
III ENCOUNTER OF THE JUSTICES OF THE SUPREME
COURTS AND CONSTITUTIONAL COURTS OF LATIN
AMERICA AND THE CARIBBEAN FOR GENDER JUSTICE



DIALOGUE: "GENDER PERSPECTIVE IN THE JUDICIAL POWERS OF THE
AMERICAS AND THE CARIBBEAN: THE EXPERIENCE OF ANDEAN
COUNTRIES, CENTRAL AMERICA, MEXICO AND THE CARIBBEAN"

COMMENTATOR:

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Honourable Miriam Naveira de Rodon, Associate Justice of the Supreme Court of Puerto Rico, other Honourable Justices of the Supreme Court of Puerto Rico, Justices of the Americas and the Caribbean. As I listened to the Honourable Justice Josefina Dixon and my sister Judge on my right from Costa Rica who just preceded me, I realized that despite our language barrier and geographical location, we share precisely the same problems when it comes to gender issues.

In the Commonwealth Caribbean and perhaps universally, when one hears of the term "gender", one automatically thinks of women and bias related to women whereas in reality, gender encompasses both women and men.

When one studies the history of the Caribbean people, one sees that women have always been placed in a less advantageous position to men. The man was regarded as the head of the household because he was the breadwinner and by virtue of simply being male. The woman performed the duties of a housewife including raising the children and was therefore, subordinate. She was in effect a chattel.

From this gradual and painful evolution, the entry of women into the male dominated working world and in particular, the ranks of the legal profession (which was hitherto the preserve of men) has been a significant feature in the Commonwealth Caribbean and admittedly, part of the process by which women have been emancipating themselves from the many legal and economic handicaps which had hitherto crippled their activities in many areas of human endeavour. As more and more females took up the challenge to pursue studies in law, there was a correlative increase in the number of female appointed to the higher bench of the Judiciary.

In presenting this commentary on "Gender Perspective in the Judicial Powers of the Americas and the Caribbean", I will focus on the Commonwealth Caribbean

and more specifically on the Eastern Caribbean. My commentary will be two-fold in nature:

Firstly, I propose to examine the perception of female judges in the Judiciary and secondly, the role of gender and its evolution in cases before the Court.

(I) GENDER AND THE FEMALE JUDGE

For those of you who are unfamiliar with the region, the Eastern Caribbean comprises 9 island states stretching from Grenada in the South to the British - dependent territory of Tortola, British Virgin Islands in the North. The other islands are the independent islands of St. Vincent and the Grenadines, Saint Lucia, Antigua and Barbuda, the Commonwealth of Dominica, the Federation of Saint Christopher and Nevis and the British dependencies of Montserrat and Anguilla. These nine islands commonly called the Organization of Eastern Caribbean States (OECS) make up the Eastern Caribbean Supreme Court with its Headquarters in Saint Lucia.

In the Eastern Caribbean Supreme Court, there are 5 female High Court Judges out of 14 or the equivalent of 38%. From a recent survey conducted, it appears that the Eastern Caribbean Supreme Court has the highest percentage of female judges appointed to the Judiciary of the Commonwealth Caribbean. I just learnt that Costa Rica surpasses the Eastern Caribbean by one percent. But, I must hasten to add that unlike the Bahamas, Trinidad & Tobago and Guyana, there are no female judges on the Court of Appeal. In addition, no female has ever been appointed to the position of Chief Justice to head the Judiciary. In this regard, I salute Her Ladyship, Dame Joan Sawyer, Chief Justice of the Bahamas and my own countrywoman, Chancellor Desiree Bernard of Guyana. One would reasonably expect that as time progresses and with the almost daily influx of

women entering the legal profession, the percentage of female judges is likely to increase significantly.

The elusive concept of equality, as a dominant theme of the western moral thought from which fundamental rights and freedoms are ultimately derived, is the source of the principle of non-discrimination now established as legal principle in all modern states. In my opinion, female judges are under more rigorous scrutiny and pressure than their male counterparts who are readily accepted by society. The concept of a judge being female is still a novelty. Although, it is well established that women are more disciplined, reliable and honorable, we still have to go the extra mile to achieve the respect which is so easily given to our brother judges. This in my opinion has its genesis in history.

However, the Eastern Caribbean Supreme Court and the Organization of Eastern Caribbean States (OECS) are committed to the promotion of equality between men and women. The Court shares the vision of the international community for the 21st century of creating with our partners, a better world for all - a world where inequality on any grounds, be it gender, class, race or ethnicity is finally overcome.

To that end, the Organization of Eastern Caribbean States (OECS) through its legal department has already embarked on a major law reform project aimed at modernized and harmonized legislation by national governments. The purpose of the project is to reform the justice system in the Eastern Caribbean to deal with domestic violence and family issues in keeping with basic human rights and the international convention on equality of women and men as well as the rights of the child.

When these legislative reforms would have materialized, we would hope that the sexist and rather unfortunate remarks made by Justice Bradley, a Judge of the

United States Supreme Court in the case of *Bradwell v Illinois* (1873) would be recorded as history. In rejecting the application of Myra Bradwell to practise law solely because she was a woman, Justice Bradley declared:

“The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinances as well as in the nature of things, indicate the domestic sphere as that which properly belongs to the domain and function of womanhood. The harmony not to say identity of interests and views which belong or should belong to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband...The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”

But, I pose the following question? Is this not how many of our men and I dare say, even the educated Caribbean men think? I will leave that for you to ponder.

(11) THE ROLE OF GENDER IN THE COURT

I now turn to the second limb of my commentary which focuses on the role of gender in cases before the Court. In this regard, I will examine the main legislation and illustrate its application in some cases.

