



GENDER SECTION NEWSLETTER

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Greetings From the Chairperson



It is a pleasure to introduce 2017's first issue of our newsletter.

This issue highlights challenges to gender equality, as outlined in our preview of the UNDP Africa Development Report published in August 2016 and our report on the meeting of the Pacific Women's Network on Violence Against Women held in Singatoka, Fiji in August 2016.

However, this issue also shares some encouraging educational developments. We review the Commonwealth Judicial Bench Book on Violence Against Women

launched at the Commonwealth Women's Affairs Ministers Meeting in Apia, Samoa. Dr. Karen Brewer's report on the seminar held in Munyonyo, Uganda in November 2016, sponsored by the International Commission of Jurists Kenya and by Equality Now, is also part of this issue.

On another positive note, this issue celebrates the achievement of **Chief Justice Susan Kiefel**, newly appointed Chief Justice of Australia's High Court, who is profiled herein.

We also congratulate **Judge Joyce Aluoch** and **Judge Sanji Monageng**, pioneering women judges (and great supporters of CMJA!), who now serve on the International Criminal Court, for being recognized as "**Women of the Decade creating a better world for all**" for their dedication to peace and justice.

In relation to the recognition of outstanding women, if I can be permitted a display of national pride, I would like to share that **Justice Rosalie Abella**, a justice of the Supreme Court of Canada since 2004, was named Global Jurist of the Year, an award given to a current judge who has shown a lifetime of commitment in the face

Objectives of the Gender Section

Aims

- ◆ To promote the interests of judicial officers throughout the Commonwealth
- ◆ To ensure wherever possible, equal access to the law

Objectives

- ◆ To provide a forum for judicial officers to be able to consider ways of redressing any gender imbalance:
 - a) Gender Bias and other colleagues;
 - b) Gender Bias and the Public both specifically and generally;
 - c) Institutionalised Gender Bias and the Justice System.
- ◆ To exchange information among judicial officers;
- ◆ To encourage the advancement of women;
- ◆ To promote and encourage women to be aware of their legal rights;
- ◆ To address women's groups on issues relating to the law and their legal rights.

of adversity to defending human rights or principles of international criminal justice. Justice Abella's who was nominated by Mr. David Jacobson, the United States Ambassador to Canada from 2009-2013, who was quoted in the *Globe and Mail* as follows: "*What I said in my nomination that really distinguishes Rosie from so many other great jurists in Canada, the U.S. and around the world, is the way she brings extraordinary human decency to the law*". He praised "the human quality she brings to the bench".

This latest recognition follows last year's award to Justice Abella of an honorary degree from Yale University, the fourth Canadian and the first Canadian woman to receive that honour.

I conclude by noting that we are very pleased to have received a contribution to our newsletter from Magistrate Naume Sikhoya of Uganda. Her article describes the "spiral challenge of gender based violence" arising from female genital mutilation ("FGM"), "a violation of woman's right to be free from degrading culture".

We are very appreciative that Naume has shone a light on the challenge to the effectiveness of the Ugandan laws criminalizing FGM.

We encourage others to share their views and perspectives by contributing to our newsletter. Please note that a formal paper is not required.

UPDATE FROM THE GENDER NEWSLETTER OF AUGUST 2016

The CMJA and the Gender Section congratulates **Mrs Justice Norma Wade-Miller**, whose Profile we featured, has been awarded the OBE (Order of the British Empire) from Her Majesty The Queen, for her contribution to the judiciary of Bermuda and as President of the CMJA.

Profile The Hon. Chief Justice Susan Kiefel, AC

The Gender Section would like to congratulate, Justice Susan Kiefel, who became the first female Chief Justice of Australia when she took over from Justice French in January 2017.

Having commenced her legal life as a legal secretary, she undertook evening classes to become a barrister in Queensland at the age of 21. She became the first female Queen's Counsel of Queensland 12 years later in 1987, having also completed during that time a Masters in Law at Cambridge University, UK. Whilst in Cambridge she was awarded the C.J. Hamson Prize in Comparative Law and the Jennings Prize.

She became a Supreme Court Judge in Queensland in 1993, before being appointed to the Supreme Court of the Norfolk Islands and was the first female Queensland Judge to be appointed to the Federal Court of Australia a year later. Other roles include being Deputy President of the Australian Federal Police Disciplinary Tribunal and a Commissioner on the Australian Law Reform Commission. She was appointed to the High Court in 2007.

