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Women, Disability and the Law: A Commonwealth Caribbean Perspective

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Abstract

This article examines the extent to which the issue of double discrimination is adequately addressed in Commonwealth Caribbean jurisprudence. Double discrimination is an acute concern of women with disabilities whose marginalisation is amplified by the intersection of their gender and their disability. As such they face higher rates of domestic violence, unemployment and poverty in comparison to other members of society. Commonwealth Caribbean law, particularly in the areas of criminal law, family law and constitutional law, has not adequately responded to the plight of the disabled women. In certain instances, the law promotes negative stereotypes about women with disabilities. In other instances, it fails to address the complexity of discrimination claims by adopting a formal approach to equality, i.e. treating like cases alike. These shortfalls can be contrasted with the growing recognition in international law of the gendered dimensions of disability and the problem of double discrimination. These international developments, combined with recent jurisprudence emanating from Belize and Guyana in the cases of *Wade v Roches* and *McEwan et al v Attorney General of Guyana*, provide hope that Commonwealth Caribbean law can be re-crafted to ensure a dignity-centric approach which addresses the disadvantages and prejudices faced by women with disabilities.

Keywords: women, disabilities, double discrimination, equality, constitutional law.

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Introduction

The World Report on Disability (WHO 2011) estimates that there are over one billion persons with disabilities (PWDs) in the world. The Economic Commission for Latin America and the Caribbean (ECLAC 2009) estimates that the disabled population in Caribbean amounts to approximately 2,278,509 persons and by 2050, PWDs will account for almost 9.6% of the population of the region. Despite these numbers, it is widely acknowledged that PWDs lead a precarious existence marked by prejudice and discrimination. For women with disabilities, the marginalisation is amplified by the intersection of their gender and their disability. They are left to navigate the conjunctive effects of the stereotypes attached to being female and those attached to being disabled.

This article aims to examine the extent to which the law in the Commonwealth Caribbean has responded to the stereotypes and double discrimination faced by women with disabilities. The picture that emerges from a survey of the law in the area of constitutional law, criminal law and family law looks bleak. However, there are recent glimmers of hope that Caribbean jurisprudence can provide redress for disabled Caribbean women by incorporating the concept of dignity in their legal analysis.

Structure

This article is structured into five parts. Part I (Background and Context) sets the stage for the Paper by examining the definition of a disability, the models of disability and the lived experience of persons with disabilities. Part II (Challenges facing Women with Disabilities) delves into the unique challenges faced by women with disabilities, in particular the problem of double discrimination caused by the intersection of gender and disability. Part III (The Caribbean Legal Approach to Disability) analyses the approach of Caribbean legal systems in treating with disability issues. Particular focus is placed on the spheres of criminal law, family law and constitutional law to illustrate their shortcomings in addressing the challenge of double discrimination. Part IV (International Law

and Double Discrimination) discusses the international approach to double discrimination using the examples of the United Nations Convention on Persons with Disabilities (UNCRPD) and the CARICOM Charter of Civil Society to ground the discussion. Part V (A New Approach to Discrimination) highlights the novel approach being taken by some Caribbean courts in interpreting the constitutional guarantee of equality as illustrated in the cases of *Wade v Roches* and *McEwan v the Attorney General of Guyana*, which may provide the solution to the problem of double discrimination.

Part I: Background and Context

What is a disability?

There is no consensus on what constitutes a disability. Scholars have observed that "[d]isability is a phenomenon that is usefully thought of as a reflection of the zeitgeist of a particular time or era" (Drum 2009, 27). As such, this article will adopt the approach taken in the UNCRPD, Article 1 of which describes PWDs as including "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." Given the record number of parties to the UNCRPD (163 signatories and 181 ratifications) this description is the closest approximation to a universally accepted statement on what constitutes a disability.

The Models of Disability

Just as there is no accepted definition of what a disability is, there is also no consensus on the theoretical approach to disability issues. The dichotomy of impairments and barriers mentioned in the UNCPRD reflects the social/human rights model of disability, which stands in contradistinction to the moral/religious and medical models.

The moral/religious model views disability as an act of God (Retief and Letšosa 2018, 4738) which is intended as either punishment or a manifestation of Christ's suffering/benevolence. The medical model views disability as a health condition that requires medical intervention, treatment and rehabilitation (Kaplan 2000, 352). Both approaches have led to the abuse and segregation of PWDs, as exemplified in the history of the treatment of mental illness. This treatment was highlighted in the 1815 Report of the Committee on Madhouses which visited several asylums including the infamous Hospital of St Mary of Bethlehem. 'Bedlam', Europe's oldest mental institution, was founded by Italian Bishop Goffredo de Prefetti in 1243. The evidence at the 1815 Inquiry into the Regulation of Asylums in England detailed the degraded and brutalizing situation at Bedlam in which patients were chained, barely clothed and kept in small cells from which they were never discharged but by death. Some appeared fully lucid and capable of coherent conversation. Such conditions cannot be considered relics of the past as seen in the 2019 police raids at a treatment facility for substance abuse in Trinidad and Tobago.

