; and a system of contingency fees whereby persons will be entitled to engage a lawyer on the basis of no win no fee.

Some time ago, the Law Development Commission issued recommendations for improving the lot of the vulnerable witness (women and children in sexual assault cases) and Government is now implementing these reforms.[25]

One of the greatest impediments to the exercise by women of the rights guaranteed by law is ignorance. In Zimbabwe many women are ignorant of the substance and effect of laws which ensure equality. For many, a law will remain insignificant and of no interest until such time as they are confronted with a particular problem and have to start seeking advice and assistance. Many others feel that the law is alien to them. They regard lawyers as impersonal, formal beings and the courts and judicial officers as intimidating. As long as women are not informed of their rights and so do not exercise them, the gap between the theory of law and what happens in practice will remain wide.

However, NGOs such as the Legal Projects Centre, the Consumer Council, the Citizens' Advice Bureau and various other organisations are endeavouring to explain to women their rights before the law and how they can exercise them. In particular, efforts are being made to reach the rural populations. They have borne some success.

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[24] As of July 1998, no reforms with respect to access to justice for the disadvantaged had been implemented.

[25] See reforms implemented under the Criminal Procedure and Evidence (Amendment) Act 1997, effective from I October 1997.

Article 16 of the Convention

This article requires the elimination of all discrimination within marriage and the family.

As mentioned previously, significant steps in the form of legislation have already been taken, for example Legal Age of Majority Act; Matrimonial Causes Act; and the Maintenance Act. The whole question of inheritance is now also under scrutiny. A Bill will be introduced to Parliament soon, effecting an improvement in the position of widows.[26]

Various NGOs are currently pursuing a programme to control domestic violence, amongst other ways by the introduction of progressive legislation. Much needs to be done on the issue of domestic violence. Court officials need to be more gender-sensitive, especially when handling victiins of domestic violence and sexual abuse.

The impact of the Convention in the case of Zimbabwe

The expression of the international statement of women's rights in the CEDAW Convention, which Zimbabwe has adopted, has enabled and indeed obliged tile country to take serious and progressive measures towards eliminating discrimination of women. In other words, the Convention has achieved the three main purposes outlined at the outset of this paper. It has, in effect

- reminded the Government and the people of the existence of discrimination against women;
- drawn attention to the fact that it must be eliminated as it is internationally unacceptable; and
- set standards which may be aspired to.

International standards of women's rights in the Zimbabwean courts

I now move on to consider how the existence of international standards of women's rights and their adoption has facilitated court applications for the enforcement of the rights concerned. The focus will again be on the Zimbabwean experience. The examples given will reveal, I trust, that when the courts adopt an activist approach, human rights are not only recognised but are also enforced and advanced.

[26] As of July 1998 the Inheritance Bill had not been passed by Parliament.

(a) The Legal Age of Majority Act, which formally became law on 10 December1982, evoked much excitement, but few people foresaw the way in which this short and simple piece of legislation would change our society. Its significance and precise impact only came to be fully appreciated when the decision of the Supreme Court in the celebrated case of *Katekwe v Muchabaiwa* was handed down on 7 September 1984.[27] The Act then became even more of a talking point. Conservative thinkers accused it of having destroyed cultural and social norms by having removed lobola[28] as a legal requirement to validate a marriage.

Katekwe's case came before the Supreme Court as an appeal against a decision of the District Court for the Midlands Province that the respondent, the father of the seduced daughter, was entitled and had *locus standi* to sue for damages for seduction, notwithstanding that at the time of the seduction his daughter had attained her majority. In the District Court the magistrate, while accepting that the 1982 Act conferred majority status on any person who had attained the age of eighteen years, dismissed the appeal from the Community Court by holding that "the court is of the strongest opinion that at no time did the Legislatture intend to do away with the award of damages despite indicating that the Legal Age of Majority Act applies in relation to customary law.[29]

The Supreme Court disagreed. It held that as a result of the passing of the Act an African father or guardian lost his right under customary law to sue for damages for the seduction of a daughter who has attained the age of eighteen years at the time of the seduction. The father or guardian cannot even sue if the major daughter consents. Put simply, he has no right of action against the seducer.

Before the Act came into force, an African woman could not, regardless of her, validly contract a marriage without her father's or her guardian's consent. With the passing of the Act, on attaining majority all women acquire full legal capacity and full contractual powers. Consequently, they can now enter into any contract, including a contract of marriage, without the consent of their fathers or former guardians. If, therefore, a woman can validly contract a marriage without her father's or her guardian's consent, it follows that he can no longer in law insist on the payment of lobola as a prerequisite of the marriage. Previously, as his consent was necessary, he could always withhold it unless and until lobola was paid or satisfactory arrangements in respect thereof had been reached.

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[27] 1984 (2) ZLR 112(S).

[28] Lobola is the valuable consideration given by the husband for the privilege of marrying the wife. It is paid to the women's parent or guardian. It is one of the most important elements in bringing about a recognised union from the point of view of the parent or guardian.

[29] 1984 (2) ZLR at 116.

Under customary law the father or guardian was entitled to damages if his daughter was seduced, on the theory that the seduction had the effect of reducing the amount of potential lobola he would receive on the marriage of his daughter.

Under the 1982 Act, the father or guardian loses his right of ownership when his daughter attains the age of majority. He therefore has no right to claim lobola in respect of her. Whether or not he will receive lobola would now depend on the discretion of his major daughter. She has a right to impose any condition precedent to the contract of marriage. She may say to her prospective husband, "if you want to marry me, you will have to negotiate with my father. If you refuse to do that, I shall not marry you."

The institution of lobola is inconsistent with the equal status of men and women and, to the extent that the Act permits a major daughter to enable her father or guardian to claim lobola, it falls short of creating equality between men and women, regardless of race.

The second important decision on the Legal Age of Majority Act was that of *Agere v Nyambuya.*[30] In that case the Supreme Court held that the Legislature, in enacting section 3(3) of the Act, which reduced the age of majority from twenty-one to eighteen years, did not intend to deprive a father or guardian of his right to sue for seduction damages in respect of his major daughter *if such right vested in him before the coming into operation of the Act.* The facts were that the daughter had been seduced by Mr Agere in May 1967, when she was twenty-four years of age. Seventeen years later, the father sued for damages in the Community Court. The point was taken that he had no right to sue because the Legal Age of Majority Act had deprived him of *locus standi in judicio.* The objection was over-ruled, and appeals to both the District Court and the Supreme Court failed on the ground that the cause of action had arisen before the operative date – 10 December 1982. In other words, it was considered as a matter of statutory interpretation that the Legislature did not intend to interfere with rights which had accrued before the date on which the Act was passed, only with rights which had come into being on or after that date.

The third decision was *Jenah v Nyemba.*[31] Mrs Nyemba issued a summons out of the High Court on 12 July 1983 against Mr Jena, claiming $18,143 in damages for personal injuries she sustained when he shot her in the thigh with a firearm. Mrs Nyemba and her husband had contracted a duly registered customary union and thereafter had entered into a civil marriage under the Marriages Act, but African

[30] 1985 (2) ZLR 336 (S).

[31] 1986 (2) ZLR 138 (S).

law and custom continued to apply to their proprietary rights by virtue of section 13 of the Act. It was not open to them to elect to have the property consequences of the marriage governed bv the general law of Zimbabwe. Mr Jenah objected to the summons on the ground that a married African woman was not entitled in law to sue in her own right for personal damages unassisted by her husband. That was certainly the position prior to the Legal Age of Majority Act 1982, and the question was whether that Act had freed Mrs Nyemba from that bondage in respect of such an action. It was held:

> "The Legal Age of Majority Act applies without qualification to any person who attains or has attained the age of eighteen years. It is not restricted to single persons. It embraces a married African woman aged eighteen years or over who prior to the fixed date was a perpetual minor falling under the guardianship of her husband, for subsection (3) of section 3 specified that the preceding two subsections 'shall apply for the purpose of any law including customary law'. The effect therefore is to bestow capacity upon African married women. Indeed, it is unthinkable that in the context of its avowed aim of liberalization the Legislature could have intended to limit its grant of capacity to unmarried African women who fulfil the age requirement, but to retain a married African woman of say fifty years of age in the disadvantageous condition of minority."[32]

The fourth decision of importance was *Chihowa v Mangwende*[33] which concerned the right of a daughter, who was the eldest child, to be appointed the intestate heiress to her deceased father's property - something unheard of under customary law. The Supreme Court pointed out that it was no longer the law that the eldest male adult becomes the heir to his deceased father's intestate estate. The eldest daughter, by virtue of the Legal Age of Majority Act 1982, has acquired the same capacity to inherit. The eldest son and the eldest daughter now share in common a right to inherit and administer the estate of a deceased father for the benefit of the father's dependants, according to African custom and usage.

This case constituted a major breakthrough in respect of the right of women to be treated as equal to men within society. In some quarters it caused consternation. It was suggested that there would be a drought of hitherto unknown proportions and terrible calamities would overtake Zimbabwe. But none of these disasters happened. On the contrary, we had the best rainy season for years. Obviously, divine authority approved of the judgement.

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[32] *Id* at 142-143.

[33] 1987 (1) ZLR 228 (S).

(b) In *Zimnat Insurance Co.Ltd. v Chawanda*[34] the Supreme Court ruled that wife of an unregistered customary union - not even valid according to African law - was entitled to claim damages for loss of support when her husband had been killed through the negligence of another. The court adopted a progressive approach to the prevailing common law and extended strict legal principles to the fulfilment of equality where public policy, social justice and fairness demanded it be extended. It was said:

> "The opportunity to play a maeaningful and constructive role in developing and moulding the law to make it accord with the interests of the country and internaitional human rights instruments may present itself where a judge is concerned with the application of the common law, even thougth there is a spate of judicial precedents which obstructs the taking of such a course. If judges hold to these precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand."[35]

(c) In *Rattigan and Ors v Chief Immigration Officer*[36] *and Salem v Chief Immigration Officer*[37] the Supreme Court had regard to the terms of article 17 of the International Covenant on Civil and Political Rights[38] and article 8(1) of the European Convention on Human Rights[39] (both provisions afford protection against interference with family life) as well as to certain decisions of the European Court of Human Rights. The court held that the Immigration Act, which restricted the right of a woman citizen to have her alien husband reside with her in Zimbabwe and obtain employment in the country, undermined and devalued her freedom of movement, protected under section 22(1) of the Constitution.

(d) In early 1997, in *Holland and Ors v The Minister of the Public Service, Labour and Social Welfare*,[40] the Supreme Court struck down as unconstitutional a provision in the Private Voluntary Organisation Act[41] which empowered the Minister to summarily suspend from office members of the executive committee of the National Council of the Association of Women's Clubs; and then to replace

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[34] 1990 (2) ZLR 143 (S), 1991 (2) SALR 825.

[35] *Ibid* at 154.

[36] 1994 (2) ZLR 54 (S) [1994] 1 LRC 343, 1995 (2) SA 182 (Supreme Court of Zimbabwe).

[37] 1994 (2) ZLR 287 (S), [1994] 1 LRC 354.

[38] 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

[39] 213 UNTS 221, entered into force 1950.

[40] 1979 (1) ZLR 186 (S).

[41] Chap 17:05

them effectively with women of his choice. It was held that action by the Minister affected the civil rights and obligations of the suspended women. Therefore, they ought to have been afforded a fair hearing in terms of section 18(1) of the Declaration of Rights. Consequently, it was declared that the women were at liberty to resume their former offices and duties. These, and other cases clearly demonstrate the will and interest of our courts to promote and safeguard the rights of women.

Conclusion

I think these few examples of the types of cases that come before our courts show that where there is an environment of the protection of human rights created in a country, such as Zimbabwe, through its adoption of international statements (i.e. conventions) expounding those rights, the advancement of those rights is freely facilitated.

It may sometimes be felt that where women's rights are stated in some noble international or regional convention, it will amount in practice to nothing more than pious expression of intention. However, the experience in just one country, Zimbabwe has proved the opposite. Through such conventions, the grounding for a culture or ethic in women's rights is established, is put into effect and is sustained for the future.

International Standards, Domestic Litigation and the Advancement of Women's Rights Perspectives/Experiences from the South Pacific

Justice Teresa Doherty,
Justice of the Supreme Court and
National Court of Papua New Guinea[*]

From 18–21 March 1991, Papua New Guinea and other South Pacific country representatives attended the South Pacific Regional Seminar on the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention)[1] in Rarotonga, Cook Islands. Although the CEDAW Convention was adopted by a resolution of the United Nations General Assembly on 18 December 1979 and entered into force on 3 September 1981, the only South Pacific countries to have signed and ratified it before 1991 were New Zealand and Australia. In fact, they signed the treaty in July 1980 immediately the Convention was opened for signature; other Pacific Rim countries such as Japan, Indonesia and Philippines also signed in 1980.

Other independent states of the South Pacific were slow to follow – possibly the reason why the United Nations Regional Office instigated the Regional Seminar in 1991. Samoa acceded to the Convention in September 1992; Papua New Guinea signed it in July 1994 and ratified it on 12 January 1995; Fiji acceded, with reservations, in August 1995; and Vanuatu did so in September 1995. As of April 1997, Tuvalu, Kiribati, the Kingdom of Tonga, Nauru, Solomon Islands, Cook Islands and Micronesia have neither signed nor acceded.[2]

As of April 1997, Papua New Guinea had not yet implemented the Convention into domestic law despite the lapse of approximately three years since signature and two years since its undertakings to the United Nations Fourth World Conference on Women 1995 (Beijing Conference).[3] We approach a general election and a new

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[*](The views expressed in this paper are the author's personal views and do not necessarily reflect the views of the Papua New Guinean Judiciary).

[1] 1249 UNTS 13, opened for signature 1 March 1980, entered into force 3 September 1981. Papua New Guinea acceded to the Convention on 12 June 1995.

[2] For an up-to-date list of states that have signed, ratified, acceded or succeeded to the Convention on the Elimination of All Forms of Discrimination against Women see http://www.un.org/womenwatch/daw

[3] Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women*, Beijing September 1995, UN Doc A/CONF.177/20 (17 October 1995), 35 ILM 401.

government, so clearly the government that signed the Convention cannot bring legislation, and future implementation is pure speculation.

I cannot offer any explanation for this situation in the South Pacific (I exclude New Zealand and Australia). The decision to sign and to accede to an international treaty or convention is a political one, into which the judiciary has no input and which judges are virtually never asked to comment upon. Most Commonwealth countries require domestic legislation to bring an international convention into domestic law, treaties are not automatically self-executing and do not become part of a country's law by virtue of ratification. Again, the decision to implement is a political one and again the judicial oath precludes judges from interfering with that process.

There has been little or no publicity given to the CEDAW Convention in the media or through government agencies or non-government organisations in Papua New Guinea. By way of example, I did not learn that Papua New Guinea had signed the Convention for several months, despite my interest in it, and I only learnt that it was signed following a chance inquiry; there had been no official announcement. I have been unable to find a copy of the proceedings of the Regional Seminar despite personal approaches to delegates attending it. Similarly, there is a practical problem in readily assessing the text of conventions in our libraries. This is in contrast to other States parties. For example, South Africa signed the CEDAW Convention in January 1993. In February 1993, its Communication Service for the Department of Justice had produced a bilingual leaflet called "Equality for Women" inviting public comment and outlining proposed legislation which was stated to "form the legal framework of the Government's commitment to the abolition of discrimination on the ground of sex and its undertaking to protect women against discrimination".[4]

This lack of public awareness about international treaties and conventions is not exclusive to the CEDAW Convention. In my experience, there is little public dissemination of information about international conventions signed by the Government in Papua New Guinea and it is not always clear when domestic legislation is implementing those treaties.

When researching this and related papers, I have found difficulty in quickly locating the text of treaties or a list of treaties signed and ratified. Our Department of Justice has supplied them promptly and willingly when requested, there is no reluctance to make the information freely available, however, there is no easy public access.

Similarly, the executive does not always make the courts aware of the status of a convention and we are not automatically informed that a statute implements the provisions of any particular treaty or convention. The preamble to a statute does not state it is implementing a treaty or convention. Does the Papua New Guinean Juvenile

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[4] "Equality for Women", Department of Justice, South Africa, 1993.

Justice Act (only parts of which are in force) implement the obligations the government undertook when it signed the Convention on the Rights of the Child[5] or was it social reform of the children's court system? I suspect, I do not know that it was a combination of both. If presented with a case concerning a section of the Juvenile Justice Act do I look to the Convention on the Rights of the Child for interpretative guidance?

The Constitution of Papua New Guinea guaranteed the rights of all citizens, including women, to vote and stand for public office when it was introduced and passed in 1975. Papua New Guinea acceded to the Convention on the Political Rights of Women in January 1982 and was bound by it with effect from April 1982.[6] Does the Constitution implement the Convention? The reports of the pre-independence Constitutional Planning Commission make clear that there was an independent intention to ensure the political status of all citizens regardless of sex or origin.

Such questions can be asked of other conventions and treaties. Our Industrial Organisations Act 1974 has similarities to industrial legislation in other Commonwealth countries: is this a result of our obligations contained in the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively?[7] Did Papua New Guinea fulfil and implement its obligations under the Convention Concerning the Employment of Women in Underground Mines of All Kinds[8] when it passed section 98 of the Employment Act 1978 forbidding the employment of women in underground mines? Women did not work in mines in Papua New Guinea, this has never been a social problem, hence, there was no need of remedial legislation. I presume, though I do not know, that the legislation was intended to implement the convention.

The powers of the courts are usually to interpret and apply domestic laws. In interpreting domestic laws that translate and implement international treaties and

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[5] Convention on the Rights of the Child, GA Res 44/25, UN Doc A/44/49, at 166 (1989), adopted on 20 November 1989, entered into force 2 September 1990. Papua New Guinea signed this Convention on 30 September 1990, and ratified it on 2 March 1993.

[6] Convention on the Political Rights of Women, 193 UNTS 135, GA Res 640 (VI), adopted 20 December 1952, entered into force 7 July 1954. Papua New Guinea acceded to the Convention on 27 July 1982.

[7] Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (ILO Convention No 98/Right to Organise and Collective Bargaining Convention), 96 UNTS 257, adopted 1 July 1949, entered into force 18 July 1951. Papaua New Guinea ratified the Convention on 1 May 1976.

[8] Convention concerning the Employment of Women in Underground Mines of All Kinds (ILO Convention No 45/Underground Work (Women) Convention), 40 UNTS 63 adopted 21 June 1935, entered into force 30 May 1937. Papua New Guinea ratified the Convention on 1 May 1976.

conventions they should look to the treaty or convention as an aid to interpretation. This was the view held by another Pacific court in *Chu Keng Lim v Minister for Immigration*[9] when it held international treaties could be a guide to interpretation and development of common law. This is not a universally held view; there is the opposing view that once a treaty becomes domestic law it is interpreted as domestic law. I have never experienced any unwillingness on the part of a court in the South Pacific to consider international treaties. Rather our problem is lack of submission and poor dissemination of information about relevant treaties and conventions.

There is no doubt that the Papua New Guinean courts are empowered to consider international conventions and treaties. Section 39(3) of the Constitution states:

> "[F]or the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a Court may have regard to –
>
> (a) the provisions of this Constitution generally, and especially the National Goals and Directive Principles and the Basic Social Obligations; and
>
> (b) the Charter of the United Nations; and
>
> (c) the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nation concerning human rights and fundamental freedoms; and
>
> (d) the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms; and
>
> (e) judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms; and
>
> (f) previous laws, practices and judicial decisions and opinions in the countries; and
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> (g) laws, practices and judicial decisions and opinions in other countries;
>
> (h) the Final Report of the pre-Independence Constitutional Planning Committee dated 13 August 1974 and presented to the pre-Independence House of Assembly on 16 August 1974, as affected by decisions of that House on the report and the decisions of the Constituent Assembly on the draft of this Constitution;
>
> (i) declarations of the International Commission of Jurists and other similar organisations; and

[9] (1992) 176 CLR 1 (High Court of Australia).

(j) any other material that the Court considers relevant." [10]

The founding fathers of the Constitution included this wide-ranging interpretative base, although Papua New Guinea was not in existence when the Universal Declaration of Human Rights was adopted, nor was it a party to the European Convention for the Protection of Human Rights or a member of the International Court. They extended the power to all courts – not just the Supreme Court, which has original jurisdiction relating to the interpretation or application of the Constitution.

The lack of public awareness of the CEDAW Convention in South Pacific countries and their failure to become parties to it in no way implies that there is a constitutional legal bar or reservation to their signing and ratifying this, or any other, convention dealing with the equality and human rights of women or the girl-child. The Constitutions are the supreme law of the Pacific States, as was stated by Sir John Muria, Chief Justice of Solomon Islands, "[h]uman rights principles have been incorporated in most of the Pacific Island countries' constitutions which was done as a prerequisite to independence".[11]

The constitutions of the countries of the Pacific Islands provide for equality of citizens in similar terms. For example, section 55 of the Constitution of Papua New Guinea provides a right to equality regardless, *inter alia*, of tribe, ethnic background, political opinion, creed, or sex.[12] The Constitutions of Tuvalu, Solomon Islands, Nauru and Kiribati all mirror this provision, containing similar wording in section 3 of their respective Constitutions. For example, every person in Nauru is entitled to fundamental rights and freedoms of the individual whatever his race, creed or sex subject to respect for the rights and freedoms of others and for the public interest to each and all of the following namely:

" (a) Life liberty, security of the person and protection of the law; and

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[10] Constitution of Papua New Guinea's 39(3).

[11] Sir John Muria, Chief Justice of the Solomon Islands, "Personal/Common Law Conflicts and Women's Human Rights in the South Pacific: the Solomon Islands Experience", in A. Byrnes, J. Connors & Lum Bik (eds) *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation*, (London: Commonwealth Secretariat, 1997) [hereinafter *Hong Kong Colloquium*] at 138.

[12] Constitution of Papua New Guinea's 55 provides:

"(1) Subject to this Constitution, all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.

(2) Subsection (1) does not prevent the making of laws for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged or less advanced groups or residents of less advanced areas.

(3) Subsection (1) does not affect the operation of a pre-Independence law."

(b) Freedom of conscience, of expression and of assembly and association; and

(c) Protection for the privacy of the home and other property and from deprivation of property without compensation."[13]

However, the Constitutions vary in their definitions of discrimination. For example, the Solomon Islands Constitution guarantees protection against discrimination on the grounds of "race, place of origin, political opinions, colour, creed or sex"[14] whereas the Kiribati Constitution defines discrimination as "affording different treatment to different persons attributable wholly or mainly to their descriptions by race, place of origin, political opinions, colour, creed...",[15] omitting "sex" as a basis for discrimination.

Article 15 of the Constitution of Western Samoa provides "all persons are equal before the law"[16] and prohibits any administrative or executive action that would confer a benefit or restrict a person purely on grounds of racial origin, creed, sex or political opinion. At the time of writing this paper, I have been unable to find up-to-date information on the Constitution of Tonga which, as originally drafted did not grant any right of equality to women, and women could not be jurors. As Chief Justice Lussick of Kiribati stated in respect of the Kiribati Constitution:

> "Unfortunately the Constitution, having guaranteed to women the fundamental rights and freedoms of the individual, does not go on to protect them from discrimination based purely on the fact that they are women."[17]
>
> "Unfortunately, the pledge to uphold the principles of equality and justice does not seem to be consistent with some of the provisions of the Constitution, in view of the present day attitudes to the equal rights of men and women. In fact, it can be said that the Constitution, because of its omissions rather than its provisions, discriminates against women."[18]

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[13] Constitution of Nauru, s 3.

[14] Constitution of the Solomon Islands, s 15.

[15] Constitution of Kiribati, s 15.

[16] Constitution of Western Samoa, article 15.

[17] Hon R. B. Lussick, "Litigation Raising Issues Relating to Women's Human Rights in the Asia-Pacific Region: the Experience of Kiribati", *Hong Kong Colloquium*, *supra* note 11, at 149.

[18] *Id* at 148.

This legal situation the Chief Justice alludes to, may be the reason some states in the Pacific have not signed the CEDAW Convention. As he points out later in his paper, ratification of the CEDAW Convention may go some way to solving customary law attitudes to women's equality status.

In most Pacific Islands, customary law is recognised as part of the law of the country. As Chief Justice Muria said at the Asia/Pacific Regional Judicial Colloquium, held in Hong Kong in 1996:

> "These countries have a common feature of a plural legal system. There is the customary law, statute laws and legal processes imported during the colonial rule before independence and laws passed by the national legislatures. All these co-exist and are assuredly changing to meet the circumstances of each of these countries. The countries in the South Pacific region are of varying backgrounds. The three main ones being Melanesian, Polynesian and Micronesian. Despite the different cultural and ethnic background, the common feature of a plural legal system runs through most, if not all, of the countries in the region."[19]

In practical terms, customary law touches a greater part of the everyday lives of people than does statutory law. In Papua New Guinea, 97% of land is held in customary tenure and subject to customary law. In the Solomon Islands, 85% is customary. This pattern is common in the Pacific.

The greater percentage of marriages are customary and subject to customary obligations, including divorce and custody of children. Despite this, courts throughout the Pacific have upheld the concept that the welfare of the child is paramount and welfare of the child will override any customary considerations.

But there is no one customary law. Custom varies between regions, tribal and language groups. Land may devolve through the father or the mother's line; how marriage is recognised varies. Customary law must be proved as a question of fact in litigation. Customary law is subject to the Constitution, which, as I have noted, is supreme law, and customs have been struck down as unconstitutional. For example, the custom of handing over a female child, or clan member, to another clan in reparation for a death caused by a member of her family has twice been declared unconstitutional and contrary to women's human rights by the National Court of Papua New Guinea. The most recent case was *Re Miriam Willingal*, decided in 1997.[20] This case is notable as the first case in which the girl herself sought

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[19] Muria, *supra* note 11, at 138.

[20] *Re Miriam Willangal*, National Court of Justice, Injia J, 10 February 1997, MP No 289 of 1996 (unreported).

declarations in the court. Other cases dealing with the application of discriminatory customs to women have arisen, *inter alia*, when the National Court has reviewed imprisonment by a Village Court.

However, it is the practical situation which still remains the biggest cause of concern for women. In a report by the United Nations Centre for Human Rights following a Needs Assessment Mission to Papua New Guinea (28th May – 6th June 1995) it was found that:

> "Women suffer great social, economic and political disadvantages, both within the state sector and in civil society. Traditional attitudes in many areas discriminate against women, and are manifested in the attitudes of locally based authorities such as police officers and village courts. A woman is commonly considered and treated as the property of her partner or family. The PNG Parliament is one of the few in the world without female representation. This political marginalization of women is reflected at all levels of decision making and the situation appears resistant to improvement – despite the existence of a government policy designed to increase female participation as both beneficiaries and agents in the development process."[21]
>
> "There is widespread evidence of violence against women – in the domestic environment, as part of inter-clan warfare and as part of the explosion of crime in urban centres. Rape and other forms of assault are prevalent and apparently increasing. The freedom of movement of women in urban centres of PNG is severely curtailed. A 1992 report of the Law Reform Commission indicated that in certain provinces, 100% of women admitted to being victims of domestic violence. The report detailed serious legislative and structural inadequacies in addressing the problem of domestic violence. It made recommendations in a number of areas, including legislative reform, police training, protection orders, awareness building, and the provision of counselling and other services for victims.....
>
> However, the Mission was informed that few, if any of these recommendations have been acted upon in the three years since the report was released."[22]

As of April 1997, the recommendations of the Law Reform Commission had still not been implemented and as a result there is no quick and simple procedure to enable women to seek protection or non-molestation orders in the lower courts.[23] Women

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[21] *United Nations Centre for Human Rights, Needs Assessment Mission (28 May–6 June 1995) Report.*

[22] *Id.*

[23] Papua New Guinea Law Reform Commission, *Final Report on Domestic Violence*, Report No 14, 1992.

have no legislative right to remain in the matrimonial home if they or their children are subjected to violence or abuse.

Dr Brunton (a former National and Supreme Court Judge) referred to this situation in a paper "Human Rights in Papua New Guinea in 1996", quoting the 1995 *United States Department of State Country Reports on Human Rights Practices in Papua New Guinea*:

> "Violence against women, including domestic violence and gang rape, is a serious and prevalent problem. While ostensibly protected by their families and clan, women are nonetheless often the victims of violence and force. Traditional village deterrents are breaking down and the number of reported cases of rape in some areas is rising although rape is punishable by imprisonment, and sentences are handed out when assailants are found guilty, few assailants are apprehended. Domestic violence such as wife-beating is also common, but is usually viewed by police and citizenry alike as a private family matter."[24]

Dr Brunton went on to say:

> "The law and the court system still need to provide effective remedies for beaten women; the family courts are ineffective, the Port Moresby Family Court is in particular need of attention and institutional renovation. Although National Court judges on circuit do what they can to review Village Court anomalies, most of the worst misery is hidden from the superior courts.
>
> Because we have a Parliament in which all members are male, there is a need for the superior courts to show leadership and to address women's rights; most women's marriages are not legally defined, the concept of customary marriage is unclear and particularly so if parties have different customs. Sentencing patterns would suggest that the judges need to reflect on their policy on battered women syndrome, particularly with the variation we have in Papua New Guinea of deaths arising in the context of polygamous marriages."[25]

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[24] United States Department of State, *Country Reports on Human Rights Practices for 1995*, Papua New Guinea's 5.

[25] B. D. Burton, "Human Rights in Papua New Guinea" in the Conference *Twenty Years of the Constitution* held at Port Moresby, Papua New Guinea in March 1996.

This violence exists despite deterrent sentences imposed by the courts and strong statements by judges concerning the rights and human dignity of women. Although courts do impose deterrent sentences for rape, the comparative number of rape cases in Papua New Guinea remains high: 45 per 1,000 of the population in Papua New Guinea compared to 35 per 1,000 in USA, 3 per 1,000 in Japan and 5 per 1,000 in European countries.

Chief Justices Lussick and Muria in their papers at the Hong Kong Colloquium referred to violence against women as a problem in their respective countries, but said that no research has been done into the extent of that violence.[26]

It is also true that there are no women legislators in the Papua New Guinean Parliament. However, this must not be interpreted as meaning that women do not stand for Parliament or vote. They do both, and returns show that the percentage of women who vote is as high as the percentage of men. Although over 60 per cent of election returns are disputed in court, discrimination against or refusal to permit women to vote or stand has never been alleged. No research has been carried out into this phenomenon. At a seminar on administrative law, held by the Commonwealth Secretariat in Port Moresby in October 1996, a woman leader present proposed a resolution that women should be given separate polling booths because of influence by their husbands. But just as likely a reason for the non-return of woman candidates are strong clan loyalties together with large numbers of candidates standing in every constituency; for example Lae Open had over 40 candidates in the 1992 election.

Chief Justice Lussick also referred to custom and customary attitudes saying:

> "Custom is another obstacle to women realising equality in Kiribati, although the same may be said of other Pacific Island nations. Custom in Kiribati has a strong influence in qualifying a woman's role in society and of perpetuating the traditional concept of an I-Kiribati woman and her place in the scheme of things. There are many aspects of custom which are discriminatory in that they reflect an ideology based on the notion that women are inferior to men."[27]

These sentiments and the "ideology based on the notion that women are inferior to men" were also forcefully put in a paper by Mrs Josepha Kanawi, a senior Papua New Guinean woman lawyer (then secretary of the Law Reform Commission and presently Land Title Commissioner), who blamed colonial influences:

> "The status of rights of women in Papua New Guinea today stands in sharp contrast to the rights enjoyed by men. This unhappy scenario which is present in all post-colonial countries is the result of the institutional

[26] Lussick, *supra* note 17, at 143; Muria *supra* note 11, at 151.

[27] Lussick, *supra* note 17, at 152.

> inequality introduced by the colonial system, principally through the operation of the churches and the cash economy.
>
> In primitive societies, activities centred around what can be best described as subsistence life, both for men and women in their hunting, gardening and gathering food for everyday consumption. Before the advent of colonialism, there existed a diffuse sense of equality between men and women. This sense of equality was destroyed by the colonial system. With the inroad of colonialism, the rights of the men-folk, especially the younger ones who seized the opportunity to participate in the various political and economic activities introduced by the colonial administration, were amplified and given legal recognition under the imposed colonial legal system. The responsibilities of men changed. They could no longer engage full-time in warfare, laborious ground-clearing and construction with stone axes, and other exclusively male occupations, while women assumed primary responsibility for producing and preparing food. Men began to assume some of the responsibilities of maintaining the household, traditionally women's role."[28]

Chief Justice Muria also spoke of the customary influence on the status of women:

> "In order to express any views on the conflicts which may possibly arise on the rights of women in the modern Solomon Islands society, it is important to appreciate first the conflicts presented between traditional and introduced norms on the status of women in countries such as Solomon Islands where traditional values play a considerable role in maintaining what the country now enjoys – peaceful co-existence between the various different groups of people in one happy peaceful country."[29]

Custom will clearly continue to be an integral part of the law in the Pacific but is subject to the constitutions. Some customary practices have been declared unconstitutional on the basis, *inter alia*, of being discriminatory to women. However, custom is changing.

New Zealand and Australia have legislation concerning sexual harassment in the workplace and equal opportunity laws but other Pacific states do not. However, employment legislation requires equal pay and treatment for male and female workers who perform the same work and duties.

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[28] J. Kanawi "Rights of Women in Papua New Guinea" presented to the 20th Waigani Seminar (and subsequently to the Beijing Forum) (unpublished) at 1.

[29] Muria, *supra* note 11, at 140.

A provision in the former Papua New Guinea Public Service Act which discriminated against married women was repealed in 1976 soon after independence. There has been no research or litigation on the incidence of sexual harassment in the workplace in Papua New Guinea, but stories and examples circulate indicating it is a problem. In early 1997, in a letter to the editor of the *Post Courier* newspaper a husband complained that his wife was sexually abused by her superior in order to retain her job.

At present there is no indication that any Pacific government is intending to propose legislation relating to sexual harassment in the workplace. Until women overcome their reluctance to speak out on the problem, I do not foresee any legislation.

A few cases have referred to or applied international conventions or decisions in the Pacific region (excluding Australia and New Zealand which have been more active in the application of international convention and treaties than other Pacific nations) but are not common. Examples are:

- *R v Rose*[30] when the Solomon Islands High Court considered and applied *Tyrer v United Kingdom*[31] on the use of corporal punishment, holding it was not inherently inhuman but could be depending on the manner of execution.

- *Re Minimum Penalties Legislation*[32] the Supreme Court of Papua New Guinea considered European Court of Human Rights decisions[33] in deciding whether a statutory minimum penalty of imprisonment was contrary to section 36 of the Constitution (freedom from inhuman treatment).[34]

- *State v Kule*[35] the National Court of Papa New Guinea used the International Convention on the Abolition of Slavery and the Slave Trade[36] and 1964 Geneva

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[30] [1987] 1 SILR 45.

[31] (1978) 2 EHRR 1.

[32] [1984] PNGLR 314 (Supreme Court of Papua New Guinea).

[33] *Ireland v United Kingdom* (1978) 2 EHRR 25, and *Tyrer, supra* note 29.

[34] Constitution of Papua New Guinea s 36 provides:

> "(1) No person shall be submitted to torture (whether physical or mental), or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person.
>
> (2) The killing of a person in circumstances in which section 35 (1) *(a) (right to life)* does not, of itself, contravene Subsection (1), although the manner or the circumstances of the killing may contravene it."

[35] [1991] PNGLR 404.

[36] 266 UNTS 3 (1956).

> Protocols to interpret section 253 of the Constitution, which states "slavery and the slave trade in all their forms, and all similar institutions and practices, are strictly prohibited" when holding the custom of handing over a girl-child as compensation for a death caused by a member of her family was unconstitutional on the premise that Papua New Guinea had signed the Convention.

It is apparent that international human rights norms are not as relevant in everyday life of women of the South Pacific as they are in neighbouring countries but that there is no legislative or constitutional barrier to their application. Traditional attitudes may be.

There is no regional human rights convention in the Pacific region. Lack of knowledge on the part of counsel and the judiciary and the lack of readily accessible texts and information on the status of conventions are of concern. At present the emphasis is on development of domestic jurisprudence. Ultimately, decisions to sign, ratify and implement international treaties are political and executive and, as I have stressed, these are decisions into which the judiciary has no input.

