

LITIGATION RAISING ISSUES RELATING TO WOMEN'S HUMAN RIGHTS IN THE ASIA-PACIFIC REGION: THE EXPERIENCE OF KIRIBATI



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This paper has been prepared for a panel discussion of the above-mentioned topic. If the paper confined literally to the terms of the heading, then it would of necessity, be extremely brief because so far there has been no such litigation in Kiribati. Not only there has been no local case in which a court has used international standards to determine women's human rights, but to my knowledge, nowhere in the Pacific region has a court used an international convention for such a purpose.

Kiribati has not yet ratified the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention)¹ and so its provisions have not been incorporated into the domestic law.

The present position in Kiribati is that if a case arises with women's human rights as the issue, the court's decision would be more likely based upon the Constitution rather than on international convention.

The Constitution is the supreme law of Kiribati. It plays a significant role in guaranteeing equality within the social structure and culture of the Republic. In the preamble to the Constitution, the people of Kiribati pledge to uphold the principles of equality and justice and to continue to cherish and uphold the customs and traditions of Kiribati.

Unfortunately, the pledge to uphold the principles of equality and justice does not seem to be consistent with some of the provisions of the Constitution, in view of the present day attitudes to the equal rights of men and women. In fact, it can be said that the Constitution, because of its omissions rather than its provisions, discriminates against women.

Section 3 of the Constitution guarantees to every person in Kiribati the fundamental rights and freedoms of the individual regardless of race, place of origin, political opinion, colour, creed or sex, subject to respect for the rights and freedoms of others and for the public interest. Those fundamental rights and freedoms are expressed to be:

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation.

* I am grateful for the many helpful suggestions offered by members of the Office for Development Assistance's Pacific Regional Human Rights Education Resource Team.

¹ 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981.

Unfortunately, the Constitution, having guaranteed to women the fundamental rights and freedoms of the individual, does not go on to protect them from discrimination purely based on the fact that they are women.

Section 15 forbids the making of any law that is discriminatory either of itself or in its effect; in other words it is forbidden for a law to be directly or indirectly discriminatory.² However, section 15 defines discriminatory as meaning

“affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”³

One class of discrimination which is notably missing from this definition is sexual discrimination.

The result is that the constitutional guarantee to women of the fundamental rights and freedoms of the individual loses much of its significance when it is realised that a provision of any law which is prejudicial to the rights of women purely on the basis of their sex is not considered to be discriminatory and is therefore not unlawful.

The citizenship provisions of the Constitution also fail to take the rights of women into account. Sections 21 and 25 deal with children of I-Kiribati descent born overseas. Such a child has a right to citizenship if his or her father is I-Kiribati. But a child has no such right if it is the mother who is I-Kiribati and not the father.⁴

² Section 15(1) states: “Subject to the provisions of subsections (4), (5), and (8) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.”

³ Section 15(3).

⁴ Section 21 relates to persons born outside Kiribati before Independence Day. It states:

“(1) Every person of I-Kiribati descent who having been born outside Kiribati is on the day prior to Independence Day a citizen of the United Kingdom and Colonies shall, if his father becomes or would but for his death or renunciation of his citizenship of the United Kingdom and Colonies have become a citizen of Kiribati by virtue of subsection (1) or (3) of the preceding section, become a citizen of Kiribati on Independence Day.

(2) Every person not of I-Kiribati descent who having been born outside Kiribati is an eligible person shall, if his father becomes or would but for his death have become a citizen of Kiribati by virtue of subsection (2) or (3) of the preceding section, become a citizen of Kiribati on Independence Day.”

Section 25 relates to persons born after the day prior to Independence Day. It states:

“(1) Every person born in Kiribati after the day prior to Independence Day shall become a citizen of Kiribati at the date of his birth unless on that date, not being a person of I-Kiribati descent or a person whose father is a citizen of Kiribati, he becomes a citizen of some other country: Provided that a person shall not become a citizen of Kiribati by virtue of this subsection if at the time of his birth —

(a) his father possesses such immunity from suit and legal process as is accorded to any envoy of a foreign sovereign power accredited to Kiribati and neither of his parents is a citizen of Kiribati; or

Under sections 22 and 26, a foreign woman who marries an I-Kiribati man has a right to citizenship. However, a foreign man who marries an I-Kiribati woman has no corresponding right. In such a case one can imagine the hardship this kind of discrimination can cause. The husband, even though married to an I-Kiribati, does not thereby acquire any right to stay in the country and if he cannot obtain the necessary work permit — which is by no means guaranteed solely because of his marriage — the I-Kiribati wife would be forced to leave the country of her birth in order to remain with her husband.⁵