The abuse, isolation and stereotyping of PWDs became a focal point of the disability movement of the 1970s. This led to the development of the social model of disability which views disability as a social construct resulting from social and environmental barriers which produce impairments (Favalli and Ferri 2016, 546). This approach recognises the lived experience of PWDS, many of whom contend that "the *main* disadvantage they experience does not stem directly from their bodies, but rather from their unwelcome reception in the world, in terms of how physical structures, institutional norms, and social attitudes exclude and/or denigrate them" (Goering 2015, 134). Thus viewed disability can be seen as a "dynamic interaction between health conditions and environmental and personal factors" (WHO 2001).

The human rights approach builds on the social approach. It recognises and acknowledges PWDs are rights bearers and the State has a responsibility to respect, protect and fulfil these rights. This human rights approach is driven not by compassion or pity but rather by dignity, freedom, equality and inclusion. The social and human rights

models of disability are reflected in the substantive provisions of the UNCRPD and these models are adopted in this article.

Persons with Disabilities: A Life on the Margins

Notwithstanding the rise of the social and human rights approach to disability encapsulated in the UNCPRD, PWDs continue to live at the margins of society (Agmon, Sa'ar and Araten-Bergman 2016, 147). There are clear linkages between disability and poverty (Filmer 2008 and Groce, London and Stein 2014), low levels of education and unemployment (Heymann, Stein and Moreno 2014), inadequate access to health care and high levels of violence and discrimination.

The statistical data paints a grim picture (Hughes et al. 2012). Adults with disabilities are 1.5 times more likely to be a victim of violence than those without a disability, while those with mental health impairments are at nearly four times the risk of experiencing violence. Children with disabilities are almost four times more likely to experience violence than non-disabled children. Children with mental or intellectual impairments appear to be among the most vulnerable, with 4.6 times the risk of sexual violence than their non-disabled peers. This data led Dr Etienne Krug, Director of the WHO Department of Violence and Injury Prevention and Disability to remark that "children with disabilities are disproportionately vulnerable to violence, and their needs have been neglected for far too long."

In the Commonwealth Caribbean, PWDs are 15 times more likely to have less primary education and 40% less likely to have reached secondary and/or university levels and comprise a mere 4.2% of the working population (ECLAC 2011). They must also confront the harmful stereotypes perpetuated in Caribbean culture where disability is often viewed as the by-product of "wrongdoing, obeah or guzu, evil spirits, ghosts or duppies" (Miller 2002).

Part II: Challenges Facing Women with Disabilities

Women with Disabilities and Double Discrimination

For women with disabilities the outlook is even more bleak. Across the globe, women with disabilities are twice as likely to experience domestic and gender-based violence such as physical, psychological, sexual and financial abuse, neglect, social isolation, forced sterilization and psychiatric treatment (Ortoleva and Lewis 2012). In the Commonwealth Caribbean men with disabilities are two times more likely to gain employment than women with disabilities; with disabled women being "heavily concentrated in low-skilled, elementary occupations, routine clerical work and service sector jobs" (ECLAC 2011).

In addition, an alarming proportion of Caribbean women experience either physical or sexual violence at the hands of an intimate partner. For example, the 2016 Women's Health Survey for Jamaica revealed that one in four women (25.2%) had experienced physical violence by a male partner, 7.7 % had been sexually abused by their male partner and 27.8% reported a lifetime prevalence of intimate physical and/or sexual violence. A 2017 study of crime in the Latin American and Caribbean region revealed that the "female homicide rate in the region is twice the world average of 2.3% per 100,000 women" (Jaitman 2017). As Tracy Robinson observed "violence against women … remains in the Caribbean a pervasive and debilitating condition of women's lives" (Robinson 2004). Many of these abused women acquire a disability, further heightening their already precarious existence (Bott, Guedes, Goodwin and Mendoza 2012).

The cases of Carrie Buck and Cheryl Miller illustrate the plight faced by disabled women. Carrie Buck was committed to the Virginia Colony for Epileptics and Feeble-Minded after having a child born out of wedlock as a result of rape. She, like her mother before her, was adjudged to be 'feebleminded and promiscuous'. Therefore, she was a candidate for forcible sterilisation under a 1924 Virginia statute. The Supreme Court upheld the constitutionality of the Virginian law, with renowned American jurist Oliver Wendell Holmes Jr reasoning

that "society can prevent those who are manifestly unfit from continuing their kind. …Three generations of imbeciles are enough": *Buck v Bell* (1927).

Cheryl Miller was forcibly removed from her cubicle at her workplace and involuntarily committed to the St. Ann's Mental Hospital. Her transgression - having an open umbrella at her desk, using headphones while playing music, appearing untidy and suggesting that her co-workers were against her. For 17-days she was forcibly administered long-acting psychotic drugs and allowed limited visitors. She had to file a *habeus corpus* application to secure her release. The trial judge held that Ms. Miller's detention violated section 15 of the Mental Health Act of Trinidad and Tobago: *Cheryl Miller v North-West Regional Health Authority* (2015). This legislation allows persons "found wandering at large on a highway or in any public place" who appear to be mentally ill to be taken into custody and sent for treatment at a mental facility.

