***Occasional Paper Series 5/2012***

**Women on Trial: Towards a Just Criminal Justice System[[1]](#endnote-2)**

*Judith Soares*

**Introduction**

In the context of the existing social reality in the Caribbean and the Commonwealth, this paper will examine the law, the criminal justice system and sentencing as a method of punishment in terms of possible gender issues which have arisen and can arise in the course of due process. While we understand that it is the intention of the state to protect the majority from the few and to protect women specifically, there seems to be, on examination as it relates to women, (and other disadvantaged social groups and classes) a gap between this intention and the existence of workable legal options to protect these women. This therefore raises a number of questions: for example, are there contradictions within the law? Is the law value free? To what extent can it protect women? How just is the criminal justice system? What is the purpose of sentencing as an instrument of correction and is there any gender bias in this process? Is there a dynamic relationship between the state and the law? Is there an ideology of male dominance and women’s subordination governing the thinking behind the construction of the law and its execution? Who writes the law? For whom is it intended?

In response to these questions, we attempt a social and political analysis of the law and its attendant criminal justice system in the Caribbean and the Commonwealth which shares the same inherited legal system from colonial Britain, though with variations or nuances. To this end, we argue that in these societies, divided as they are by race, class and sex/gender, the law and the criminal justice system is the will of the ruling class or the state. As such, they exist to protect their interests, to keep them in power and to maintain hegemony. At the same time, they act as a means of social control for all those marginalised and disadvantaged social groups such as the poor, ‘non-white’ peoples, Blacks and women.

The focus of our attention, however, is women and the way in which the law and the legal system which originated with the state, discriminates against them. This discrimination operates in the interest of the state which, in our view, is characterised, in part, by the ideology of patriarchy, the designation of wealth and notions of the racial, and class superiority.

British common law which is part of the core of the existing law, stated from very early that women, children and lunatics were the property of men. (Women were seen only as wives and mothers). As such, women were relegated to an inferior status in social, political and economic terms. In predominantly white cultures, white women face the sexism of white men and black women (read native/aboriginal, ‘non-white’) face sexism in a racist society and racism in a sexist society. And, all these societies were constructed on the basis of male dominance and women’s subordination. However, one must be aware that women can contribute to their own subordination, precisely because they have been socialised to accept and internalise negative views and images of themselves. Women have been inculcated with ideas of the dominant male who is always head of the household, the chief breadwinner, the political and religious/spiritual leader and women’s place as being in the home. In this construction, women are essentially followers. Some women accept and believe in society’s social construction of themselves. Others do not. While some women ( and a few men) have risen (ideologically and otherwise) above the space society has carved out for them, the agents of the superstructure are reluctant in giving up their privileges and therefore, we continue to we live in an unequal world, a less than level playing field in which women are undervalued and devalued by many. Take for example the judgement of a Montreal judge in a labour dispute which went to court. Without getting into the details of the case, the judge, in handing down judgement after hearing the matter said, “rules are like women, they were meant to be violated”.[[2]](#endnote-3) This, in our view, represents an extreme/highly conservative form of sexism which cannot and should not be generalised as the view of all judges and magistrates, but it is important to be aware that some decisions of the bench can be influenced by the sex/gender of the offender.

Against this background, we will focus on three main areas in which women bear the brunt of what we consider unjust criminal justice. These areas are domestic violence, rape and illegal drug trafficking.

**The Law and the State**

In order to address the above questions, we wish to isolate three areas of social life which bring into sharp relief the contradictions of class, race and gender which seem to be inherent in the practice and theory of our existing legal systems. But first, we wish to set the stage by briefly looking at the relationship between the state, the law and the legal system. By the state we mean, not just government, but all the governing institutions which represent the political and economic coordinates (Poulanzas: 1974; Gramsci: 1985; Konstantinov *et al*: 1979). In this sense then, the state has a class character, as well as a race (in predominantly white cultures) and a gender character since patriarchal ideology was critical in structuring the post-emancipation/colonial and neo-colonial state which located women in a uniquely subordinate position. In the Caribbean, for example, black women as enslaved peoples shared the status of commoditisation with black men, but after slavery they became subordinate to white men, white women and black men. Black women in the Caribbean had to struggle from the outset against the racism and sexism of the white man, the racism of the white woman and the sexism of the black man. We submit that this being the case, these ‘isms’ have influenced the construction of the state, its institutions and particularly, the framing of the law and the construction of the existing legal system. How then can associations be made?

In a theoretical and practical sense, the state cannot exist without the law which supports the *status quo* and the law cannot function without the state which safeguards legal norms. As such, law can be defined as the “sum total of the standards of behaviour laid down in legal acts and is sanctioned by the state”[[3]](#endnote-4). And, like the state, the law has a class character and, one might add, a race and sexist character. After all, the law in our various countries was written by men of a particular class and race in the relevant context. In fact, if the law were to be read without wisdom and social and ideological clarity, one would conclude that all human beings are men as the language of the law is exclusively masculine. That aside, the law legitimises the standards which regulate social, political and economic relations and provides judicial sanctions necessary for the ‘normal’ functioning of such relations. It regulates society. In so doing, it formulates social and economic relations between social classes and social groups; it defines the legal status of all social institutions and organisations and specifies the position, rights and duties of individual citizens. As a matter of fact, the law embraces, to a large extent, all aspects of societal life, all forms of peoples activities and all forms of social relations.

