

DRAFT BACKGROUND PAPER

Gender Equality and Judging in the OECS and wider Commonwealth Caribbean

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1. THE CONTEXT

Though there has been meaningful progress in improving the status of women in the Caribbean in the last quarter century, gender inequalities persist in every sphere. There are stark disparities in access to economic resources. Women and the households they head are the poorest in the Caribbean and many women who have responsibilities for families dominate low paid and insecure jobs in the service sector which have been badly affected by the economic downturn.¹ Unremittingly high levels of gender-based violence are, as Barrow J put it in *Francois v AG*,² 'part of the bedrock on which rests the subjugation and servitude of women.' The CEDAW Committee explains that gender based violence nullifies or impairs the enjoyment by women of many human rights.³

Gender ideologies about how to be a man and a woman have not just been inimical to women and girls but impact the development and security of men and boys. The strong association between masculinity and violence is reflected in high rates of arrests and convictions of men for violent crimes against men, women and children. Not only does the gender system disempower women as a class, but gender and class relations also 'mark out some men as vulnerable to the violence of other men.'⁴

The justice system is not removed from these inequalities. Both laws and the administration of justice can be implicated in maintaining gender inequality. However the justice system can be an engine for both 'reproducing *and destabilizing* inequality'.⁵ This background paper explores judges' role in the latter, looking at decisions of the Eastern Caribbean Supreme Court (ECSC) and the wider Caribbean that have re-evaluated and developed common law rules and interpreted legislation consistent with the constitutional norms of gender equality and equal protection of the law.

2. CONSTITUTIONAL PROTECTION AGAINST SEX DISCRIMINATION

There has been a discernible and slow evolution over the last twenty five years from the earlier cases of *Nielsen v Barker*⁶ and *Girard v AG*,⁷ where the courts did not get to consider the crux of the constitutional sex discrimination claims to the 2004/2005 Belizean case *Wade v Roches* in which both the Supreme Court and Court of Appeal affirmed that the dismissal of an unmarried pregnant teacher amounted to sex discrimination and a violation of her right to work under that Constitution. Three developments have strengthened the recognition of constitutional anti-discrimination law: wide definitions of public authority,

¹ Juliana S. Foster and Rhoda R. Reddock, *The Global Financial Crisis and Caribbean Women: A Gender Analysis of Regional Policy Responses*, SALISES 11th Annual Conference, March 24-26th 2010, Trinidad, 7.

² (24 May 2001) LC 2001 HC 16.

³ See CEDAW Committee, General Recommendation 21 [40] (1994).

⁴ Angela Harris, 'Gender, Violence, Race, and Criminal Justice' (2000) 52 *Stan L Rev* 777, 779.

⁵ Rebecca Sandefur, 'Access to civil justice and race, class and gender inequality' (2008) 34 *Annual Rev Sociology* 339, 340 (emphasis added).

⁶ (1982) 32 WIR 254.

⁷ LC 1986 HC 24, 17 December 1986 (Nos. 371/1986, 372/1986). The Court of Appeal did not disturb the High Court's ruling on the constitutional questions in *Att Gen v Girard* LC 1988 CA 1, 25 January 1988.

clearer definitions of discrimination and ongoing elaboration of the burden of proof in bill of rights matters.

A. Wide definition of public authority

In prohibiting discrimination, OECS constitutions prohibit primarily state action but it is increasingly clear that the prohibition against sex and other forms of discrimination can in certain circumstances bind private actors and quasi-public actors. This effectively expands the scope and reach of the antidiscrimination clause. Most constitutions prohibit discriminatory laws and discrimination by any person acting by virtue of a law or in the performance of any functions of any public office or public authority.⁸ The Dominica's Constitution 1978 and the St. Lucia Constitution 1978 go further and cover discrimination 'by any person or authority.'⁹

In any event, for the purposes of the anti-discrimination protection, 'public authority' is defined widely. A Belize school operated by the Catholic Public Schools and the Catholic Church was held to be a public authority. In *Wade v Roches*,¹⁰ a sex discrimination case brought by unmarried pregnant teachers who were dismissed by the catholic school, Conteh CJ identified a 'publicly avowed and acknowledged partnership between the Government and the Church in the area of education' as being an 'enduring feature' of education in Belize.¹¹ In education, the church was carrying out functions of 'enormous public ramifications' and could be seen as the 'alter ego of the government'.¹² The Court of Appeal affirmed this aspect of the Chief Justice's Supreme Court decision.¹³

B. Defining discrimination

i. Different and less favourable treatment

The antidiscrimination section in OECS Constitutions defines discrimination as affording different treatment to different persons because of their sex, for example, such that persons of one sex are subject to disadvantage that those of the other sex are not, or subject to privileges that those of the other sex are not. A principle that has emerged from the later Caribbean cases, and one that was already well established in comparative equality law, is that not all differentiation amounts to discrimination.

The nub of discrimination is different *and* less favourable treatment, as the Court of Appeal pointed out in *AG v Jones*,¹⁴ a recent appeal from St. Kitts-Nevis involving a boy who argued that his primary school's refusal to allow him to wear a ponytail to school amount to sex discrimination. The school prohibited stylish hairstyles for both boys and girls but additionally said that boys' hair must be worn short. The Court of Appeal of Alleyne CJ (Ag), Rawlins JA, as he then was, and Barrow JA said that this was not sex discrimination because

⁸ e.g. Antigua and Barbuda Const 1981 ss 14(1), (2).

⁹ Dominica Const s 13(2); St Lucia Const s 13(2).

¹⁰ (9 March 2005) BZ 2005 CA 5.

¹¹ (30 April 2004) Bze SC. 10.

¹² *ibid* 19.

¹³ *Wade v Roches* (9 March 2005) BZ 2005 CA 5.

¹⁴ (10 May 2004) KN 2008 CA 3.

boys were not treated less favourably; both boys and girls were expected to wear their hair in conventional styles.

