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RESPECTING THE HUMAN RIGHTS OF WOMEN WITHIN THE JUDICIAL SYSTEMS OF THE COMMONWEALTH CARIBBEAN

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by

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When I was asked to deliver the feature address at the opening of this Colloquium, I pondered over the choice of a topic which would embrace the theme of the Colloquium, "Gender, Culture and the Law" and at the same time indicate areas of the law and practices which were or still are inconsistent with the promotion of women's rights as human rights.

I have heard a theory expressed that woman's inferiority to man stems from the Christian religious belief that woman was created from the rib of the first man, Adam, and hence women owe their very existence to men. I am not prepared to enter into a debate about this theory, but the history of women's societal development has lagged behind that of their male counterparts, and in fact the promulgation of laws accentuated this inferior status, ostensibly thought to be for their own protection. Men arrogated unto themselves the role of protector of those regarded

as the "weaker sex." The child-bearer role went hand-in-hand with that of child-rearer; hence all laws were formulated to accord with this stereotype.

As colonies within the former British Empire the English common law and statutes became ours, and were invariably applied without exception or necessary adaptation to our peculiar customs and culture. The following example illustrates this in large measure. It concerned the lawful marriage of two persons under the provisions of the Muslim Marriage and Divorce Registration Ordinance of Trinidad and Tobago.[1] The wife brought a complaint against her husband for maintenance on the ground of his wilful neglect to maintain her. The magistrate found the complaint proved and made an order. On appeal by the husband evidence was led from an expert witness in Islamic law and custom, and which established that Muslim marriages were potentially polygamous. The Supreme Court of Trinidad and Tobago in its Appellate Jurisdiction held that the only kind of marriage that entitled the parties to remedies under the matrimonial law of England upon which the Trinidad and Tobago marriage laws was based is a marriage that is

[1] Henry v Henry (1959) 1 WIR, 149

monogamous in the Christian sense of the term, and a Muslim marriage not being monogamous the magistrate had no jurisdiction to make an order for maintenance.

It must have seemed incredible to nationals of a country whose marriage had been registered in accordance with the law to discover that that marriage was regarded as polygamous and not recognised because it did not conform with the Christian and English concept of marriage. Of course, this was over fifty years ago, during the colonial pre-independence era of the Caribbean. Thankfully, there have been changes which to a large extent reflect our mores and culture although there are still vestiges of that past era reflected in some archaic laws and statutes.

An important feature of life in Caribbean societies is the common-law relationship. Although a significant proportion of our societies comprise common law unions it was not until fairly recently in some jurisdictions that laws were promulgated to afford some measure of protection for women caught in these relationships with no rights to property acquired by their joint efforts with reputed husbands who may die intestate or fail to

provide for them in their wills. Formerly children of such unions were branded as "bastards," a term which happily has been expunged from the statute books in most jurisdictions.

CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

At this juncture I think it apposite to make reference to what is familiarly called the "Women's Convention." In my respectful view inequality of treatment of persons equates with overt discrimination, particularly in relation to women. After much lobbying by the members of the Commission on the Status of Women the United Nations General Assembly on 18 December, 1979 adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which became the springboard which catapulted women's rights into the stratosphere of human rights guaranteed to all human beings without distinction of any kind. In 2000 implementation of the Convention was listed among the objectives in the U.N. Millennium Declaration as well as combating all forms of violence against women.

This Convention ratified by all states of the Commonwealth Caribbean defined discrimination against women

in great detail, but succinctly the effect is that women must not be hindered in any form or fashion in the enjoyment of their basic human rights, and must be accorded equal treatment with men in all areas of their lives. Ratification of the Convention, however, is the first step in the process of compliance with its provisions; implementation is usually the most difficult. By ratifying states parties undertake, inter alia, "*to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle,*"[2] and "*to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudice and customary and all other practices ....*"[3]

This gives rise to the question of enforceability of the Convention in the domestic institutions of states parties when its provisions are violated. To put it more directly - how do international treaties become part of the domestic law of a state? Some states though ratifying international treaties take no steps

[2] Article 2(a) of the Convention
[3] Article 5(a) of the Convention

to incorporate them into their domestic law; hence they cannot be enforced in the national legal system, unless incorporated by legislation. Other states regard an international treaty once ratified as being part of its domestic law without further incorporation, and is said to be "self-executing." This means that upon ratification it becomes part of the domestic law and can be enforced within the domestic legal system. These two methods epitomise the dualist (incorporation by legislation) and the monist (incorporation upon ratification) approaches to implementation of the provisions of an international treaty. Ratification of international treaties is invariably the function of the Executive branch of government with implementation by statute being left to the Legislature. The majority of the States of the Commonwealth Caribbean adopt the dualist approach resulting in an international treaty being unenforceable under domestic law until the requisite legislation is passed giving effect to its provisions. The result of this is that judges in domestic courts rarely make reference in judgments to international treaties ratified by their states, but would enforce statutes enacted to implement the provisions of those treaties.