In terms of regulating society, we argue that the law is the will of the ruling class, it safeguards the interests of the privileged and is an instrument for keeping the working people and other socially and politically disadvantaged groups in place. In other words, the law functions as a means of social control. Despite this, we would want to believe, as implied above, that the law, as law, is fundamentally fair. But, Dianne Martin, in analysing the criminal justice system in Canada, points out that the principles of fairness (all persons are presumed equal before “Her Majesty’s criminal courts; all persons are presumed to be sane and morally responsible for their actions which are characterised as free choices between socially acceptable conduct and socially reprehensible and dangerous behaviour”)[[4]](#endnote-5) are not really ‘fair’ as there continues to be a bias within the system. She points out that “the systematic jailing of wildly disproportionate numbers of poor people, Aboriginal peoples and visible minorities is beyond doubt....” [[5]](#endnote-6) In the case of women, she notes the argument of British criminologist, Hilary Allen “that the [British] criminal justice system not only treats women offenders differently from men because they are women, but also cannot conceive of doing otherwise”[[6]](#endnote-7).

If we accept this argument, then we have to agree that the equality which exists within the law and hence the criminal justice system is merely a formal equality. Too often we hear in the Caribbean, for example, people lamenting that there is one law for the rich and one for the poor, one for men and one for women and in the dominant white culture, such as Canada, we have come to believe that there is one law for whites and one law for Blacks, native peoples and ‘non-white’ peoples within the same criminal justice system. However, the intention here is not to enter into a discourse on specifically the racist or classist character of any criminal justice system. Of concern here are the gender issues which can and have arisen in criminal justice systems within the Caribbean and other countries of the Commonwealth. However, it is important to bear in mind that women do not exist just as women, but that they have specific identifying features of class, race, culture, history and ethnicity which when combined with sex/gender provides their full identity.[[7]](#endnote-8)

**Women *vs* Men in Due Process**

With this in mind, we wish to look at the way in which women, as opposed to men, are treated for committing the same crime and to suggest that women are treated differently because they are women and ideas about women have been socially constructed from the beginning of time.

Women activists and feminists have pointed to the way in which women are and have been treated before the courts for criminal offences. In her feminist analysis of the criminal trial process in Canada, and which has relevance for the Caribbean, Marguerite Russell, for example, examines various aspects of the criminal justice system. She specifically highlights the relationship between substance and procedure and the roles of the main players in the process: judges, lawyers and juries. She concludes that:

[W]estern law, of which Canadian criminal law is a part, has been constructed out of the male experience. Law is both support for and a means of exercising patriarchal domination. ...patriarchal dominance has existed for so long that male experience under patriarchy is perceived as the norm. Thus concepts which have a particular importance in law such as “bias”, “neutrality”, ‘objectivity”, “reasonableness” and “common-sense” are all interpreted from a masculinist social construction of reality. When feminists question this masculinist experience, they are immediately perceived as “biased”, “nonobjective”, “subjective”, “unreasonable” and “irrational”.[[8]](#endnote-9)

In the case of the Caribbean,

Despite this, our view, based on discussions with members of the Caribbean criminal justice system, is that judges in the Caribbean’s political and legal systems can be impartial and can, in fact, be independent of government and state. That is to say they are not necessarily allied to the government of the day. Nor do they have to do its bidding. They may act in the context of their own judgement, but within the parameters of the law. For, we do believe that there is room for judicial discretion in the application of the law and judicial creativity in the framing of the law. Sometimes, however, we have to look beyond the confines of impartiality and independence and recognise that judges have been socialised in a particular political, social and cultural context. To some extent, therefore, it means that like the rest of society, it is difficult for them to be independent of influences such as class origin, class position, race origin, cultural context and gender bias. And judges, themselves have been, at times, conscious of their particular biases. This was the case of a fairly conservative English judge, one Lord Justice Scrutton, who, from as early as 1922, noted that:

...the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that ,when you have to deal with other ideas, you do not give as round and accurate judgements as you would wish. This is one of the great difficulties at present with Labour. Labour says: “Where are your impartial judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice? It is very difficult sometimes to be sure that you put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.[[9]](#endnote-10)

However, we will not argue in an absolute way that the ‘elistist’ position of judges in the state system includes an ideological position which casts them in a conservative mold since there is no linear relationship between race/class background, race/class position and race/class outlook. Nor is there a fixed and formulated idea about gender issues among the judiciary. One could also offer the view that within the judiciary of the Caribbean, there are various expressions which exert different kinds of influences and a broad spectrum of world views which govern decision making, sentencing and so on.

**Violence against Women**

Violence against women is prevalent in all societies. Violence against women is an obstacle to their development as it violates and impairs their ability to enjoy quality life, human rights and fundamental freedoms. The term ‘violence against women’ as defined in the Beijing Platform of Action (1995) means “any act of gender-based violence which results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life”[[10]](#endnote-11). Accordingly, violence against women encompasses, but is not limited to physical, sexual, mental, emotional and psychological violence in the private and in the public sphere. This includes battering, incest, pornography, marital rape, dowry-related violence, rape, sexual harassment, trafficking in women and forced prostitution, forced sterilisation, forced pregnancy, forced abortion, female infanticide and prenatal sex selection. This violence, in whatever form, is a manifestation of the historically unequal power relations between women and men and is essentially the product of cultural patterns which are rooted in relations of subordination and dominance. It is a culture in which men control both women’s bodies and all social institutions. In our reality, violence is used against those women who dare to breach “social rules” and so this violence is used to contain these women within the constructed parameters of their roles and behaviours.