Caribbean cases judge different and less favourable treatment by a fictional or real comparator who is similarly situated.¹⁵ A good example of this is *Johnson v AG*,¹⁶ a 2009 appeal from Trinidad and Tobago. A regulation of the Police Service Commission said that the Commission could terminate the appointment of a female officer who was married on the grounds that her family obligations were affecting the efficient performance of her duties. Using male married officers as a comparator, plainly female married officers were evidently treated less favourably.

ii. Bad faith or intention to discriminate should not be required

The better view is that there is no need to establish an intention to discriminate or that the lawmakers or public authority were acting in bad faith. Inequality can stem from 'innocently-motivated actions', not just intentional behaviour.¹⁷ Some early Trinidad and Tobago cases indicated proof of an intention to discriminate was essential, but the Privy Council in *Bhagwandeem* has cast doubt on this, and correctly so.¹⁸

iii. Indirect sex discrimination prohibited

Both direct and indirect sex discrimination are prohibited by the constitutions. Indirect discrimination takes place when a law or policy on its face is neutral or appears to treat everyone equally but its effect disadvantages certain groups and that requirement is not reasonable. In relation to laws, the constitutions make this explicit when they say that the law cannot be discriminatory in itself or its effect.¹⁹

The *Wade v Roches* decision from Belize can be read as an instance of indirect discrimination by a public authority. The catholic school in question had a policy of dismissing unmarried pregnant teachers. When faced with the charge that they had discriminated against these teachers on the ground of their sex, they argued that unmarried male teachers who fathered children were also dismissed. Conteh CJ whose decision on the merits was upheld on appeal rejected this claim. Since pregnancy shows on women, they were more vulnerable to the policy, and the practice of dismissals confirmed this. Men on the other hand, the Chief Justice said, could ignore the policy with impunity.

C. Burden of proof

i. Old application of the presumption of constitutionality as a burden of proof

*Girard v AG*²⁰ was one of the earliest sex discrimination cases in the Caribbean. St. Lucian teachers and their union challenged the constitutionality of regulations of the Teaching

¹⁵ *Bhagwandeem v AG* [2004] UKPC 21, (2004) 64 WIR 402 (T&T); See also *Wade v Roches* (9 March 2005) BZ 2005 CA 5.

¹⁶ [2009] UKPC 53 (T&T).

¹⁷ Justice L'Heureaux-Dube (n **Error! Bookmark not defined.**) 73.

¹⁸ Powerful obiter dictum in *Bhagwandeem* *ibid* [20] – [23] casting doubt on *Smith v LJ Williams Ltd* (1980) 32 WIR 395 (HC T&T) and *AG v KC Confectionery Ltd* (1985) 34 WIR 387 (CA T&T).

¹⁹ e.g. Antigua and Barbuda Const s 14(1).

²⁰ (17 December 1986) LC 1986 HC 24.

Service Commission that required an unmarried pregnant teacher to be suspended on her first pregnancy and fired on her second. The discrimination claim was disposed of through the application of the presumption of constitutionality. Relying on statements made in *Hinds v R*,²¹ the High Court said that there was rebuttable presumption that any restriction of fundamental rights is justified and the burden rests on the applicant to prove that Parliament had acted in bad faith or misinterpreted the provisions of the Constitution. The High Court ruled in favour of the applicants on the basis that there was an enforceable collective agreement that all pregnant women should have maternity leave but the Court of Appeal reversed this decision, leaving the High Court's ruling on the constitutional question in place.²²

ii. *Modern understanding of the burden of proof and presumption of constitutionality*

The more recent *de Freitas v Permanent Secretary*²³ has put this earlier approach of using the presumption of constitutionality as a burden of proof in doubt. There the Privy Council on an appeal from Antigua and Barbuda ruled that the applicant is responsible for establishing a prima facie breach of a right. The burden then shifts to the state or respondent to prove that the infringement is justified, for example that it is reasonably required for a legitimate state goal. If the respondent succeeds, then the burden shifts back to the application to say that the measure is nevertheless not reasonably justifiable in a democratic society. This is eminently good sense since it is the respondent who is in the best position to explain the justification for the breach. Asking an applicant to prove that the breach was not justified or that state actors acted in bad faith imposes an unreasonably high burden and will diminish dramatically the impact and effectiveness of the bills of rights.

The better view is that the *de Freitas* allocation of the burden of proof applies also where the limitation is implied into the right, as it would be in some antidiscrimination clauses which lack the 'reasonably required' provision. That is, applicants would be required to establish a prima facie breach (different and less favourable treatment) and the burden would rest on the respondent to show the breach was justified or reasonable.²⁴

3. RIGHTING WRONGS: THE STATE'S DUTY TO ADDRESS GENDER BASED VIOLENCE

A. Public private dichotomy challenged: Positive duty on the state to protect against violence against women

²¹ [1977] AC 195 (PC Ja).

²² *AG v Girard* (25 January 1988) LC 1988 CA 1. The trial judge has said that he had hoped that the teachers and their union would appeal further to the Privy Council (Albert Matthew, *On the Benches of the Eastern Caribbean* (Emmanuel Publications, Dominica 2008) 23. On the constitutional law points, the Belizean case, *Wade v Roches* reflects a later determination of similar issues.

²³ [1998] 3 LRC 62; [1999] 1 AC 69; [1998] 3 WLR 675; (1998) 53 WIR 131.

²⁴ In recent times the Privy Council has become less clear on the relationship between a presumption of constitutionality and the burden of proof; see *Suratt v AG No 1*; *Public Service Board v Maraj* [2010] UKPC 29 [29]; *Grant v The Queen* [2006] UKPC 2, [2007] 1 AC 1 [15].

