

Gender, Equality, Justice and Caribbean Realities: The Way Forward

Tracy Robinson

Salutations

The Rt Hon Sir Dennis Byron, President of the Caribbean Court of Justice

Hon Mr Justice Adrian Saunders, Judge of the CCJ, Conference Chair

Judges of the Caribbean Court of Justice

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Honourable Mr Justice Kenneth Benjamin, Chief Justice of Belize

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The Hon Adriel Brathwaite, Attorney General of Barbados

Honourable Justices of Appeal, Judges of the High and Supreme Court, Masters, Registrars and magistrates

I wish to thank the organisers for the invitation to participate in CAJO this year and the President for his very generous introduction. I am aware of the eminence of previous addressors and I humbled as a law teacher from the Caribbean, now Kingston and one time Barbados, to have yet another opportunity to talk with judicial officers in the Caribbean again.

It is an honour to be introduced by Sir Dennis. A conversation with him nearly fifteen years ago at the Eastern Caribbean Supreme Court about the need for family law reform in the Eastern Caribbean was a seminal moment for me. It obliged me to ask less abstractly how do our laws and legal institutions maintain and extend social injustice, then to ask what difference can law and law reform make, what questions are worth asking to make that possible, especially for researchers, and who are we—what role we should play—in the business of change, in engineering development in the Caribbean.

[Tribute to Hon Madam Justice Desiree Bernard](#)

One woman who has led those types of conversations long before many of us is the Honourable Mme Justice Desiree Bernard. There can be no more fitting way to begin this conference than to pay tribute to this pioneer woman judge in the Caribbean.

The former Chief Justice and Chancellor in Guyana, was an activist lawyer in Guyana who helped to found the Guyana Association of Women Lawyers. She was a Member, Chair and Rapporteur of the CEDAW Committee where she detailed legal and policy recommendations to States parties to the one of the most ratified human rights conventions. She was a member of the Committee that issued the ground breaking General Recommendation 19 on Violence against Women that gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men and is a form of discrimination within the meaning of the Women's Convention.

The Hon Mme Justice Bernard is a generous and plain speaking, deeply committed to nation and region, yet an avowed internationalist and a long time defender of women's rights. She has been honoured by her country, the University of the West Indies, and she is the recipient of the CARICOM Triennial Award for Women in 2005. She is a Judge of the Inter-American Development Bank Administrative Tribunal. (Not to be outdone by CARICOM, the Republic of Guyana, and others, one of those 'bigging' up Mme Justice Bernard earlier this year is a blog called guyanesegirlsrock.com.) I wish in this moment to salute you and express our admiration, regard and gratitude for your service.

A Longer View of Law in the Caribbean

This third CAJO is titled 'Equality, Justice and Caribbean Realities' I want to ask the question, what difference *gender* makes to our analyses of equality, justice and Caribbean realities. I have two answers. The first is a subtle one, in which gender is a suggestion about our need rediscover law as a social formation if we wish to tackle questions of social injustice—to learn law and about it from other perspectives. The second is more substantive, that gender can give us insight into developing a more robust understanding of justice.

In 1997, Justice Bernard co-chaired a ground breaking judicial colloquium in Guyana. Hosted by the Commonwealth Secretariat in collaboration with the CARICOM Secretariat it had as its objective increasing sensitivity to and awareness of gender discrimination when encountered by the judiciary of Caribbean states, and strengthening the use of international human rights norms and instruments. On many occasions since then she has boldly called for 'judicial intervention and activism in the enforcement of women's human rights.'¹

¹ The Hon Madam Justice Desiree Bernard, 'Respecting The Human Rights Of Women Within The Judicial Systems Of The Commonwealth Caribbean' Commonwealth Caribbean Colloquium on Gender, Culture and the Law, Jamaica, 23 June 2011.

The 1997 colloquium clearly had an impact on Honourable President of the CCJ, then Chief Justice of the Eastern Caribbean Supreme Court, who was present at the meeting. A year later, in 1998, in an appeal from St. Vincent and the Grenadines, in a case named *Gooderidge v R*² he cited the Women's Convention. The appellant was appealing 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 or due process. Byron CJ concluded that a delay of six years between arrest and trial was 'presumptively prejudicial'. Still, 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. Especially given the strength of the corroborating evidence of the offence from a health worker, the appeal was dismissed.

In *Gooderidge*, the Chief Justice took a familiar conception of justice—of fairness—to *see and recognise* the six year old girl. He refocused notions of fairness and due process, which have been concerned primarily with the interests of the person facing conviction, to contemplate the interests in justice of this girl-complainant. He used international law as an external 'reflective mirror' through which to assess Caribbean realities and what our commitment to gender equality means. It gave him an opportunity to reflect and review what we take for granted or sometimes deem 'necessary', 'natural' and 'normal', and see how these may in fact be contested and socially constructed subordination or disadvantage.³ Then Saunders JA in *Hughes v R*⁴ said we should not 'regard the circumstances of each territory as being so peculiar, so unique as to warrant a reluctance to take into

² VC 1998 CA 9.