The Relevance of International Standards to Constitutional Litigation in the Commonwealth Caribbean: A General Survey with Emphasis on Gender Equality Issues

Douglas Mendes[*]

Introduction

In most Commonwealth countries, an international treaty or convention is not cognisable as part of the domestic law of the country that has ratified it. It creates no rights or obligations enforceable by or against individual citizens, unless it is expressly incorporated by statute into the domestic law. But when it is so incorporated, it is not enforceable *qua* treaty or convention but as a valid law duly enacted by the appropriate constitutional authority. International instruments are not enforceable in domestic courts simply because constitutional law-making authority vests not in the members of the executive who may have signed the treaty or convention, but in the duly elected or appointed legislature established under the constitution of the participating nations.

Nevertheless, when the government of a country enters into a treaty or a convention, it signifies to its citizens and to the rest of the world that, at the very least, it intends to be guided by the principles and policies embodied in the treaty or convention in its dealings with its citizens, if not to incorporate the treaty into the domestic law. In addition, the ratification of a treaty or covenant constitutes a commitment to the international community that the requirements of the instrument will be implemented, and if not, that they will be respected and promoted in the conduct of the affairs of the nation. Thus, while courts of law will not directly enforce the rights and obligations declared and recognised in an international document, they will nevertheless presume that in enacting legislation, Parliament does not intend to derogate from its international obligations solemnly and sincerely assumed, unless otherwise expressly stated. Thus, where an Act is susceptible to more than one interpretation, the courts will adopt that interpretation which is consistent with the rights and obligations embodied in the international treaty or convention to which the State is a party. In so doing, the courts do not enforce the treaty or convention but merely make use of it as an aid to construction. Thus, while Parliament's intention is expressed in the statute to be enforced, the courts discern that intention by reference to the treaty and the

[*] Faculty of Law, University of the West Indies.

assumption that Parliament intended to comply with rather than renege on its international obligations.

Treaties and the courts in Commonwealth Caribbean jurisdictions[1]

In fleshing out the fundamental human rights and freedoms declared and recognised in the constitutions of the Caribbean nations, it has been accepted that international treaties and conventions are proper and relevant source material. In *Minister of Home Affairs v Fisher* (1979),[2] the Privy Council drew attention to certain special characteristics of the Constitution of Bermuda. It noted first of all that the fundamental human rights provisions were drafted in "broad and ample style" and laid down principles of "width and generality".[3] It noted further that the constitutions of newly independent states were greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention).[4] Having regard to these antecedents and to the form of the Constitution itself, its provisions called for a generous interpretation "avoiding what has been called the 'austerity of tabulated legalism', suitable to give to individuals a full measure of the fundamental rights and freedoms referred to".[5] The issue in that case was whether the word "child" used in the Constitution applied to children born out of wedlock.[6] Both the United Nations Declaration on the Rights of the Child[7] and the International Covenant on Civil and Political Rights[8] guaranteed the protection of every child without discrimination as to birth. The Privy Council was certain that the draftsman had these documents in mind when drafting the Constitution and concluded that, though at the date of the

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[1] See Angela D Byre & Beverley Y Byfield (eds), *International Human Rights Law in the Commonwealth Caribbean Jurisdictions*, for the International Centre for the Legal Protection of Human Rights (Interights) (Dordrecht, Martinus Nijhof, 1991).

[2] [1980] AC 319.

[3] *Id*, at 328.

[4] European Convention for the Protection of the Human Rights and Fundamental Freedoms 1950, 213 UNTS 221.

[5] [1980] AC at 328.

[6] Constitution of Bermuda, SI 1968 No 182, Sch 2, s11 (5)(d).

[7] Declaration on the Rights of the Child, adopted by the General Assembly of the United Nations in resolution 1386 (XIV) (1959).

[8] 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

Constitution these instruments had no binding legal force in relation to Bermuda, "they can certainly not be disregarded as influences on legislative policy".[9]

Similarly, in *Re Public Service Employee Relations Act*,[10] the Supreme Court of Canada accepted that the various sources of international human rights law, including declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals and customary norms, could not be ignored in the process of interpreting the provisions of the Canadian Charter of Rights and Freedoms.[11] Since Canada was a party to a number of these international human rights conventions, which contained provisions similar or identical to its Charter, Canada had thus obliged itself internationally to ensure within its borders the protection of those rights and freedoms. As such, "the general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation."[12] As the court noted:

> "The more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association and even the right to counsel."[13]

From time to time, courts in the Commonwealth Caribbean have made reference to international treaties and covenants as aids to the interpretation of the rights and freedoms recognised under the constitutions. In *Attorney General and another v Antigua Times Ltd*[14] the Privy Council referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms as well to the Universal Declaration of Human Rights in interpreting the Antiguan human rights provisions as applicable to artificial as well as to natural persons.[15] Similarly, in *Collymore and another v Attorney General of Trinidad and Tobago*[16] the Privy Council

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[9] [1980] AC at 330.

[10] [1987] 1 SCR 313, (1987) 38 DLR (4th) 16.

[11] Canadian Charter of Rights and Freedoms, Constitution Act 1982, Schedule B, Part 1.

[12] [1987] 1 SCR 313 at 349, (1987) 38 DLR (4th) at 184, per Dickson CJC.

[13] [1987] 1 SCR 313 at 349, (1987) 38 DLR (4th) 161 at 184; per Dickson CJC quoting Clayton, "International Human Rights law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 *Supreme Court Law Review* 287 at 293.

[14] (1973) 20 WIR 573 (Court of Appeal of the West Indies Associated States); [1976] AC 16 (PC).

[15] *Id.* [1976] AC at 24-25.

[16] (1967) 12 WIR 5 (Court of Appeal of Trinidad and Tobago); [1970] AC 538 (PC).

referred to ILO Conventions in coming to the conclusion that freedom of association under the Constitution of Trinidad and Tobago did not include the right to collective bargaining and the right to strike.

However, there do not appear to be any reported cases in which issues of gender equality have been resolved by reference to international treaties or conventions for the guidance which they might impart. Such reported litigation as there has been on the right not to be subjected to discriminatory treatment,[17] has involved questions of discrimination on the grounds of political beliefs[18] or affiliation[19] and the denial of benefits extended to other applicants similarly placed;[20] but none of them relied on international obligations for assistance. There appears to be only one case dealing with gender equality and its result is not entirely satisfactory.[21] This case is dealt with below.

Gender equality

While there appears to be a dearth of reported decisions in the Commonwealth Caribbean in which courts have utilised the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention)[22] as an aid in the interpretation of the human rights provisions of the constitutions, its potential in this regard is undoubted. All of the constitutions of the independent Commonwealth Caribbean countries declare and recognise the existence of fundamental rights and freedoms and guarantee their enjoyment without discrimination, *inter alia*, by reason of sex.[23] Thus, any law which, without

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[17] There appears to be only one unreported decision concerning discrimination on the basis of sex, namely *Girard, Jn Pierre & the St Lucia Teachers Union v Attorney General of St Lucia* Suits Nos 371, 372 & 471 of 1985 (HC) (St Lucia) (17 December 1986), in which there was little discussion on the merits.

[18] *Camacho & Sons Ltd v Customs* (1971) 18 WIR 159.

[19] *Byfield v Allen* (1970) 16 WIR 1.

[20] *Smith v L J Williams Ltd* (1980) 32 WIR 395, *AG v K C Confectionery Ltd* (1985) 34 WIR 387.

[21] *Nielsen v Barker* (1982) 32 WIR 254.

[22] 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981.

[23] See Antigua and Barbuda Constitution (1981) s 3; Bahamas Constitution (1973) s 15; Barbados Constitution (1966) s 11; Belize Constitution (1981) s 3; Dominica Constitution (1978) s 1; Grenada Constitution (1974) s 1 – brought back into force by Proclamation by the Governor-General on November 4, 1983, Proc. No. 3 of 1983 s 4(1); Guyana Constitution (1982) s 40; Jamaica Constitution (1962) s 13; St Christopher and Nevis Constitution (1983) s 3; St Lucia Constitution (1979) s 1; St Vincent and the Grenadines Constitution (1979) s 1; Trinidad and Tobago Constitution (1976) s 4.

justifiable cause, places restrictions on the enjoyment by women of fundamental rights and freedoms, while at the same time failing to place similar restrictions on men, and which is not passed in accordance with the relevant requirements for enacting legislation which infringes the human rights provisions, will be struck down as unconstitutional, null and void and of no effect. Further, quite apart from ensuring the enjoyment of fundamental rights and freedoms without discrimination on the basis of sex, the constitutions of the Commonwealth Caribbean nations also ensure that no law may be passed and no executive action taken which discriminates against women, whether or not such discrimination is in relation to the guarantee of human rights. In Trinidad and Tobago, St. Kitts and Nevis and St. Lucia this is achieved by the declaration of a right to equality before the law and a right to equal treatment by public authorities in the performance of their functions.[24] In *R v Drybones,*[25] the Supreme Court of Canada held that the right to equality before the law meant at least that no individual or group of individuals was to be treated more harshly than others before the law. It was argued that equality before the law meant simply equality "in the presence of the law" and had nothing to do with the application of the law equally to everyone or with equal laws for everyone. In rejecting this argument, Hall J said:

> "The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when ... it is seen to repudiate discrimination in every law of Canada by reason of race, national regime, colour, religion or sex ..."[26]

The constitutions of all other Commonwealth Caribbean countries expressly prohibit laws that make any provision discriminatory, either of itself or in its effect. They also outlaw the treatment of persons in a discriminatory manner by any public authority acting by virtue of any written law or in the performance of the functions of any public office.[27] With the exception of the Bahamas, Barbados, Guyana and Jamaica, the constitutions of these countries define discrimination as meaning "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed". In the Bahamas, Barbados, Guyana and Jamaica the definition of discrimination includes different treatment on the basis of race, place of origin, colour or creed but not sex. However, in these four countries, as noted previously, discrimination on the basis of sex is prohibited under the guarantee of

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[24] St. Kitts s 3 (a); St. Lucia s 1(a); Trinidad & Tobago s 4 (b).

[25] [1970] SCR 282, (1970) 9 DLR (3d) 473.

[26] (1970) 9 DLR (3d) at 486.

[27] Antigua s 14; Belize s 16; Dominica s 13; Grenada s 13; St. Kitts and Nevis s 15; St. Lucia s 13; St. Vincent s 13; Bahamas s 26; Barbados s 23; Guyana s 149; Jamaica s 24.

fundamental rights and freedoms. The fundamental rights and freedoms are expressly declared and recognised to exist without the discrimination by reason, *inter alia*, of sex. For example, in Guyana article 29 of the Constitution, which is contained in that section providing for the guiding principles, provides that:

> "Women and men have equal rights and the same legal status in all spheres of political, economic and social life. All forms of discrimination against women on the basis of sex are illegal."[28]

Whether the general declaration of rights and the enjoyment thereof without discrimination on the basis of sex can be used to supplement the specific provisions of these four constitutions prohibiting discriminatory laws and treatment is a moot point which has not yet been the subject of any authoritative decision. It would be surprising though if, in the context of international human rights provisions which deprecate discrimination on any basis, including sex, the constitutions of these four countries could be interpreted as not prohibiting discrimination on the basis of sex. Yet still, this appears to be the conclusion at which Messiah JA arrived in *Nielsen v Barker*.[29] There, the Honourable Justice of Appeal held that section 149 of the Guyanese Constitution was confined in its application only to favouritism or differentiation based on "race, place of origin, political opinions, colour or creed." The learned judge concluded:

> "It is to be profoundly in error to think that there has been a contravention of a person's fundamental rights under article 149 where the alleged discrimination is based on some ground other than those referred to above, no matter how reprehensible such grounds may appear to be."[30]

Fortunately, it is now possible to argue in Guyana, on the authority of *Attorney General of Guyana v Mohammed Ali*,[31] that article 29 of the Constitution, although styled a guiding principle is nevertheless justiciable, and that laws and executive action which discriminate against women will be struck down. Unfortunately, the interpretation which the court applied to article 29 in *Nielsen v Barker*[32] leaves little about which to rejoice. In that case, the Immigration Act provided that a

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[28] Article 29 of the Constitution of the Co-operative Republic of Guyana, 1982.

[29] (1982) 32 WIR 254.

[30] *Id*, at 280.

[31] (1987) 41 WIR 176.

[32] (1982) 32 WIR 254.

person shall be deemed to belong to Guyana if he is a dependant of a citizen of Guyana. The dependant of another person was defined as including, *inter alia*, "the *wife* of such person unless she is living apart from him under a deed of judicial separation or the decree of a competent court" (emphasis added). It was argued that the Immigration Act, being a law in force when the Constitution was promulgated, must be interpreted with such modifications as were necessary to bring it into conformity with article 29. Counsel suggested that the word "wife" be replaced by the word "spouse" with the result that male and female citizens would be accorded equal rights to have their spouses deemed to belong to Guyana. If such a modification were not made, this would lead to discrimination on the basis of sex since a male citizen "could enjoy the comfort and pleasure of his alien wife's society, but a Guyanese woman ... might be deprived (by deportation) of the society of her alien husband."[33] Declaring that "the historical evolution of feminine emancipation" was concerned with the "desire to achieve equality of the sexes" and had "nothing to do with the elevation of the man,"[34] Messiah JA expressed concern that counsel's argument "would lead to a fundamental alteration of the basic concept of an economic or financial dependency which is inherent in the provisions of section 2 of the Immigration Act."[35] One would be excused for thinking that it is precisely such a fundamental alteration in the status quo that "the historical evolution of feminine emancipation" and the expressed declaration of equality of the sexes in article 29 were designed to achieve. Surely a law ought not to escape scrutiny on the ground of discrimination on the basis of sex because in attempting to equalise the sexes "the elevation of the man" occurred. In any event, the construction of the Immigration Act proposed by counsel would have had the effect of "elevating" the female citizen by bestowing on her husband "belonger" status and thereby permitting her access to his society.

By way of contrast, in *Dow v Attorney General*,[36] the Court of Appeal of Botswana grappled with a similar problem. The Constitution of Botswana contained provisions identical to those of the Bahamas, Barbados, Jamaica and Guyana. Nevertheless, the Court of Appeal of Botswana held that discrimination under section 15(3) of the Constitution,[37] which did not refer to sex as a ground of

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[33] *Id*, at 290c.

[34] *Id*, at 290e.

[35] *Id*, at 290j.

[36] [1991] LRC (Const) 574 (High Court of Boswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana).

[37] Section 15(3) of the Constitution of Botswana states:

> "In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such

discrimination, was to be interpreted as providing examples of groups that might be affected by discriminatory treatment and was not intended by the omission of the word "sex" to exclude discrimination on the basis of sex. Referring specifically to the CEDAW Convention and other international agreements,[38] the Court held that if there were two possible ways of interpreting the Botswanan Constitution, the Court should adopt that interpretation which did not conflict with Botswana's international obligations. As Aguda JA said:

> "...there is clear obligation on this country like on all other African states signatories to the charter[39] to ensure the elimination of every discrimination against their womenfolk. In my view it is the clear duty of this court when faced with the difficult task of the construction of provisions of the Constitution to keep in mind the international obligation. If the constitutional provisions are such as can be construed to ensure the compliance of the state with its international obligations then they must be so construed. It may be otherwise, if fully aware of its international obligations under a regime creating treaty, convention, agreement or protocol, a state deliberately and in clear language enacts a law in contravention of such treaty, convention, agreement or protocol."[40]

Applying these principles, the court interpreted the Constitution as prohibiting discrimination on the grounds of sex. It held that certain provisions of the Citizenship Act which provided that a person born in Botswana after the Act would be a citizen if at the time of his birth his father was a citizen or, in the case of a child born out of wedlock, his mother was a citizen, was discriminatory and accordingly *ultra vires* the Constitution. Similarly, in *Student Representative Council of Molepolole College of Education v Attorney General*,[41] the Botswanan

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description are subjected to disabilities or restrictions to which persons of another such description are not made subject to are accorded privileges or advantages which are not accorded to persons of another such description."

[38] The Court in *Dow* referred to the following international agreements:

- African Charter on Human and People's Rights 1981, OAU Doc CAB/LEG/67/3/Rev5, 21 ILM 59, adopted 26 June 1981, entered into force 21 October 1986
- Atlantic Charter 1941
- Convention on the Elimination of all Forms of Discrimination against Women 1979
- European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
- Organisation of African Unity Convention on Discrimination
- United Nations Declaration on the Rights of the Child 1959
- United Nations Universal Declaration on Human Rights.

[39] African Charter on Human and People's Rights 1981.

[40] [1992] LRC (Const) 623 at 674.

[41] [1995] 3 LRC 447.

Court of Appeal held that a certain regulation that required pregnant students to leave college was discriminatory within the meaning of section 15 of the Constitution.

Whether reliance on international obligations for assistance marks the difference between the opinions expressed in the *Dow* case and that of the Guyanese Court of Appeal in the *Nielsen* case is a matter best left for speculation.

Potential use of the CEDAW Convention in the Commonwealth Caribbean

Despite uncertain beginnings, it can nevertheless be anticipated that, in the future, international treaties and conventions and, in particular, the CEDAW Convention, will be used by Commonwealth Caribbean courts in interpreting the right to equality before the law, the right to be treated equally by public officials and in the definition of discriminatory action. There will of course be limits to the extent to which conventions and treaties may be used as aids to construction since in some of the Caribbean constitutions the provisions prohibiting discriminatory laws and treatment are expressly declared not to apply in certain circumstances. For example, laws falling into one of the following categories may be immune from challenge on the ground of discrimination:

- laws for the appropriation of public revenue or other public funds;
- laws with respect to persons who are not citizens;
- laws relating to adoption, marriage, divorce, burial, devolution of property on death and similar matters which are governed by the personal law of persons of that description; and
- laws which make provision whereby persons may be subjected to disability or restrictions or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons in any other such description, is reasonably justifiable in a democratic society.

In such cases, there will be little room for the application of the principles declared in international treaties and conventions. On the other hand, where sex discrimination is proscribed by way of the rights to equality before the law and to equal treatment by public authorities, there appears to be far more scope for the application of international treaties and covenants, as in Trinidad and Tobago, St. Kitts and Nevis, and St. Lucia.

Thus, in *Re Use of French in Criminal Proceedings in Sashkatchawan*[42] the Saskatchewan Court of Appeal referred, *inter alia*, to the CEDAW Convention in construing the term "without discrimination" used in the Canadian Charter of

[42] (1987) 44 DLR (4th) 16.

Rights and Freedoms.[43] Further, in *Schachter v The Queen*[44] the Federal Court of Canada referred to the fact that Canada had ratified the CEDAW Convention as evidence that equality between parents, with respect to the responsibility and opportunity for the care of newborn children, was consistent with the values of contemporary Canadian society.[45]

The applicability of international treaties and conventions has also been considered in cases involving judicial review of discretionary powers exercised by public officials. In *R v Secretary of State for the Home Department, ex parte Brind*[46] the Home Secretary issued directives pursuant to his power under the Broadcasting Act prohibiting the broadcasting of direct statements by representatives of proscribed organisations in Northern Ireland. The appellants, who were journalists, applied for judicial review of the Secretary's decision on the ground that it was irrational and in breach of the freedom of expression recognised by article 10 of the European Convention on Human Rights.[47] They argued that, where a statute confers a discretion upon an administrative authority, it is to be presumed that Parliament intended that the discretion should be exercised within the limitations which the Convention imposes. This proposed principle was analogous to the principle of construction whereby Acts of Parliament are to be interpreted so as to conform with international obligations.

The House of Lords rejected this submission since, it said, to hold otherwise would inevitably result in the incorporation of the Convention into domestic law by the back door. The Court did point out, however, that where the discretion of a public official could potentially impose a restriction on human rights, the courts were entitled to start from the premise that any such restriction required to be justified

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[43] *Id*, at 39–40.

[44] (1988) 52 DLR (4th) 525.

[45] *Id*, at 541–2.

[46] [1991] 1 AC 696; [1991] 1 All ER 720.

[47] Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states:

> "1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

and that nothing less than an important competing public interest would be sufficient to justify it. In this limited way, therefore, international obligations can be made to impinge upon the exercise of executive discretion.

More recently, while affirming that the courts will not lightly permit individual human rights to be restricted by public authorities in the exercise of a statutory discretion, the Court of Appeal of England in *R v Ministry of Defence, ex parte Smith*,[48] upheld the validity of a Ministry of Defence policy which prohibited homosexual men and women from employment in the armed forces. The Court held that, since the United Kingdom's obligation to secure compliance with the provisions of the European Convention – which prohibited discrimination on the grounds of sexual orientation – was not enforceable by the domestic courts, the fact that a decision-maker failed to take account of Convention obligations when exercising an administrative discretion was not of itself a ground for impugning that exercise of discretion. The Convention, the court held, was only relevant as a background to the complaint of irrationality.[49]

In *Wallen & Another v Baptiste (No2)*,[50] the Trinidad and Tobago Court of Appeal followed *Brind* in holding that the execution of a condemned prisoner ought not to be delayed to await the outcome of his application to the United Nations Human Rights Committee for a recommendation that his death sentence be vacated. Counsel argued that the applicants should be allowed to place any recommendation of the United Nations Committee before the Mercy Committee for its consideration and that he should be allowed sufficient time to process this application. The submission was based on the proposition that the Mercy Committee was obliged to consider the recommendations of the United Nations Commission. The Court of Appeal held that it was a matter entirely within the discretion of the designated minister whether or not the recommendation of an international body would be taken into consideration by the Mercy Committee. The Court considered that since the international treaty created no enforceable rights, the minister could not be forced to take into consideration any recommendations made by the Committee and therefore was not obliged to delay execution in order to permit the condemned man to pursue his application.

While it is clear law that international treaties and conventions do not create rights and obligations enforceable in a court of law, a requirement that a public authority, in the exercise of a statutory discretion, consider the obligations undertaken by his or her government under an international treaty or convention does not entail the enforcement of any such unincorporated rights and obligations. A requirement that

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[48] [1996] 1 QB 517; [1996] 1 All ER 257.

[49] [1996] 1 QB at 554-556; [1996] 1 All ER at 266–267.

[50] (1994) WIR 405, [1994] 2 LRC 62 (on appeal to the Privy Council: [1996] AC 397).

a public authority consider these obligations is not a requirement that he or she act in accordance with them. As long as a public authority in exercising a statutory discretion takes into account all relevant considerations, his or her discretion will not be reviewed. It is submitted therefore that a requirement that a public authority have regard to international treaties and conventions in the exercise of a discretion does not violate the rule of law that treaties and conventions are not enforceable in domestic law but rather is consistent with the international declaration implicit in the ratification of a convention.

Since the *Brind*, *Wallen* and *Baptiste* cases, there have been developments in other jurisdictions in this area. In *Tavita v Minister of Immigration and Another*[51] the New Zealand Court of Appeal described as unattractive the argument that a minister is entitled to ignore international instruments. This implied, the Court of Appeal said, that New Zealand's adherence to the international instruments had been at least partly window-dressing. In *Ashby v Minister of Immigration*[52] the New Zealand Court of Appeal recognised that there were some international obligations so manifestly important that no reasonable minister could fail to take them into account. In *Tavita*, the court was concerned that:

> "Legitimate criticism could extend to the New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them."[53]

In *R v Director of Immigration, ex parte Yin Xiang Jiang Simon and Others* [54] the Court of Appeal of Hong Kong, following the dicta in *Tavita*, held that whereas the Director of Immigration was not obliged to exercise his discretion in conformity with the convention relating to the status of stateless persons, international obligations were a relevant, though not a determinative factor, to be taken into account by immigration authorities when dealing with an application to remain in Hong Kong. Bokhary JA stated the proposition in the following terms:

> "Naturally, it is not to be assumed that Hong Kong has no respect at all for its treaty obligations, especially those pertaining to fundamental human rights of an international dimension. It is at

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[51] [1994] 1 LRC 421; [1994] 2 NZLR 257 (New Zealand Court of Appeal).

[52] [1981] 2 NZLR 22.

[53] [1994] 1 LRC 421 at 431; [1994] 2 NZLR at 266. See also *Mangawaro Enterprises Limited v Attorney General of New Zealand* [1994] LRC 88.

[54] (1994) 4 HKPLR 265 at 267; [1995] 2 LRC 1 (Hong Kong Court of Appeal).

> least potentially arguably, therefore, that where Hong Kong has a treaty obligation not to expel stateless persons except on grounds of national security or public order, then, even though that obligation has not been incorporated into our domestic law, it is, nevertheless, a factor which our immigration authorities ought to take into account when exercising a discretion as to whether or not, in all the circumstances, to insist upon the departure from this territory of any stateless person even though his departure is not required by national security or public order."[55]

The High Court of Australia has taken the argument a step further. In *Minister of State for Immigration and Ethnic Affairs v Teoh*[56] the Court held that although the ratification of an international treaty did not go so far as to effect automatic incorporation into domestic law, the ratification of a treaty did amount to a statement by the Australian government that the executive and other public agencies would adhere to the principles and obligations set out in the treaty. There was thereby created a legitimate expectation that public authorities would act in accordance with the treaty and that where the public official proposed not to comply with the treaty, procedural fairness required that the person affected should be given notice and an adequate opportunity of presenting a case against taking such a course. Mason CJ and Deane J noted:

> "... ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers will act in conformity with the Convention ..."[57]

The Court was of the view that this position did not contradict the rule that international conventions are not enforceable as part of domestic law. A legitimate expectation that a decision-maker would act in accordance with the convention

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[55] [1995] 2 LRC at 7.

[56] (1994) 183 CLR 273, [1995] 3 LRC 1 (High Court of Australia).

[57] (1994) 183 CLR at 291, [1995] 3 LRC 1 at 17.

does not necessarily compel him or her to act in that way. There is a fundamental distinction between a legitimate expectation and a rule of law.

It is respectfully submitted that this is the preferable approach to judicial review of the exercise of statutory discretion which involves rights and obligations recognised and declared in international treaties and conventions. It gives full recognition to the sanctity of international obligations and at the same time as it acknowledges the unenforceability of international treaties and conventions.

Conclusion

Be that as it may, courts in the Commonwealth Caribbean countries ought not to find themselves as hamstrung as English courts in the review of the exercise of discretionary powers on the ground of breach of international obligations, including especially those relating to gender equality. Public authorities in the Commonwealth Caribbean must respect the rights of the individual to equality of treatment and to equality before the law declared in the constitutions. To the extent that the full content and detail of the right not to be discriminated against on the ground of sex will be influenced by the obligations to which member countries have adhered under the relevant treaties and conventions, Commonwealth Caribbean courts have the opportunity of giving substantial and direct effect to the right of women to be treated equally with men as declared and formulated in particular in the Convention on the Elimination of All Forms of Discrimination against Women. This is particularly so in Trinidad and Tobago, St. Lucia, St. Kitts and Nevis and now in Guyana as a consequence of the *Mohammed Ali* decision,[58] where the right to gender equality is expressed in broad and unrestricted terms.

[58] See discussion *supra* (text accompanying notes 22–41).

International Labour Standards of Particular Relevance to Women Workers: Application in the Caribbean

*Constance Thomas**

Introduction

This paper presents general background information on the International Labour Organisation (ILO), its historical commitment to human rights, its placement within the United Nations System, and the relationship between ILO instruments and other human rights instruments. It details the international labour standards of particular importance to women and their application in the Commonwealth countries of the Caribbean. It also briefly covers matters of ratification, complaints, and reporting obligations. This paper attempts to point out trends, patterns of practice and problems encountered within the sub-region concerning the judicial use and application of standards as well as aspects of the impact of international labour standards in the Caribbean.

Created by the Peace Treaty of Versailles in 1919 alongside the League of Nations and the International Court of Justice, the ILO was established to defend the human rights of workers, to protect them and to improve their working and living conditions. Within the context of the time, that of industrial revolution, social upheavals and transformations, the ILO was premised on the notion that there can be no peace, no harmonious economic or social development without social justice. These notions are captured in the Preamble to the ILO Constitution.[1]

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* Senior Specialist, International Labour Standards, International Labour Office, Caribbean Office, at the time of writing.

[1] The Preamble to the Constitution of the ILO provides:

> "Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures; Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries; The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organisation."

Following the end of the Second World War, the ILO became a member of the United Nations family of specialised agencies. Each specialised agency has its own area of competence and the ILO's lies in all aspects of the world of work and employment. One of the most unique features of the ILO compared to other international bodies is its tripartite structure.[2] Employers' and workers' representatives participate in its work on an equal basis with representatives of governments. The tripartite structure and the ILO supervisory organs enable the ILO to remain oriented towards concrete issues and to remain aware of its possibilities and limitations. This concern for concrete solutions for the protection of workers marks the standard-setting activity of the ILO, which commenced upon the founding of the organisation.

International labour standard-setting

From the very beginning the ILO has endeavoured to induce all nations to adopt humane working conditions by fixing international labour standards to serve as models for national law and practice. These standards are set forth in international instruments which are adopted by the International Labour Conference after discussions in which representatives of governments, the workers' organisations and employers' organisations of all member states take part.

The process of standard-setting is a lengthy one involving the undertaking of studies of international law and practice, the formulation of questionnaires and analysis of responses to those questionnaires by the social partners and lastly discussions at the International Labour Conference, usually over a two-year period. The standard-setting process may be used to address new topics or to revise existing standards that have been determined to be out of date.

The internationally adopted standards take the form of *Conventions* or *Recommendations*. A Convention is a legal instrument, an international treaty, designed for ratification by Member States. A Recommendation, on the other hand, cannot be ratified. It involves no legal obligation, but it provides detailed guidelines to supplement principles set out in Conventions. As of April 1997, the ILO had adopted 180 Conventions and 186 Recommendations.[3] These instruments cover practically all aspects of human labour: employment, conditions of work, occupational safety and health, social security, labour administration, labour statistics,

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[2] See Convention concerning Tripartite Consultations to Promote the Implementation of International Labour Standards (ILO Convention No 144), 1089 UNTS 354, adopted 21 June 1976, entered into force 16 May 1978; and its accompanying Recommendation (No 152). Also Resolution concerning the Strengthening of Tripartism in the ILO, adopted by the Conference in 1977 (preceded by a 1971 Resolution on Tripartism).

[3] For information regarding ILO Conventions and Resolutions see http://www.org; and the ILO CD-ROM series, especially ILOLEX.

industrial relations, freedom of association, non-discrimination and specific sectors of activity and categories of workers. Although most of the standards cover all workers, and all sectors of activity, some lay down standards to cover specific groups such as women, and others address specific sectors of activity, such as the maritime industry or specific occupations, such as nursing.

Seven conventions have recently been designated as promoting fundamental human rights. A strict delineation of the fundamental human rights conventions in the ILO did not emerge until 1995. This view was voiced in delegates' speeches in 1994 and 1995 at the International Labour Conferences and affirmed in the 75th Anniversary Resolution adopted at the ILO Conference in 1994.[4] The designated fundamental ILO Conventions cover the main areas of freedom of association and collective bargaining, prohibition of forced and child labour, non-discrimination and promotion of equal opportunity and treatment and equal remuneration for work of equal value, and are listed below:

- Forced Labour Convention 1930;[5]
- Freedom of Association and Protection of Right to Organise Convention, 1948;[6]
- Right to Organise and Collective Bargaining Convention, 1949;[7]
- Equal Remuneration Convention, 1951;[8]
- Abolition of Forced Labour Convention, 1957;[9]
- Discrimination (Employment and Occupation) Convention, 1958;[10] and
- Minimum Age for Admission to Employment Convention, 1973 (No 138).[11]

The ultimate purpose of the standard-setting process is, of course, that the standards should be accepted as widely as possible and implemented in national law and practice. The ILO endeavours to ensure a link between the work done in standard-setting and the decisions taken at the national level concerning human rights, employment and labour related issues through its supervisory system, its programme of technical co-operation, its advisory services and its educational activities.

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[4] Resolution concerning the 75th anniversary of the ILO and its future orientation, adopted on 22 June 1994 at the Eighty-first session of the International Labour Conference, authentic text in the *Record of Proceedings of the Eighty-first Session of the ILO* (International Labour Conference, Geneva, 1994.)

[5] ILO No 29, 39 UNTS 55, adopted 28 June 1930, entered into force 1 May 1932.

[6] ILO No 87, 68 UNTS 17, adopted 9 July 1948, entered into force 4 July 1950.

[7] ILO No 98, 96 UNTS 257, adopted 1 July 1949, entered into force 18 July 1951.

[8] ILO No 100, 165 UNTS 303, adopted 29 June 1951, entered into force 23 May 1953.

[9] ILO No 105, 320 UNTS 291, adopted 25 June 1957, entered into force 17 January 1959.

[10] ILO No.111, 362 UNTS 31, adopted 25 June 1958, entered into force 15 June 1960.

[11] ILO No 138, Cmnd 5829, adopted 26 June 1973, entered into force 19 June 1976.

Ratification and supervision of international labour standards

A. Ratification

In ratifying a Convention, a State formally undertakes to "take such action as may be necessary to make effective the provisions of such Convention".[12] This means ensuring implementation in practice as well as in law. The decision to ratify is solely left to the Member State as a matter of sovereignty. Membership of the ILO is not conditioned on, nor does it require, ratification of international labour standards. A change to the omission of this condition of membership, however, is currently under discussion in ILO bodies.

The national body with the authority to ratify an ILO Convention is the body with the authority under national law to enter into international treaties and conventions. However, unlike other international treaties and conventions, ILO Conventions may not be ratified with reservations.

Ratification levels of international labour standards in general in the Caribbean are relatively low in comparison to Latin America and other Commonwealth countries (for details see Annex A to this paper). As of April 1997, Guyana leads the Caribbean with a total number of 42 ratifications of Conventions that are still in force. Barbados is next in line with 36 ratifications. Grenada and Suriname follow with 28, Belize with 27, the Bahamas with 26 and Jamaica and St. Lucia with 25. Dominica has 20, Antigua and Barbuda has 15, and Trinidad and Tobago has registered 13 ratifications.

Although the ratification levels are low, most of the countries have ratified a majority of the Conventions concerning fundamental human rights. For example, all the countries but three (Bahamas, St. Kitts and Nevis and St. Vincent and the Grenadines)[13] have ratified Convention No 87 concerning Freedom of Association, and all countries have ratified Convention No 98 concerning the Promotion of Collective Bargaining. All but two countries (St. Kitts and Nevis and St. Vincent and the Grenadines) have ratified Conventions Nos 29 and 105 on the Abolition of Forced Labour. Most countries have ratified Convention No 111 on Non-discrimination, but only some have ratified Convention No 100 on Equal

[12] Article 19, paragraph 5(d) of the ILO Constitution states:

> "In the case of a Convention
> (d) if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention."

[13] St Vincent and the Grenadines joined the ILO in 1996. As of September 1998, they had not submitted any instruments concerning ratification.

Remuneration.[14] Only two countries (Antigua and Barbuda and Dominica) have ratified Convention No 138 on Minimum Age for Admission to Employment, although several other countries are giving consideration to its ratification.[15]

With regard to other important Conventions of particular relevance to women only three countries (Barbados, Jamaica and Suriname) have ratified Convention No 122 on Employment Policy.[16] No country in the sub-region has ratified either of the Conventions on Maternity Protection (No 3 from 1919 or No 103 from 1955)[17] or Convention No 156 on Equal Opportunities and Equal Treatment of Men and Women Workers: Workers with Family Responsibilities.[18] Nor has any country ratified Convention No 158 on the Termination of Employment.[19]

It is fair to say that prior to 1994, most Caribbean countries had not pursued the formal undertaking of obligations on international labour standards since gaining independence. In fact, prior to this time, no Caribbean country had registered ratification for over the past 10 years (since 1984).