It is evident that women with disabilities experience "invisibility, estrangement and/or powerlessness" (Fine and Ash 1981, 239). This puts them at risk of double discrimination; a term credited to African-American feminists who noted that persons often experience discrimination and prejudice as a result of a combination of factors (Kimberlie Crenshaw 1989, 149) . There is additive discrimination where a person experiences unfair treatment "on several grounds at the same time" (Duvefelt and Sjölander 2008) such as where a person fails to gain employment because of their language skills, age, nationality and job experience: *Perera v Civil Service Commission* (1983). Intersectional discrimination results from a "combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone" (Eaton 1994, 222). This genus of discrimination is often experienced by disabled women. The post-modernist era has seen the birth of disability-feminism, explained by Rosemarie Garland-Thompson as a rejection of "the homogenous category of women and … the essential effort to understand just how multiple identities intersect" (Garland-Thompson 2001, 4).

Part III: The Caribbean Legal Approach to Disability

In general, the law in the Commonwealth Caribbean has not adequately addressed the problem of gender stereotypes and double discrimination. Rather the legal system seems to perpetuate misconceptions about both gender and disability. This is evident from a review of criminal law, family law and constitutional law cases. However, two constitutional law cases, *Wade v Roches* (2004) and *McEwan et al v Attorney General of Guyana* (2018), coupled with the approach to double discrimination in international law, provide some hope that the law in the Commonwealth Caribbean will acknowledge and address the multi-faceted forms of discrimination faced by women with disabilities.

To be clear, this article is not suggesting that law is a panacea for all the problems faced by women with disabilities. Observations regarding the challenges faced by post-colonial societies in addressing human rights issues and the disconnect between law in the books and law in reality are well-made (Chouinard 2018, 8). However, the fact remains that an inevitable consequence of the social/human rights model of disability is that women with disabilities will seek redress through the legal system. When they do so, it is imperative that the law rises to meet this challenge. To the extent that the law is falling short must be highlighted and addressed.

(i) Criminal Law

In criminal law disability issues can manifest in two ways: (1) where the virtual complainant is a PWDs or (2) where a defendant has a disability. The judicial approach to the former category is demonstrated in two Caribbean cases: *Mapp v R* (Bermuda) and *R v Silburn* (Cayman Islands). Regarding the latter, the decisions in *Douglin v R* (Barbados), *Ramjattan v the State* (Trinidad and Tobago), *Longsworth v R* (Belize) and *Toussaint v R* (Antigua and Barbuda) merit discussion.

Mapp (1999) involved an appeal against a 10-year sentence for sexual assault. The appellant pled guilty to having sexual intercourse with a woman without informing her that he was infected with HIV. The court allowed the appeal, reducing the sentence to six years. What is interesting is the manner in which the judge, Huggins J, describes the appellant and the complainant. The juxtaposition of these descriptions clearly shows gender stereotypes.

The judge describes the complainant as 43 years old woman, living in a nursing home who was "mentally challenged" and yet "world-wise." He also noted that although she was initially "upset by what had happened … there was evidence that she had put the incident behind her." In contrast he describes the appellant as a 37-year-old father of five children and whose own father committed suicide when he was 11 years old.

Thus, Huggins J seems to cast the complainant as promiscuous and the appellant as the man who had suffered a tragic loss that led to poor life choices. He pays no regard to the high rates of sexual violence which women with disabilities experience. Neither does the learned judge attach much store to the fact that the appellant had two previous convictions for sexual offences. Taken in the round, the learned judge's remark that his decision should not be taken as an indication that the court regards offences of that nature as anything but extremely serious rings hollow.

The approach of the trial judge in *Mapp* can be usefully contrasted with that taken in *Silburn* (2016). Here the appellant was charged with raping the complainant whilst she was on holiday in the Cayman Islands. Like Mapp, he was also sentenced to 10 years' imprisonment and appealed to the Court of Appeal. On appeal, he argued that the trial judge had usurped the role of the jury in expressing his views in the summing up in such a way that the jury would have been left with the impression that they had to deliver the verdict he was expecting. In particular, he complained the following passage from the

summing up where the judge reminded the jury that the complainant had mental health issues:

> We don't know what the diagnosis is, we don't know any details of it. It's not something that you should be troubled by, members of the jury, in my judgment. Lots of people have mental health issues at some time in their life, doesn't make them more likely to have sex with a stranger or to make things up. So again, be careful about stereotyping mental illness.

The Court of Appeal rejected the contention that this passage rendered the appellant's conviction unsafe and dismissed the appeal. Thus, rather than perpetuate stereotypes, the court in *Silburn* actively attempted to prevent them from arising. Given that *Silburn* is the more recent authority, it is hoped that this becomes the norm in the judicial approach to complainants with mental health impairments, particularly in sexual offence cases.

