

**Equality Jurisprudence under Commonwealth
Caribbean Constitutions Litigation relating to the
Human Rights of Women**

Equality Jurisprudence under Commonwealth Caribbean Constitutions and Legislation relating to the Human Rights of Women: The Eastern Caribbean

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Introduction

In the note inviting me to make this presentation, I was asked:

1. to describe the domestic legislative situation and give examples of cases where international and regional standards of equality have been useful in litigation and decision-making as well as promoting gender equality before the law;
2. if this has not happened, to indicate the capacity for future realisation; and
3. to assess the legal and practical difficulties that stand in the way of greater use of international standards in domestic litigation and the strategies that may be adopted to address this.

Examples of cases

In the Eastern Caribbean there has not been much, if any, litigation relating to the human rights of women. I have found no examples of any cases where international or regional standards of equality have been used in litigation or in promoting gender equality before the law.

The only case I have come across where the issue of women's constitutional right to non-discrimination has been raised on the pleadings is the St Lucian case *Girard, Jn Pierre & the St Lucia Teachers Union v Attorney General*.¹ Misses Girard and Jn Pierre were two unmarried teachers who were dismissed under regulation 23(3) of the Teaching Service Commission Regulations which reads:

"An unmarried teacher who becomes pregnant shall be dismissed on a second pregnancy if still unmarried".

¹ *Girard, Jn Pierre & the St. Lucia Teachers' Union v Attorney-General* (Unreported) Suits Nos 371, 372 & 471 of 1985 (HC) (St Lucia) (17 December 1986).

The Teachers' Union was involved because it had a collective agreement with the government, which provided for three months maternity leave to all employees regardless of marital status. St Lucia had been a party to the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) since 1982,² which specifically prohibits discrimination against women on the ground of their marital status. However, neither in argument, nor in the judge's reasoning in the decision, was mention made of any international or regional material as guidance to the interpretation of the constitutional provisions.

The trial judge delivered his decision in 1986.³ He concluded that the presumption of constitutionality had not been rebutted and that regulation 23(3) did not contravene the non-discrimination section of the Constitution. Instead, he found that there was a breach of the collective agreement and ordered reinstatement and/or damages for wrongful dismissal. The Government appealed.⁴ There was no cross-appeal on the constitutional issue and it was not considered. The appeal was allowed and the judgement set aside on the ground that the collective agreement could not be read as repealing regulation 23(3) by implication.

The matter was eventually resolved politically because after sustained public pressure the regulation was repealed by the Teaching Service Commission (Amendment) Regulation 1995.

Despite the lack of case law, there is every indication that the issue of gender equality has been addressed by Caribbean governments in their stated policies and in legislative programmes. I therefore propose to discuss briefly:

- constitutional provisions on gender equality;
- international and regional standards of equality;
- the capacity for realising international standards in domestic litigation;
- legal difficulties;
- practical difficulties; and finally
- the domestic legislative situation.

Constitutional provisions on gender equality

The Eastern Caribbean Commonwealth countries include six independent states and three dependent territories. I have used the Constitution of St Lucia as an example

² 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981. St Lucia acceded to the Convention on 8 October 1982.

³ *Supra* note 1.

⁴ St Lucia, Civil Appeals Nos 12 and 13 of 1986.

Equality jurisprudence in the Eastern Caribbean

since it is generally representative of the independent constitutions.⁵ The issue of gender equality is addressed with general declarations that every person whatever his race, place of origin, political opinions, colour, creed or sex is, subject to respect for the rights and freedoms of others and for the public interest, entitled to, *inter alia*, equality before the law and the protection of the law, protection for family life and specific prohibitions against:

1. laws which are discriminatory in themselves or in their effect; and
2. treatment in a discriminatory manner by any person or authority.

These prohibitions are subject to a number of exceptions regarding matters such as:

- appropriation of public revenues;
- people who are not citizens;
- personal law for persons on adoption, marriage, divorce, burial, dissolution of property on death and like matters;
- disabilities or restrictions or privileges or advantages reasonably justifiable in a democratic society;
- setting of standards or qualifications not specially relating to, for example, sex and race to be required of any person in any office or employment;
- the restrictions on the basic fundamental rights and freedoms authorised by the Constitution which in general refer to the requirements of defence and other matters of public safety and interest and the rights and freedoms of other persons; and
- matters relating to the civil or criminal procedures in court.

The Constitution defines discrimination as affording different treatment to different persons attributable wholly or mainly to their respective descriptions of sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description.

International and regional standards of equality

International treaties and conventions on human rights have long affected the Eastern Caribbean and continue to do so. The United Nations Charter includes, as one of its purposes, the universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. This has

⁵ St Lucia Constitution Order, SI 1978 No 1901.

been elaborated and developed in the Universal Declaration for Human Rights⁶ and in subsequent United Nations covenants on human rights.

There have also been a number of international conventions having specific relevance to women. The CEDAW Convention,⁷ which was adopted by the United Nations in 1979, is the international instrument which deals most comprehensively with the conditions of women and its obligations are legally binding on the States which become parties to it. All of the Eastern Caribbean States are parties to this Convention.

The regional treaties containing provisions promoting gender equality which may affect jurisprudence in the Eastern Caribbean include the European Convention for the Protection of Human Rights and Fundamental Freedoms⁸ and the American Convention on Human Rights.

In our specific context Caribbean Community (CARICOM) governments have subscribed to the Charter of Civil Society for the Caribbean Community. This is not a legally-binding instrument but it includes an affirmation of determination to promote policies and measures to strengthen gender equality between women and men in political, civil, economic, social and cultural spheres and makes specific undertakings with regard to women's rights to political office; equal employment and remuneration, not to be discriminated against by reason of marital status; pregnancy or health-related matters; and protection against domestic violence and sexual abuse.

In the CEDAW Convention, the term "discrimination against women" means:

"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality for men and women, of human rights and fundamental freedoms in the political, social, cultural, civil or other fields."⁹

By concentrating on the elimination of all forms of discrimination against women without seeking to eliminate discrimination experienced by men, the CEDAW Convention goes beyond gender-neutral human rights and requires that in this context women be seen as a separate class of human being.

⁶ GA Res 217A (III), adopted on 10 December 1948.

⁷ *Supra* note 2.

⁸ See the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 221. The amended text of the Convention and the protocols adopted to date are reproduced at 15 HRLJ 102.

⁹ *Supra* note 1, article 1.

The capacity for realising the intentional standards in domestic litigation

In considering the way in which the principle of non-discrimination against women will be applied by our courts, the dual prohibitions in the Eastern Caribbean Constitutions against making any law discriminatory in itself, or in its effect, and the prohibition against discriminatory treatment, which must necessitate looking at the effect of the conduct, would seemingly permit the court to emphasise both the universality and indivisibility of human rights and their full application to women as human beings, as well as to deal with systematic or indirect discrimination of women as a class or group of human beings.

