

Gender Equality in the Caribbean*

by

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Introduction

Protocols.

It is both an honour and a pleasure for me to deliver the key note address at this very important sub regional workshop on gender equality for Judges of the Caribbean. I must express my appreciation to Mr Giovanni di Cola the Director of the International Labour Office Decent Work Team and Office for the Caribbean for inviting me. I have always admired the work of the ILO and am grateful for its continued interest in the Caribbean. I am confident that this will be a most beneficial experience for all presenters and participants and result in a benefit to the region. Since its creation in 1919, the ILO has given high priority to promote the rights of women at work and to achieve equality between women and men. It has regarded gender equality as a key component for women and men to obtain decent and productive work in conditions of freedom, equity, security and dignity. The idea of gender equality stands integral to achieving the organization's four strategic goals of:

1. promoting and realizing standards of fundamental principles and rights at work;
2. creating greater opportunities for women and men to decent employment and income;
3. enhancing the coverage and effectiveness of social protection for all, and
4. strengthening social dialogue.

The objective of this workshop falls well within these strategic goals. However, the idea of providing professionals of Caribbean Courts with knowledge that will enable them to use international labour law to enhance gender equality when delivering labour justice at a national level raises a number of interesting issues. These are issues which are relevant to the Caribbean

jurisprudence which falls directly within the mandate of the CCJ and indicates additional reasons why I am so pleased at our association with this program.

I think that the most interesting of these issues is the fact that your topic will require you to consider the extent to which international labour law is applicable in the respective countries of the Commonwealth Caribbean. This is because as I am sure you all know that according to the legal traditions in this region our countries are dualist.

In international law the terms dualist and monist refer to the relationship between international law and national law. In a pure monist State, international law does not need to be translated into national law; it is just incorporated and has effect automatically in national or domestic laws. The act of ratifying an international treaty immediately incorporates the law into national law and customary international law is treated as part of national law as well. International law can be directly applied by a national judge and can be directly invoked by citizens, just as if it were national law. Dualists, on the other hand, emphasize the difference between national and international law and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. If a State accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. One cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. As a consequence, according to dualists, national judges never apply international law, only international law that has been translated into national law.

International law does not determine whether a State is or should be dualist or monist and States are free to decide on the manner in which they want to make international law binding on its citizens and agencies. This is an issue which has come before the CCJ and since I am sure that you will be sufficiently familiar with the CCJ case of *AG v Joseph and Boyce*¹ it should be sufficient for me to simply state briefly that these theories were considered in that case. This was a case from Barbados. It clarifies that in cases where the government accepted a treaty but did

¹ [2006] CCJ 3 (AJ).

not adapt its national laws, yet the fact of the acceptance of the treaty was made public and citizens acted on the basis that their rights were in conformity with the treaty provisions, the Court would uphold the citizens' legitimate expectations. Another very important principle was referenced in the case of *BCB v AG of Belize*² when the Court confirmed that, even in a dualist country, when the government entered into a treaty, it was legally possible for the state to confer rights on citizens directly, even before the introduction of any domestic legislation.

Without dealing with the content of your programme I would like to encourage a pro-active approach to the implementation of international rules in domestic litigation. Of course I am not advocating that one should ignore the rules, but you should be open to the prospect of applying the rules which have been developed to improve the quality of life of our citizens.

The vision of the ILO in grouping your Caribbean judiciaries together in one workshop is obviously so much better than having a separate workshop in each country. The obvious benefit is that this is more time and cost effective, and the participation of several judiciaries increases the teaching opportunities that arise from discussion among participants. Later this month CAJO will be having its 3rd biannual meeting right here in Barbados. This will be another opportunity for the Caribbean judicial officers to work together to enhance justice delivery in the region. I am attracted to the idea of integration and the reality of the benefits to be gained from the concept of a Caribbean judiciary. This will surely strengthen the rule of the law and help in developing Caribbean jurisprudence. This type of workshop should foster and inspire a culture that would underlie and support the development of such jurisprudence. In other words, a workshop with these objectives embodies the vision of inspiring a regional approach to the application of international labour justice standards at national levels.

It is most likely that the training programme will provoke discussions on the question of whether the time has come for the Caribbean to develop a harmonised approach to the national laws on gender equality. I am sure that if you arrive at such a conclusion, CARICOM would like to know about it as this would factor into the strategic plans that they are currently undertaking.