In cases involving defendants with disabilities, men and women do not always fare equally. For example, the 1977 Barbadian case of *Douglin* involved an appellant who was charged with abandoning her child contrary to section 25 of the Offences Against the Person Act. She delivered her baby at the Queen Elizabeth Hospital on July 10, 1976, went home two days later and returned on August 5 to take the child home. She gave a statement to the police admitting to having put the child in the outhouse of her neighbour and that she did not want the child. At trial, the admissibility of this confession was challenged on the basis that at the time she made the statement she was suffering from post-partum depression. The defence led medical testimony from a psychiatrist who examined the appellant after she gave the statement to the police. The psychiatrist testified that the accused was emaciated, withdrawn, uncommunicative, prone to bouts of crying and had been depressed during her pregnancy. She explained that the appellant was suffering from post- partum depression psychosis and denial of her child was a part of her illness. The trial judge held that the appellant's health was not so impaired as to render her confession inadmissible. This conclusion was upheld on appeal with the court

noting that in cross-examination the psychiatrist had admitted that post-partum psychosis tends to improve from day to day and she could not say with certainty what the appellant's mental condition was at the time she confessed. This decision demonstrates a lack of appreciation of the nuances of post-partum depression; which is even more surprising as the medical evidence examined the different aspects of this illness.

Over time the criminal law has developed to account for female-centric defences such as battered woman's syndrome (BWS). In the Commonwealth Caribbean the cases of *Ramjattan v the State* (1999) and *Longsworth v R* (2014) both establish that evidence of BWS can be used to establish the defence of diminished responsibility, thereby reducing a charge of murder to manslaughter. However, it is important not to overstate the effect of this development. After all, BWS is not a defence in and of itself. Furthermore, in both cases, the evidence of BWS was only accepted after it was shown as satisfying the fresh evidence rule. In addition, the decision in *Holley v AG* (2005) demonstrate the challenges faced by juries in dealing with BWS under the umbrella of diminished responsibility. As such, the ability of a female accused to adduce evidence of BWS is somewhat limited.

The challenges faced by the female defendants in the aforementioned cases can be contrasted with the decision in the 2001 case of *Toussaint*. Here the appellant was convicted of murdering his wife Sylvia. In his confession statement to the police he explained the events leading to his wife's death as follows: the couple was estranged. One night after work he showed up at her apartment at midnight asking for sex. She refused, using several expletives to express her rejection. The appellant then picked up a piece of wood which he had found in her yard and struck her several times on the head. When she fell to the ground unconscious, he placed her body in his car, taking it to the beach where he buried it.

At trial he used his confession to raise the issue of provocation. He also raised the pleas of insanity and diminished responsibility, using evidence that one year before he killed his ex-wife he had been diagnosed with and treated for a problem of anxiety and depression. His treating physician testified that she saw the appellant in 2000 and he was on medication for depression but showed no signs of mental illness. There was also evidence that whilst he was incarcerated awaiting trial he was prescribed anti-psychotic drugs. His appeal against conviction was allowed on the basis that the trial judge did not properly direct the jury on the issue of diminished responsibility. The Court of Appeal's critique of the trial judge's summation demonstrates clear gender bias. Singh JA explained that the trial judge erred in failing to direct the jury to "consider the proposition that the appellant, having been treated for the ailment of manic depression shortly before and shortly after the killing, that the balance of probability could have been that the deceased's vulgar responses to his advances could have agitated this ailment causing him to snap, triggering off his violent and cruel reaction." In this passage the deceased woman is framed as the aggressor and the appellant as the victim.

The foregoing cases provide a snapshot of the need for further refinement of the criminal law to properly address the challenges and prejudices created by the combined effects of gender and disability.

(ii) Family Law

In family law legislation across the Commonwealth Caribbean, disability is a factor that is considered in awarding spousal and child maintenance. However, problems still arise particularly in relation to the continuance of an order for maintenance of a child beyond the age of 18. This challenge would adversely affect women given the high number of single female headed households which are disproportionately represented among the poor in the Commonwealth Caribbean (Caribbean Development Bank 2016).

In Trinidad and Tobago orders for child maintenance cease at age 18 and a court can extend the order but only up to the age of 21 and only where the person is engaged in a course of study or where there are other special circumstances: Family Law Act, sections 16 and 17. In Antigua and Barbuda under the Maintenance of and Access to Children Act 2008, sections 2 and 20, a child maintenance order can be extended beyond the age of 18 on the ground of special circumstances. There is no guidance in the legislation as to what amounts to "special circumstances." It does not automatically follow that a disability would continue to qualify.

Take for example, the 1992 decision of *Bacchus v Bacchus*. Upon the dissolution of her marriage in 1977, Mrs. Bacchus was granted $25.00 per month to maintain each of her three children until they attained the age of 18. One of the children, Lennox had mental health challenges, spending intermittent periods at the Mental Health Hospital. He continued to reside with Mrs. Bacchus in the matrimonial home until it was ordered to be sold as part of the divorce. For 14 years she supported him financially. Then in 1991, she applied to the court for an order that Mr. Bacchus provide reasonable maintenance and housing accommodation for his son. She also sought reimbursement for the expenses incurred over the 13 years that she continued to provide for Lennox after the maintenance order against Mr. Bacchus had expired. None of these applications met with success.