In this volume Professor Mahoney expresses the opinion that the Canadian cases of *Andrews v Law Society of British Columbia*¹⁰ and *Brooks v Canada Safeway Ltd*¹¹ set a new test for discrimination which accorded with the definitions contained in the CEDAW Convention, and therefore with international standards of equality.¹² In this test, discrimination may be found where a distinction based on personal characteristics of the individual or group, which is not imposed on others and which continues or worsens a disadvantage, is determinable contextually by examination of the applicant's social, political and legal reality and not necessarily by comparison with that of another individual or group.

The main factors which influence the use of international standards in domestic litigation are:

- first, the nature of the litigation and the manner of its presentation (obviously the jurisprudence on gender equality will be developed in direct relation to the incidence of cases which raise the issue); and
- secondly, the principles of interpretation which will be applied by the courts.

One of the difficulties we face is the adversarial system of litigation, which causes the court to focus on the issues raised by the parties. If constitutional issues on gender equality are not raised by counsel, presumably because they are not aware of their existence, it reduces the probability that the judge will notice them. Having said this, I recognise that judges have the powers to initiate this consideration.

¹⁰ [1989] 1 SCR 143.

¹¹ [1989] 1 SCR 1219.

¹² See Mahoney, "Gender and the Judiciary: Confronting Gender Bias", in this volume.

The principles of interpretation

There is already judicial authority on the permissible employment of international norms as aids to interpreting constitutional provisions. I need refer only to the Bermudan case of *Ministry of Home Affairs v Fisher*.¹³ In that case, a Bermudan man married a Jamaican woman and brought her children, born out of wedlock, to Bermuda to live. Under the Bermudan Constitution, as in the case of other Caribbean countries, the stepchild of a citizen belongs. The Crown contended that an illegitimate person could not benefit under the stepchild provision because there is a legal presumption that the word "child" in legislative and other formal documents connotes legitimate child.

Lord Wilberforce delivered the judgement of the Privy Council. He rejected that contention. His reasoning included the consideration that the constitution was influenced by the human rights norms in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the United Nations Universal Declaration for Human Rights 1948. That premise, together with the context of the Constitution, which included every person in its guarantees of fundamental rights and freedoms, enabled the conclusion that in the Constitution the term "child" meant any child and was not restricted to a legitimate child.

In my view our courts will be open to consider the constitutional provisions relating to gender equality in the light of international norms as expressed in our constitutional documents and illuminated by international and regional instruments, the judicial reasoning from other jurisdictions which have already developed jurisprudence on these issues, and writings of legal scholars.

The legal difficulty

The Eastern Caribbean countries have dualist legal systems, which regard international law as being intrinsically different from domestic law. This generally means that international treaty law cannot be applied in domestic courts, until it has undergone some process of transformation or incorporation into the domestic legal system.

The power to utilise the international obligations of a state whether or not they have been integrated into domestic law in interpreting and applying national constitutions, legislation, and common law is already well established. The situation may be different, however, where national law which clearly accords with the constitution is inconsistent with the international obligations of a state or with international standards to which a state has subscribed. This is an area where legal and judicial concepts are developing. But the traditional and general principle of the common law has been that effect be given to the national law.

¹³ [1980] AC 319; [1979] 3 All ER 21.

Practical difficulty

I agree with the general view that traditional legal training has tended to ignore the increasing gender-sensitivity of our times. Judges and practising lawyers are often unaware of the remarkable and comprehensive statements of international human rights norms.

But I want to emphasise that the lack of awareness is community-wide. As I made an effort to prepare myself for this colloquium I made inquiries of a number of relevant institutions, organisations and individuals on the issue of discrimination against women in our societies. It was particularly interesting to note that apart from issues surrounding domestic violence and sexual crimes, women in the Eastern Caribbean do not seem to consider that there is gender inequality in our society.

This fact is perhaps a substantial contributing factor to the absence of litigation and other formal complaints relating to gender equality.

It would be beneficial to have better dissemination of information to judges, lawyers and law enforcement officials, meetings for exchanges of relevant information and experience, promotion of expert advisory bodies, knowledgeable about developments in the field of human rights of women and gender equality and appropriate courses at the University of the West Indies.

The dissemination of information needs a much wider audience than judges and lawyers. In fact, it would seem that women need to be targeted in this process. Perhaps even more crucial is the need for political, economic, and social analysis considering laws affecting women in the development process. Without increased awareness, little difference will be experienced in the trends of litigation on this issue.

I should make the comment that performing the reporting obligations under the CEDAW Convention, and the availability of such reports, will be useful in developing awareness. As of April 1997, the only countries in the Eastern Caribbean to report have been St Vincent and the Grenadines and Antigua and Barbuda, although all have expressed their intention to do so.

Domestic legislation

Violence against women

In the Eastern Caribbean women's groups and other organisations dealing with women's rights are most vocal on issues of violence against women. This is an area where regional standards have promoted gender equality before the law. Domestic

legislation has already responded or is on the agenda in all the States of the OECS and in general this response has been influenced to some extent by the CARICOM model legislation.

St Lucia has enacted the Domestic Violence (Summary Proceedings) Act 1995. The gender-neutral legislation provides summary remedies before the Magistrates Court for victims of domestic violence, who are for the most part women.

In general, this legislation is geared to ensure that the victims of domestic violence retain the use of their home, the area where it is located, their work place or other place where they happen to be to the exclusion of the respondent with suitable financial and other conditions.

A magistrate who has been applying this legislation since its introduction, expressed the view that it has had a dual effect:

1. provided a much-needed remedy;
2. provided a means of revising the attitude of men.

Apparently, many of the orders carried conditions of counselling. In almost every case the orders were discharged within three to four months and there have been no reported repetitions. Similar legislation has been enacted in St Vincent and the Grenadines and the British Virgin Islands (BVI). Dominica has a committee considering this legislation.

Sexual harassment

As of April 1997, the topic of sexual harassment has received limited legislative treatment domestically. Despite CARICOM model legislation on the issue, Belize is the only Caribbean country so far to have enacted legislation specifically dealing with sexual harassment: the Protection against Sexual Harassment Act 1996.¹⁴ In general, victims must rely on the general law relating to rape, and indecent or simple assault and attempt and relating to indecency in language or defamation. In St Lucia the Equality of Opportunity and Treatment in Employment and Occupation Bill contains provisions defining and prohibiting sexual harassment.

Crimes of violence and sex against women

There has been an increase in criminal prosecutions for violence against women and sexual crimes against women and children, including crimes of incest and statutory

¹⁴ Commonwealth Secretariat & CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual harassment*. See Thelma Rodney-Edwards, "CARICOM model legislation on violence against women in areas of sexual offences. Domestic violence and sexual harassment: a comparison with international standards and existing Commonwealth Caribbean legislation", in this volume.

rapes against girl children by their stepfathers. The definition of these crimes are generally consistent with international and regional standards.