² [2013] CCJ 5 (AJ).

All Caribbean countries have constitutions as their supreme law. All of these constitutions have to some degree at least been influenced by the Universal Declaration of Human Rights and the concept of inalienable rights that attach to each person of whatever nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Human beings are all equally entitled to human rights without discrimination. These rights are interrelated, interdependent and indivisible.

However, the expression of these principles in each constitution is not identical. Most of the states in the region provide a right to freedom from discrimination on the basis of sex. The Guyana Constitution goes a step further as it specifically expresses the principle that women and men have equal rights and the same legal status in all spheres of political, economic and social life and that all forms of discrimination against women on the basis of sex is illegal. Although this provision may be unique, I would dare to say that it captures the belief of Caribbean people that women and men are equal and as such equal rights should be accorded to them in all areas of life.

International Conventions and the Caribbean

In addition to the Caribbean constitutions, the Commonwealth Caribbean has fully subscribed to the international conventions and treaties that address the cross-cutting principle of non-discrimination in international law.

The principle is present in all the major human rights treaties and provides the central theme of some of international human rights conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This principle is also fundamental to the important values that the ILO has been introducing and they factor into many of the developments of international labour law that will be addressed during this workshop. Although I know that I am addressing experts in this area, I must just briefly refer to some landmarks on which much of the work of the ILO is based. CEDAW creates State obligations and responsibilities in relation to these rights. The convention requires State Parties to work to improve the cultural attitudes and practices towards women within their jurisdiction, to use anti-

discrimination laws and policies to achieve gender equality and requires state parties to take all appropriate measures to eliminate discrimination against women in both the public and private spheres. The Equal Remuneration Convention, 1951 is a foundation stone of the ILO goal of promoting gender equality in the workplace. The convention crystallizes the principle of equal remuneration for men and women for work done of equal value and mandates states to enact national laws or regulations to this end. The Discrimination (Employment and Occupation) Convention, 1958 also sets out the principle of non-discrimination in employment situations. It mandates state parties to pursue a national policy designed to promote and practice equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination in this regard. State parties to this convention are obligated to enact legislation and to promote educational programmes calculated to secure acceptance and observance of the principle. Other relevant conventions include: the Termination of Employment Convention, 1982 that addresses a worker's right to not be terminated on the basis of sex and the Maternity Protection Convention (Revised), 1952 that provides for maternity leave for women in work. In 2004 the ILO adopted the Resolution for the Promotion of Gender Equality, Pay Equity and Maternity Protection that calls upon governments to provide all employed women with access to maternity protection and to eliminate all forms of gender discrimination in the labour market by developing gender-specific social security schemes, promote measures to better reconcile work and family life, eliminate pay differences based on gender, among others. Then there is the work regarding domestic workers, which represent a very high percentage of the work force, HIV and AIDS, as well as gender-based violence and sexual harassment at the workplace, all of which I see on the agenda for this week.

These international agreements rightfully challenge state parties to increase their efforts to promote gender equality, eliminate gender discrimination and to provide necessary safeguards for the protection of women in work. However, I can see that in some instances you will be challenged if in our dualistic state some of these principles are not domesticated. How will you react on the bench when you are faced with such a situation?

One of the weaknesses of the Caribbean region that I think is obvious is that commitment to the most laudable objectives is not always followed up by the necessary critical action. As I

reflected earlier, although the Caribbean people have to a large extent the same regard for the principles of human rights it is not expressed in the same terms in our constitutions. The same is true of the labour law. A brief review of the application of the labour law and law on gender equality shows that the introduction of laws in each state has not been consistent nor has it been harmonised, so that there is some variance in the law from country to country. I think it is appropriate to mention in this context the wonderful work that the CARICOM Secretariat has done in so many areas of law, preparing model laws that can be adopted in each member state with minor adjustments, and the area of labour law is one such area that is suitable for this type of intervention. So there is a host of statutes that address issues of non-discrimination, equal remuneration, maternity leave, the promotion of equal opportunity in employment and related matters and, to a lesser extent, there are statutes and policies that address sexual harassment and HIV/AIDS in the workplace. I would think that it is not too much to hope for that these statutes can be consolidated, harmonised and kept in conformity with international labour law. In many of these situations, there are no political considerations, or matters of special national interest which would discount the value of harmonisation. I would think that the region would benefit if the labour regime was more similar, if not identical. This would not only enhance integration but also move towards the CARICOM goal of freedom of movement of skilled workers. Enhancing these goals is integral even where there is a variance between the international standards and national law. Well established is that the respect for human rights is a key factor in economic development and social stability.