The court, per Joseph J admitted that the fact that a child is mentally ill would be a special circumstance which would allow a maintenance order to be extended beyond age 18. Yet, the learned judge reasoned that this provision could not extend to a person aged 31. He put the matter thus:

> Would financial provisions extend to the child of a marriage who is 31 years old, whether or not the child is mentally ill, particularly when an application is made in respect of that child some fourteen years after the dissolution of the marriage?

> Again I think the answer is no. I think that the financial provision for such a person would be left to the good sense, conscience and reasonableness of both parents. If a mother seeks assistance for a mentally ill adult who is a child of the family a right thinking father surely would not refuse, but I do no think that the Court can make the order applied for by the applicant.

It appears that there is a growing recognition in the region of the challenges faced in providing for the ongoing maintenance of a PWDs. Thus section 15 of the Maintenance Act of Barbados, CAP 216 states that a magistrate may make or extend an order for beyond age 18 on the ground of mental or physical handicap. Also worthy of mention is the Maintenance Act 2005 of Jamaica which allows that in making an order for spousal maintenance, the court must have regard to whether the spouse has undertaken the care of a person of 18 years of age or over who is unable, by reason of illness, disability or other cause, to care for himself: section 5(2)(e). Hopefully these provisions will become the norm in the Commonwealth Caribbean.

(iii) Constitutional Law: The Right to Equality

No examination of the legal response to gender and disability would be complete without a discussion of the Constitution. The Bills of Rights of Commonwealth Caribbean Constitutions fall into two categories: the conventional model and the unconventional model. The former contains a preambular section with a list of fundamental rights, followed by detailed provisions which largely cast these rights in negative terms by detailing their permitted limitations. It is the most common formulation in the Commonwealth Caribbean and is found in the Constitutions of Antigua and Barbuda, The Bahamas, Barbados, Grenada, St. Kitts/Nevis, St. Lucia and St. Vincent and the Grenadines. The latter contains a list of broad, open-ended rights followed by floor of due process protections which cannot be abridged by legislative enactment and is only found in Trinidad and Tobago. Despite their diverse permeations, all Caribbean Bills of Rights recognise the normative value of

equality. The raison d-être of the right to equality has been judicially described as the eradication of "unfairness and discrimination and the creation of true freedom and peace": *Sanatan Dharma Maha Sabha v Attorney General* (2009). In the conventional model constitutions there are anti-discrimination clauses which prohibit discriminatory written laws and discriminatory treatment by public officials. These clauses define discrimination by reference to a laundry list of protected characteristics such as race, place of origin, political opinion or affiliation, colour and creed. Given this status-based approach an equality claim can only be brought on one of the detailed grounds. This principle was famously laid out in *Nielsen v Barker* (1982) where Massiah JA reasoned that "[t]he word "discriminatory" in Article 149 does not bear the wide meaning assigned to it in a dictionary. It has a precise and limited connotation [and] is confined only to favouritism or differentiation based on race, place of origin, political opinion, colour or creed."

This all or nothing approach has been applied to exclude claims of discrimination based on disability. In *Spencer v Attorney General* (1998) the Opposition Leader filed a wide-ranging constitutional claim challenging a planned tourism development on the west coast of Antigua. Byron CJ, as he then was, struck out the aspect of the claim alleging discrimination based on disability using the reasoning in *Nielsen*. He reasoned that "physical disability seems to lie outside the parametric limitations inherent in section 14(3). Our court is not a super legislature and does not have the power to expand the rights given in the Constitution."

Furthermore, the conventional model Constitution does not readily permit an equality claim based on sex and disability. Only four conventional model constitutions, namely Grenada, St. Kitts/Nevis, St. Lucia and St. Vincent and the Grenadines, label 'sex' as a protected ground. The only Caribbean constitution to include both sex and disability as protected traits is Guyana but to date there has been no double discrimination constitutional claim in that jurisdiction.

The status-based approach to equality can impose unnecessary limitations on litigants whose discrimination claim involves multiple characteristics as claimants tend to plead only one ground, foregoing the others. As a result, the court may not have a full picture of all the relevant circumstances which produced the discrimination complained about. For example, in the English case of *Burton v De Vere Hotels* (1997), two black female waitresses sought redress for race discrimination although they had been subjected to racist and sexist abuse by the late comic Bernard Manning. Hannett decries this atomised approach as unfairly minimising the complexity of double discrimination claims and allowing courts to retreat "into easily compartmentalised, discrete, essentialists understandings of discrimination (Hannett 2003, 76).

The unconventional model of Trinidad and Tobago adopts a more expansive approach to equality. Section 4(b) provides for the right to equality before the law and section 4(d) provides for equal treatment by a public authority in the exercise of its functions. There is no attempt to circumscribe the parameters of discrimination by the albatross of a protected characteristic. Although the opening recitation of section 4 does refer to character traits such as race, origin, colour, religion or sex, the equality provisions are not viewed as thusly circumscribed: see *Smith v LJ Williams* (1980), *Paponette v Attorney General* (2010) and *Public Service Appeal Board v Maraj* (2010). Therefore, in theory the breadth of the Trinidad and Tobago equality provisions should accommodate a double discrimination claim by a woman with a disability. In practice however, equality/discrimination claims based on disability do not meet with success owing to the requirement of an actual comparator.