³ Vicki Jackson, *Constitutional Engagement in a Transnational Era* (OUP 2010) 198.

⁴ *Hughes v R; Spence v R* (2001) 60 WIR 156 (CA).

account the standards adopted by humankind in other jurisdictions.’ He encouraged judges to fully consider ‘[t]he collective experience and wisdom of courts and tribunals the world over’.⁵ That reflective mirror of the world around us—comparative and international law—can help us come to terms with our past and present realities. This need not only be done on a case by case basis. Judges make guidelines on a range of issues. I recently visited Peru and met with judges of their Supreme Court who had just issued a plenary agreement on appraising evidence in sexual offences cases that would serve as a guide in all courts, having regard to the rulings and recommendations of the Inter American Human Rights System.

In a region in which governance and law were premised on exclusions, oppression and violence, and, we have been reluctant to ask how this history has marked the administration of justice today. Distancing ourselves from our violent histories regrettably has been a way of showing our maturity.⁶ The late Ralph Carnegie had to concede for example that emancipation had ‘only been indirectly a matter of constitutional law.’⁷

It is not just *what* we know but *how* we come to know and what we make of that knowledge that matters. I say so respectfully because there is a legal epistemology or ‘distinctively legal ways of approach knowledge’.⁸ All of us remember that initiation during our first year in the LLB when we were told to unlearn ‘common’ understandings of our world and taught how to adopt stances of neutrality, select relevant details from cases using abstract legal categories, practice social distancing from those who are subjects of the law.⁹ Typically, in the ways we learn and do law the ‘social roots of legal doctrines’ get lost and that this dulls our ability to fully appreciate social inequalities.¹⁰ We

⁵ Ibid.

⁶ Anthony Bogues, ‘Politics, Nation and PostColony: Caribbean Inflections’ (2002) 11, 6(1) *Small Axe* 1, 16.

⁷ Ralph Carnegie, ‘The importance of Constitutional Law in Jamaica’s Development’ *WILJ* 43, 43.

⁸ Elizabeth Mertz, *The Language of Law School: Learning to “Think like a Lawyer”* (OUP 2007) 3.

⁹ Ibid 4-5.

¹⁰ Ibid 5-6.

tend to treat law, especially the common law, we treat as an inheritance that is dehistoricised. The legal precedents we use to teach about our constitutions, family law and criminal law, and others, don't take us far back enough, or take us to the wrong place—transatlantic. They leave us alienated from the social formation of law in our region, which we can ill afford as judicial officers and lawyers who must every day respond social inequalities and injustice.

Please indulge in telling a longer view of law and legal institutions, through a turn to history. My four short stories about law come from the first half of the nineteenth century in the English speaking Caribbean: 1801, 1827, 1832 and 1846.

The first is the criminal trial of Thomas Picton, governor of Trinidad, at the beginning of the nineteenth century for torturing Luisa Calderon, a free mulatto woman.¹¹ Calderon was said to have been 'seduced' by Pedro Ruiz at ten or eleven to live with him as his mistress. She is said to have given access to Pedro Gonzalez to Ruiz's home who robbed Ruiz.¹² Calderon and Gonzalez were taken into custody and when she refused to implicate Gonzalez in the questioning, Governor Picton ordered the infliction of torture on her to extract a confession. She was subject to *picqueting*, that is tied to a scaffold by one wrist, the other wrist tied to her ankle, and then she was lowered unto a wooden spike, for 54 minutes, with her full weight bearing down on that leg. She confessed but not completely and was subject to a further 24 minutes the next day. Picton's trial and retrial ended inconclusively where a special verdict was delivered in which it was found torture was legal at that time under Spanish law in Trinidad.

My second account is about Mary Prince who was a slave in Bermuda, Turks Islands and Antigua. Her owners, the Woods, took her with them to England in 1827 and she sued for her freedom, claiming

¹¹ James Epstein, 'Politics of Colonial Sensation: The Trial of Thomas Picton and the Cause of Louisa Calderon' (2007) 112 *American Historical Review* 712, 716.

¹² Epstein, *ibid.*

that they had abused her and violated specific aspects of the Consolidated Slave Acts of 1824.¹³ One reason for the violence was her marriage to a free black man 1826. She says:

When Mr. Wood heard of my marriage, he flew into a great rage and sent for [my husband] Mr Wood asked him who gave him a right to marry a slave of his? [Mrs Wood] could not forgive me for getting married, but stirred up Mr. Wood to flog me dreadfully with his horsewhip. I thought it very hard to be whipped at my time of life for getting a husband—I told her so. She said that she would not have nigger men about her yards and premises, or allow a nigger man's clothes to be washed in the same tub where hers were washed.

