

USING INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE LAW TO ADVANCE WOMENS' RIGHTS IN THE DOMESTIC CONTEXT

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When the words "human rights" are mentioned several definitions may spring to mind. I understand them to mean basic inviolable standards of conduct which inhere in every human being and which others are expected to respect and recognise regardless of nationality, race, ethnicity, gender or religion. These rights which are closely allied with ethics and morality reflect the values of a community, and are invariably enshrined within the legal framework of a state with provision made for their enforceability if violated.

Ratification of international treaties and conventions provides the framework within which states can effectively safeguard and protect the rights of their citizens.

However, having ratified an international treaty implementation can be the most troubling. Questions arise as to enforceability in the domestic courts of the ratifying state, and depends in large measure on the relationship between a state's

international obligations and its domestic laws. States which adopt the monist approach to implementation have the advantage of a treaty becoming part of the domestic law immediately upon ratification, whereas the dualist approach requires ratified treaties to be implemented into domestic law by legislation.

In countries which adopt the dualist approach implementation of a treaty depends in large measure on the integrity, commitment and political will of the particular state in honouring its international obligations by enacting the required legislation to ensure enforceability in its domestic courts. Nearly all of the English-speaking countries in the Caribbean which inherited the English common law and systems of government adopted the practice of the United Kingdom which followed the dualist approach; hence in our Region international treaties are not automatically incorporated into our domestic law upon ratification, but requires legislation for implementation, and which must in spirit accord and be consistent with the state's treaty obligations. In 2003 the Government of Guyana amended its constitution to protect human rights enshrined in international treaties which it ratified (CEDAW and CRC being

two of them) and urged respect for and upholding of such human rights by the executive, legislature, judiciary and all organs and agencies of Government.

INCORPORATION BY LEGISLATION

All of the states within the Caribbean Community have ratified or acceded to CEDAW, but 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 Gender Division of the Caribbean Community Secretariat 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 member states to enact or amend existing statutes in the areas covered by the models.

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.

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, for example, in the law of succession or inheritance, property rights upon dissolution of a marriage, to name just two. Some judges prefer to tread the safe and time-honoured path of precedent rather than launch out into deep uncharted international waters where no one has ventured before.

This is particularly so within the Caribbean Region. Four judgments, however, indicate that this seems to be

changing, one being as far back as 1998 and which emanated from the Eastern Caribbean Court of Appeal, and three others of recent vintage (2010 and 2011) from Dominica, the British Virgin Islands and Guyana. Two involved sexual assaults, one an incident of domestic violence and the other alleged torture of a minor while in police custody. In two of them reference was made to CEDAW, and in the two others, to the Convention on the Rights of the Child. In three of the cases the victims were female, and the other was a teenaged male.

In 1997 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 of co-chairing it as Chief Justice. Hon. Mr. Justice P.N. Bhagwati, former Chief Justice of India and a passionate advocate for human rights, delivered the keynote address to about forty Caribbean judges.

The colloquium, *inter alia*, emphasised the incorporation of international human rights treaties into

domestic litigation and encouraged the utilisation of these treaties in judicial decisions.

At this juncture mention must be made of the Optional Protocol to CEDAW which entered into force on 22 December, 2000. Within the Caribbean Region three member states have ratified the Optional Protocol despite efforts undertaken to persuade other member states of the Region to do so. I have noted with interest that the CEDAW Committee considered three cases involving domestic violence between 2005 and 2007, and made recommendations to the state parties for improving relevant legislation and expediting the prosecution of perpetrators of such violence.

In one of the cases, *Goekce v Austria* the Committee addressed the question of whether states parties can be held accountable for the conduct of non-state persons, and concluded that discrimination under the Convention was not restricted only to action by or on behalf of Governments since under general international law and specific human rights covenants states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.

REGIONAL INITIATIVES

One of the achievements of the Inter-American Commission of Women within the Organisation of American States was the adoption in June 1994 by the OAS of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, generally known as "The Convention of Belem Do Para." As far as can be ascertained all of the member states of the Caribbean Community have ratified or acceded to this Convention under which the states parties agree to undertake by all appropriate means policies to prevent, punish and eradicate all forms of violence against women.

Another regional initiative taken solely by the Caribbean Community member states is the adoption of the Charter of Civil Society in February 1997 whereby the states parties resolve to "respect and strengthen the fundamental elements of a civil society."

In its preamble the Heads of Government declare their resolve to pay due regard to the principles by which they commit themselves to respect and strengthen the fundamental elements of a civil society. These principles include equality before the law

and the promotion of policies aimed at strengthening women's and children's rights including legal protection against physical and mental violence, sexual abuse and neglect. The states parties undertake to submit reports periodically to the Secretary General of the Caribbean Community 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 there is no monitoring mechanism so implementation is left to the honour, integrity and commitment of each state. The provisions of the charter mirror in large measure those of CEDAW, but surprisingly has not been disseminated among nationals of the member states to any large extent. Much work needs to be undertaken in this regard.

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.

In closing I adopt an excerpt from a paper delivered by former Chief Justice P.N. Bhagwati of India, 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 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."

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