

GENDER BIAS IN THE CAYMAN ISLANDS LAW

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ABSTRACT

Gender Issues have become a focal point of the global community for the past twenty years. With billions of dollars spent by governments around the world to promote gender equality and legislation constantly changing to address issues associated, it is interesting to note that there is still gender bias in the Cayman Islands.

In this paper we examine the gender bias reality which penalizes males based on their gender. While the law that will be examined specifically makes it an offence for doing an act against one gender, when the very act is perpetrated on the opposite gender there is no offence.

THE CAYMAN EXPERIENCE

Insulting the Modesty of a woman seems like a moral issue, but in the Cayman Islands it is a criminal issue. According to Section 133 of the Penal Code (2010) Revision, "*A person who, with intent to insult the modesty of any woman, utters any word, makes any sound or gesture or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, is guilty of an offence and liable to imprisonment for three years.*" On the face of it, one could arguably say that this is good legislation because it supports the view of a community to identify behavior that is unacceptable and intolerable to the ordinary person. However, the fact is that this law is not gender neutral but gender bias. Thus in attempting to enforce a public moral to keep good order in the society, the law discriminates against men as there is no corresponding law for the protection of a man's modesty. The law makers and/or the legal drafters must have thought that men have no modesty, or they

looked at statute throughout the Commonwealth, copied and pasted it without regard to ensuring accuracy in protecting the rights of all individuals in the Cayman Islands regardless of their sex.

Is public morality an excuse to promote gender bias within the context of the law as evidenced by the Penal Code (2010) Revision in the Cayman Islands? Specifically, the discussion focuses on s. 133; and for many who think that the law weighs heavy against men, and societal misgivings of perpetrators of crime are usually men, the fact is that if there is one wrong amongst ninety-nine rights, that one wrong is still wrong. This particular law is based on the mens rea. In Criminal law there are two fundamental elements that comprise a crime. The mens rea or mental element and the actus reus or act. In being able to successfully prosecute an individual for committing this crime, one must prove beyond a reasonable doubt that there was intent.

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In its simplest term, it must be shown that the accused had a mental element of intent. This is significant in the argument of gender equality, because had the accused committed this offence and thought that the victim was a woman, when in fact the victim was not a woman, there would be no offence. The emphatic position of the law is that it is a woman's modesty that is insulted, and this is the inequality of the law, because there is no answer to what happens when a man's modesty is insulted. One may further argue that in addition to the law being gender bias, it is discriminatory and a breach of one's human rights, based on sex and a violation of natural justice where one ought to be treated equally and the human rights of all respected. While the right to non-discrimination in s.16 of the Cayman Islands Bill of Rights is not a free standing right, its attachment in this instance to public morality is questionable at best, because the one must ask whose morality is determined to be the acceptable view. Each of us has a different view of morals; and in the Cayman Islands this is certainly the case with the myriad of nationalities, cultures, and people resident. It should be noted that the right to non-discrimination is a qualified right, whose justification in this instance is linked to public morality; however, this does not negate the issue of gender bias which continues to exist by virtue of this law in 2014.

Is a man's right being infringed on if he is the victim of what is defined as s. 133, if we use "man" as a substitute for the word "woman"? At this particular juncture, it would appear that a man's right is not infringed on, based on the law, although he may have his feelings hurt. Interestingly, it is ok for a man to have his feelings hurt and the perpetrator of misconduct faces no charge, but should the converse occur the perpetrator of the crime potentially faces 3 years in prison. The Cayman Islands is not unique in its continuation of this archaic law

which, quite frankly, should be thrown into the abyss of the Cayman trench. It is in the Penal Codes of Kiribati s. 133(3), Solomon Islands s. 141(3) and Tuvalu s.133(3), "*Whoever, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman or girl, or whoever intrudes upon the privacy of a woman or girl by doing an act of a nature likely to offend her modesty, shall be guilty of a misdemeanour, and shall be liable to imprisonment for 1 year.*"

A more appropriately drafted statute which would close the gender bias gap is found in s. 213 of the Fiji Crimes Decree 2009. It is referred to as Indecently insulting or annoying any person. It states, "*A person commits a summary offence if he or she, intending to insult the modesty of any person, a) utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by the other person; or b) intrudes upon the privacy of another person by doing an act of a nature likely to offend his or her modesty. Penalty is imprisonment for one year.*" Moreover, one may also look at the Crimes Ordinance 1961 of Samoa in s. 45. It is termed Indecent act with intent to insult or offend- "*Everyone is liable to imprisonment for a term not exceeding 2 years who, with intent to insult or offend any person, does any indecent act in any place.*"

This law which encompasses gender bias should be amended and similarly where it exists in other jurisdictions the same such recommendation would be made. The overarching point that cannot be ignored is that a country such as the Cayman Islands, a British Overseas Territory that is representative of the best in all that should be fair and just in law, ought to be a leader in ensuring that the values

and tenets that are expected of other lesser developed countries are exemplified in its statutes. To suggest or imply that gender bias exists in other jurisdictions, so it is ok for it to be a part of the Cayman model, is a gross miscarriage of natural justice. If Cayman is to be a leader in the region and a champion of law and order, human rights and gender equality, it should first start by looking at this gender bias which has been lawful for quite some time; and in the absence of law reform, human rights review and/or gender equality assessment, the status quo will continue.