Mrs Wood was always abusing me about [my husband]. She did not lick me herself, but she got her husband to do it for her, whilst she fretted the flesh off my bones.¹⁴

Diana Paton explains that the flogging of women was regarded as especially offensive because it involved the exposure of women's bodies.¹⁵ Flogging of women was banned during amelioration to 'strengthen slaves' sense of gender difference'.¹⁶

Just a few years later, on the eve of emancipation in Barbados, there was an infamous trial recounted by Barbadian historian Melanie Newton.¹⁷ Robert James, a slave, in 1832 who was convicted by an all-white jury of robbing and sexually violating Margaret Higginbotham, a poor white widow and mother who lived nearby. He was sentenced to death. Compensation was ordered for the benefit of James' owner for loss of him. The Acting Governor John Brathwaite Skeete, a planter and slaveowner took the surprising decision to stay execution to allow the Privy Council to review the case. As Newton notes, the rape by a black male slave of a white woman was probably the most emotionally charged there could be in that period.¹⁸ Skeete doubted about the fairness of the trial because the verdict rested primarily on the widow's testimony and he suggested that Higginbotham may have

¹³ Nicole Aljoe, "'Going to Law": Legal Discourse and Testimony in Early West Indian Slave Narratives' (2011) 42 *Early American Literature* 351, 354,

¹⁴ *The History of Mary Prince, A West Indian Slave, Related by Herself* (ed Moira Ferguson (University of Michigan Press 1997) 84-5.

¹⁵ Diana Paton, *No Bond but the Law: Punishment, Race and Gender in Jamaican State Formation, 1780-1970* (Duke University Press 2004).

¹⁶ *Ibid.*

¹⁷ Melanie J. Newton, 'The King v. Robert James, a Slave, for Rape: Inequality, Gender, and British Slave Amelioration, 1823-1834' (2005) 47 *Comparative Studies in Society and History* 583.

¹⁸ *Ibid* 586.

known James prior to the incident and not been an unwilling party to sexual intercourse.¹⁹ Without corroborating evidence, the Acting Governor did not think a conviction could stand.

Finally, historian Diana Paton describes a system of alternative community justice led by church leaders like Paul Bogle that existed in Jamaica after slavery. She tells the story of the trial of James Graves who in 1846 was tried at the Trelawny quarter sessions for sexually assaulting a thirteen year old girl, Rebecca Campbell. The report was the parents were advised by their Christian leader to get money from the prisoner in exchange for dropping the case. The accused refused. The judge reprimanded the parents for their 'base and detestable conduct' in trying to 'sell the virtues of their child' and acquitted Graves.²⁰

These vignettes capture something of justice in this historical window of a changing Caribbean that was shaped by race, class *and* gender. Law and justice don't stand outside these social forces—they prefigured whether violence would be considered punishment or torture, what was considered fair proceedings, what marriage meant and what was sexually expected of who to this day. In our longer views of law, we can miss this. Sir Hugh Wooding in 1967 famously identified the need for a Caribbean legal philosophy. He thought it would recognise the ubiquity of heterosexual couples living together without the benefit of marriage but in 'the true spirit of a husband-and-wife relationship' and allow the common law husband be treated like a *de jure* husband, entitled to some exculpation if he 'caught his woman in an act of quasi-adultery,' the paradigmatic act of provocation at common law.²¹ What Sir Hugh's analysis presumes rather than questions the gendered privilege that underlie the common law rule of provocation – that that men have proprietary rights in women's bodies and sexuality.²²

¹⁹ Ibid 588.

²⁰ Diana Paton, *No Bond but the Law: Punishment, Race and Gender in Jamaican State Formation, 1780-1970* (Duke University Press 2004) 180-181.

²¹ H Wooding, 'Foreword' in K Patchett (ed), *The Law in the West Indies: Some Recent Trends* (Commonwealth Series No 6, British Institute of International and Comparative Law, London 1966) vii..

²² T Robinson, "A Caribbean common law", (2007) 49(2) *Race and Class* (A special issue: *Caribbean Trajectories: 200 years on* (eds) A. Trotz, A Kamugisha), 118.

So to the question, what difference does gender make to our analyses of equality, justice and Caribbean realities, I think in some respects it is a quite subtle one; it suggests that we must have a much closer look at and contextualise the nature and features of social disadvantage in our region. This is a form of cosmopolitanism that benefits from the work of historians and social scientists as it does from an internationalism that gives us an opportunity to use a reflective mirror in evaluating ourselves.