Recent renewed interest in the ratification of international labour standards is indicated by:

- filing of three Instruments of Ratification by Grenada in 1994 relating to Convention No 87 concerning Freedom of Association; Convention No 100 on Equal Remuneration between Men and Women; and Convention No 144 concerning Tripartite Consultation (International Labour Standards);

- by Barbados ratifying Convention No 147 on Merchant Shipping (Minimum Standards in 1994;[20]

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[14] *Supra* notes 10 and 8 respectively. The following states have ratified Convention No 100: Jamaica on 14 January 1975; Guyana on 13 June 1975; Dominica on 28 February 1983 and Saint Lucia on 18 August 1983. The following states have ratified Convention No 111: Trinidad and Tobago on 26 November 1970; Barbados on 14 October 1974; Jamaica on 10 January 1975; Guyana on 13 June 1975; Antigua and Barbuda on 2 February 1983; Dominica on 28 February 1983 and Saint Lucia on 18 August 1983.

[15] Guyana ratified Convention No 138 on 15 April 1998.

[16] ILO Convention No 122, 569 UNTS 65, adopted 9 July 1964, entered into force 15 July 1966.

[17] ILO Convention No 3, 38 UNTS 53, adopted 28 November 1919, entered into force 1921; ILO Convention No 103; adopted on 28 June 1952, entered into force 7 September 1955.

[18] ILO Convention No 156, Cmnd 8773, adopted 23 June 1981, entered into force 11 August 1983.

[19] ILO Convention No 158, Cmnd 9078, adopted 22 June 1982, entered into force 23 November 1985.

[20] ILO Convention No 147, 1259 UNTS 335, adopted 29 October 1976, entered into force 28 November 1978.

- by Trinidad and Tobago ratifying Convention No 144 in 1995;
- by Suriname ratifying Convention No 98 on the Right to Organise and Collective Bargaining and Convention No 154 on Collective Bargaining in 1996; and
- by Guyana ratifying Convention No 166 on Repatriation of Seafarers[21] and Convention No 172 on Working Conditions (Hotels and Restaurants) in 1991.[22]
- Additionally, a decision has just been taken by the cabinet in Trinidad and Tobago to ratify Convention No 100 on Equal Remuneration.

The reasons underlying this low level of ratification vary from country to country but several common threads may be identified. Firstly, it is clear that those countries which have ratified Convention No 144 on Tripartite Consultation have, for the most part, higher ratification records than those that have not. This may be due to the fact that these countries have obligated themselves, under Convention No 144, to hold tripartite discussions on prospects for ratification. Secondly, administrative reasons exist such as cumbersome national ratification procedures, lack of systematic reviews of standards to identify prospects and priorities for ratification, and lack of time on the part of responsible and interested officials to propose ratification or to undertake more reporting obligations.

In addition to the International Labour Organisation, other bodies have called for an increase in the ratification levels of ILO Conventions. In 1993, the Standing Committee of Ministers Responsible for Labour pointed out that several important Conventions still needed to be ratified by Caribbean Community (CARICOM) Member States; including Convention No 147 on Minimum Standards in Merchant Shipping, Convention No 156 on Workers with Family Responsibilities and Convention No 137 with respect to Dock Work.[23] In 1995, the Standing Committee of Ministers Responsible for Labour again called for ratification of ILO Conventions.[24] The Seventh Committee of Ministers Responsible for the Status of Women called for CARICOM members to ratify Conventions concerning Equal Remuneration (No 100), Maternity Protection (No 103), Discrimination (No 111) and

[21] ILO Convention No 166, Cmnd 658, adopted 9 October 1987, entered into force 3 July 1991.

[22] ILO Convention No 1991, adopted 25 June 1991, entered into force 7 June 1994.

[23] ILO No 137, Cmnd 5829, adopted 25 June 1973, entered into force 24 July 1975.

[24] Report of the Thirteenth Meeting of the Standing Committee of Ministers Responsible for Labour, Nassau, The Bahamas, 26 – 28 April 1995, Caribbean Community Secretariat, REP 95/13/37/ML.

Workers with Family Responsibilities (No 156).[25] The Beijing Platform of Action also calls for ratification of these four Conventions essential to the promotion of gender equality.[26]

B. The ILO supervisory system

Regular supervision of the observance by Member States of their obligations under or related to Conventions and Recommendations is entrusted to the Committee of Experts on the Application of Conventions and Recommendations and the International Labour Conference Tripartite Committee on the Application of Conventions and Recommendations. When a country ratifies a Convention, it commits itself to report periodically on how the Convention is applied in law and practice. Trade unions and employers' organisations have the constitutional right under the ILO Constitution to present their comments on the application as well. The Committee of Experts may also consider other relevant authoritative documentation submitted by NGOs. The Government reports, comments and other official documentation such as legislation court decisions, collective agreements, and labour inspection reports form the mainspring of the supervisory system.

The Committee of Experts is composed of jurists and specialists in the field of labour and social rights who are appointed to serve on the Committee in their individual capacity. Participating in this Colloquium is one of the highly esteemed members of this Committee, the Honourable Justice Bhagwati, former Chief Justice of India. The Committee meets yearly to examine the extent to which countries apply ratified, and still to be ratified, Conventions. Its work is based on the principles of impartiality, objectivity and independence. The members of the Committee now number 20 and reflect a geographical balance as well as a balance between different legal, economic and social systems. Now, as a result of positive initiatives taken by the Director-General, the Committee also reflects an improved gender balance with four female members. The Committee of Experts deliberates in private sessions to produce its comments. The United Nations is invited to designate a representative to attend the sessions, and a representative of specialised agencies of the UN family may be invited to participate in relevant sittings of the Committee.

The Committee reviews the country reports and prepares comments, where appropriate, on matters concerning the extent of application of a convention in the national law or practice. The *direct requests* or unpublished comments of the Committee of Experts are sent directly to the Government and social partners for

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[25] Report of the Seventh Meeting of Ministers with Responsibility for the Integration of Women in Development, Nassau, The Bahamas, 11 – 12 May 1995, Caribbean Community Secretariat, REP 95/7/39/WID.

[26] Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women*, Beijing September 1995, UN Doc A/CONF.177/20 (17 October 1995), 35 ILM 40. See paragraphs 165 – 180, especially 178–9.

consideration or reply. The *observations* of the Committee are published and form the basis of the discussions of the Standing Tripartite Committee at the International Labour Conference each year. It is at this Committee that representatives of Governments are invited to explain the reasons for the failure to apply a particular Convention. Any member of the Tripartite Committee can question the representative or offer advice.

Supervision based on the submission of complaints operates when a representation or complaint is made against a State alleging that it has failed to secure observance of a Convention it has ratified. A representation may be made by an organisation of employers or workers.[27] It is considered by a tripartite Committee composed of members of the ILO Governing Body. A complaint may be filed by one country against another, where both have ratified the convention concerned or by a delegate to the International Labour Conference or by initiative of the Governing Body itself. The Governing Body may refer the matter to a Commission of Inquiry, which is composed of independent persons and has investigative authority. A complaint alleging a violation of freedom of association may be filed before a special standing Committee on Freedom of Association by an organisation of workers or employers against government whether or not the relevant Conventions have been ratified. No exhaustion of local remedies is required before a complaint can be received in any of these fora.

International labour conventions and recommendations of particular importance to women workers and their application

A. Overview

- The vast majority of Conventions and Recommendations apply equally to both men and women workers. However, a number are of special concern to women workers. A list of ILO Conventions and Recommendations of particular concern to women workers is appended as Annex B to this paper. ILO standards, which have become the catalyst for new economic and legal norms affecting working women, cover the following areas:

    - equality of remuneration;
    - discrimination;
    - maternity protection;
    - workers with family responsibilities; and
    - special measures relating to night work, underground work and part-time work, and other health-related issues.

The early international standards adopted by the ILO aimed principally at protecting women from exceedingly arduous conditions of work and at safeguarding their

[27] See articles 36 to 34 of the Constitution of the ILO regarding the complaint procedure.

reproductive function. Two of the earliest ILO standards adopted were concerned with maternity protection[28] and the prohibition of women working at night.[29] While maternity protection was based on biological considerations, the prohibition of night work for women in industry was perhaps inspired by what was thought to be the proper role for women.

With the end of the Second World War and the advent of a more modern approach to human rights the ILO adopted the Declaration of Philadelphia, which was incorporated into the Constitution. There was a shift in attitude away from the adoption of general protective measures for women and towards the adoption of international labour standards promoting equality of opportunity and treatment gained increasing recognition.

At the same time, working conditions were improving for both men and women workers in many parts of the world, thus negating justifications for the continuation of many of the so-called protective provisions. Over time, many began to view special protective measures for women as contradictory to the principle of equality of treatment between men and women in employment. It was also considered that such protection could be actually prejudicial to women's employment and promotion prospects. As the debate on this subject continued, an ILO Resolution in 1985[30] called for all protective measures concerning women to be reviewed in light of equality of opportunity, scientific and technological innovations and the current situation pertaining social and labour conditions in each country, to determine which measures should be repealed as contrary to equality, which should be revised, and which should be extended to men. The substantive areas of ILO standards involved in this debate were night work, underground work and the absolute prohibition of women working with certain dangerous substances. The protection of maternity was clearly designated to be outside the scope of this debate as it is considered to be essential to the promotion of substantive equality of opportunity and treatment for women.

The principle of equality has been elaborated in three ILO Conventions and their accompanying Recommendations. It is evident from the pattern of standards adopted that the scope of application of the principle of equality has broadened with the

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[28] Convention concerning the Employment of Women before and after Childbirth, (ILO Convention No 3), 38 UNTS 53, adopted 28 November 1919, entered into force 13 June 1921.

[29] Convention concerning the Employment of Women During the Night 1919, (ILO No 4), 38 UNTS 68, adopted 28 November 1919, entered into force 13 June 1921. Later revised by the Convention concerning the Employment of Women During the Night (Revised 1934) (ILO 41), 40 UNTS 33, adopted 19 June 1934, entered into force 22 November 1936 and Convention concerning the Employment of Women During the Night (Revised 1984) (ILO 89) 81 UNTS 147, adopted 9 July 1948, entered into force 27 February 1951.

[30] Resolution concerning Equal Opportunity for Women and Men in Employment and the Occupation, paragraph 5, adopted on 25 June 1985 at the Seventy-first Session of the International Labour Conference, authentic text in *Record of Proceedings of the Seventy-first Session of the International Labour Conference*, International Labour Office, Geneva, 1985.

realisation that equality in one area can only be achieved through attainment of equality, dignity and respect in all areas of social and economic life. Thus the Conventions started with pay, reinforced maternity protection, moved to terms and conditions of work and vocational training and guidance, and now cover work and family responsibilities.

B. Equal remuneration

The Equal Remuneration Convention No 100 and Recommendation No 90 require States to promote and, consistent with the methods in operation for determining rates of remuneration, to ensure for all workers "the principle of equal remuneration for men and women workers for work of equal value". The term remuneration includes, wages, benefits, bonuses and any other emoluments, whether direct or indirect, whether in cash or in kind, paid by the employer to the worker arising out of the workers' employment.

In regard to the notion of equal pay for work of equal value, the Convention provides that measures should be taken to promote objective appraisal of jobs on the basis of the work to be performed and not on the basis of who is doing the work.[31] Obviously, the application of this principle involves some comparison between jobs and between occupational categories. The Committee of Experts has stated that the reach of comparison between jobs should extend beyond cases where work is performed in the same establishment, and should be viewed as the level at which wage policies, systems and structures are co-ordinated, certainly across occupational groupings.[32]

Further, the Committee emphasised that it is not sufficient to replace separate wage scales for "male" and "female" jobs by similar scales worded in neutral language, but preserving both the inherited job profiles and existing wage differentials.[33] Thus, the pay scale in a particular occupational category should not reflect whether the composition of its members is primarily male or female.

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[31] Article 2(1) provides that every Member,

> "shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value."

[32] General Survey on the Reports on the Equal Remuneration Convention No 100 and Recommendation No 90, in *Report of the Committee of Experts on the Application of Conventions and Recommendations (CEAR)*, 1986 Report III, Part 4B, ILO Session 1986.

[33] *Id*, para. 23.

In March 1990, the Committee of Experts issued a General Observation concerning the application of Convention No 100.[34] In that Observation, the Committee noted the difficulties encountered by many countries in understanding and applying the principle of equal remuneration for men and women for work of equal value, and invited governments, employers' and workers' organisations to collect and analyse relevant statistical data and to have recourse to objective job-evaluation systems in order to be able to compare the relative value of jobs.

In 1996, in response to the Platform for Action adopted by the Fourth World Conference on Women, which contained a number of recommendations calling for the improved statistical data on women, the ILO published a Working Paper on "Measuring Gender Wage Differentials and Job Segregation".[35] In accordance with Convention No 100, the paper recognises that an important measurement of inequality between men and women in the labour market is in the statistical calculation of gender and wage differentials. The documentation on the issue, both international and Caribbean, shows that, even if productivity-related factors are taken into account, a major male-female wage gap still remains indicating the existence of discrimination against women.

Moreover, it has been observed that gender differentials are greater if earnings are used rather than wages because earnings include overtime and fringe benefits.[36]

In order to have a clearer picture of the causes and effects of gender discrimination and the differential that exists, greater attention needs to be attached to the compilation of statistics on wages and earnings and its use by policy-makers, judges and labour officers so that any detected differential based on gender can be remedied.

In the sub-region, Convention No 100 has been ratified by six countries (Barbados, Dominica, Grenada, Guyana, Jamaica, and St Lucia), soon to be seven, with the recent decision to ratify the Convention by the Government of Trinidad and Tobago. The Committee of Experts has pointed out to most of these countries the lack of legislative guarantees of the principle of equal remuneration for work of equal value and has encouraged legislative reform in this area. As set out in the Recommendation, a minimum wage is one mechanism that can be used to apply the principle to low paid workers. However, in at least one country, minimum wage orders generally exclude from their scope any ancillary benefits such as housing, marriage or family allowance and thus undercut any guarantee of equality.

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[34] General Observation concerning the Application of Convention No 100, in *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 1990 Report III, Part 4A, ILO Session 1990.

[35] Gonzalez and Watts, *Measuring Gender Wage Differentials and Job Segregation* (ILO Working Paper, Interdepartmental Project to Promote Equality for Women Workers, ILO, Geneva 1996).

[36] *Id.*

Other concerns raised by the Committee of Experts include the removal of reference to sex in wage categories, but the continuation of the former categories and differentials in pay without evidence that any objective job evaluation has taken place. It has also been noted with concern that differentials in the agriculture industry between wage rates of men and women persist. A complaint and many comments by the supervisory bodies over a number of years concerning the differential in pay between men and women in the sugar industry has resulted in an objective job appraisal being undertaken in Barbados to eliminate, among other things, differentials based on gender.

C. Discrimination

As of April 1997, the Discrimination (Employment and Occupation) Convention 1958 (No 111) had been ratified by 119 countries world-wide.[37] In the Caribbean, it has received seven ratifications and has been made applicable to the non-metropolitan territories of the Netherlands.

Convention No 111 aims at eliminating discrimination and promoting equality of opportunity and treatment in employment and occupation on grounds of race, sex, national extraction, religion, colour, political opinion and social origin. Discrimination is defined as any distinction, exclusion or preference based on the above listed grounds which has the effect of nullifying or impairing equality of opportunity or treatment.[38] The scope of the Convention covers all workers in vocational training, access to employment and to particular jobs, and terms and conditions of employment.

In its comments on the application of Convention No 111, the Committee of Experts has noted that in some countries legislation does not prohibit discrimination in employment on all the grounds set out in the Convention or, if the protection is provided it does not extend to all workers.[39] The Committee has also noted the lack of

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[37] The current status of ratification of ILO Conventions can be found at http://www.ilo.org or the ILOLEX CD-Rom series published by the ILO.

[38] Articles 1–2 of the Convention provide:

> "1. For the purpose of this Convention the term discrimination includes – (a) any distinction, exclusion or preference made on the basis of race, colour sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.
>
> 2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

[39] *Report of Committee of Experts on the Application of Conventions and Recommendations,* 1986 Report III, Part 4A, ILO Session, 1996, at 313 (comment in unpublished Direct Request).

policies promoting equality of opportunity and treatment in employment and occupation.

With regard to the existence of discriminatory provisions, the Committee has pointed out a few in the sub-region. One particular concern to which the Committee has drawn attention for years are provisions in one country which provide that female officers may have their employment terminated if family obligations affect efficient performance of their duties, and that a female officer who marries must report the fact of her marriage to a public commission.[40] In another country, the Committee continues to request whether action has been taken to remove the provision requiring an unmarried teacher who becomes pregnant to be dismissed upon becoming pregnant a second time if still unmarried (St Lucia).

The Committee has also noted in several countries that protection against discrimination does not appear to extend to non-nationals (Antigua, Dominica, St Lucia).[41] The Committee has also indicated its concern over the practical application of the Convention and how its principles are guaranteed and enforced (Guyana, Jamaica).[42] On a positive note, the Committee previously noted with interest the adoption of the Equal Rights Act of 31 December 1990 in Guyana.[43]

D. Workers with family responsibilities

The aim of Convention No 156 on Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, is spelled out in its title. It superseded a Recommendation concerning Workers with Family Responsibilities.[44] The Convention applies to women and men workers with responsibilities for their dependent children or other family members where such responsibilities restrict their participation in economic activity. It requires States to make it an aim of national policy to enable workers with such responsibilities to engage in employment without being subject to discrimination, and as far as possible without conflict between their employment and family responsibilities.[45]

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Report of the Committee of Experts on the Application of Conventions and Recommendations,* Report III Part 4A, ILO Session, 1996, at 306.

[44] Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, (ILO Recommendation 165) adopted 23 June 1981. For text see ILO website, *supra* note 3.

[45] *Supra* note 17, article 3.

It provides for corresponding measures to be taken in community planning and in the development of community services such as child care and family services and facilities.[46] In addition, the Convention provides for information and education to engender a broader understanding of the principles involved.[47]

The Convention states that family responsibilities alone are not a valid reason for a person to lose his or her job.[48] The accompanying Recommendation provides that either parent should be able to take parental leave within a period immediately following maternity leave with the right to return to employment; and to take leave in case of a dependant's illness.

No Caribbean country has ratified this Convention, although an ILO Regional Workshop[49] has been held on this subject and some measures have been undertaken in a few countries to implement the convention.[50]

E. Maternity protection

Maternity protection measures have always been a major concern of the ILO. Two Conventions have been adopted, No 3 and No 103.[51] In March 1997, the ILO Governing Body decided to set Convention No 103 for revision in 1998 and 1999.

Convention No 103 provides for twelve weeks of maternity leave with entitlement to cash benefits and medical care, protection of employment security and return to job following leave and entitlement to nursing breaks while nursing.[52]

No Caribbean country has ratified either Convention, although several countries do provide in their legislation for maternity protection largely in conformity with the Convention. In most countries in the sub-region, collective agreements are found to contain the basic protection set out in the Convention.

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[46] *Id,* article 5.

[47] *Id,* article 6.

[48] *Id,* article 8.

[49] ILO Caribbean Tripartite Workshop on Promotion of Equality of Opportunity and Treatment for Workers with Family Responsibilities, Georgetown, Guyana, Nov–Dec 1994, country report submitted at workshop, unpublished.

[50] In Guyana the Equal Opportunity and Treatment in Employment and Occupation Act 1997 includes provisions prohibiting discrimination on the ground of family responsibility.

[51] *Supra* note 24.

[52] ILO No 103, *supra* note 16 article 3(2).

F. Child labour

The Minimum Age Convention, No 138, requires Member States to pursue a national policy designed to ensure the effective abolition and prevention of child labour, and to raise progressively the minimum age for admission to a level consistent with the fullest physical and mental development of young persons.[53] The Convention requires the setting of a minimum age that is not less than the age of completion of compulsory schooling, and in any case, no less than 15 years (14 years in exceptional cases).[54]

Convention No 138 contains several flexibility clauses. For example, it authorises the employment or work of children on light work to be excluded when certain situations exist but it must be applied to certain branches of activity including mining, quarrying, transport, manufacturing, electricity, plantations, etc.[55] The Convention, and its accompanying Regulation, set out how young persons, when working, should be protected in terms of conditions of work, including remuneration, hours of work, rest and leave, social security and occupational safety and health.

As of April 1997, only two countries in the sub-region had ratified the Convention: Dominica and Antigua.[56] The Committee has requested Dominica to amend its national laws to include a minimum age for employment of 15 years.[57] In this country, as in many others in the sub-region, there is no explicit reference to the minimum age for employment or work in the labour legislation. In practice, this age is deemed through provision in law of the compulsory school age, which is 15, and the social security benefit laws. The Committee however has underscored the importance of enacting prohibitions of child labour in statutory law.

Impact of international labour standards on law, practice and jurisprudence in the Commonwealth Caribbean

In the countries of the Caribbean, as in other countries of the Commonwealth, international law does not have priority over national law, nor can it be relied on directly to establish a cause of action before a national court. International law is to be

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[53] *Supra* note 10.

[54] *Id*, article 2(3).

[55] *Id*, article 5.

[56] Convention No 138 was ratified by Dominica on 27 September 1983 and by Antigua on 17 March 1983. However, note that Guyana ratified the Convention on 15 April 1998.

[57] See *Report of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEAR): General Observations concerning Convention No 138*, 1996 Report III, Part 4A, ILO Session 1996. See also CEAR: Individual Observation concerning Convention No 138, Minimum Age, 1973, Dominica (ratification 1983).

implemented through the statutory process in order to enjoy full legal status in national law, and in many instances this is in fact accomplished. However, international law, specifically international labour conventions, may still have persuasive authority outside of their impact on national statutory law through their influence on national policies, regulations, codes of practice, collective agreements and judicial decisions.

In the area of judicial decision-making, international labour standards may be relied on to interpret existing constitutional protections, statutes and common law and to determine good industrial relations practices. International labour standards can perhaps best serve as guidance in cases where applicable constitutional or statutory law is very general or unclear, or where gaps or apparent contradictions appear to exist. It may also serve as a reference in developing the common law as it relates to a specific case or context, particularly in cases of first impression. Further, international labour standards, supervisory comments and reports on the standard-setting process may be consulted to assist in the interpretation of a particular term or principle where the drafting of the law has been inspired by or based on international standards.

The potential for the use of international labour standards is best illustrated in the recognition of ILO Conventions concerning Freedom of Association and Collective Bargaining in Commonwealth jurisdictions by constitutional courts, the Privy Council, labour and industrial courts, labour tribunals and industrial relations commissions. Conventions concerning the promotion of gender equality have also been referred to, albeit less frequently. For example, the Supreme Court of India referred to the Preamble of the ILO Constitution in determining a case concerning the principle of equal pay contained in the Constitution of India.[58] The High Court of Australia found that the Commonwealth had authority to legislate on matters concerning equal pay, termination of employment, discrimination in employment, family leave, minimum wages and collective bargaining based on ILO Conventions, under its powers of external affairs.[59]

An excellent example of how reference may be made to international labour conventions is found in a decision of the industrial relations commission of New South Wales concerning an action for unfair dismissal. In taking into consideration ILO standards on Termination of Employment (Convention No 158)[60] and Workers

[58] *State of Bihar v Yogendra Singh* AIR 1982 SC 879. See also *Vishaka and others v State of Rajasthan*, AIR 1997 SC 3011, (1998) 3 BHRC 261; *State of Madhya Pradresh v Pramod Bhartya*, 1993 AIR SC 286. See Byrnes, "Using gender-specific human rights instruments in domestic litigation: the Convention on the Elimination of All Forms of Discrimination against Women", in this volume.

[59] *Victoria v Commonwealth*, (1996) 187 CLR. 416, 138 ALR 129.

[60] Convention concerning Standards on Termination of Employment at the Initiative of the Employer (ILO No 158), adopted 22 June 1982, entered into force 23 November 1985.

with Family Responsibilities (Convention No 156),[61] the Commissioner stated that she used them as instructive guidance on the range and scope of rights appropriate for the workplace. The Commissioner held that the termination of a man as a result of his non-attendance at work to be with his wife during the birth of their child, was, in all circumstances, a harsh and unfair dismissal.[62]

Within the context of court or tribunal decisions in the Caribbean, it would appear that ILO Conventions and Recommendations are informally referred to or consulted most often in labour courts, labour tribunals and labour boards. Even in those fora, it has been reported that while the judges take these standards into consideration, greater use could be made of international labour standards if brought to their attention by the parties before them in a dispute.

The impact of international labour conventions may also be found in the sub-region concerning the application of Convention No 100 on Equal Remuneration in Barbados and Dominica. In both countries, long-standing comments have resulted in the undertaking of objective job appraisals to ensure the lack of gender bias in the remuneration systems. For Barbados, this involved the sugar industry and, in Dominica, the public service.

International labour standards have most certainly had, and continue to have a significant impact in the Caribbean through the development of Caribbean Community (CARICOM) model legislation to harmonise labour law. Of particular relevance are two model laws: one on equality of opportunity and treatment in employment and occupation[63] and one on termination of employment,[64] both of which give effect to ILO Conventions Nos 100, 103, 111, 156 and 158, to name a few. Both were adopted by the CARICOM Meeting of Ministers responsible for Labour in 1995.

Several countries in the Caribbean are now undertaking to adopt or reform their labour laws, using the model legislation and ILO Conventions as guides. Such initiatives are under way in Antigua and Barbuda, Grenada, Guyana, Jamaica, St Lucia, and Trinidad and Tobago. Perhaps the greatest impact of international labour standards in general in the Caribbean has been on their modelling of collective bargaining agreements.

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[61] *Supra* note 17.

[62] *Robert Anthony Baker and South West Security Pty Ltd*, Matter No IRC 1534 of 1992, 2 December 1992, Commissioner McKenna (on appeal, see South West Security v Pty Ltd Baker [1993] NSWIR Comm 42 (24 September 1993) http://www.austlii.ed.au).

[63] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to equality of opportunity and treatment in employment and occupation.*

[64] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to termination of employment.*

Enforcement of equality provisions

The ILO undertook a review in 1992 to assess the effectiveness of the implementation of equality provisions contained in national law through administrative and judicial enforcement mechanisms. A summary of some of the findings of this study is attached as Annex C. Highlights of the findings are as follows:

- The relatively low number of cases initiated, investigated or resolved in favour of the claimant attests to problems in the enforcement machinery.

- Legal recourse through individual action has proven to be a significant avenue through which changes in legal provisions and their interpretation and common law can be accomplished.

- Group actions or representative actions can result in wide-scale changes in application of equality provisions and in employment practices.

- The use of legal recourse needs to be made more accessible through the simplification of procedures, lower costs, and increased legal aid.

- Judicial procedures could be made more effective through changes in evidentiary rules, protection against reprisals and the fashioning of more appropriate sanctions and remedies to compensate the victim and prevent the recurrence of the discriminatory practice.

The relationship between UN and ILO instruments

The United Nations work of codifying human rights principles took inspiration from many of the ILO standards. Articles 2 and 20 through 26 of the Universal Declaration of Human Rights concern the areas covered by the ILO including, freedom of peaceful assembly, right to free choice of employment, right to equal pay, right to form and join trade unions, right to social security, limitation of working hours and holidays, and right to professional education.[65]

The principles contained in the Universal Declaration of Human Rights were codified into two binding instruments called covenants in 1966. The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains many labour rights derived from and consistent with international labour standards such as prohibition of discrimination and promotion of equal rights between men and women, right to opportunity to gain one's living by work, vocational training, minimum wages, equal pay for work of equal value, right to form and join trade unions, right to strike, right

[65] GA Res 217A (III), adopted 10 December 1948.

to social security, maternity protection, and right to safety and health.[66] Indeed, article 8 contains a specific reference to the ILO Convention No 87 on Freedom of Association and Right to Organisation.[67]

Other international human rights instruments also contain substantive areas that overlap with those of ILO Conventions. The International Convention on the Elimination of All Forms of Racial Discrimination specifically refers to ILO Convention No 111 on Discrimination in Employment and Occupation.[68] The Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) refers, in general terms, to the international conventions concluded under the auspices of the United Nations and the specialised agencies promoting equality of rights of men and women.[69] While no special mention is made of ILO Conventions, provisions from no less than 17 ILO Conventions are contained in the CEDAW Convention. While the Convention included provisions from ILO Conventions, springs of inspiration have flowed both ways. The ILO Convention No 156 on the Promotion of Equality of Opportunity and Treatment for Workers with Family Responsibilities found its source of inspiration from article 11 (2)(c) of the CEDAW Convention. The United Nations Convention on the Rights of the Child[70] and the ILO Convention No 138 on Minimum Age for Work[71] both concern child labour.

Conclusion

There is potential for greater use of ILO Conventions and Recommendations concerning women and equality issues in litigation in the Caribbean courts as reflected in their use in cases in other Commonwealth countries. The appearance of few reported cases of gender discrimination in employment in the courts in the Caribbean should prompt concern, questioning and study as to why this situation exists. Action should be taken to ensure that when cases of discrimination, including

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[66] 993 UNTS 3, adopted 16 December, entered into force 3 January 1976. See articles 2, 3, 6, 7, 8, 9, 10, 11, and 12.

[67] Article 8 (3) of the ICESCR states:

> "Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention".

[68] 660 UNTS 195, adopted 21 December 1965, entered into force 4 January 1969.

[69] 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981.

[70] GA Res 44/25, UN Doc A/44/49, at 166 (1989), adopted on 20 November 1989, entered into force 2 September 1990.

[71] *Supra* note 10.

unequal access to jobs or occupations or training, unequal pay, unequal promotional opportunities, sexual harassment, lack of maternity protection, discriminatory termination of employment and unequal protection of the law to categories of predominantly female workers are able to be dealt with in a fair and equitable manner. Reference to international conventions could offer guidance to ensure that the existing equality provisions contained in constitutional and statutory law in Caribbean countries are implemented to their fullest.

ANNEX A

PRINCIPAL ILO CONVENTIONS OF PARTICULAR RELEVANCE TO WORKERS IN THE CARIBBEAN

RATIFICATION BY CARIBBEAN COUNTRIES AS OF APRIL 1997

COUNTRY	INTERNATIONAL LABOUR CONVENTIONS																			
	29	81	87	89	95	98	100	103	105	111	122	138	141	142	144	149	150	155	156	158
Antigua & Barbuda	X	X	X		X	X			X	X		X								
Bahamas	X	X			X	X			X						X					
Barbados	X	X	X		X	X	X		X	X	X				X					
Belize	X	X	X	X	X	X			X											
Dominica	X	X	X		X	X	X		X	X		X								
Grenada	X	X	X		X	X	X		X						X					
Guyana	X	X	X		X	X	X		X	X			X	X	X	X	X			
Jamaica	X	X	X			X	X		X	X	X				X	X	X			
St Lucia	X		X		X	X	X		X	X										
St Vincent and the Grenadines																				
Suriname	X	X	X		X	X			X		X				X					
Trinidad and Tobago	X		X			X			X	X					X					
TOTAL	11	9	10	1	8	11	6	0	12	7	3	2	1	1	7	2	2	0	0	0

ANNEX B

INTERNATIONAL LABOUR STANDARDS OF PARTICULAR RELEVANCE TO WOMEN WORKERS

Basic Human Rights

Equal Opportunity and Treatment

- Convention No 100: Equal Remuneration, 1951
- Recommendation No 90: Equal Remuneration, 1951
- Convention No 111: Discrimination (Employment and Occupation), 1958
- Recommendation No 111: Discrimination (Employment and Occupation), 1958
- Convention No 156: Workers with Family Responsibilities, 1951
- Recommendation No 165: Workers with Family Responsibilities, 1981

Freedom of Association and Right to Organise

- Convention No 87: Freedom of Association and Protection of the Right to Organise, 1948
- Convention No 98: Right to Organise and Collective Bargaining, 1949
- Convention No 141: Rural Workers' Organisations, 1975
- Recommendation No 149: Rural Workers' Organisations, 1975

Employment

- Convention No 122: Employment Policy, 1964
- Recommendation No 122: Employment Policy, 1964
- Recommendation No 169: Employment Policy (Supplementary Provisions), 1984
- Convention No 142: Human Resources Development, 1975
- Recommendation No 150: Human Resources Development, 1975
- Convention No 158: Termination of Employment, 1982

Social Policy

- Convention No 117: Social Policy (Basic Aims and Standards), 1962

Maternity Protection

- Convention No 3: Maternity Protection, 1919
- Convention No 103: Maternity Protection (Revised), 1952
- Recommendation No 95: Maternity Protection, 1952

- Convention No 110: Plantations, 1958; and Protocol, 1982
- Recommendation No 12: Maternity Protection (Agriculture), 1921

Occupational health and safety

- Recommendation No 4: Lead Poisoning (Women and Children), 1919
- Convention No 13: White Lead (Painting), 1921
- Recommendation No 114: Radiation Protection, 1960
- Convention No 127: Maximum Weight, 1967
- Recommendation No 128: Maximum Weight, 1967
- Convention No 136: Benzene, 1971
- Recommendation No 144: Benzene, 1971
- Convention No 170: Chemicals, 1990
- Recommendation No 177: Chemicals, 1990

Night work

- Recommendation No 13: Night Work of Women (Agriculture), 1921
- Convention No 89: Night Work (Women) (Revised), 1948; and Protocol, 1990.
- Convention No 171: Night Work, 1990
- Recommendation No 178: Night Work, 1990

Conditions of work

- Convention No 45: Underground Work (Women), 1935
- Recommendation No 102: Welfare Facilities, 1956
- Recommendation No 116: Reduction of Hours of Work, 1962
- Convention No 140: Paid Educational Leave, 1974

Other special categories of workers

- Convention No 159: Vocational Rehabilitation and Employment (Disabled Persons), 1983
- Recommendation No 168: Vocational Rehabilitation and Employment (Disabled Persons), 1983
- Convention No 169: Indigenous and Tribal Peoples, 1989

Other conventions of special importance for women workers

- Convention No 4: Night Work (Women), 1919
- Convention No 81: Labour Inspection, 1947
- Convention No 95: Protection of Wages, 1949
- Convention No 102: Social Security (Minimum Standards), 1952
- Convention No 118: Equality of Treatment (Social Security), 1962
- Convention No 129: Labour Inspection (Agriculture). 1969
- Convention No 138: Minimum Age, 1973

- Convention No 149: Nursing Personnel, 1977
- Convention No 157: Maintenance of Social Security Rights, 1982
- Convention No 168: Employment Promotion and Protection against Unemployment, 1988

ANNEX C*

Enforcement of equality provision in national law

1.3.1 General framework

In many countries, specific legislative texts prohibiting discrimination and promoting equality of opportunity and treatment in employment have been adopted, thus creating a legal framework for the elimination of discrimination between women and men in employment. However, gaps still remain between the law and its application. The supervision of the application of the principles and provisions of the relevant laws on non-discrimination and equality of opportunity and treatment is thus a crucial area for action. Emphasis has shifted from obtaining legal rights to the effective implementation and reinforcement of those rights through legal and administrative processes, and also to the removal of the barriers which, in practice, hinder the achievement of equality.

In addition to the relevant national bodies and social partners, national machineries created to improve the status of women can play a critical role in both these areas. Women's organisations and individuals also have an important role to play. The first step is to learn about the relevant bodies and procedures already established at the national level. Some of the issues to be considered in assessing new laws on enforcement at the national level are outlined below.

1.3.2 Administrative supervision: labour inspection

In most countries, equality legislation is administered by the labour inspection services. These services verify, through the inspection of premises and records, that the undertakings subject to their control comply with the requirements of the law. In addition, they provide information and advice for employers and workers concerning the most effective means of complying with the legal provisions. Although it is often difficult for labour inspectors to deal effectively with the personnel policies of employers (e.g. hiring, training, promotion), their special attention to matters such as termination of employment, wages or maternity protection, could be very effective in detecting and preventing discriminatory practices.

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* ILO Women Workers' Modular Training Package (ILO Geneva, 1994).

Labour inspectors also frequently have the power to hear complaints by employees, and may either refer the complaint to the appropriate authorities or initiate proceedings themselves before the courts or tribunals. Often, they may be involved in conciliation proceedings, in an attempt to settle the complaint between the employer and the employee without recourse to further action. For example, in the Central African Republic, the Labour Code provides that the labour inspectors may bring cases involving infractions of the labour law direct to the competent judicial authorities. In Malawi, an individual may complain to a labour officer who is duty-bound to investigate the complaint and, where possible, effect a settlement (section 51 of the Employment Act).

