

EQUALITY, JUSTICE and CARIBBEAN REALITIES
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PROTECTION OF CHILDREN
A RIGHTS-BASED APPROACH

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Article XIII of the CARICOM Charter of Civil Society provides for Children's Rights, reiterating that children are not to be subjected to harmful circumstances and situations that would hinder their all round welfare and development.¹ While there is much to celebrate, Caribbean realities include circumstances whereby many of our children are subjected to varying vulnerabilities, whether as a result of poverty, disabilities, or as victims of emotional, psychological, physical and sexual abuse, trafficking and other disadvantages. Our children are also the products of societies that have seen a decline in family cohesiveness and values and a rise in crime rates, with an increasing concern about involvement of youth in criminal activities. Many of our children are suffering the effects of immigration problems of their

¹ For the purposes of the Charter, a child is anyone under the age of 18 years.

parents and are ‘barrel’ and ‘Western Union’ children – nurtured on remittances of money and goods but without the stability of positive family life.²

In an attempt to respond to these realities, the law in relation to children in Guyana has had a fillip over the past five years with the enactment of a number of pieces of child-friendly legislation. This presentation will highlight the changes in our laws and offer some points for reflection given the rapid changes in our societies. As a result of our constitutional reform process of 1997 – 2003, the Constitution of Guyana was amended to include specific provision inter alia that “the best interests of the child shall be the primary consideration in all judicial proceedings and decisions and in all matters concerning children, whether undertaken by public or private social welfare institutions, administrative authorities or legislative bodies.”³

Importantly, the Constitution provides for the incorporation of seven human rights conventions – the ICCPR, ICESCR, the Torture Convention, CEDAW, CERD, Belem do Para which addresses violence against women and the CRC⁴. These conventions, which are interrelated, are to be

² Dr. Maria Gomes, ‘Living on the Edge: Families Fractured by the 1996 US Immigration Reform Act, International Society of Family Law Caribbean Regional Conference, The Bahamas, March 17 -19, 2011.

³ Art 39B, Constitution of Guyana.

⁴ International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment,

monitored by human rights commissions with the CRC being monitored for implementation by the Rights of the Child Commission (RCC). The RCC has as its mandate the promotion of initiatives for the enhancement of the well-being and rights of children. In carrying out this mandate, the Commission is authorized to receive and investigate complaints of violations of the rights of children and make recommendations for remedies and interventions to ensure respect for such rights.

The CRC and the other UN human rights conventions outline universal or international legal standards for the protection of children and guarantee their basic human rights. These conventions also bind States to ensure that private individuals and entities respect these rights also. Article 154A(1) of the Constitution includes a specific exhortation acknowledging the importance and implementation of these conventions. It states as follows:

“... every person, as contemplated by the respective international treaties set out in the Fourth Schedule to which Guyana has acceded is entitled to the human rights enshrined in the said international treaties, and such rights shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of Government, and where applicable to them, by all natural and legal persons”⁵

Convention on the Elimination of All Forms of Discrimination Against Women, International Covenant on the Elimination of All Forms of Racial Discrimination, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belem do Para) and Convention on the Rights of the Child.

⁵ The Fourth Schedule lists the seven international human rights conventions referred to herein.

Article 154A(1) is therefore in consonance with article 4 of the CRC which enjoins States to undertake measures for the implementation of the rights that are recognized in the Convention.

In consonance with the provisions of the Constitution and the CRC, a number of pieces of legislation have been enacted which provide for the protection of children. In 2009 the Childcare and Protection Agency⁶ came into being and has jurisdiction for implementing the Protection of Children Act, 2009⁷, and the Childcare and Development Services Act 2011⁸ which provides for the licensing and monitoring of child care services. It is the resource agency for the Adoption of Children Act, 2009⁹, the Custody, Contact, Guardianship and Maintenance Act 2011¹⁰ and the provisions of the Sexual Offences Act, 2010¹¹ which apply to child victims, with the age of consent now being 16 years old for both females and males. The Agency is also the focal point as regards children who have been trafficked and is part of the machinery for the implementation of the provisions of the Combating Trafficking in Persons Act, 2005.¹² In addition, the Status of Children Act, 2009¹³ provides for determinations of paternity and maternity as well as

⁶ Childcare and Protection Agency Act, No. 2 of 2009 commenced by Order No. 12 of 2010.

⁷ Act No. 17 of 2009 commenced by Order No. 15 of 2010.