More generous notions of justice and equality

I see ideas about gender also having a weighty and substantive dimension—pushing us to more worthwhile understandings of justice and equality—from which we can ask ourselves the questions I posed earlier, *what role does law play in maintaining inequalities, what different can law and legal institutions make and who are we in the business of change.*

I think gender equality is evolving into a Caribbean higher order legal standard²³ with the imprimatur of our imperfect constitutions and modern laws, through the dynamism of ‘transnational legal processes’²⁴ as law ‘transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again’²⁵ and through the actions of those who seek justice and administer justice. This is an incipient process. We are only now beginning to work out the details of what that really means. Noticeably, we tend to see equality in a very formal

²³ T Robinson, Gender Equality as a Caribbean Legal Standard’. Paper delivered at the Caribbean Colloquium: Gender, Culture and the Law sponsored by UN Women, Ministry of Youth, Sports and Culture Jamaica and Commonwealth Secretariat, 21-23 June 2011, Jamaica. See also T Robinson, ‘Gender, nation and the common law constitution’ (2008) 28(4) *Oxford Journal of Legal Studies* 735.

²⁴ Harold Hongju Koh, Transnational Legal Process’, (1996) 75 *Neb L Rev* 181, 184.

²⁵ *Ibid.*

way, as demanding exactly the same treatment even though what is typically warranted are measures that address vulnerability and disadvantage, which might demand different treatment.²⁶

In some ways it has become easier to talk about gender and the law in the Caribbean and in high places, especially in relation to violence against women.²⁷ Such are the discourses of concern and spaces to talk that we might miss the volatility, contestation and confusion on the verges and margins. These tensions should push us to refine what we think justice and equality mean.

I have benefited greatly from feminist analyses of justice that take us beyond Aristotelian notions of fairness and an even-handedness that means everyone is treated the same. I want to adopt and discuss Nancy Fraser's three dimensions of justice. She says it has a political dimension of *representation*, an economic dimension of *distribution* and a cultural element of *recognition*.²⁸

Recognition

I want to build into Fraser's category of recognition, Sandra Fredman's notions of equality as equal dignity and worth and the need to acknowledge 'different identities, aspirations and needs'.²⁹ Violence and harassment must be treated as dignitary harms and ones of non-recognition.

Let me start with violence. With the successful enactment of domestic violence everywhere, we now have sobering evidence of a 'protection gap'. Complainants 'vanish' and few orders relative to

²⁶ See Arif Bulkan, 'The Poverty of Equality Jurisprudence in the Commonwealth Caribbean' (2013) 10 Equal Rights Review 11; Se-shauna Wheatle, 'The Rights to Equality and Non-Discrimination and the Jamaican Charter of Fundamental Rights and Freedoms' (2012) WILJ 50th Anniversary Special Edition 126.

²⁷ Angela McRobbie calls this the post-feminist moment. She talks about how 'political issues associated with feminism are understood to be widely recognised and responded to' even when feminists and feminists are themselves not highly valued. Angela McRobbie, *The Aftermath of Feminism: Gender, Culture and Social Change* (Sage Publishers 2008) 55. See also T Robinson, "Our Imagined Lives" in Faith Smith (ed), *Sex and the Citizen: Interrogating the Caribbean* (2011 University Press of Virginia) 201.

²⁸ Nancy Fraser, *Feminism, Capitalism, and the Cunning of History: An Introduction*, FMSH-WP-2012-17, August 2012. 11-14, available at http://halshs.archives-ouvertes.fr/docs/00/72/50/55/PDF/FMSH-WP-2012-17_Fraser1.pdf

²⁹ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

applications seem to get made.³⁰ An oft cited World Bank study shows that the Caribbean has some of the highest global levels of reported rapes. All exceed the global average of 15 per 100,000; Some Caribbean countries report levels as high as 112 and 133 per thousand.³¹ We have made important changes to our laws but they do not go far enough. Many of the reforms fail to criminalise all rapes in all forms and contexts—in marriage, by anal penetration and in relation to men. And impunity is high for sexual violence, despite reforms, as you know better than most, and as has been confirmed by baseline studies undertaken by UN Women.

On the question of recognition, I am stunned that Barbados is approaching 50 years of independence, and with clear recommendations to do the same from the Forde Commission on constitutional reform made over a decade ago,³² and no clear right to non-discrimination on the basis of sex.³³ The situation in the Bahamas is as troubling, given its 2002 referendum vote against gender equality as a constitutional right.³⁴

Many of the questions on the margins about gender in the public discourse and Caribbean legal literature revolve around this question of recognition. One set of questions revolve around the relationship between gender, sex and women. Who is entitled to claim non-recognition because of

³⁰ Mindie Lazarus-Black, *Everyday Harm: Domestic Violence, Court Rites and Cultures of Reconciliation 5* (University of Illinois Press, Urbana & Champaign 2007), especially 1, 35-64.

³¹ *Ibid.*

³² Barbados, *Report of the Constitution Review Commission*. (Government Printing Office 1998).

³³ Section 23 of the Barbados Constitution provides:

(1) Subject to the provisions of this section—

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) 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, colour or creed, 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 which are not afforded to persons of another such description.

³⁴ See T. Robinson, 'Gender, Feminism and Constitutional Reform in the Caribbean in Bailey, Leo Rhynie (eds.) *Gender in the 21st Century: Caribbean Perspectives, Visions and Possibilities* (2004, Ian Randle Publishers) 592.

gender: is the gender women's territory? Can we claim non recognition if both men and women are impacted?