Recently, the Government requested the Office for Development Assistance's Pacific Regional Human Rights Education Resource Team to facilitate a workshop in response to the need to increase the general understanding of I-Kiribati women on the Constitution and how the particular clauses in the Constitution discriminate against women. The result of that workshop was the submission of a resolution by the leaders of women non-governmental organisations to the Constitutional Review Committee expressing the urgent need to amend the following provisions of the Constitution:

Section 15 — to include “sex” as a ground of discrimination

Sections 21, 22, 25 and 26 — to include “mother”, “women”, “husband” in each section so as to be in conformity with the rest of the Constitution and maintain equality throughout the Constitution.

The resolution also requested the Select Committee to ask the Government (inter alia) to incorporate in the Constitution a provision allowing affirmative action in respect of women and other disadvantaged groups and, further, to ratify the Women's Convention.

Thus, while the Women's Convention has not yet been used in the courts in Kiribati it has been used to lobby for policy changes. The Convention is also useful in addressing problem areas regarding women's

(b) his father is a citizen of a country with which Kiribati is at war and the birth occurs in a place then under occupation of such country.

- (2) Every person born outside Kiribati after the day prior to Independence Day shall become a citizen of Kiribati at the date of his birth if at that date his father is, or would but for his death have been, a citizen of Kiribati.”

⁵ Section 22 relates to wives of persons who become citizens on Independence Day. It states:

“Every woman who, having been married to a person who becomes, or would but for his death or renunciation of his citizenship of the United Kingdom and Colonies have become, a citizen of Kiribati by virtue of section 20 or 21 of this Constitution, acquired the status of citizen of the United Kingdom and Colonies, automatically or by registration, on the grounds of that marriage and who possesses that status on the day prior to Independence Day, shall become a citizen of Kiribati on Independence Day.”

Section 26 relates to marriage to citizens of Kiribati. It states:

“Any woman who after the day prior to Independence Day marries a person who is or becomes a citizen of Kiribati shall be entitled, upon making application in such manner as may be prescribed, to be registered as a citizen of Kiribati.”

rights not only from the constitutional aspect but also in respect to land rights, sexual offences and domestic violence.

This last-mentioned problem area, ie domestic violence, is an additional problem faced by I-Kiribati women. There is little data on the incidence of wife beating and other forms of abuse, but women attending the national conference on children rated domestic violence, often associated with alcohol abuse, as an extremely serious problem. The problem seems to be more common in urban South Tarawa than in rural areas, but this may be due to an increased willingness to discuss the problem. Domestic violence is covered under general assault laws, but police are reluctant to interfere even when complaints are made.⁶

In fact, much of women's experiences of human rights violations occur in the private sphere at the hands of private individuals. The Women's Convention does not attach responsibility to States parties for violations in the private sphere or at the hands of private individuals. However, the Declaration on the Elimination of Violence against Women (the Violence Declaration)⁷ adopted by the General Assembly of the United Nations by consensus in December 1993 imposes specific obligations on the States and on the United Nations. The Declaration concerns physical, sexual and psychological violence occurring in the family, the community and at the hands of, or with condonation of the State.⁸ States are obliged to condemn violence against women and not to invoke any custom, tradition, or religious consideration to avoid this obligation and to take all appropriate measures to eliminate violence against women.⁹ The Declaration was joined in March 1994 by another mechanism to confront violence against women — the Special Rapporteur on Violence against Women who was appointed by the Commission on Human Rights.¹⁰ Both the Declaration and the appointment of the Special Rapporteur recognise that violence against women violates the fundamental human rights of women, and accordingly, States have an obligation to eliminate this violence. Insofar as domestic litigation is concerned, the standards set in the Declaration that constitute the framework of the work of the Special Rapporteur may be relevant in the interpretation of national laws.¹¹

However, I am afraid that the time is still some way off when the courts in Kiribati will use the Women's Convention and other international standards to decide questions of women's human rights. The starting point, of course, will be ratification by the government of the Women's Convention.

⁶ Government of Kiribati and UNICEF, *The Situation of Children and Women in Kiribati*, 1991.

⁷ GA Res 48/104, UN Doc A/48/49, at 217 (1994), reprinted in 1 IHR.R. 329.

⁸ For details, see Violence Declaration, articles 1 and 2.

