

CREATING A JUDICIAL CULTURE TO PROMOTE THE ENFORCEMENT OF WOMEN'S HUMAN RIGHTS



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I must congratulate the Gender and Youth Affairs Division of the Commonwealth Secretariat for organising this judicial colloquium for the senior judges of the Asia Pacific region for discussing the domestic application of international women's human rights norms. The first judicial colloquium on the subject of domestic application of international human rights norms was convened by me in Bangalore, India under the auspices of the Legal Division of the Commonwealth Secretariat, where predominantly South Asian and South-East Asian judges of the superior courts met in order to discuss this important topic.¹ That judicial colloquium evolved a number of principles concerning the role of the judiciary in advancing human rights by reference to international human rights norms and these principles have now come to be known as "the *Bangalore Principles*".² They have inspired a good number of judges in the Commonwealth to develop human rights jurisprudence in conformity with international human rights norms. Then came the judicial colloquium in Harare where Chief Justices and judges from Commonwealth Africa participated.³ This was followed by a judicial colloquium in Banjul,⁴ and then came a judicial colloquium in Abuja⁵ where judges of the superior courts from West Africa participated. We had then judicial colloquia in Oxford⁶ and in Bloemfontein, South

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¹ See *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms, Judicial Colloquium in Bangalore, 24-26 February 1988* (London, Commonwealth Secretariat, 1988).

² For the text of the *Bangalore Principles*, see *id* at ix and Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988-92* (London, Commonwealth Secretariat, 1992)[hereinafter *Conclusions*] at 1.

³ See Commonwealth Secretariat, *Developing Human Rights Jurisprudence, Volume 2: A Second Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Harare, Nigeria, 19-22 April 1989* (London, Commonwealth Secretariat, 1989).

⁴ See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 3: A Third Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Banjul, The Gambia 7-9 November 1990* (London, Commonwealth Secretariat, 1991).

⁵ See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 4: Fourth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Abuja, Nigeria, 9-11 December 1991* (London, Commonwealth Secretariat, 1992).

⁶ See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 5: Fifth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium at Balliol College, Oxford, 21-23 September 1992* (London, Commonwealth Secretariat and Interights, 1993).

Africa.⁷ These judicial colloquia dealt generally with incorporation of human rights in domestic jurisprudence and there was no special emphasis on women's human rights.⁸ As I shall presently point out, women's human rights stand in a distinct category by themselves and they merit special treatment. I was therefore very happy when Ms Eleni Stamiris, Director of the Gender and Youth Affairs Division of the Commonwealth Secretariat decided to hold judicial colloquia for women's human rights in different parts of the Commonwealth for the purpose of sensitising judges to the human rights of women so that, while adjudicating on cases coming before them which involve women's issues, they remain keenly aware of women's human rights and interpret and apply the law in conformity with such rights.

Before I deal with the specifics of human rights of women, let me make a few general observations so far as the role of the judiciary vis-à-vis human rights is concerned, as it has relevance equally in relation to women's human rights so far as identification, protection and preservation of such rights is concerned.

Human rights are as old as human society itself, for they derive from every person's need to realise his essential humanity. They are not ephemeral, not alterable with time and place and circumstances. They are not the product of philosophical whim or political fashion. They have their origin in the fact of the human condition; and because of this origin, they are fundamental and inalienable. More specifically, they are not conferred by constitutions, conventions or governments. These are the instruments, the testaments, of their recognition; they are important, sometimes essential, elements of the machinery for the protection and enforcement of human rights, but they do not give rise to human rights. Human rights were born not of humans, but with humans.

The judiciary has to administer justice according to law. But the law must be one which commands legitimacy with the people and legitimacy of the law would depend upon whether it accords with justice. The concept of justice has no universally accepted definition. It has meant different things to different people, in different societies, at different times. It is, therefore, necessary to have a standard of values, especially of justice, against which a law can be measured. Such a standard must necessarily be superior to the law itself and would, therefore, constitute the highest rank in the legal hierarchy. There was a time when the standard of divine law as revealed by God to man in some holy scriptures was widely applied and served to confer legitimacy upon laws enacted by rulers. But over the years, religion as a standard of values began to lose

⁷ See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 6: Sixth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Bloemfontein, South Africa, 3-5 September 1993* (London, Commonwealth Secretariat, 1995).