Nowhere in the law has there been a more dramatic shift in thinking about relations of gender than violence against women and especially domestic violence. In earlier times domestic violence was referred to as 'physical correction' being administered to a wife by her husband²⁵ or the 'fair wear and tear of marriage'.²⁶ In an important early decision in 1971 the Barbados Court of Appeal rejected the claim that rape, which the defendant was convicted of, was fundamentally different to other violent crimes he had committed, insisting 'that violence against women is not of a different character'.²⁷

i. Domestic violence not a private matter

But it is Barrow J's judgment in *Francois v AG*²⁸ in 2001, a case challenging the constitutionality of the St Lucia Domestic Violence Act, that provides the best marker of the judicial shift to thinking about domestic violence as 'a scourge' and a 'major source of violence in our societies'.²⁹ Barrow J said that the 'tendency to treat violence against women as a private matter, the lack of laws dealing specifically with such violence and socialisation to patterns of violence' all perpetuated the violence.³⁰

More recently in *R v Paddy*³¹ Hariprashad-Charles J described domestic violence as 'a crime of moral turpitude that causes far more pain than the visible marks of bruises and scars'.³² The defendant pleaded guilty to unlawfully and maliciously causing grievous bodily harm to his wife by hitting her repeatedly with a hammer. The judge sought guidance from Blackstone's Criminal Practice 2010 on sentencing guidelines where there is domestic violence and she emphasised that 'offences committed in a domestic violence context should be regarded as being no less serious than offences committed in a non-domestic violence context'.³³ She continued:

Violence against women is an appalling human rights violation. In the broadest sense, it is the violation of a woman's personhood, mental or physical integrity, or freedom of movement through individual acts and societal oppression. It is so woven into the fabric of society to such an extent that many women who are victimized feel that they are at fault. Many of those who perpetuate violence feel justified by strong societal messages that these violence against women, be it sexual harassment, rape, child abuse are acceptable.³⁴

She described the progress towards recognising domestic violence as a violation of women's human rights at the international and national levels: CEDAW, the enactment of domestic violence legislation and various state policies and agencies with a mandate to address gender based violence. She concluded:

²⁵ *Younis v Younis* (12 June 1968) DM 1968 HC 7.

²⁶ See discussion of Jamaica Supreme Court decision overruled in *Llewelyn v Llewelyn* (1978) 27 WIR 188 (CA Ja).

²⁷ *R v Fraser* (CA Bdos, 30 September 1971) BB 1971 CA 2.

²⁸ LC 2001 HC 16, 24 May 2001.

²⁹ *ibid* 5.

³⁰ *ibid* 6.

³¹ (HC, BVI 27 April 2011).

³² *ibid* [1].

³³ *ibid* [25].

³⁴ *ibid* [47].

It is now the duty of the courts to send out a strong message that domestic violence in any form will not be tolerated and that men do not have an unfettered licence to batter women. The only way the courts can effectively show this is by the sentences that are passed which are aimed at ensuring that the wrongdoer does not repeat the offence and that potential offenders get the message that society will not condone such behaviour.

The judge sentenced Paddy to 8 years and ordered compensation of \$5,161.68 for medical expenses his wife incurred.

ii. Positive duty on state to protect citizens from domestic violence

More remarkable than Barrow J's clear description of the harms of domestic violence to victims and Caribbean societies, was his insistence that the enactment of domestic violence legislation was the fulfilment of the state's constitutional duty to protect its citizens from violence. He pronounced *obiter* that the state had a constitutional duty to protect everyone from violence, and this included domestic violence. He said that it was constitutionally imperative for the state to address domestic violence and that this arose from the constitutional right of everyone to 'life, liberty, security of the person, equality before the law and the protection of the law.'³⁵

iii. The state must do everything it can to ensure that non-state actors do not violate the human rights of citizens

Barrow J's decision reflects a seminal development in Caribbean constitutional law, one that has been well recognised in the Inter American human right system. It is the principle that the state has a positive duty to take reasonable steps to prevent private actors from violating the human rights of its citizens. It is not enough that state actors do not violate these rights. The state must do everything it can to ensure that private citizens do not violate the rights of others. In the *Velasquez Rodriguez Case*³⁶ the Inter American Court of Human Rights stated that the state must carry out a serious investigation of violations committed by others, identify those responsible, impose the appropriate punishment and compensate victims adequately.³⁷

Barrow J's statements do not form part of the ratio of the case, but it is expected that other Caribbean courts will follow his lead. Even though Caribbean constitutions mostly bind state actors, *Francois* demonstrates the nature of the state obligation to ensure respect for human rights at the level of citizen vis-a-vis citizen. His judgment also clarifies that Caribbean bills of rights are not simply concerned with negative duties or non-interference, but that they impose positive duties on the state to act to protect human rights.

B. Proving the crime: Duty of court to develop the common law

i. Mandatory corroboration warnings at common law outdated and abolished

At common law a special rule developed requiring the judge to warn the jury in a sexual case that it was dangerous to convict on the uncorroborated evidence of the complainant. The rationale was the propensity of women and girls to lie about the commission of a sexual

³⁵ *Francois v AG* (24 May 2001), HC, St. Lucia.

³⁶ Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

³⁷ *ibid* [174].

offence.³⁸ Although a longstanding rule, it was based on assumptions about women's disposition rather than evidence and sent a message that minimised this form of gender based violence.

In *R v Gilbert*,³⁹ the accused, Gilbert, had been convicted of attempted rape mainly on the uncorroborated evidence of the complainant. No direction was given by the judge about the dangers of convicting based on uncorroborated evidence. In the 2002 appeal from Grenada by Gilbert, the Judicial Committee ruled that there was no longer a requirement at common law for corroboration warnings in sexual offences cases. Whether a warning or a corroboration direction is given is now within the discretion of the trial judge.

In the UK the rule had been abrogated by legislation. But the Privy Council made it clear that the same result obtained at common law. The common law rule had to be reassessed and reevaluated. Lord Hobhouse said that the requirement had been based on a discredited view that the evidence of female complaints should be regarded as suspect and liable to be fabricated. He added that this belief was not conducive to the fairness of the trial as between defence and prosecution or the safety of the verdict.