Guyana is unique among Caribbean states in this regard in that in 2003 the Constitution was amended to provide expressly that every person contemplated by the respective international treaties ratified by the state is entitled to the human rights enshrined in the said treaties, and such rights shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of Government. Among the treaties ratified by the Government of Guyana is CEDAW. The amendment thus mandated the judiciary to have regard to this Convention, notwithstanding any legislation giving effect to the provisions of the treaty.

One of the means of determining the effectiveness of any treaty or constitutional instrument is usually by interpretation and pronouncements of the judiciary of a state or by the theoretical assessment of its academics. The conservatism of the judiciary is reflected usually in its reluctance to utilise international treaties in decisions particularly on issues affecting women, preferring to tread the safe and time-honoured path of precedent rather than launching out into deep uncharted international waters where no one has ventured before.

This is particularly so within our Region. Three judgments, however, which I was able to find, indicate that this seems to be changing, one being as far back as 1998 and which emanated from the Eastern Caribbean Court of Appeal,[4] and two others of recent vintage (2010 and 2011) from Dominica and the British Virgin Islands.[5] They were all in the criminal jurisdiction with two involving sexual assaults and one an incident of domestic violence. In two of them reference was made to CEDAW, and the other, the Convention on the Rights of the Child. The victims in all of the cases were female.

In 1977 a colloquium organised by the Commonwealth Secretariat in collaboration with the CARICOM Secretariat had as its objective increasing sensitivity to and awareness of gender discrimination when encountered by the judiciary of Caribbean states. This colloquium was held in Guyana and I had the honour as Chief Justice of co-chairing it with the then Chief Justice of The Bahamas, Hon. Madame Justice Joan Sawyer. Hon. Mr. Justice P.N. Bhagwati, former Chief Justice of India and

[4] **Gladstone Gooderidge v The Queen** (Criminal Appeal No. 3/1997) judgment of Sir Dennis Byron, former Chief Justice

[5] **The State v Andrew Valmond** (DOMHCR 2010/0009); **The Queen v Vernon Anthony Paddy** (BVICR 2010/0020)

a passionate advocate for human rights, delivered the keynote address to about forty Caribbean judges.

The colloquium, inter alia, emphasised the utility of international human rights treaties in domestic litigation and encouraged the incorporation of these treaties in judicial decisions. It may be that the time is ripe for another colloquium to continue the process of sensitisation which began in our Region in 1997.

Before leaving discussion on international treaties I am compelled to make mention of the Charter of Civil Society for the Caribbean Community which, I am sure, is not well known in our Region and which is seldom referred to or relied upon, but which was adopted by our Heads of Government since 1997. It was one of the strongest recommendations of the West Indian Commission contained in its report "Time for Action."

In accepting the recommendation for the Charter the Heads of Government declared "that a CARICOM Charter of Civil Society be developed as an important element of the Community's structure of unity to deal with matters such as free press; a fair and open democratic process; the effective

functioning of the parliamentary system; morality in public affairs; respect for fundamental civil, political, economic, social and cultural rights; the rights of women and children; respect for religious diversity; and greater accountability and transparency in government."

The laudable objectives of the Charter mirrored to a large extent the provisions of the Universal Declaration of Human Rights with specific provisions for the promotion of policies and measures aimed at strengthening gender equality including, inter alia, equal opportunities for employment with equal remuneration, and legal protection with effective remedies against domestic violence, sexual abuse and sexual harassment.

Our CARICOM states undertake to submit reports periodically to the Secretary General for transmission to the Conference of Heads of Government, and also to establish in each state a National Committee or designated body to monitor and ensure the implementation of the Charter. This is commendable, but we may ask whether its laudable objectives are being pursued. There is no monitoring mechanism so implementation

is left to the honour, integrity and commitment of each state. Sensitisation to and dissemination of this Charter among the peoples of the Region should be a priority in order to ensure that it is not just another treaty filled with good intentions but relegated to the annals of history.