In practice, however, the information available shows that labour inspection services play a very limited role, owing to meagre resources and the lack of staff trained to handle questions of discrimination and equality. Labour inspectorates in all countries need to be strengthened and supported by individual and organizational actions, and they need to be trained on equality issues in employment.

Labour inspectors can play a key role in the enforcement of anti-discrimination provisions because of their regular contacts with employers and workers at work-places, their access to relevant files, and because they are not handicapped by the obstacles which individual employees usually face. The work of these inspectors also involves informing employers and workers of the existence of current legal provisions explaining their meaning and scope, and suggesting how to use these provisions effectively.

The supervisory and advisory functions of labour inspectorates reinforce and complement each other in promoting the effective application of legal provisions for the protection of workers. For this reason, it is crucial to train inspectors in matters of equality, to recruit specialized staff and to strengthen the participation of workers' representatives in the process of inspection.

1.3.3 Specialized agency support

Within the framework of a national machinery set up to improve the status of women, a number of countries have established enforcement agencies which examine complaints of discrimination and monitor the implementation of anti-discrimination measures. These agencies can facilitate the filing and resolution of individual complaints and, in many jurisdictions, initiate action on their own

in support of individual actions. The competence of these enforcement agencies varies, as does their effectiveness in providing support to the individual complainant. Most are empowered to receive individual complaints. In some countries the filing of a claim with the Equal Employment Opportunity Commission is a procedural prerequisite to pursuing any employment discrimination complaint. Some agencies have the authority to initiate complaints on their own.

In order to facilitate individual actions, mandatory filing of complaints by the national agency is being eliminated in some countries. In the Netherlands the Reparations Act of 1989 no longer requires a complainant to seek advice from the Equal Rights Commission before going to court. However, in many cases, individuals continue to rely almost exclusively on agency assistance. Recourse to an agency is thought to relieve some of the feeling of isolation and stress which occurs in the pursuit of a claim. The processing of a complaint through an agency is usually carried out free of charge. Most of the agencies are authorized to undertake investigations of complaints and to request records from the employer. This greatly assists the individual in the identification and collection of important documents. The specialized enforcement agency can often ensure that the complaint is handled by experts in the field who are able to recognize discriminatory employment practices. This expertise is considered a distinct advantage in equal pay cases, which often involve the application of complex methods of job evaluation.

The procedures followed by the enforcement agencies vary. In general, they receive complaints and then proceed by way of inquiry and conciliation. Where this is of no avail, some are authorized to resort to other measures by hearing the complaint themselves or by initiating action on behalf of the complainant in court. Other agencies may authorize the complainant to take the case to court after conciliation efforts have failed. Where agencies exercise their quasi-judicial authority to hear the complaint, it is important that individuals be entitled to challenge the agency decision in labour tribunals or courts of law.

The level of support provided to individuals by the agencies essentially depends on their effectiveness in promoting and guaranteeing the implementation of the equality provisions. In particular, the effectiveness of commissions responsible for supervising the application of provisions concerning equality depends not only on their powers of investigation and conciliation, but also on the extent to which they may enforce their recommendations, either by referring the matter to courts, or by the binding nature of their decisions. The effectiveness of these specialized agencies also depends on the human and financial

resources available to them for the discharge of their responsibilities, for without adequate resources their functions remain hypothetical and their actions hampered. The International Labour Conference emphasized in its 1985 resolution that agencies responsible for ensuring equality of opportunity should be sufficiently well staffed to carry out their tasks.

The enforcement agencies may also have educational and advisory functions. The supervisory and advisory functions reinforce and complement each other to the extent that they both tend to promote greater awareness of legal rights and their effective application.

1.3.4 Legal recourse

In most countries the relatively low number of cases initiated, investigated or resolved in favour of the claimant attests to problems in the enforcement machinery, and in some cases, in the relevant legislation. Such problems include the inflexibility of procedures, the difficulty in assembling evidence and the burden of proof. In Japan, the low number of cases filed has been attributed to the absence of penalties and remedial measures and the virtual impossibility of proving indirect discrimination under the existing Equal Opportunity Act. In Canada, out of 149 cases filed on sex discrimination in a two-year period, only 25 were settled or redressed; in Denmark only four equal pay cases have been filed in ten years; in Ireland, out of 124 cases filed under an anti-discriminatory pay law in a period of approximately two years, only 15 were decided in favour of the employee.

Nevertheless, legal recourse through individual action has proven to be a significant avenue through which changes in legal provisions and their interpretations can be accomplished. Group actions can result in wide-scale changes in employment practices. The use of legal recourse could be made more accessible to all workers through simplification of procedures, lower costs and increased legal aid.

The right to bring a legal action against an employer on the basis of sex discrimination is determined within the legal framework of each country. In some systems the rights conferred upon individuals, agencies, trade unions or other groups are specifically defined in the legislation. In other countries, such rights exist under the general civil law procedures. In jurisdictions where individuals are authorized to take their claims directly to tribunals, the onus may be completely on the individuals concerned to enforce their rights. The aim of giving victims

responsibility for taking direct legal action to enforce their legal rights has often been frustrated in employment discrimination cases because of the difficulties they encounter in proving such cases. However, even in jurisdictions which authorize agencies to pursue complaints on behalf of individuals, the process is, in most instances, set in motion when a person alleging discrimination files a complaint with the agency.

In most cases filed, a settlement of the dispute is agreed to between the employer and employee before the case reaches a final judicial determination. This may be seen in a positive light where the settlement results in a fair and equitable resolution of the complaint between the two parties and precludes unnecessary court action. But there is a growing concern that cases are settled in an unsatisfactory manner owing to financial pressures, the uncertainty of the outcome (even for a meritorious case), and the inadequacy of the remedies. In other words, procedural obstacles in the enforcement system may deter individuals from pursuing their legal entitlements to the full.

The use of enforcement machinery can have a substantial positive impact in reducing discriminatory employment practices. In areas where claims have been successful, changes have been visible. Women have gained entry to occupations from which they were previously excluded by using legal recourse to show that entrance restrictions such as height and weight requirements unnecessarily discriminated against them. The filing of a sex discrimination complaint by an employee or applicant often unveils broader-based systematic discrimination. Thus, complaints can serve as a means for detecting discriminatory practices, and set in motion, either through voluntary or compulsory means, the correction of such practices. Enforcement machinery can also operate to ensure positive outcomes in meritorious cases and to deter the continuation of discriminatory practices.

Group action

Lodging a general complaint covering a number of workers, whether by an agency, collective action or trade anion, makes it easier to assume the burden of proof, probably reduces the risk of reprisals and obliges the employer to find valid objective arguments to defend her or his position. The possibility of group action is also likely to serve as a deterrent to discriminatory action.

One alternative to individual action is collective action, better known as a class action. A class action is a complaint filed on behalf of an entire group of applicants or employees who, under a pattern of related facts, claim to have suffered from similar discriminatory practices. In the United States, where the concept originated, the provision for class actions brought under Title VII

of the Civil Rights Act of 1964 has been credited with resulting in major overhauls in hiring practices, classification schemes, lay-off policies and promotion criteria. Class actions are considered particularly useful in addressing practices of indirect discrimination which often cannot be established on an individual claim basis. The significant impact of class actions, as well as the protection offered to individual class members, has led to calls for the wider introduction of this practice.

Another alternative to individual action which is growing in frequency is the practice of trade unions filing proceedings on behalf of a claimant. The legislation of many countries authorizes trade unions to institute proceedings on equal treatment on behalf of their members. This type of action has proven to be very useful particularly in the area of equal pay; however, it appears as yet to have been infrequently used. One issue currently being discussed in this connection is whether the unions must obtain the permission of the individual concerned before being entitled to bring action against the employer. In most cases, a trade union must be duly authorized to act on behalf of a worker. The right of unions to institute action offers advantages similar to class actions, in the sense that it provides an alternative to individual action.

Trade union action is possible, for example, in Tunisia, Sweden, Hungary and Israel. In India, recognized welfare institutions may bring a complaint to court (included in such institutions are at least three women's groups).

Financial support

Proceedings in court may be long and expensive, particularly since legal representation is usually involved. One measure aimed at combating this problem is the provision of legal aid (that is, the claimant need not pay any of the costs of a lawyer and/or the costs of proceedings).

Legal aid strategies usually entail the establishment of legal aid and family law centres which give free legal advice to women, especially low-income women. In some parts of the world, the concept of legal aid is that of taking the law to the people. Lawyers and women activists visit remote villages and barrios on a regular basis, ascertain the problems of women living in those areas, and provide advice regarding possible courses of action.

Legal aid may be requested in Malawi and the Philippines, for example. Another tactic is simply to make the proceedings free, which has been done in Burkina Faso, Swaziland and Mexico.

In Australia, the Sex Discrimination Act provides for assistance to complainants to meet the costs of an inquiry or proceedings in the federal courts. The Equal Opportunities Commission in the United Kingdom has taken a policy decision to try to assist more applicants and has allocated additional resources to legal services. In the United States, the courts may order the defendant to pay the claimant's attorney's fees on a successful outcome, which makes lawyers willing to take on such cases without receiving payment from the individual claimant.

Burden of proof

Another problem in discrimination cases can be how the burden of proving or disproving the discrimination claim is distributed between the complaint and the responding employer. The nature of these cases makes proof very difficult in many cases. Once before a tribunal, a complainant still faces great difficulty in proving her case. In general, the legal systems in many countries place the burden of proof on the party initiating the complaint to substantiate the allegations to a particular level of certainty, such as with a preponderance of the evidence or on the balance of probabilities. This is recognized as a major stumbling block to enforcement in discrimination cases, and a trend towards a reversal of the burden in such cases is well under way. This trend towards shifting or reversing the burden of proof to the employer is based on the fact that the employer is usually the one in possession of all the documentation or other evidence concerning the taking of employment decisions. Shifting the onus of the burden of proof usually means that once the employee has set out basic elements of a complaint of discrimination, the employer has the burden of proving his or her actions were not discriminatory in violation of the law.

In Swaziland, Rwanda and Canada, as well as in most European countries, the burden of proof in employment discrimination cases has either been reversed to be placed fully on the employer to disprove discrimination, or shifted to the employer once the complainant has established basic elements in her case.

Reversing the burden of proof also may help address unvoiced and often unconscious prejudice in society which makes courts reluctant to draw favourable inferences from evidence which supports a claimant's position. This has, for example, raised problems in sexual harassment cases. Placing the burden of proof on the employer also takes into account that there is a general lack of understanding of the concept and practice of indirect discrimination, particularly in cases of equal pay.

Protection against reprisal

The fear of reprisal is a great deterrent to individuals wishing to enforce their rights. Many individuals fear dismissal or other forms of reprisal if they seek to enforce the legal provisions. In an increasing number of countries, legislation includes some provision for sanctions against those who threaten actual or prospective complainants with reprisals. In Cyprus, for example, an employer can be fined up to $1,000 for dismissing a complainant. In Ethiopia, labour inspectors may not reveal the source of a complaint.

There needs to be greater recognition that effective protection against discrimination in employment must entail protection against reprisals, particularly dismissal. The commission of reprisals should carry harsh penalties, including the reversal of improper action.

In a report from the Equal Opportunity Ombudsman in Sweden, 112 out of 465 complainants stated that they hid experienced serious negative consequences at work after having filed a complaint of sex discrimination. A study in the United Kingdom noted that many applicants who filed complaints reported that relationships in the work-place had deteriorated thereafter. Moreover, no successful applicant felt that the employment situation had improved as a result of having brought an action. Nevertheless, the majority of successful applicants stated that bringing the claim had been worthwhile as "a matter of principle".

Remedial action and sanctions

The remedies available in instances of discrimination are not always adequate. At times they may render the legal system ineffective by not compensating the complainant fairly and by falling to serve as a deterrent to such conduct.

Some of the inadequacies in enforcement stem from the restrictions placed on the tribunal's power to formulate and impose remedies tailored to each case. For example, in France, while a judge may be empowered to order payment of compensation (usually limited), he or she is rarely authorized to annul the consequences of the discriminatory action or decision. This is a serious limitation on enforcement.

A gradual trend towards strengthening remedies and sanctions can be observed. Many countries rely more heavily on sanctions than on remedies. While fines give the appearance of severity they may not always be the most effective remedy. They are rarely used; they do not compensate the victim or remedy the

wrong, and they may not be appropriate, as in cases involving institutional patterns of indirect discrimination.

For more effective enforcement, it may be better to combine legal sanctions (criminal penalties and civil fines) with the equitable approach of compensation as practised in Canada and the United States, where the basic objective of any proceeding is twofold: to restore the victim to the position she would have been in had the discriminatory act not taken place; and to prevent its recurrence. Moreover, it appears that the more the remedy is tailored to a specific discriminatory employment practice, the fairer and more equitable the remedy from both the worker's and employer's point of view.

In cases in which the effect of discriminating is on remuneration, it is relatively easy to compensate for the damage incurred by means of an adjustment in salary and/or benefits and the award of back pay owed. However, cases of failure to provide training or restrictions on access to employment or promotion do not lend themselves to purely financial remedies. Some general equitable remedies include reinstatement, adjustment of seniority accrual and pension contributions, participation in training courses, transfer and promotion. As part of the remedial measures, courts may order (or the parties may agree to) the implementation of a positive action policy or some other action in order to counteract the effects of past discriminatory practices.

Emphasizing the desired objective rather than the penalty, the court may defer pronouncing the sentence and order the employer to state by a specified tune what positive measures he or she intends to take after consulting the works committee or staff representatives. Attention has also been drawn to the failure of an employer to comply with settlements or orders.

The enforceability of awards or settlements should be considered a factor in their adequacy. It is clear from the discussion of these difficulties that the area of sanctions and remedies requires more in-depth study and attention.

Composition of tribunals or agencies

Consideration must also be given to the receptiveness of the arbitrator or judicial officer hearing the complaint. A common criticism is that a legal system dominated by men constitutes yet another obstacle to the enforcement process. A review of cases in Australia over a period of four years clearly suggests that plaintiffs are more likely to obtain favourable judgements when the tribunal is presided over by a woman. This suggests that increasing female representation on industrial relations benches should be an objective of positive action policies.

Equality Jurisprudence under Commonwealth Caribbean Constitutions Litigation relating to the Human Rights of Women

Equality Jurisprudence under Commonwealth Caribbean Constitutions and Legislation relating to the Human Rights of Women: The Eastern Caribbean

Justice Dennis Byron,
Chief Justice of the Eastern Caribbean Supreme Court

Introduction

In the note inviting me to make this presentation, I was asked:

1. to describe the domestic legislative situation and give examples of cases where international and regional standards of equality have been useful in litigation and decision-making as well as promoting gender equality before the law;

2. if this has not happened, to indicate the capacity for future realisation; and

3. to assess the legal and practical difficulties that stand in the way of greater use of international standards in domestic litigation and the strategies that may be adopted to address this.

Examples of cases

In the Eastern Caribbean there has not been much, if any, litigation relating to the human rights of women. I have found no examples of any cases where international or regional standards of equality have been used in litigation or in promoting gender equality before the law.

The only case I have come across where the issue of women's constitutional right to non-discrimination has been raised on the pleadings is the St Lucian case *Girard, Jn Pierre & the St Lucia Teachers Union v Attorney General.*[1] Misses Girard and Jn Pierre were two unmarried teachers who were dismissed under regulation 23(3) of the Teaching Service Commission Regulations which reads:

> "An unmarried teacher who becomes pregnant shall be dismissed on a second pregnancy if still unmarried".

[1] *Girard, Jn Pierre & the St. Lucia Teachers' Union v Attorney-General* (Unreported) Suits Nos 371, 372 & 471 of 1985 (HC) (St Lucia) (17 December 1986).

The Teachers' Union was involved because it had a collective agreement with the government, which provided for three months maternity leave to all employees regardless of marital status. St Lucia had been a party to the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) since 1982,[2] which specifically prohibits discrimination against women on the ground of their marital status. However, neither in argument, nor in the judge's reasoning in the decision, was mention made of any international or regional material as guidance to the interpretation of the constitutional provisions.

The trial judge delivered his decision in 1986.[3] He concluded that the presumption of constitutionality had not been rebutted and that regulation 23(3) did not contravene the non-discrimination section of the Constitution. Instead, he found that there was a breach of the collective agreement and ordered reinstatement and/or damages for wrongful dismissal. The Government appealed.[4] There was no cross-appeal on the constitutional issue and it was not considered. The appeal was allowed and the judgement set aside on the ground that the collective agreement could not be read as repealing regulation 23(3) by implication.

The matter was eventually resolved politically because after sustained public pressure the regulation was repealed by the Teaching Service Commission (Amendment) Regulation 1995.

Despite the lack of case law, there is every indication that the issue of gender equality has been addressed by Caribbean governments in their stated policies and in legislative programmes. I therefore propose to discuss briefly:

- constitutional provisions on gender equality;
- international and regional standards of equality;
- the capacity for realising international standards in domestic litigation;
- legal difficulties;
- practical difficulties; and finally
- the domestic legislative situation.

Constitutional provisions on gender equality

The Eastern Caribbean Commonwealth countries include six independent states and three dependent territories. I have used the Constitution of St Lucia as an example

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[2] 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981. St Lucia acceded to the Convention on 8 October 1982.

[3] *Supra* note 1.

[4] St Lucia, Civil Appeals Nos 12 and 13 of 1986.

since it is generally representative of the independent constitutions.[5] The issue of gender equality is addressed with general declarations that every person whatever his race, place of origin, political opinions, colour, creed or sex is, subject to respect for the rights and freedoms of others and for the public interest, entitled to, *inter alia*, equality before the law and the protection of the law, protection for family life and specific prohibitions against:

1. laws which are discriminatory in themselves or in their effect; and
2. treatment in a discriminatory manner by any person or authority.

These prohibitions are subject to a number of exceptions regarding matters such as:

- appropriation of public revenues;
- people who are not citizens;
- personal law for persons on adoption, marriage, divorce, burial, dissolution of property on death and like matters;
- disabilities or restrictions or privileges or advantages reasonably justifiable in a democratic society;
- setting of standards or qualifications not specially relating to, for example, sex and race to be required of any person in any office or employment;
- the restrictions on the basic fundamental rights and freedoms authorised by the Constitution which in general refer to the requirements of defence and other matters of public safety and interest and the rights and freedoms of other persons; and
- matters relating to the civil or criminal procedures in court.

The Constitution defines discrimination as affording different treatment to different persons attributable wholly or mainly to their respective descriptions of sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description.

International and regional standards of equality

International treaties and conventions on human rights have long affected the Eastern Caribbean and continue to do so. The United Nations Charter includes, as one of its purposes, the universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. This has

[5] St Lucia Constitution Order, SI 1978 No 1901.

been elaborated and developed in the Universal Declaration for Human Rights[6] and in subsequent United Nations covenants on human rights.

There have also been a number of international conventions having specific relevance to women. The CEDAW Convention,[7] which was adopted by the United Nations in 1979, is the international instrument which deals most comprehensively with the conditions of women and its obligations are legally binding on the States which become parties to it. All of the Eastern Caribbean States are parties to this Convention.

The regional treaties containing provisions promoting gender equality which may affect jurisprudence in the Eastern Caribbean include the European Convention for the Protection of Human Rights and Fundamental Freedoms[8] and the American Convention on Human Rights.

In our specific context Caribbean Community (CARICOM) governments have subscribed to the Charter of Civil Society for the Caribbean Community. This is not a legally-binding instrument but it includes an affirmation of determination to promote policies and measures to strengthen gender equality between women and men in political, civil, economic, social and cultural spheres and makes specific undertakings with regard to women's rights to political office; equal employment and remuneration, not to be discriminated against by reason of marital status; pregnancy or health-related matters; and protection against domestic violence and sexual abuse.

In the CEDAW Convention, the term "discrimination against women" means:

> "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality for men and women, of human rights and fundamental freedoms in the political, social, cultural, civil or other fields."[9]

By concentrating on the elimination of all forms of discrimination against women without seeking to eliminate discrimination experienced by men, the CEDAW Convention goes beyond gender-neutral human rights and requires that in this context women be seen as a separate class of human being.

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[6] GA Res 217A (III), adopted on 10 December 1948.

[7] *Supra* note 2.

[8] See the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 221. The amended text of the Convention and the protocols adopted to date are reproduced at 15 HRLJ 102.

[9] *Supra* note 1, article 1.

The capacity for realising the intentional standards in domestic litigation

In considering the way in which the principle of non-discrimination against women will be applied by our courts, the dual prohibitions in the Eastern Caribbean Constitutions against making any law discriminatory in itself, or in its effect, and the prohibition against discriminatory treatment, which must necessitate looking at the effect of the conduct, would seemingly permit the court to emphasise both the universality and indivisibility of human rights and their full application to women as human beings, as well as to deal with systematic or indirect discrimination of women as a class or group of human beings.

In this volume Professor Mahoney expresses the opinion that the Canadian cases of *Andrews v Law Society of British Columbia*[10] and *Brooks v Canada Safeway Ltd*[11] set a new test for discrimination which accorded with the definitions contained in the CEDAW Convention, and therefore with international standards of equality.[12] In this test, discrimination may be found where a distinction based on personal characteristics of the individual or group, which is not imposed on others and which continues or worsens a disadvantage, is determinable contextually by examination of the applicant's social, political and legal reality and not necessarily by comparison with that of another individual or group.

The main factors which influence the use of international standards in domestic litigation are:

- first, the nature of the litigation and the manner of its presentation (obviously the jurisprudence on gender equality will be developed in direct relation to the incidence of cases which raise the issue); and

- secondly, the principles of interpretation which will be applied by the courts.

One of the difficulties we face is the adversarial system of litigation, which causes the court to focus on the issues raised by the parties. If constitutional issues on gender equality are not raised by counsel, presumably because they are not aware of their existence, it reduces the probability that the judge will notice them. Having said this, I recognise that judges have the powers to initiate this consideration.

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[10] [1989] 1 SCR 143.

[11] [1989] 1 SCR 1219.

[12] See Mahoney, "Gender and the Judiciary: Confronting Gender Bias", in this volume.

The principles of interpretation

There is already judicial authority on the permissible employment of international norms as aids to interpreting constitutional provisions. I need refer only to the Bermudan case of *Ministry of Home Affairs v Fisher.*[13] In that case, a Bermudan man married a Jamaican woman and brought her children, born out of wedlock, to Bermuda to live. Under the Bermudan Constitution, as in the case of other Caribbean countries, the stepchild of a citizen belongs. The Crown contended that an illegitimate person could not benefit under the stepchild provision because there is a legal presumption that the word "child" in legislative and other formal documents connotes legitimate child.

Lord Wilberforce delivered the judgement of the Privy Council. He rejected that contention. His reasoning included the consideration that the constitution was influenced by the human rights norms in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the United Nations Universal Declaration for Human Rights 1948. That premise, together with the context of the Constitution, which included every person in its guarantees of fundamental rights and freedoms, enabled the conclusion that in the Constitution the term "child" meant any child and was not restricted to a legitimate child.

In my view our courts will be open to consider the constitutional provisions relating to gender equality in the light of international norms as expressed in our constitutional documents and illuminated by international and regional instruments, the judicial reasoning from other jurisdictions which have already developed jurisprudence on these issues, and writings of legal scholars.

The legal difficulty

The Eastern Caribbean countries have dualist legal systems, which regard international law as being intrinsically different from domestic law. This generally means that international treaty law cannot be applied in domestic courts, until it has undergone some process of transformation or incorporation into the domestic legal system.

The power to utilise the international obligations of a state whether or not they have been integrated into domestic law in interpreting and applying national constitutions, legislation, and common law is already well established. The situation may be different, however, where national law which clearly accords with the constitution is inconsistent with the international obligations of a state or with international standards to which a state has subscribed. This is an area where legal and judicial concepts are developing. But the traditional and general principle of the common law has been that effect be given to the national law.

[13] [1980] AC 319; [1979] 3 All ER 21.

Practical difficulty

I agree with the general view that traditional legal training has tended to ignore the increasing gender-sensitivity of our times. Judges and practising lawyers are often unaware of the remarkable and comprehensive statements of international human rights norms.

But I want to emphasise that the lack of awareness is community-wide. As I made an effort to prepare myself for this colloquium I made inquiries of a number of relevant institutions, organisations and individuals on the issue of discrimination against women in our societies. It was particularly interesting to note that apart from issues surrounding domestic violence and sexual crimes, women in the Eastern Caribbean do not seem to consider that there is gender inequality in our society.

This fact is perhaps a substantial contributing factor to the absence of litigation and other formal complaints relating to gender equality.

It would be beneficial to have better dissemination of information to judges, lawyers and law enforcement officials, meetings for exchanges of relevant information and experience, promotion of expert advisory bodies, knowledgeable about developments in the field of human rights of women and gender equality and appropriate courses at the University of the West Indies.

The dissemination of information needs a much wider audience than judges and lawyers. In fact, it would seem that women need to be targeted in this process. Perhaps even more crucial is the need for political, economic, and social analysis considering laws affecting women in the development process. Without increased awareness, little difference will be experienced in the trends of litigation on this issue.

I should make the comment that performing the reporting obligations under the CEDAW Convention, and the availability of such reports, will be useful in developing awareness. As of April 1997, the only countries in the Eastern Caribbean to report have been St Vincent and the Grenadines and Antigua and Barbuda, although all have expressed their intention to do so.

Domestic legislation

Violence against women

In the Eastern Caribbean women's groups and other organisations dealing with women's rights are most vocal on issues of violence against women. This is an area where regional standards have promoted gender equality before the law. Domestic

legislation has already responded or is on the agenda in all the States of the OECS and in general this response has been influenced to some extent by the CARICOM model legislation.

St Lucia has enacted the Domestic Violence (Summary Proceedings) Act 1995. The gender-neutral legislation provides summary remedies before the Magistrates Court for victims of domestic violence, who are for the most part women.

In general, this legislation is geared to ensure that the victims of domestic violence retain the use of their home, the area where it is located, their work place or other place where they happen to be to the exclusion of the respondent with suitable financial and other conditions.

A magistrate who has been applying this legislation since its introduction, expressed the view that it has had a dual effect:

1. provided a much-needed remedy;
2. provided a means of revising the attitude of men.

Apparently, many of the orders carried conditions of counselling. In almost every case the orders were discharged within three to four months and there have been no reported repetitions. Similar legislation has been enacted in St Vincent and the Grenadines and the British Virgin Islands (BVI). Dominica has a committee considering this legislation.

Sexual harassment

As of April 1997, the topic of sexual harassment has received limited legislative treatment domestically. Despite CARICOM model legislation on the issue, Belize is the only Caribbean country so far to have enacted legislation specifically dealing with sexual harassment: the Protection against Sexual Harassment Act 1996.[14] In general, victims must rely on the general law relating to rape, and indecent or simple assault and attempt and relating to indecency in language or defamation. In St Lucia the Equality of Opportunity and Treatment in Employment and Occupation Bill contains provisions defining and prohibiting sexual harassment.

Crimes of violence and sex against women

There has been an increase in criminal prosecutions for violence against women and sexual crimes against women and children, including crimes of incest and statutory

[14] Commonwealth Secretariat & CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual harassment.* See Thelma Rodney-Edwards, "CARICOM model legislation on violence against women in areas of sexual offences. Domestic violence and sexual harassment: a comparison with international standards and existing Commonwealth Caribbean legislation", in this volume.

rapes against girl children by their stepfathers. The definition of these crimes are generally consistent with international and regional standards.

Procedure and evidence

The issues of *in camera* trials, restrictions regarding adducing evidence of sexual history, provisions empowering the court to forbid publication of reports of details and the identity of the parties and the admissibility of video recordings of statements by minors have not received widespread legislative action. In Dominica there is a new Sexual Offences Bill addressing these issues on the basis of the CARICOM model legislation.[15]

Sentencing

Although in most states the domestic legislation with regard to sentencing has been amended to permit more severe penalties up to life imprisonment and even corporal punishment (the constitutionality of which has not been challenged in our courts perhaps because it is seldom imposed) the exercise of the court's discretion has been criticised as being too lenient. I can refer to two cases, both of which were abnormal and not representative of general sentencing trends. In the St. Lucian case, *R v Titus Reynolds*,[16] the indictment charged murder. The female victim was brutally sexually assaulted and killed. The accused denied that he was the assailant. Much of the forensic evidence relied on to connect him with the crime was ruled inadmissible by the trial judge. The court subsequently accepted a plea of manslaughter and imposed a sentence of 15 years. This sentence was considered too lenient, and it sparked a period of public outrage, with public meetings and placards demonstrations, press involvement, and even debates in Parliament discussing the issue of mandatory life imprisonment for manslaughter of women by men.

In *Mark Williams v The Queen*,[17] a case from St Vincent and the Grenadines, the indictment charged murder. A well-known lawyer shot and killed his girlfriend in the presence of crowds of people during Carnival. He was convicted of manslaughter by a jury and sentenced to five years. This, too, sparked intense public outrage characterised by public meetings and demonstrations, press involvement, and protests by human rights and women's organisations. It was felt that the leniency of these sentences diminished women or the value placed on their lives.

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[15] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual offences*.

[16] High Court Criminal Appeal, No 1 of 1996, St Lucia, unreported.

[17] No 3 of 1996, St Vincent & The Grenadines, unreported.

Drafting principles

Gender-neutral drafting has not become commonplace as many legislative counsels consider it cumbersome and inelegant. The Interpretation and General Clauses Act usually indicates that words importing masculine gender include the feminine gender and vice versa.

Marital status

International and regional standards have been influential on the issue of generating legislative and policy reforms to counter discrimination on the basis of marital status.

I referred earlier to the repeal of the Teaching Service Commission Regulation which required the dismissal of unmarried mothers on a second pregnancy. It is reported that both private and public sector collective agreements now protect unmarried mothers from dismissal on that ground and the National Insurance Schemes provide benefits for them on an equal basis with married mothers.

I have been advised that in most of the states, unmarried teenage girls are permitted to continue their education after becoming pregnant at whatever level of school.

Common law spouse

Despite the CEDAW Convention, this issue has not yet been dealt with in legislation or in any constitutional challenge before the courts. As a result, unmarried women do not inherit from their male partners on intestacy. The courts recognise property rights based on the principle of resulting trusts. This only recognises the value of the woman's contribution to assets which the man owns, and gives her (and their children where there is no Status of Children Act) no interest in his property on intestacy.

The provisions providing financial support for a wife or divorced woman are not applied to unmarried women in any circumstances. This has not been addressed by legislation or litigation.

In St Lucia, like most Eastern Caribbean countries, the Affiliation Ordinance places a maximum on the awards for the maintenance, care, education and upbringing of children born out of wedlock. This maximum is usually considered inadequate by any standard of living. This contrasts with the unlimited discretion of the court in relation to children of a marriage where the means of the parents and their standard of living (or that of the person liable for support) is the main basis for assessing the amount of the award.

Status of children

In most jurisdictions the status of illegitimacy has been abolished by the Status of Children Act which also deals with equalising rights to inheritance and property. Thus, an illegitimate child will be able to inherit from the father's estate on an intestacy. It also rebuts the presumption in domestic legislation and formal documents such as wills that "child" means legitimate child. This has had important consequences. There are still some countries, such as St. Lucia, which have not passed this or similar legislation.

Employment

Equality in the workplace

Many countries now have Labour Codes or other legislation which provide for equality of remuneration and working conditions between women and men, for example the Antigua Labour Code which:

1. prohibits discrimination with respect to hiring, wages, hours or other conditions of work by reason of sex;
2. prohibits women to be employed under less favourable terms than men by reason of sex; and
3. empowers labour inspectors to ascertain whether there are contraventions of the provisions.

The legislative framework provides special enforcement machinery including an Industrial Court. Similar legislation exists in many states, for example the British Virgin Islands and Montserrat. St Vincent and the Grenadines has an Equal Pay Act. Dominica has a Labour Contracts Act and Labour Standards Act. St Lucia is considering its Equality of Opportunity and Treatment in Employment and Occupation Bill, which is intended to eliminate discrimination on grounds including sex, family responsibilities, pregnancy, and marital status. It defines key terms such *de facto* spouse, marital status, sexual harassment and specifically prohibits discrimination between men and women.

Citizenship

In general, the Constitutions provide for citizenship by descent from either parent. Citizenship by registration on marriage is usually marked (except in the case of Grenada) by some restrictions on the male spouse of a citizen. For example, in St Lucia there is power to refuse registration of a man's application on grounds of character, language, etc. No such restrictions apply to female applicants. The

distinction between the treatment of such male and female applicants is in section 102 (2) of the Constitution. In the British Virgin Islands there is no right conferred on the male spouse. This treats a woman who marries a citizen differently to a man who marries a citizen, and it affects various other rights such as acquisition of property – (without an Alien's Landholding License) the incidence of higher stamp duties and immigration status, including rights of residence and employment. In all of the Constitutions, however, protection from discrimination is specifically excluded in the case of non-citizens, and in cases relating to public revenues.

Constitutional amendments

One of the obligations under the CEDAW Convention is the amendment of constitutions. So far, none of the Eastern Caribbean States have effected any. From my inquiries, however, it is apparent that in almost all member states, the need for examination of the constitution and addressing law reforms is being discussed with varying degrees of intensity.

Conclusion

The subject of education, health care, access to finance, professional and managerial positions and political office have not attracted special legislation in the light of the human rights of women. However, in general, it is perceived that women have been making steady progress in all of these areas in the Eastern Caribbean.

Equality Jurisprudence under Commonwealth Constitutions/Litigation Relating to the Human Rights of Women: The British Virgin Islands

Justice Ephraim F. Georges,
Eastern Caribbean Supreme Court

Introduction

In 1986, the British Virgin Islands (BVI) adopted the United Nations Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention).[1] This is the most comprehensive international legal instrument to date dealing with the rights of women. There is therefore an obligation on the part of the government to make significant moves towards eliminating any form of sexual discrimination in society. Nevertheless, there can be found in the legal system of the territory scattered pieces of legislation which do in fact discriminate against women.

Geographical and physical setting

The BVI comprises about forty islands, fifteen of which are inhabited. Twelve of the islands are privately owned by expatriates. The total land area is about 59 square miles, half of which is hilly terrain. The population is put at 18,867 persons, distributed mainly on the islands of Tortola, Virgin Gorda, Anegada and Jost Van Dyke with slightly more males than females.

Constitutional framework

As a British Dependent Territory, the Constitution of the BVI is essentially a colonial constitution.[2] The power to make laws for the peace, order and good government of the Virgin Islands is given to the legislature by section 34 and a similar power is separately reserved to Her Majesty by section 71. Unlike the constitutions of independent countries, the Virgin Islands Constitution does not establish or create the judiciary. This is established by ordinary legislation - the

[1] 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981. Expressly extended to the British Virgin Islands upon ratification by the United Kingdom of Great Britain and Northern Ireland on 7 April 1986.

[2] Virgin Islands (Constitution) Order 1976, SI No 2145.

West Indies Associated States Supreme Court Order (Virgin Islands) Ordinance 1967 and the Magistrates Code of Procedure Act.[3]

Human rights

We have no Bill of Rights in the BVI. Fundamental rights provisions such as freedom from discrimination based on sex, freedom of speech, freedom of movement are absent from this written colonial constitution. As far as these rights are concerned, the position is regulated, as it is regulated in the United Kingdom, by ordinary legislation as enacted by the legislature, and also by the English common law.

The precarious position of having fundamental rights that rest on the basis of ordinary legislation which can be changed by the majority vote in the legislature is worrying to the average Caribbean person. That these rights are not entrenched results in a system of insecurity. Hence, there is a growing demand for constitutional reform and the need for a Bill of Rights in the Virgin Islands Constitution.

The Englishman may be content with having his freedom of speech rest on ordinary unentrenched legislation for the simple reason that he has a tradition of respect for fundamental rights. And even in England today, Lord Scarman in delivering the 4th Sovereignty Lecture sponsored by the Charter 88 Trust declared:

> "A constitution without a Bill of Rights enforceable in the Courts is an appalling anomaly which no civilised state should tolerate."

Perhaps the most profound practices of discrimination against women are to be found in the common law. Judges, throughout the ages up to the beginning of the twentieth century, handed down numerous court decisions with respect to various aspects of social, economic and political life which treated women differently from men.