In addressing the issue of violence against women, we note the following. Domestic violence is increasing at an alarming rate worldwide and it is no secret that over 90 percent of battered women (battered by husband, lovers, partners, boyfriends) end up dead. At the same time, battered women in some instances end up killing their partners. This is, however, not as frequent as men killing women. In either case, the bottom line is battering. Women then become both perpetrators and victims of such a crime. So when women are killed by men and when they kill men, they both must face the courts on charges of homicide.

Within the criminal justice system, the state generally argues that both women and men should be given equal treatment in these cases. They are to be tried for murder and, if found guilty, must be given the death sentence (where this still takes place) or life imprisonment, sometimes without parole, for sins committed against the state. But, to understand the relationship between sentencing and domestic violence, one has to go beyond the confines of the law and locate this issue in its social context. Social context.

If this approach was taken by members of the criminal justice system, then they would be better prepared to understand and to be more sensitive to the involvement of women in violent crimes as both perpetrators and victims. But, to assist this approach government/the state must be willing to/or implement measures and programmes to increase the knowledge and understanding of the causes and consequences of domestic violence among those responsible for implementing these policies. In this respect, one can point to law enforcement officers i.e. police, members of the judiciary and the broader legal profession as well as medical workers. In other words, it is necessary to resocialise a group of people who have been socialised in the ideology of sexism, male chauvinism and patriarchal values, particularly in this situation where the law has been constructed out of the male experience and the criminal justice system acts on behalf of the state/*status quo*. This again is necessary because the same system which undervalues and marginalises women is being called upon to pursue sanctions in cases of violence against them.

In the absence of these programmes, we feel that ‘battering’ must be considered as a mitigating factor in trials of women who kill their partners. If this is done, it is only then can we begin to speak about real criminal justice.

**Violence against Women: The Battered Woman’s Syndrome**

The case, *Indravani Ramjattan v. State* provides just as good as an example as any and forcefully brings home to the judiciary the need to consider the *Battered Women’s Syndrome,* as a mitigating factor *in* addition to self-defence and diminished responsibility in murder/manslaughter trials where women are charged for the murder of their partners. While Ramjattan did not kill her husband, she was seen by the court as being an accessory to his murder. She was convicted of such and given a sentence of seven years. The details of the case indicate that Ramjattan was constantly abused by her “insanely jealous” husband who accused her of “having other sexual relationships, while at the same time boasting of his sexual encounters with other women”[[11]](#endnote-12). He would torture her, threaten to kill her and the children. She eventually left him but he went for her. Noted Trinidadian psychiatrist, Dr. Eastman describes and records one of Ramjattan’s episodes:

I saw him look through the window...he asked me to open the door and I refused and he kept on...he said he would break it down and he kicked it down. I jumped to get out of the house..he came back outside and I twisted my ankle so he got to me, took me inside, beat me up, all over cursing and ordered me, started to mash up things and told me to pack my things, but he did it....he took me and my children home.[[12]](#endnote-13)

The document further states: “by the time they got home she was covered in blood, he threatened to kill her, locked her in the bedroom and told her that he was going to sink her head inside her neck with a piece of wood. He struck her on the head, hands, arms, back and feet until she fell unconscious”.[[13]](#endnote-14) In the doctor’s opinion, Ramjattan had “suffered from symptoms of depressive illness and of chronic post traumatic stress for several years” leading up to the time of the offence. He concluded that based on her psychological reactions, she exhibited the characteristics of battered woman’s syndrome. He summarises this as follows.

Learned helplessness; intense ambivalent attachment; precipitation of episodes (getting it over as soon as possible) decreased capacity to manipulate her circumstances constructively; depressive symptoms ; anxiety, reluctance to admit the abuse to friends or medical carers; diminishing attempts to leave; reduced motivation to protect herself; preoccupation with day to day survival; a latitude of acceptance.[[14]](#endnote-15)

In situations like these, it is difficult to argue that women must be treated the same as men for committing a homicide and must be imprisoned or executed in the same way men are imprisoned or executed. Such an argument eschews fairness and questions the way in which justice is dispensed. It is our view that in instances where battered women kill their partners, it is an indication that the criminal justice system which is expected to protect these women and to punish their batterers more severely has failed them. In the case of Ramjattan, the law did not protect her, it punished her.

In circumstances such as these, we are proposing a requirement of the criminal justice system as it relates to capital sentencing: the consideration of battering as a mitigating factor, as is the case in Britain and the United States of America. Additionally, we may argue that in murder cases, battered women should be excluded from eligibility from the death sentence altogether. For even if they are convicted for murder, it seems unthinkable to justify executing a battered woman. The battered woman’s human and social rights are violated by her cruel husband or partner and she is further violated by a criminal justice system which deprives her of the right to recovery, the right to freedom and the right to life. She is twice violated in her struggle for life. But when women are sentenced for murder, our justice system pats itself on the back and says “justice has been done” as they claim to have acted fairly because women and men are treated equally before the law. This, in our view, can be seen as a travesty of justice which can only serve to undermine our Christian and religious principles which we hold so dear. The main lesson to be learnt here is that domestic violence is more than a straight legal issue. What is notable is that the we speak about equal treatment in punishment for women and men but, as a society, we do not countenance equal treatment in social, economic, religious and political life.