⁸ Act No. 12 of 2011.

⁹ Act No. 18 of 2009 commenced by Order No. 13 of 2010 amended by Act No. 10 of 2011.

¹⁰ Act No. 5 of 2011.

¹¹ Act No. 7 of 2010 commenced by Order 14 of 2010.

¹² Act No. 2 of 2005.

¹³ Act No. 19 of 2009.

parentage since the Act allows for declarations of fatherhood and motherhood in recognition of assisted reproductive technologies (ART) that allow for genetic, biological and surrogate parenthood. Prior to these Acts, the Domestic Violence Act 1996¹⁴ was enacted in which there is provision for the protection of children in the context of a household. This Act defines associated persons for the purposes of those who seek protection and other orders under the Act to include married or formerly married persons, cohabitants of former cohabitants, relatives and persons who are or were in relationships of a sexual nature. While there has been no adjudication on it, the latter provision appears not to be limited to persons of the opposite sex. The Medical Termination of Pregnancy Act, 1995¹⁵ permits abortion procedures to be performed on children without the consent or notification of their parents though the medical practitioners are meant to encourage the children to seek such consent or inform their parents or guardians.¹⁶

While the legislation speaks to the rights of children and the responsibilities of adults whether as parents, guardians, teachers, caregivers, coaches and mentors, the fact remains that the reality and practicality of implementing the law has its challenges. In this regard I will highlight some aspects of our Caribbean realities which have and will continue to impact on how we as

¹⁴ Act No. 18 of 1996.

¹⁵ Act No. 12 of 1995

¹⁶ See sec 3 of Act No. 7 of 1995. The legislation and regulations thereto also provide for counselling for persons who seek terminations of pregnancies.

judicial officers make decisions for the protection of our children. The aspects to be highlighted relate to children who are in vulnerable situations, the issue of gender and children who are in conflict with the law.

In our region we have many children who are victims of violence, including sexual abuse, or who are exposed to violent environments or situations of disadvantage in circumstances where our national resources are limited, often resulting in inadequate options which judicial officers have at their disposal in order to alleviate and ameliorate the circumstances of these children or to have them removed from such environments to safe havens. In Guyana e.g. magistrates have expressed concern at children being brought before them for wandering with applications that they be sent to what in effect is an institution of punishment for children who are in conflict with the law. There is concern that in fact a number of these cases are really instances of children escaping from abuse and violence. It is the duty of judicial officers to understand the nature, extent and impact of violence on children in the conduct of proceedings in our courts and in our judgments.

As judicial officers where these cases come before us, we have to probe a bit more and take a robust view of the situation and rights of the children to ensure that the social service sector supports these children so that they are in fact protected and not criminalized. In this regard, difficult as it often is,

we need to call for parents or guardians to attend court so that they too can be held accountable and be a part of the solution.

We must appreciate a child's right to interact with her/his parents, though we must strive to ensure that the child lives a life that is free from violence or the threat of violence. In this regard, we must address the issue of corporal punishment which is a prevalent form of discipline of children and is part of our Caribbean reality. An understanding of the psycho-social issues that affect children, their parents and families would be key to arriving at decisions for the protection of children. We have to appreciate the diversity of families that can now encompass legal parents (as evidenced by marriage or paternity or birth or adoption certification), genetic and biological parents (as evidenced by the use of assisted reproductive technologies) and social parents (those who care for the child).¹⁷ Even where the rules of court do not provide specifically, judicial officers should pursue judicial settlement conferencing¹⁸ that allows parents and where possible children to be part of, and to take ownership of the process in arriving at solutions that are best for the children and the family as a whole.¹⁹ There should be relationship-

¹⁷ Tatiana Tolstoy Kongstad, (Sweden) 'Contemporary Parenthood', International Society of Family Law, Caribbean Regional Conference, The Bahamas, March 17 – 19, 2011.

¹⁸ Judge Nancy Flatters, (Calgary Family and Youth Court, Canada), 'Increasing Access to Justice: Judicial Dispute Resolution (JDR) Settlement Conferencing: Evolving and Changing Roles', International Society of Family Law, Caribbean Regional Conference, The Bahamas, March 17 – 19, 2011.