That some interpret the Christian religion as showing a preference for men over women is evident by the present Roman Catholic Church, the head of which, the Pope himself, has refused to have women ordained in the church as priests precisely on the grounds that it is contrary to the teaching of the church.

Since Christian religion has had, from inception, a profound effect on the thought processes and beliefs of mankind, then it may be argued that religion bears some responsibility for the belief that women are inferior to men.

[3] Cap 45 of the Revised Laws of the Virgin Islands.

So, from early times one could find ridiculous aspects of discrimination against women, and the English common law as it developed reflected this unequal position between the sexes. This inequality came out clearly in the areas of contract and tort, voting rights, property law, succession, domicile and other areas.

English law recognises marriage as "the voluntary union for life of one man with one woman to the exclusion of all others." Flowing from this definition came the common law rule that husband and wife are one person, the legal existence of the wife during the marriage being regarded as incorporated and consolidated or merged into that of the husband.[4]

Therefore, the wife was considered as generally incapable of acquiring or enjoying any property, real or personal, independently of her husband and he acquired a freehold interest during their joint lives in all estates of inheritance and the estates of which the wife was seized at the time of the marriage, or of which she became seized during the coverture.

Because of her inability generally to own property, she had at common law no capacity to enter into a contract unless she was living apart from her husband under a decree of judicial separation or unless she was in possession of a protection order issued by a court. If she purportedly entered into a contract, she incurred no personal liability under it. In other words, she was considered as having no legal capacity to make a simple contract while living with her husband. Her position as to liability for torts committed by her was based on her inability to own property. One could not, therefore, proceed against a wife alone as a result, but had to join her husband as defendant and it was only if he died, that she became liable personally.

Thus, as a general rule, the common law considered a woman as not being equal to a man; for whereas the man was responsible for torts committed by his wife, she was excluded from any liability whatsoever for torts. Nor was she allowed to sue anyone for any tort or wrong committed against her.

Furthermore, at common law a woman had no voting rights. Even though she might be in possession of a freehold interest, she was incapable of voting.

At common law, a wife's domicile was submerged into that of her husband. She was bound to take the domicile of her husband. Marriage resulted as an absolute gift to the husband of all personal chattels and money belonging to the wife at the time of the marriage or acquired by her during coverture, including chattels acquired by her while living apart from him and her personal earnings. Moreover,

[4] See generally Blackstone, *Commentaries on the Law of England* (8th ed, 1842) Volume 1, and more specifically Glanville Williams, "The Legal Unity of Husband and Wife" (1947) 10 *Modern Law Review* 16.

the legal custody of the children remained with the husband who had the exclusive right to decide on their upbringing.

Modification of the common law

The common law position which prevailed in the BVI has, however, been rectified by progressive legislation. Voting rights and the right to be elected to the Legislative Council were given to the woman on equal terms with men. The married woman was also given the right to own separate property apart from her husband's as a femme sole, and husband and wife were considered as two separate persons as far as property acquisitions were concerned. Married women were entitled to enter into contracts on their own, sue or be sued in tort and to be treated as separate legal persons.

The Married Women's Property Act 1897 made sweeping modifications to the common law status of women, enabling them to acquire, hold and to dispose of any real or personal property as their separate property. They could enter into and render themselves liable in contract or tort as if they were single women. In respect of property ownership, suing and being sued in contract and tort they were under this Act given equal status with men.

Section 31 of the Constitution and the Elections Ordinance 1977[5] gave equal voting rights to women. Section 28 of the Constitution gave women the same right as the men to be elected as members of the Legislative Council. Today, there are in fact three women, one ex officio, in the thirteen-member Legislature, one of whom, for the first time, holds ministerial office.

The Guardianship of Infants Act[6] gives a mother equal rights with the father in applying for custody, the welfare of the infant being the first and paramount consideration. A woman who is granted custody of the child will generally have the right to determine its upbringing.

Section 4 of the Jury Act[7] now permits female jurors to sit in criminal trials. Section 59 of the Matrimonial Proceedings and Property Act 1995 gives a wife the right to domicile independent of her husband.

Notwithstanding these statutory modifications of common law, which have improved the status of women, there are other significant areas of the law where inequality with respect to women still persists.

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[5] Cap 133 of the Revised Laws of the Virgin Islands.

[6] Cap 233.

[7] Cap 37.

Citzenship rights, belonger status by marriage and discrimination in citizenship rights of male spouses

Section 2(2)(f) of the Virgin Islands Constitution Order states that a person shall be deemed to belong to the Virgin Islands if that person is the wife of a person who is deemed to belong to the Virgin Islands and is not living apart from such a person under a decree of a competent court or a deed of separation. In other words, the wife, under this provision, is deemed to belong to the Virgin Islands if her husband belongs thereto. The wife in effect gets her belonger status because of her husband.

However, the converse situation is not true, for only the wife is deemed to belong to the Virgin Islands under this provision. Nor does it apply to the position of a woman, already deemed to belong to the Virgin Islands, who has such a husband. In such a case, the husband would not be deemed to belong to the Virgin Islands under section 2(2)(f). This section therefore discriminates in that it makes the husband the operating vehicle through which the wife may be given belonger status for the purposes of the Constitution.

Significantly, a similar discrimination existed under the British Nationality Act 1948 and this limitation was adopted by the draftsmen of section 2(2)(f) of the BVI Constitution. The British have since recognised the repugnant character of this sexual discrimination and have removed it by repealing the relevant provisions of the 1948 Act and enacting the British Nationality Act 1981. But in the BVI the discrimination persists. Ironically, it is this self-same British Nationality Act 1981 which regulates citizenship of the British Virgin Islands and, indeed, all British Dependent Territories.

Section 2(2)(h) of the Constitution similarly makes a widower the operating vehicle for the conferment of belonger status but not the widow.

These provisions clearly discriminate against women by making the husband the operating vehicle through which belonger status can be conferred on the wife but failing to make the wife the operating vehicle to confer similar rights on her husband.

Immigration matters

The Immigration and Passports Act 1977 stipulates the persons who are entitled to land and embark in the Territory. Under section 18 of the Act a person may apply for a certificate of residence and the Governor in Council may grant such a certificate. A person who possesses such a certificate is entitled to land in the BVI.

Section 18 (2) of the Act states that a person who has a certificate of residence may apply to the Governor for him to endorse the certificate so that "that wife and any dependent child" under the age of 18 years may take up residence in the territory.

Thus a wife's authority to get a certificate of residence, under section 18(2) of the Act, is dependent on her husband.

That section gives the husband the power to allow his wife and child to reside with him in the territory by applying to the Governor for this purpose, but the wife is not given a similar power for her husband and child. In other words, if a wife obtained her certificate of residence under section 18(1), she cannot have the certificate endorsed so that her husband could reside in the Territory. Section 18(2) of the Act is unreasonably discriminatory against women.

It is interesting to note in passing that the Turks and Caicos Islands Constitution Order[8] does contain a Bill of Rights and provides a measure of protection for discrimination on grounds of race etc., affords no protection whatever against discrimination on grounds of sex. Section 78 (1) stipulates that:

> "... no law shall make any provision which is discriminatory either of itself or in its effect."

Whilst section 78(3) provides that:

> "In this section, 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

The word "sex" is conspicuously absent as a discriminatory ground. This in fact was also the situation in Zimbabwe at independence in 1981 but was rectified by a subsequent amendment last year, as Chief Justice Allan Gubbay informed this gathering.[9]

For legal purposes, historically, women have generally had many institutionalised incapacities. The common law basis of much of the law has created many anomalies in Caribbean society as a whole and no less so in the BVI. Following the adoption of the CEDAW Convention, the BVI has effected a number of legislative reforms designed to promote women's rights and eliminate discrimination against them. Over the last two decades especially, the British Virgin Islands, in its own way, has made enormous strides in terms of the legal infrastructure to improve the

[8] SI1988 No 247.

[9] See Gubbay, "International and regional standards in women's human rights: their importance and impact on the domestic scene, the position in Zimbabwe", in this volume.

lives of women, children and the family as a whole. The past ten years has witnessed a plethora of social legislation in particular, designed to promote and enhance the political, social and economic well-being of women in the Territory.

It is noteworthy that the Heads of Government of the Caribbean Community (currently all men) signed the Charter of Civil Society at their meeting on 20 February 1997 in Antigua. While this is not an instrument binding on the individual governments, it constitutes a statement of the ideals to which governments in the region have committed themselves to adhere.

Article XII of the Charter, which is captioned "women's rights", provides:

> "For the promotion of policies and measures aimed at strengthening gender equality, all women have equal rights with men in the political, civil, economic, social and cultural spheres. Such rights shall include the right:
> (a) to be elected or appointed to public office and to be eligible for appointment to positions of decision-making bodies at all levels of their society;
> (b) to be afforded equal opportunities for employment and to receive equal remuneration with men for work of equal value;
> (c) not to be discriminated against by reason of marital status, pregnancy, lactation or health-related matters which affect older women;
> (d) to legal protection including just and effective remedies against domestic violence, sexual abuse and sexual harassment."

This is important to women of the Virgin Islands who have no Bill of Rights and live with a Constitution which has provisions which discriminate against them enshrined in it. It is a most noble aspiration which should give fresh impetus to continue the necessary legislative reforms and implement appropriate social policies to ensure that the law and practice of the territory vis-à-vis women are equitable and accord with international human rights norms.

The Women's Desk set up a few years ago in the Chief Minister's Office has been a driving force in arousing public interest in and stimulating public discussions of women's issues and so helping to formulate public policy with regard to some of these changes.

The legislative measures to which I earlier alluded include the Labour Code 1975, section A2 of which sets out the national policy underlying it and provides that:

> "It is hereby declared that the following expressions of national policy underlie and shall be used in the interpretation of the various provisions of the Code. There should be no different

> standards or levels of pay for equal service regardless of age, nationality, sex, race, creed, colour or political beliefs."

The year 1996 saw the enactment of The Domestic Violence (Summary Proceedings) Act which provides summary remedies and sanctions in cases of domestic violence. Domestic violence is rife and on the increase in the Virgin Islands with women and children more often than not being the unfortunate victims. The Act is intended to protect all members of a household and to resolve a dispute and bring the issue to court as quickly as possible. It has had a large measure of success since its enactment on 1 March 1996. One of its most important features is that it provides for a "cooling time" where an interim protective order is placed on the batterer, moving him, or her, from the house for seven days. This is set up as a pre-emptive strike, to use a military term, in order to create peace. There is provision for protection orders, occupation orders and tenancy orders.

Domestic violence is widely defined to mean "any act of violence, whether physical or verbal abuse perpetrated by a member of a household upon a member of the same household which causes or is likely to cause physical or mental harm to the abused party or any other member of the household." The police are provided with the power to lay charges where there is a breach of the court's order or where a domestic violence offence is committed. The legislation is written in language which is gender-neutral and which prohibits news reports of cases in court. An order for counselling in respect of one or both parties can be made.

The importance of this kind of legislation comes to the fore when statistics show that of 911 murders in Jamaica, three-quarters were as a result of domestic violence.

The Matrimonial Proceedings and Property Act 1995 has modernised our divorce laws and makes provision for reconciliation and counselling as well as for a more equitable division of property on dissolution. Provision is also made for the protection and custody of children and financial provision for support of a spouse as well as the children of the family.

Either party can be ordered to maintain the other and the children and both parents are entitled to custody of the children. A married woman can now decide where she wishes to be domiciled, in place of the former rule which forced her to adopt and retain her husband's domicile.

A new Criminal Code was enacted in April 1997 with enhanced penalties for rape and other sexual offences. A significant part of this new Act deals with rape. At common law, a husband could not rape his wife. This was grounded, as some of you may know, on the pronouncement of Sir Matthew Hale (c 1676) that:

> "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent

> and contract his wife hath given up herself in this kind unto her husband which she cannot retract."

All of this has now changed.

A draft bill for an Act entitled the Status of Children Act 1996 is to be tabled before the legislature. It will provide for the equal status of all children in the eyes of the law, thus removing from the statute books the age-old nomenclature of "legitimate" and "illegitimate" in describing the status of children. In a small parochial Christian society such as the BVI, it is not surprising that this proposed measure has stirred up widespread debate and has encountered strong opposition from certain quarters.

The bill is made applicable to all children, whether born before or after its commencement (once enacted), and to all dispositions and instruments made after it is enacted. In that context, all children, male or female, shall be of equal status and enjoy identical rights, privileges and obligations. Provision is also made for circumstances in which paternity may be presumed and established.

Other legislation, such as the Social Security Act 1975, provides significant protection and benefits for the health and well-being of women in the work force (for example, maternity leave with pay), which they did not hitherto enjoy.

That said, there are still a number of critical areas which need to be addressed. Among these are the problems of teenage pregnancies; continuing education for teenage mothers; support for children and mothers; the level and effective enforcement of maintenance orders; and procedures which impact adversely on the economic position of BVI women generally and on single mothers in particular. There is, for example, no provision for attachment of earnings orders in our laws.

There is also the growing need for "protection" in the widest sense for women in common law unions. Unlike some Caribbean and Commonwealth countries, our matrimonial law, modelled as it is on its English counterpart, does not recognise stable *de facto* relationships for purposes of maintenance and property rights arrangements. It is felt in some circles that legislation of this kind elevates the practice of concubinage to the level of marriage and undermines the sanctity and values which the latter enshrines.

Recent laws, however, have shown a willingness to search for and implement appropriate legislative models, and reforms represent a departure from the usual conservative approach. Changes generally have moved towards putting to rest the common law ghosts which have haunted several areas of our laws.

Conclusion

Since discrimination against women is prevalent and its existence is often not appreciated or ignored, it is of considerable importance that international statements of the fundamental rights of women should be made known and ought to be widely publicised.

This is of crucial importance to the women of the British Virgin Islands and other territories which have no Bill of Rights for this awakens concern to the fact of discrimination in society and encourages the initiation of reform because discrimination against women is expressed to be unacceptable internationally. It further sets a standard which can be aspired to and adopted by those concerned in the process of reform.

As British dependent territories, the formal adoption and ratification of all international conventions of course rests with Her Majesty's Government in the United Kingdom. There is, however, an impressive body of jurisprudence, both international and regional, concerning women's human rights.

This jurisprudence is of practical relevance and value to judges and lawyers generally. Of course, where the language of the law is clear, then the judge must give effect to it but there are many cases where the domestic law (whether constitutional, statute or common law) is ambiguous, uncertain, incomplete or capable of bearing an interpretation consistent with international norms of women's human rights, and in such cases the courts should have recourse to these international norms and mould and develop the law consistent with these norms.

Equality Jurisprudence under Commonwealth Caribbean Constitutions/Litigation Relating to the Human Rights of Women in Guyana

Justice Claudette Singh,
High Court of Guyana

Introduction

There was a time – though not long ago – when any discussion of the status of women was an occasion for facetious and snide comments by over-confident males. These days, men have learnt to be wiser and more careful. It is not that we women have changed but that we are asserting our rights. New perspectives have grown out of the changes wrought by modern life in the social and working environment. New openings have been created to provide women with opportunities to release their natural energies, to demonstrate their true capabilities and, in due course, to equal and sometimes surpass men in many an area previously closed to them by male prejudice and presumption.

The basic factors working for change are no doubt social change, educational, economic, psychological and political. As in so many other cases, the influence thereby exerted needs, however, to be supported and concretised by the interposition of the legal process and it may be that there are indeed times when it is the legal process which needs to take the leading role.

Before we examine these changes we need to look at the historical background in Guyana.

- Before 1904, a woman's property was effectively under the control of her husband. In that year, the law was changed to give her separate rights.
- Women obtained the franchise in 1928.[1]
- Women obtained the right to sit in the legislature in 1945.[2]
- Prior to 1952, women were treated as being under the tutelage of men. But the man's superior status carried a price; he was subject to civil liability for certain

[1] British Guyana (Constitution) Order in Council 1928, s 28.

[2] British Guyana (Constitution) (Amendment) Order in Council 1945.

> acts of his wife. So, in this case, the boot was on the other foot. Yet, whichever foot the boot was on, it rested on the invidious assumption of the wife's inferiority. The law on this point was however changed in 1952.[3]

- Women became eligible to sit on juries in 1961.

It would not be true therefore to assume that the law has been completely static in respect of the status of women. However, it would be equally fair to recognise that the pace at which changes were made was very slow. This has changed in the recent past.

Recent changes

Equality and citizenship

The fundamental principle of equality of women with men has now been put on the highest legal plane. It is set out in article 29(1) of the Constitution, which reads as follows:

> "Women and men have equal rights and the same legal status in all spheres of political, economic and social life. All forms of discrimination against women on the basis of their sex are illegal."[4]

In keeping with that general principle, Chapter IV of the Constitution removed certain discriminatory features affecting the citizenship of women under the previous Constitution.[5]

Before the enactment of the 1980 Constitution only the wives of Guyanese males could have applied to become citizens. Now husbands of Guyanese females can apply to become citizens. Article 45 provides:

> "Any person who, after the commencement of the Constitution, marries a person who is or becomes a citizen of Guyana shall be entitled *upon making application in such manner and taking such oath of allegiance as may be prescribed, to be registered as a citizen of Guyana."* (emphasis added)

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[3] Married Persons (Property) Act (Cap 45:04), s 13.

[4] The Constitution of the Co-operative Republic of Guyana 1980.

[5] *Ibid.*

A child could once have only acquired citizenship through his father. Now a child may acquire citizenship through his mother.[6]

Employment

Employment has been a field rich in discrimination against women. Much of it was sought to be rationalised on the ground of biological and other physical differences between sexes. On the basis of such considerations, legislation was often justified as being really intended to benefit women and not to discriminate against them. There may indeed be some pieces of legislation that can be so justified, but a lot of it is in essence discrimination disguising itself as protective legislation.

In Guyana, the Factories (Health and Welfare) Regulations[7] were amended in 1983 to remove certain restrictions on hours of work and overtime in relation to women. (Women were not allowed to work for more than 8 hours per day or 42 hours per week, or on Sundays). We have, however, retained the competence to legislate for the protection of women where this is truly warranted on physical or biological grounds, but we have not yet found it necessary to exercise this power.

Status of children

Associated with the status of women is the question of children born out of wedlock, who were designated illegitimate. However, by the Children Born out of Wedlock (Removal of Discrimination) Act 1983, the then existing discrimination between the mother and father of a child born out of wedlock with regard to inheritance and guardianship was removed.[8]

The legislation removed from the statute the book term "bastard" and substituted for it the seemingly less unhappy phrase "children born out of wedlock".[9] Such a child now has the same rights as a person born in wedlock and on the intestacy of his or her father is entitled to succeed on an equal basis with his legitimate brother and sister. Correspondingly, the father is also entitled in some circumstances to succeed to the estate of his intestate child born out of wedlock, but is only allowed to do so where he was adjudged to be the father or had acknowledged the child to be his own and had contributed towards the child's maintenance.

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[6] *Id,* article 44.

[7] Chapter 95:02 (Reg 9/83).

[8] Children Born Out of Wedlock (Removal of Discrimination) Act 1983, section 30. See also article 30 of the Constitution of Guyana.

[9] Evidence Act (Cap 5:03), s 61 – as amended by the Children Born out of Wedlock (Removal of Discrimination) Act No 12/83.

Income tax

In 1980, the law was amended so as to enable a taxpayer to claim an allowance for a reputed wife or reputed husband.[10] At one time, the husband was liable to pay out of his income the full income tax due on the joint income of himself and wife if they were both employed. There was no legislation as to separate assessments. The wife's portion of the tax would be collected from her only where it was not practicable to collect it from her husband. Deduction is allowed for reputed wife as well as a reputed husband.

Pensions

In the case of pensions, a reputed wife and children born out of wedlock were placed in the same position as lawful wives and legitimate children in the legislation dealing with Guyana Defence Force personnel.[11]

Dependants

It is also important to mention an interesting piece of male-oriented legislation, the Dependants' Pension Fund Act. This Act was intended to benefit widows only. So here the widower of a deceased female officer got nothing. True, it was men who were discriminated against, but the discrimination was founded on an underlying assumption of female inferiority.

This discrimination was removed in 1978 when widowers were also made eligible for payment of pensions.[12] Correspondingly, prior to 1978, only men were eligible to contribute to the Fund. Women were, in that year, also made eligible as contributors.

Equal rights

In 1990, the Equal Rights Act was passed bringing equality for women with men and greater benefits for women.

This Act gave effect to article 29 of the Constitution, which provides for equal rights and opportunity for both men and women. Men and women are to be paid equal remuneration for the same work or work of the same nature. Further, in the area of employment, men cannot be afforded more favourable opportunities or conditions than women.

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[10] Act 18/80, s 21A.

[11] Defence (Pensions and Gratuities) Regulations (Cap 15:01), regulation 8(3).

[12] Dependant's Pension Act 1978 (Cap 27:08), s 2.

The Act also amends a number of Acts presently on the statute books, which either perpetuate inequality or make provision for the members of one sex to enjoy benefits, ensuring to the other. Some examples are provided in the following sections.

Bail

An accused who is a married woman could previously only provide recognisance of her bail through a surety. The amendment, which removes this discrimination against women, allows her to provide recognisance without the need for a surety.[13]

Adoption

The Citizenship Act was amended to remove discrimination against women in a joint adoption of a minor if either parent is a citizen.[14] Before this amendment a child, in these circumstances, would only have become a citizen if the male adopter was a citizen. Under section 2(1)(a) of the Immigration Act[15] either spouse can be a dependent of the other. Had this been the law at the time of *Nielsen v Barker*,[16] case the decision *might* have been different.

Legitimation

In addition, the Legitimacy Act,[17] provides for legitimisation of a child by subsequent marriage of its parents if the child's father was domiciled in Guyana. The amendment removed discrimination against women by providing for legitimisation where either parent was at the date of the marriage domiciled in Guyana.

Married Persons (Property) (Amendment) Act 1990 (amending the Married Persons (Property) Act)[18]

The Married Persons (Property) (Amendment) Act 1990 inserted a number of provisions that are beneficial to married persons and is also applicable to a single woman and a single man living together in a common law union.

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[13] Criminal Law Procedure Act (Cap 10:01), s 89(3).

[14] Citizenship Act (Cap 14:01), s 2(3).

[15] Cap 14:02.

[16] (1982) 32 WIR 204.

[17] Legitimacy Act (Cap 46:02), s 10 as amended by the Equal Rights Act No 19/90.

[18] Cap 45:04.

This Act makes provision for money saved, in the absence of an agreement to the contrary, from housekeeping allowance, or property acquired out of such money, to be treated as belonging to both parties in equal shares.[19]

Section 4 of this Act, amending section 15 of the Married Persons (Property) Act is noteworthy because of its unprecedented provisions:

(i) Where parties have been living together for less than five years, the judge is required to quantify the contribution made by a spouse.

(ii) In the case of parties living together for five or more years and the:

  (a) a claimant party was not working, then she is entitled to one-third, or

  (b) if the claimant party was working, she is entitled to one half.

Family and Dependants Provision Act 1990

The Family and Dependants Provision Act 1990 aimed to prevent family dependants of deceased persons being left with inadequate provision, when the person on whom they were dependent died possessed of sufficient estate to provide for, or contribute towards their maintenance.

Provision is made for the court to take into account earning capacities, financial obligations and responsibilities. In the case of a surviving spouse, the court is to have regard to the duration of the marriage and the contribution made by the applicant to the welfare of the family.[20]

In the case of a child, any educational commitments and prospects will be considered. In the case of a dependant outside the immediate family, the basis upon which the deceased assumed responsibility for that person's maintenance will also be taken into account.[21]

The court is also empowered to review certain transactions effected by the deceased (otherwise than for full valuable consideration) with the intention of defeating claims for financial provision and to make the property comprised in those transactions available for provision. Property disposed of or settled by the deceased less than five years prior to his death as well as contracts made by the deceased in his lifetime to leave property by his will can be enquired into.[22]

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[19] Married Persons (Property) (Amendment) Act 1990, s 60.

[20] Family and Dependents Provision Act 1990, s 5.

[21] *Ibid.*

[22] *Id*, s 12–15.

Rape cases and protection of the victim: Criminal Law (Amendment) Act 1991[23]

In 1991, the Criminal Law (Offences) Act[24] was amended by the Criminal Law (Amendment) Act to provide for trials in rape cases involving women and girls to be held *in camera* and for restricted reporting of anything which would tend to disclose the identity of the complainant. [25] Prior to this legislation, there were cases where victims were rather reluctant to prosecute these offences because of their fear of publicity.

Since this legislation was enacted, one victim, who had since emigrated to the United States following the incident, returned for the trial. She opted to have the trial conducted in open court as part of her therapy. Her aim was to assist another young girl in her neighbourhood, whom it was alleged her assailant had also de-flowered. It worked and the girl came forward. The accused, who was then a 73-year old man, lost his appeal and his conviction and sentence were affirmed. At the subsequent trial, in relation to the other complainant he pleaded guilty and was sentenced.

Domestic Violence Act 1996

The Domestic Violence Act became law on 31 December 1996. This Act conferred for the first time a wide variety of powers to help protect battered women and children from those who were making their lives miserable by various degrees of physical assault. Regrettably there are no reported cases.

Conclusion

While there is room for improvement, the main point is that we have broken down the myth and taboos which inhibited action in the past and have, in fact, embarked on a programme of action to achieve equality

But although we in Guyana have happily moved far from these cruel concepts, there is yet some way to go before we succeed in achieving the ideal of total equality.

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[23] Cap 19/1991.

[24] Cap 10:01.

[25] Section 77A, inserted by Act 19/91.

The Elimination of Discrimination Against Women and Girl Children in Antigua and Barbuda

Justice Kenneth Benjamin,
High Court of Antigua and Barbuda

Introduction

In 1989, by acceding to the United Nations Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention),[1] the State of Antigua and Barbuda indicated its political willingness to conform to the principles of the Convention and, by extension, to bring its domestic laws into conformity with it.

At the coming into operation of the Antigua and Barbuda Constitution Order 1981,[2] there came the termination of the status of Antigua as an Associated State and the creation of the unitary state of Antigua and Barbuda. Simultaneously, the Constitution of Antigua and Barbuda came into effect. The Constitution, like those of all Commonwealth Caribbean (CARICOM) independent states, provides protection to every person in Antigua and Barbuda in respect of his or her fundamental rights and freedoms. More specifically, section 14(1) of the Constitution expressly provides, with certain qualifications, that no law shall make any provision that is discriminatory either of itself, or in its effect.[3] The word "discriminatory" is defined by sub-section (3) to include the affording of different treatment to different persons wholly or partially on the basis of sex.[4]

In this general way the supreme law of Antigua and Barbuda contemplates non-discrimination on the ground of sex and plays a supervisory role in ensuring non-discriminatory legislation against women and female children. This is the extent of the treatment of the subject in the Constitution.

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[1] 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981. Antigua and Barbuda acceded to the Convention on 1 August 1989.

[2] Antigua and Barbuda Constitution Order, SI 1981 No 1106.

[3] Section 14(1) of the Constitution of Antigua and Barbuda states:
"Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect."

[4] Section 14(3) of the Constitution states:
"In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions or affiliations, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description."

This meant that in the period immediately following independence, there remained in force the pre-existing legislation which did little to address issues of discrimination on the basis of sex, far less discriminatory treatment of women and girl-children in Antigua and Barbuda.

It therefore provides some satisfaction to have observed a recent legislative movement towards the enactment of legislation specifically aimed at the elimination of discrimination against women.

Sexual offences

The Sexual Offences Act 1995 was passed and took effect subsequently on 2 November 1995, replacing the common law offence of rape with an extended statutory definition of rape, and introducing a myriad of other sexual and kindred offences which were in demand of urgent attention. The 1995 Act made its appearance as a Bill as early as 1993 and is patterned upon the CARICOM model legislation relating to sexual offences.[5]

Given the recent coming into force of this Act, as of April 1997, the High Court had had the opportunity to deal with less than twelve cases, thus providing only limited experience in the application of the provisions and their effectiveness.

Nevertheless, it is pertinent to direct attention to three major changes to the law brought about by the 1995 Act. The first relates to the offence of incest. Unbelievable as it may sound, for the first time in the legal history of Antigua and Barbuda the offence of incest was created.[6] For several years, it was a source of much concern to judicial officers, lawyers and social workers alike (and indeed to concerned citizens) that the pre-1995 law made no provision prohibiting sexual intercourse between persons linked by a blood relationship. Prior to 1995, unless the offending conduct fell within the common law offence of rape or within the general law dealing with statutory defilement of minors, incest went unpunished and perpetrators were free to pursue such conduct with impunity. Though this omission has now been rectified as of April 1997, we as judges, have yet to see a case brought alleging this offence.

Attention should also be drawn to the categories of punishment prescribed for incest.[7] These are:

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[5] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual offences*.

[6] Sexual Offences Act 1995, section 8

[7] *Ibid*, section 8(3)(a), (b) and (c).

(a) if the offence is committed by an adult with a person under 14 years of age – life imprisonment;

(b) if committed by an adult with a person 14 years or over – 15 years' imprisonment; and

(c) if committed between minors between 14 and 18 years of age – 2 years' imprisonment.

It is possible to conceptualise the rationale for the reduced penalty for the offence when committed between minors. However, I am yet to formulate any acceptable rationale, for drawing a distinction between a victim who is under or over the age of 14 years where an adult accused is involved. I am unable to accept that as the age of the victim increases the crime becomes less objectionable.

The second significant change effected by the Sexual Offences Act relates to the prohibition of sexual intercourse with minor employees.[8] This represents an opening gambit towards the disapproval of the exploitation of employees under the age of 18 years by employers.

The third change is the alteration of the procedural climate intended to reduce the traumatic impact previously visited upon victims of sexual offences who are undeniably predominantly female. I here specifically refer to the conduct of the proceedings *in camera*.[9] My own observations are that, with the absence of spectators from the public gallery, female complainants have been noticeably less hesitant and in general far more forthcoming than previously. However, caution must be exercised so that the public perception of open justice is not jeopardised. Judges ought to allow the presence and attendance of a close or other relative or companion of the accused person to forestall negative public impressions of one-sided justice. This is contemplated by the discretion conferred upon the court by the Act.

It is worthy of mention that the restriction placed upon evidence concerning the sexual activity of the victim with any person other than the accused person and upon evidence of sexual reputation has not operated in derogation from the ability of the accused to fully present his defence to the jury.[10]

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[8] *Id*, section 16.

[9] *Id*, section 26.

[10] *Id*, section 27 states:

> "(1) In proceedings in respect of an offence under this Act no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless the Court, on an application made by or on behalf of the accused in the absence of the jury, thinks such evidence necessary for the fair trial of the accused.
>
> (2) Save as provided in subsection (1), no evidence of sexual reputation is admissible for the purpose of challenging or supporting the credibility of the complainant."

As to the abolition of the common law doctrine of recent complaint,[11] jurors have now been relieved of a direction that is more amenable to a legal mind than to the realistic approach required in deliberations upon human behaviour. Further, the de-emphasising of the timing of the victim's first complaint which, more often than not, can be attributed to psychological factors associated with trauma makes for a more satisfactory approach to the ascertainment of credibility.

It may be that any purported assessment of the efficacy of the Sexual Offences Act 1995 is premature, but it is desirable that its impact be constantly monitored in order that its provisions do not operate in derogation from the CEDAW Convention.

Domestic violence

Progress in this area has been slow. In early 1997, draft legislation entitled the Family Protection against Domestic Violence Bill, was circulated. This draft faithfully follows the identically-named CARICOM model legislation regarding the provision of protection in cases involving domestic violence.[12]

Prior to the end of the last parliamentary session in February 1997 it was publicly stated that this draft was up for consideration. However, it failed to pass into legislation. Its non-passage is attributable, I am advised, not to an absence of parliamentary will but to inadequate legislative time to secure its passage. This is prima facie borne out by the specific reference to the proposed introduction of legislation on domestic violence at the commencement of the 1996–1997 Parliamentary session by the Governor-General's speech outlining the Government's imminent policies and objectives.

The consequent delay has had the effect of affording legal practitioners and social workers the further opportunity for consideration and possibly to make timely suggestions to tailor the legislation to the social and legal climate of Antigua and Barbuda.

The Antigua and Barbuda draft differs from the CARICOM model in so far as the former clothes the High Court with the jurisdiction of a court of summary jurisdiction. Pragmatically, when one considers the work-load of the Court, this is useful. The High Court has a large work-load and only two resident judges.

There has been no move to date towards the enactment of the CARICOM model legislation with regard to sexual harassment nor on any of the other matters that have

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[11] *Id*, section 28. For a general discussion see C. Tapper, *Cross and Tapper On Evidence* (London: Butterworths, 8 ed 1995).

[12] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to domestic violence.*

been the subject of CARICOM model legislation.[13] It would be otiose to speculate on the future intent of Parliament.

[13] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual harassment.*

The Rights of the Girl-Child

Protecting and Promoting the Rights of the Girl-Child in Commonwealth Jurisdictions with emphasis on Commercial Sexual Exploitation

*Florence Butegwa**

Introduction

Children are an integral part of humanity. Consequently, international, regional and national standards for the protection of human rights apply to children as equally as they apply to adults. Thus, the Convention on the Rights of the Child (the CRC)[1] guarantees rights such as the right to life, the freedom of expression, freedom of thought, conscience and religion and the freedom of association and of peaceful assembly. The CRC also guarantees the fundamental right to privacy and family and the right of the child to the enjoyment of the highest attainable standard of health, including a right to facilities for the treatment of illness.[2]

Children also have special needs and rights because of their age and resultant vulnerability. The Universal Declaration of Human Rights[3] proclaims that children are entitled to special care and assistance. This is necessary for the full and harmonious development of the child's personality and to prepare him or her to live an individual life in society. The ideal was aptly stated by the international community of states in the following terms:

> "The Children of the world are innocent, vulnerable and dependent. They are also curious, active and full of hope. Their time should be one of joy and peace, of playing, learning and growing. Their future should be shaped in harmony and co-operation. Their lives should mature, as they broaden their perspectives and gain new experiences."[4]

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*Management Consultant, Associates for Change, Kampala, Uganda

[1] GA Res 44/25, UN Doc A/44/49 (1989) at 166, reprinted in 28 ILM 1448 (1989).

[2] See Articles 6, 12,13,14,15,16 and 24 respectively.

[3] GA Res 217A (III), adopted on 10 December 1948.

[4] World Declaration on the Survival, Protection and Development of Children agreed to and adopted at the World Summit for Children, New York September 1990. For text of the Declaration see http://www.unicef.org/wsc/index.htm. See also Plan of Action for the Implementing of the World Declaration on the Survival, Protection and Development of Children at http://www.unicef.org/wsc/plan.html.

The CRC sets universal legal standards for the protection of children against neglect, abuse and exploitation as well as guaranteeing to them their basic human rights. This Convention has been ratified by almost all countries of the world.[5] Ratification imports state responsibility to ensure for each child, without discrimination, the enjoyment of the rights stated in the Convention.

Despite these guarantees, children suffer all manner of abuse including neglect, cruelty and exploitation. They are denied the rights to childhood, dignity, and integrity, and many live under circumstances in which the fundamental right to life is under constant threat. While the rights of many children, as a group, are either violated or under serious threat, the girl-child's vulnerability is reinforced by her childhood and by her gender. She is discriminated against by her own family, community and by state policy and practices. She suffers different forms of abuse, including sexual abuse, simply because she is a girl.

This paper outlines state responsibility for the protection of the girl-child in Commonwealth jurisdictions, particularly with respect to commercial sexual exploitation. It also explores the role of the judiciary and attempts to make suggestions for greater protection and promotion of the rights of girls.

What is commercial sexual exploitation of girls?

Commercial sexual exploitation of the girl-child is a complex phenomenon that is increasingly prevalent within and between different countries. It involves the sexual exploitation of a girl in return for money or other valuable considerations to the girl, her parents or other third parties. Commercial sexual exploitation includes child prostitution, sex tourism, trafficking in girls for purposes of prostitution or forced marriages. It also includes child pornography.