According to Professor Anne Twomey of the University of Sydney, writing in *The Australian* in November 2016:

"During her time on the High Court, Kiefel has been most notable for her advocacy of a European style test of proportionality, a test judges use to assess whether a law is really enacted for a legitimate purpose or as a means of avoiding limitations in the Constitution. Kiefel has argued for a structured test that

assesses whether the law is proportional to its purpose. Her argument is that the court must try to avoid value judgments and that its reasoning must be clearly exposed".

She goes on to state:

"She was the most senior judge on the High Court and her judgments have garnered widespread respect."

Justice Kiefel received an Honorary Doctorate from Griffith University in recognition of her distinguished contributions to the legal profession and leading the way for women in the industry. In 2008 she was elected a Fellow at Wolfson College, Cambridge. In 2011, she was made a Companion of the Order of Australia for her service to the law, the judiciary, to law reform and to legal education in the areas of ethics, justice and governance.

In a speech given to the ... In August 2016, Justice Kiefel said: *"In the age of the internet we are able to transmit a legal idea across the world in an instant, but it might not enter one legal mind. None of our technologies matter unless we are open to different ideas and approaches. This does not mean that they must be adopted and it does not imply that it is only us who should be looking elsewhere. Nonetheless, a consideration of other approaches promotes a better understanding of our own system of law. It does so largely through the process of comparison. More subtly, that understanding may affect our legal thinking and by that means influence the future shape of the law"*.

The CMJA Gender Section wishes Justice Kiefel all the best in her new post and looks forward to her contribution not only to the development of the judiciary in Australia but in the rest of the Commonwealth of Nations.

Seeking Regional Representatives of the Gender Section

In the last newsletter issued in February 2016, we reported that the new Council of the CMJA had been elected in September 2015 in New Zealand, but that there were still vacancies in certain regions for representatives on the Gender Section Committee.

We are delighted to inform you that at the meeting of the Gender Section held in Guyana in September 2016, the following agreed to represent the Gender Section: **Mrs Cordella Bart-Stewart** for the Atlantic and Mediterranean, **Her Worship Sikhoya Naume** for East, Central and Southern Africa and **Magistrate Linda Bradford-Morgan** for the Pacific.

We are STILL seeking nomination from the Indian Ocean Region

CONTACT: Dr Karen Brewer at the CMJA: kbrewer@cmja.org if you would like your nomination to go forward for the Indian Ocean Region.

Duties of the Regional Representative

Each Regional representative would be expected to galvanise activities within their region and promote the aims and objectives of the Section (see below for further information on the objectives)

Each regional representative would have authority to call on active judicial officers in each of the countries in their region to advance the aims and objectives or assist with information on developments on gender issues.

Each Regional Representative would submit an annual report to the Gender Section Chairperson in time for the chairperson to report back to Council on activities.

Commonwealth Women's Affairs Ministers Meeting Apia, Samoa



The following is the Communiqué from the 11th Commonwealth Women's Affairs Ministers Meeting (11WAMM) held in Apia, Samoa from 7-8 September 2016.

"...Delegations from 14 member countries attended the meeting. The Theme was "Gender Equality through Sustainable Development in an Inclusive Commonwealth". 11WAMM took place almost a year after the adoption of the 2030 Agenda for Sustainable Development, as well as the Paris Agreement at COP21.

In pursuance of the 2030 Agenda and SDGs, Ministers reiterated that realizing gender equality and the empowerment of women and girls is critical and will make an essential contribution to progress across all the 17 SDGs and 169 targets. They also noted the importance of systematic mainstreaming of a gender perspective in the implementation of the 2030 Agenda is crucial.

11WAMM focused on the contribution that the Commonwealth can make towards the achievement of the SDGs, with an emphasis on promoting gender equality and women's empowerment across the 2030 Agenda.

1. Ministers noted the 2015 Commonwealth Heads of government Malta Communiqué, reaffirming that gender equality and empowerment of all women and girls should be mainstreamed

into development, and reaffirmed their commitment to prioritising the issue in line with the 2030 Agenda for Sustainable Development and within the work of the Commonwealth Secretariat.

2. Ministers welcomed the Report from Senior Officials and noted the recommendations in the report of the End Term Review (ETR) of the Commonwealth Plan of Action on Gender Equality 2005-2015 (known as the PoA).

They further noted the importance of the ETR in informing the future direction of Commonwealth's priorities on gender equality.

3. Ministers welcomed the establishment of the Commonwealth Women's Forum (Malta, November, 2015), acknowledged the contribution made by the Forum, the Women Leaders' Summit (London, July, 2016) and the National Women's Machineries in the determination of the next Commonwealth priorities on gender equality and empowerment.