Caribbean jurisprudence has an unyielding attachment to the construct of a comparator, as demonstrated by *Bhagwandeen v AG* (2004) where Lord Carswell explained that a "claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described … as actual or hypothetical comparators." The forging of the bonds

between comparison and equality is ascribed to Aristotle who wrote that "Equality in morals means this: things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness."

It has been suggested that the use of comparators serves to assuage counter-majoritarian fears that equality jurisprudence, if not moored to an objective legal test, can easily devolve to a reflection of the judiciary's conception of the good life. Suzanne Goldberg notes that "because of their utility in producing inferences of discrimination, comparators have emerged as the predominant methodological device for evaluating discrimination claims (Goldberg 2011, 745).

Be that as it may, the fact remains that courts often offer precious little guidance as to how to determine when cases are sufficiently alike or similarly situated, which makes the selection of a comparator difficult. In double discrimination claims the identification of a comparator becomes even more complex. For example, must the comparator have one characteristic or both? Take the case of a woman in a wheelchair who wishes to sue a State hospital for failing to provide an accessible examination table. Who would be the relevant comparator- a man without a disability, a man with a disability or a woman without a disability?

Furthermore ,the comparator paradigm, with its "assimilationist tendency" (Fredman 2016, 719) can serve to re-enforce patriarchal notions given its frequent use of male comparators. As Catharine MacKinnon once warned "man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man… Gender neutrality is thus simply the male standard" (MacKinnon 1987, 34).

The inability to find an appropriate comparator can inhibit the ability of PWDs to seek redress for discrimination through the equality provisions. This is clearly

demonstrated in the case of *Daniel v Attorney General* (2007). Mr. Daniel, the President of the Trinidad and Tobago Chapter of Disabled Peoples International was a wheelchair user. He brought a constitutional claim arguing that the lack of wheelchair access at the Hall of Justice violated his right to life, equality and freedom of movement. Only the first claimed violation succeeded. The equality claim was dismissed on the basis that Daniel had not shown that he had been treated differently when compared to other persons who were similarly circumstanced. Counsel for Daniel argued that the actual comparator test might not be an appropriate basis in dealing with PWDs. The trial judge, Bereaux J acknowledged that "the comparator test may not always be an appropriate basis for judging equality. But… finding a suitable and more appropriate test is fraught with difficulty. The matter requires review by the Court of Appeal or by the Judicial Committee of the Privy Council."

It is interesting that in allowing the claimed breach of the right to life, Bereaux J's analysis was heavily influenced by US 14th Amendment jurisprudence (equal protection of the law) and the UN Declaration on the Rights of Disabled Persons (the precursor to the UNCPRD). The learned judge seemingly suggested that the rights of disabled persons warrant heightened scrutiny in light of the systemic discrimination to which they have been subjected. He also relied on the concept of dignity reasoning that:

Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of same age which applies first and foremost to the right to enjoy a decent life as normal and full as possible. Bereaux J's analysis resoundingly approved on appeal to the Privy Council. It echoes the reasoning in the earlier decision of *Matthews v Transport Commissioner* (2000), a judicial review claim challenging the decision of the Transport Commission to refuse to issue a taxi licence at a taxi driver with a prosthetic leg on the basis that he posed a safety risk to the travelling public.

However, despite the success of these claims, the use of a comparator has serious shortcomings. It affects the ability of the law to expand beyond notion of formal equality, i.e. treating like cases alike. One of the pitfalls of formal equality is that it can be satisfied by consistently bad treatment (Hepple 2008, 1). For example, a State-run bank that fails to provide bathroom accommodation for PWDs can successfully resist a discrimination claim by showing that either it does not have such facilities for any of its customers or if it does have them, by removing them altogether. This phenomenon known as 'levelling up/levelling down' was famously demonstrated in the US case of *Palmer v Thompson* (1971) where Mississippi responded to a racial discrimination claim based on 'white only' public swimming pools, by closing all the public pools. It was held that this action did not violate the 14th Amendment of the US Constitution.

In addition, formal equality does not address the underlying causes of inequality such as historic prejudices and disadvantages which are acute concerns for PWDs. Such historic discrimination can be remedied by a substantive approach to equality which pursues four objectives: (1) redressing disadvantage, (2) countering prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic, (3) enhancing voice and participation, countering both political and social exclusion and (4) accommodating difference and achieving structural change (Fredman 2016, 727).

For example, one way to address the low levels of employment of disabled persons might be to establish quotas for employers. This is provided for in the Persons with Disabilities (Equal Opportunities) Act 2014 of The Bahamas, section 14(3) which requires every employer having more than one hundred employees to employ not less than 1% of qualified PWDs. As Amartya Sen notes "[e]qual consideration for all may demand very unequal treatment in favour of the disadvantaged (Sen 1992). However, such programmes would violate the uniformity and consistency cherished by Aristotelian equality.

Part IV: International Law and Double Discrimination

What of International Law?