Child prostitution is the act of engaging or offering the services of a child to perform sexual acts for money or other consideration.[6] In sex tourism, the opportunity to engage in sex with children is offered to potential tourists as part of the tour package. It becomes part of the attractions which a country has to offer. Trafficking is the procurement and transportation of girls for purposes of prostitution, pornography or forced marriages. The procurement may or may not involve kidnapping, deceit of the

[5] As of July 1998, the Convention on the Rights of the Child has been ratified by all States with the exception of the USA, which is signatory to the Convention, and Somalia, which has neither signed nor ratified. For up to date information on the status of signatories, ratification and accession to the Convention see http://www.un.org/Depts/Treaty/ and http://www.unicef.org/crc/status.htm.

[6] Provisional report prepared by Ofelia Calcetas-Santos, Special Rapporteur of the Commission on Human Rights on the sale of children, child prostitution and child pornography, UN Doc A/50/456 (1995) [hereinafter *Calcetas-Santos report*].

girl or her parents, sale of the girls by their parents or guardian. The trafficking may be from one part of the country to another or across national borders.[7] In the *Calcetas-Santos report* the definition of child pornography was found to include "the visual depiction of a child engaged in explicit sexual conduct, real or simulated, or the lewd exhibition of the genitals intended for the sexual gratification of the user, and involves the production, distribution and or use of such materials."[8]

Although there have not been systematic studies, there is increasing evidence that girls of all ages in many countries, both Commonwealth and non-Commonwealth, are subjected to these different forms of sexual exploitation.[9] Many girls are at risk and the indications are that commercial sexual exploitation of girls is increasing at an alarming rate. The World Congress Against Commercial Sexual Exploitation of Children,[10] held in Stockholm in 1996, acknowledges this trend and calls for urgent action at national, regional and international level to combat the practice.

Causes of commercial sexual exploitation

Just as the circumstances in which girls are victimised are many, so are the underlying causes of commercial sexual exploitation of the girls. Causal factors are many, complex and interrelated. They range from poverty, the promotion and idolisation of market forces and consumerism to armed conflicts and other disasters with the consequent displacement of people.

Poverty with its many manifestations has played a role in the sexual exploitation of the girl-child. Parents in Asia, Africa, Latin America and parts of Eastern Europe unable to send their children to school and at times to feed them are more willing to entrust their daughters to those who promise them lucrative jobs. The prospects of the girls contributing to the family income or even ensuring material security for the parents through their earnings is an incentive many parents cannot ignore. There are reported cases of parents actually selling their daughters or placing them into bondage until the repayment of loans. These girls are often trafficked or forced into

[7] Background document to the World Congress Against Commercial Sexual Exploitation of Children at 4. World Congress Against Commercial Sexual Exploitation of Children (Stockholm, August 1996). For the Report of the Congress, the Declaration and the background papers prepared for it, see http://www.childhub.ch/webpub/csechome.

[8] *Calcetas-Santos report*, supra note 5, at para 25.

[9] See F Butegwa, "The Commercial Sexual Exploitation of the Girl-child: The African Perspective", Commonwealth Secretariat WAMM (96) (WHR) 3. See also Savitri Goonesekere, "The Commercial Sexual Exploitation of the Girl-child: The Asian Perspective", Commonwealth Secretariat WAMM (96) (WH) at 4.

[10] *Supra* note 7.

prostitution by those to whom they are entrusted or other agencies and brothels. As Professor Savitri Goonesekere has put it:

> "The economic context ... creates a predatory family and community environment in which some of the worst exploiters are parents, family members, relatives or friends. [Cultural values] become distorted, encouraging exploitation of children rather than providing them with family and community support and care."[11]

The emergence of a market economy, liberalisation of trade and immigration regulation has played a role in the commercial sexual exploitation of girls. Tourists and so-called investors continue to move into developing economies. They bring much needed foreign currency but also create a market for commercial sex with young girls. Local tour agents procure girls as young as eight to meet the demand. In some countries, the tourists take advantage of the local customs of early marriage. To them it is just indulging in the exotic. To the girls it is exploitation and a violation of their fundamental rights.

Armed conflict has been and continues to be a characteristic feature of many developing countries. There are almost 20 countries in Africa alone currently experiencing internal armed conflict of varying intensity. Families have been displaced within the same countries or have crossed borders as refugees. The dislocation severs familial ties, social order and makes families incapable of supporting themselves. Young girls are separated from older family members or the latter are not able to exercise the kind of control and guidance over the girls that was possible under normal circumstances. Inability to meet basic requirements from meagre hand-outs or other resources, combined with the concentration of many people in a small area of the camp, combine to make many girls extremely vulnerable to commercial sexual exploitation.

The problem has been significantly aggravated by the HIV/AIDS pandemic. Statistics on HIV/AIDS indicate a high rate of infection among adults particularly in Africa. Men are resorting to young girls who are perceived as HIV-free. There is evidence that the age of the girls sought is becoming lower. Brothel operators, tour agents and operators of escort agencies are again cashing in on the demand by providing the young girls.

Underlying all these factors is the culture of according a low value and status to women and female children. Girls are seen as growing up for the purpose of sexually gratifying a man. That is ultimately seen as her destiny. She is of little other value to many families, rather she is often viewed as a drain on scarce family resources. Poverty and the other factors only serve as catalysts to parents, traffickers and pimps to force girls into sexually exploitative and abusive situations.

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[11] Goonesekere, *supra* note 8, at 6.

Consequences of commercial sexual exploitation

Commercial sexual exploitation is a graphic demonstration of the violation of the fundamental human rights of the girl-child. It demonstrates the failure of states to follow through with the ideals stated in the Universal Declaration of Human Rights and the commitments made at the World Summit on Children. The negative impact on the children are profound and often permanent.

Due to repeated sexual intercourse with many different adult men, girl victims of forced prostitution often suffer rectal fissures, lesions, poor sphincter control and lacerated vaginas. Many have objects like bottles thrust into their vaginas or anus. They are beaten by clients and/or those under whose control they work. Commercially-exploited girls are exposed daily to the risk of infection with various sexually transmitted diseases, including HIV. Because their vaginas are still young, the risk of HIV infection is much higher than in adult women due to the lacerations which occur during intercourse.

Girls forced into prostitution or pornography are subjected to immense psychological trauma and abuse. They are socially ostracised even where parents and family played a part in their situation. Those trafficked or prostituted are traumatised by the slave-like conditions in which they work, and being away from home and family. Where parents and family sell or pressure the girl into sexually exploitative situations, she is tormented by a sense of betrayal and hopelessness. They also run the risk of pregnancy and all the physical and psychological trauma associated with pregnancy in their circumstances. Such girls tend to risk unsafe abortion and consequent death. In many affected countries abortion is illegal.

In addition to the physical and psychological consequences, sexually-exploited girls are often deprived of their earnings. These go to their employers, pimps, parents or towards the repayment of debts by family members or traffickers. Girls forced into prostitution in a foreign country are often deprived of their travel documents and risk prosecution and imprisonment as illegal aliens. These circumstances place the girls at the mercy of their exploiters. They cannot move or travel freely or give up prostitution or contact government family and service organisations for assistance. They are deprived of the opportunity of education and the right to childhood.

Applicable human rights standards

Commercial sexual exploitation of the girl is a human rights issue. There are many international human rights instruments guaranteeing the girl-child the rights which are so widely violated. Below is an outline of some of the standards.

Convention on the Rights of the Child

The CRC embodies the most comprehensive standards applicable to children. It recognises that every child has the inherent right to life and States undertake to ensure to the maximum extent the survival of the child.[12] Many forms of commercial sexual exploitation are life-threatening.

A child has the right not to be separated from her parents and States parties are under a duty to combat the illicit transfer and non-return of children abroad.[13] Children have a right to privacy and to protection by the State against interference or attacks on that privacy, honour and reputation.[14] Children have a right not to be subjected to violence, injury, abuse or exploitation including sexual abuse.[15] The CRC also provides that the child has a right to the enjoyment of the highest attainable standard of health and to education. Article 32 guarantees the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

Article 34 of the CRC reads:

"States parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes States parties shall in particular take all appropriate national bilateral and multilateral measures to prevent:

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;
(b) the exploitative use of children in prostitution or other unlawful sexual practices;
(c) the exploitative use of children in pornographic performances and materials."

Children also have the right not to be sold or trafficked for any purpose or in any form and not to be subjected to any other form of exploitation.[16] They have a right not to be subjected to torture or other cruel, inhuman or degrading treatment.[17]

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[12] Article 6.

[13] Article 11.

[14] Article 16.

[15] Article 19.

[16] Articles 35 and 36, respectively.

[17] Article 37.

State obligations under the Convention on the Rights of the Child

The obligations assumed by States parties to the CRC are extensive and specific. They explicitly bind states not only to refrain from violating the rights of the child but to ensure that private individuals and entities also respect them. States shall undertake all appropriate legislative administrative and other measures for the implementation of the rights recognised by the Convention.[18] In the case of article 19 States shall take all appropriate measures to protect the child from violence, abuse and exploitation even when in the care of parent(s), legal guardian(s) or "any other person who has the care of the child."

Once a state has ratified the CRC, its provisions are binding on the state ratifying it. All Commonwealth countries have ratified the Convention.[19]

Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention)[20] was adopted to reinforce the fundamental right to equality and freedom from discrimination on the basis of sex. States parties to the Convention undertake to eliminate discrimination in law and practice. The Convention provides that States parties shall take all appropriate measures including legislation to suppress all forms of traffic in women and exploitation of prostitution of women. This applies to the girl-child too. In a recent commentary on article 6, the Centre for Human Rights of the United Nations affirms that states which tolerate the existence of exploitative prostitution, girl-child prostitution and pornography and other slave-like practices are in clear violations of their obligations under the article.[21] Many countries of the Commonwealth are parties to the CEDAW.[22]

Other human rights instruments

Standards for the protection of the girl-child against commercial sexual exploitation can be found in other human rights instruments. For instance, the International

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[18] Article 4.

[19] For details, see the sources noted *supra* note 5.

[20] GA Res 34/180, 1249 UNTS 13.

[21] UN Human Rights Fact Sheet No 22 at 13.

[22] For up to date information on the status of signatories, ratification and accession to the Convention on the Elimination of All Forms of Discrimination against Women see http://www.un.org/womenwatch/daw/cedaw.

Covenant on Civil and Political Rights (ICCPR)[23] guarantees the right to life, to personal security and integrity, to privacy, and to equal protection of the law and non-discrimination. The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[24] obliges States parties to prosecute and punish any person who traffics or exploits the prostitution of a girl or woman, or attempts to do so. Unfortunately, very few countries have ratified this Convention.[25] Anti-slavery conventions also apply.[26]

In addition to the conventions, States have reaffirmed the need to protect women and the girl-child against violence and sexual exploitation in other instances. The World Conference on Human Rights, held in Vienna in 1993, reaffirmed that the human rights of women and of the girl-child are an inalienable integral and indivisible part of universal human rights. States unanimously declared that gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person and are to be eliminated.[27] The Beijing Platform for Action[28] with regard to trafficking and forced prostitution, calls on States to take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and girls for prostitution and other forms of commercialised sex.

The United Nations Declaration on the Elimination of Violence against Women,[29] and *General Recommendation No 19* of the Committee on the Elimination of

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[23] 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

[24] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 101 UNTS 30, adopted 21 March 1950, entered into force 25 July 1951.

[25] As of July 1998 there are 14 signatories and 72 State parties to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1950, see http://www.un.org/Depts/treaties.

[26] Slavery Convention, 60 UNTS 253, adopted 25 September 1926, entered into force 9 March 1927; Protocol Amending the Slavery Convention, 182 UNTS 51, adopted 7 December 1953, entered into force 7 December 1953; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 UNTS 3, adopted 7 September 1956, entered into force 30 April 1957.

[27] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, held in Vienna in June 1993, UN Doc A/ CONF.157/24 (1993), 32 ILM 1661.

[28] Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women*, Beijing September 1995, UN Doc A/CONF.177/20 (17 October 1995), 35 ILM 401.

[29] GA Res 48/104 (1994), 1 IHRR 329. The text of the Declaration is also reproduced in Jane Connors and Andrew Byrnes, *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women* (Commonwealth Secretariat and International Women's Rights Action Watch, 2nd ed 1996).

Discrimination Against Women (the CEDAW Committee)[30] rightfully consider sexual exploitation and trafficking as forms of violence against women and girls.

Measures taken at national level

Legislative measures

There is clearly a broad framework which Commonwealth countries can use as a basis for protecting the girl-child against commercial sexual exploitation. Individual States have in fact taken some steps to create a legal framework at national level, which would facilitate this protection. The penal laws of most countries criminalise trafficking and sexual exploitation of the girl-child. In Uganda for instance:

> "Any person who:
>
> (a) procures or attempts to procure any girl or woman under the age of 21 years to have unlawful carnal connection, either in Uganda or elsewhere, with any person or persons; or
>
> (b) procures or attempts to procure any woman or girl to become either in Uganda or elsewhere a common prostitute; or
>
> (c) procures or attempt to procure any woman or girl to leave Uganda with intent that she may become an inmate of or frequent a brothel elsewhere;
>
> is guilty of an offence and shall be liable to imprisonment for seven years."[31]

Similar provisions exist in Nigeria and Kenya and perhaps in other Commonwealth countries. Legislative provisions on defilement, statutory rape and living off the earnings of the prostitution of others can also be used to prosecute and punish offenders. Countries like Sri Lanka have amended penal laws to provide stiffer sentences and protect girls against forced prostitution.

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[30] Committee on the Elimination of Discrimination against Women *General recommendation No 19* (Eleventh Session, 1992) (*Violence against Women)*, UN Doc HRI/GEN/1/Rev. 3, at 128 (1997). For the text of CEDAW *General recommendations* see Connors and Byrnes, *supra* note 29. Also available at http://www.un.org/womenwatch/daw/cedaw/committee.html.

[31] Penal Code Act (Cap 106), s 125.

Unfortunately, the existence of laws has not been of much benefit to girls who have been sexually exploited for commercial purposes. The provisions against trafficking in girls have not been enforced. A recent study in Kenya, Uganda, Nigeria and Mali did not refer to any reported court cases, despite the prevalence of trafficking in girls[32].

Cultural notions of family honour often prevent victims and or their parents from reporting the offences. This is aggravated by the discriminatory practices of law enforcement officers who always tend to arrest the girl and women prostitutes and leave the male clients and pimps. The victims are thus further targeted for prosecution and harassment. The effect is to protect the violators of the girls' rights.

Another factor which makes laws ineffective is the fact that the victim is treated by police and courts as an accomplice whose evidence is not to be trusted. In addition, because the victim is a minor, her evidence is further discredited. Court procedures, rules of evidence and cross-examination all combine to reduce any prospect of a successful prosecution. The environment of open court, and the demeanour of defence counsel and judicial officials often are too frightening to a child. All these combine to contribute to the non-reporting of cases and the impunity with which girls continue to be sexually exploited for gain.

Special units for better surveillance

A few countries have set up special police units to patrol areas in which children are especially at risk of being sexually exploited for gain. These include brothels, massage parlours, and tourist or entertainment areas suspected of harbouring children for prostitution and pornography. These specially trained units, in some countries working closely with social workers, can be found in South Africa, Namibia, Australia, Kenya (e.g. beach management programme) and Malta to name but a few[33].

Provision of services

In some countries both government and non-governmental organisations offer support services to girls who are victims of commercial sexual exploitation. Such services range from counselling, medical treatment, legal aid and to residential homes. These services exist only in a few countries and their appropriateness needs to be assessed. In the majority of countries, however, commercial sexual exploitation

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[32] F Butegwa, "Trafficking in Women in Africa: A Regional Report", part of a global study co-ordinated by the Global Alliance Against Trafficking in Women (unpublished) (1996).

[33] See William Schurink et al, "Children involved in Prostitution: Exploring a Social Profession to Manage the Problem in South Africa", Human Sciences Research Council, South Africa (1995). See also Government of Malta, "Action on Violence Against Women", Commonwealth Secretariat Document WAMM (96) (WHR) MLT.

has hardly been acknowledged as a problem. Consequently, no appropriate services (and policies) have been developed. In one country a 13 year-old girl who was rescued from an incestuous ordeal with her father ended up in a remand home for juvenile suspected offenders. The government concerned had no facilities to cater for child victims of sexual abuse.

The role of the judiciary

The judiciary has an important role to play in the protection of the rights of the girl-child against commercial sexual exploitation. Where international human rights standards have been incorporated in national law, courts should apply them to cases of sexual exploitation.

Even in those cases where international standards are yet to be incorporated in domestic law, a court can be informed by these standards in interpreting existing laws. As long as a country has ratified a convention it is under a legal obligation to comply with its tenets. Courts and other relevant national bodies are under a corresponding obligation not to do anything which might lead the country to contravene its obligations. It is encouraging to note that the judiciary in a number of Commonwealth countries are indeed using international human rights standards as guides in the interpretation of domestic law. These are to be commended and emulated. Their experiences should also be documented and widely disseminated to other countries.[34]

Rules of evidence and cross-examination should not be used to deny young complainants the justice which they seek. The practice of putting the complainant in sexual offences on trial needs to end and judges have the responsibility for ensuring this.

It is possible, in my view, for the court to protect both the defence's right to cross-examine witnesses and witnesses' right not to be intimidated and unduly harassed. This is crucial in cases where the girl-child is a victim of sexual abuse and exploitation. She will have already gone through a terrible ordeal and will be traumatised. The court-room environment becomes a further factor in the continuation of her torment. The judiciary must take the initiative in making courts and the entire proceedings victim-friendly. This will encourage victims of commercial sexual exploitation and other forms of sexual abuse to seek redress in our courts. Steps in this regard, taken by countries like Zimbabwe, are commendable and should be emulated.

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[34] See A. Byrnes, J. Connors, Lum Bik (eds) *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* (London, Commonwealth Secretariat, 1997).

The judiciary are already tackling the above problems in the criminal courts. Should the role of the judiciary only be invoked then? In other words, do the courts have power to assume jurisdiction over cases not "properly" before them? This is an important question which needs to be asked and debated openly, particularly in developing countries where levels of literacy are extremely low and the per capita ratio to practising lawyers is high. Lawyers are concentrated in the major urban centres and charge fees out of the reach of the majority of the population. Most people are not aware of their rights and are therefore unlikely to report cases. Police stations cater for large areas, are under-resourced and are manned by officers who are not gender-sensitive. Low pay and low morale also mean that officers can be corrupted easily by those who benefit from the sexual exploitation of girls.

Under these circumstances should a judge or magistrate assume jurisdiction over cases of commercial sexual exploitation reported, *inter alia*, in the newspapers, in a letter, communicated verbally? This Colloquium is an opportunity to reflect on this question. The experiences of India in this regard should be shared and given the attention they deserve. There are judges and magistrates in other countries, for example Uganda, who have taken the initiative to set up complaints desks to receive and deal with such cases.

The judiciary in most countries is dedicated and committed to administering justice. Naturally what is just in any particular situation is influenced greatly by the culture and value system in which the judicial officers were brought up. Unfortunately, many of those values regard women and girls as subordinate, as sex objects and as liable to distort reality in matters of sexual offences. Judgements from many jurisdictions carry statements indicative of this reality. Members of the judiciary therefore need to participate in available gender-sensitisation programmes. The Commonwealth Secretariat can also play a role in supplementing national efforts in this regard.

Conclusions

Commercial sexual exploitation of girl-child is a serious problem whose magnitude is increasing. It results in the violation of human rights guaranteed by international human rights law. While the problem is receiving attention in some Commonwealth countries, in others the issue remains under wraps with very low levels of awareness within government and the public. The Convention on the Rights of the Child, together with other human rights instruments, provides a comprehensive legal framework for the protection of the girl-child against commercial sexual exploitation. Most Commonwealth countries have ratified these instruments. There are strategies at national, regional and international levels to give effect to the standards and combat the exploitation while offering some support to victims. However, these efforts remain inadequate and not systematic. Further action is required along the following lines:

National level

1. States must ensure that national laws and practices are in conformity with their international obligations.

2. To facilitate the enforcement of these laws, States should be encouraged to establish special police units or retrain the police in investigating and prosecuting cases of commercial sexual exploitation of girls.

3. States should design and implement education campaigns to make the public more aware of the problem and to streamline reporting of suspected cases to appropriate officers.

4. The judiciary should rise to the challenge of efficient, just and humane handling of sexual offences. To facilitate this process judges and magistrates should participate in gender-sensitisation programmes or others which highlight the relevance of gender sensitivity in the administration of justice.

5. The problem of child pornography requires a special response, given the fact that Commonwealth countries have constitutional guarantees on freedom of speech and information dissemination. This is particularly so in light of developments in other jurisdictions where government attempts to combat pornography have been interpreted as muzzling the media and restricting the right to information. Research and public debate should be encouraged in order to develop proposals for legal reform which balance the right of the girl-child against sexual exploitation and the right to information and freedom of expression.[35]

6. As Professor Goonesekere put it, unless the status of the girl-child is improved and it is recognised that discriminatory traditions must be eliminated, it will be impossible to address the root causes of the continued sexual exploitation of girls.[36] States must develop comprehensive strategies to bring about change in attitudes towards girls. Programmes which encourage parents to value all children and give them equal opportunities in life must be a priority concern for states.

7. States must consider themselves under an obligation to put in place an effective system for services to victims of commercial sexual exploitation. These include shelter, counselling, legal advice and representation. The involvement of girls who are or have been commercially exploited in the

[35] Gooneskere, *supra* note 8.

[36] *Ibid.*

design and implementation of the service may ensure that these services respond to the real needs, build trust and improve access. Non-governmental organisations offering similar services should be supported by governments.

Regional level

1. Commercial sexual exploitation often means that girls are forced to cross borders within a region. Even where no such crossing takes place, patterns of sexual exploitation of girls within a region tend to be similar. Countries within a region should therefore endeavour to collaborate in research, legal reform and in the development and implementation of other strategies.

2. Where regional human rights regimes exist, they provide a forum and mechanism for developing contextualised strategies for the further protection of the rights of the girl child.

International level

1. States which have entered reservations on ratification of the Convention on the Elimination of All Forms of Discrimination against Women should be encouraged to withdraw them. As indicated earlier, discrimination and exploitation of girls is inexplicably linked to discrimination against women.

2. Governments should use the reporting procedures under the various human rights instruments as opportunities to review the progress made in the protection and promotion of the rights of the girl-child. State reports should, therefore, address commercial sexual exploitation of the girl-child, among other situations.

3. There is a need for greater co-operation and co-ordination in respect of the rights of the girl-child among various human rights mechanisms, particularly the CEDAW Committee; the Human Rights Committee; the Committee on the Rights of the Child; the Special Rapporteur on the Sale of Children, Child Prostitution and Pornography, and the Special Rapporteur on Violence against Women, its causes and consequences. Country-specific rapporteurs should also be encouraged to pay attention to the issue of commercial sexual exploitation in the countries of their mandate.

4. Inter-governmental and non-governmental organisations with the expertise and resources should assist government machineries, including the police and the judiciary, in building capacities to detect, investigate and handle cases of commercial sexual exploitation more effectively.

Protecting and Promoting the Rights of the Girl-Child in Caribbean Jurisdictions

*Denise Noel-DeBique**

Introduction

The United Nations Fourth World Conference on Women held in Beijing in 1995 established a global agenda for girls' empowerment and gender equity.[1] This reaffirmed States' commitment to the full implementation of the human rights of the girl-child as an inalienable, integral and indivisible part of all human rights and freedoms. Acting from this, Commonwealth Caribbean Community (CARICOM) countries have agreed to give urgent attention to the protection of the rights of children. In particular, there is increased concern about the psycho-social and physical risks of girl-children to exploitation, abuse and abandonment.[2]

Following ratification of the Convention on the Rights of the Child (the CRC)[3] and the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention)[4] by many countries of the Commonwealth Caribbean, there has been significant rationalising of laws affecting children in the region, influenced by specific articles of these Conventions.

Government is given the primary responsibility to implement the provisions of the Conventions through the reorientation of policy and administrative measures. These measures aim to correct the dysfunctions that perpetuate the maltreatment of children. Gender mainstreaming has been explicitly recognised and endorsed by CARICOM countries as a fundamental strategy to enable national institutions to fulfill these measures effectively and to ensure that before decisions are taken on issues concerning children and youths, an analysis is made of their impact on both

* Director, Women's Affairs Division, Ministry of Community Development, Culture and Women's Affairs, Trinidad and Tobago.

[1] Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women,* Beijing September 1995, UN Doc A/CONF.177/20 (17 October 1995), 35 ILM 401.

[2] Priority areas of concern expressed at The Caribbean Convention on the Rights of the Child Conference in Belize, 1996.

[3] GA Res 44/25, UN Doc A/44/49, at 166 (1989), adopted on 20 November 1989, entered into force 2 September 1990. For up-to-date information on signatories, ratification and accession to the Convention see http://www.un.org/Depts/Treaty/ or http://www.unicef.org/crc/status.htm.

[4] 1249 UNTS 13, adopted I March 1980, entered into force 3 September 1981. For up to date information on signatories, ratification and accession to the Convention see also http://www.un.org/womenwatch/ daw/cedaw.

girls and boys. Some CARICOM countries have already begun to strengthen their institutional capacity in gender analysis and gender planning. This process requires dynamic and sustainable interaction with all economic and social sectors, and is accompanied by an agenda for social legal and administrative reform.[5]

This paper sets out to:

- discuss the plight of the girl-child in the Commonwealth Caribbean;
- explore how international human rights standards can be used to promote and protect the rights of the girl-child;
- review measures to implement international human rights, particularly in relation to the CEDAW Convention and the CRC;
- indicate the strategies that can be used by national courts to promote and protect the rights of girl-children, suggesting the barriers that may be encountered in domestic litigation.

Methodology

This paper has been developed from a literature review which included the national reports on women produced for the United Nations Fourth World Conference on Women, reports of regional meetings on development issues concerning women and girls, and on the basis of information received from field-workers across the region.

The conceptual standpoint of the paper is that mainstreaming gender rights is critical to the empowerment of girls and women and to the consolidation of democracy.

The situation of the girl-child in the Commonwealth Caribbean

Women's primary role across the Caribbean has been defined in similar paradoxical ways, reinforced by their socialisation, dominant gender-stereotypes, and by the demands placed on them by rapidly changing political, cultural and economic factors. They are nurturers of families and, increasingly, they also provide the livelihoods to meet the family's basic needs. This is indicative of the growing potential for gender equality in the Caribbean. National reports on the situation of women, prepared for the United Nations Fourth World Conference on Women, indicate areas of sharp differentiation between women and men. Women

[5] Training in gender and development has been provided for senior government employees in Jamaica, Barbados, St Kitts and Nevis, and Trinidad and Tobago.

on average work longer hours than men, are paid less, have less representation in government and municipal bodies, but are over-represented among the poor.

The experience of girls is fraught with equivalent contradictions. In many countries of the Commonwealth Caribbean, girls' school attendance is equal to boys. While data show that they often exceed boys academically, this pattern has not translated into equal opportunities for them in the workplace or in opportunity for employment in later years.[6] As governments in the region integrate gender analysis into their development initiatives, there is growing awareness of the consequences of gender discrimination on the lives of girls in relation to increasing poverty, and the depletion of social services, falling household incomes and occupational segregation in the formal and informal sectors.

Socio-economic situation

Because of the relatively small land size and small populations of Caribbean countries, the main socio-economic realities relate to their vulnerability and marginalisation. Small land size and small populations restrict resource diversification and development. There has been a high dependence on external trade, limited access to international capital markets and insufficient human resources to make effective use of markets.

Shifts in the global market since the beginning of this decade have therefore had a negative effect on the regional economic climate. World trade adjustments have brought increased competition and erosion of preferential market access. These have contributed to a decline in GDP growth and increased commodity dependence in some of the smaller territories between 1990 and 1994. These countries have therefore been vulnerable to slight shifts in the major sectors in their economies.

Economic development has facilitated an increase in private enterprise and foreign investment. There has been an accompanying decline in state intervention in the social sector in many countries. In Guyana, for example, reduced social investment has resulted in a depreciation in the quality and scope of the health and educational services. According to national statistical reports, access to piped water has declined from 33.1% coverage in 1981 to 20.6% in 1991.[7] According to UNICEF, between 1991 and 1994 an estimated 31% of the population had limited access to

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[6] *Developing Profiles of Women and Girls in Latin America and the Caribbean* (UNICEF, Colombia, 1996).

[7] *1995 Digest of Selected Demographic & Social Indicators 1960-1994 for CDCC Member Countries* (UNECLAC/CDCC, Demography Unit, Port of Spain).

safe water.[8] This situation impacts upon the survival of the children, especially those who live in poor communities.

Growing levels of poverty in the region have had a critical effect on the ability of governments to strengthen the economic and social protection of women and children. The pressure on poor women is manifested in diverse ways. Within households the domestic workload of women and girls has increased. The vulnerability of girls to abuse, pregnancy and HIV/AIDS has also markedly increased. Newspapers report a growing commercial sex trade of girls linked to an expanding sex tourism industry in the region, and to poverty as well.

It is also becoming difficult within communities, to find solutions to the problems associated with the low status of women and children such as domestic violence and responsibilities for child care. In some countries more than 40% of households are headed by women (Table 1). There is a highly significant connection between poverty and female-headed households.[9] This is most marked among rural and indigenous families headed by women. In the national reports on the situation of women in Guyana and Dominica the factors which discriminate against indigenous women are described as: their isolation from economic opportunity, illiteracy and cultural traditions.[10]

Table 1
Heads of Households by Sex
1980/1981 and 1990/1991 Census

Country	1980/81		1990/91	
	Female	Male	Female	Male
Barbados	43.9	56.1	43.5	56.5
Belize	22.3	77.7	21.8	78.2
British Virgin Is	25.4	74.6	28.7	71.3
Dominica	37.7	62.3	36.9	63.1
Grenada	45.2	54.8	42.7	57.3
Guyana	24.4	75.6	28.5	71.5
Montserrat	42.1	57.9	39.6	60.4
St Lucia	38.8	61.2	40.4	59.6
St Vincent & the Grenadines	42.4	57.6	39.3	60.7
Trinidad & Tobago	25.3	74.7	28.0	72.0

Source: National Census Reports 1980/1981 and 1990/1991

[8] *The Progress of Nations* (UNICEF, New York, 1994).

[9] *Supra* note 6, at 23.

[10] *Id.*

Employment

Recent regional statistical trends highlight unemployment among youth, particularly among young women, as being higher than the national averages. In Jamaica in 1993, female unemployment was double that of male unemployment in nearly every age group.[11] There is increasing competition amongst young women for low-income jobs in the services sector, as revealed by labour force statistics.

Even with the acute economic situation, the participation rates of young women in the labour force are increasing in many countries. Failure to provide marketable skills and employment to the young, and to keep minimum wages apace with the prices for essential goods has resulted in many women having multiple jobs, many of which are in low-income sectors. This phenomenon is also reflective of the status of legislation on minimum wages in some countries, where there is no regulation or protection for workers offering cheap labour. The lives of girls are particularly burdened, since, in order to adjust to the demands of the work environment, women's responsibilities for domestic tasks are passed on to older children, mostly to the girl-children.

Child labour is fast becoming a growing social issue. The situation has not yet been quantified, though reports are that children are employed as a form of cheap labour in both the formal and informal sectors of the economy.[12] Many children work extra hours in the family business or in small urban or agricultural enterprises to support their own economic needs and those of the households. It is obvious that many children, as wage-earners, also combine work with study.

Children are also removed from school and put to work to support the household.[13] As noted earlier, the implications of this are the risks to girl children to labour and sexual exploitation. In Trinidad and Tobago, Henry and Dumas reported on children's involvement in subsistence production and marketing of agricultural produce, on the streets during school hours.[14] This situation is aggravated by a lack of places in secondary school after the common entrance examination.

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[11] *"Labour Force Survey, 1994" Country Summaries of Girls and Women in Latin America and the Caribbean* (UNICEF, Colombia, 1996) at 38.

[12] *Regional Plan of Action on Gender and Development to the Year 2000* (CARICOM Secretariat). For information on the Caribbean Community (CARICOM), see http://www.caricom.org.

[13] *Supra* note 6, at 23.

[14] Henry and Dumas, *Situation Analysis of Women and Children in Trinidad and Tobago* (UNICEF, Port of Spain, 1990).

Fertility

Adolescent fertility rates in some countries, such as St Vincent and the Grenadines, and Grenada are unacceptably high. This situation is exacerbated by the relative high proportions of young people and the age-dependence structure of populations. The non-governmental organisations (NGOs), particularly the Family Planning Associations, have engaged in innovative approaches with adolescents to provide information and education and in promoting their sexual and reproductive rights.[15] The extent of the influence of these approaches is dependent on their capacity and ability to counter strong cultural attitudes and values relating to fertility and male dominance.[16] In countries such as Jamaica, it has been reported that women are pressurised into having children. They are called mules if they do not bear children. However, the advocacy work of NGOs serves to institutionalise standards in respect of gender equality, male responsibility and the reproductive rights of adolescent girls and boys.

Available adolescent fertility data, however, must be noted and challenged. This data is not yet disaggregated and, in particular jurisdictions, may lead to some confusion over the true situation. In Guyana, for example, where the legal age of consent is the lowest in the region, sexual relations between an adult male and a girl of 12 years are not unlawful.[17] In Trinidad and Tobago, marriage laws allow minors to enter into long-term marriage commitments with the potential for early pregnancy.[18] Overall, however, teenage pregnancy is discussed when it takes place outside of marriage and is dominated by the social and economic consequences of early motherhood. The pregnant girl is likely to be cut off from sources of adequate support and information. As such, teenage pregnancy is discussed in relation to the transmission of poverty, the abuse of early sexual activity and exposure, and girls' limited access to care and support.

Some governments, supported by NGOs and international donor agencies, are targeting resources directly to teen-mothers. In Jamaica, there have been policy shifts to facilitate the child-rearing activities of teen-mothers and the continued education of pregnant teens. New approaches, emerging largely among the NGOs,

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[15] *Annual Report of the Family Planning Association Trinidad and Tobago,* 1996.

[16] *Supra* note 6, at 19.

[17] *Supra* note 6, at 32.

[18] In Trinidad and Tobago, three different situations apply as follows:

- Under the Hindu Marriage Act (Chapter 45:03) a girl may marry at 14 and a boy at 18.
- Under the Muslim Marriage and Divorce Act (Chapter 45:02), a girl may marry at 12 and a boy at 16.
- Under common law, the ages are 12 years for a girl and 14 years for a boy.

call for male reproductive health services and for the rights of fathers to participate in the responsibility of child-rearing.[19]

The protection issues for girls, which emerge within the fertility discourse, relate to their sexuality. These issues are often not always carefully determined and, even where they have been, require much advocacy and political support to impact on legal, policy and administrative reform in this area. Indeed, there may be reason to believe that family law itself in many countries perpetuates deep gender biases which relate to the sexuality of girls and women.[20] It is therefore not surprising to find that, despite regional consensus following international conferences, the discourse on fertility in the region is still quite limited in its articulation of the reproductive and sexual rights of adolescents to protection and information. A major task of governments, through the gender-mainstreaming process in the region, is the creation of an enabling environment for the promotion of the sexual and reproductive rights of women and girls.[21]

Migration

Over the last decades, demographic shifts in the population of some countries have largely been as a result of social and economic stresses within and outside the countries.[22] In-migration to the Bahamas and Belize has been as a result of occurrences in neighbouring countries.[23] Among the OECS countries, St Kitts and Nevis, Anguilla and Antigua and Barbuda have also had very high levels of immigration. By and large, the percentage of women migrating is higher than men.

For receiving countries this has placed strain on the resources of their social sectors, with shortfalls particularly in respect of children of migrating families.

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[19] *Vision 2000*, the strategic plan of the International Planned Parenthood Federation, has directed the activities of family planning services among member associations towards increasing men's commitment and joint responsibility in all areas of sexual and reproductive health. In Trinidad and Tobago, the Family Planning Association provides a clinic, *For Men Only*, with accompanying support to men with low incomes, promoting a positive role for men to play within the sexual and reproductive health care.

[20] Evidence of bias is found where pregnant girls are denied the opportunity to complete their education in some countries.

[21] *Supra* note 12.

[22] *Human Development Report* (United Nations Development Programme, 1996).