Kaleel Jones was a four year old boy in St. Kitts-Nevis. He was sent home from school because he had a pony tail and the school had a rule that boys' hair should be cut short. While no such restriction existed for girls, both boys and girls were told not to wear 'stylish' hairdos to do. It was accepted that to cut his hair would have been deeply wounding psychologically to this little boy. His claim of sex discrimination failed before the Court of Appeal because although there were differences in expectations, there was no disadvantage because both boys and girls were subject to the requirement of wearing conventional hairstyles.³⁵ The Court of Appeal made the familiar technical distinction between a case of discrimination, which was impermissible, and one of mere differentiation, which was not prohibited. Respectfully, I think this misses a key point. What Kaleel was also seeking to upend were the conventions about what was appropriate hairstyles for boys and girls. These which were based on gender stereotypes and prescriptions about masculinity and what it means to be a boy. They were saying: you must present yourself and look the way boys are expected to look. Alternatively he might have been saying that these conventions had a disproportionately harsher impact on boys who typically have fewer options for self-expression through hairstyles. Nadia Ellis explains how men in dancehalls in Jamaica now 'ride the dangerous edges of masculinity' as ways of affirming machismo and also to disrupt it.³⁶ Girls are also subject to gender expectations about femininity and respectability that establish what is conventional for them. In other words, both girls and boys can find themselves negatively impacted (Kaleel certainly was) by these gender conventions. They create different rules for boys and girls but affect them both. Equality analysis will

³⁵ *AG v Jones* KN 2008 CA 3, 2 June 2008.

³⁶ Nadia Ellis, 'Out and Bad: Toward a Queer Performance Hermeneutic in Jamaican Dancehall' (2011) 15 *Small Axe* 7, 22.

fail us if it must always involve a comparison.³⁷ It must be able to establish structural disadvantage that is caused by the social relations of gender and address it as such.

In another recent case brought by McEwan and others who are trans persons in Guyana, Hon Chief Justice Mr. Justice Chang had a similar worry. Can a law that prohibits cross dressing for an improper purpose by both men and women be said to amount to gender discrimination against trans persons born male biologically.³⁸ The Chief Justice thought not and we are all curious to hear what understanding of equality will be taken up by the Court of Appeal.

The second anxiety about gender has been about its capaciousness. To the extent it shows up interlocking forms of injustice and non-recognition and implicates sexuality, lawmakers have sounded an alarm. Is it a super-category that swallows up sexual orientation and gender identity? The Jamaica Constitution for example in section 13(3)(i) does not prohibit discrimination on the grounds of sex or gender. Instead it prohibits discrimination on the ground of being 'male or female'. The Jamaican courts will no doubt soon try to make sense of this.

And we also have the Equal Opportunities Act of Trinidad and Tobago, an antidiscrimination law that says that 'sex does not include sexual preference or orientation'. The Trinidad and Tobago Court of Appeal concluded unanimously that this was a constitutionally impermissible distinction to make.³⁹ They took the view either that sexual orientation was analogous to other well accepted grounds of discrimination and it was an impermissible limit to make, or that it was an element of gender discrimination. Buried deep in the Privy Council's decision in *Suratt v AG* is a reversal of this ruling and a general conclusion that 'there can be little doubt that the balance which Parliament struck in

³⁷ Many Caribbean constitutions define 'discrimination' using comparisons. See for example Barbados Constitution s 23(2). However, Jamaica, Guyana, Belize and Trinidad and Tobago include equality clauses in their constitutions which need not be so limited and could abandon the need for comparators.

³⁸ *McEwan and others v AG* 6 September 2013 (SC Guy).

³⁹ *Suratt v AG* (unreported) 26 January 2006, CA, T&T.

the EOA is justifiable and consistent with the Constitution.⁴⁰ The majority decision of the Privy Council did not bother to set out, far less interrogate, the decision and reasoning of the intermediate Court of Appeal on this point. The only clue from the Privy Council that this issue had been decided by the Court of Appeal comes in a spare paragraph in Lord Bingham's dissent that is obiter because he concluded that the law was unconstitutional on other grounds and did not need to decide this point. While Baroness Hale avoided a discussion of the issue Lord Bingham said that he did not see 'sex' in section 4 of the Trinidad and Tobago Constitution as embracing sexual preference or orientation,⁴¹ This was a surprising statement because it had long been established that there was no closed list of prohibited categories of discrimination in the Trinidad and Tobago Constitution.⁴²

I think the analytical concept of *gender* is a tool for discerning expectations about what it is to be male or female that are socially, politically and economically embodied as opportunities, privileges and disadvantages. Historically those 'legal sex differentiations have disadvantaged women.'⁴³ But the concept of gender discerns many other sites and intersections of privileging and disadvantage. Notions of gender capture not just expectations about but expectations *that we must* be male or female. It prescribes a strong cutting binary. Persons who fall short of this, can find themselves demeaned, punished because of gender norms, sexual orientation and gender identity. I think it is right to say that sexual orientation cannot be made into a mere subset of gender, still, they are not distinct antagonistic considerations.⁴⁴ The two are intersecting forms of social distinction and differentiation. Attitudes about lesbians, gays, bisexuals and intersex (LGBTI) persons are interwoven with expectations about what it is to be male or female—that is the notion of gender.⁴⁵

⁴⁰*Suratt v AG* [2007] UKPC 55 [58].

