

## THE ROLE OF THE JUDICIARY IN THE PROMOTION AND PROTECTION OF THE HUMAN RIGHTS OF WOMEN

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### BACKGROUND

1. Respect for human rights is one of the fundamental values of the Commonwealth. As early as 1971, when Heads of Government issued the Singapore Declaration, laying down the principles on which the Commonwealth was to operate, they expressed their unequivocal support for equal rights for all citizens. Twenty years later their commitment was reaffirmed in the 1991 Harare Declaration which has as one of its priority areas the protection and promotion of:

- \* Fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;
- \* Equality for women, so that they may exercise their full and equal rights.

2. In Cyprus in 1993, Heads of Government again renewed their commitment to the Harare priorities. They stressed their dedication to building a world in which women enjoyed their full rights and were equal partners in shaping the economic, political, social and cultural development of their countries. They also recognised that women's rights are an "integral and indivisible part of human rights" and that men's violence against women is a contravention of basic human rights. They urged the ratification by 1995 of the Convention on the Elimination of All Forms of Discrimination against Women by all Commonwealth governments and the endorsement of the United Nations Declaration on Violence Against Women. The affirmation of women's rights as human rights by Heads of Government was reflected and built on by the 1995 Beijing Declaration and Platform for Action, which establish a set of actions that should lead to fundamental change. The Declaration confirms women's rights as human rights, while the Platform for Action identifies human rights as one of the critical areas of concern which must be addressed so as to ensure women's advancement and elaborates concrete measures required nationally and

internationally, by governments and international governmental organisations, to promote and protect the human rights of women.

3. The advancement of women through the framework of human rights constitutes a commitment of Commonwealth governments, both by virtue of agreements made in Commonwealth fora and at United Nations level. While this commitment has been crucial, even more important is its translation to the national level. To a large extent this translation is achieved by way of ratification of or accession to international and regional human rights treaties and legislation of those treaties into domestic law.

4. A majority of members of the Commonwealth have become state party to international and regional human rights treaties, particularly the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, and some have gone forward to incorporate their treaty obligations into domestic legislation. Irrespective of whether treaty obligations have been incorporated into domestic legislation, judges have a crucial role in translating Commonwealth government commitments to the human rights of women from the level of rhetoric to reality.

### THE ROLE OF THE JUDGE

5. Judges are provided with many opportunities to advance the interests of women through the framework of human rights. Human rights standards can be taken into account and inform decision making in litigation at all levels, even in those cases where such standards have not been enacted into domestic law. The Australian High Court, for example, has held that ratification of international treaties, while not entrenching rights into Australian law unless incorporated by statute and not operating as a direct source of individual rights and obligations, gives rise, absent statutory or executive indications to the contrary, to legitimate expectations that those treaty obligations will be taken into account by administrative decision-makers.<sup>1</sup>

6. The New Zealand Court of Appeal has also

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<sup>1</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.

suggested that a submission by a decision-maker that no regard at all need be paid to international obligations agreed by New Zealand by ratification was "an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing".<sup>2</sup>

7. In Commonwealth countries with constitutional bills of rights, there is greater potential for judges to advance the interests of women through human rights. Although some are more specific than others, most Commonwealth bills of rights contain norms of non-discrimination or non-distinction on the basis of sex and the norm of equality before the law.

8. In a number of these countries, judges had been prepared to interpret these norms in a broad and purposive manner, with some being prepared to interpret creatively their domestic bills of rights in line with international and regional human rights norms and standards. For example, the Court of Appeal of Botswana has interpreted the anti-discrimination clause in the Botswana Constitution's bill of rights, which does not include sex amongst the categories of prohibited distinctions, in light of the bill's preamble, and also Botswana's international and regional treaty obligations. The Court's broad and purposive interpretation allowed it to declare a legislative provision discriminating between women and men where devolution of citizenship to children was concerned as in contradistinction to the bill of rights.<sup>3</sup>