[23] The Government of the Commonwealth of the Bahamas, upon signing and ratifying the Convention on the Rights of the Child on 30 October 1990 and 20 February 1991 respectively, "reserved the right not to apply the provisions of article 2 of the Convention, in so far as those provisions relate to conferment of citizenship upon a child, having regard to the provisions of the Constitution of that country". For text of the Convention on the Rights of the Child including reservations see http://www.un.org/Depts/Treaty and http://www. unicef.org.

Social workers describe situations where migrant parents leave children alone, usually in the care of a girl-child, placing both her and the other children of the family at a great risk. Additionally, children have been found migrating from rural areas to cities in search of employment to escape dysfunction and abuse in families.[24] These situations have been found to disrupt family life with negative consequences on the development of children. It is important to stress that they also increase the vulnerability of girls in these societies.

Violence, abuse and exploitation

Violation of the human rights of girl-children remains quiet and undetermined, emerging as incest, sexual and labour exploitation and sometimes occurring within family situations. The incidence of abused children is growing rapidly despite growing public awareness of the problem. Indeed in some countries of the Caribbean there has been unparalleled levels of violence against women and girls, particularly in domestic situations.

Even in the absence of accurate data, it is reasonable to conclude from the reports of countries, that a higher number of girls are neglected and abused within their families. While the situation of abused children is a matter of growing social concern, in many countries there is no central registry. This limits efforts to assess the historical trend in abandonment and abuse cases. Inadequate monitoring systems also affect the ability to follow up cases. There are limited facilities to treat or rescue abandoned or abused children. In some countries there is a movement away from institutionalised care because of the cost associated with providing girls and boys with the quality of care they need.

While there is a growing problem of street children, boys rather than girls are more prevalent in this situation. Indications are that children may be sold illicitly across borders as part of a sex trade.[25] As noted earlier, sex tourism is a significant aspect of the growth of the tourism industry. In Trinidad and Tobago, older girls are engaged as erotic dancers and provide escort services. Police reports reveal that some of these girls have come from other countries, notably Guyana. It is believed that girls become involved in order to survive the effects of poverty, since their earnings supply their basic needs for shelter and education. Models of good practice are emerging among NGOs who operate programmes of education, economic empowerment and personal development, especially among disadvantaged sectors.

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[24] Bishop and Sharpe, *Report of Children in Difficult Circumstances: Trinidad and Tobago* (UNICEF,1993).

[25] Statement by the Minister of Social Development of Trinidad and Tobago to the Parliament in June 1996.

National institutions

In order to achieve a comprehensive approach to improving the status of women and girls, many governments have set up special departments to deal with children and women. These act as administrative mechanisms with analytical, co-ordinating and organising functions. Over the past decade, the machinery for women has had a positive influence on the growth of public interest in women's and gender issues.

Forde noted that there are genuine efforts to rethink and reform the legal rules in respect of the treatment of children.[26] However, given the commitments made at the United Nations Fourth World Conference on Women to the empowerment of women and children, the situation has become more complicated and urgent in respect of the gender implications of current approaches. Is there gender bias within legal systems, administrative systems and the legal culture which may perpetuate inequity against girls in the region? The question applies in many circumstances, two of which are of note. First, at an institutional level where the mandate and plan of action of the institution are not gender-sensitive or essentially, not based on non-discrimination. Second, where the legal culture itself is resistant to change, and where, even though it may be working with a marginalised population group, it does not see itself as representing the interests of such people.

Human rights standards in the protection and promotion of the rights of the girl-child in the Commonwealth Caribbean

There are a number of ways in which human rights standards have been used to set guidelines to legal systems and national courts for the promotion of non-discrimination in many aspects of women's lives across the life-cycle. Some of these are outlined as follows:

- The Convention on the Rights of the Child (CRC), adopted by the United Nations General Assembly in 1989 is a political programme and legal instrument which seeks to preserve and protect the human rights of children below the age of 18 years. As with the CEDAW Convention, adopted in 1979 to address gender equality issues, the CRC further clarifies the nature of discrimination in respect of abuse and violence. Its articles contain particularly innovative provisions in respect to discrimination of girls and it addresses the concerns of rural girls.

[26] Norma Monica Forde, "The Convention on the Rights of the Child and Legal Reform: The Caribbean Experience" in *The Report of the Caribbean Conference on the Rights of the Child: Meeting the Post Ratifcation Challenge,* UNICEF Workshop, Belize, 7-10 October 1996.

- Convention No 138 of the International Labour Organisation encourages States to set a minimum age of employment.[27] This Convention, presently being considered by CARICOM Ministers of Labour sets a framework for establishing priorities in assessing and improving the situation of working children in the region.

- The Inter-American Convention on the Protection, Punishment and Eradication of Violence against Women, an instrument developed by the Organisation of American States,[28] has been ratified by many regional States. The articles of this Convention clearly outline the obligations of States in relation to the protection of women against violence.

Upon adoption and ratification of any or all of these conventions there has been subsequent development of law and the legal systems in Commonwealth Caribbean countries in respect of the provision of protection to women and children. This strategy has been a prerequisite for addressing more sustained challenges to the rights of girls. However, the fragile socio-economic environment of the Caribbean is a major issue that impacts on the sustainability of current measures. It has also been observed that despite the relative gains in basic rights (for example, in food, shelter and education) poverty still represents, in no small way, a very real threat to the loss of those rights, as well as of their other rights to development and participation, for girls in particular.

Though there is regional consensus that women and girls remain vulnerable to intolerable levels of discrimination and violence, the scope and nature of the discrimination against the girl-child remains relatively unexplored. The Beijing Platform for Action recognises the multifaceted nature of gender-based discrimination of girls' globally. It provides an integrated human rights, gender-based framework for analysis and implementation of plans to address national priorities. In respect of the girl-child, the Platform provides new opportunities for the implementation of human rights standards in the creation of action against the persistent structures, attitudes and customs that negate the full protection, participation and development of girls and boys in the society.[29]

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[27] Convention concerning Minimum Age for Admission to Employment (ILO Convention No 1383, Cmnd 5829, adopted 26 June 1973, entered into force 19 June 1976.

[28] Inter-American Convention on the Protection, Punishment and Eradication of Violence against Women 1994, (Convention of Belém do Para) 33 ILM 1534. For the text of this Convention see the Organisation of American States' website at http://www.oas.org.

[29] See Platform for Action, *supra* note 1, Section L The Girl Child, paragraphs 259-285, available at http://www.un.org/womenwatch/daw/beijing/platform/girl.htm.

National initiatives

The CEDAW Convention and CRC impose on States parties obligations to undertake appropriate measures, both legal and administrative, to ensure the implementation of the rights recognised in the treaties. In this regard, States have established and strengthened appropriate institutions, enacted and upgraded relevant legislation and developed and implemented programmes aimed at ensuring the protection of rights of girls.

The institutional framework

Countries have developed implementation strategies based on collaboration between governments and the non-governmental sector. These plans include strategies for legal reform, policy development, education and training for values and attitudinal change, institutionalised care and rehabilitation and advocacy.

Legal measures

The first step in the implementation of the CEDAW and the CRC is the harmonisation of national laws. Legal reform is considered as establishing the foundation for ensuring the rights of children. The legal reform process however is a lengthy one. All countries were able to identify areas where harmonising is necessary. From a review of the Situational Analyses of Children and their Families in the region, major areas identified for reform include:

> "Age limits in respect of marriage, sexual consent, employment and compulsory education, age of criminal responsibility, maintenance, domestic violence, sexual offences, foster care, and juveniles in conflict with the law."

The following table is the current status, as of April 1997, of legal reform in respect of children in some of the Commonwealth Caribbean countries.

Trinidad and Tobago and Jamaica have assessed existing legislation within the articles of the CRC and suitable legislation drafted.[30] In Trinidad and Tobago there

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[30] See:

Antigua and Barbuda, Status of Children Act 1980,

Barbados, Status of Child Reform; Act 1979,

Belize, Status of Child Act 1980,

Grenada, Status of Children Act 1991,

Guyana, Children Born out of Wedlock Removal Discrimination Act 1989,

Jamaica, Status of Children Act 1976,

St Kitts and Nevis, Status of Children Act 1983,

St Vincent and The Grenadines, Status of Children Act 1980,
Trinidad and Tobago, Status of Children Act 1981.

Country	Legal Reform	Comments in respect of the provision of protection for girls
Barbados	Juvenile Offenders Act Protection of Children's Act 1990 Sexual Offences Act 1992 Domestic Violence (Protection Order) Act 1992	Legal aid services extended to minors. Protection from child pornography. Court can remove perpetrator from home.
Belize	Children's Act Juvenile Offender Act Criminal Code	Under review
Dominica	Sexual Offences Act	In-camera hearings Restriction on press
Grenada	Status of Child Act (1991) Maintenance Amendment Act No 54 Adoption Amendment Act No 17 Care and Protection at Risk Family Court Act	Removes discrimination of illegitimate children Amount increased Established Adoption Board
Guyana	Adoption Foster care Maintenance Infancy Equality of rights Criminal Law Juvenile offenders Employment of children Whipping of children Education Age limits	Intended areas of reform
Jamaica	Child Abuse Adoption Child Care Disabled Children education Sexual Exploitation Juvenile Justice	Under review
St Vincent	Family Court Criminal Code	Age limit raised to 18 for life imprisonment and death sentence
Trinidad and Tobago	Attachment of Earnings Act Child Care Services Bill 1992 The Children (Amendment) Act 1992	

have been further amendments to the Children's Act to provide the court with the necessary power to make a care order, empowering social workers to remove a child to a place of safety.[31] In respect of children's universal right to protection, some Commonwealth countries have enacted status of children legislation to abolish any rule of law which excludes any children from claiming benefits from their parents and permits parents to enjoy relationships with their children.

In relation to the sexual exploitation of children and child prostitution, articles 34, 35 and 36 of the CRC urge States parties towards national, multilateral and bilateral arrangements to protect children. In accordance with article 34 of the CRC, some States have enacted a Sexual Offences Act based on the CARICOM model legislation.[32]

A number of countries have instituted a family court system to ensure the well-being of families and children and provide effective and efficient justice for related problems.

Because of prevailing gender stereotypes and the low status of girls in families, the provision of financial support necessary girls to gain access to education and training is often resisted. In some jurisdictions legislation regarding the attachment of earnings and garnishments has been introduced. In the case of Trinidad and Tobago, the Attachments of Earnings Act 1988 enables persons entitled to maintenance orders to obtain an attachment order from the High Court or the Magistrate's Court which would direct the debtor's employers to deduct a special amount from his or her earnings. Some women's organisations have expressed concern over circumstances. They advocate less harsh measures which could reduce the levels of violence which is inflicted by men on women who bring them before the courts for maintenance of children.

Education and training

In compliance with article 28 (l)(a) of the CRC and article 10 of the CEDAW Convention, most countries offer compulsory co-education till the end of primary school.[33] There is still concern across the region about placement after the common entrance examination. The general situation is that a significant percentage of students are not given the opportunity of secondary level education. In Grenada, though an equal number of boys and girls enrol in primary school every year, there is a high attrition rate among the boys, giving an impression that girls are achieving better grades as a result of the examination. Initiatives by NGOs provide

[31] Children (Amendment) Act 1992.

[32] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual offences.*

[33] Education to this level is not mandatory in St. Vincent and the Grenadines: UNICEF Caribbean Office, July 1996.

education to support those children who have not been placed and for those who have dropped out of the primary school system in poor communities.

St Kitts and Nevis introduced the principle of free secondary education for all. This was accompanied by the abolition of the common entrance examination and the democratisation of secondary education. The government also supplies textbooks to all, regardless of parental ability to pay.

Articles 28(1)(b) and (d) and article (9) of the CRC broaden the scope of education to include the right to vocational education. Article 10 of the CEDAW Convention refers to the elimination of any stereotype concept for girls and women in curricula. Technical and vocational education is conducted within most education systems and in some countries this is extended to a system of remaining open to older teenagers. Vocational education in the Eastern Caribbean has been linked to the provision of an adequate workforce. While girls have done well in the subjects to which they have been exposed, there are efforts to revise these work programmes to ensure they can enter non-traditional areas of employment. In most territories, there have been adjustments in the curricula to redress the gender imbalance and link girls to the new demands of the construction and tourism sectors.

Article 29 of the CRC speaks of education that includes respect for human rights. In the Bahamas, in particular, programmes target at risk populations. In Guyana, a rights-based curriculum has been introduced in the school curriculum and community education system with the support of NGOs such as Amnesty International of Guyana. There are other collaborative programmes across the region between governments and NGOs which target girls as juveniles in institutions and pregnant teenagers, offering them child care facilities and an opportunity to continue their education. In accordance with the provisions of articles 5 and 18 of the CRC and article 5(b) of the CEDAW Convention, which recognise the common responsibility of men and women in the upbringing and development of their children, programmes in Grenada and Jamaica also target the partners of these girls, to encourage them to share in the responsibilities of child-rearing.

There is still an imbalance in sports education for girls in the formal system, no doubt linked to the lack of facilities and trainers for young women. Redressing this imbalance is supported by NGOs and sporting clubs.

Other social programmes under articles 19, 34 and 36 of the Convention on the Rights of the Child

Social mobilisation and advocacy are critical to support legal initiatives on the protection of children. Through the support of the private sector, Jamaica's Coalition on the Rights of the Child has set up a telephone counselling and rehabilitative service now accessible to abused children and their families,

launched a national initiative for street children service and developed a national policy on children.

The provisions of article 32 of the CRC are to protect children from economic exploitation. The CARICOM Regional Plan of Action on Gender refers to the growing problem of child domestic labour and other forms of child labour. This initiative resulted from public consultations across the region prior to the Beijing Conference and also because of the growing awareness within the region of unwaged work carried out by women and the economic exploitation of children. Trinidad and Tobago has enacted legislation on unwaged work by women and men. It has been suggested that this model be adopted by other countries in the region as a legal position on quantifying and recognising the work that children do. The purpose of the legislation is not simply to develop indicators but ultimately to assist with positive policy outcomes in the public and private sectors for those who are most affected.

The Juvenile Liaison Scheme in Barbados offers family counselling and conducts public education campaigns. It also supports Big Brother and Big Sister Projects in its thrust towards prevention and rehabilitation.

In Trinidad and Tobago, priority areas for programming include maternal and child health and family planning, basic education and literacy, children in especially difficult circumstances, and education. Parenting education is supported through the work of Servol, an NGO, which conducts an outreach programme into the rural areas.

The Bahamas Child Welfare Services investigates children at risk. Care is provided through counselling, alternative care by relatives, foster care, adoption and institutional care. In relation to the provisions of articles 20 and 22 of the CRC, the children of undocumented migrants are accorded equal care and support. Jamaica has introduced community-based care to support its institutionalised care programme for children. This may assist in removing some of the gender biases against girls which are finely entrenched in institutionalised care, and which impact on their re-entry into society.

The role of national courts

In some countries over the last decade, there has been a positive shift in the legal system to advance the status of women towards women's rights. However, as the national reports on women indicate, legal reform has not kept pace with the increasing vulnerability of women and girls to exploitation, discrimination and violence.

It is evident that the protection of girls in families is not understood from a rights perspective. There is still a pervasive belief that the violence perpetrated on them

and the sexual exploitation they experience is due to a sense of possession and property which men feel for their family. This is translated into feelings of great insecurity when there is the threat of loss of a job or relationship.[34]

The multi-cultural character of many of our Commonwealth Caribbean societies has also made it difficult to improve legislation and the enforcement machinery in response to the emerging critical concerns of girls in Caribbean societies. Indeed, many girls face revictimisation in their attempts to seek justice from the courts. Newspaper reports of judicial rulings in cases of rape, incest and other forms of violence against girls in certain jurisdictions indicate that they promote prejudicial unequal gender relations.

Girls are particularly vulnerable to re-victimisation within the court system because of the lack of consistency around issues such as the minimum age for marriage and employment. Indeed in the Caribbean, as household wages shrink there is growing pressure on girls to work inside and outside the family unit from an early age. Approaches are needed to deal with premature employment and the establishment of good personnel practices within the private sector to protect working children. However, other approaches will be necessary within the informal sector of the economy and in family enterprises. Difficulties with the latter may arise because of deeply entrenched negative cultural attitudes towards women in society, a lack of respect for their integrity and for the rights of minors over their bodies and sexuality. Reference is made here as to how culture can work against the reform process. The law in relation to the minimum permissible age of marriage in Trinidad and Tobago is governed by both statutory and common law.[35] Parental consent is required for all marriages of minors except in respect of a Hindu girl who has attained the age of 16 years. Attempts to adjust this minimum age through public consultations have failed.

Practitioners within the courts and legal advisory services reporting on the response of girls and women to their applications for justice, particularly in situations of violence, tell of the inadequacies and gaps occurring in national courts. Other burning problems relate to:

- the costs of litigation and girls' access to legal aid in criminal matters;

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[34] Stephanie Daly, *Child and Family Law: Trinidad and Tobago* (1992) states that there should be uniformity in relation to the obligations of the State and others to ensure the care of children. She also states that while it is appropriate to have varied age limits within the category of "minors" in relation to different matters, these age limits should not fail to give protection to persons still within the age group. She cites the Children Act (Chapter 46:01) which provides for children and young persons up to the age of 16 to be taken into care and custody granted to a fit person. The Summary Court Act (Chapter 4:20) only offers protection to a person up to the age of 14 years, leaving those who are 16 and 17 unprotected.

[35] *Supra* note 18.

- legal provisions which cannot be challenged; [36]
- lack of a consistent legal approach;
- legal processes that do not prioritise juvenile matters;
- lack of empathy and understanding by court personnel;
- lack of recognition by practitioners of key legal and social changes;
- inadequate systems for monitoring and evaluation;
- lack of training of personnel to work with child witnesses; and
- intimidation and stress while giving evidence.

There are fundamental issues which stand in the way the court is able to use international human rights standards in domestic litigation in different jurisdictions.

1. There are preconceived notions about the social identity of girls and women, the work they do and their decision-making power in their families and communities in the Caribbean. These notions impede policy development, legal reform and acceptance of girls' rights.

2. A lack of an enabling environment for the development of adequate basic instruments, such as minimum age legislation, child labour legislation and compulsory education legislation with appropriate enforcement. These include:

    - Resources: reduced expenditure in social sector spending, reduced size of the public service with an impact on remuneration and the training of professionals;

    - Advocacy: weakened trade union movement; and

    - Poverty: facilitating early labour market entry, the demand for cheap labour, early child bearing, single motherhood and girl domestic workers.[37]

3. Key economic and social issues which impact directly on the strategies of national courts to promote the rights of the girl-child:

    - increasing fragility of the family structure and its ability to assist with supervision mandated by the court;

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[36] This is found to be relevant to the inconsistencies within the law on children regarding different definitions and of age.

[37] It may be opportune to consider the conclusions of the Caribbean Conference on the Rights of the Child held in Belize in 1966, which identified the following areas as critical areas of emphasis for the promotion and protection of rights of children around the Caribbean: restrictions on governments budgets; inadequate legislation; multifaceted approaches to child protection; increased measures for appropriate family care; data gaps in the incidence of child abuse; and cultural patterns which reinforce the invisibility of children.

- a lack of trained officers of the court such as probation officers, social workers, law enforcement officers, and lawyers, particularly in respect of their sensitivity to gender issues;

- an imbalance between the skills training of girls in institutions and the formal education system, and in the labour market;

- inadequate data collection and analysis within the court for use in planning and policy development needed to address the gender gaps in the experiences of children before the court;

- the prevailing negative attitudes of men and a culture which supports flogging and the physical punishment of children; and

- a lack of resources to improve support services within the Family Court and for the proper management of integrated services of psychological, legal and medical care for girls.

The role of national courts is to administer the law and advance the status of girls and women by developing strategies to challenge the legal system to address any inequalities girls may face in their legal status, in their access to legal services and in the administration of justice. There must, therefore, be continued co-ordination and communication between the legal and social sectors.

In so doing, the courts must ensure that the legal system is an effective tool for achieving and maintaining positive gains in the status of girls. This requires an assessment of the capabilities and processes of the court in its responsibilities for promoting and protecting the rights of girls. It also requires a commitment by the court to engendering its processes. This means that the court must take account of gender differences in all of policy, programme, administrative and financial activities and organisational procedures.

The following strategies are proposed:

1. Capacity Building. Gender training along with the CRC for all court personnel, consistent with their portfolio. All practitioners must be trained to enable them to conform to ethical professional and gender-sensitive standards, as required by international human rights standards.

2. Information systems for the production of gender-disaggregated data for research, policy formulation and for planning timely interventions. The type of information that would be useful to collect at the level of the court includes the number and type of offences; case profiles; family and socio-economic background of offender and victim; types of rehabilitative services and their accessibility; decisions of the Court; and follow up of cases.

Data can be also be incorporated into continuing legal education strategies in different jurisdictions and within current legal education programmes in the region, to influence the content and application of the law in respect of advancing the legal status of girls. Data can also be used for advocacy of the rights of girls and for human rights programmes development by relevant institutions.

3. Development of monitoring and evaluation systems based on culturally-specific, gender-sensitive indicators around protection rights: this would require much dialogue and endorsement from the community.[38]

4. Establishment, or strengthening of, networks between the court and civil society incorporating the experiences of the non-governmental organisations such as workers' organisations in the design of networking strategies.

5. Enhancement of the role of the police and empower the community in enforcement, by the systematic participation of the local community in monitoring the experiences of children.

Conclusions

I have advanced the standpoint in this paper that mainstreaming a gender rights perspective within the law and national courts is critical to the empowerment of girls and women across the life cycle and to the consolidation of democracy.

The challenge this poses is both of issue and of process. It will take, on one hand, a commitment to advancing the conceptual underpinnings of girls' oppression based on:

- the realities of their family life, in terms of their socialisation and experience of labour;
- their concerns for the safety of their bodies and their sexuality; and
- their needs for protection.

[38] The language of family law and the Children Act must be reviewed and amended to be gender-sensitive where necessary. In addition, provision should be made to address issues such as the privacy and confidentiality of children's reports and evidence; girls' access to sex education and family life education; financial support to minors (particularly to support the girls who are staying in schools longer than boys); pregnant girls access to continued education; and access to legal aid in criminal matters.

It also requires strong commitment to the gender perspective within institutions of governance and leadership, and the continued commitment to resources for training, monitoring, public education and support.

In preparation for the Fourth World Conference on Women, member countries of the Commonwealth Caribbean were given the opportunity to review the status of women and make that critical link across the life cycle to the girl-children in their societies. All reports highlighted women's loss of security and feelings of disempowerment as the major issues of the Caribbean. The preparatory process was based on willing partnerships between governments, NGOs, women and men in communities and the international community, working together for common purposes. In implementing the outcomes of the conference, a similar cohesion of perspectives is necessary.

And what does this entail in Caribbean jurisdictions? In addition to strong political and juridical will, I wish to propose building alliances for girls among key stakeholders, inclusive of community organisations.

CARICOM Model Legislation on Violence against Women in the Areas of Sexual Offences, Domestic Violence and Sexual Harassment: Comparison with International Standards and Existing Commonwealth Caribbean Legislation

CARICOM Model Legislation on Violence against Women in the Areas of Sexual Offences, Domestic Violence and Sexual Harassment: Comparison with International Standards and Existing Commonwealth Caribbean Legisation

Thelma Rodney-Edwards[*]

Developments at the international level

Universal acclaim for the principle of equality of men and women has been recognised by the United Nations since the adoption of its Charter, which includes in its preamble the goal "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women".[1] Since then, many resolutions, declarations and conventions have been adopted by the General Assembly of the United Nations in relation to the status of women and the girl-child, the most important being the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW Convention),[2] which was adopted on 18 December 1979, and the Convention on the Rights of the Child (CRC),[3] which was adopted on 20 November 1989.

Article 2 of the CEDAW exhorts States parties "to condemn discrimination against women in all its forms and to pursue by all appropriate means and without delay a policy of eliminating discrimination against women". In article 19 of the CRC States parties are exhorted "to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". It is to be noted that both the CEDAW and the CRCs impose on States parties obligations to undertake all appropriate legislative and other measures to ensure the implementation of the rights recognised in those Conventions. The concern for the human rights of women and the girl-child was also

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[*] Assistant General Counsel, CARICOM Secretariat.

[1] Charter of the United Nations, adopted on 26 June 1945, entered into force 24 October 1945.

[2] 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981.

[3] GA Res 44/25, UN Doc A/44/49 (1989) at 166, reprinted in 28 ILM 1448 (1989).

addressed and reiterated in the Platform for Action emanating from the Beijing Conference in 1995.[4]

Developments at the regional level

The framers of the Treaty establishing the Caribbean Community (CARICOM),[5] which was signed on 4 July 1973, were cognisant of the status of women in the Caribbean and it is worth noting that one of the areas of functional co-operation listed in the Schedule to the Treaty is "The Position of Women in Caribbean Society". This provision in the Treaty was certainly demonstrative of an early appreciation of, and commitment to, a regional approach to improving the position of women in the Caribbean society.

Government ministers with responsibility for the integration of women in development sought to implement the provision of the Treaty, at their meetings in 1981 and 1983, by requesting that the CARICOM Secretariat monitor the status of the CEDAW Convention in CARICOM member states. In response to this mandate, the CARICOM Secretariat engaged the services of a consultant to undertake an examination of the constitutions and other legislation of CARICOM states in order to identify those provisions in their laws which discriminated against women, as well as areas of omission in national constitutions and other legislation in relation to which action should be taken.

Based on the results of this study and also on the priority areas that were identified by the governments of CARICOM States as requiring urgent attention, several drafts of model legislation were prepared for consideration and adoption by them. These were in relation to citizenship, sexual offences, domestic violence, sexual harassment, inheritance, equal pay, equal opportunity and maintenance. These models are drafted in gender-neutral language.

CARICOM member States recognised that there was an upsurge in violence against women – physical, psychological and sexual – and, in the case of the girl-child, sexual abuse and incest and also that there were increasing reports of sexual harassment, especially in employment. They therefore included these as critical areas to be addressed.

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[4] Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women*, Beijing September 1995, UN Doc A/CONF.177/20 (17 October 1995), 35 ILM 401.

[5] Treaty establishing the Caribbean Community (CARICOM), 947 UNTS 17, 12 ILM 1033, adopted 4 July 1973, entered into force 1 August 1973. See generally http://www.caricom.org.

CARICOM model legislation

Sexual offences

The model legislation on sexual offences was prepared in the form of a separate draft statute, thus departing from the position in most CARICOM States where offences of this nature were included in the general law relating to offences against the person.[6]

It was recognised that victims of sexual offences were very reluctant to report the matter to the police, not only because of the nature of the offence but also because of the stigma attached to it and the traumatic experience which the victim suffered, especially in attending court to give evidence and the publication of the details in open court and in the media. In some cases, the complainant failed to attend court and sometimes opted to settle the matter out of court by accepting payment from the offender.

The model legislation sought to effect some solution to the problems concerning the prosecution of offences of this nature. Hence, the following provisions were included:

- Provision for *in camera* hearings sought to encourage more victims to report offences of this nature and attend court for the trial of offenders.[7] The model legislation provides for the public to be excluded during such hearings. An exception is made, so that the judge may permit the presence of any member of the public whose presence is requested by the complainant or the accused.[8]

- The model legislation provides for restrictions on reports of the identity of an accused or complainant after a person has been charged with an offence, except on the application of the complainant or accused to the court to permit such publication or, in the case of the accused, after the person has been tried and convicted of the offence.[9] Thus, the model legislation provides for the passing of sentence to take place in public so that the identity of the accused may be disclosed at this stage. Any person who discloses the identity of the accused or complainant after the accused is charged with the offence is liable on conviction to a fine or a term of imprisonment.

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[6] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual offences*.

[7] *Id*, clause 21.

[8] *Id*, clause 21(2).

[9] *Id*, clauses 25 and 26.

This is indeed a very important provision in view of the fact that in Guyana the media, from time to time, unwittingly discloses the identity of the accused is published. For example, it may be stated in the media that the accused is the stepfather of the child or the neighbour of the child and the address of the accused is published. Thus, even though the name of the complainant is not mentioned, invariably the public is led to recognise that person's identity.

- The model legislation restricts the adducing of evidence as to the sexual history of the complainant.[10]

- The model legislation empowers the court to forbid the publication of reports of certain details of the alleged act.[11] The breach of an order of the court forbidding publication of such report or account giving details of the criminal act alleged to have been performed on the complainant may be dealt with as contempt of court.

By 1997, five CARICOM countries had enacted legislation based on the model legislation. They were Antigua and Barbuda; the Bahamas; Barbados; Dominica; and Jamaica. In the case of Guyana, the Criminal Law (Amendment) Act 1991 amended the Criminal Law (Offences) Act to provide for *in camera* trials unless the court orders otherwise.

Member States	*Legislation enacted*
Antigua and Barbuda	Sexual Offences Act 1995
The Bahamas	Sexual Offences and Domestic Violence Act 1991 (The Bahamas has combined sexual offences and domestic violence under one Act)
Barbados	Sexual Offences Act 1992
Dominica	Sexual Offences Act 1995
Guyana	Criminal Law (Amendment) Act 1991 (This Act amended the Criminal Law (Offences) Act and the Criminal Law (Procedures) Act. The amendment to the Criminal Law (Offences) Act provides for proceedings to be held *in camera* unless the court otherwise

[10] *Id*, clause 23.

[11] *Id*, clause 25.

orders. The Magistrate is therefore given a discretionary power. The Chancellor of the Judiciary, at a meeting held on 5 April 1997 with the Magistracy, reminded them of the amendment to the Criminal Law (Offences) Act.)

Domestic violence

The model legislation with regard to domestic violence was prepared on the basis that there was a perceived need for legislation dealing exclusively with the matter of domestic violence and to provide remedies which are intended to mitigate the effects of domestic violence.[12] The model, therefore, attempts to provide legal protection to persons who are victims of domestic violence.

The main categories of persons falling within the ambit of the legislation are men and women who are, or have been, married to each other or who are, or had been, living together as man and wife[13] and children; "child" being defined in the model legislation as a child of both parties to a marriage, or a child of an unmarried couple, or a child who has been accepted as a member of the family or of the couple's household.[14] The definition of a child includes a child who resides in a household on a regular basis or who is under the guardianship of a man or woman.

The scope of remedies provided in the model legislation covers the granting of a protection order,[15] occupation order[16] or tenancy order. [17]

Protection order

A protection order prohibits the respondent from:

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[12] Commonwealth Secretariat and CARCICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to domestic violence.*

[13] *Id,* clause 2.

[14] *Ibid.*

[15] *Id,* clauses 4, 5 and 6.

[16] *Id,* clauses 7, 8, 9 and 10.

[17] *Id,* clauses 11, 12, 13 and 14.

- entering or remaining in the household residence of any prescribed person. (The model legislation defines "prescribed person" as being the spouse of the respondent, or a parent or a child or dependent of that person); [18]

- entering or remaining in any area specified in the protection order, being an area in which the household residence of a prescribed person is located;

- entering the place of work or education of any prescribed person; [19]

- entering or remaining in any place where a prescribed person happens to be; [20]

- molesting a prescribed person by:

  - watching or besetting the prescribed person's household residence, place of work or education;

  - following or waylaying the prescribed person in any place;

  - making persistent telephone calls to a prescribed person; or using abusive language to or behaving towards a prescribed person in any other manner which is of such nature and degree as to cause annoyance to or result in ill-treatment of the prescribed person.[21]

The court may make a protection order if it is satisfied that: [22]

- the respondent has used or threatened to use violence against or caused physical or mental injury to a prescribed person and is likely to do so again; or

- having regard to all the circumstances, the order is necessary for the protection of a prescribed person and the court may, if it thinks fit, attach a power of arrest to the order.

A protection order may be made on an ex parte application if the court is satisfied that the delay that would be caused by proceeding on notice would or might entail:[23]

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[18] *Id,* clause 2.

[19] *Id,* clause 4(a) and (b).

[20] *Ibid.*

[21] *Id,* clause 4(e).

[22] *Id,* clause 4(2).

[23] *Id,* clause 5(1).

- risk to the personal safety of a prescribed person; or
- serious injury or undue hardship.

The person who breaches such an order is liable on conviction to a fine or imprisonment.[24] Provision is also made in the model legislation for a constable to arrest a person who breaches such an order if the constable has reason to believe that the arrest is reasonably necessary for the victim's protection.[25]

Occupation order

An occupation order is intended to grant the prescribed person named in the order the exclusive right to live in the household residence.[26] The order may be granted by the court if the court is satisfied that it is necessary for the protection of the prescribed person or that it is in the best interests of a child. Before making an occupation order, the court is obliged to direct that notice be given to any person having an interest in the property who would be affected by the order, for example a landlord. That person also has the right to appear before the court and be heard in the matter of the application for the occupation order.[27]

Where such an order is made the prescribed person to whom it relates is entitled, to the exclusion of the respondent, personally to occupy the household residence to which the order relates.[28]

Tenancy order

A tenancy order is applicable in cases where the respondent is either the sole tenant of the household residence or holds the tenancy jointly or in common with the applicant.[29] "Applicant" is defined in the model legislation to mean any person who applies, or on whose behalf the application is made, for an order.[30]

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[24] *Id,* clauses 5(2)-(5).

[25] *Ibid.*

[26] *Id,* clause 7.

[27] *Ibid.*

[28] *Id,* clause 9.

[29] *Id,* clause 11.

[30] *Id,* clause 2.

The effect of a tenancy order is to vest the tenancy in the applicant to the exclusion of the respondent.[31] The applicant is, however, bound by any terms and conditions of the tenancy in force at the time when the order is made.[32] A tenancy order may be made if and only if the court is satisfied that it is necessary for the protection of the applicant or that it is in the best interests of a child of the family.[33]

In relation to occupation orders and tenancy orders, the court is also empowered to make ancillary orders granting the applicant the use of all or any of the furniture, household appliances or household effects in the residence to which the tenancy order or occupation order relates. [34]

The model legislation also contains provisions restricting the persons who may be present at any proceedings (other than criminal proceedings) in connection with applications under the Act.[35] The leave of the court is also required for the publication of any report of the proceedings.[36] This restriction does not apply to publications which are bona fide technical or professional reports or which are intended for circulation among members of certain professions specified. The restrictions outlined above are intended to be for the protection of the applicant.

Counselling

An important feature of the model is the power of the court to recommend that either or both parties participate in counselling. The court would specify the nature of the counselling recommended.

Legislation enacted following the CARICOM model legislation on sexual offences and domestic violence

All CARICOM states, with the exception of Grenada, St Kitts and Nevis, and Suriname, have either enacted legislation or are in the process of doing so. The following CARICOM states have enacted legislation based generally on the CARICOM model legislation:

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[31] *Id,* clause 11.

[32] *Id,* clause 13(3)(a).

[33] *Id,* clause 11(2).

[34] *Id,* clause 16.

[35] *Id,* clause 18(d).

[36] *Id,* clause 21.

Member States	*Legislation enacted*
Bahamas	Sexual Offences and Domestic Violence Act 1991 (Sexual offences and domestic violence have been combined under one Act)
Barbados	Domestic Violence (Protection Orders) Act 1992 (Requirement of corroboration in rape cases has been abolished)
Belize	Domestic Violence Act 1992
Guyana	Domestic Violence Act 1996
Jamaica	Domestic Violence Act 1995
St Lucia	Domestic Violence (Summary Proceedings) Act 1995
St Vincent and the Grenadines	Domestic Violence (Summary Proceedings) Act 1994
Trinidad and Tobago	Domestic Violence Act 1991

The British Virgin Islands, an Associate Member of the Caribbean Community, has enacted the Domestic Violence (Summary Proceedings) Act 1996. Antigua and Barbuda, Dominica and Montserrat are in the process of enacting legislation.[37]

The impact of legislation enacted in relation to domestic violence

Since legislation has only recently been enacted in CARICOM states, it is perhaps too soon to arrive at an accurate assessment of the impact of this legislation. However, at this stage one can be guided by the comments received from member states.

[37] As of 2 September 1998, Antigua and Barbuda, Dominica and Montserrat had not yet enacted legislation. The matter is still under consideration by the relevant authorities.

St Lucia has reported that persons have been applying for Protection Orders under the Domestic Violence (Summary Proceedings) Act 1995 but statistics are not yet available.