⁴¹ *Ibid* (Lord Bingham) [35].

⁴² *Smith v LJ Williams* (1980) 32 WIR 395 (T&T CA).

⁴³ Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knopp, *Gender and Human Rights* (OUP 2004) 13, 16.

⁴⁴ See T. Robinson, 'Gender, Feminism and Constitutional Reform in the Caribbean in Bailey, Leo Rhynie (eds.) *Gender in the 21st Century: Caribbean Perspectives, Visions and Possibilities* (2004, Ian Randle Publishers) 592.

⁴⁵ Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knopp, *Gender and Human Rights* (OUP 2004) 13, 16.

Even if gender is not sufficient to capture all the dimensions of sexuality and sexual expressions, it cannot be made irrelevant either. Many of us are learning about the harsh force of the gender binary male/female in new ways from the stories of intersex persons. See the testimony of Jen 'Pidgeon' Pagonis, before the Inter American Commission on Human Rights on March 15 of this year in a public hearing.⁴⁶ Pidgeon is a leader in the intersex youth movement in the United States.⁴⁷



Distribution

The question of distribution is one of the least appreciated aspects of gender justice, even though courts play a very central role this function in relation to families and the workplace. Distribution is essential to ensure we all have equal life chances and to break patterns of disadvantage.⁴⁸

⁴⁶ The hearing can be found at http://www.youtube.com/watch?v=245zpmTobCM&list=PLkh9EPEuEx2st1_l-W6cr0o3oH9DxBSDc&index=12.

⁴⁷ See <http://aiclegal.org/who-we-are/staff/pidgeon-pagonis/>; <http://aiclegal.org/the-pursuit-of-happiness-in-our-original-beautiful-bodies-pidgeon-pagonis-recent-testimony-before-the-inter-american-commission-on-human-rights/>

⁴⁸ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

Distribution and recognition often go hand in hand. Starting in the late 1970s in the Anglophone Caribbean, there has been a process of what is termed by the late Professor Rex Nettleford, smaddification.⁴⁹ The starting premise was that ‘Everybody is somebody’; in Jamaican: ‘Everybody a smaddy’. Nettleford describes this as the ‘phenomenon of growth of personal awareness and self-confidence amongst the vast majority of Jamaicans and the sense of place and purpose engendered by the social legislation programmes of the seventies.’⁵⁰ Prof Nettleford had in mind laws like the Jamaica Status of Children Act 1976 and the creation of family courts.

There are now some real possibilities of distribution to meet gendered disadvantages of relationships, through property distribution and spousal maintenance. These have been reserved for marriages or relationships that are close to that and been the virtual exclusive province of superior courts, and most families appear before magistrates.⁵¹ Legal smaddification has been undone by economic, emotional, psychic costs of going to summary courts, especially for poor women who disproportionately bear the heaviest burden of families. In child support proceedings, many of us in the Caribbean continue to live in the haze of nineteenth century quasi criminal summary proceedings, operating on the basis of barely softened versions of old ‘bastardy’ and poor laws that were designed to transfer the burden of poor children born outside marriage and never considered its subjects dignified human beings.⁵² They are built around tropes of the black male ‘wutlessness’ and abject black femaleness. These summary proceedings are ineffective in making economic transfers to families that need help and tend to fuel

⁴⁹ Rex Nettleford, ‘Preface: Michael Manley and Caribbean Development: The Culture of Resistance’ (2002) 48 *Caribbean Quarterly* 1, 1.

⁵⁰ Rex Nettleford, Review Article on Michael Manley, *Jamaica: Struggle in the Periphery* Third World Media Limited London 1982) (1982) 28(3) *Caribbean Quarterly* 47-53, 51. Nettleford attributed the phrase to Anthony Laing who worked with the Popular Music Development Programme of the Jamaica Cultural Development Corporation (53 n 15).

⁵¹ See T Robinson, ‘Division of Relationship Property in the Caribbean: Negotiating ‘Equality’ and ‘Commonsense Knowledge’ of Caribbean Families’, Paper Presented at the International Society of Family Law Caribbean Regional Conference, 18 March 2011, The Bahamas.