⁸ For the conclusions of the Colloquia up to and including the fifth colloquium held in Oxford, see *Conclusions, supra* note 2.

its vitality and significance. Morality, though undoubtedly important and certainly complementary, was also found unable to solve the complicated problems of modern society and to provide a standard against which to judge the laws enacted by rulers. Some other ground had to be found to support a standard against which to judge the rulers' laws and thus ground was provided by the concept of human rights which for the first time found its formulation conceptually in the United States Bill of Rights and was then developed as a universal concept in the Universal Declaration of Human Rights⁹ and elaborated in the various international human rights instruments which followed the Universal Declaration. The great principles set out in these documents may be summarised as follows:

- (1) *the principle of universal inherence*: every human being has certain rights, capable of being enumerated and defined, which are not conferred on him by any ruler, nor earned or acquired by purchase, but which inhere in him by virtue of his humanity alone.
- (2) *the principle of inalienability*: no human being can be deprived of any of those rights, by the act of any ruler or even by his own act.
- (3) *the rule of law*: where rights conflict with each other, the conflicts must be resolved by the consistent, independent and impartial application of just laws in accordance with just procedures.

Most of these human rights as formulated in the various international human rights instruments are rights against the State, representing the Western liberal philosophy which sees "rights" as the duty of the State not to interfere with the freedoms and liberties of the individual. These human rights are common to men and women but there is a large category of human rights inhering in women which are unfortunately not recognised as human rights, and are therefore neglected.

Consequently it is necessary to inject gender perspectives into the concept of human rights, for whatever violations of human rights women suffer are usually shaped by gender. The development of a gender perspective in the human rights context facilitates understanding of how the exercise and enjoyment of human rights by women is adversely influenced by social construction of the female and male roles in which women are always subjected to a subordinate position. It calls for reconstruction of relations between men and women so that they are not based on inequality, domination and exploitation of women.

The concepts of equality and non-discrimination lie at the heart of a gender-sensitive perspective. Now obviously there are some aspects of life that are common to women and men, and clearly women should be accorded equal opportunity in those areas. In many ways, however,

⁹ GA Res 217A (III), adopted on 10 December 1948.

women and men lead different lives and the human situation is not always gender-neutral. But a relevant human rights regime must not only guarantee equality in areas that are common to both sexes, but must also promote social justice to women in areas of private and civil life. The human rights which reflect the realities of women's situation must, therefore, include autonomy within the family, reproductive rights and conditions suitable for healthy reproduction, and sufficient economic resources to sustain women and their families. It is lack of education, inequality in access to employment, economic dependence on the husband and his family and above all social attitudes which are responsible for denial of social justice to women.

I may also point out that women have a fundamental right to information, education and access to family planning and other reproductive health services, including AIDS prevention. Motherhood must result from a free and informed decision by each woman. Women have a right to their bodily integrity even against their husbands. The English courts have held that there can be rape of a wife by her husband as that would be a violation of her human rights.

It is also necessary for us to bear in mind that human rights of women cannot be allowed to be violated on the ground of cultural or religious values. Cultural relativism or misconceived religious dogmas cannot be an excuse for violations of human rights. This is something which has to be borne in mind by judges when women's issues come up for consideration.

There has been neglect of women's human rights in the mainstream of human rights. There are three reasons for this:

- (1) mainstream human rights bodies have an overwhelmingly male membership;
- (2) an underlying schism over the relative importance of civil and political rights versus economic, social and cultural rights. Despite the rhetoric about the indivisibility of human rights, traditional civil and political rights have received the bulk of attention within the mainstream human rights discourse. Human rights theorists from the West — particularly from the United States — see “rights” as the duty of governments not to interfere with the civil and political liberties of citizens. By contrast, many Third World countries argue for the primacy of economic and social rights, guarantees that create a positive obligation on State governments to meet basic human needs. Since many women's issues emanate from their position as the majority of the vulnerable sections of the society, the general neglect of economic and social rights means that women's concerns are further neglected.
- (3) The mainstream's insistence on a division between public and private responsibility is also responsible for this situation. Traditional human rights theory primarily focuses on violations perpetrated by the State

against individuals, such as torture, arbitrary arrest, and wrongful imprisonment. Under this framework, mainstream theorists do not recognise wife assault and other forms of violence against women as human rights violations because such acts are perpetrated by private individuals and not by the State. Violence against women is the touchstone that illustrates the mainstream limited concept of human rights. The dichotomy between public and private responsibility when applied to the reality of woman's life leads to absurd distinctions. Rape by a police officer, for example, becomes a violation, while rape by a stranger, husband or acquaintance does not. The state should be held responsible for failing to protect the woman on the ground that the physical integrity of the woman is violated. Is it not a violation of the human rights of the woman?