4. Ministers agreed to four priority areas for action:
(i) Women's economic empowerment;
(ii) Women in leadership;
(iii) Ending violence against women and girls; and
(iv) Gender and climate change

**NEXT MEETING OF
THE GENDER
SECTION
26 SEPTEMBER 2016
16.00-17.00
Dar - Es - Salaam
Tanzania**

See www.cmja.biz for further info on the CMJA Conference

5. Ministers agreed that the implementation of the four priorities may vary for different member governments and requested the Secretariat coordinate with member governments to identify their focus areas.

6. Ministers requested that the Commonwealth Secretariat provides an Implementation Strategy for 2017-2020 and develop a monitoring and evaluation mechanism that uses the reporting framework of the SDGs.

7. Ministers acknowledged the importance of accurate timely data and information, as well as clear targets, to underpin evidence based policy and monitoring.

8. Ministers recognised the critical importance of economic empowerment of women to the delivery of the 2030 Agenda for Sustainable Development and called for equitable access to resources for example land, property rights, information communication technology and finance.

9. Ministers agreed to continue the advocacy for increased numbers and effective participation of women in leadership at all levels of decision making in the private and public sectors.

10. Ministers welcomed the continuing efforts to end violence against women and girls, including the prevention and elimination of child, early and forced marriage, female genital mutilation and other harmful traditional practices. They noted studies which estimate the costs of violence against women/gender based violence (GBV) are essential. These results can be factored into national macro-economic assessments and policies.

11. Ministers acknowledged and recognised the disproportionate impact of climate change on women and girls and committed to engage in mitigation and adaptation

initiatives, including disaster preparedness, response, recovery and related measures to build resilience in Commonwealth countries.

12. Ministers confirmed the importance of strong legal frameworks to prevent discrimination against women and girls including the incorporation of international agreements into domestic regulatory frameworks and policies.

13. Ministers welcomed the launch of two publications prepared by the Commonwealth Secretariat - *Advancing Gender Equality Case Studies from Across the Commonwealth and the Judicial Bench Book on violence against women in East Africa*, and recognised the importance of working in partnership with the judiciary across the Commonwealth to enhance best practices.

14. Ministers noted the best practices and lessons learnt of Commonwealth *Partners to promote gender equality and encouraged development partners and member countries to build on existing successful partnerships, as well as to launch innovative new ones, to advance gender equality and the 2030 Agenda for Sustainable Development.*

15. Ministers committed to the rinciple of inclusion and recognised the importance of working with all groups, including civil society and private sector, in their efforts to implement commitments to gender equality at all levels.

16. Ministers noted the importance of utilising all available resources for implementation of agreed priorities. They acknowledged the importance of engaging with national, regional,

and international partners to mobilise and leverage resources to support member states' efforts to promote gender equality.

17. Ministers thanked the Government of Samoa for successfully hosting 11WAMM. Ministers welcomed and confirmed Kenya as the host of 12WAMM in 2019."

Gender Inequality in Africa

According to the UNDP Africa Development Report on "Accelerating Gender Equality and Women's Empowerment in



Africa" published in August 2016, Gender inequality is costing sub-Saharan Africa on average \$US95 billion a year or about six percent of the region's GDP . This jeopardises the continent's efforts for inclusive human development and economic growth.

The Report examines the challenge of gender equality by pinpointing the interaction between political, economic and social processes that either impede or contribute to advancing women's empowerment

The report further states that: Closing gender gaps in public administration helps to ensure democratic governance, restore trust and confidence in public institutions, and accelerate the responsiveness of government policies and programmes.

The full report is available at: <http://www.undp.org/content/undp/en/home/librarypage/hdr/2016-africa-human-development-report.html>

Gender Equality Jurisprudence and the Role of the Judiciary

A one day seminar on the above was held in the wings of the East African Magistrates and Judges Association (EAMJA) Conference held in Munyonyo, Uganda in November 2016. The seminar was sponsored by International Commission of Jurists (ICJ) Kenya and by Equality Now.

The CMJA was represented at the meeting by Dr Karen Brewer, Secretary General and Justice Patrick Kiage, Council Member for Kenya. The following is a short report on the Seminar.

Despite the strengthening of legal protections of women's rights in the region at both the constitutional and court level, women still continued to face persistent inequalities in accessing justice. The seminar sought to explore the issues surrounding the effective protection of women both within the formal and informal court systems and to identify and support the removal of obstacles for women's access to justice as well as strengthen the capacity of the judiciaries in the region to design measures to ensure justice is gender-responsive.