⁵² R. Clarke, J. Sealy-Burke, T. Robinson, “The Administration of Family Justice: Child Support, Shared Family Responsibilities and Gender Equality: Barbados Country Report” (UNIFEM 2006).

not resolve conflict and have become sites where gender relations and social hierarchies are dramatized—sites of ‘gender wars’.⁵³

It will be surprising to some the extent to which the workplace, the site for economic survival, is still the frontier for gender equality. Smaddification generated maternity leave benefits but it is not always available to women with insecure employment or the new contract workers providing services.⁵⁴ There has been very little take up in relation to sexual harassment legislation although some judges have recognised this violation.⁵⁵ Many of the discrimination cases initiated on the grounds of sex or gender have involved work and this is in part because patently discriminatory laws and policies have lasted into well the twenty first century and impact women’s access to employment and progress at work. The Trinidad and Tobago Police Service Commission Rules provided that the Commission could terminate the appointment of a woman officer who was married on the grounds that her family obligations are affecting the efficient performance of her duties. In *Johnson v AG*⁵⁶ in 2009, the Privy Council ruled that such laws were discriminatory towards women.

⁵³ Suzanne Lafont, ‘Gender wars in Jamaica’ (2000) 7 *Identities* 233.

⁵⁴ See generally, Rose-Marie Antoine, ‘Rethinking Labor Law in the New Commonwealth Caribbean Economy: A Framework for Change’ (2010) 32 *Comp. Lab. L. & Pol’y J.* 343.

⁵⁵ See *Bank Employees Union v. Republic Bank Limited* (25 March 1996) TT 1996 IC 13; *Banking, Insurance and General Workers Union V. ACCSYS Limited* (10 March 2008) TT 2008 IC 37. More generally see T Robinson, “Sexual Harassment in the Workplace: Let the Conversation Begin”, paper presented at the Jamaica Bar Association in Association with the General Legal Council, Continuing Legal Education Week-End Seminar, 20 November 2011, Jamaica.

⁵⁶ *Johnson v AG* [2009] UKPC 53 (T&T). Women have fought through the courts to maintain their jobs as teachers having become unwed mothers. In a striking judgment, then Conteh CJ said it was impermissible for a Catholic school which was a public authority to bind women teachers to a contractual term, to abide by the teachings of Jesus Christ, to the exclusion of their constitutional right against discrimination on the grounds of sex. See *Wade v Roches* BZ 2005 CA 5; (30 April 2004, Supreme Court, Belize (No. 132)). Affirmed on appeal *Wade v Roches* (unreported) 9 March 2005, CA, Belize (Civ App No 5 of 2004)(30 April 2004, Supreme Court, Belize (No. 132)).

Representation

Finally, I want to turn to representation as an aspect of justice. Despite the progress made by women in the Caribbean in their participation in the workforce and all arenas of public life, there is a noticeable shortfall in our representation at the highest levels of governance and public life. Throughout the Anglophone Caribbean we have seen declines in women's political participation in parliaments. Research by Mark Figueroa demonstrates that it is not just a matter of time.⁵⁷ He found that while women academics at UWI increased from 22 to 35 % between 1988 and 2001, only about 10 per cent of the professors on the three campuses were women.⁵⁸ Figueroa demonstrated that the problem was not simply a time lag. He used as a base the numbers of women and men at UWI 33 years ago to gauge what percentage should be professors now.⁵⁹ He concluded that should have been about three times as many female professors in 2001 than was the case.⁶⁰ He said that 'If women are catching up in the academic field, they are doing so very slowly and they are making very heavy weather with regard to storming the highest levels of academic leadership.'⁶¹

I ask this question because UWI has trained more women lawyers than men for at least thirty years, I suspect. Those lawyers can now be found at the very top of the legal profession. Yet there is only one woman sitting on the CCJ and she is due to retire soon. Figueroa's analysis should dissuade from the view that it is just a matter of time.

Controversially, Justice Sonia Sotomayor of the United States Supreme Court said prior to her elevation that she thought women might be better judges than men but then retreated from this

⁵⁷ Mark Figueroa, 'Old (Female) Glass Ceilings and New (Male) Looking Glasses: Challenging Gender Privileging in the Caribbean' In Barbara Bailey and Elsa Leo-Rhynie (eds) *Gender in the 21st Century: Caribbean Perspectives, Visions and Possibilities* (Ian Randle Publishers, 2004) 134.

⁵⁸ Ibid 140.

⁵⁹ Ibid 141.

⁶⁰ Ibid 141.

