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Paper on:
Judicial Gender Bias:
Does it Exist? How Can it be Changed?

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The judiciaries of the world have seen ever-increasing changes in the last decade in their substance and process. Some aspects of change have been reflected in their composition, the method of selection and appointment of their members. Others have been reflected in the diversity of the roles played by judiciaries across the globe and their intrinsic interaction in the dynamics between governments and the public. Judiciaries play a pivotal part in bringing about change in a society and contributing to its development and values.

Public demands, driven by many forces, have also caused a concomitant change in the judiciaries. But through its many facets, and during its many changes, the public expectation has been grounded on two non-negotiable factors, that is, impartiality and independence of the judiciary. No nation in the world can boast of a judiciary that can be respected unless these two characteristics form the fulcrum of that judiciary.

The legitimate concern of the public is increasing the scrutiny under which modern judiciaries function. In a more rights-oriented society, the justice system has had to respond more to contemporary values and mores, and also to widespread concerns about systemic discrimination. The Courts are getting more and more involved in the value systems of society.

Modern judiciaries are moving according to a trend that requires that systems of justice must be inclusive, fair and just. A failure in this realm causes a loss in public trust and confidence reposed in the judiciary, and this in turn erodes the effective implementation of the rule of law.

In order to achieve inclusive justice, there are requirements apart from the appointment of judges to ensure that the bench comprises of a broad spectrum of views that is truly representative of the experiences of the community.

For example, until the late 1970's, judgments were rarely criticized unless they referred to some contemporary human issue about which the public had strong views. But then a series of studies in the U.S.A. and Canada revealed the bias that existed in judgments. Consider the following examples:

- A Canadian judge noted remarks by:
The Judge in 1973 who said "*the paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother*"; the Judge in 1915 [who] thought admitting women to the legal profession would be a "*manifest violation of the Law of...public decency*"; the Judge who said in 1905 that fault based support laws were desirable because wives "*ought to be preserved from imminent temptation*".¹

¹ Abela J.A., "Appellate Judicial Lawmaking: Ten Realities of the Judicial Role", Quebec City, Canadian Appellate Court Seminar, April 27, 1995 (unpublished).

- Dr. Sheilah Martin, Dean of Law at the University of Calgary, expressed a similar thought when she said that:

“Most modern legal theorists recognise that law is about making choices between competing interests and support the idea that law is not politically neutral in its operation...Individuals must be able to see the possibility of other choices before they can be asked to bear personal responsibility for the choices they do make”.²

The recognition of such biases and prejudices by those outside the judiciary made it important to undertake the urgent education of judges, what is known today as 'social context learning' or 'social context education'. But the greatest hurdle to the adoption of such education is the denial that it is needed by judges as well as lawyers and all those concerned with the administration of justice. At seminars, when such issues were first discussed and brought to the forefront, judges, especially in South Asia, including Sri Lanka, believed that as there were constitutional safeguards guaranteeing equality, such biases did not occur, especially in their own court rooms, and there was denial. The denial of gender bias posed many problems, as then the judiciary could not know that it was their responsibility to eliminate it.

Judicial education has three important aspects:

1. It must enable judges to see the importance of both recognising and eliminating judicial gender bias;
2. Judges must be given skills and tools – like laws, case law, and handbooks -- which are a quick reference and work as guidelines, as well as policies which impact on women beneficially and foster legal reform; and
3. Judges must be enabled to change their attitudes.

But most importantly, any education programme has to occur in an environment where there is fair criticism of decisions which are gender-biased, and for this, the role of NGOs is both invaluable and vital. So that in the end the effectiveness of change in Courts, especially in the area of addressing gender-bias, will only be patent when an overall change in general awareness on these issues permeates through a sensitized community.

Another important factor to be considered is the use of international law and its standards for development of standards of State law. A global commitment to realizing gender equality is important to standardize our value systems. International conferences and the development of standards at such gatherings can be used as important tools to develop a uniform commitment to gender equality throughout the globe. Decisions rendered in a court, as for instance in the Indian Supreme Court case of *Visakha Vs the State of Rajasthan*,³ which applied international human rights treaty provisions, have played an important role in the identification and development of codes against sexual harassment at the workplace. Courts in the Asian region and Commonwealth countries often borrow precedents in case law from each other, and this is one way in which important changes in this area can be effected. When strategies are adopted for states to ratify international standards on gender equity, then national conformity to these standards can be monitored. In the modern development

² Dr. Sheilah Martin, “Proving Gender Bias in the Law and the Legal System,” in Joan Brockman and Dorothy E.Chunn, eds., *Investigating Gender Bias: Law and the Courts and the Legal Profession*, Thompson Educational Publishing, Toronto, 1993) 19 at 24-25.

³ *Vishaka v Rajasthan* (1997) 6 SCC 241.

of law, these international instruments are often quoted and used as standards for the interpretation of national law, especially in interpretation of statutes by Courts.

It is also important to note that when the body of international law is considered it sets minimum international standards, as for instance the UN Charter of Human Rights. The foundation of human rights instruments being the equality of all persons, the development, extension and use of human rights law to transcend national laws that impede the concept of equality lends support for decisions that seek to embody such international standards and make available to all men and women a level playing field, devoid of non-discrimination and governed only on the principle of equality of all persons. Article 5 and Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) especially highlight and stress the importance of inculcating norms of equality, and are propelling goals towards the eradication of gender discrimination of any sort.⁴

The Asian experience has shown that the transforming of international standards within the national level, and monitoring inside and outside the country, has impacted to some extent and acted as a catalyst for incorporating globally-accepted standards into decision making, especially on equality issues.⁵ Judicial teaching must make available to us as judges the notion that women's rights are after all human rights and that these must be established through the courts in our decision-making.