On this issue, it is interesting to compare the situation in the Caribbean with that of India where violence against women takes many forms: for example, killing of female foetuses, female infanticide and murder in the form of ‘dowry deaths’ or ‘bride burning’ which are widespread social phenomena in the country. However, we single out for discussion the inhuman practice of ‘bride burning/dowry deaths’ Because of the nature of the crime, the sole source of information about the circumstances of the death is the victim herself. Having recognised the seriousness of dowry related crimes, the state introduced the *Dowry Prohibition Act 1961* (with subsequent amendments),in an effort to eradicate the dowry system. This *Act,* however, remains largely unenforced. Thus, dowry deaths continue and very few men have ever been convicted of that crime. According to 1993 statistics, convictions have taken place in only three percent of all reported cases.[[15]](#endnote-16)

Newman further notes:

Although these changes in Indian criminal law reflect a serious effort by legislators to put an end to dowry deaths, less than 5% of dowry death cases ever result in convictions. Out of the seventeen cases that had been assigned to the special dowry cell of the Delhi police in 1987, for example, all those accused had either been acquitted or discharged. In fact, from 1983-1990, of the three hundred dowry death cases investigated by this special unit, only three convictions were ordered by the court, with 220 cases remaining unresolved....[[16]](#endnote-17)

This is an advance on the previous periods when no man was ever convicted for this crime. It is interesting to note that between 1947 and 1992, 72,000 young brides between the ages of 15 and 20 were victims of dowry deaths.

Dowry deaths, when coupled with the ideology and practice of husband worship and husband protection, reinforces the violation of the rights of Indian women who live in a society which already sanctions many forms of violence against them. This means that the dying woman would prefer to maintain her silence about the conditions of her death rather than to incriminate her husband by disclosing his antisocial action. By protecting her husband, the wife is satisfied that she has observed the social prohibition thrust upon her as a ‘good Hindu wife’. She would not name her husband because of the belief that with each time she speaks her husband’s name his life is shortened by a day. It is this ideology and social practice of husband worship which compounds the crime of dowry death.

**Rape**

Another violent crime against women is expressed in the form of rape, the ultimate in physical and sexual abuse. We recognise that this is a very serious issue and requires deeper discussion. But suffice it to say, rape, and this includes marital rape, is a feature of all societies. In some societies it is used to punish women and/or disempower them and in others, such as Pakistan, it is used against the women of one’s enemies.

In the Caribbean where rape is used to disempower and destroy women, this act of violence is often trivialised and sensationalised by the *status quo* and significant elements in society, regardless of their ideological and political awareness. [[17]](#endnote-18)The legal system treats rape victims no better. In fact, in the course of due process, great care is taken by lawyers representing the rapist/offender to diminish the status of the woman and to defame her character by ‘digging up the dirt’: the number of men she has slept with, the ‘kind’ of life she lives and so on in order to indicate that her rapist was just another man she slept with, had casual sex with or just another one of her ‘victims’. Or simply she deserves to be raped because of her mode of dress or that she was out of her house after dark or it was a consensual act. At the same time, the life of the rapist is always assumed to be impeccable (a church going man of great repute and from a good family). No attempt is made to dig up his ‘dirt’. Rarely, is rape treated as an act of violence. In other words, while it is assumed by the criminal justice system that the victim is not lying, invariably, the trial puts her and her character on trial because of the way in which the trial is conducted. The circumstances surrounding the incident are not usually examined because it is the woman and her character that are under scrutiny as every attempt is made “to impeach her character”. This is just another example of the sexist attitude which pervades the law and the legal system. As one Jamaican defence attorney states:

I sympathise with women who come before the courts as rape victims because the law and the justice system is not kind to them. Invariably, it is her character that is put on trial, it is her social and sexual history that becomes significant. It is never his. Sometimes the men (defence lawyers) make a big joke out of it, thus embarassing the woman, and every attempt is made to impeach her character. Furthermore there are no support systems in place for victims of rape. At the same time, the offender is not subject to the kind of treatment given to the victim. I remember one case in which the man had clearly raped the woman, but he was portrayed as a nice, hardworking, patriotic Christian, church-going man not capable of rape and... because he was also from the upper middle class. [[18]](#endnote-19)

Michelle Anderson, writing on the rape law in democratic South Africa corroborates our experience. She states that in addition to the country’s rape law,

There are other structural barriers that impede women’s ability to bring men who rape to justice in South Africa. The legal definition of consent is skewed. For example, testimony regarding a woman’s prior sexual history is used against a complainant “to demonstrate the probability of her consenting to sexual intercourse”... . Though a defendant’s prior sexual history is inadmissable in a court of law, a woman bringing charges of rape must submit to extensive questioning about her prior sexual history.... A defense attorney can ask an alleged rape victim about what previous sexual experiences she has had and can ask other witnesses about the victim’s general sexual reputation. The law adheres to the notion that “the reputation for chastity (or unchastity) of a complainant in a rape case is in issue and that is why evidence is adduced about it....” [[19]](#endnote-20)

In Pakistani society, for example, rape is used as a weapon against one’s enemies. Khalil Ahmed, in his article, “The Sociology of Rape” points to the stark reality.