Procedure and evidence

The issues of *in camera* trials, restrictions regarding adducing evidence of sexual history, provisions empowering the court to forbid publication of reports of details and the identity of the parties and the admissibility of video recordings of statements by minors have not received widespread legislative action. In Dominica there is a new Sexual Offences Bill addressing these issues on the basis of the CARICOM model legislation.¹⁵

Sentencing

Although in most states the domestic legislation with regard to sentencing has been amended to permit more severe penalties up to life imprisonment and even corporal punishment (the constitutionality of which has not been challenged in our courts perhaps because it is seldom imposed) the exercise of the court's discretion has been criticised as being too lenient. I can refer to two cases, both of which were abnormal and not representative of general sentencing trends. In the St. Lucian case, *R v Titus Reynolds*,¹⁶ the indictment charged murder. The female victim was brutally sexually assaulted and killed. The accused denied that he was the assailant. Much of the forensic evidence relied on to connect him with the crime was ruled inadmissible by the trial judge. The court subsequently accepted a plea of manslaughter and imposed a sentence of 15 years. This sentence was considered too lenient, and it sparked a period of public outrage, with public meetings and placards demonstrations, press involvement, and even debates in Parliament discussing the issue of mandatory life imprisonment for manslaughter of women by men.

In *Mark Williams v The Queen*,¹⁷ a case from St Vincent and the Grenadines, the indictment charged murder. A well-known lawyer shot and killed his girlfriend in the presence of crowds of people during Carnival. He was convicted of manslaughter by a jury and sentenced to five years. This, too, sparked intense public outrage characterised by public meetings and demonstrations, press involvement, and protests by human rights and women's organisations. It was felt that the leniency of these sentences diminished women or the value placed on their lives.

¹⁵ Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual offences*.

¹⁶ High Court Criminal Appeal, No 1 of 1996, St Lucia, unreported.

¹⁷ No 3 of 1996, St Vincent & The Grenadines, unreported.

Drafting principles

Gender-neutral drafting has not become commonplace as many legislative counsels consider it cumbersome and inelegant. The Interpretation and General Clauses Act usually indicates that words importing masculine gender include the feminine gender and vice versa.

Marital status

International and regional standards have been influential on the issue of generating legislative and policy reforms to counter discrimination on the basis of marital status.

I referred earlier to the repeal of the Teaching Service Commission Regulation which required the dismissal of unmarried mothers on a second pregnancy. It is reported that both private and public sector collective agreements now protect unmarried mothers from dismissal on that ground and the National Insurance Schemes provide benefits for them on an equal basis with married mothers.

I have been advised that in most of the states, unmarried teenage girls are permitted to continue their education after becoming pregnant at whatever level of school.

Common law spouse

Despite the CEDAW Convention, this issue has not yet been dealt with in legislation or in any constitutional challenge before the courts. As a result, unmarried women do not inherit from their male partners on intestacy. The courts recognise property rights based on the principle of resulting trusts. This only recognises the value of the woman's contribution to assets which the man owns, and gives her (and their children where there is no Status of Children Act) no interest in his property on intestacy.

The provisions providing financial support for a wife or divorced woman are not applied to unmarried women in any circumstances. This has not been addressed by legislation or litigation.

In St Lucia, like most Eastern Caribbean countries, the Affiliation Ordinance places a maximum on the awards for the maintenance, care, education and upbringing of children born out of wedlock. This maximum is usually considered inadequate by any standard of living. This contrasts with the unlimited discretion of the court in relation to children of a marriage where the means of the parents and their standard of living (or that of the person liable for support) is the main basis for assessing the amount of the award.

Status of children

In most jurisdictions the status of illegitimacy has been abolished by the Status of Children Act which also deals with equalising rights to inheritance and property. Thus, an illegitimate child will be able to inherit from the father's estate on an intestacy. It also rebuts the presumption in domestic legislation and formal documents such as wills that "child" means legitimate child. This has had important consequences. There are still some countries, such as St. Lucia, which have not passed this or similar legislation.

Employment

Equality in the workplace

Many countries now have Labour Codes or other legislation which provide for equality of remuneration and working conditions between women and men, for example the Antigua Labour Code which:

1. prohibits discrimination with respect to hiring, wages, hours or other conditions of work by reason of sex;
2. prohibits women to be employed under less favourable terms than men by reason of sex; and
3. empowers labour inspectors to ascertain whether there are contraventions of the provisions.

The legislative framework provides special enforcement machinery including an Industrial Court. Similar legislation exists in many states, for example the British Virgin Islands and Montserrat. St Vincent and the Grenadines has an Equal Pay Act. Dominica has a Labour Contracts Act and Labour Standards Act. St Lucia is considering its Equality of Opportunity and Treatment in Employment and Occupation Bill, which is intended to eliminate discrimination on grounds including sex, family responsibilities, pregnancy, and marital status. It defines key terms such *de facto* spouse, marital status, sexual harassment and specifically prohibits discrimination between men and women.

Citizenship

In general, the Constitutions provide for citizenship by descent from either parent. Citizenship by registration on marriage is usually marked (except in the case of Grenada) by some restrictions on the male spouse of a citizen. For example, in St Lucia there is power to refuse registration of a man's application on grounds of character, language, etc. No such restrictions apply to female applicants. The

distinction between the treatment of such male and female applicants is in section 102 (2) of the Constitution. In the British Virgin Islands there is no right conferred on the male spouse. This treats a woman who marries a citizen differently to a man who marries a citizen, and it affects various other rights such as acquisition of property – (without an Alien's Landholding License) the incidence of higher stamp duties and immigration status, including rights of residence and employment. In all of the Constitutions, however, protection from discrimination is specifically excluded in the case of non-citizens, and in cases relating to public revenues.

Constitutional amendments

One of the obligations under the CEDAW Convention is the amendment of constitutions. So far, none of the Eastern Caribbean States have effected any. From my inquiries, however, it is apparent that in almost all member states, the need for examination of the constitution and addressing law reforms is being discussed with varying degrees of intensity.

Conclusion

The subject of education, health care, access to finance, professional and managerial positions and political office have not attracted special legislation in the light of the human rights of women. However, in general, it is perceived that women have been making steady progress in all of these areas in the Eastern Caribbean.

Equality Jurisprudence under Commonwealth Constitutions/Litigation Relating to the Human Rights of Women: The British Virgin Islands

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Introduction

In 1986, the British Virgin Islands (BVI) adopted the United Nations Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention).¹ This is the most comprehensive international legal instrument to date dealing with the rights of women. There is therefore an obligation on the part of the government to make significant moves towards eliminating any form of sexual discrimination in society. Nevertheless, there can be found in the legal system of the territory scattered pieces of legislation which do in fact discriminate against women.

Geographical and physical setting

The BVI comprises about forty islands, fifteen of which are inhabited. Twelve of the islands are privately owned by expatriates. The total land area is about 59 square miles, half of which is hilly terrain. The population is put at 18,867 persons, distributed mainly on the islands of Tortola, Virgin Gorda, Anegada and Jost Van Dyke with slightly more males than females.

Constitutional framework

As a British Dependent Territory, the Constitution of the BVI is essentially a colonial constitution.² The power to make laws for the peace, order and good government of the Virgin Islands is given to the legislature by section 34 and a similar power is separately reserved to Her Majesty by section 71. Unlike the constitutions of independent countries, the Virgin Islands Constitution does not establish or create the judiciary. This is established by ordinary legislation – the

¹ 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981. Expressly extended to the British Virgin Islands upon ratification by the United Kingdom of Great Britain and Northern Ireland on 7 April 1986.