¹⁹ Such settlement can be done by magistrates also where the parties consent. See Judge Flatters *ibid*.

focused solutions, though where necessary the focus may have to be more outcomes oriented where the legal or family circumstances so require.²⁰

And in adjudicating for the protection of children, we have to consciously guard against gender stereotyping whether as regards what we consider is best for a boy as against a girl or as regards male and female parents or guardians or how we define gender. The Constitution of Guyana now includes a fundamental right²¹ to non-discrimination on the basis of gender and there is also a wide equality provision in Art 149D that states:

“(1) The State shall not deny to any person equality before the law or equal protection and benefit of the law.”

(2) The State shall, for the purpose of promoting equality, take legislative and other measures designed to protect disadvantaged persons or persons with disabilities.

(3) Equality includes the full and equal enjoyment of all rights and freedoms guaranteed by or under this Constitution or any other law.”

How are these provisions to be interpreted?²² In this context, I turn now to consider another challenge for us as judicial officers and that is dealing with the issue of sexual orientation. There may be judicial officers in our region who would have encountered applications by same sex couples in relation to custody and or contact with and maintenance for children and for adoption. I

²⁰ Prof John Eekelaar, Family Justice: ‘Not of the Highest Importance’, International Society of Family Law, Caribbean Regional Conference, The Bahamas, March 17 – 19, 2011.

²¹ Article 39 (2) of the Constitution mandates that in interpreting and adjudicating on the fundamental rights provisions, the judiciary “shall pay due regard to international law, international conventions, covenants and charters bearing on human rights.”

²² See McEwan & Ors v The AG Constitutional Motion 21-M/2010 per Chang CJ (ag), decision of 6th Sept 2013.

am not aware of any such application in Guyana to date. How might we deal with custody, contact and maintenance cases where one parent is transsexual or transgendered? How do we address the child who professes to be homosexual? Do we deem them as deviant? Do we censure and consign them to care institutions for delinquent children? Or do we consider it their right and therefore respect their right to choose their lifestyle?

While such applications may be currently few to non-existent, the fact remains that in time to come they will be made. Can we continue to apply the 1970 decision in Corbett v Corbett²³ that sex is determined at birth? In Trinidad & Tobago there is the decision of Archie, JA (as he then was) in Suratt v The AG²⁴ where it was stated that discrimination on the basis of sex would include discrimination on the basis of sexual orientation; and in McEwan & Ors v AG²⁵, CJ (ag) Chang recently held that while the offence of dressing in clothes of the opposite sex for improper purposes was not unconstitutional, persons are free to dress in whatever clothes they choose. Chief Justice (ag) stated that “... it is not criminally offensive for a person to wear the attire of the opposite sex as a matter of preference or to give expression to or to reflect his or her sexual orientation.”

²³ [1971] P 83, [1970] 2 WLR 1306, [1970] 2 All ER 33.

²⁴ 26 January 1996, CA, T&T. See Tracy Robinson, Background Paper ‘Gender Equality and Judging in the OECS and Wider Commonwealth Caribbean’ July 2011.

²⁵ Constitutional Motion 21-M/2010 per Chang CJ (ag), decision of 6th Sept 2013.

Sentencing of children who are in conflict with the law would fall under the purview of protection of children – protection in the sense of punishing a child for criminal misconduct but with a view to fostering their rehabilitation in order that they would develop into productive members of society. As judicial officers we should research methods of punishment which will permit this, such as restorative justice methods²⁶, though this would require support from parents and guardians and the education and social service sectors which is not always possible or available and it is acknowledged that there must be cases where institutionalization must occur because of the nature of the crime committed. Given that many of our States are signatories to the CRC, States will have to better address the issues that are relevant to juvenile justice, so that judicial officers can properly carry out their duties as regards sentencing, while taking into consideration the age of the child when s/he committed the offence, as well as other established sentencing factors.

There is also the issue of sentencing a person who committed an offence while a child, but who comes on for sentencing as an adult, most likely as a result of delay in the administration of the criminal justice system. What

²⁶ There is the SKYE program in Guyana – **S**kills **K**nowledge for **Y**outh **E**mployment in collaboration with the private sector and social services targeted at offenders between the ages of 15yrs 9 mths to 24 yrs. It includes parents and has an education and counselling component.