It would be beneficial, particularly when the CCJ is the only final appellate court for the region, for the region to have a consistent regime in this area of law. I would think that this too would enhance the economic development and social stability that is the vision of the CARICOM Single Market and Economy.

The Role of Judicial Activism

The concept of judicial activism in the application of international standards in labour law in the absence of local legislation is not new. I refer to two cases. The first is *Girard v AG of St.*

Lucia.³ The trial court judge found that the effect of a Collective Agreement that contained terms contrary to an earlier Executive directive was to set out the granting of maternity leave as one of the terms of conditions of teachers and so the exercise of maternity leave was not a ground for disciplinary action. The second is from the Industrial Court in Trinidad, *Bank Employees' Union v Republic Bank Ltd.*⁴ The court defined sexual harassment and condemned incidents of sexual harassment of a bank employee at a time when there was no legislation in place. Today there is already a highly developed legislative system, but there are occasions where on your return to your domestic courts you may still face the problem that the international law and standards you have learnt at this workshop have not been domesticated and may not form part of the national law when you have to adjudicate. You are going to have to determine how to apply the lessons learnt during the course of this week. I do not advocate usurpation of the legislative function, but there are some tools available. I would think that it could be said that you may find yourself in one of these situations. If the international labour law is already domesticated by statute, then the international law and the national law are identical, in which case applying the principles at the national level will depend only on the extent to which the principles are understood. But if the international rules were not domesticated by statute law, there is the question to be resolved as to whether they are the law of the nation. There are at least two legitimate tools. One tool is concerned with the principles of statutory interpretation that may allow the international law to assist in the interpretation of the constitution and the existing national law in such a manner as to allow the rules to be applied. Another useful tool is the jurisprudence on legitimate expectation discussed earlier in this address. However, you will have to consider whether and to what extent the absence of domestication need not result in a denial of the citizen of the benefit of the treaties that were made for his/ her benefit. I hope that this fosters some discussion on the integration of judiciaries of the Caribbean, and also on the value of the harmonisation of statute law that is giving rise to ensuring that our citizens receive the protection in areas of fundamental human rights.

³ No 371 of 1985 High Court, St. Lucia, 17 December 1986.

⁴ No 17 of 1995 Industrial Court, Trinidad and Tobago, 25 March 1996.

The judiciary has a significant role to play in ensuring that citizens enjoy their rights fully. It is imperative that judges are cognizant of the nuances often associated with issues related to gender equality as it adjudicates on such matters. This awareness will come about through continual training on these and other issues. Thus, I am particularly pleased with the objectives of this workshop. It provides a unique opportunity for members of the judiciary from across the region to engage in meaningful discussions and learning with each other and with presenters from the ILO. It allows for these members to have an opportunity to learn of developing international labour standards and to equip themselves to effectively utilize these standards as guiding principles when adjudicating matters in national courts.

The Strategic Plan of the CCJ

The Caribbean Court of Justice is pleased to be a part of this venture. The Court has identified in its Strategic Plan 2013-2017 ‘equality, fairness, integrity and promoting the rule of law’ as one of its themes for the growth and development of the Court over the next five years. The Court not only intends to conduct its business in accordance with this theme but the theme captures key principles, the observance of which is integral in all areas of society. In its commitment to equality and promoting the rule of law, the CCJ commits to upholding principles that will eliminate discrimination and better facilitate gender equality across the region. As when requested, the CCJ stands ready to assist in any way it can with the promotion and achievement of gender equality in the Caribbean.

And so in closing I congratulate the ILO Decent Work Team and Office of the Caribbean and the ILO Bureau for Gender Equality for the initiative of convening this week’s activities. I am sure the exchanges will be meaningful and will equip many of you with knowledge that will enable you to better deliver justice in your respective courts.

Best wishes to all participants and presenters for a most successful programme.



The Right Honourable Sir Dennis Byron