² Virgin Islands (Constitution) Order 1976, SI No 2145.

West Indies Associated States Supreme Court Order (Virgin Islands) Ordinance 1967 and the Magistrates Code of Procedure Act.³

Human rights

We have no Bill of Rights in the BVI. Fundamental rights provisions such as freedom from discrimination based on sex, freedom of speech, freedom of movement are absent from this written colonial constitution. As far as these rights are concerned, the position is regulated, as it is regulated in the United Kingdom, by ordinary legislation as enacted by the legislature, and also by the English common law.

The precarious position of having fundamental rights that rest on the basis of ordinary legislation which can be changed by the majority vote in the legislature is worrying to the average Caribbean person. That these rights are not entrenched results in a system of insecurity. Hence, there is a growing demand for constitutional reform and the need for a Bill of Rights in the Virgin Islands Constitution.

The Englishman may be content with having his freedom of speech rest on ordinary unentrenched legislation for the simple reason that he has a tradition of respect for fundamental rights. And even in England today, Lord Scarman in delivering the 4th Sovereignty Lecture sponsored by the Charter 88 Trust declared:

"A constitution without a Bill of Rights enforceable in the Courts is an appalling anomaly which no civilised state should tolerate."

Perhaps the most profound practices of discrimination against women are to be found in the common law. Judges, throughout the ages up to the beginning of the twentieth century, handed down numerous court decisions with respect to various aspects of social, economic and political life which treated women differently from men.

That some interpret the Christian religion as showing a preference for men over women is evident by the present Roman Catholic Church, the head of which, the Pope himself, has refused to have women ordained in the church as priests precisely on the grounds that it is contrary to the teaching of the church.

Since Christian religion has had, from inception, a profound effect on the thought processes and beliefs of mankind, then it may be argued that religion bears some responsibility for the belief that women are inferior to men.

³ Cap 45 of the Revised Laws of the Virgin Islands.

Equality guarantees in the British Virgin Islands

So, from early times one could find ridiculous aspects of discrimination against women, and the English common law as it developed reflected this unequal position between the sexes. This inequality came out clearly in the areas of contract and tort, voting rights, property law, succession, domicile and other areas.

English law recognises marriage as "the voluntary union for life of one man with one woman to the exclusion of all others." Flowing from this definition came the common law rule that husband and wife are one person, the legal existence of the wife during the marriage being regarded as incorporated and consolidated or merged into that of the husband.⁴

Therefore, the wife was considered as generally incapable of acquiring or enjoying any property, real or personal, independently of her husband and he acquired a freehold interest during their joint lives in all estates of inheritance and the estates of which the wife was seized at the time of the marriage, or of which she became seized during the coverture.

Because of her inability generally to own property, she had at common law no capacity to enter into a contract unless she was living apart from her husband under a decree of judicial separation or unless she was in possession of a protection order issued by a court. If she purportedly entered into a contract, she incurred no personal liability under it. In other words, she was considered as having no legal capacity to make a simple contract while living with her husband. Her position as to liability for torts committed by her was based on her inability to own property. One could not, therefore, proceed against a wife alone as a result, but had to join her husband as defendant and it was only if he died, that she became liable personally.

Thus, as a general rule, the common law considered a woman as not being equal to a man; for whereas the man was responsible for torts committed by his wife, she was excluded from any liability whatsoever for torts. Nor was she allowed to sue anyone for any tort or wrong committed against her.

Furthermore, at common law a woman had no voting rights. Even though she might be in possession of a freehold interest, she was incapable of voting.

At common law, a wife's domicile was submerged into that of her husband. She was bound to take the domicile of her husband. Marriage resulted as an absolute gift to the husband of all personal chattels and money belonging to the wife at the time of the marriage or acquired by her during coverture, including chattels acquired by her while living apart from him and her personal earnings. Moreover,

⁴ See generally Blackstone, *Commentaries on the Law of England* (8th ed, 1842) Volume 1, and more specifically Glanville Williams, "The Legal Unity of Husband and Wife" (1947) 10 *Modern Law Review* 16.

the legal custody of the children remained with the husband who had the exclusive right to decide on their upbringing.

Modification of the common law

The common law position which prevailed in the BVI has, however, been rectified by progressive legislation. Voting rights and the right to be elected to the Legislative Council were given to the woman on equal terms with men. The married woman was also given the right to own separate property apart from her husband's as a *femme sole*, and husband and wife were considered as two separate persons as far as property acquisitions were concerned. Married women were entitled to enter into contracts on their own, sue or be sued in tort and to be treated as separate legal persons.

The Married Women's Property Act 1897 made sweeping modifications to the common law status of women, enabling them to acquire, hold and to dispose of any real or personal property as their separate property. They could enter into and render themselves liable in contract or tort as if they were single women. In respect of property ownership, suing and being sued in contract and tort they were under this Act given equal status with men.

Section 31 of the Constitution and the Elections Ordinance 1977⁵ gave equal voting rights to women. Section 28 of the Constitution gave women the same right as the men to be elected as members of the Legislative Council. Today, there are in fact three women, one *ex officio*, in the thirteen-member Legislature, one of whom, for the first time, holds ministerial office.

The Guardianship of Infants Act⁶ gives a mother equal rights with the father in applying for custody, the welfare of the infant being the first and paramount consideration. A woman who is granted custody of the child will generally have the right to determine its upbringing.

Section 4 of the Jury Act⁷ now permits female jurors to sit in criminal trials. Section 59 of the Matrimonial Proceedings and Property Act 1995 gives a wife the right to domicile independent of her husband.

Notwithstanding these statutory modifications of common law, which have improved the status of women, there are other significant areas of the law where inequality with respect to women still persists.

⁵ Cap 133 of the Revised Laws of the Virgin Islands.

⁶ Cap 233.

⁷ Cap 37.

Citizenship rights, belonger status by marriage and discrimination in citizenship rights of male spouses

Section 2(2)(f) of the Virgin Islands Constitution Order states that a person shall be deemed to belong to the Virgin Islands if that person is the wife of a person who is deemed to belong to the Virgin Islands and is not living apart from such a person under a decree of a competent court or a deed of separation. In other words, the wife, under this provision, is deemed to belong to the Virgin Islands if her husband belongs thereto. The wife in effect gets her belonger status because of her husband.

However, the converse situation is not true, for only the wife is deemed to belong to the Virgin Islands under this provision. Nor does it apply to the position of a woman, already deemed to belong to the Virgin Islands, who has such a husband. In such a case, the husband would not be deemed to belong to the Virgin Islands under section 2(2)(f). This section therefore discriminates in that it makes the husband the operating vehicle through which the wife may be given belonger status for the purposes of the Constitution.

Significantly, a similar discrimination existed under the British Nationality Act 1948 and this limitation was adopted by the draftsmen of section 2(2)(f) of the BVI Constitution. The British have since recognised the repugnant character of this sexual discrimination and have removed it by repealing the relevant provisions of the 1948 Act and enacting the British Nationality Act 1981. But in the BVI the discrimination persists. Ironically, it is this self-same British Nationality Act 1981 which regulates citizenship of the British Virgin Islands and, indeed, all British Dependent Territories.