⁹ For details, see Violence Declaration, article 4.

¹⁰ The mandate of the Special Rapporteur on Violence against Women, Its Causes and Consequences was established by Resolution 1994/45 of the United Nations Commission on Human Rights: CHR Res 1994/45 (4 March 1994).

¹¹ Speech by Florence Butegwa at Judicial Colloquium on Promoting the Human Rights of Women, Victoria Falls, 1994.

Custom is another obstacle to women realising equality in Kiribati, although the same may be said of other Pacific island nations.

Custom in Kiribati has a strong influence in qualifying a woman's role in society and of perpetuating the traditional concept of an I-Kiribati woman and her place in the scheme of things. There are many aspects of custom which are discriminatory in the sense that they reflect an ideology based on the notion that women are inferior to men.

Traditionally, the position of women was to be at home and to care for their families, to prepare food and to look after all the members, both young and old. Their lives were focused on fulfilling the role of mother, wife and daughter. The husband was officially head of the household, but the wife was the most important single figure in the family because she dealt with all the problems. While the husband was the main provider of food through fishing and planting babai (swamp taro), he would have taken very little interest in the day-to-day happenings within the family. Politics, however, was officially men's work. The unimane, or elder men, discussed and debated in the maneaba and made all important decisions for the community. Though women were present in the maneaba, traditionally they did not speak, but sat behind the men and whispered what they thought. They were expected, however, to participate in activities associated with the maneaba, contributing their efforts and skills in communal work and at times of celebration.¹²

Customary law has been granted legal recognition in Kiribati. It is defined in section 5 of the Laws of Kiribati Act 1989 as comprising the customs, and usage existing from time to time of the natives of Kiribati and is part of the laws of Kiribati unless inconsistent with legislation.

In practice, customary law tends to be recognised and applied primarily in relation to criminal defences, land, marriage, succession, adoption, and personal law generally.¹³ With very few exceptions, it can be described as patriarchal.

Nowadays, things have begun to change, but very slowly. In the outer islands women still defer to men on political matters, but they have begun to take a more prominent role in organisations which deal specifically with women's affairs, such as women's associations and youth groups. The degree to which a woman is able to participate more actively outside the family in community affairs depends a great deal on how understanding the husband is. Considerable effort is going into educating women these days, which hopefully will give them the confidence to participate more and more in modern Kiribati, but there are still many aspects of traditional society which work against the progress of women.¹⁴

¹² Taboneao Ngaebi, Tekarei Russell and Fenua Tamuera, "The Status of Women" in Howard Van Trease (ed), *Atoll Politics: the Republic of Kiribati* (Christchurch, Macmillan Brown Centre for Pacific Studies, 1993) 266.

¹³ Martin Tsamenyi, "Kiribati" in M A Ntunmy (ed), *South Pacific Islands Legal Systems* (Honolulu, University of Hawaii Press, 1993).

¹⁴ "The Status of Women", *supra* note 12.

This problem might well be solved upon ratification of the Women's Convention. The Government would thereby be obliged to modify social and cultural patterns of behaviour so as to eliminate customary practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁵ The resultant laws would of course be interpreted by the courts in accordance with the intentions of the Convention.

At present, there is no basis for the courts in Kiribati to use the Women's Convention in the interpretation of existing laws. However, ratification would inevitably lead to the provisions of the Convention being incorporated into the laws of Kiribati. The Convention would then prove useful in litigation and decision-making in the following ways:

- (1) Judges would adopt a more progressive interpretation of the domestic law, according women equality with men before the law in accordance with article 15 of the Convention.
- (2) Where judicial discretion existed, a judge would have a responsibility to abide by the principles of non-discrimination as outlined in the Convention in exercising that discretion. This would have considerable impact where the applicable legislation was gender-neutral, but judicial interpretation had in the past discriminated against women.
- (3) Where there was a conflict of legislation, the interpretation would be in accordance with the Convention.
- (4) Customary laws and practices discriminating against women would henceforth be interpreted in the light of the Convention.

In conclusion, I wish to emphasise that the question of the ratification of the Women's Convention is one for the executive, and that what I have said is not to be regarded in any way as an attempt to encroach upon that role. I am able to make the observation, however, that the present Government of the Republic of Kiribati is a progressive government which has already shown its support for women's rights and would not be likely to make a decision contrary to the interests of women in Kiribati.

¹⁵ Article 5(a) states "States Parties shall take all appropriate measures...to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."