The first session was an introduction to the CEDAW convention or what was described as the Bill of Rights for Women as well as the Maputo Protocol (i.e.: [The Protocol to the African Charter on Human and People's Rights](#)). The main problem is that, whilst the convention has been ratified by all East African Community Member states, cultural traditions are still in place in some countries which limits the role of women in decision making as well as their role in society which is reduced

to that of someone without rights. which consider women as children in most countries they are still not allowed to be involved in the councils of chiefs or elders and marriage by abduction is still practices in some parts of East Africa.

The Maputo Protocol which was introduced in 2003, aimed at addressing issues that were not in the CEDAW Convention such as FGM or sexual harassment, abortion as well as setting the minimum age of marriage at 18. It also sought to abolish harmful practices (such as widows rights, breast ironing and other such practices). However, the implementation of the Protocol leaves a lot to be desired as stereotyping and cultural practices continue. It is absolutely essential that the mindsets of lawyers, clients and judicial officers are changed. In one case mentioned a woman had come to court but had already agreed with the other party that she should not pursue the case, even though her rights had been breached. In some communities pressure was exerted on women.



In Rwanda, changes had occurred at the ground level in order to ensure that people were fully informed of their rights. Women now had equal rights to succession in Rwanda. Women were more knowledgeable about their rights. If a woman became pregnant through rape, they could request an abortion through the courts. It was important that the

state ensured that people knew their rights.

In Rwanda, a law has been recently introduced to allow girls and boys to inherit in equal proportions. Bigamy/adultery as well as desertion are now in the penal code (if a husband is absent for 15 days or more from the home when his wife is pregnant, he can be subject to proceedings for abandonment). A husband can no longer dispose of community property without consent of his spouse.

In Uganda, before a man can dispose of his property, he must show evidence that he has the consent of his spouse.

The Seminar suggested that the Judiciary should lead by example and ensure that there is better diversity in the ranks and should also sensitise themselves on the rights of women and girls and take into account unconscious bias when dealing with women and girls in court.

There were two types of judges according to one of the speakers:

- the timid judges who kept to the letter of the law;
- the bold judges who interpreted the law more widely.

All Judges should be **BOLD** judges and be more proactive in applying international standards and the law.

But it was also a question of training and judges should therefore be trained on Human Rights and Women's Rights.

When the judiciary is independent, judges can make fair and impartial decisions and they are expected to put aside their backgrounds. But in reality all individuals hold implicit biases. Boys are socialised to create leaders but this also creates egos and creates an attitude that women are subservient to men. Studies have indicated that whilst men, whether qualified or not, would apply for a

position, women have a tendency to not apply for positions of leadership even when qualified. There continued to be a lack of women in decision making. They suffer from the lack of opportunities despite being equally competent. In the judiciary, women struggle in a 'male dominated role' and the numbers of women in the judiciary continued to be low.

In Kenya, the new Constitution of 2011 was seen as an "equality constitution as it provided that no public appointment should be dominated by any one gender. However, in 2011 there were no women appointed to the highest office. Judith Thongori, a lawyer campaigning for such rights in Kenya took a case to court but the Supreme Court ruled that there hadn't been a violation of the constitution. The Controller of the Budgets however is now a woman.

The last 3 CJs (including the transitional CJ) had been men. According to Judith Thongori, a lawyer who took the JSC to court over the lack of numbers in the run up to the interviews for the CJ/DCJ and SC Judges positions, the recent appointments had been a missed opportunity. Whilst a woman had been appointed as Deputy CJ, there continued to be a lack of women in the judiciary.

Gender Section News

Publication by
Justice Lynne Leitch
(Chair)

Dr. Karen Brewer (Editor
in Chief)

Female Genital Mutilation, a violation of Women's right to be free from degrading culture.

By Her Worship Sikhoya Naume,
MAGISTRATE UGANDA
Gender Representative for Central,
East and Southern Africa

The term Female Genital Mutilation (FGM) is highly value laden.¹ FGM is an invasive and painful surgical procedure that is often performed without anesthetic on girls before puberty. The procedure on women often involves the removal of healthy organs as opposed to skin. The term FGM highlights the severity and irreversibility of the practice. Despite criticism, the term FGM is currently used in all official documents of the United Nations and in the documents of world conferences and has been adopted by the Uganda legislators. Female genital mutilation comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons. United Nations Human Rights Agencies have classified FGM into clitoridectomy and excision and infibulation which is the most severe.

An estimated 135 million of the world's girls and women have undergone genital mutilation and 2 million girls a year, approximately 6000 a day, are at risk of FGM. FGM is practiced in more than 40 countries; this number is rising because of increasing migration to Western countries from traditionally practicing

¹ Nour NM, "Female circumcision and genital mutilation: a practical and sensitive approach" (2000) 45(3) Contemporary Obstetrics and Gynaecology 50

countries. It has been reported in Uganda, Canada, Denmark, France, Italy, Netherlands, Sweden, UK and USA. FGM is practiced extensively in Africa, is common in the Middle East and has been reported among Muslim populations in Indonesia, Sri Lanka, Malaysia and among the indigenous peoples of Columbia, Mexico and Peru.