Section 2(2)(h) of the Constitution similarly makes a widower the operating vehicle for the conferment of belonger status but not the widow.

These provisions clearly discriminate against women by making the husband the operating vehicle through which belonger status can be conferred on the wife but failing to make the wife the operating vehicle to confer similar rights on her husband.

Immigration matters

The Immigration and Passports Act 1977 stipulates the persons who are entitled to land and embark in the Territory. Under section 18 of the Act a person may apply for a certificate of residence and the Governor in Council may grant such a certificate. A person who possesses such a certificate is entitled to land in the BVI.

Section 18 (2) of the Act states that a person who has a certificate of residence may apply to the Governor for him to endorse the certificate so that "that wife and any dependent child" under the age of 18 years may take up residence in the territory.

Thus a wife's authority to get a certificate of residence, under section 18(2) of the Act, is dependent on her husband.

That section gives the husband the power to allow his wife and child to reside with him in the territory by applying to the Governor for this purpose, but the wife is not given a similar power for her husband and child. In other words, if a wife obtained her certificate of residence under section 18(1), she cannot have the certificate endorsed so that her husband could reside in the Territory. Section 18(2) of the Act is unreasonably discriminatory against women.

It is interesting to note in passing that the Turks and Caicos Islands Constitution Order⁸ does contain a Bill of Rights and provides a measure of protection for discrimination on grounds of race etc., affords no protection whatever against discrimination on grounds of sex. Section 78 (1) stipulates that:

"... no law shall make any provision which is discriminatory either of itself or in its effect."

Whilst section 78(3) provides that:

"In this section, 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

The word "sex" is conspicuously absent as a discriminatory ground. This in fact was also the situation in Zimbabwe at independence in 1981 but was rectified by a subsequent amendment last year, as Chief Justice Allan Gubbay informed this gathering.⁹

For legal purposes, historically, women have generally had many institutionalised incapacities. The common law basis of much of the law has created many anomalies in Caribbean society as a whole and no less so in the BVI. Following the adoption of the CEDAW Convention, the BVI has effected a number of legislative reforms designed to promote women's rights and eliminate discrimination against them. Over the last two decades especially, the British Virgin Islands, in its own way, has made enormous strides in terms of the legal infrastructure to improve the

⁸ SI1988 No 247.

⁹ See Gubbay, "International and regional standards in women's human rights: their importance and impact on the domestic scene, the position in Zimbabwe", in this volume.

Equality guarantees in the British Virgin Islands

lives of women, children and the family as a whole. The past ten years has witnessed a plethora of social legislation in particular, designed to promote and enhance the political, social and economic well-being of women in the Territory.

It is noteworthy that the Heads of Government of the Caribbean Community (currently all men) signed the Charter of Civil Society at their meeting on 20 February 1997 in Antigua. While this is not an instrument binding on the individual governments, it constitutes a statement of the ideals to which governments in the region have committed themselves to adhere.

Article XII of the Charter, which is captioned "women's rights", provides:

"For the promotion of policies and measures aimed at strengthening gender equality, all women have equal rights with men in the political, civil, economic, social and cultural spheres. Such rights shall include the right:

- (a) to be elected or appointed to public office and to be eligible for appointment to positions of decision-making bodies at all levels of their society;
- (b) to be afforded equal opportunities for employment and to receive equal remuneration with men for work of equal value;
- (c) not to be discriminated against by reason of marital status, pregnancy, lactation or health-related matters which affect older women;
- (d) to legal protection including just and effective remedies against domestic violence, sexual abuse and sexual harassment."

This is important to women of the Virgin Islands who have no Bill of Rights and live with a Constitution which has provisions which discriminate against them enshrined in it. It is a most noble aspiration which should give fresh impetus to continue the necessary legislative reforms and implement appropriate social policies to ensure that the law and practice of the territory vis-à-vis women are equitable and accord with international human rights norms.

The Women's Desk set up a few years ago in the Chief Minister's Office has been a driving force in arousing public interest in and stimulating public discussions of women's issues and so helping to formulate public policy with regard to some of these changes.

The legislative measures to which I earlier alluded include the Labour Code 1975, section A2 of which sets out the national policy underlying it and provides that:

"It is hereby declared that the following expressions of national policy underlie and shall be used in the interpretation of the various provisions of the Code. There should be no different

standards or levels of pay for equal service regardless of age, nationality, sex, race, creed, colour or political beliefs."

The year 1996 saw the enactment of The Domestic Violence (Summary Proceedings) Act which provides summary remedies and sanctions in cases of domestic violence. Domestic violence is rife and on the increase in the Virgin Islands with women and children more often than not being the unfortunate victims. The Act is intended to protect all members of a household and to resolve a dispute and bring the issue to court as quickly as possible. It has had a large measure of success since its enactment on 1 March 1996. One of its most important features is that it provides for a "cooling time" where an interim protective order is placed on the batterer, moving him, or her, from the house for seven days. This is set up as a pre-emptive strike, to use a military term, in order to create peace. There is provision for protection orders, occupation orders and tenancy orders.

Domestic violence is widely defined to mean "any act of violence, whether physical or verbal abuse perpetrated by a member of a household upon a member of the same household which causes or is likely to cause physical or mental harm to the abused party or any other member of the household." The police are provided with the power to lay charges where there is a breach of the court's order or where a domestic violence offence is committed. The legislation is written in language which is gender-neutral and which prohibits news reports of cases in court. An order for counselling in respect of one or both parties can be made.

The importance of this kind of legislation comes to the fore when statistics show that of 911 murders in Jamaica, three-quarters were as a result of domestic violence.

The Matrimonial Proceedings and Property Act 1995 has modernised our divorce laws and makes provision for reconciliation and counselling as well as for a more equitable division of property on dissolution. Provision is also made for the protection and custody of children and financial provision for support of a spouse as well as the children of the family.

Either party can be ordered to maintain the other and the children and both parents are entitled to custody of the children. A married woman can now decide where she wishes to be domiciled, in place of the former rule which forced her to adopt and retain her husband's domicile.

A new Criminal Code was enacted in April 1997 with enhanced penalties for rape and other sexual offences. A significant part of this new Act deals with rape. At common law, a husband could not rape his wife. This was grounded, as some of you may know, on the pronouncement of Sir Matthew Hale (c 1676) that:

"The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent

and contract his wife hath given up herself in this kind unto her husband which she cannot retract."

All of this has now changed.

A draft bill for an Act entitled the Status of Children Act 1996 is to be tabled before the legislature. It will provide for the equal status of all children in the eyes of the law, thus removing from the statute books the age-old nomenclature of "legitimate" and "illegitimate" in describing the status of children. In a small parochial Christian society such as the BVI, it is not surprising that this proposed measure has stirred up widespread debate and has encountered strong opposition from certain quarters.

The bill is made applicable to all children, whether born before or after its commencement (once enacted), and to all dispositions and instruments made after it is enacted. In that context, all children, male or female, shall be of equal status and enjoy identical rights, privileges and obligations. Provision is also made for circumstances in which paternity may be presumed and established.