9. Broad and purposive interpretation of bills of rights, taking into account international and regional norms, as well as interpretation of those norms, has advanced the interests of women in countries as diverse as Namibia, Zimbabwe, Zambia, Tanzania, Canada and India. Litigation has been similarly diverse. Cases have raised questions of whether the requirement of corroboration in cases of sexual assault contravenes the equality before the law provision, in light of the fact that most victims of sexual assault are women and thus this requirement impacts disproportionately upon them; whether the right to freedom of movement includes the right of a woman to have her foreign husband live with her in her country of nationality; whether the right to

freedom of discrimination includes a woman's right to enter hotel premises on a non-discriminatory basis; whether restrictions on the rights of women to alienate clan land constituted discrimination and the meaning of discrimination on the basis of sex where employment is concerned. In many of these cases international and regional human rights instruments were taken into account to aid the interpretation of the rights enshrined in national bills of rights. In many of these cases, also, the decisions of international and regional human rights bodies and courts were taken into account so as to enhance the liberal and purposive approach of individual judges.

10. While there is now a significant jurisprudence illustrating how the rights of women can be enhanced through reflection of international and regional human rights standards and their interpretation, there is scope for greater development in this area. In the first place, for international norms and jurisprudence to be useful for judges, it is essential that they be known by them. In many Commonwealth countries, the domestic legal system allows for reflection of international and regional standards, but sometimes these standards are not well known. There are many reasons for this. Until quite recently, the legal training of most lawyers has neglected specific instruction in international and regional human rights norms and even where such instruction was part of legal training, norms relating to the human rights of women and the interpretation of these norms, were rarely included in such instruction. Frequently materials concerning these norms are unavailable to lawyers and even judges and there are few resource institutions to advise lawyers and judges about international and regional human rights norms and jurisprudence. Even more frequently, those cases from other jurisdictions which have used international and regional human rights norms and interpretation to advance the interests of women are not well-known and frequently inaccessible in other jurisdictions.

11. In 1988, the Commonwealth Secretariat embarked on a series of judges' colloquia in order to stimulate and encourage judges to reflect on and incorporate concepts of international human rights and their interpretation in their decision making. The first such colloquium, convened by Justice P. N. Bhagwati in Bangalore, India, resulted in the elaboration of a set of Principles which confirm the relevance of international and regional human rights jurisprudence for domestic courts and encouraged resort to such jurisprudence where domestic law - whether constitutional, statute or common law - is

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<sup>2</sup> [1994] 2 NZLR 696.

<sup>3</sup> *Unity Dow v AG of Botswana* [1992] LRC (Const) 623.

uncertain or incomplete. The Bangalore Colloquium was followed by five other Colloquia and the Bangalore Principles were confirmed and reaffirmed.

12. Until 1994, however, no colloquium had explored the domestic application of international human rights norms from a gender perspective. In 1994, however, the first Judicial Colloquium for Senior Judges on the Domestic Application of International Laws on Gender Issues was held in Victoria Falls, Zimbabwe. Here senior judges from Commonwealth Africa, joined by two senior judges from Commonwealth jurisdictions outside that region, exchanged experiences and considered ways and means to promote the interests of women through the domestic application of international human rights norms. Building on the model of the Bangalore Principles, participants agreed the Victoria Falls Declaration.

#### THE VICTORIA FALLS DECLARATION

13. The Victoria Falls Declaration affirms the universality of human rights which are inherent in women and men and stresses the vital duty of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. The Declaration stresses the indivisibility of human rights, emphasising that although universal human rights are often perceived to be confined to civil and political rights or civil liberties, they also consist of economic and social rights which may perhaps be of great significance to women. The Declaration points out that universal human rights are usually interpreted as applying to regulate only the public sphere of life. Violations of human rights in the private sphere, including the family - where women experience a vast variety of suffering - are usually perceived to be outside the reach of human rights. While the state does not usually violate women's human rights in the private sphere in a direct fashion, it often supports or condones exploitative private structures through laws and rules of behaviour which legitimise the authority of men over women. In addition, states sometimes fail to act to protect women from private violations or tolerate or encourage structures wherein private violations against women occur on a regular basis. The Declaration recognises that many existing international, regional and national human rights standards were formulated within a primarily male perspective and with insufficient gender sensitivity. Accordingly, these standards sometimes fail to provide protection for the gender specific interests of women, particularly in the economic and social

field. The Declaration also emphasises that discrimination against women can be direct and indirect, with indirect discrimination deserving of particular scrutiny of the judiciary. It goes on to stress the need to ensure not only formal, but substantive equality for women, suggesting that in certain contexts the adoption of affirmative action or positive discrimination measures might be appropriate.