The Barbados Court of Appeal has also reconsidered the warnings courts give in *R v Woodall*.⁴⁰ The Barbados Sexual Offences Act 1992 requires warnings where there is no corroboration in a sexual offence but the Court of Appeal has ruled that the traditional warnings that 'were disparaging and reinforced false stereotypes' should not be used any longer.⁴¹ Williams JA said that judges were obliged to have regard to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which had been ratified by Barbados and sought to eliminate discrimination and prejudice based on stereotyping women.

ii. The duty of the court to develop the common law consistent with bill of rights, including the right of accused as well as victims to fairness in trials

The South Africa Constitution in section 39 requires all courts to develop the common law with due regard to the "spirit, purport and objects" of the Bill of Rights. In *Carmichele v Minister of Safety and Security*⁴² the applicant sued two Ministers for damages resulting from a brutal attack by a man who was released pending trial for rape of another woman. The police and prosecutor recommended his release without bail even though he had a history of sexual violence. Her claim was initially dismissed because it was held that the police and prosecution had no legal duty of care towards her and could not be liable for damages to her. The Constitutional Court did not deny that the legislature was the main engine of law reform, but concluded that even where constitutional issues are not directly before a court, it has a general duty to develop the common law where it is inconsistent with the South Africa Bill of Rights. In this instance, the common law should be developed

³⁸ See Salmon LJ's dictum in *R v Manning* [1969] 53 Cr App R 150.

³⁹ [2002] UKPC 17; (2002) 61 WIR 174.

⁴⁰ (29 November 2005) BB 2005 CA 25.

⁴¹ *ibid* [46]

⁴² (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001)

consistent with the state's duty to prevent gender-based discrimination and protect women's dignity, freedom and security of the person.

No equivalent provision—to develop the common law with due regard to the constitution's protection of fundamental rights—can be found in Caribbean constitutions. Nevertheless, a similar responsibility might very well be implied from the supremacy of Caribbean constitutions. *State v K*,⁴³ a Namibian case points in that direction. In that case the Namibian Supreme Court ruled that the application of the cautionary rule in sexual offences had outlived its usefulness and should not be applied any longer in Namibia. The Supreme Court said that the rule might adversely infringe the fundamental rights of the victims, which include a fair trial as well. Since the rule could adversely affect the fairness of the trial, regardless of whether it is fairness in relation to the accused or victims, the court was duty bound to address the rule. It did not matter that it was a rule since time immemorial, the court was duty bound to measure the rule against the constitution.⁴⁴

C. Vindicating human rights through laws addressing gender-based violence: Getting the balance right

When a superior court grants constitutional redress pursuant to the enforcement provision in the bill of rights of a Caribbean constitution, its goal is to vindicate or uphold the right by an ensuring effective remedy.⁴⁵ All organs of government, including Parliament in exercising its lawmaking function, are obliged to take positive steps to effectively secure fundamental rights and freedoms, including gender equality. The passage of laws designed to ensure greater accountability and effective justice in respect of gender based violence is in fulfilment of that responsibility.

Lawmakers must strike an appropriate balance between protecting the interests and rights of victims of gender based violence against those of perpetrators and alleged perpetrators. A few constitutional cases have been brought by defendants and respondents, testing whether the laws in question take adequate account of their rights in their effort to protect the human rights of victims of gender based violence.

i. Overall fairness achieved in ex parte relief for domestic violence

In *Francois* a lawyer against whom an ex parte protection order had been granted challenged the constitutionality of the ex parte relief. Although an ex parte protection order does implicate the respondent's right to a fair trial, the High Court ruled that the jurisdiction to grant such an order under the St. Lucia Domestic Violence Act did not infringe the respondent's right to a fair trial and natural justice. Barrow J concluded that the legislative scheme provided for overall fairness.

- a. There was a high threshold for obtaining ex parte relief, that delay would or might cause serious injury, undue hardship or create risks to personal safety.

⁴³ [2000] 4 LRC 129 (SC Nam).

⁴⁴ *ibid* 135-6.

⁴⁵ *AG v Ramanoop* [2005] UKPC 15 [18]. *Gairy v AG* (No 2) [2001] UKPC 30 (1999) 59 WIR 174.

- b. The ex parte order can only be made on an interim basis
- c. The respondent can immediately apply for the discharge of the order.
- d. The judicial officer had a discretion to determine whether the order should be made

Although the respondent had a right to be heard, this was not an absolute right. A protection order could be granted initially and on an interim basis without the involvement of the respondent, and the standard for doing so was high. He had an opportunity to immediately apply for the order to be discharged.

The High Court in *Soleyn v Soleyn*⁴⁶ did not consider an ex parte order, but looked at the need to provide effective relief for victims and at the same time balance the respondent's rights. Blenman J heard an application challenging the grant of an occupation order in circumstances where the magistrate gave the respondent a few hours to find a lawyer and went ahead to hear the application and grant the order even though the respondent was unrepresented. Blenman J upheld the granting of the occupation order. Implicit in her reasoning was a balancing of the interests of applicants and respondents. She recognised the importance of acting expeditiously to prevent further harm to the victim especially where the parties live in the same home. The respondent had been charged on a number of occasions for acts of violence against his wife, the applicant, and there was uncontradicted evidence that he had raped his wife. In these circumstances Blenman J concluded that he was an 'extremely violent' man and affirmed the importance of granting relief in a timely manner and she refused to vary the occupation order.

ii. The need to maintain some judicial discretion: Access to bail for alleged sex offenders

Well intentioned laws designed to secure gender equality and the dignity, liberty and security of the person of victims of sex crimes must still achieve a proper balance with defendant's rights. As was seen in *Francois*, a critical dimension of this is ensuring that judges have the discretion when it is appropriate to limit defendant's rights to safeguard those of victims. St. Lucia Criminal Code 2004's section 593(4) which provided that persons charged with rape, among other offences, were ineligible for bail failed to achieve that balance.⁴⁷

It is known that persons who have been victims of sexual violence, especially where they know the perpetrator, often experience retaliation at the hands of perpetrators who even if arrested often receive bail. But a law, as did section 593(4) that entirely removes judicial discretion to grant bail for sex offenders is overly broad and fails to achieve that balance between the need to secure gender equality and defendants' liberty.