Feuds are settled through rapes. Men avenge themselves on each other by raping each others mothers, wives, daughters and sisters. A brave adversary is supposed to break down under grief and dishonour the violation of his women folk. At times, women are gang raped then paraded naked in the streets to show that terminal revenge has been taken.

**Prostitution *vs* Romance in the Caribbean**

Another area of social life which comes up for scrutiny and in which the criminal justice system can be questioned is that of the gendered world of prostitution.

While both women and men are involved in prostitution, the focus by the system has been on the female prostitute and little or no attention has been paid to male prostitutes, whether they be street prostitutes, beach boys or rent-a-dreads. At the same time, female prostitution is criminalised. It would seem that the law assumes that all prostitutes are women and that only women can be prostitutes. While female prostitution is criminalised by the state as already mentioned, the very same state promotes it for tourism, ‘sex tourism’. Various tourism authorities promote “Sun, Sea and Sex” highlighting the offerings made by some countries seeking to attract the tourist dollar. It must be pointed out however, the Jamaica in the 1970s and beyond advertised itself as “more than a beach”: “it is a country”.

Prostitution in the Caribbean takes place, not just in the local sector, but also in the ‘foreign sector’ of tourism. Both women and men are involved in the industry. However, a double standard exists when the same system characterises or treats male prostitution differently from female prostitution. What do we mean by this?

Beach boys and rent-a-dreads ( the rent-a-dread scheme is popular on Jamaica’s North coast, particularly during the reggae festivals at which time one can also rent a ‘reggae bed’) who enter liaisons with white women tourists are excused as having romantic relationships based on courtship and it is, therefore, assumed that such relationships do not involve use and/or exchange value. In fact, the term “romantic tourism” is the current euphemism used to describe this aspect of the sex trade. The argument is that these relationships sometimes end in marriage. This is true. But women prostitutes are also known to have married their clients. Nonetheless, some of the male prostitutes who act as escorts invariably stay with the same woman for the duration of her holiday. They are kept by these women to ensure that they are available when next they return. The local men want money (and perhaps a trip to the metropole) and the tourist wants sun, sea and sex. As Phillips notes, “[T]he “arrangement” is usually sex and money or goods in exchange for such services as tour guides and escorts to clubs and restaurants”.[[20]](#endnote-21)

I am aware of and understand the existence and operations of the beach boy, having been approached by one on the beach in Ocho Rios, the tourist resort on Jamaica’s north coast. He thought I was a non-local. When I indicated that I was Jamaican, we got into a conversation about his line of work. It was no different from that of a woman prostitute. He provided sexual services for tourists, mainly white women; he acted as an escort and basically, he was their ‘man’ for the duration of their stay. He indicated to me that he was well rewarded financially for such services. He also pointed out to me his coworkers who more than dotted the beach where we were.

The conversation went something like this:

“Hi, how you doing?”

“Awright and you?”

“So what’s happening?”

“Nutten”.

“I can show you a good time”.

“What dat mean?”

“I can take you around, show you a good time, you know, and make you feel good”.

“What! Young man, what is your line of business? I live in Kingston and I’m only here for the day. I know Ocho Rios”.

He laughs for a good three minutes and then says “You know, white women like us and they come here so we can give them what they want. You know what I’m talking about, nuh true? ”. And he laughs again.

“So what white women want?”

“You know, dem love the black man. The black man make dem feel good all over. White man caan do nutten fi dem. Is the black man ting dem love’.

“So is only you one do this kind of ting?”.

“No man, yuh see that youth over de so, and dat one and dat one...All a we do the same ting”.

“Den the money good?”

Yah man, the white woman dem spen money pon we”.

Phillips provides some relevant information in the case of Barbados. She writes:

One beach boy in explaining the attraction by white female tourists to beach boys speaks about the white male’s inability to sexually satisfy his female counterpart: *They ain’t up to mark, so when dem women come to Barbados and see that we black boys healthy and look good and thing. They (white women) want to try something new.[[21]](#endnote-22)*

So men do solicit in the same way women do. In the case of the rent-a-dread, they openly advertise, and male prostitutes also have their corner on the streets soliciting not only women but at times, men. Even in the face of this, there is no record anywhere in the Caribbean or beyond where any man has been arrested and convicted for male prostitution or even been harassed by the police. As one female prostitute puts it, “they (gigolos, beach boys or rent a dreads) are not harassed by the police. By nobody, not even by security guards”. [[22]](#endnote-23)

The situation appears to be somewhat different for women. It is assumed that there can be no “romance” involved in relationships between local black women and the white (or black) male tourist, although there have been cases where the women do marry their ‘clients’. While local black men have the ability to fall in love with white women, one is led to believe that black women are severely limited in their sensibilities and exist as mere objects of male desire and pleasure.