Other legislation, such as the Social Security Act 1975, provides significant protection and benefits for the health and well-being of women in the work force (for example, maternity leave with pay), which they did not hitherto enjoy.

That said, there are still a number of critical areas which need to be addressed. Among these are the problems of teenage pregnancies; continuing education for teenage mothers; support for children and mothers; the level and effective enforcement of maintenance orders; and procedures which impact adversely on the economic position of BVI women generally and on single mothers in particular. There is, for example, no provision for attachment of earnings orders in our laws.

There is also the growing need for "protection" in the widest sense for women in common law unions. Unlike some Caribbean and Commonwealth countries, our matrimonial law, modelled as it is on its English counterpart, does not recognise stable *de facto* relationships for purposes of maintenance and property rights arrangements. It is felt in some circles that legislation of this kind elevates the practice of concubinage to the level of marriage and undermines the sanctity and values which the latter enshrines.

Recent laws, however, have shown a willingness to search for and implement appropriate legislative models, and reforms represent a departure from the usual conservative approach. Changes generally have moved towards putting to rest the common law ghosts which have haunted several areas of our laws.

Conclusion

Since discrimination against women is prevalent and its existence is often not appreciated or ignored, it is of considerable importance that international statements of the fundamental rights of women should be made known and ought to be widely publicised.

This is of crucial importance to the women of the British Virgin Islands and other territories which have no Bill of Rights for this awakens concern to the fact of discrimination in society and encourages the initiation of reform because discrimination against women is expressed to be unacceptable internationally. It further sets a standard which can be aspired to and adopted by those concerned in the process of reform.

As British dependent territories, the formal adoption and ratification of all international conventions of course rests with Her Majesty's Government in the United Kingdom. There is, however, an impressive body of jurisprudence, both international and regional, concerning women's human rights.

This jurisprudence is of practical relevance and value to judges and lawyers generally. Of course, where the language of the law is clear, then the judge must give effect to it but there are many cases where the domestic law (whether constitutional, statute or common law) is ambiguous, uncertain, incomplete or capable of bearing an interpretation consistent with international norms of women's human rights, and in such cases the courts should have recourse to these international norms and mould and develop the law consistent with these norms.

Equality Jurisprudence under Commonwealth Caribbean Constitutions/Litigation Relating to the Human Rights of Women in Guyana

*Justice Claudette Singh,
High Court of Guyana*

Introduction

There was a time – though not long ago – when any discussion of the status of women was an occasion for facetious and snide comments by over-confident males. These days, men have learnt to be wiser and more careful. It is not that we women have changed but that we are asserting our rights. New perspectives have grown out of the changes wrought by modern life in the social and working environment. New openings have been created to provide women with opportunities to release their natural energies, to demonstrate their true capabilities and, in due course, to equal and sometimes surpass men in many an area previously closed to them by male prejudice and presumption.

The basic factors working for change are no doubt social change, educational, economic, psychological and political. As in so many other cases, the influence thereby exerted needs, however, to be supported and concretised by the interposition of the legal process and it may be that there are indeed times when it is the legal process which needs to take the leading role.

Before we examine these changes we need to look at the historical background in Guyana.

- Before 1904, a woman's property was effectively under the control of her husband. In that year, the law was changed to give her separate rights.
- Women obtained the franchise in 1928.¹
- Women obtained the right to sit in the legislature in 1945.²
- Prior to 1952, women were treated as being under the tutelage of men. But the man's superior status carried a price; he was subject to civil liability for certain

¹ British Guyana (Constitution) Order in Council 1928, s 28.

² British Guyana (Constitution) (Amendment) Order in Council 1945.

acts of his wife. So, in this case, the boot was on the other foot. Yet, whichever foot the boot was on, it rested on the invidious assumption of the wife's inferiority. The law on this point was however changed in 1952.³

- Women became eligible to sit on juries in 1961.

It would not be true therefore to assume that the law has been completely static in respect of the status of women. However, it would be equally fair to recognise that the pace at which changes were made was very slow. This has changed in the recent past.

Recent changes

Equality and citizenship

The fundamental principle of equality of women with men has now been put on the highest legal plane. It is set out in article 29(1) of the Constitution, which reads as follows:

"Women and men have equal rights and the same legal status in all spheres of political, economic and social life. All forms of discrimination against women on the basis of their sex are illegal."⁴

In keeping with that general principle, Chapter IV of the Constitution removed certain discriminatory features affecting the citizenship of women under the previous Constitution.⁵

Before the enactment of the 1980 Constitution only the wives of Guyanese males could have applied to become citizens. Now husbands of Guyanese females can apply to become citizens. Article 45 provides:

"Any person who, after the commencement of the Constitution, marries a person who is or becomes a citizen of Guyana shall be entitled *upon making application in such manner and taking such oath of allegiance as may be prescribed, to be registered as a citizen of Guyana.*" (emphasis added)

³ Married Persons (Property) Act (Cap 45:04), s 13.

⁴ The Constitution of the Co-operative Republic of Guyana 1980.

⁵ *Ibid.*

A child could once have only acquired citizenship through his father. Now a child may acquire citizenship through his mother.⁶

Employment

Employment has been a field rich in discrimination against women. Much of it was sought to be rationalised on the ground of biological and other physical differences between sexes. On the basis of such considerations, legislation was often justified as being really intended to benefit women and not to discriminate against them. There may indeed be some pieces of legislation that can be so justified, but a lot of it is in essence discrimination disguising itself as protective legislation.

In Guyana, the Factories (Health and Welfare) Regulations⁷ were amended in 1983 to remove certain restrictions on hours of work and overtime in relation to women. (Women were not allowed to work for more than 8 hours per day or 42 hours per week, or on Sundays). We have, however, retained the competence to legislate for the protection of women where this is truly warranted on physical or biological grounds, but we have not yet found it necessary to exercise this power.

Status of children

Associated with the status of women is the question of children born out of wedlock, who were designated illegitimate. However, by the Children Born out of Wedlock (Removal of Discrimination) Act 1983, the then existing discrimination between the mother and father of a child born out of wedlock with regard to inheritance and guardianship was removed.⁸

The legislation removed from the statute the book term "bastard" and substituted for it the seemingly less unhappy phrase "children born out of wedlock".⁹ Such a child now has the same rights as a person born in wedlock and on the intestacy of his or her father is entitled to succeed on an equal basis with his legitimate brother and sister. Correspondingly, the father is also entitled in some circumstances to succeed to the estate of his intestate child born out of wedlock, but is only allowed to do so where he was adjudged to be the father or had acknowledged the child to be his own and had contributed towards the child's maintenance.

⁶ *Id.*, article 44.

⁷ Chapter 95:02 (Reg 9/83).

⁸ Children Born Out of Wedlock (Removal of Discrimination) Act 1983, section 30. See also article 30 of the Constitution of Guyana.

⁹ Evidence Act (Cap 5:03), s 61 – as amended by the Children Born out of Wedlock (Removal of Discrimination) Act No 12/83.