Theophilus was accused of rape and denied bail and challenged the constitutionality of this provision. The Court of Appeal held that the right to bail arises from the general right to liberty which is declared in the opening section to the bill of rights in the St. Lucia Constitution, the detailed right dealing with liberty and the presumption of innocence as an

⁴⁶ (5 November 2004) VC 2004 HC 35.

⁴⁷ *AG v Theophilus* (20 March 2006) LC 2006 CA 2.

aspect of the right to the 'protection of the law'.⁴⁸ Rawlins JA, as he then was, giving the decision of the Court of Appeal explained that

'these provisions promote the right and interest of a detained person to remain at liberty, unless and until convicted of a crime that is sufficiently serious to justify depriving the person of his or her liberty..... on the other hand, the community has countervailing interest in ensuring that the course of justice is not thwarted or perverted by the flight of the person or by his interference with witnesses or committing other crimes while on bail awaiting the trial.'⁴⁹

The Court of Appeal held that these competing interests can only be resolved by giving judges the discretion to determine whether to grant bail in an individual case. Removing discretion from judges was an undue interference with the fundamental rights of those accused but it also transferred from the judiciary a function that was always viewed as a judicial one, in violation of the separation of powers doctrine.⁵⁰

While a total removal of judicial discretion in bail cases for rape is unconstitutional, cases like *Carmichele* and *Francois* point to the positive duty on the state to secure meaningful protection of its citizens against violence. Thus judges have a serious duty when considering bail to have regard to the need to protect the survivor of the alleged rape and the likelihood that the accused will endanger her safety or harass or intimidate her while on bail.

D. The right of victims to fundamental fairness in legal proceedings dealing with gender based violence

It has been generally assumed that right to the 'protection of the law' in Caribbean constitutions is entirely for the benefit of criminal defendants and civil litigants.⁵¹ *Gilbert* discussed above and *Gooderidge* discussed below call this into question and point to the interests of complainants in a fair and effective legal system. The rule of law demands that justice be done. In *R v A (No 2)*⁵² Lord Hope explained that the 'rule of law requires that those who commit criminal acts should be brought to justice.'

Arguably, impunity for sexual violence not only contravenes the rights of victims to liberty and security of the person but also their right to fundamental fairness in trials as an aspect of the protection of the law and the rule of law. In *Grant v R*⁵³ the Privy Council has also confirmed that there was a 'the need for a fair balance between the general interest of the community and the personal rights of the individual.'⁵⁴ Barrow JA in *Calderon v R*⁵⁵ recognised this as demanding fairness not just for the accused but overall fairness.

⁴⁸ St. Lucia Constitution 1978 ss 3(a), 5, 10(2)(a).

⁴⁹ *Theophilus* [33].

⁵⁰ *State v Khoiratty* [2006] UKPC 13 (Mauritius).

⁵¹ See e.g. Antigua and Barbuda Constitution, s 15 which speaks of the rights of criminal defendants and the determination of civil rights and obligations.

⁵² [2001] 2 WLR 1546 (HL).

⁵³ (2006) 68 WIR 354.

⁵⁴ *ibid* [17.2]

⁵⁵ (CA, St Luc 27 November 2007) LC 2007 CA 11 [23].

In *Gooderidge v R*,⁵⁶ an appeal from St. Vincent and the Grenadines, the appellant appealed his conviction for indecent assault of the daughter of common law wife and the sentence of two years. He argued that there had been unreasonable delay in the proceedings in breach of his constitutional right to the protection of the law. Giving the Court of Appeal's decision, Byron CJ concluded that a delay of six years between arrest and trial was 'presumptively prejudicial'. Notwithstanding this, he said that the court should have regard to a 'special factor', the fact that the complainant was a six year old girl. He viewed international commitments made by St. Vincent and the Grenadines to protect girl children against domestic violence and sexual abuse under CEDAW as relevant. She was entitled to state protection from violence. Both the society and the complainant, he said, had an important interest in the prosecution of her case. The evidence in case was strong. A nurse had witnessed the violation and immediately the child to be medically examined, which confirmed a violation. The appeal was dismissed.

4. VALUING CARING WORK

Economic disparities between men and women can be related directly to the sexual division of labour, the disproportionate burden on poor women of the economic and other care of families and strong patterns of sex segregation in employment. Both proceedings dealing with the division of property of intimate partners and child support proceedings ask judges to use their statutory discretion to do justice between the parties against this backdrop.

A. Homemaker contributions in relationship property division on divorce

In most of the OECS, property division on divorce is based on a version of the UK Matrimonial Causes Act 1973. Matrimonial laws have either been modelled on the UK legislation or incorporated into the law through a general incorporation clause, as in Dominica and Grenada. The High Court is given broad discretion to distribute the property of the parties having regard to certain specified considerations.

In a much cited judgment in 2003, Saunders JA in an appeal from the BVI explained that the homemaker contribution should be equally valued to financial contributions.⁵⁷ Anything less, he observed, would be gender discrimination. He explained:

The Court should not pay too much regard to a contribution merely because it is easily quantifiable in hard currency and too little to a contribution that is less measurable but equally important to the family structure. In the vast majority of cases where these two types of contribution are in issue – that of a homemaker and that of an income earner, it is the wife who has stayed at home while the husband has performed the role of breadwinner. There is therefore an element of gender discrimination in degrading the woman's role in the home.⁵⁸

⁵⁶ (12 January 1998) VC 1998 CA 9.

⁵⁷ *Stonich v. Stonich* (29 September 2003) VG 2003 CA 6.

⁵⁸ *ibid* [29]. Cited in *Fussee-Durham v. Fussee-Durham nee Baker* (18 September 2006) VC 2006 CA 4, 3 (Gordon JA); *Joseph v Joseph* April 30, 2007 AG 2007 HC 16 (Blenman J); *Michael v Michael* (18 June 2008) AG 2008 HC 25

Here was a clear acknowledgment that the traditional approach to distributing matrimonial property devalued non financial contributions to the home and was discriminatory and that it was time to abandon this approach and interpret the legislation in accordance with a commitment to gender equality.

