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 1 (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 1 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 l(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 concemed, 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

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[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.