Income tax

In 1980, the law was amended so as to enable a taxpayer to claim an allowance for a reputed wife or reputed husband.¹⁰ At one time, the husband was liable to pay out of his income the full income tax due on the joint income of himself and wife if they were both employed. There was no legislation as to separate assessments. The wife's portion of the tax would be collected from her only where it was not practicable to collect it from her husband. Deduction is allowed for reputed wife as well as a reputed husband.

Pensions

In the case of pensions, a reputed wife and children born out of wedlock were placed in the same position as lawful wives and legitimate children in the legislation dealing with Guyana Defence Force personnel.¹¹

Dependants

It is also important to mention an interesting piece of male-oriented legislation, the Dependants' Pension Fund Act. This Act was intended to benefit widows only. So here the widower of a deceased female officer got nothing. True, it was men who were discriminated against, but the discrimination was founded on an underlying assumption of female inferiority.

This discrimination was removed in 1978 when widowers were also made eligible for payment of pensions.¹² Correspondingly, prior to 1978, only men were eligible to contribute to the Fund. Women were, in that year, also made eligible as contributors.

Equal rights

In 1990, the Equal Rights Act was passed bringing equality for women with men and greater benefits for women.

This Act gave effect to article 29 of the Constitution, which provides for equal rights and opportunity for both men and women. Men and women are to be paid equal remuneration for the same work or work of the same nature. Further, in the area of employment, men cannot be afforded more favourable opportunities or conditions than women.

¹⁰ Act 18/80, s 21A.

¹¹ Defence (Pensions and Gratuities) Regulations (Cap 15:01), regulation 8(3).

¹² Dependant's Pension Act 1978 (Cap 27:08), s 2.

The Act also amends a number of Acts presently on the statute books, which either perpetuate inequality or make provision for the members of one sex to enjoy benefits, ensuring to the other. Some examples are provided in the following sections.

Bail

An accused who is a married woman could previously only provide recognisance of her bail through a surety. The amendment, which removes this discrimination against women, allows her to provide recognisance without the need for a surety.¹³

Adoption

The Citizenship Act was amended to remove discrimination against women in a joint adoption of a minor if either parent is a citizen.¹⁴ Before this amendment a child, in these circumstances, would only have become a citizen if the male adopter was a citizen. Under section 2(1)(a) of the Immigration Act¹⁵ either spouse can be a dependent of the other. Had this been the law at the time of *Nielsen v Barker*,¹⁶ case the decision *might* have been different.

Legitimation

In addition, the Legitimacy Act,¹⁷ provides for legitimisation of a child by subsequent marriage of its parents if the child's father was domiciled in Guyana. The amendment removed discrimination against women by providing for legitimisation where either parent was at the date of the marriage domiciled in Guyana.

***Married Persons (Property) (Amendment) Act 1990 (amending the Married Persons (Property) Act)*¹⁸**

The Married Persons (Property) (Amendment) Act 1990 inserted a number of provisions that are beneficial to married persons and is also applicable to a single woman and a single man living together in a common law union.

¹³ Criminal Law Procedure Act (Cap 10:01), s 89(3).

¹⁴ Citizenship Act (Cap 14:01), s 2(3).

¹⁵ Cap 14:02.

¹⁶ (1982) 32 WIR 204.

¹⁷ Legitimacy Act (Cap 46:02), s 10 as amended by the Equal Rights Act No 19/90.

¹⁸ Cap 45:04.

This Act makes provision for money saved, in the absence of an agreement to the contrary, from housekeeping allowance, or property acquired out of such money, to be treated as belonging to both parties in equal shares.¹⁹

Section 4 of this Act, amending section 15 of the Married Persons (Property) Act is noteworthy because of its unprecedented provisions:

- (i) Where parties have been living together for less than five years, the judge is required to quantify the contribution made by a spouse.
- (ii) In the case of parties living together for five or more years and the:
 - (a) a claimant party was not working, then she is entitled to one-third, or
 - (b) if the claimant party was working, she is entitled to one half.

Family and Dependants Provision Act 1990

The Family and Dependants Provision Act 1990 aimed to prevent family dependants of deceased persons being left with inadequate provision, when the person on whom they were dependent died possessed of sufficient estate to provide for, or contribute towards their maintenance.

Provision is made for the court to take into account earning capacities, financial obligations and responsibilities. In the case of a surviving spouse, the court is to have regard to the duration of the marriage and the contribution made by the applicant to the welfare of the family.²⁰

In the case of a child, any educational commitments and prospects will be considered. In the case of a dependant outside the immediate family, the basis upon which the deceased assumed responsibility for that person's maintenance will also be taken into account.²¹

The court is also empowered to review certain transactions effected by the deceased (otherwise than for full valuable consideration) with the intention of defeating claims for financial provision and to make the property comprised in those transactions available for provision. Property disposed of or settled by the deceased less than five years prior to his death as well as contracts made by the deceased in his lifetime to leave property by his will can be enquired into.²²

¹⁹ Married Persons (Property) (Amendment) Act 1990, s 60.

²⁰ Family and Dependents Provision Act 1990, s 5.

²¹ *Ibid.*

²² *Id.*, s 12–15.

Rape cases and protection of the victim: Criminal Law (Amendment) Act 1991²³

In 1991, the Criminal Law (Offences) Act²⁴ was amended by the Criminal Law (Amendment) Act to provide for trials in rape cases involving women and girls to be held *in camera* and for restricted reporting of anything which would tend to disclose the identity of the complainant.²⁵ Prior to this legislation, there were cases where victims were rather reluctant to prosecute these offences because of their fear of publicity.

Since this legislation was enacted, one victim, who had since emigrated to the United States following the incident, returned for the trial. She opted to have the trial conducted in open court as part of her therapy. Her aim was to assist another young girl in her neighbourhood, whom it was alleged her assailant had also de-flowered. It worked and the girl came forward. The accused, who was then a 73-year old man, lost his appeal and his conviction and sentence were affirmed. At the subsequent trial, in relation to the other complainant he pleaded guilty and was sentenced.

Domestic Violence Act 1996

The Domestic Violence Act became law on 31 December 1996. This Act conferred for the first time a wide variety of powers to help protect battered women and children from those who were making their lives miserable by various degrees of physical assault. Regrettably there are no reported cases.

Conclusion

While there is room for improvement, the main point is that we have broken down the myth and taboos which inhibited action in the past and have, in fact, embarked on a programme of action to achieve equality

But although we in Guyana have happily moved far from these cruel concepts, there is yet some way to go before we succeed in achieving the ideal of total equality.

²³ Cap 19/1991.

²⁴ Cap 10:01.

²⁵ Section 77A, inserted by Act 19/91.

The Elimination of Discrimination Against Women and Girl Children in Antigua and Barbuda

*Justice Kenneth Benjamin,
High Court of Antigua and Barbuda*

Introduction

In 1989, by acceding to the United Nations Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention),¹ the State of Antigua and Barbuda indicated its political willingness to conform to the principles of the Convention and, by extension, to bring its domestic laws into conformity with it.