B. Establishing a common intention constructive trust: ‘The law has indeed moved on’ from the position that nothing less than direct financial contributions will do

Where the law makes no statutory provision for the redistribution of the property of intimate partners on relationship breakdown, Caribbean courts utilise the common intention constructive trust to resolve disputes, both while the parties are alive and when one has died.

Until recently, two Privy Council decisions supported a very restrictive application of the constructive trust in these settings, confirming the approach adopted in the House of Lords decision, *Lloyds Bank v Rosset*.⁵⁹ These are the Jamaican appeal *Stoeckert v Geddes*⁶⁰ and the Grenadian appeal *Otway v Gibbs*.⁶¹ The lack of some direct financial contribution to the property was fatal where the applicant could not prove the existence of some express common intention between the parties to share ownership of the property. Conversations to that effect rarely take place. The women in both applications failed despite very long term committed cohabiting relationships with the men in question.

Although not mentioning its earlier decisions on the constructive trust in the Caribbean, the Privy Council in *Abbott v Abbott*,⁶² an appeal from Antigua and Barbuda, has declared that the law has moved on in response to changing social and economic circumstances. The eminent family lawyer Baroness Hale gave the judgment of the Board and said the test was whether the parties’ common intention could be found, whether actual, inferred or imputed, in light of the whole course of conduct in relation to the property.

In *Abbott* there was evidence of direct financial contributions, but it is now quite clear that indirect financial contributions could give rise to a common intention, having regard to all of the circumstances. What is not clear is whether a common intention could be inferred entirely from homemaker contributions in the absence of explicit words and a financial contribution, whether direct or indirect.

Abbott is likely to have its greatest impact in recognising the non financial contributions that women usually make in the quantification of the shares since the courts are obliged to take a holistic approach to this exercise and examine the whole course of dealings between the parties. This will include homemaker contributions. Once the door is opened by

(Blenman J); *Richardson v. Richardson* (19 January 2007) AI 2007 HC 9 (George-Creque J); *Wheatley v Wheatley* (13 October 2008) VG 2008 CA 5.

⁵⁹ [1991] AC 107 (HL).

⁶⁰ (13 December 1999) JM 1999 PC 5.

⁶¹ *Otway v Gibbs* (2000) 58 WIR 168; [2001] 2 LRC 301 (PC Gren).

⁶² *Abbott v Abbott* [2007] UKPC 53 (2007) 70 WIR 183 (A&B).

establishing a common intention, the court will have a reasonably wide discretion to take into account a range of contributions in quantifying the shares.

5. REDEFINING THE REASONABLE PERSON IN INTIMATE PARTNER HOMICIDES

A. Reconciling the provocation defence and gender equality in sentencing

The provocation defence developed historically as an excuse for men who killed after finding their wives in the act of adultery. The traditional position was that 'words can amount to provocation and that sexual infidelity and its publication can arouse uncontrollable anger.'⁶³ There is a tension between this conventional formulation of provocation and contemporary notions of gender equality. The defence provides an excuse for domestic violence, it sustains the ideology that women belong to men and undermines women's right to sexual and physical autonomy.⁶⁴

Byron CJ acknowledged this when determining the sentence of the appellant in *George v State* by 'tailoring the punishment in provocation cases to fit the crime'⁶⁵ and treating domestic violence as an aggravating factor. He explained:

On the question of sentence, we were asked to exercise leniency and to impose a fixed term of years on a young man of 26 years who could be rehabilitated after serving a custodial sentence. This crime, however, falls within the category of domestic violence. This is a man who killed his woman because she said she was going to leave him and because she had been having an affair with another man for a long time. The community is paying more attention to these crimes, which are on the increase. They are particularly horrible and undermine the equal status of women in our society. We have concluded that the maximum sentence allowed by law should be imposed and we order the appellant to serve life imprisonment.⁶⁶

Other judges in the OECS have followed his lead, by noting that the 'fact that the deceased met her death in circumstances of domestic violence is not lost on the court.'⁶⁷

B. Rejecting traditional excuses for domestic violence

The most potent answer to the traditional excuses provided for domestic violence have come from High Court judges in sentencing in non-homicide criminal cases. In *R v Paddy*⁶⁸ Hariprashad-Charles J rejected provocation as an excuse for domestic violence. In that case a husband violently attacked his wife with a hammer as she came out of the shower. She suffered from multiple sclerosis and diabetes. He claimed to have been troubled by a call she received on her cell phone from a man and was provoked by her indication that she could no longer put up with his violence and wished to end the relationship. He raised

⁶³ *George v State* (March 27, 2000) DM 1994 CA 4 [8].

⁶⁴ Caroline Forell, 'Gender equality, social values and provocation law in the United States, Canada and Australia' (2006) 13 American University Journal of Gender, Social Policy and the Law

⁶⁵ Forell (n 64).

⁶⁶ *George v State* DM 1994 CA 4 March 27, 2000 [12].

⁶⁷ *R v Monelle* (18 September 2008) AG 2008 HC 10 (Blenman J). See also *R v Deterville* (27 November 2003) LC 2003 HC 46. Compare with *R v Fahie* (19 October 1998) VG 1998 HC 14.

⁶⁸ (HC, BVI 27 April 2011).

provocation as mitigating factor. Hariprashad-Charles J rejected this and said that in these circumstances he should have sought counselling or petitioned for divorce, but his 'recourse to violence cannot be justified.'⁶⁹

C. Understanding abused women who kill in their social context

i. *The expansion of the 'reasonable person'*

It took some time for criminal law to acknowledge that defences to murder, especially self defence and provocation, used men as the standard for the 'reasonable person'. Over time courts said that the 'reasonable person' should have the characteristics of the accused that affect his or her ability to exercise self control.⁷⁰ This has produced more satisfactory results, though not ones free from difficulty, in cases where women kill their abusers. Provocation now serves as a partial defence both for victims of domestic violence who kill their batterers and men who kill intimate partners or former partners 'in the heat of passion'.

ii. *Provocative acts can span a period of time*

Byron JA in *Jn Baptiste v R*⁷¹ described the development of the law. He acknowledged that in domestic violence cases, provocative acts might span a period of time and he cited the well known case *R v Ahluwalia*.⁷² He added that 'although the fatal injury need not follow immediately on the provocation it must be close enough in time for it to be found that the accused person acted from sudden and temporary loss of self-control.'