Another important development in applying international standards through local legislation and judicial interpretation has been the impact on the discrimination that exists in Asia and other countries based on cultural and ethnic differences. Courts have, without intending to, ratified the roles that divide men and women and tolerate discrimination against women as the normal pattern of things. Hitherto these had not been tested or challenged. The development of an understanding of women's rights as human rights then becomes an important tool in identifying and changing laws that are inherently gender-discriminatory. The rights guaranteed by the Human Rights Charter, are not equally guaranteed to women -- and it can be visibly demonstrated how the courts do not recognise the fact that judgments

⁴ Article 5 of CEDAW provides as follows: "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases." Article 11 of CEDAW further provides: 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training; (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

⁵ Sri Lanka was one of the first countries in Asia to ratify the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW). Unfortunately the norm of equality of the sexes embodied therein has been rarely used in the courts of law.

should be based on these guarantees rather than on culture or gender-biased preferences which reflect archaic thinking patterns. The rights set out in the Universal Declaration of Human Rights are nothing short of a necessary condition for the co-existence of all of society and community. The key importance of it rests on the message that it carries that all human beings are equal. The judiciary must emphasize its importance in the delivery of justice to all citizens. Article 26 of the International Covenant on Civil and political rights is also significant in this regard.⁶

To bring about effective change one has to first identify and lay open prejudices and biases as and when they occur, giving effective tools for judges themselves to be aware of our own prejudices. The best way of doing this is to relate such prejudices to the language that we understand, that is, through notions of judicial independence and impartiality and equality. We need to see that it is equality that is the important link to justice that makes it a tool to prevent or bar discrimination. We also need to establish that whilst impartiality and independence are the cornerstones of a democratic society, without substantive equality the very heart of a democratic society could be assailed. In other words, substantive equality, the removal of prejudices and biases, is the main instrument for advancing rights as it forms the framework of any in-depth analysis of judicial independence and impartiality.

In undertaking education of judges, moving from the idea of formal equality to substantive equality has been a major obstacle, since for many years the 'similar treatment' test was applied to consider whether there was discrimination. But the Courts of law have to comprehend that it is only when the dissimilarities between the sexes are considered and the disadvantage test is applied that the real problems about equality can be best understood and redressed. It is in terms of dissimilar people needing dissimilar treatment to reach equality that the true ambit and purport of discrimination can be addressed, that is through substantive equality, not just formal equality. The Courts need to accommodate the difference between the sexes in dispensing gender justice.

Legal reforms through the court structures have to be an urgent priority if the Courts are to continue to hold the confidence reposed upon them by the general public. It is however important to realize that to bring about reforms to address gender inequality, the process is as important as the content. Much of the change must come from within the judges. Throughout the globe, one aspect of judicial education which is becoming more and more patent, is that inevitably judges need to learn from judges. Groups outside the judiciary, like law professors, NGOs, and facilitators must also be included, for they are able to bring much of the reality of affected persons and tell the real life stories of how people are affected, but ultimately, most judges would only talk and interact freely in a fraternity of judges.

In my opinion, the beginning of change can only come about by the recognition and acceptance by ourselves as judges of the existence of judicial gender bias. And we must also acknowledge how important the role of judges has become today -- and that it is an ever increasing and an ever-challenging role that is never static but is wholly dynamic. As Justice Ted Thomas has said:

⁶ Article 26, ICCPR provides as follows: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

“The challenge for judging at the outset of the 21st Century is to adopt a functional and practical approach which will promise justice and equality in the law and better ensure that the Law meets the needs and the reasonable expectation of the community.”

This is best done if all judges are able to have ongoing social context education. To do this we need to have a study designed specifically for judges with the purpose of increasing our awareness and understanding of principles of equality and fairness in an era of rapid change within the society in which our judicial duties are performed. The ultimate goal would be that we would become better judges.

The study on social context issues should show judges, through practical and cogent examples, how stratification and biases and prejudices always exist and come to be played out in society. So that though the norm is equality, whether in national or international law, in practice our social context and reality is that people are always stratified and divided into groups - young, old, women men, coloured, non-coloured, able, and disabled. Equality and non-discrimination is only to remove the barriers of stratification and create a level playing field.

The process of sensitizing of judges must train us to effectively use and apply international laws to concrete problems of discrimination and violence. We also have to recognize that myths and stereotypes have no place in decision making. We will accept this when we are shown that myths and stereotypes are used in decision-making, especially as the application of human rights are applications to the individual and not a group or body. Gender stereotyping and myths about men and women sometimes unconsciously direct decision making. It is therefore important to be able to recognize gender-stereotyping in law and gender-stereotyping in practice.

This is of especial importance in the dynamics within a courtroom, where credibility is often judged on the male norm. Perceptions about the morality of a woman cloud any assessment of her credibility. The language she speaks is different to the language a man speaks due to habit, upbringing, socialization and teacher assistance. The different roles they play fashion them into different persons, reacting differently. The trivializing of a woman's testimony, sometimes as a result of a lack of understanding of her language or her manner of speaking, is an important hurdle that must be got over in reaching the decision of the truth, for it is only with that truth that justice will be given.

The distinction between 'neutrality' and 'impartiality' is pivotal in a true understanding of equality. As judges, we should understand that neutrality is a myth and can never exist, especially in the circumstances that we are the end product of the corridors of experience of our own lives. So we come with baggage and we need to understand, especially as judges, that we come with a lot of baggage that shapes our thinking our ideologies, our likes and dislikes.

If we as a body of judges in Asia are sensitized to these issues, and our denial is replaced by education and awareness, then, and only then, can we resolve the barriers that are there for access to justice by women.