The practice is common among the Sabinu and Karimojong for the case of Uganda. The practice is expressly prohibited under the Prohibition of Female Genital Mutilation Act, 2010 an Act to provide for the prohibition of female genital mutilation, the offences, prosecution and punishment of offenders and the protection of victims as well as girls and women under threat of female genital mutilation.

The Act criminalizes the practice under section 2² and it states that " A person who carries out female genital mutilation commits an offence and is liable on conviction to imprisonment not exceeding ten years".

The Act goes ahead under S.3 (2) to provide for aggravated FGM. It provides that a person who commits the offence of aggravated female genital mutilation is liable on conviction to life imprisonment.

Art 24 of Uganda's 1995 Constitution goes ahead to promote Respect for human dignity and protection from inhuman treatment. It states that 'no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.

Various sources estimate that from about 60 to 140 million women in the world have been circumcised. An average of about four girls a minute continue to be mutilated.³ Their

² Act 5/2010

³ Al-Krenawi A & Wiesel-Lev R, "Attitudes toward and perceived psychosocial impact of female circumcision as practiced among the Bedouin-Arabs of the Negev" (1999) 38(4) Family Process 431

prepuce is removed and their clitoris may be partially or completely removed. In some traditions, the operation is far more invasive: the labia minora are also surgically removed and the labia majora are sewn together, covering the urethra and vagina. A small opening is retained for the passage of urine and menstrual fluid. The result is that sexual feelings are either inhibited or terminated. Sexual intercourse is often extremely painful for the woman.

FGM has been a social custom in Karamoja and Sebei for millennia. Many people link FGM with the religion of Islam. Actually, it is a social custom that is practiced by Animists, Christians, and Muslims in those countries where FGM is common. There are many Muslim countries in which the mutilation is essentially unknown, including Algeria, Iraq, Iran, Kuwait, Pakistan and Saudi Arabia.

The practice although widely condemned globally as a women's right violator, it continues to rattle Ugandan communities of sebei and Karamoja with a number of the loyalists insisting that it is part of their 'culture'. The Children Act, Section 8 for example provides that *it shall be unlawful to subject a child to social or customary practices that are harmful to the child's health* but this has not stopped the practice has continued and by far accounts for a big percentage of gender based violence.

Against this backdrop, it is clear that despite enactment of a number of legislative frameworks locally, regionally and internationally, Uganda continues to suffer from FGM as a spiral challenge of gender based violence that exposes the women victims not only to social torture by way of reduction of their sexual libido but also exposes them to serious health risks.

Quoted remarks from those who have suffered through the practice

are appalling and sickening. Swensen quotes one of the victims to have said;

"I turned my head toward the rock; it was drenched with blood as if an animal had been slaughtered there. Pieces of my meat, my sex, lay on top, drying undisturbed in the sun. ."⁴

Remarked a one Chelengat, a Sabiny woman who had suffered the wrath of the custom.⁵

Uganda is a signatory to the Universal Declaration of Human Rights (1948). The practice of FGM would appear to breach Articles 3 and 5. Uganda is also a party to the Convention on the Elimination of All Forms of Discrimination Against Women (1979) for which Article 10 states that parties shall take all appropriate measures to promote equality between men and women. Article 12 focuses on women's health care facilities. Article 16 specifically deals with the "public/private" distinction, and requires appropriate measures for equality between the sexes regarding marriage and family relations.

The above notwithstanding, this form of gender based violence continues to torment women in the region and there have been few realistic measures if any that have deliberately been formulated and implemented to end the vice. The Convention on the Rights of the Child (1989) equally sets out human rights principles applicable to children, with article 24(3) particularly referring to harmful traditional practices, thus leaving little doubt that that this particular article aims to eliminate such practices as FGM and requires Uganda to take action accordingly. In addition, Uganda was key in the passing and ratification of the United

⁴Swensen G, "Female Genital Mutilation and Human Rights" (1995) 48(2) Ugandan Social Work 27.

⁵ Ibid.

Nations Declaration on Elimination of Violence Against Women (December 1993) and formally supports the declaration. Article 2, (a) specifically states that violence against women encompasses FGM.

