



The Role of the Judiciary in Promoting Gender Equality

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Justice

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Remarks

By

The Honourable Mme Justice Dèsirèe Bernard, Judge of the Caribbean Court of Justice,

on the occasion of

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Over the past one and one half days we have been addressed about and have discussed the topic of Gender and the Law in all aspects - gender-based violence, gender and judging, human rights of victims and perpetrators of violence, equality in division of property, gender equality and international treaties as well as gender in the work-place, masculinity and violence, sentencing and access to justice. I asked myself what more was left to be said, and decided that perhaps a historical overview of earlier judicial colloquia may form a backdrop to all of the issues we have so far considered.

The last two decades have revealed increasing recognition of women's rights as human rights, no doubt facilitated by the ratification by an overwhelming number of member states of the United Nations of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The effectiveness of any treaty or constitutional instrument depends in large measure on its application and interpretation. In this regard judges are strategically placed to determine such effectiveness by utilisation of international treaties in their judgments particularly in promoting and enhancing women's rights. It was recognised that the historic conservatism of the judiciary resulted in a reluctance to depart from tradition and time-honoured precedent, and a

change of attitude was essential especially at the national level in order to advance the status of women.

In pursuance of this objective in 1994 the Commonwealth Secretariat, the Commonwealth Foundation and the Commonwealth Magistrates and Judges Association initiated a series of judicial colloquia on the utilisation of international human rights standards in domestic litigation. The result of this first colloquium held in Zimbabwe for senior judges of the African region was the adoption of the Victoria Falls Declaration of Principles for Promoting the Human Rights of Women. These Principles reflected the vital function of an independent judiciary to interpret and apply national constitutions and laws. One of the principles recognised that discrimination against women could be direct or indirect, and indirect discrimination requires particular scrutiny by the judiciary.

With regard to international human rights instruments the Victoria Falls Declaration recognised that these instruments have inspired many constitutional guarantees of fundamental rights and freedoms, and as such they should be interpreted generously, particularly those pertaining to women in relation to discrimination. Further, it is essential to promote a culture of respect for international and regional human rights norms, and particularly those affecting women which should be applied in the domestic courts of all nations and given full effect. They ought not to be considered as alien to domestic law in national courts.

Time does not permit for mention of all of the Principles in the Declaration, and I have selected just a few. Before leaving them I wish to refer to two others, one being the need to develop and encourage public interest litigation and other means of access to justice to litigants, especially

women, for violation of their rights. Another was encouraging closer links and cooperation by the judiciary across national frontiers on the interpretation and application of human rights law.

Two years later in 1996, a similar colloquium for senior judges from the Asia/Pacific Region led to the adoption of the Hong Kong Conclusions which reaffirmed the Principles of the Victoria Falls Declaration, and expressed their commitment to uphold and implement those principles. Participants noted that it was important that the judiciary reflect the population it serves, and accordingly encouraged the exploration of ways to ensure a gender balance in the judicial system.

They also identified several areas where there were clear violations of the human rights of women which might be addressed by the utilisation of international treaties in domestic decision-making, such as discrimination in matters of nationality, citizenship, property and inheritance, and encouraged the review of legislation to ensure consistency with those treaty obligations undertaken by ratifying countries.

The next stop was in Guyana in 1997 where the Georgetown Recommendations were adopted by senior judges at that Colloquium, and which while reaffirming the Principles and Conclusions of the earlier colloquia, recognised that the fundamental duty of judges to ensure the fair and due administration of justice requires them to be alert to manifestation of gender discrimination in the law and in the administration of justice, and to take such measures as lay within their power to redress or eliminate any such discrimination. The Colloquium also recognised that a community's understanding of fairness and equality may evolve over time and that judges had both the power and responsibility to adopt the common law or interpretations of constitutional provisions to meet the changing circumstances of society. The full enjoyment by women of their human rights could only be realised through the creative interpretation and effective enforcement of these rights by the

courts, and this can only occur if there is an independent and competent judiciary which enjoys the confidence of the people it serves.

Among the Recommendations coming out of this Colloquium which I had the honour as Chief Justice of Guyana to co-chair with Hon. Madam Justice Joan Sawyer, then Chief Justice of The Bahamas, and attended by about forty judges from our Region, were that gender-sensitive training and information about women's human rights should be provided to the judiciary, lawyers, law enforcement agencies, court personnel, law students and community leaders, and legal literacy programmes to raise public awareness should also be undertaken.