INCORPORATION OF TREATIES BY LEGISLATION

As stated earlier all of the CARICOM states have ratified or acceded to CEDAW, but one wonders how many of them have enacted legislation or taken positive steps to implement the Convention into their domestic law. Mere ratification is useless without effective means of enforcement and availability of remedies for violation of human rights to which one is entitled. In this regard, in 1980 the then CARICOM Women's Desk (now the Gender Division) embarked on a project to ascertain the legal status of women in the Region, and to identify deficiencies in the laws of member states which hindered women's full development. This led to the formulation of a regional project funded by the Commonwealth Secretariat to draft model legislation in six critical areas with a focus on addressing gender disparities. The areas identified were citizenship, domestic

violence, equal pay, inheritance, sexual harassment and sexual offences; two other areas (equal opportunity and treatment in employment, and maintenance) were added later.

These model pieces of legislation have been very effective in persuading CARICOM states to enact or amend existing statutes in the areas covered by the models. All of the states have legislation in place ensuring married women's rights to maintenance and property, but only two have extended that right to women living in common law relationships. Barbados was the first to do so way back in 1981 by passage of the Family Law Act. This right is gender neutral, and applies equally to men or women in such a union. Trinidad and Tobago enacted the Cohabitational Relationship Act which allows a cohabitant (defined as a woman living with a man in a cohabitational relationship) to apply to the courts for maintenance and for property adjustments. Guyana's Married Persons Property (Amendment) Act of 1990 empowered courts to make orders concerning property acquired during marriage or cohabitation. These enactments in relation to women in common law relationships must be applauded and emulated having regard to the fact, referred to earlier, that such relationships abound in the

social fabric of our Caribbean societies. Hopefully, other states will enact similar legislation with all urgency.

Commendably all states have in place legislation to combat domestic violence based, I am sure, on CARICOM's model legislation. This is a problem which is so widespread that it should be the subject of a separate colloquium or as I have urged before at other fora, a summit of CARICOM leaders to ascertain its depth by collection of data and gender disaggregation. The whole problem of violence in our individual societies needs to be addressed seriously before it consumes us completely. It has already spread beyond boundaries of tolerance, and is not confined to domestic situations, but embraces all sections of society.

Within the context of sexual offences, marital rape is considered an offence in most of our Caribbean states. It, however, applies only where spouses have separated or about to be finally divorced; only in Guyana and Trinidad and Tobago can the offence be committed during marriage.

Overall one can conclude that the political will to improve the status of women in the Caribbean is manifesting

itself exponentially although there is still much more ground to be covered.

The effectiveness of any law depends on its implementation and enforceability which to a large extent rests on the shoulders of the judicial arm of a state. Dispensing justice according to law involves conformity with established rules of procedure and precedent which sometimes collide with society's sense of morality and fair play. In this regard I mention what has come to be known as "the battered woman syndrome," and which has been recognised by the courts only within recent times. Although it is not gender specific, it has been used in situations involving women with a history of being abused and who cannot legally rely on the defence of self-defence. It is used now as a defence. The first known case where expert evidence was led to support a history of battering suffered by the female defendant on a charge of murder was the Canadian case of *Lavallee v R*[6] where dicta suggested that "a battered woman need not wait until the physical assault is underway before her apprehensions can be validated in law."

[6] [1990] 1 SCR, 852

Within our Region in the Trinidadian case of *Indravani Ramjattan v The State*[7] the "battered woman syndrome" defence succeeded when the Court of Appeal accepted the expert evidence of a psychiatrist and found that the appellant facing a conviction for murder of her common law husband had established that the prolonged physical, mental and sexual abuse to which she had been subjected caused abnormality of mind, thereby satisfying the defence of diminished responsibility.

In this address I have attempted to highlight the need for judicial intervention and activism in the enforcement of women's human rights.

In this regard I adopt an excerpt from a paper delivered by former Chief Justice P.N. Bhagwati of India, to whom I referred earlier, at the Asia/South Pacific Regional Judicial Colloquium held in Hong Kong in 1996. The topic was "Creating a Judicial Culture to Promote the Enforcement of Women's Human Rights," and is to this effect:

> "Judges have a creative function. They cannot afford to just mechanically follow the rules laid down by the legislature; they must interpret

[7] (1999) 57 WIR, 501

these rules so as to reconcile them with the wider objectives of justice which are encapsulated in the international norms of women's human rights. So long as judges are sensitive to women's human rights and are prepared boldly to advance the law through a process of creative interpretation, women's human rights will be safe."