It can be argued that these relationships to some extent, as a mutually exploitative one, but like any other sex work, it is prostitution. However, the point is whether male prostitution is being differently categorised by the law and the state, and on what basis. As we will argue, the criminal justice system is fairly hostile to female prostitutes, whether they operate in the foreign or local sector.

In the tourism sector, Campbell *et al* in presenting their findings of their study of tourism and the sex trade in Jamaica, report:

Sex workers who work in clubs, discotheques, hotels and their private residences reported occasional hostile encounters with the police. Those who worked on the streets and on the beaches recounted several incidences of police harassment....Generally, the police were accused of unnecessary physical and verbal abuse, of discriminating against female sex workers while in some instances ignoring male sex workers; of themselves being involved in the industry as “pimps” and gigolos and of taking bribes from both tourists and locals.[[23]](#endnote-24)

Like their coworkers in the tourism sector, street prostitutes in the local sector face constant police harassment. In informal discussions with over 10 street prostitutes in New Kingston, Jamaica,(1987) we were told by the prostitutes that their greatest hazard when on the job was not sexually transmitted diseases. It was the police who would verbally and physically abuse them, arrest them, then ask of them money or sex in return for their release. In one case, the police had so badly beaten one woman that she ended up with severe injuries, including a broken arm. If they reach court, they are usually fined. At the same time, their male clients walk free. There is always pressure on the supply side, never the demand side. What is even more distressing is that if these women are abused by their clients, as they frequently are, (another instance of violence against women) they cannot complain because the law does not protect them. Neither as women nor as prostitutes. Essentially, they are both persecuted by society and prosecuted by the criminal justice system. But, the issue should not be persecution or prosecution. What should be considered, instead, are measures such as enforced legislation, to protect and control the players and the industry. In other words, steps should be taken to go beyond morals and social discrimination to create a legal space for sex workers (both women and men) so that less women will be exploited and victimised and more men at the level of the government/state will come to appreciate that sex work for these women is an honest way of making a living. Problematic though it may be, perhaps the example of containment in Holland could be examined as a first step towards a workable solution.

**Drug Trafficking: Violence Against Women?**

The trafficking of illegal drugs and of human beings raises moral, economic and political questions. In recent times, we have heard on the news of trafficked people dying in ship holds and in trucks transporting their human cargo across borders. The trafficking of human beings is both explainable and understandable for both women and men are seeking a better life. They are trying to escape the horrors of economic deprivation and socio-political exclusion in their countries of origin. An aspect of trafficking in human beings which is most disconcerting is the global trafficking of women as servile wives, domestic workers, factory workers, prostitutes, dancers and so on. It is disconcerting because these women usually end up in situations of forced labour, and slave-like practices in marriage, prison conditions in prostitution and a new kind of slavery and indentureship in domestic or factory work. When they end up in these situations for which they were not prepared, they defeat their purpose of creating the conditions for earning enough money to care for themselves and to send home for the care and maintenance of their families.

Women are not only trafficked. They are also traffickers and a companion of trafficking in women is women trafficking illegal drugs across borders. Caribbean women (in addition to other women from throughout the Commonwealth) are involved in this illegal activity as a means out of poverty, for the most part. We agree that some poor women choose other options, but in conditions of dire poverty and frustration, particularly among single women and single mothers, women’s involvement in the illegal international drug trade in the Caribbean and other parts of the Commonwealth has emerged as a viable option, though not one to be condoned.

In this part of the world, the colonial legacy has combined with the anti-social policies of neoliberalism and globalisation which continue to impoverish the majority of our peoples, mostly women, or to exacerbate poverty where it already exists. Most of the women in the Commonwealth Caribbean are either underemployed or unemployed and bear the major responsibility (emotional and financial) for supporting their families, including extended family members Therefore, in societies which have very few opportunities to offer women and their families for financial prosperity, social stability and social mobility, women will be attracted to any activity, legal or illegal, which promises a better life. In this case for poor women, the activity which offers an attractive remuneration is illegal drug trafficking which is a gendered, globalised industry owned, controlled and operated by men. Women from throughout the Commonwealth flock the centres of high demand for illegal drugs: Britain, Canada and the United States of America.

Some women knowingly traffick, hoping that it will work out, and some are unsuspecting being offered a job, a chance to travel and then asked to drop off a package for a friend. For example, one can look at the case of Britain where a number of Caribbean and ‘Third World’ women are incarcerated for trafficking and where/ how the criminal justice system, characterised, not just by gender inequalities, but also by racial inequalities, treats them as women, blacks and non-nationals. Our own research into the British criminal justice system as it relates specifically to drug couriers who are also non-nationals have pointed to clear inconsistencies in sentencing between women and men couriers and between white foreign nationals and black foreign nationals.

We found that women were more harshly dealt with and given harsher sentences because, as we came to understand, they were black foreigners and therefore members of the judiciary had no “connection” to them because they “are not one of us so it is easier to give them long sentences”. [[24]](#endnote-25)This is supported by the British National Association of Probation Officers in a 1998 news release which stated that “there is significant anecdotal evidence that black prisoners, particularly women, jailed for drug offences receive longer sentences than their white European counterparts”.

And in their report, *Drug Smuggling: An Analysis of the Traffickers 1991-1997*, Rosalyn Harper and Rachel Murphy of the Information and Research Department, Middlesex Probation Service, London, conclude as follows.