The treatment of double discrimination in international law can provide a means of confronting the current challenges facing women with disabilities in Caribbean jurisprudence. After all, as far back as 1975 Caribbean courts have had recourse to international law, particularly in the area of constitutional adjudication: see *Trinidad Island Wide Cane Farmers Association v Seereram*. This trend has continued in modern jurisprudence, as illustrated by the 2002 trilogy of death penalty cases - *Reyes*, *Hughes* and *Fox*.

The concept of double discrimination features prominently in the UNCRPD which has been signed by almost every Caribbean country. The UNCRPD has been recognised as the first treaty to specially recognise women with disabilities by adopting a "gender lens in its terms and provisions" (Ortoleva and Lewis 2012, 17). Article 6 recognises that women and girls with disabilities are subject to double discrimination. Article 16 requires the development of legislative, administrative, social and educational measures to combat exploitation, violence and abuse, including their gender-based aspects. This gender-centric approach to disability also permeates Article 8 which requires awareness-raising measures to combat harmful stereotypes and prejudices, especially those based on sex and age, Article 25 which requires gender-sensitive health-services for PWDs and Article 23 which provides for the right to marry and have a family, inclusive of access to reproductive and family planning education as well as the right to retain one's fertility.

Under Article 34(4) of the UNCRPD, the Committee on the Rights of Persons with Disabilities, the treaty's monitoring body, is specifically mandated to ensure "balanced gender representation" in its composition. The Committee has embraced this mandate and has used its voice to highlight the high rates of sexual violence, discrimination, abuse, forced sterilization, female genital mutilation, sexual and economic exploitation, institutionalization, marginalization

and termination of parental rights faced by women with disabilities. In its 2016 General Comment, the Committee has also recognized that women with disabilities are prime candidates for "intersectional discrimination which recognises that individuals do not experience discrimination as members of a homogenous group but, rather, as individuals with multidimensional layers of identities, statuses and life circumstances."

Explicit recognition of the gendered dimensions of disability has also occurred at the regional level in the CARICOM Charter of Civil Society (the "CARICOM Charter") which was adopted on February 19, 1997. It is the product of *Time for Action: the Report of the West Indian Commission* which recognised the need to provide for normative moorings for the regional integration movement. The CARICOM Charter is comprised of 27 Articles and contains explicit protections for PWDs. Article II includes disability as a protected characteristic in the general guarantee of non-discrimination and respect for fundamental rights and freedoms. This is bolstered by Article XIV which provides that "Every disabled person has, in particular, the right not to be discriminated against on the basis of his or her disability; to equal opportunities in all fields of endeavour and to be allowed to develop his or her full potential; [and] to respect for his or her human dignity so as to enjoy a life as normal and full as possible." The CARICOM Charter also explicitly recognises women's rights and calls for "the promotion of policies and measures aimed at strengthening gender equality, all women have equal rights with men in the political, civil, economic, social and cultural spheres" including the right to hold public office, equal work and equal pay, non-discrimination and legal protection against domestic violence, sexual abuse and harassment: Article XII. Although it is not legally enforceable the CARICOM Charter does impose an obligation on States to discharge of their legislative, executive, administrative and judicial functions in a manner that ensures respect for and protection of the human dignity of every person: Article III.

International courts have also demonstrated a willingness to address gender stereotypes and double discrimination. In this regard, two recent decisions from the Inter-American system are worthy of note. *Maria da Penha v Brazil* (2001) involved a petition to the Inter-American Commission of Human Rights (IACHR) by a woman who had been the victim of repeated acts of domestic violence since 1983, culminating in her attempted murder. As a consequence of these attacks she suffered irreversible paraplegia. She challenged the State's failure to ensure that the perpetrator, her ex-husband, was brought to justice despite the evidence implicating him in the attacks. The case meandered through the court system for over 15 years creating the risk of impunity given the 20-year statute of limitations. Whilst noting that the State had taken some positive action such as establishing special police stations and shelters to assist battered women, the IACHR concluded that these initiatives had no effect in curbing the problem. Furthermore, by failing to prosecute and convict the aggressor, the State was tolerating and condoning his actions which served to "perpetuate the psychological, social and historical roots and factors that sustain and encourage violence against women." As such, there was a breach of the rights to life, equal protection of the law and the duty to condemn, prevent, punish and eradicate violence against women.

The 2016 decision of *I.V. v Bolivia* went even further. The case involved a woman who was granted asylum after fleeing the Fujimori dictatorship and had her tubes tied, without her consent, following complications with a caesarean section. She brought her case to the Inter American Court of Human Rights (IACtHR), after the criminal case against the doctor was dismissed. The IACtHR found that there had been a violation of, *inter alia*, the right to humane treatment and privacy and the duty to eradicate violence against women. In its judgement the court stressed the importance of autonomy and informed consent and also highlighted the women's control over their reproductive health can be affected by a combination of factors such as discrimination in access to health, power relations with respect to her husband, family and community, gender stereotypes and additional vulnerability factors such as race, disability and socioeconomic status. In finding a violation of the right to

non-discrimination the IACtHR stressed the values of autonomy and human dignity. As noted by Martín Hevia and Andrés Constantin, the *I.V.* case "marks the first time in which the Inter-American Court has connected gender stereotypes to forced sterilization and has recognized the role that gendered power relations play in reinforcing gender stereotypes and social practices that position women as dependents and subordinates" (Hevia and Constantin 2018).