Further more, the Declaration and Platform for Action of the Fourth World Conference on Women - Beijing (September 1995) makes strong statements supporting women's and girls rights and calls for the end of the practice of FGM. Paragraph 39 lists FGM as one of the various forms of sexual and economic exploitation to which girls are often subjected. Paragraph 93 refers to FGM in the context of social discrimination, with paragraph 107(a) calling for the strengthening of preventive programs that promote women's health, concerning which FGM is specifically mentioned. Paragraph 232(h) calls for the prohibition of FGM and paragraph 277 calls for the development and implementation of education programs regarding among other things FGM.

All the powerful legislative frameworks notwithstanding, the practice is laden in our society. Reasons given by practicing populations include: religion, despite the fact the Koran does not require the practice, and that FGM helps maintain cleanliness and health. Sociologically: tradition, culture and gender identity are key reasons for continuation of the practice. It is believed that FGM preserves virginity, family honour and prevents immorality. This in my view is without doubt a violation of the rights of women laid under Article 33 of the 1995 Constitution that specifically provides that Women shall be accorded full and equal dignity of the person with men and goes ahead to prohibit Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status.

Ironically, after being mutilated, some women continually seek experiences with new sexual partners due to sexual dissatisfaction, whilst others pretend to still be virgins by getting stitched-up tightly again. Women are indoctrinated to believe that the practice results in increased sexual pleasure for men. However, research about the correctness of this view suggests otherwise. It shows that it is one of the gravest forms of gender based violence because it is principally done in the interest of men and not women who are the victims of the practice.

Myths given by the affected communities necessitating the practice include; the death of a child during childbirth or a man during sexual intercourse if the clitoris is touched, without excision a woman's genitals can grow and hang down between her legs and the food that an unexcised woman cooks smells bad. All these explanation given in justification are selfish clamors for male dominances.

The immediate and long-term health consequences of FGM are appalling. Research suggests that immediate complications include severe pain, urine retention, shock, haemorrhage and infection, the latter two can both cause death. Long-term consequences include cysts, abscesses, keloid scarring, damage to the urethra, dyspareunia, difficulties with childbirth and sexual dysfunction.⁶ In addition, personal accounts of mutilation reveal feelings of anxiety, terror, humiliation and betrayal, all of which would be likely to have long-term negative psychological effects are disturbing. The premise of cultural relativist theory is that as all cultures are different, thus a person outside a particular culture cannot judge it. Consequently legislative action and

other "judgemental" interventions are deemed inappropriate by its loyalists but this in my view is an extreme violation of women's dignity. General feminist thought sees the practice of FGM as a means to exercise social control over women in societies which are highly patriarchal and patrilineal. There are a number of divergent feminist schools of thought that vary dramatically in their support of legislative intervention. But if the practice is for male appeasement, then the view that it is a crude gender based violence is not far from the mark. Several factors have previously prevented FGM from being seen as a human rights issue, namely the fact that it is sanctioned by private actors (family members) as opposed to state officials and the belief that the practice is beneficial and of cultural import. It is now recognised that traditional interpretations of international standards have created an artificial hierarchical distinction between violations by state forces in the realm of public political activity and similar abuses in the "private" sphere.

While the notion of international human rights standards has broad support, it is directly criticized by advocates of "cultural relativism", whose major argument is that International Human rights standards are based on specifically Western philosophical and social values and is thus a version of neo-colonialism. However this is overcome by recognizing that FGM is one of many forms of social injustice which women suffer world-wide and is no different from Western practices that value women less than men.⁷ Consequently, given both the human rights perspective and Uganda's obligations under international standards, the recent legislative action taken by the Uganda government against FGM is but one of the measures that should be taken

to prevent violence against women and to protect children from abuse. Specific legislation serves to extinguish any doubt within the general community as to the illegality of FGM, by officially stating that the practice of FGM will not be tolerated.

Despite its importance, education alone cannot serve to eliminate FGM within an acceptable time frame. Education aims to change attitudes by raising awareness, however not all people's attitudes can be changed by way of education. Notwithstanding educational programs that focus on the detrimental consequences the practice of FGM has on health, some members of the affected communities refuse to accept that all types of FGM are dangerous.⁸

Educational programs are not compulsory and as such cannot provide a guarantee that all sections of the communities will be reached. Furthermore, those women that do attend may be forced to withdraw, due to friction within the family. It has been widely acknowledged that the cultural pressures on mothers, even when they move to completely different cultures remain a major consideration in the perpetuation of the practice. In the circumstances, it is also vital to provide alternative sources of income to the old women who engage in the surgery as a source of livelihood in order for the practice to be completely wiped out. Force alone may not help. Legislation can provide legal protection and support to women and children who wish to resist the practice within their communities. Legislative action is also not without its critics. There is however no specific child protection protocol within Uganda for addressing the practice of FGM. This is problematic, given the cultural nature of the practice and some of the unique

⁶ Otto D, "Violence Against Women - Something Other Than a Violation of Human Rights?" (2013) The Ugandan Feminist Law Journal 159

⁷ Dirie W, *Desert Flower: The Extraordinary Life of a Desert Nomad*, Virago Press, New York, 1998

⁸ Patrick I, "Responding to Female Genital Mutilation: The Ugandan Experience in Context" (2011) 36(1) Ugandan Journal of Social Issues 15

qualities of the procedure that may distinguish it from other offences against children.