14. As well as incorporating hortatory elements, the Victoria Falls Declaration includes very practical suggestions for judges. These suggestions, aimed at creating a culture of respect for internationally and regionally stated human rights norms, in particular those concerning women, were considered at a second colloquium which the Commonwealth Secretariat co-sponsored with the Commonwealth Magistrates' and Judges' Association during the Non-Governmental Organisation Forum held to coincide with the Fourth World Conference in Beijing, China. It is expected that the Declaration will be reaffirmed and strengthened at the third colloquium in this series which will be held during May 1996 in Hong Kong.

#### RECOMMENDATIONS

15. During the course of their consideration of this agenda item, Ministers may wish to consider the following recommendations:

- \* Regular exchange of information and views between members of the judiciary at all levels should be encouraged both regionally and Commonwealth-wide so that judicial techniques of advancing domestic decision-making by use of international and regional human rights norms can be further developed. In particular, the model of the judicial colloquium should be considered to achieve these ends.
- \* Means of disseminating international and regional human rights norms and their interpretation, particularly those related to women's human rights, should be explored. Information exchanged and disseminated should include litigation where international human rights norms and their interpretation have been used to expand the meaning of domestic statutes, including constitutional provisions.

- \* Closer links and co-operation across national frontiers by the judiciary on the application of human rights law should be encouraged.
- \* Means to encourage judges to consider that they have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women should be explored.
- \* Means to encourage judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination against Women when interpreting and applying the provisions of the national constitutions and laws, including the common and customary law, and when making decisions generally should be developed.
- \* Means to encourage judges to take particular note of the egregious nature of gender-based violence against women and to interpret forms of violence against women as constituting violations of human rights should be addressed. In particular, judges should be encouraged to consider the United Nations Declaration on the Elimination of Violence against Women and seek to interpret national law in the light of the norms and obligations established in that Declaration.
- \* Measures to encourage judges to be aware that all too frequently cultural and customary principles can be used to deny women their internationally agreed human rights should be developed. Judges should also be encouraged to be aware that frequently respect for women's human rights may appear to conflict with respect for other human rights values. Judges should be alert to the fact that frequently other human rights values have been given priority over women's human rights and should seek to give these rights the protection they deserve.
- \* Measures should be taken to encourage judges to consider that responsibility for violations of human rights, and particularly women's human rights, arises not only out of direct state violation, but also as a result of failure of the state to ensure that women have equal access to and enjoyment of internationally respected human rights.
- \* Means to encourage judges to aim for interpretations of domestic legislation, particularly constitutional bills of rights, that advance substantive equality rather than achieving mere de jure equality should be explored.
- \* Means to encourage judges to pay particular attention to indirect as well as direct discrimination should be considered, as indirect discrimination constitutes a significant obstacle to women's enjoyment of their enshrined rights.
- \* Measures to encourage judges to interpret human rights standards agreed at international, regional and national level widely so as to avoid androcentric interpretation of rights already defined by the male standards should be developed.
- \* Institutes devoted to the training of lawyers should be encouraged to develop courses in human rights, including modules related to the human rights of women. Gender sensitised new initiatives in legal education, provision of material for libraries, programmes of continuing judicial education and professional training for lawyers should be developed and encouraged.
- \* The Commonwealth Secretariat should be encouraged to develop a handbook for Commonwealth judges and lawyers which would be updated periodically and which would contain as core elements:
  - (a) the basic texts of the most relevant international and regional human rights instruments;
  - (b) a comparative table of provisions of international and regional human rights instruments;
  - (c) a compilation of jurisprudence of international, regional and national decision-making bodies relevant to women's human rights.
- \* The Commonwealth Secretariat should be encouraged to ensure that a section in the Commonwealth Law Bulletin is devoted to developments, including decisions of international, regional and national tribunals, in the field of women's human rights.

- \* Commonwealth member states should be encouraged to notify the Commonwealth Secretariat of relevant decisions relating to the promotion of the interests of women. These decisions should be compiled by the Secretariat and disseminated to all Commonwealth members.