In Trinidad and Tobago, many persons have sought remedies under the Domestic Violence Act 1991. However, the Act is presently under review because it has been shown to be ineffective in offering complete relief to victims of domestic violence. Areas of concern regarding the 1991 Act in Trinidad and Tobago have been expressed by the Women's Desk in government.[38] They are as follows:

- the need for the establishment of family courts in all magisterial districts as an integral part of the support system for the Domestic Violence Act;
- the powers of the police as regards the arrest and removal of the perpetrator from the location;
- the duration of the protection order;
- police procedures when a domestic violence complaint is lodged at a police station;
- counselling for victim and perpetrator should be mandatory;
- support services for the Domestic Violence Act; and
- legal aid for victims of domestic violence.

Belize has commenced a pilot study and the preliminary observations suggest that:

- the Act has facilitated the legal process;
- women and service providers look forward to positive changes as a result of attitude changes and the legislation that is in place;
- however, some providers were of the view that women are still not safe with the issuance of a protection order; and
- the system is not sufficiently confidential or private.

From the preliminary observations of the Belize pilot study and the concerns expressed by the women's desk in Trinidad and Tobago, it would appear that the Domestic Violence Act has improved the social and legal status of women. Nevertheless, it is apparent that much more needs to be done to make the Act more

[38] Communication from the Women's Desk to the Women's Affairs Officer of the CARICOM Secretariat.

effective. Perhaps there is a need to review the legislation, though only after a proper analysis and evaluation of the impact of the legislation has been undertaken.

Sexual harassment

CARICOM has also proposed model legislation to provides protection to persons who suffer discrimination arising from acts of sexual harassment.[39] The model addresses sexual harassment in employment, in educational institutions and when seeking accommodation.

"Sexual harassment" is defined as conduct which involves an unwelcome sexual advance or unwelcome request for sexual favours or other unwelcome conduct of a sexual nature, by one person to another.[40] Such conduct falls within the ambit of the legislation if the person who is harassed has reasonable grounds for believing that he or she will suffer some disadvantage as a result of his or her rejection of the sexual advances of the other person, or if such disadvantage is actually suffered by him or her as a result of such rejection.[41]

The remedies contemplated do not provide for criminal sanctions but for the hearing of civil complaints by a tribunal.[42] Two options are proposed in the model legislation.[43] The first option provides for the establishment of a permanent tribunal, while the second option provides for the setting up of an *ad hoc* tribunal where costs are most likely to be reduced. The procedure for filing complaints is set out in the model legislation.

With the exception of Belize, legislation in relation to sexual harassment has not yet been enacted by member states. Belize has enacted the Protection Against Sexual Harassment Act 1996 and St Kitts and Nevis is presently addressing this matter in their law reform programme.[44]

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[39] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual harassment.*

[40] *Id,* clauses 2(2), 3, 4 and 5.

[41] *Id,* clauses 3(4) & 4(2).

[42] *Id,* clause 6.

[43] *Ibid.*

[44] As of 2 September 1998, legislation on sexual harassment had not yet been enacted in St Kitts and Nevis.

Conclusion

In concluding, while it is recognised that legislation is an important vehicle to initiate change, legislation in itself is not enough, but must be complemented by effective policies intended to change stereotyped attitudes, to educate persons about gender sensitivity and to introduce support services and measures such as the Help and Shelter Service in Guyana. These measures should not, however, be the responsibility of the governments alone but must also be borne by non-governmental organisations and the community as a whole.

Violence against Women in the Commonwealth Caribbean – CARICOM Model Legislation in areas of Sexual Offences, Sexual Harassment and Domestic Violence – Their Use in the Framing of National Legislation and a Comparison with International Standards

*Margarette May Macaulay**

Introduction

This paper attempts to give the NGO perspective on the national positions on these legislative provisions. I must, of necessity, give more details on the Jamaican position and a mere gloss in relation to the other countries herein mentioned.[1]

Sexual offences

Jamaica still operates under the Offences against the Person Act 1864 for the prosecution of perpetrators of violence against women. A Sexual Offences Bill was put aside some years ago following great public outcry against the proposal to decriminalise homosexual acts in private between consenting adults which, in the Offences against the Person Act, is described as "outrages on decency".

In 1996, Government laid before Parliament two Bills. The first proposed to amend the sections in the Offences against the Person Act relating to sexual offences, and the second was the Incest (Punishment) Act. As of April 1997, these Bills were still before the Joint Select Committee of Parliament since its sittings on them had been adjourned the previous year for lack of a quorum.

The proposed amendments seek to make the offence of rape gender-neutral and enlarge its definition to include sexual violation by means other than vaginal penetration by the penis. In this regard, this proposal goes beyond the provision on rape in the Caribbean Community (CARICOM) model legislation with regard to sexual offences, which confines rape as hitherto to vaginal penetration by a male

* Caribbean Association for Feminist Research and Action, Jamaica

[1] I am indebted to the national Caribbean Association for Feminist Research and Action (Cafra) groups of Trinidad and Tobago, St. Vincent and the Grenadines, Guyana and Dominica, and in particular to Cathy Shepherd of Trinidad and Tobago, Josephine Whitehead and Doreen Holder of Guyana, Nelcia Robinson of St. Vincent and the Grenadines, and Christene and Irma Loford of Dominica for their assistance.

person.[2] If the amendments are passed, the offence of rape in Jamaica will apply to women and men, and will encompass the use of any part of the body or any implement to penetrate any opening in the body. To fit the Jamaican situation, but in keeping with the CARICOM model legislation, it also creates the legislative offence of marital rape when a decree nisi has been granted, when the parties are living separate and apart (with or without a separation agreement), there is in existence an order restraining contact between the parties or if the act occurs with the use of violence or force.

The draft legislation proposes to repeal the common law presumption that a boy under the age of 14 is incapable of rape. The presumption is retained in the CARICOM model legislation.[3] The Jamaican proposal is considered necessary because of many reported incidents of rape by boys under the age of fourteen.

There is notably absent from the Jamaican proposed amendment any provision relating to sexual conduct with a minor employee.[4]

The amendments also propose to abolish the technical necessity for a judge to warn a jury that it is dangerous to convict on a complainant's uncorroborated evidence of rape.

The Bill proposing amendments to the Offences against the Person Act also introduces provisions to regulate the use in evidence of a complainant's sexual history. It provides, *inter alia*, that no questions about previous sexual history shall be asked of a complainant, except with the consent of the judge. The CARICOM model legislation however provides for a complete ban on such evidence being adduced by or on behalf of the accused.[5]

In addition, the Bill prohibits the publication of a complainant's identity (but not the accused's) and of details of the proceedings in the case. It also provides for the offences of carnal abuse, indecent assaults, procuration, abduction, procuring defilement gross indecency.

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[2] Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual offences, clause 4(2).*

[3] *Id*, clause 3(3).

[4] See *Id*, clause 11, which "provides for an offence where an adult has sexual intercourse with a minor who is in the adult's employment, or who, by virtue of the employment is subject to the adult's direction or control or receives salary or wages directly or indirectly from the adult." Commonwealth Secretariat, CARICOM Secretariat, *Explanatory memorandum on model legislation with relation to sexual offences*, at 3.

[5] *Supra* note 3, clause 23.

The non-governmental organisation (NGO) response by Awoja's Legal Committee[6] supported the proposed amendments and stated some concerns. We opposed and still oppose the inclusion of the requirement that the Director of Public Prosecutions consent to any prosecution for marital rape. We fail to recognise any logical reason for this requirement and hold the view that:

(i) the circumstances in which a husband may be convicted of the rape of his wife are so detailed in the Bill as to provide sufficient checks and balances;

(ii) this requirement reflects the mistrust of women which gave rise to the need for corroboration;

(iii) it is a continuation of the paternalistic attitude towards married women; and

(iv) it may re-enforce the tendency of women to refrain from reporting marital rape, a consequence which is most undesirable.

We also submitted that the use of the words "idiot" and "imbecile" in the Bill was inappropriate and should be deleted and replaced by the term "persons with severe intellectual disabilities" or as in the CARICOM model legislation "mentally incapacitated person". In our view, these words are archaic and vague and derogatory. Our submission on this resulted from consultation with the Combined Disabilities Foundation. It was their view that persons with mild to moderate intellectual impairment have the same rights to enjoy normal sexual relations and the criminal sanction as drafted puts a blanket prohibition on such intercourse. In the Foundation's view, these persons are usually able to give or refuse consent, and ought to fall under the provisions related to rape.

The offence of procuration applies where anyone "procure[s] or attempt to procure" a person, under 18 years and "not being a prostitute or person of known immoral character", to have sexual intercourse with another. We recommend that the exception "not being a prostitute or person of known immoral character" be omitted because it ought to be an offence for anyone to "procure or attempt to procure" a person. It is our view that the retention of the statutory exception in the Offences against the Person Act in relation to prostitutes and persons of "known immoral character" could have the following effect:

(a) it may encourage accused persons to defend themselves by smearing the reputation of the complainant by trying to bring them within these categories;

[6] Awoja is an umbrella women's NGO in the Caribbean region.

(b) it may introduce a subjective element (that of morality) into criminal proceedings;

(c) it may exclude from the protection of the law some young Jamaicans who are potential victims of this type of procuration; and

(d) it establishes an underlying assumption that persons of lax sexual conduct have no right to the protection of the law.

We also criticised the fact that, though provision is made for the abduction of minors, none is made for the abduction of adults; and we considered that there ought to be such provision.

We also recommended that the offence of soliciting or living off the earnings of prostitution, which carries a sentence of imprisonment, also ought to be subject to the imposition of fines because of their economic nature. In this way, the punishment could to some extent be made to fit that part of the crime.

The second Bill (entitled "an Act to amend the Incest (Punishment) Act") extends the definition of incest and the category of persons who can commit the offence to include persons in "step" relationships to the victims and other persons *in loco parentis* to the victim. It also extends the definition of sexual intercourse, in the manner described above, and increases the penalty for incest to a maximum of life imprisonment. These proposed amendments are similar to provisions for incest found in the CARICOM model legislation.[7]

Trinidad and Tobago has a Sexual Offences Act 1986. It provides, *inter alia*, in Part 1 for the indictable offences of rape, sexual assault by a husband in certain circumstances; sexual intercourse with a female under 15; sexual intercourse with a female between 14 and 16; sexual intercourse with males under 16; incest; sexual intercourse with an adopted minor; sexual intercourse with a minor employee; sexual intercourse with a mentally-subnormal person; buggery; serious indecency; procuration; procuring defilement of a person; detention of a person; abduction of a female householder; permitting defilement of a minor under 16 and suppression of brothels. Part 2 contains supplementary provisions and offences relating to living on earnings of prostitution; aiding in prostitution; sexual intercourse; age; divestment of authority; consent; hearings in camera; evidence concerning sexual activity and sexual reputation; recent complaint; anonymity of complainants in committal proceedings; and alternative verdict.

This Act was not, I understand, based on the CARICOM model legislation. Nonetheless, there seem to be similarities between some of the provisions in the Trinidad and Tobago Act and those in the CARICOM model legislation.

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[7] *Supra* note 3, clause 7.

St Vincent and the Grenadines deals with rape and sexual assaults and attendant offences in its general criminal provisions. Guyana has no Sexual Offences Act and the law relating thereto can be found in the Criminal Law Act.

In the Bahamas, sexual offences and domestic violence are dealt with together in one Act, the Sexual Offences and Domestic Violence Act 1991. This Act is gender-neutral in its provisions. It provides for corroboration for the charge of procuration and for the charges of soliciting, living on the earnings of prostitution and for non-disclosure of AIDS.

The provision regarding AIDS makes it an offence for a person infected with a virus causing or known to cause AIDS, to knowingly have sexual intercourse with a consenting partner without disclosing the fact of infection to such partner. The penalty on conviction is 5 years' imprisonment.

It is a defence to the charge, if it is shown that the other person knew or had reasonable cause to believe, before the sexual connection, that the accused was so infected. At this time, the Bahamas stands alone in the region in having the provision relating to AIDS and sexual harassment as a criminal offence.

In other respects, the Bahamas legislation seems to have incorporated the provisions in the CARICOM model legislation. It also provides that sexual harassment by a prospective or actual employer or a person in a position of authority in any place of employment or an institution or co-worker is an offence punishable by a fine of $5,000 or imprisonment for two years or both.

Sexual harassment

As of April 1997, there was no legislation addressing sexual harassment in Jamaica, Guyana, St. Vincent and the Grenadines, or Trinidad and Tobago. All these countries, however, have plans afoot for the drafting of such legislation and to base it on the CARICOM model legislation. It is reported that the governments have, in some cases expressly and in others tacitly, recognised the need for such legislation.

In fact, on 8 March 1997, International Women's Day, the Minister of Legal Affairs and Attorney-General of Jamaica publicly stated at the ceremony held for that day, that drafting instructions would soon be given for the drafting of a Sexual Harassment Bill.

Domestic violence

In St Vincent and the Grenadines there is a Domestic Violence (Summary Proceedings) Act. In the Bahamas, domestic violence is dealt with in Part II of the Sexual Offences and Domestic Violence Act 1991. In Barbados, it is dealt with in the Domestic Violence (Protection Order) Act 1992. Trinidad and Tobago passed its Domestic Violence Act in 1991; it was assented to on the 16 August 1991. In Jamaica the Domestic Violence Act was passed in March and assented to in April 1995, but was put into operation on 6 May 1996. Guyana's Domestic Violence Act was passed on 31 December 1996. I understand that, though the CARICOM model legislation was used in the drafting of the Guyana Act, the final product was largely based on the legislation in Belize.

It seems clear from the provisions of the Acts of the other countries referred to that the CARICOM model legislation was used as a basis for framing their legislation. There are, however, expansions and/or additions in most instances in the Acts passed to provide for national needs.

On the other hand, Jamaica's Domestic Violence Act closely mirrors the CARICOM model legislation without taking into account conditions peculiar to the country. As a result of this, many persons are left unprotected by the Act. The NGO Awoja again made submissions recommending amendments to the Bill in order to make it more effective. The Bill was, however, passed without these changes, except in relation to the issue of the standard of proof, which had not been provided for in the Bill. The Prime Minister has, however, directed that consultations be held with the government and other interested and qualified persons, with a view to effecting necessary amendments. The amendments recommended, *inter alia*, were that:

- the definition of "household residence" be extended to include single parent households, those shared by siblings or unrelated persons;

- that the court be empowered to make financial provision orders at the same time as it grants a protection and/or occupation order; and

- that the persons who may make applications on behalf of children be extended to include the medical profession (and that there is a legal obligation in the medical profession to report incidents of abuse), teachers, guidance counsellors, other family members and neighbours.

It was also recommended that the conduct against which protection is available should also include damage to, destruction or prevention of the use of personal property, and that spouses should be "compellable" witnesses against each (other than in relation to child abuse). We recommend that the definition of spouse as it relates to common-law unions should specify a qualifying time for a person to be defined as a "spouse" and that concurrent jurisdiction be given to the Supreme Court. We were of the view that there ought to be public proceedings in the name of the defendant but

not of the victim-complainant disclosed. This can be a deterrent and a means of effectively educating the public about the types of conduct which fall foul of the law.

The provisions in the various Acts of these countries empower the courts to grant speedy redress for acts of domestic violence, being actual or threatened physical injury or mental injury by granting protection and/or occupation orders. The courts are also empowered to grant *ex parte* orders where the circumstances so warrant and can order the parties to receive counselling. Property interests are protected despite the making of occupation orders.

International standards

The Declaration on the Elimination of Violence against Woman, adopted by the General Assembly in 1993,[8] emphasises that violence against women is a violation of human rights and recommends strategies to be employed by member states to eliminate it.

We feel that without an Optional Protocol establishing a process for redress in the international arena, the Convention on the Elimination of All Forms of Discrimination Against Women[9] will not be of practical assistance to women in the Caribbean.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)[10] has been ratified by Bahamas; Barbados; Dominica; Guyana; St. Kitts and Nevis; St. Lucia; and Trinidad and Tobago. As of mid-1997, it had not been ratified by Antigua, Barbuda, Belize, Grenada, Jamaica or St Vincent and the Grenadines. Article 1 states:

> "For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death, or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."

By and large, the legislative provisions existing in the region do seek to grant protection and redress in keeping with this article.

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[8] GA Res 48/104, (1994) 1 IHRR 329.

[9] 1249 UNTS 13.

[10] Opened for signature 9 June 1994, entered into force 5 March 1995, 33 ILM 1534. The text of the Convention is available on the website of the Organization of American States. Inter-American Commission on Human Rights at http://www.oas.org/EN/PROG/ichr/enbas7.html.

Article 2 specifies that:

> "Violence against women includes physical, sexual and psychological violence:
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> a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
> b. that occurs in the community and is perpetrated by any person, including rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health or any other place; and
> c. that is perpetrated or condoned by the state or its agents regardless of where it occurs."

The legislative provisions existing in the region have fallen short of this article, in the restrictive definitions of dwellings and the exclusion of other inter-personal relationships, whether or not the parties share or have ever shared the same residence and the failure of too many countries to pass sexual harassment legislation. Articles 3[11] and 4[12] have largely been implemented in existing legislative provisions. Articles 5[13] and 6[14] which recite the right of women to the free and full exercise of civil,

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[11] Article 3 provides: "Every women has the right to be free from violence in both the public and private spheres."

1. [12] Article 4 provides: "Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, amongst others:
   a. The right to have her life respected;
   b. The right to have her physical, mental and moral integrity respected;
   c. The right to personal liberty and security;
   d. The right not to be subjected to torture;
   e. The rights to have the inherent dignity of her person respected and her family protected;
   f. The right to equal protection before the law and of the law;
   g. The right to simple and prompt recourse to a competent court for protection against acts that violate her rights;
   h. The right to associate freely;
   i. The right of freedom to profess her religion and beliefs within the law; and
   j. The right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making."

[13] Article 5 provides: "Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights."

[14] Article 6 provides: "The right of every woman to be free from violence includes, among others:
   a. The right of women to be free from all forms of discrimination; and
   b. The right of women to be valued and educated free of stereotyped patterns of behavior

political, economic, social and cultural rights, to be free of all forms of discrimination, and to the full protection of these rights as embodied in regional and international instruments on human rights, are still largely hopeful goals.

The failure of states to undertake education programmes in keeping with article 8 to ensure their citizens' full understanding of their human rights, derogates from the enjoyment of those rights and prevents the seeking of redress for breaches of those rights. Educational programmes on legislation and human rights conventions have largely been left on the shoulders of the NGO community. These organisations, in all the countries referred to in this paper, have been engaged in public education campaigns in the media, in their workshops and seminars, and in the production and distribution of brochures and pamphlets on the various legislative provisions.

It is the opinion of the NGO community, that there ought to be put in place a mechanism to sanction those states which fail to ratify international instruments for the protection of women against violence, as well as those who do ratify but take no step to give effect to them by passing protective provisions in their national laws.

On this point I make special mention of Dominica which ratified the Belém do Pará Convention on 6 June 1995. CAFRA Dominica is extremely concerned that the Government of Dominica has given no indication of its intent to pass legislation addressing domestic violence, sexual harassment or update its sexual offences law. They state that incest is rampant there and that sexual violation of young girls often goes unprosecuted, and that cases remain untried for years. The following are two examples as reported to me:

(1) A 17-year old girl was raped by her father at gun-point. The Director of Public Prosecution ruled that he could not prosecute the father as he would also have to charge the girl since the violation occurred after her 16th birthday. The girl became pregnant as a result.

(2) A 12-year old girl was raped by three men and that though she has identified her assailants, indeed she faints whenever she sees them, the men have never been arrested or charged.

I am informed that they have had in Dominica a draft Sexual Offences Bill for some time and, despite the strenuous lobbying of the women's groups there, nothing has been done to effect its passage into law.

This naturally leads me to examples of judicial insensitivity following the Dominican case.

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and social and cultural practices based on concepts of inferiority or subordination."

Guyana: I was supplied with reports of sentencing by two judges of men who had killed their female partners. In both cases the men pleaded guilty to manslaughter, a plea which was readily accepted and they were both sentenced to five years' imprisonment.

Trinidad: Senator Diana Mahabir-Wyatt, in an article in the *Trinidad Guardian* on 1 July 1994, stated that in five recent cases of murder by men of their wives, the tendency was to replace the murder charge with that of manslaughter and to give sentences of from five to twelve years.

An accused who killed his eight months pregnant wife was sentenced to 12 years. Another was sentenced to five years for killing his wife who was six months pregnant at the time of her death. In another case, a husband killed his wife and attempted to kill his two children – he was sentenced to five years for the killing of his wife and six years for the killing of his children.

The Senator pointed out that in Trinidad, one is liable to a sentence of 14 years under the law for the charge of forging a baptismal certificate. This, she said, demonstrates the relative value given in the legal system to the lives of women and children.

She also referred in her article to the adverse position of a wife found guilty of killing her husband whom she had found committing adultery in their home with her younger sister. She was charged with and tried for murder and on conviction sentenced to death. We in the NGO community join her in her condemnation of this diminution of the value of a woman's life as reflected in such sentences and their effect on the status accorded to women within the society.

Trinidad and Tobago: There have been several cases of murder committed after the issuance of occupation and/or protection orders under the Domestic Violence Act. There have been some reports in the media that men are aggrieved by the Act and the killings have occurred because of the Act. It is interesting to note that this has also occurred in Puerto Rico and the cry to repeal the legislation is being strenuously resisted by the women's movement there.

Jamaica: There have been no reported killings or acts of violence after the grant of orders under the Domestic Violence Act. Murder by both men and women of their partners tried and charged as murder when the circumstances so warrant. In Jamaica, following legislative amendment murder may be capital and non-capital murder. The mandatory penalty for murder was hitherto death, and both sexes were likewise sentenced to death. However, women have never been executed in Jamaica. Their sentences are generally commuted to life as a matter of practice. A singular example of discrimination in favour of women some say. There has, however, been an NGO and public outcry over recent sentences imposed for carnal abuse, for instance, the sentence of a J$5000.00 fine (approximately US$120.00) for the carnal abuse of a three-year old disabled child, or a suspended sentence of two years for the abuse of the eldest child to enable the father to return home, as he was married to the mother

who had two younger daughters with her, he had promised to pay for the treatment she may need, and it was reported that he was quiet and hard-working.

Conclusions

We are of the firm view that our governments do not adhere to their obligations under the international instruments on human rights for the protection of women from violence though they talk a good game. Their failure to pass national legislation quickly and to establish and undertake the training of our judges, police and other personnel who have to deal with victims and perpetrators of violence is evidence of their actual lack of interest. They must undertake gender education in schools from the earliest age and change the curriculum of schools. The services of experts on trauma and its effects are generally neither used during the drafting nor in the application of legislation relating to various forms of violence. In most of our countries there is no provision for treatment for the victims nor are there any mechanisms put in place to provide for them. It is clear to us that for women in the region to realise the standards contained in international instruments, a great deal has to be done and a change in the mental and social attitudes of all must be effected through a close working relationship between the sexes.

The NGO community feels the burden of continuous lobbying for legislation and the establishment of mechanisms, facilities and programmes to ensure the protection of women in our societies and enable them to enjoy the place and position of true partners of their menfolk. It is clear that in order to effectively discharge this burden women must be equally involved in the decision-making process in all countries in the region.

Annex A

Guide to Selected Human Rights Sources

Guide to Selected Human Rights Sources

Many of the documents referred to in the chapters in this compilation are available in both hard copy and electronic format (including on the Internet). The following list of sources and resources is intended to provide an indication of some of the principal sources of information, and does not purport to be exhaustive.

GENERAL GUIDES TO SOURCE MATERIAL

Frank Newman and David Weissbrodt, *Selected International Human Rights Instruments and Bibliography for Research on International Human Rights Law* (Cincinnati, Anderson Publishing Co, 2nd ed 1996) (supplement to Frank Newman and David Weissbrodt, *International Human Rights: Law, Policy and Process*, 2nd ed 1996): contains a detailed listing of human rights materials, including a good guide to on-line sources.

Rebecca Cook and Valerie Oosterveld, "A Select Bibliography of Women's Human Rights", (1995) 44 *American University Law Review* 1429–1471 [This bibliography is updated and made available on-line through the Internet by the Bora Laskin Law Library at the University of Toronto. The URL is: **http://www.law.utoronto.ca/pubs/h_rghts.htm**

United Nations, Centre for Human Rights, *Human Rights on CD-ROM: Bibliographical database for United Nations documents and publications 1980–1994* (Geneva, United Nations, 1995)

Women, Law & Development International and Human Rights Watch/Women's Rights Project, *Women's Human Rights Step by Step: A Practical Guide to Using International Human Rights Law and Mechanisms to Defend Women's Human Rights* (Washington, DC, Women, Law & Development International, 1997) contains a list of useful resources relating to women's human rights. For details, see **http://www.wld.org** or contact WLDI on email wld@wld.org or fax (202) 463 7480

COLLECTIONS OF HUMAN RIGHTS INSTRUMENTS AND DOCUMENTS

United Nations, *Human Rights: A Compilation of International Instruments* (New York, United Nations 1993), 2 vols: contains human rights instruments (treaties as well as other instruments) adopted by United Nations bodies

United Nations, *The United Nations and Human Rights 1945–1995*, The United Nations Blue Books Series, vol VII (New York, United Nations, 1995) contains many important United Nations documents, including the major treaties and the Vienna Declaration and Programme for Action

United Nations, *The United Nations and the Advancement of Women 1945–1996*, The United Nations Blue Books Series, vol VI (New York, United Nations, rev ed 1996) contains many important United Nations documents; the revised edition of 1996 also contains the Beijing Declaration and Platform for Action

Council of Europe, *Human Rights in International Law* (Brussels, Council of Europe Press, 1995) contains human rights treaties adopted by the United Nations bodies and regional organisations, including the Council of Europe, the Organization of American States, the Organization of African Unity and the Council on Security and Co-operation in Europe.

Organization of American States, *Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to May 1996)* (Washington, DC, General Secretariat, Organization of American States, 1996), contains human rights treaties adopted by the Organization of American States, with information about signatures and ratifications.

ELECTRONIC/ON-LINE RESOURCES

United Nations High Commissioner for Refugees, *Refworld* (Geneva, UNHCR)
This is a CD-ROM issued every six months to subscribers. In addition to material related to refugees, it contains a wealth of general human rights material, including the general comments and recommendations of the treaty bodies, recent documents of the Commission on Human Rights (including the reports of thematic rapporteurs such as the Special Rapporteur on Violence against Women) and Sub-Commission on Prevention of Discrimination and Protection of Minorities. Part of this material, as well as other material, is also available at the United Nations High Commissioner for Refugees website: **http://www.unhcr.ch/**

United Nations High Commissioner for Human Rights website
http://www.unhchr.ch/

University of Minnesota Human Rights Library
This contains a wealth of United Nations and regional human rights material. In addition to the texts of the major international and regional treaties, it contains the general comments and general recommendations of the treaty bodies, and the decisions and views of the Human Rights Committee under the first Optional Protocol since the forty-third session. **http://www.umn.edu/humanrts/**

United Nations website
This contains general information as well as full texts of international treaties deposited with the United Nations. **http://www.un.org**

UNICEF website
This includes information on the Convention on the Rights of the Child. **http://www.unicef.org**

United Nations Division for the Advancement of Women website
This contains material relating to the work of the Committee on the Elimination of Discrimination against Women and the Commission on the Status of Women **http://www.un.org/womenwatch/daw**

Council of Europe website
This contains general information on the Council of Europe **http://www.coe.fr/**
For information about the European Court of Human Rights in particular, including its judgments: **http://www.dhcour.coe.fr/**

Organization of American States website
This contains general information on the Organization of American States **http://www.oas.org/**
For the decisions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, see this site and also the University of Minnesota Human Rights Library (above).

International Labour Organisation ILOLEX CD-ROM
This is a CD-ROM issued to subscribers and providing the texts of ILO Conventions and Recommendations.

For general information, the status of ILO Conventions, and ILO documents see the ILO website: **http://www.ilo.org**

Commonwealth Secretariat website
This contains information and documents relating to the work of the Commonwealth Secretariat, including the texts of declarations and press releases of meetings **http://www.thecommonwealth.org**

Caribbean Community (CARICOM) website
This contains information on CARICOM and its policies **http://www.caricom.org**

Annex B

List of Participants

Caribbean Regional Judicial Colloquium, Georgetown, Guyana, 14 – 17 April 1997

ANTIGUA AND BARBUDA
The Hon. Kenneth Benjamin
High Court Judge
High Court
High Street
St John's

THE BAHAMAS
The Hon. Madame Justice Joan Sawyer
Chief Justice
Supreme Court
Nassau

BARBADOS
The Hon. Madame Justice Marie McCormack
Judge of the Supreme Court
The Supreme Court
Bridgetown

BELIZE
The Hon. Madame Justice Cynthia Pitts
Judge for the Family Court
The Family Court
Paslow Building
P o Box 1185
Belize City

GRENADA
The Hon. Justice Brian Alleyne
High Court Judge
Eastern Caribbean Supreme Court
The High Court
York House
St. George's

GUYANA
The Hon. Madam Justice Desirée Barnard
Chief Justice
Law Courts
Avenue of the Republic
Georgetown

The Hon. Madam Justice Claudette Le Bennett
Puisne Judge
Supreme Court
Victoria Law Courts
Avenue of the Republic
Georgetown

The Hon. Madam Justice Claudette Singh
The Hon. Mr Justice Dennis Hanoman-Singh
The Hon. Mr Justice Deonarine Bicessar
The Hon. Mr Justice Donald Trotman
The Hon. Mr Justice Carl Singh
The Hon. Mr Justice Ramraj Jagnandan
The Hon. Mr Justice Desmond Buchsmith
The Hon. Mr Justice Nandram Kissoon
The Hon. Mr Justice Oslen Small
The Hon. Mr Justice Prem Persaud
The Hon. Mr Justice Lennox Perry

Ms Ann Greene
Assistant Chief Probation and
Welfare Officer
Ministry of Labour and Social
Security
Cornhill Street
Georgetown

JAMAICA
The Hon. Mr Justice Wolfe
Chief Justice
Supreme Court
Public Buildings (East)
King Street
PO Box 8466
Kingston

The Hon. Madame Justice Hazel
Harris
Judge
The Supreme Court of Jamaica
Public Buildings East,
King Street
Kingston

ST LUCIA
The Hon Mr Justice Dennis Byron
Chief Justice
Chief Justice's Chambers
Eastern Caribbean Supreme Court
PO Box 1093
Water Front
Castries

The Hon Madame Justice Suzie
d'Auvergne
Puisne Judge of
Supreme Court OECS
Judges Chambers
High Court of Justice
Castries

ST. VINCENT AND THE GRENADINES
The Hon. Justice Dunbar Cenac
High Court Judge
Government Buildings
Kingstown

ST. KITTS & NEVIS
The Hon. Justice Neville L. Smith,
MBA
PO Box 694
Basseterre

BERMUDA
The Hon. Mr Justice L A Ward
Chief Justice
Supreme Court
21 Parliament Street
Hamilton HM12

BRITISH VIRGIN ISLANDS
The Hon. Justice Ephraim Georges
Judge's Chambers
P O Box 418
Roadtown
Tortola

CAYMAN ISLANDS
The Hon. Mr Justice George E.
Harre
Chief Justice
Chief Justice's Chambers
PO Box 495
Georgetown
Grand Cayman

TURKS & CAICOS ISLANDS
The Hon Mr Justice David
Hallchurch
Chief Justice
Chief Justice's Chambers
Grand Turk

Africa Region

ZIMBABWE
The Hon. Mr Justice A. R. Gubbay
Chief Justice of Zimbabwe
Supreme Court of Zimbabwe
PO Box 870
Causeway, Harare

South Pacific Region

PAPUA NEW GUINEA
The Hon. Justice Tracy Doherty
National Court and Supreme Court
The Supreme Court House
PO Box 7018
Boroko N.C.D.

Asian Region

INDIA
The Hon. Mr Justice P N Bhagwati
S-296, Greater Kailash, Part II
New Delhi 110 048

Human Rights Commission of Belize (HRCB)

Ms Antoinette Moore (Flores)
83 Commerce Street
Dangriga Town
Stann Creek District
BELIZE

Caribbean Association for Feminist Research and Action

Ms Margaret May Macaulay
21/23 Duke Street
Kingston
JAMAICA

Development Alternatives for Women in the New Era (DAWN) The Bahamas Chapter

Ms Marion Bethel
Attorney-at-Law
DAWN
PO Box N-3645
Nassau, NP
THE BAHAMAS

Ms Susan A Moge
President
Guyana Association of Women Lawyers
Georgetown Legal AID Clinic
Moraj Building
185 Charlotte & King St.
Georgetown
GUYANA

Commonwealth Magistrates and Judges' Association (CMJA)

Mrs Nicola Padfield
Fitzwilliam College
Cambridge
CBB 9EE
UNITED KINGDOM

Mrs Rosy Mannion
10 Duke Street
LONDON
W1M 5AA
UNITED KINGDOM

Women in Law and Development in Africa

Ms Florence Butegwa
Associate for Change
PO Box 9627
Kampala
UGANDA

International Women's Rights Action Watch (IWRAW)

Ms Shanti Dairium
Director
International Women's Rights Action Watch – Asia Pacific
2nd Floor, Block F
Jalan Maktab
54000 Kuala Lumpur
MALAYSIA

United National Division for the Advancement of Women

Ms Jane Connors
Chief, Human Rights Unit
Room DC2 1226
2 UN Plaza
New York NY 10017
UNITED STATES OF AMERICA

UNIFEM

Ms Joycelin Massiah
Regional Programme Advisor
UNIFEM, Alphonso House
1st – 2nd Avenue, Belleville
St. Michael
BARBADOS, W.1.

International Labour Organisation

Ms Constance Thomas
Senior Specialist
International Labour Standards
ILO Office
11th Street Clair Avenue
PO Box 1201
Port of Spain
TRINIDAD & TOBAGO

Observers

NEDERLANDSE ANTILLES EN ARUBA
The Hon. Justice Luis A. J. deLannoy
Chief Justice
High Court of Justice of the Netherlands Antilles and Aruba
4 Wilberlminaplein
Willemstad
Curacao

Resource Persons

Prof. Kathleen Mahoney
Faculty of Law
The University of Calgary
2500 University Drive N W
Calgary, Alberta
CANADA

Mrs Denise Noel-de-Bique
Gender Equity Co-ordinator/Consultant
Canadian High Commission
Mapple House
3-3A, Sweet Briar Road
St.Clair
P.O Box 1246
Port of Spain
TRINIDAD AND TOBAGO

Consultant

Mr Andrew Byrnes
Director
Centre for Comparative and Public Law
Faculty of Law
University of Hong Kong
Pokfulam Road
HONG KONG

The Caribbean Community Secretariat

Ms Thelma Rodney-Edwards
Assistant General Counsel
Caribbean Community Secretariat
Bank of Guyana Building
P O Box 10827
Georgetown
GUYANA

Commonwealth Secretariat

Ms Eleni Stamiris
Director
Gender and Youth Affairs Division
Commonwealth Secretariat
Marlborough House, Pall Mall
London, SW1 5HX
BRITAIN

Dr. Judith May-Parker
Assistant Director
Gender Affairs Department
Commonwealth Secretariat
Marlborough House, Pall Mall
London, SW1 5HX
BRITAIN

Mrs Gloria Mintah
Senior Programme Officer
Human Rights Unit
Legal and Constitutional Affairs Division
Commonwealth Secretariat
Marlborough House, Pall Mall
London, SW1 5HX
UNITED KINGDOM

Ms Patrice La Fleur
Senior Programme Officer
Commonwealth Youth Programme
Caribbean Centre
P O Box 101063
Georgetown
GUYANA

Gender Equality and the Judiciary

This publication presents papers contributed by senior judges, lawyers, academics and representatives of international and non-government organisations involved in promoting the human rights of women and the girl-child. It provides an overview of international and regional human rights standards relevant to the human rights of women, highlights the importance of using a gender perspective in judicial decision-making, examines challenges involved in promoting the human rights of women and the girl-child in domestic litigation, and explores ways in which international human rights standards can be relied on to ensure gender equality at the national level.

Commonwealth Secretariat

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