Despite criticisms concerning the efficacy of education as the sole tool against FGM, it plays an essential complementary role to legislation. In the absence of educational programs, communities will misinterpret the purpose of legislation. The importance of education is further highlighted by the reasons given by the affected communities for the perpetuation of the practice. Many people who practice FGM see Western societies as sexually promiscuous, and in the process of disintegration: consequently citing FGM as a defence against Europeanisation and its corrupting influences.

Given the criminalisation of FGM by the 8th Parliament, it is now imperative to ensure that all penal sanctions are implemented and concerned communities like Sebei and Karamoja made aware of the law.

Of further concern is the fact that there is no counselling program in place in Uganda unlike in other developed countries, particularly given that many of the psychological effects of FGM can become more acute when placed in a non-practising culture. The women may become more conscious of their condition, question their womanhood and feel abnormal after making friends with women of their own age that have not undergone the procedure.

In conclusion, it is my view that in order for the laws criminalizing FGM to be effective, they must be accompanied by a broader strategy for community-based, particularly legislative education than is in effect at the moment. So as to ensure that the law is not misunderstood, otherwise the amendments shall be counterproductive. The practice of FGM is an unnecessary, life-threatening procedure that damages

not only the women's physical, mental, body image and general well being but also her sexuality. To guarantee the integrity of women, serious efforts must be taken to ensure that the practice is discontinued and that interventions that aim to do so are successful.

The case of Law & Advocacy for women in Uganda v Attorney General (Constitutional Petition No. 8 of 2007) [2010] UGCC 4 is one of the highlights of the strides Uganda has made in fighting FGM. This petition was filed by Law and Advocacy for Women in Uganda, an NGO, under 137(1)(3)(a) and (d) of the Constitution of Uganda and Rule 3 of the Constitutional Court (Petitions and References) Rules. The petition sought declarations that the custom and practice of Female Genital Mutilation as practiced by several tribes in Uganda is inconsistent with the Constitution of the Republic of Uganda, 1995 to the extent that it violates Articles 2(2) 21(1), 24, 27(2) 32(2) and 33 thereof and as a result of this violation, the custom and practice of Female Genital Mutilation should be declared null and void and unconstitutional.

The Court unanimously held inter alia that Female Genital Mutilation is carried out crudely without anaesthesia which makes the victim suffer excruciating, pain excessive bleeding which may lead to death, permanent pain and trauma. Further, that it is carried out by traditional "surgeons" who cut girls and women's genitalia wantonly and often causes their victims urinary incontinence (failure to contain urine) which results in continued urinary odour and renders the victims social outcasts.

The court also pointed out that Female Genital Mutilations are associated with a series of health risks and consequences. Almost all those who have undergone female genital mutilation experience pain and bleeding as a consequence of the

procedure. The intervention itself is traumatic as girls are usually physically held down during the procedure (Chalmers and Hashi, 2000; Talle, 2007). Those who are infibulated often have their legs bound together for several days or weeks thereafter (Talle, 1993). Other physical and psychological health problems occur with varying frequency. Generally, the risks and complications associated with Types I, II and III are similar, but they tend to be significantly more severe and prevalent the more extensive the procedure. Immediate consequences, such as infections, are usually only documented when women seek hospital treatment. Therefore, the true extent of immediate complications is unknown (Obermeyer, 2005). Long-term consequences can include chronic pain, infections, decreased sexual enjoyment, and psychological consequences, such as post-traumatic stress disorder. In addition, that findings from a WHO multi-county study in which more than 28,000 women participated, confirm that women who had undergone genital mutilation had significantly increased risks for adverse events during childbirth. Higher incidences of caesarean section and post-partum haemorrhage were found in the women with type I, II and III genital mutilation compared to those who had not undergone genital mutilation, and the risk increased with the severity of the procedure (WHO Study group on Female Genital Mutilation and Obstetric Outcome, 2006).