One other recommendation encouraged judges and prosecutors to be vigilant about the withdrawal of cases in order to ensure that the legal system fully protects the rights of women and girls, notwithstanding the obligation to ensure a fair trial for all.

With regard to the operation of the legal system and reform of the law, it was recommended that where general or specific reviews of the law are undertaken by law reform commissions or other bodies, the terms of reference of such reviews should ensure that the impact of existing and proposed laws on the human rights of women is fully taken into account in the process of review and reform of the law.

There were other recommendations which time does not permit for discussion, but overall the three judicial colloquia for judges held in Zimbabwe, Hong Kong and Guyana between 1994 and 1997 provide formidable reasons for continuation of the process of judicial education and sensitisation of women's human rights. In fact, a powerful recommendation came out of Georgetown that a Reference Group be constituted to follow up the recommendations made in Guyana as well as assess the impact of previous judicial colloquia on the domestic enforcement

of international human rights norms through national courts. In addition the Colloquium recommended broad dissemination of the Victoria Falls Declaration, the Hong Kong Conclusions and the Georgetown Recommendations as well as the reports of the colloquia. I cannot verify fourteen years later, whether this was ever done or whether the Reference Group was ever constituted. At seminars, conferences, colloquia, call it what you will, laudable recommendations and decisions are usually made, but, alas, there is usually very little follow-up action. Maybe it is now appropriate to renew a call for the establishment of that Reference Group and dissemination of the reports of the colloquia.

At this juncture we should consider the question of what can the judiciary do to aid in the task of promoting gender equality. The high profile of judges in every society raises high expectations of honesty, fairness and independence, not to mention our ability to find acceptable solutions to the myriad problems with which we are confronted on a daily basis. Inherent in the qualities expected of a judge, and in fact a fundamental right of every citizen of a state, is fairness - the right to receive equal treatment by those constitutionally entrusted with the duty to hold the scales of justice evenly. Judges upon assumption of office swear to administer justice according to law without fear or favour, affection or ill-will. Of course, judges come in all sizes, shapes, backgrounds, genders and ethnicities. We also bring with us personal beliefs, prejudices and opinions on a variety of issues which affect society. All of this may have an impact (positive or negative) on matters which fall to be determined by us. Judges are expected to be objective, not subjective. Our personal prejudices must be subsumed in striving to be just and impartial. It is an ideal to which every judge aspires and is expected to achieve. This leads to a question which springs to mind - is justice really just? This could very well be a topic for another colloquium,

and I shall not endeavour to open such a discussion on this occasion because of its multifaceted nature.

On the issue of gender equality a judge's personal views and life experiences may come into play in some instances. These views, however, may be tempered by a better understanding of the inequities and discrimination encountered by women due to the impact of poverty, race, illiteracy, alcohol and drug abuse as well as sexual and physical abuse; also the recognition that in some instances the courts and the judiciary are the only recourse available to women to protect and enforce their basic human rights. The judiciary stands as a bulwark against continuous violation of all human rights with the utilisation of international norms and treaties ratified by states being the instruments for enforcement of these rights particularly in relation to women. In fact, in some of our jurisdictions where there are codes of conduct for the judiciary based on the Bangalore Principles, judges are encouraged to keep themselves informed about relevant developments in international law including the international norms and to conform to such norms far as is feasible. The code of conduct of Guyana and in fact our Code of the Caribbean Court of Justice contain this provision.

A few examples will illustrate a new trend across jurisdictions and the enlightened approach of the judiciary in the domestic courts of some states.

There is the well known case of *Attorney General of Botswana v. Unity Dow (1992)* in which both the High Court and the Court of Appeal upheld a challenge to provisions of the State's nationality law which did not permit a Botswanan woman married to a non-Botswanan man to pass on her citizenship to the children of the marriage. In the Court of Appeal reference was made to CEDAW which Botswana had ratified, and the status of international treaties and conventions in domestic laws was considered.

In *Aldridge v. Booth* (1988) 80 ALR, 1 the Federal Court of Australia dismissed a challenge to the constitutionality of the sexual harassment provisions of the Federal Sex Discrimination Act holding that Article 11 of CEDAW imposed a very clear obligation on Australia to eliminate sex discrimination in employment, and sexual harassment was a form of sex discrimination within the meaning of CEDAW.