⁶¹ Ibid 142.

position in the confirmation hearings.⁶² Some suggest women improve the quality of justice by bring new important perspectives; such as they might be more likely to promote decisions premised on gender equality, to have a different approach to dispute resolution, and better understand women who are victims and offenders.⁶³ But the empirical evidence is inconclusive on this point.⁶⁴ As Kate Malleson points out, it takes some work to reconcile this claim with judicial impartiality (not impossible but difficult) and do we want to assume all women have the same interests.⁶⁵ And with the special woman's perspective approach she notes that we risk can ghettoising women judges in fields like family, which are important but less well regarded.⁶⁶

I agree with Malleson that the better argument for strengthening women's participation and representation at the highest levels of the judiciary is equality and the right of women and men to equal participation in public life. For this reason, I think it would be a shame if the CCJ in 2014 becomes a court only represented by men. I think this question of representation is a matter of justice. Some argue that insisting on women in these high ranking positions does not mean there is real diversity and can reinforce stereotypes that women are not qualified for the top positions.⁶⁷ I see those risks but would wish you to consider the value of the principle of representation here. Indeed, this is a court built around the principle that as a matter of legitimacy, democracy and fairness, the region should have its own court.⁶⁸ An all-male court sends a message that is not in sync with this. As Lady Hale said, 'in a democratic society, in which we are all equal citizens, it is wrong in

⁶² See Stephen Choi, Mitu Gulati, Mirya Holman, Eric Posner, 'Judging Women' (2011) 8 *Journal of Empirical Legal Studies* 504, 504.

⁶³ Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 *Feminist Studies* 1, 4.

⁶⁴ *Ibid* 8. See also Stephen Choi, Mitu Gulati, Mirya Holman, Eric Posner, 'Judging Women' (2011) 8 *Journal of Empirical Legal Studies* 504.

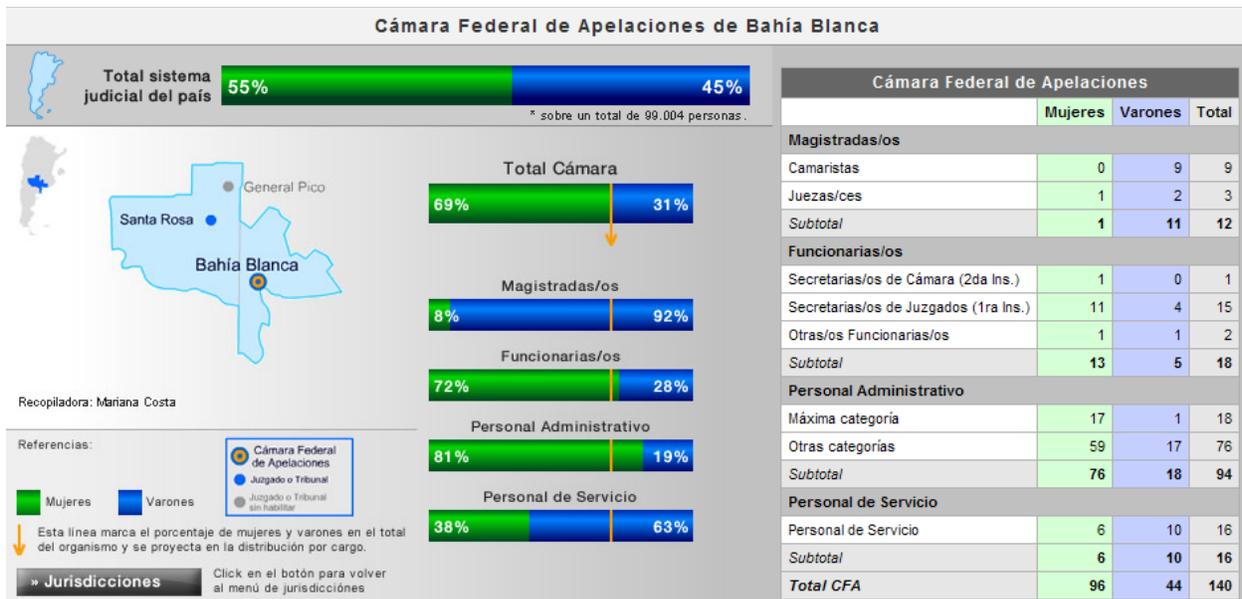
⁶⁵ Malleson 12.

⁶⁶ *Ibid* 13.

⁶⁷ Patrick Shin, Mitu Gulati, 'Showcasing Diversity' (2011) 89 *North Carolina Law Review* 1017.

⁶⁸ See T Robinson, "A Caribbean common law", (2007) 49(2) *Race and Class* (A special issue: *Caribbean Trajectories: 200 years on* (eds) A. Trotz, A Kamugisha), 118.

principle for that authority to be wielded by such a very unrepresentative section of the population.’⁶⁹ In this instance, I am not being prescriptive and saying what should be doing, rather saying as a first step we must start talking about it. One initiative we can look at are gender maps as have been undertaken by the Supreme Court of Argentina that assist us in diagnosing the issue. See for example below:



The path set by Justice Bernard must not get overgrown or taken up with macca bush.⁷⁰ If we are committed to justice, we must be committed to vigorous debate about these key issues of recognition, distribution and representation. There can be no better place than here to start that debate.

With that incendiary entreaty, and best wishes for a successful conference, I thank you all very much.

⁶⁹ See Brenda Hale, Equality and the Judiciary: Why Should We Want More Women Judges?’ (2001) Public Law 489, 502.

⁷⁰ Jamaican for a bush with prickles.