One finds that in our respective constitutions there is the provision for the protection of the fundamental rights and freedoms of all citizens. For example, Section 1 of Chapter 1 of the Constitution of St. Lucia reads as follows:

“Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, color, creed or sex, but 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, equality before the law and the protection of the law...”

This principle was applied in the Guyanese case of *Nielsen v Barker* (1982) 32 WIR 254 by Massiah JA who declared:

“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.”

In determining:

1. how cases involving gender issues are resolved in the Court, or
2. whether gender of a litigant or defendant affect the outcome of a case, and if so, in what circumstances,

I shall confine myself to aspects of Criminal Law and Family Law.

CRIMINAL LAW

I pose the question: is a female defendant likely to receive a lighter sentence than her male counterpart on a murder charge given same facts and circumstances? In six of our nine island states, capital punishment is still the penalty for the offences of murder and treason. If one is found guilty of murder,

the ultimate penalty is death by hanging. However, in the case of Dominica, the law protects a woman from being hanged.

In Saint Lucia, for example, a pregnant woman cannot be hanged but she could be sent to prison. However, she cannot give birth in prison.

On the whole, I think that women are given lighter sentences compared to men. I could think of two factors which in my opinion, may contribute to lighter sentencing of women for example, in many of our states, there are no proper institutional facilities to house our female prison population. Secondly, if the Defendant is a mother with minor children or infants.

However, there are exceptions. In the unreported Court of Appeal case of *Mursula Cadette v The State*, a case emanating from the Commonwealth of Dominica, the appellant, a female had her sentence of 5 years imprisonment increased to 7 years by the Appellate Court for molesting a young boy.

FAMILY LAW

When a marriage breaks up, the most difficult questions for the Court to decide relate to property rights and custody, care and control of the children. One of our Spanish-speaking sister Judges in discussion last night jocularly remarked that the husband gets the house and the wife gets the children. The learned judge would have been absolutely correct in making that statement some 50 years ago, as, under English Common Law (which we follow), a wife who stayed at home to care for the home and raise the children would have gotten exactly that if she did not make any direct monetary contributions to the acquisition of the matrimonial home or other family assets.

The approach by the English Court to the wife who stays home to rear the children and keep the home was reflective of the era when a woman was merely a chattel. But, this draconian law was short-lived. By the nineteen seventies, with the introduction of the Married Women's Property Act and the Matrimonial Causes Act (1973) the law began to recognize the proprietary rights of women including the valuable contribution of the house wife.

In *Wachtel v Wachtel* [1973] 1 All ER 829 , Lord Denning, MR at page 838 said:

"...we may take it that Parliament recognized that the wife who looks after the home and the family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind. The other in money or money's worth. If the court comes to the conclusion that the home has been acquired by the joint efforts of both, then, when the marriage breaks down, it should be regarded as the joint property of both of them, no matter in whose name it stands. Just as the wife who makes substantial money contributions usually gets a share, so should the wife who looks after the house and cares for the family..."

The starting point at that time for distribution of matrimonial property was what was called "the one-third rule." But it was not a rule. It was just the starting point.

In the recent House of Lords decision of *White and Carter (Councils) Ltd v McGregor* 2000 3WLR 1571 , a case which is regarded as "the watershed for wives" in the United Kingdom, it was held that a wife is entitled to one-half share of all family assets acquired during the subsistence of the marriage. An analysis of *White and Carter* seems to suggest that the Courts are now leaning towards the principle of "equality is equity" when it comes to the division of matrimonial property. Or, at the very least, to use one-half as the starting point as opposed to the "one-third rule".

In Saint Lucia, the law governing distribution of matrimonial property is the Civil Code which is based on the French Napoleonic Law. This law speaks to "community of property" which means that all property acquired during the marriage is community or joint property unless otherwise agreed or expressed.

With respect to the custody of children, traditionally it was the practice of the courts to award custody, care and control to the mother. However, Caribbean Judges must apply the overriding principle that the child's welfare is of first and paramount importance.

Judges in the past had loathed to award custody to the father as it was accepted that the role of the wife or mother was in the home and that of caring for the children. Fortunately, there has been growing awareness that this is not always in the best interest of the child and there have been instances where the father was deemed to be the better parent.

In the case of unmarried mothers, generally the law provides that the mother has legal custody of the child. The law in most of the islands and for example Dominica permits the biological father, at any stage while the child is a minor, to make an application to the Lower Court for custody provided that he proves to the Court that the mother is unfit.

Prevention of Domestic Violence Acts have been introduced in most of the English-speaking islands like Barbados and Trinidad. Most of the OECS states including St Kitts, Dominica and Tortola have this legislation. It is interesting to note that the law does not only protect the rights of women but the rights of any person, regardless of gender who may be the victim of domestic violence or abuse.

It is clear from the growing amount of legislation protecting parties from discrimination and seeking equality in treatment and the manner in which our Judges are handling these cases, that every effort is being made within the OECS to ensure that fundamental rights and freedoms are respected so that gender is not an issue.

CONCLUSION

In my opinion, as we are progressing into the 21st century and more and more women are appointed to the Judiciary, the notion of gender neutrality will become more readily acceptable and a reality.

In closing, I would like to leave you with these words which were so aptly said at the Beijing Platform for Action, Fourth United Nations World Conference on Women:

“The advancement of women and the achievement of equality between men and women are matters of human rights and conditions for social justice and should not be seen in isolation as a woman’s issue. They are the only way to build a sustain -able, just and developed society. Empowerment of women and gender equality are prerequisites for achieving political, social, economic, cultural and environmental security among all peoples.”

Muchas gracias.