And see Janice George, (Attorney-at-Law) ‘The Possibilities of Mediation as a Problem Solver for Male Juvenile Delinquency in Trinidad & Tobago’, International Society of Family Law, Caribbean Regional Conference, The Bahamas, March 17 – 19, 2011 on the utilisation of mediation and counselling involving youth and their mothers (no fathers participated) with a view to addressing the reintegration of the youth into their communities.

then is the frame of reference for sentencing – should the adult before the court be considered as the child or the juvenile who committed the offence or should he/she be treated as an adult, moreso when the crime committed is particularly serious in nature? What form should the sentencing take?²⁷ Constitutional and legislative provisions in many countries prohibit the imposition of the death sentence where a person was under eighteen years old at the time the offence of murder was committed, but s/he came up for trial and was convicted when an adult. It has been held in a number of cases, that the convicted person is to be held at the Court's pleasure.²⁸ This means that the Court has to establish monitoring mechanisms in relation to the detention of such persons otherwise they may get lost in the penal system. Given these factors regarding sentencing children in conflict with the law, it is recognized that there is tension between society's views of what the sentence, especially for violent crimes, should be, as against what the law provides regarding the institutionalization of a child who has been convicted and as a result a tension between the rights of a child accused and the rights of victims of crime.

²⁷ See Browne v R (1999) 54 WIR 213, DPP v Mollison (Kurt) (2003) 64 WIR 140, Ramkissoo v R (1962) 5 WIR 250, CA TT, and the dissenting judgment of Lord Salmon in Eaton Baker & Anor v R (1975) 23 WIR 463 PC J'ca, R v Williams (1970) 16 WIR 63 CA J'ca, R v Martin Wright (1972) 18 WIR 302 CA J'ca, R v Downer (Allistair) (1996) 52 WIR 284 (J).

²⁸ DPP v Mollison (ibid), Browne v R (ibid), Attin v The State (2005) 67 WIR 276, Scantlebury v R (2005) 68 WIR 88.

A rights-based approach

Having highlighted these issues as examples of some of the challenges we face or will face regarding protection of our children, how are we as judicial officers to apply and implement the law in coming to decisions in cases such as these which will test our adjudicative abilities; cases which will or may challenge our personal values and beliefs? In consonance with the CRC, we should adopt a rights-based approach to our adjudication in these and other types of social impact cases where our decisions will ultimately determine whether we make or break the spirit of a child, whether that child is able to fulfil her or his dreams or whether life would be a nightmare.

And in all this, where the age of children permits, they have a right to express their opinions and to have their views taken seriously and given due weight, though it is recognised that children also have a responsibility to respect the rights of others, especially those of their parents and guardians.²⁹

Similarly, we must be cognisant of the language we use in court – what we say and how we say it – for our words have great weight and can lend to accord and thereby a positive outcome or result in discord and harm. Gender sensitivity is now mandatory. Despite our heavy case loads, we must be flexible in relation to the time we allocate to matters involving children. We

²⁹ The Protection of Children Act, the Adoption of Children Act and the Custody, Contact, Guardianship and Maintenance Act, all have provision for the appointment of legal counsel, at the expense of the State, to represent the interests of the child before the Court. Where necessary, judicial officers should be proactive in having legal counsel so appointed.

have to rise to the challenge of ensuring just and humane adjudication which is sensitive to the realities that many children, with whom we interface, see and feel on a daily basis. We must ensure that children have access to justice.

In Guyana the constitutional provisions and legislation referred to can be utilised by the courts as a basis for upholding Guyana's responsibilities in relation to its international human rights obligations, more especially pursuant to the CRC. Judicial officers, as members of an integral, though independent, arm of the State, must uphold the international human rights obligations of our States, moreso as provided for in the international human rights conventions that have been ratified. As judicial officers, we have an obligation to respect, protect, fulfil and ensure the human rights of all who come before us, including our children. These principles or due diligence obligations were enunciated and explained in Velasquez Rodriguez v Honduras³⁰ a decision of the Inter-American Court of Human Rights.

The international obligations of our countries mean that if we, as judicial officers, violate the rights of persons who come before us, the State would be liable for our actions or inaction even to the extent of being liable to pay

³⁰ Inter-American Court for Human Rights (Ser C0 No. 4 (1988) July 29, 1988.

compensation.³¹ A failure on the part of the judiciary to uphold human rights norms would amount to a failure by the State to live up to its international obligations, moreso where they have been expressly incorporated into the domestic law. A failure to be a responsive judiciary to the rights of children may mean that judicial officers may be complicit in the violation of their rights which they have sworn to protect without fear or favour.