Jn Baptiste did not involve a woman defendant who had killed her abuser but the 1987 Jamaica Court of Appeal decision *R v White*⁷³ did. The appellant and the deceased had lived together and she gave evidence that he was a 'warrior' who had treated her brutally. She cited multiple incidents of grave physical abuse, including him cutting her in the face and kicking her in her abdomen while she was pregnant, leading to a miscarriage. She said despite her reports to the police, he was never prosecuted for the violence.

On the fateful afternoon, the defendant stabbed the deceased with a knife she used for oranges when he accosted her close to the market where she worked and demanded money. Kerr JA explained that 'The memory of the many brutal attacks made by the deceased on her must have been with her that afternoon and his accosting her in the manner he did was the final straw that broke her self-control.'⁷⁴ The Jamaica Court of Appeal substituted a verdict of manslaughter for murder because the trial judge failed to direct the jury on the issue of provocation. A custodial sentence of three years imprisonment was deemed appropriate in light of the 'pugnacious disposition of the deceased' and his history of violence against the appellant and that she was the mother of a child of tender years.

⁶⁹ *ibid* [38].

⁷⁰ *R v Smith* [2001] 1 AC 146 (HL); *AG for Jersey v Holley* [2005] UKPC 23.

⁷¹ (12 February 1996) LC 1996 CA 4

⁷² [1992] 4 All E.R. 889.

⁷³ (17 December 1987) JM 1987 CA 68.

⁷⁴ *ibid*.

iii. The role of expert evidence

In 1999 the Privy Council allowed the Court of Appeal to hear fresh evidence in the case of Indravani Ramjattan who was sentenced to death for murdering her former common law husband.⁷⁵ The evidence of Dr. Eastman, a renowned psychiatrist, was that she was suffering from an abnormality of the mind which could have reduced her responsibility for the crime. The appellant said that she did not have the resources or opportunity to engage a psychiatrist earlier and it was not routine for the mental health of defendants in murder cases to be assessed.

Ramjattan had been subjected to severe physical and sexual violence during the course of a long cohabiting relationship with the deceased, which started, against her will, at age seventeen. He was considerably older and threatened her family if she was not sent to live with him. She managed to escape and had started a new relationship. She was pregnant when the deceased eventually found her and forcibly and violently returned her to his house, where he continued his abuse and locked her in. He allegedly threatened to keep her imprisoned in the house until the child was born and to kill her if the child was not his. She sent a message to her new partner to rescue her and 'take care of' the deceased. Together with a friend, he beat the deceased to death eight days after her abduction. She was convicted of murder and sentenced to death for participating in the killing as part of a joint enterprise.

The Privy Council remitted the case to the Court of Appeal to hear the fresh psychiatric evidence in relation to the defence of diminished capacity, but ruled out the possibility that this evidence could be relevant to other aspects of her case or another defence like self defence or provocation.

The psychiatric expert evidence led to the substitution of manslaughter by reason of diminished capacity instead of murder in *Ramjattan's* case. There is a tendency for the evidence presented in *Ramjattan* of an abnormality of the mind to portray victims of domestic violence as pathologised.⁷⁶ To the extent this expert evidence is of battered woman syndrome, another difficulty is that many abused women who kill may not have key aspects of the syndrome such as learned helplessness. Professor Sherene Razack astutely observes that many Caribbean women, especially African-Caribbean women, do not meet stereotypes of passivity and helplessness and that this has sometimes harmed them in asylum applications in Canada.⁷⁷

In cases where battered women kill, social agency framework (SAF) testimony is now often provided in other jurisdictions. It focuses on the woman's social conditions such as the inadequacy of the police response, limited community alternatives and the risks of leaving

⁷⁵ *Indravani Ramjattan v State No. 1* (1999) 54 WIR 383 (PC T&T).

⁷⁶ Karyn Plumm, Cheryl Terrance, 'Battered women who kill: the impact of expert testimony and empathy induction in the courtroom' (2009) 15 *Violence Against Women* 186, 188.

⁷⁷ Sherene Razack, *Looking White People in the Eye: Gender Race and Culture in Courtrooms and Classrooms* (University of Toronto Press, Toronto 1998) 113 - 119.

home, not the woman's psychological reactions.⁷⁸ In *Ramjattan* the social context (her poverty, very limited help available in rural Trinidad, the friendship of the deceased with the police, and the likelihood of fatal retaliation after her escape from the relationship and her capture) provided as powerful evidence of her need for self protection.

Many Caribbean judges already take a common sense approach to this question of social context in sentencing women who killed abusive partners. However a narrow definition of murder and mandatory death sentences can take these questions out of their hands in some cases.

D. Provocation, an imperilled defence?

The expansion of who is a 'reasonable person' in provocation has opened the door for women defendants who have been abused by the deceased to better meet the standard. At the same time, it provides an excuse for killings which may be hard to justify, for example men who kill out of possessiveness. The wide moral difference in who gets to plead provocation led law reformers in Victoria, Tasmania and West Australia, Australia to abolish the defence. In two of these states, a new defence of unreasonable self-protective killings was introduced. The UK Coroners and Justice Act 2009 has abolished provocation and introduced a defence of loss of self control, which would include a loss of control due to fear. Now that the mandatory sentence of death for murder has been replaced by a discretionary one throughout the OECS, the question of the fate of the provocation defence properly arises for lawmakers.

