

The 3rd Biennial Conference of the Caribbean Association of Judicial Officers (CAJO)

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“Equality, Justice and Caribbean Realities – the Way Forward”

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Keynote Address: Gender, Equality, Justice and Caribbean Realities

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In her address, Ms. Robinson asked, what difference does gender make to an analysis of the law? Gender sensitivity, she pointed out, allowed us to rediscover the law and led to a more robust understanding of justice. She asserted that gender had a subtle influence on Caribbean law - it suggested that we must have a close look at and contextualize the nature of social disadvantage in our region.

The ways we learn and practice law encouraged judicial officers and practitioners to maintain “neutrality”, a social distance. It enshrouded the social roots of legal doctrines, leaving us unable to fully appreciate social inequalities. Particularly as a result of our unflinching acceptance of common law, she suggested that the Caribbean was alienated from the social formation of its law.

Ms. Robinson provided “four small [historico-legal] stories” from the early 19th century: (i) the trial of Thomas Picton, Governor of Trinidad, for torturing a free Mulatto woman, Louisa Calderon; (ii) the story of Mary Prince, a former slave who sued for her freedom; (iii) the Barbadian trial of Robert James convicted by an all-white jury of robbing and violating a poor white widow; and (iv) the trial of James Greaves for sexually assaulting a young girl in an alternative justice system established by churchmen in Jamaica.

Using these stories, Ms. Robinson made the point that justice in the Caribbean was crafted by notions of gender, race and class. Law was not impervious to social influences. Rather, social norms determined and continue to determine legal principles – for example, when violence was acceptable, the definition of marriage, what sexual behaviour was permitted. She argued that ideas of gender could push to a more comprehensive understanding of equality from which to consider the role that law has played in maintaining inequality and how we might seek to rectify this. Ms. Robinson opined that gender equality could be seen as a higher Caribbean legal order and standard to which our laws should strive.

She noted that equality was still conceived in a formal manner mandating identical treatment although what may be required is different treatment - measures to address vulnerability and disadvantage. Feminist theories have now re-conceptualized Aristotelian notions of fairness. Nancy Fraser, for example, has posited that justice must have (i) a political dimension of representation; (ii) an economic dimension of distribution; and (iii) a cultural dimension of recognition while Sara Friedman asserted that equality means equal dignity and worth and an acknowledgment of diversity.

Violence and harassment could be seen as an attack against equal worth and dignity. While the Caribbean had now enacted domestic violence legislation, statistics showed that domestic

violence and rape in the region remained quite high. Legal measures were insufficient and reforms had simply not gone far enough.

A lot of the questions in the Caribbean gender discourse revolved around the question of recognition. She asked whether the category of gender was confined to women. She referred in this regard to the case of Khalil Jones, a little boy not permitted to wear a ponytail at school and whose constitutional action alleging discrimination on the basis of sex failed on the basis that both boys and girls were bound by such rules. Equality, she pointed out, would fail if it depended on comparisons such as these.

Gender, she said, was an analytical tool that allowed us to discuss the expectations heaped upon us by being male or female, a distinction that has conveyed opportunities, privileges and disadvantages. Yet, judges and legislators have sometimes demonstrated an aversion to the use of the term (see for e.g. s.13.3(i) of the Jamaican Constitution).

Society expected us to be either male or female; gender was conceived as a binary, a conceptualization dangerous to anyone who could not be securely placed into one of these categories such as “Pigeon” who was born with partial androgen sensitivity syndrome and was forced to endure three non-essential surgeries before adulthood to make her “female”. A short clip of film was shown to emphasize this point.

In order to break patterns of discrimination and disadvantage and achieve justice, redistribution of resources was essential. Distribution and recognition could not be separated. Courts were critical in redistribution especially in relation to families and workplaces. There was a real potential for resource distribution though applications for property division and spousal maintenance but this was confined to marriage or marriage like relationships and virtually the province of superior courts. Most families, poor families, however, went before lower courts where the same relief and treatment was elusive.

Child proceedings were described as resembling 19th century quasi-criminal proceedings “operating on barely softened old bastardy and poor laws” never intended to accord equal worth and dignity but only to transfer the burden of children born out of wedlock from the state to their fathers. These proceedings fuelled conflict and failed to redistribute resources to those most in need.

Workplaces too could be the sites of gender inequality. Maternity benefits were not available to contractual workers and there was still no harassment legislation. Moreover, despite the participation of Caribbean women in the workforce, there was minimal participation in public life. Equal representation was also a matter of justice.

Ms. Robinson began her presentation by paying an emotional tribute to Madam Justice Désirée Bernard. She concluded it by observing that although there were women at all levels of the Caribbean judiciary, only one sat on the panel of the CCJ. She urged the CCJ to maintain the legacy of this trailblazing woman and activist by not becoming in the 21st century an all-male panel unrepresentative of the reality of the Caribbean population. While

studies as to whether women made better judges were inconclusive, the inclusion of a woman was integral to democracy and fairness, equality and representative governance.