At the coming into operation of the Antigua and Barbuda Constitution Order 1981,² there came the termination of the status of Antigua as an Associated State and the creation of the unitary state of Antigua and Barbuda. Simultaneously, the Constitution of Antigua and Barbuda came into effect. The Constitution, like those of all Commonwealth Caribbean (CARICOM) independent states, provides protection to every person in Antigua and Barbuda in respect of his or her fundamental rights and freedoms. More specifically, section 14(1) of the Constitution expressly provides, with certain qualifications, that no law shall make any provision that is discriminatory either of itself, or in its effect.³ The word "discriminatory" is defined by sub-section (3) to include the affording of different treatment to different persons wholly or partially on the basis of sex.⁴

In this general way the supreme law of Antigua and Barbuda contemplates non-discrimination on the ground of sex and plays a supervisory role in ensuring non-discriminatory legislation against women and female children. This is the extent of the treatment of the subject in the Constitution.

¹ 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981. Antigua and Barbuda acceded to the Convention on 1 August 1989.

² Antigua and Barbuda Constitution Order, SI 1981 No 1106.

³ Section 14(1) of the Constitution of Antigua and Barbuda states:
"Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect."

⁴ Section 14(3) of the Constitution states:
"In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions or affiliations, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description."

Elimination of discrimination in Antigua and Barbuda

This meant that in the period immediately following independence, there remained in force the pre-existing legislation which did little to address issues of discrimination on the basis of sex, far less discriminatory treatment of women and girl-children in Antigua and Barbuda.

It therefore provides some satisfaction to have observed a recent legislative movement towards the enactment of legislation specifically aimed at the elimination of discrimination against women.

Sexual offences

The Sexual Offences Act 1995 was passed and took effect subsequently on 2 November 1995, replacing the common law offence of rape with an extended statutory definition of rape, and introducing a myriad of other sexual and kindred offences which were in demand of urgent attention. The 1995 Act made its appearance as a Bill as early as 1993 and is patterned upon the CARICOM model legislation relating to sexual offences.⁵

Given the recent coming into force of this Act, as of April 1997, the High Court had had the opportunity to deal with less than twelve cases, thus providing only limited experience in the application of the provisions and their effectiveness.

Nevertheless, it is pertinent to direct attention to three major changes to the law brought about by the 1995 Act. The first relates to the offence of incest. Unbelievable as it may sound, for the first time in the legal history of Antigua and Barbuda the offence of incest was created.⁶ For several years, it was a source of much concern to judicial officers, lawyers and social workers alike (and indeed to concerned citizens) that the pre-1995 law made no provision prohibiting sexual intercourse between persons linked by a blood relationship. Prior to 1995, unless the offending conduct fell within the common law offence of rape or within the general law dealing with statutory defilement of minors, incest went unpunished and perpetrators were free to pursue such conduct with impunity. Though this omission has now been rectified as of April 1997, we as judges, have yet to see a case brought alleging this offence.

Attention should also be drawn to the categories of punishment prescribed for incest.⁷ These are:

⁵ Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual offences*.

⁶ Sexual Offences Act 1995, section 8

⁷ *Ibid*, section 8(3)(a), (b) and (c).

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- (a) if the offence is committed by an adult with a person under 14 years of age – life imprisonment;
- (b) if committed by an adult with a person 14 years or over – 15 years' imprisonment; and
- (c) if committed between minors between 14 and 18 years of age – 2 years' imprisonment.

It is possible to conceptualise the rationale for the reduced penalty for the offence when committed between minors. However, I am yet to formulate any acceptable rationale, for drawing a distinction between a victim who is under or over the age of 14 years where an adult accused is involved. I am unable to accept that as the age of the victim increases the crime becomes less objectionable.

The second significant change effected by the Sexual Offences Act relates to the prohibition of sexual intercourse with minor employees.⁸ This represents an opening gambit towards the disapproval of the exploitation of employees under the age of 18 years by employers.

The third change is the alteration of the procedural climate intended to reduce the traumatic impact previously visited upon victims of sexual offences who are undeniably predominantly female. I here specifically refer to the conduct of the proceedings *in camera*.⁹ My own observations are that, with the absence of spectators from the public gallery, female complainants have been noticeably less hesitant and in general far more forthcoming than previously. However, caution must be exercised so that the public perception of open justice is not jeopardised. Judges ought to allow the presence and attendance of a close or other relative or companion of the accused person to forestall negative public impressions of one-sided justice. This is contemplated by the discretion conferred upon the court by the Act.

It is worthy of mention that the restriction placed upon evidence concerning the sexual activity of the victim with any person other than the accused person and upon evidence of sexual reputation has not operated in derogation from the ability of the accused to fully present his defence to the jury.¹⁰

⁸ *Id*, section 16.

⁹ *Id*, section 26.

¹⁰ *Id*, section 27 states:

"(1) In proceedings in respect of an offence under this Act no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless the Court, on an application made by or on behalf of the accused in the absence of the jury, thinks such evidence necessary for the fair trial of the accused.

(2) Save as provided in subsection (1), no evidence of sexual reputation is admissible for the purpose of challenging or supporting the credibility of the complainant."

Elimination of discrimination in Antigua and Barbuda

As to the abolition of the common law doctrine of recent complaint,¹¹ jurors have now been relieved of a direction that is more amenable to a legal mind than to the realistic approach required in deliberations upon human behaviour. Further, the de-emphasising of the timing of the victim's first complaint which, more often than not, can be attributed to psychological factors associated with trauma makes for a more satisfactory approach to the ascertainment of credibility.

It may be that any purported assessment of the efficacy of the Sexual Offences Act 1995 is premature, but it is desirable that its impact be constantly monitored in order that its provisions do not operate in derogation from the CEDAW Convention.

Domestic violence

Progress in this area has been slow. In early 1997, draft legislation entitled the Family Protection against Domestic Violence Bill, was circulated. This draft faithfully follows the identically-named CARICOM model legislation regarding the provision of protection in cases involving domestic violence.¹²

Prior to the end of the last parliamentary session in February 1997 it was publicly stated that this draft was up for consideration. However, it failed to pass into legislation. Its non-passage is attributable, I am advised, not to an absence of parliamentary will but to inadequate legislative time to secure its passage. This is prima facie borne out by the specific reference to the proposed introduction of legislation on domestic violence at the commencement of the 1996–1997 Parliamentary session by the Governor-General's speech outlining the Government's imminent policies and objectives.

The consequent delay has had the effect of affording legal practitioners and social workers the further opportunity for consideration and possibly to make timely suggestions to tailor the legislation to the social and legal climate of Antigua and Barbuda.

The Antigua and Barbuda draft differs from the CARICOM model in so far as the former clothes the High Court with the jurisdiction of a court of summary jurisdiction. Pragmatically, when one considers the work-load of the Court, this is useful. The High Court has a large work-load and only two resident judges.

There has been no move to date towards the enactment of the CARICOM model legislation with regard to sexual harassment nor on any of the other matters that have

¹¹ *Id.*, section 28. For a general discussion see C. Tapper, *Cross and Tapper On Evidence* (London: Butterworths, 8 ed 1995).

¹² Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to domestic violence*.

been the subject of CARICOM model legislation.¹³ It would be otiose to speculate on the future intent of Parliament.

¹³ Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual harassment*.