There has been no public discussion on repealing or amending the gender bias law discussed in this paper. However, there are constant debates on the social dynamics of gender based violence and other equally important national issues. The matter of moral equivalence is not what is intended by this author when looking at gender issues, however, it is important that in a time when the gender most likely to be raising a family as a single parent is being supported through policy and legislation to eliminate gender bias against that sex, there should be every effort to also assure that both sexes are treated fairly free from gender bias as enshrined in a law. Sadly, in the Cayman Islands in spite of the fact that persons have been prosecuted under this poorly drafted law, there is no significant progress or intent to amend the law as is.

'Deeply entrenched gender biases have resulted in notions of "full employment" predicated on male labour.'¹ In another British Overseas Territory-Anguilla, gender bias is highlighted in a 2016 Caribbean Development Bank report. This indicates that there is recognition of gender bias in a particular focus and as such the concept of gender and acceptance that there can be gender bias is raised in this jurisdiction. To this end, it is reasonable to conclude that the concept is not

unknown and can also be examined with alacrity in the Cayman Islands if there were an interest in doing so.

This paper does not quantify the number of persons that have been prosecuted and convicted based on this gender biased law or is likely able to quantify the potential number of persons that could be prosecuted and convicted should the same crime have been committed against males. When contrasting the experience of gender bias in the law in the Cayman Islands with other jurisdictions in the Caribbean such as St. Kitts and Nevis, it is encouraging to note that in St. Kitts and Nevis, legislators have been proactive in ensuring that there is no gender bias in recent legislation.

"The Domestic Violence Act (2000) which went into effect in 2004 has a number of commendable features such as: (a) the absence of gender bias in that both males and females can obtain protection under any of the orders under the Act;"²

Having worked in St. Kitts and Nevis subsequent to this legislation being passed, it is commendable that the Law Reform and Legislative Drafters moved with alacrity to address an acknowledged problem with the law.

'Gender bias is also taught implicitly through the resources chosen for classroom use.'³ Therefore, the reality of gender bias existing in other facets of our society including education further supports the position that is being advocated in this paper that there must be an elimination of gender biases in all forms inclusive of what is found in the Cayman Islands statute.

The study by Professor Birdsong clearly shows empirically what this author has been saying anecdotally about the Cayman Islands Section 133 of the Penal Code (2010) Revision.

"For many years I assumed that there was gender-bias with respect to the imposition and carrying out of the death penalty in the United States. The death sentencing rate and the death row population remain very small for women in comparison to that of men. What we can say with some degree of certainty is that my prediction rang true. The inherent gender-bias with respect to putting women to death saved Ramjattan from the gallows in the English-speaking Carribean."⁴

'To date there are no male nurses in the island. Discussions on work in the health-care industry unearthed gender biases, stigma, discrimination and homophobia, despite the extension to Montserrat by the UK Government of legislation decriminalizing same-sex sexual activity.'⁵ The previous sentence demonstrates other types of gender bias that currently exists in another British Overseas Territory-Montserrat.

Contrasting the economies of the Cayman Islands, Anguilla and Montserrat, it becomes immediately clear that the Cayman Islands is in a financial league of its own. More importantly as the leading offshore global financial services center in the Caribbean, with a multicultural society and a GDP per capita above USD 45,000 it has significant leadership expectations in terms of being able to do things the right way. However, by continuing to promote, prosecute and convict persons based on a gender biased law, this is a blight in its otherwise good record in its penal code.

CONCLUSION

Gender bias is such that if left unchecked can erode public confidence in natural justice. It threatens the cohesive growth and

development of a society and promotes injustice through its inequity. The author is fully convinced that the gender bias that exists in the Cayman Islands has a deleterious effect on males and is an injustice that should be corrected without delay. Moreover, it is a reasonable proposition that should be accepted by all legislators and right thinking persons as a matter of promoting the rule of law in a stable democracy.

The Cayman Islands is a beautiful country with an exceptionally high standard of living with a people that have a proud heritage that places them in an elite class of accomplishment that is unmatched in the Caribbean. It is hoped that this tremendous success will translate into equal justice being applied in every law that is enacted in those magnificent islands.

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