Also worthy of note are the 2018 observations of the United Nations Special Rapporteur on the Rights of Persons with Disabilities which highlighted the issue of forced sterilisation of women with intellectual and psychosocial disabilities. The Rapporteur called on States to "[g]uarantee that health-care services and programmes include a human rights-based approach to disability, are non-discriminatory, seek informed consent prior to any medical treatment, respect privacy and are free from torture or other cruel, inhumane or degrading treatment (UN Doc. 2018, 21).

As such, on the international law front there is growing recognition of the multiple factors which operate to subjugate women and the need for special protection for women with disabilities.

PART V: A New Approach to Discrimination

Glimmers of Hope: *Wade* and *McEwan*

Given the willingness of Commonwealth Caribbean courts to engage with international law especially in claims brought by PWDs (see *Daniel* (ibid) and *Matthews* (ibid),) it is hoped that Caribbean jurisprudence will reflect a better understanding of the gendered dimensions of discrimination and double discrimination in particular. In this regard, two cases represent glimmers of hope on the horizon.

In *Wade v Roches* (2004) the Supreme Court of Belize showed its willingness to recognise the limits of formal equality, adopt the principles of substantive equality and take account of double discrimination. Ms. Roches brought a constitutional claim after being dismissed from her teaching position at a Roman Catholic school because she became pregnant out of wedlock. In its defence, the school used male teachers as the appropriate comparators and argued that the policy regarding pregnancy out of wedlock applied to both sexes.

Conteh CJ rejected their submissions, reasoning that although the rules of the school authorities applied equally to both men and women, they would "more assuredly, naturally and readily impact" females. Thus, the court was willing to look beyond formal notions of equality and embrace principles of substantive equality. Furthermore, though the case was not argued as one of double discrimination Conteh CJ reasoned "it was Ms. Roches' pregnancy while unmarried that was the issue", thus recognising the combined effect of her sex and marital status. The learned Chief Justice therefore concluded that in "dismissing her because of her pregnancy while unmarried does not accord with the protection afforded by Section 16 (2) and (3) of the Constitution against non — discrimination on account of sex."

McEwan et al v the Attorney General of Guyana (2018) involved a challenge by four transgender persons to the constitutionality of section 153(l)(xlvii) of the

Summary Jurisdiction (Offences) Act of Guyana which makes it a crime for a man to appear in female attire or a female to appear in male attire in a public place for an improper purpose. The Caribbean Court of Justice (CCJ) found that there was a violation of the right to equality and non-discrimination contained in Article 149 of the Constitution of Guyana. The Court adopted the substantive approach to equality considering the historic discrimination against transgender persons in the Caribbean which meant that section 153(l)(xlvii) would disproportionately affect them. The CCJ stressed the link between equality and dignity, stressing that Article 149 "signifies a commitment to recognising each person's dignity and equal worth as a human being despite individual differences… The constitutional promise of equality prohibits the State from prescribing legislative distinctions or other measure that treat a group of persons as second-class citizens or in any way that offends their dignity as human beings."

The concept of dignity finds expression in several international human rights documents such as the American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights and the Charter of the United Nations. It is hardly surprising therefore that the preamble of almost all Commonwealth Caribbean Constitutions refers to the concept of dignity. The Preamble of the St. Lucian Constitution sets out the belief that "all persons have been endowed equally by God with inalienable rights and dignity." Trinidad and Tobago's Preamble refers to the "dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator." Belize records similar sentiments but goes even further, stating that state policies should eliminate economic and social privilege and disparity and ensure gender equality. These preambles set out the norms that lie at the heart of the Caribbean constitutional enterprise and "breathe … life into the clay of the more formal provisions: see *Attorney General v Boyce* (2006). There is a growing recognition in Caribbean constitutional jurisprudence of an "umbilical cord" (*Bowen v Attorney General* (2009)) between the preambles and the Bill of Rights: see *Cal v Attorney General* (2007) and *Maya Leaders Alliance v Attorney General* (2015). As such there is room to use the concept of dignity as a means

to address the historic disadvantage and prejudice suffered by women with disabilities.

Conclusion

In many respects the ability of the Commonwealth Caribbean legal system to address the challenges facing women with disabilities, especially the problems associated with double discrimination and gender stereotypes, leaves much to be desired. That being said, the principles of international law coupled with two recent equality cases from Belize and Guyana give hope that the law can address the plight of the disabled woman in the Caribbean. Dignity that is "an acknowledgement of the intrinsic worth of human beings": *S v Makwanyane* (1995). Dignity is a value that finds expression in almost all Commonwealth Caribbean Constitutions. The second-class citizenship of women with disabilities in the Caribbean is the antithesis of a dignified existence. It is hoped that in time the law can assist in addressing this injustice.

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