We have found that the sentencing guidelines are being adhered to in terms of the weight of the drug, role and final plea of the trafficker. However, other variables e.g. nationality, residency, age and gender do appear to be having an impact, to varying degrees, on length of sentence given to drug traffickers.[[25]](#endnote-26)

The findings of McIntosh and Soares[[26]](#endnote-27) which support the findings of Harper and Murphy point out that, for example, an 82-year-old Caribbean woman was given a 12-year sentence and a 78-year-old, an eight year sentence. The latter served four years and was deported for health reasons. In addition, they point to the case of a Caribbean family, mother, daughter and niece, each found with one 1 kilo of cocaine but charged jointly as having three kilos and given a 30 year sentence.

At the same time, in one case in a Crown Court, in England (which I attended in September 1998) a young Caribbean man of 24 years was being sentenced by the judge for trafficking 128 grams of cocaine. In his defence, the lawyers informed the court that back home, his dog was killed by his handlers who had also knifed his common-law wife. In handing down judgement, the judge gave him a what could be considered a “light” sentence of three years because “already his dog has been killed”. There was no mention of the wife. We understand in discussions with Hibiscus that experience has shown that a woman carrying a similar amount would most likely fetch some five years.

Our investigation also showed that the court is more impatient with female couriers, particularly if they enter “not guilty pleas”. The impatience alssssso stems from the view expressed by one Crown Court judge in England that “these women are greedy”. We concluded:

... in the case of a female courier who quite often claims that she “was carrying a package for a friend” and unknowing to her cocaine was concealed in this package, and who enters a plea of not guilty gets a longer sentence for not collaborating and providing information on her organisers. She also fears reprisals on her family left at home and gets a longer sentence than her male counterpart.[[27]](#endnote-28)

Green *et al* in their article, “The Characteristics and Sentencing of Illegal Drug Importers” point out that “Nigerian women, on average, received 10 months longer”[[28]](#endnote-29) in their sentencing within the terms of the guidelines set out by the British legal system. This, they suggest, maybe the “result of the judges’/magistrates’ impatience with women who plead not guilty, claiming instead that they have been duped”. Women are known to have been duped. Take for example the case of a 49-year old Grenadian mother of 12 who ended up in Cookham Correctional Facility in England. Her story is this.

I didn’t know I was carrying drugs. When the man asked me to travel to England, I was glad because I have never travelled and so I saw this as an opportunity to see another part of the world. I was glad. When I reach the airport, they lock me up saying I am carrying drugs.[[29]](#endnote-30)

Or another case where the woman was pressured by her boyfriend to do so.

I did it because my boyfriend pressures me to do so. He said that some men were pressuring him and that they told him that they had a bullet with his name on it. I did it for fear of losing his love. I thought he really cared for me. Now I find out he was really using me.

Nonetheless, the British court in exercising its impatience seem to ignored the principle underlying due process: one is assumed innocent until proven guilty. So, in cases of illegal drug trafficking for the British criminal justice system, it would seem that there is no presumption of innocence. Women are, in such cases, guilty until proven guilty. Sentencing is used as a weapon, on behalf of the state, to punish women and to send a message to the rest of society that illegal drug trafficking will not be tolerated by the *status quo* which expresses its interests through the criminal court. While we agree that the *status quo* should not tolerate illegal drug trafficking, what is considered intolerant is the way in which it treats women who commit such crimes.

We are not here arguing that women should be exonerated for trafficking. We do believe that if they break the law, they should take the consequences. We are saying, however, that they should be given fair treatment within the limits of the law and that their socio-economic conditions as well as their being ‘set up’ by their male handlers be taken as mitigating factors, especially since many of these women are not criminals and most of them are first offenders. This is possible because the Probation Department in England prepares pre-sentence reports which contain *inter alia* information on the social and economic background of the offender. But as we understand it, the pre-sentence reports are optional and the judge can make his/her ruling without consulting them. However, we argue in favour of pre-sentence reports for as Olga Heaven, director of Hibiscus notes, the typical courier is in fact a poor, unsophisticated, naive, not very well educated woman in her mid-30s. She is usually a single parent and the sole provider for four or five children, and more often than not, an elderly or sick parent.[[30]](#endnote-31)

But, what is also noteworthy is that the long sentences will not and have not act(ed) as a deterrent to illegal drug trafficking. The global trade continues to be vibrant and lucrative for those who own and control. And women couriers are always marginal to the trade. For the global industry, according to the British-based Female Prisoners Welfare Project/Hibiscus, is organised “as an army, at the top are the field marshals of cartels...at the bottom are the foot soldiers who patrol the streets with their stashes of crack and their mobile phones. The ‘mules’ (women) are not even in the army, more like civilians, cannon fodder, bystanders, shot at by both sides”. [[31]](#endnote-32)

This kind of violence against women is expressed in the way in which women are recruited through threats, deception and/or coercion and the consequences they bear for falling victim to the exploitation of drug ‘dons’.