There is need for revisioning of the concept of human rights. The most important of all human rights is the right to life set out in article 6 of the International Covenant of Civil and Political Rights,¹⁰ which forms part of customary international law. The right is concerned with the arbitrary deprivation of life through public action, i.e. State action. But protection from arbitrary deprivation of life or liberty through public action, important as it is, does not address how being a woman is in itself life-threatening and the special ways in which women need legal protection to be able to enjoy their right to life. From conception to old age, womanhood is full of risks which are not attendant upon men: of abortion and infanticide because of the social and economic pressure to have sons in some cultures, of malnutrition because of social practice of giving husbands and sons food in priority, of less access to health care than men, of endemic violence against women in all States. There is overwhelming evidence of violence against women but this high level of documented evidence around the world is unaddressed by the international notion of the right to life, because this international norm is focused on "public actions" by the State. So also the right to be free from torture has failed to encompass domestic violence or violence in the family, sexual harassment in the work place or genital mutilation, again because the focus of international notion of freedom from subjection to torture is public action by the State. Further, human rights practice has failed to address adequately, as violations of human rights of women, acts of violence directed at women in situations of economic, civil or political turmoil or during international or internal conflicts. These are regarded as appropriate subjects of concerns of international humanitarian law and not of international human rights law.

¹⁰ 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

Violence against women is a violation of women's human rights, though, as I have earlier pointed out, it is not regarded as such by the human rights activists trained in the Western liberal thought. Some of the areas of violence may be set out as follows:

- (1) Domestic violence and rape;
- (2) Genital mutilation or traditional practices of female circumcision;
- (3) Trafficking in women;
- (4) Gender-based violence against women refugees and asylum-seekers;
- (5) Violence associated with prostitution and with pornography;
- (6) Violence in the work place, including sexual harassment; and
- (7) Dowry deaths in India and some other countries.

These are the types of violence which need to be addressed by the judiciary. It is the duty of the State in all its departments, executive, legislature and judiciary, to take steps to prevent such violence, since it constitutes violation of women's human rights and to punish the guilty and direct payment of compensation to the women victims. Judicial sensitivity is most essential for protection and enforcement of women's human rights.

I may also point out that the language used in human rights instruments and court proceedings and judgments is unfortunately not gender-neutral. It is always male-oriented and is reflective of a world where the male is the only representative of the human species. One of the most regrettable uses, humiliating to women, is what we find in the interpretation statutes of many of the Commonwealth countries where "man" is defined as including "woman". It must be noted that language both defines and perpetuates reality. At present, the continuing use of male-defined language which is androcentric, stereotypical, discriminatory and exclusionary, maintains the current imbalance in power relations and contributes to a situation in which women are unable to exercise and enjoy their human rights. It painfully conditions all thinking about social problems and processes. It has the further effect of obscuring women, their experiences and their social value and contributing to the perpetuation of a society in which women are regarded as lesser beings. The use of sexist language must therefore be avoided and I would like to impress upon the judiciary always to use gender-neutral language. That will help to create a judicial culture of respect for women's human rights.

Many judges may not be aware that some of women's human rights are recognised in the Convention for the Elimination of All Forms of Discrimination against Women¹¹ but this Convention does not

¹¹ 1249 UNTS 13.

specifically prohibit gender-based violence or place any explicit responsibility on States parties to eliminate or at least to reduce it. However, there is an impressive body of jurisprudence, both international and national, concerning women's human rights. This jurisprudence is of practical relevance and value to judges and lawyers generally. Of course, where the language of the law is clear, then the judge must give effect to it but there are many cases where the domestic law — whether constitutional, statutory or common law — is ambiguous, uncertain or incomplete or capable of bearing an interpretation consistent with the international norms of women's human rights, and in such cases the *Bangalore Principles* require that national courts should have regard to these international norms and must mould and develop the law consistent with these norms. 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. Judges must remember that with changing human consciousness and renovation of social reconstruction of human relationships, the law cannot afford to stand still: it must move forward and satisfy the hopes and aspirations of women who constitute half the world's population. The Goddess of Justice is shown blind-folded in Anglo-Saxon jurisprudence, but I do not agree with this image. The Goddess of Justice, in my view, should keep her eyes wide open to see the injustice and inequality from which women suffer. If she does not, she will lose her credibility and the vulnerable sections of the community like women will lose faith in her capacity to give justice.