The Indian case of *Madhu Kishwar and others v. State of Bihar and others* (1996) is significant because of the dissenting judgment of Ramaswamy J. It involved the succession rights of tribal women. Customary law governing tribal communities provided for succession along the male line to the exclusion of women, and proceedings were launched to determine whether this was contrary to the Constitution and international conventions that protect the rights of women. The majority decision recognised that the customary law of succession discriminated against tribal women, but refused to strike it down. The Court held that it was not desirable to declare customary law to be contrary to the rights of women under the Constitution of India and the rules of succession sometimes provide different treatment that is not necessarily equal. The Court also held that judicial activism in the courts where judges reinterpret provisions beyond the legislative intent should be avoided, and opined that the role of the courts is merely to advise and point out any legislative gaps to the Executive so that the State, in its legislative role, can attend to any problems.

Ramaswamy, J, however, disagreed and held that the full rights to the estate of their parent, brother or husband should be granted to women in tribal communities as heirs of intestate succession. He noted that the principles of equality having been ratified by the Government of India in international conventions and declarations should be upheld. He found that the principles of CEDAW had become integral to the Constitution.

This dissenting judgment was an example of judicial activism incorporating international law into both domestic law and the Constitution in enforcing the rights of women.

In the area of criminal law in *The Republic of Kiribati -v- Tieta Timiti & Rabaere Robuti (1997)* the Court was asked to consider whether the rule of corroboration in the law governing rape in Kiribati discriminates against women and was contrary to the provisions of the Constitution and CEDAW. It involved the rape of a woman allegedly by two men whose defence was that intercourse was consensual. The Court was asked to consider the principles formulated in CEDAW and other international instruments that protect the rights of women. Although this case did not result in having the rule of corroboration changed the Court was presented with the opportunity to consider the claim that the requirement of corroboration is discriminatory against women under CEDAW.

The English common law which former colonies of the British Empire inherited including all of its acts and statutes perpetuated the stereotypical role of women without exception or necessary adaptation to accord with the peculiar customs and culture of the particular colony.

This sometimes led to absurd results when courts were required to apply the law strictly and follow long-established precedent. A case in point was one decided in 1959 in Trinidad & Tobago¹ when a Muslim marriage was held not to be monogamous in the Christian sense of the term, and a magistrate who had made an order for maintenance against a husband on an application by his wife had no jurisdiction to do so. The reasoning was that the only kind of marriage that entitled the parties thereto to the remedies, adjudication and relief of the matrimonial

¹ Henry v Henry (1959) 1 WIR, 149

law of England upon which the Trinidad and Tobago general law relating to marriage was based, was a marriage that was monogamous in the Christian sense of the term.

Being colonies of the then British Empire the influence of the mother country was very strong, and any departure from the settled norms of behaviour was frowned upon as being reactionary. Unrepentant monarchists brooked no interference with long-established precedent which they felt had served us well in the past, and should continue undiminished in form and substance. The conservative view was that the law must be certain and invariable, and any attempt to introduce any liberal interpretation of laws was dismissed summarily even if injustice was the inevitable result. Fortunately, we are now masters of our own destiny and responsible for crafting a jurisprudence within our Region which is peculiarly ours based on our own customs, mores and traditions with judges who are sensitive to the peculiarities of our societies.

In concluding I adopt the view expressed by Professor Kathleen Mahoney of the Faculty of Law, University of Calgary, in her address at the Colloquium held in Guyana in 1997 on the subject of "Gender and the Judiciary: Confronting Gender Bias," which is to this effect:

"Inequality is tangible and real for all women, yet equality has always been a very difficult concept for judges, lawyers, law professors and other students of the law to define or describe."

She went on to give the reason for this difficulty by quoting an excerpt from Justice Rosalie Abella of the Ontario Court of Appeal in a paper entitled "The Dynamic Nature of Equality," which states:

"... equality is evolutionary, in process as well as in substance. It is cumulative, contextual, and it is persistent. At the very least, equality is freedom from adverse discrimination. But what constitutes adverse discrimination changes with time, with information, with experience and with insight. What we tolerated as a society one hundred, fifty or even ten years ago is no longer necessarily tolerable. Equality is thus a process, of constant and flexible examination, of vigilant introspection, and aggressive open-mindedness. If in this on-going process we are not always sure what 'equality' means, most of us have a good understanding of what is fair."

It is my sincere wish and hope that we leave this colloquium with firm resolve to eliminate gender inequality within our judicial systems by utilising all available methods in ensuring justice for all women whenever injustices and discrimination rear their ugly heads.