**Conclusion**

By way of a conclusion, we would like to suggest, in the first instance, a rethinking, reforming and reconstructing of the existing legal system. For, the system as it now stands, reflects the position of the state/*status quo* whose interests do not coincide with those of women, the poor, the diametrically opposed social classes and social groups, and the racial ‘other’. In the case of women, the subject under discussion, the law pretends to protect them but its operation and application are harmful to their autonomy. In fact, the law as it now exists is quite oppressive and needs to be recast outside of its masculinist, elitist framework and in a way that spans the interests of the broader society. This would call for a casting away of old patriarchal values, negative cultural traditions and practices and a move towards embracing aspects of our cultures which encourage commitment to the nurturing of children, caring for the elderly beyond the narrow nuclear family, respect for women and men in their positive social and economic roles, the spirit of community expressed in communal labour, the sharing of power and the demand for justice. This should allow for a start to be made in the execution of justice which would be based on a combination of the dispensation of law and the dispensation of grace. New and improved laws, in our present context, and the consistent enforcement of these laws will signal the dawn of a more ‘just’ criminal justice system.

1. This paper is an abridged version of a paper presented to the Conference of Commonwealth Judges and Magistrates in July, 2001. First published in *Abeng News: The Caribbean Voice*, November 22/26, 2009. [↑](#endnote-ref-2)
2. Attributed to a Montreal judge, 1990. [↑](#endnote-ref-3)
3. Daglish, Robert, (translator) *The Fundamentals of Marxist-Leninist Philosophy* , (Moscow: Progress Publishers) 1982, p. 296. [↑](#endnote-ref-4)
4. See Dianne L. Martin, “Casualities of the Criminal Justice System: Women and Justice Under the War on Drugs”, *CJWL/RFD Vol. 6,* 1993, pp. 311-312. [↑](#endnote-ref-5)
5. *Ibid.* [↑](#endnote-ref-6)
6. *Ibid.* [↑](#endnote-ref-7)
7. We could also include ethnicity, nationality and culture in understanding one’s identity. [↑](#endnote-ref-8)
8. See Marguerite Russell, “A Feminist Analysis of the Criminal Trial Process”, *CJWL/Rifd, Vol. 3,* 1989-1990, pp. 552-553. [↑](#endnote-ref-9)
9. Cited in Ralph Miliband, *The State in Capitalist Society,* ( London: Weidenfeld and Nicholson , 1970) p. 141. [↑](#endnote-ref-10)
10. *Platform for Action and the Beijing Declaration,* (U.S.A.: United Nations Department of Public Information, 1996) p. 73. [↑](#endnote-ref-11)
11. Republic of Trinidad and Tobago in the Court of Appeal, *Indravani Ramjattan and the State, CrA No. 98 of 1995,* p. 7. [↑](#endnote-ref-12)
12. *CrA, No. 98 of 1995,* p.8. [↑](#endnote-ref-13)
13. *Ibid.* [↑](#endnote-ref-14)
14. *CrA No.98 of 1995,* p. 9. [↑](#endnote-ref-15)
15. See Sunder Rajan Rajeswari, *Real and Imagined Women: Gender, Culture and Post-Colonialism* (London and New York: Routledge, 1993). [↑](#endnote-ref-16)
16. Newman, p. 118. [↑](#endnote-ref-17)
17. This is based on my own experience in observing rape cases in court research connected to the issue. [↑](#endnote-ref-18)
18. Interview, July 11, 2001. [↑](#endnote-ref-19)
19. Michelle J. Anderson, “Rape in South Africa”,*Georgetown Journal of Gender and Law,* Summer 2000, Issue 1, p. 798. [↑](#endnote-ref-20)
20. ”Tourist-Oriented Prostitution in Barbados: the Case of the Beach Boy and the White Female Tourist”, in Kamala Kempadoo and Cyndi Mellon (eds.) *The Sex Trade in the Caribbean*, unpublished research project,1998, p.191. [↑](#endnote-ref-21)
21. Phillips, p. 190. [↑](#endnote-ref-22)
22. See Shirley Campbell, Althea Perkins and Patricia Mohammed, “‘Come to Jamaica and Feel All Right: Tourism and the Sex Trade” in Kempadoo and Mellon (eds) p. 116. [↑](#endnote-ref-23)
23. Campbell *et al*, p.115. [↑](#endnote-ref-24)
24. See Dianne Macintosh and Judith Soares, *Report of the Fact Finding mission tot he united Kingdom to Investigate the Situation of Caribbean Women Incarcerated for Drug Trafficking,* UNDCP, December 1998 p. 4. Note that theFemale Prisoners Welfare Project/Hibiscus is a British based organisaton which works with foreign women incarcerated in British prisons. Its director is Olga Heaven. [↑](#endnote-ref-25)
25. Harper and Murphy, p. 53. [↑](#endnote-ref-26)
26. See *Report*, McIntosh and Soares. [↑](#endnote-ref-27)
27. MacIntosh and Soares p. 4. [↑](#endnote-ref-28)
28. See Harper and Murphy, p. 51. [↑](#endnote-ref-29)
29. The women’s stories are to be found in the study by Macintosh and Soares. [↑](#endnote-ref-30)
30. Discussions with Olga Heaven, September-October 1998. [↑](#endnote-ref-31)
31. Female Prisoners Welfare Project/Hibiscus, “The Tragedy of Jamaican Women in U.K. Prisons”, mimeo, n.d. p. 4. [↑](#endnote-ref-32)