6. SAFETY AND EQUALITY AT WORK: EMERGING JURISPRUDENCE ON SEXUAL HARASSMENT

A. Under-regulated workplaces and uncertain judicial functions

The crux of sexual harassment is that it fails to treat persons with equal respect at work and to respect for their human dignity. In the past the focus used to be on the fact that the conduct was sexual in nature, but today the more usual understanding is that the conduct is unwelcome and based on the sex, gender or sexuality of the person. It is equality not sexual morality that is being regulated.

In the Commonwealth Caribbean, only Belize has stand-alone sexual harassment legislation.⁷⁹ St. Lucia, the BVI and Guyana provide protection against sexual harassment at work in their anti-discrimination legislation. In these laws, sexual harassment is a form of sex discrimination. In the Bahamas and St Lucia, modest protection is offered against sexual harassment as a sexual offence.⁸⁰

⁷⁸ Plumm, Terrance (n 76) 188.

⁷⁹ Protection Against Sexual Harassment Act 1996 (Belize).

⁸⁰ Bahamas Sexual Offences and Domestic Violence Act 1991 (Bahamas); Criminal Code 2004 (St. Lucia).

In this under-legislated terrain, Caribbean employers have responded to concerns about sexual harassment in a haphazard way and not always with gender equality in mind. Too few employers seek to prevent sexual harassment through a policy that is clear and well publicised and allows victims to have their grievances addressed. Some handle allegations of sexual harassment poorly, ignore them or fail to adopt the correct procedures for discipline. In the earliest cases to reach the courts, it was employees dismissed for sexual harassment that brought claims, not victims of sexual harassment and courts struggled to determine whose interests were preeminent.⁸¹

As shown below, industrial courts and tribunals can shape the development of labour law significantly by clarifying the duties and responsibilities of employers and fellow employees to promote fairness and equality at work and send a 'very strong message' to them about changing standards.

B. Expanding common law understandings: A safe system of working extends to freedom from sexual harassment

In 1996 the Trinidad and Tobago Industrial Court decided in *Bank Employees Union v. Republic Bank Limited*⁸² that sexual harassment by Deolal Mohess, an employee of the bank, was within the 'corridor of dismissable misconduct'. His Honour Mr. Cecil Bernard giving the opinion of the Industrial Court, described 'sexual harassment' as 'an idea which has come into public consciousness',⁸³ even though the term is 'yet to define a precise "offence"'⁸⁴

Mohess was dismissed following an investigation of the allegations made by three women that he made unwelcome physical contact with them, touching their bottom, hips and kissing them on the cheek. After the first allegations, a supervisor spoke to him. The employer wrote to him and asked him to respond to the various allegations. He admitted some of the behaviour but said his actions were innocent. The court said it was not relevant what his intentions were, simply that he acted voluntarily and his conduct was unwelcome.

His Honour Bernard articulated the problem with sexual harassment in terms of a common law duty on employers to provide a safe system of working. He said this went beyond protecting employees from physical harm. He added, "That obligation may well extend to the provision of a work environment which is free of the threat or application of sexual coercion by one employee towards another."⁸⁵

C. The duty of the court to ensure equality at work

*BIGWU v ACCSYS Limited*⁸⁶ may be one of the first Caribbean sexual harassment cases that involve the harassed person as litigant and not the harasser. In this case before the Trinidad

⁸¹ e.g. *Bico Ltd v Jones* (2 August 1996) BB 1996 CA 27.

⁸² (25 March 1996) TT 1996 IC 13.

⁸³ *Ibid.* at 12.

⁸⁴ *Ibid.*

⁸⁵ *B.E.U. v. Republic Bank* at 15.

⁸⁶ (10 March 2008) TT 2008 IC 37.

and Tobago Industrial Court, the employee was a receptionist. She said that she made complaints to her immediate supervisor at the accounting firm about several acts of sexual harassment by a male senior officer. Her supervisor promised to speak to the employee but what happened next was 'subtle work pressures' on her thereafter by the harasser and continued unwanted conduct.

She was called into a meeting with the harasser, her supervisor and the Principal of the firm and dismissed for using obscene language. When she advised the Principal in the firm that she had made complaints against the harasser and that this might be the motivation for the complaint against her, he insisted that he could not allow her to make that allegation except in the presence of the harasser.

The Industrial Court was of the view that having regard to the nature of the accusations she had made against the employee and the involvement of the said employee in her dismissal, and her junior status relative the three men, he ought to have given her a hearing without fear of intimidation or duress or management's power. A dismissal in these circumstances was harsh and oppressive. An employer is required to take into account the degree of seriousness of the conduct and the relative positions of the parties in the organisation in determining the appropriate discipline.

The Court also pointed out that the Industrial Relations Act was aimed at improving industrial relations and the court had a duty by virtue of the Act to ensure sexual harassment does not go 'unchecked and unabated' and to send a 'very strong message to employers and fellow workers.'⁸⁷ The Industrial Court acknowledged sexual harassment as implicating the fundamental right guaranteed against discrimination on the grounds of sex.⁸⁸ It also noted that ILO conventions address the prevention of and sanctions for sexual harassment in the workplace.⁸⁹ In these two decisions, the Trinidad and Tobago Industrial Court has identified sexual harassment as a serious matter that compromises the right of an employee to a safe place of work and the right to gender equality at work.⁹⁰

7. CONCLUSION

The Caribbean cases discussed in this paper speak eloquently because the judges fine-tune the law with reference to fundamental aspirational norms and values. They provide varied support for the need for change, and rarely justify change or refinements simply based on an available precedent. They look closely to the constitutions, changing societal norms within the Caribbean and also to international standards. Finally, these cases do more than decide the issues before them, they self consciously provide guidance for future cases. We should promote greater awareness of these decisions and their significance as part of the process of 'regendering' justice in the Caribbean.

⁸⁷ *ibid.*

⁸⁸ *ibid* 29.

⁸⁹ *ibid.*

⁹⁰ Compare with *Cadet v Deep Bay Development Co. Ltd* (21 December 1989) AG 1989 IC 12; *Titus v Sandals (Antigua) Ltd* (4 February 2002) AG 2002 IC 1.