The implementation of the international human rights conventions by our States is monitored in the case of the United Nations by UN Committees, established pursuant to the various human rights conventions. Our States have reporting obligations to these UN Committees which are charged with monitoring States' implementation of the Conventions and Optional Protocols. These reports outline the situation of children in the country and explain the measures taken by the State to realize their rights. In their reviews of the reports made by our States, the Committees urge all levels of government to use the Conventions as guides in policymaking and implementation. These reports often contain information on the role and actions of the judicial officers regarding the implementation of these human

³¹ Maria de Penha v Brazil, Inter-American Commission Case No. 12.051, April 16 2006 where the Commission concluded that Brazil had violated the rights of the petitioner and was therefore liable to her for the delay in prosecuting her husband for domestic violence; In MZ v Bolivia the Inter-American Commission on Human Rights determined that Bolivia would have violated the rights of the petitioner if the allegations concerning the overturning of a rape conviction in the face of overwhelming evidence were true.

rights treaty obligations. Individuals can make complaints about allegations of violations of their human rights to these committees or other treaty bodies such as the Inter-American Commission for Human Rights and the Inter-American Court for Human Rights. These complaints may refer to decisions of our courts.

While it is recognised that there is and would be tension as regards the views or recommendations expressed by human rights bodies and human rights advocates and activists, and our judicial role and pronouncements nationally, knowledge and appreciation of such views or recommendations can only enhance our jurisprudence. A number of decisions from the Courts of our region refer to international human rights law and decisions.³² Knowledge of General Comments of the Treaty Bodies would be helpful in giving insight into what is happening at the international level especially as there is much overlapping in the comments pursuant to the various conventions so e.g. comments on the status of the girl child by the CEDAW Committee would be in consonance with comments made by the CRC Committee on rights of the child. General Comments on e.g. General measures on the

³² See e.g. decision of the CCJ in Frank Errol Gibson and The Attorney General [2010] CCJ 3 (AJ) Caribbean Court of Justice Appellate Jurisdiction, CCJ Appeal No CV 1 of 2010 BB Civil Appeal No 8 of 2007.

implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)³³ and on Children in Conflict with the Law³⁴ are informative.

In Guyana, it is apposite for the judiciary to take cognisance of the fact that the amendments to the Guyanese Constitution and the legislation for children have been spawned in an era when human rights issues have taken on even greater meaning and importance. The judiciary, as it always does, has a pivotal role to play as the guardian of the interests of justice, for ultimately it is this arm of the State which will have the final say on the application of the fundamental and convention rights as enshrined in the Constitution.

While some may see it as judicial activism and that certain issues should be left to the Parliaments of our countries, the national, regional and international environment in which we live, means that we, as judicial officers, have to be alive to and in tune with the human rights framework within which we must operate especially as much of the international human rights standards are enshrined in our national constitutions. With the rights of a child being indivisible and interrelated, we must focus on the child as a

³³ GENERAL COMMENT No. 5 (2003) COMMITTEE ON THE RIGHTS OF THE CHILD Thirty-fourth session 19 September-3 October 2003 GENERAL COMMENT No. 10 (2007) Children's rights in juvenile justice COMMITTEE ON THE RIGHTS OF THE CHILD Forty-fourth session Geneva, 15 January-2 February 2007

³⁴ GENERAL COMMENT No. 10 (2007) Children's rights in juvenile justice COMMITTEE ON THE RIGHTS OF THE CHILD Forty-fourth session Geneva, 15 January-2 February 2007

whole. In doing so, we would be effectively enforcing the rights of our children while establishing a jurisprudential human rights framework by adjudicating with cognizance that protection of our children is of primary importance for their development and the development of our countries. The policies and systems of our administration of justice systems must be responsive to the needs of our children. As Chief Justice Bhagwati of India said:

“Judges ... must interpret the rules laid down by the legislature; they must interpret the rules so as to reconcile them with the wider objectives of justice which are encapsulated in the international norms of human rights.”³⁵

Judicial officers therefore have a pivotal developmental role to play. In keeping with the theme of this CAJO conference, given our evolving Caribbean realities, equality and justice mean that adjudicating for the protection of our children must include a rights-based approach in order to secure their well-being and the future development of our countries.

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³⁵ P N Bhagwati, J Keynote address ‘Gender and the Judiciary’ in Kirstine Adams & Andrew Byrnes (eds) *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl Child at the National Level*, Papers and Statements from the Caribbean Regional Judicial Colloquium, Georgetown, Guyana 14 – 17 April 1997 Georgetown Recommendations (Commonwealth Secretariat London 1999).