In sum, the court stated that Female Genital Mutilation violates the rights of women enshrined in articles 21, 24, 32(2), 33 and 44 of the Constitution. To the extent that girls and women are known to die as a direct consequence of Female Genital Mutilation, it contravenes article 22 which provides protection to the right to life.

Attention and emphasis was paid to the UN Interagency Statement on Elimination of Female Genital Mutilation states:-

“Female genital mutilation violates a series of well-established human rights principles, norms and standards, including the principles of equality and non-discrimination on the basis of sex, the right to life when the procedure results in death, and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment as well as the rights identified below. As it interferes with healthy genital tissue in the absence of medical necessity and can lead to severe consequences for a woman’s physical and mental health, female genital mutilation is a violation of person’s right to the highest attainable standard of health”.

From the foregoing, it is clear beyond any doubt that the practice of Female Genital Mutilation is condemned by both the Constitution of Uganda and International Law [The treaties, covenants, conventions and protocols to which Uganda is a party]. In particular, the practice contravenes the provisions of articles 21(1), 22(1), 24, 32(2), 33(1) and 44(a) of the Constitution.

Changing the prison narrative from punishment, retribution and isolation – to one of reform, opportunity and true justice

The following article has been written by the African Prisons Project.

Prison can be many things to different people. Prisons can be places that destroy - they can destroy self-esteem, dignity, and

hope for the future. But they can be places which strengthen - they can build skills, courage, resilience, and confidence. The perceptions are as endless as are the varying approaches to crime and punishment.

The African Prisons Project takes a progressive view of prisons as places of positive transformation. The emphasis here shifts from punishment, retribution and isolation – to one of reform, opportunity and true justice in the countries where we work. APP is working to create societies where no-one experiences injustice by building a community of equality, opportunity, recognising the inherent value, potential and dignity within each human being.

APP’s approach is to create a new generation of **Changemakers** with first-hand experience of the justice system, working selflessly as a community to use the studied tools of the law to serve the marginalised and create more just societies. Pivotal to this shift is an understanding that inmates sent to prisons receive but one sentence and one sentence alone. No case better represents this than the recent one of Susan Kigula which exemplifies the ideology of APP and our hopes for prisons and prisoners. Convicted of murder at 21 years and made subject of the then mandatory death penalty in the year 2000, Susan became one of the pioneers of the APP Legal Education Programme and led a successful ground breaking challenge on the constitutionality of the mandatory death sentence (that now takes into consideration mitigating circumstances) in the case of Susan Kigula and 416 Others filed initially in Uganda’s Constitutional Court in 2006 and the appeal heard in the Supreme Court in 2009.

As an APP legal scholar and whilst in prison, Susan studied by distance learning, a Diploma in the Common Law and undergraduate Law Degree from the University of London. She

set up a school in prison giving an opportunity to the poorest and most marginalised women access to education behind prison walls. Susan was both a student and teacher at the school sitting her completing her secondary school in prison.

Fully embracing the student life afforded by APP and the University of London under its International Programmes, Susan took part in extra curricula activities including mock trials and court activities that helped build the students’ understanding and confidence in presenting logical and structured legal arguments persuasively before a critical audience, bringing the court alive into prisons, making it accessible and reducing the stigma and distress. As a Litigant, Susan successfully raised before the Supreme Court, issues of the unconstitutionality of the death sentence imposed on her and others. The court agreed with her submissions and her own sentence was revisited and appraised in light of the extenuating circumstances previously not considerable. This action then led to, firstly, commutation of her sentence to a prison term of 20 years, then remission and time already spent leading to her final release in January 2016, a transformed member of society.

More than 400 other inmates benefited from the ruling in her case, a case, which has continued to impact on the sentencing framework in Uganda and beyond. In 2016, Wilson Harling Kinyua, another APP student and 11 others led a similar petition in Kenya’s Constitutional court. His two hour address to the Justices of the Country’s Constitutional Court leading to the abolition of the mandatory death penalty in Kenya. Wilson drew from his study of the law under APP’s programme as well as the decision by Uganda’s Supreme Court in Susan’s petition, bringing lasting reform to Kenya’s statute books benefiting

thousands of inmates on death row in the Country.

Both the prisons services in Uganda and Kenya have slowly moved away from the punitive nature of imprisonment to correction, rehabilitation and transformation. Uganda boasts of the best rehabilitation programmes in Africa and is ranked fourth globally. This partly is due to its innovative educational/rehabilitation programmes including opportunities to attend primary, secondary, vocational training and university education. In addition, religious and sports activities are open to all prisoners and competitions between prisoners and the officers are not uncommon.

APP is contributing to this vision, one prisoner at a time. Currently, 63 prisoners and prison staff in Uganda and Kenya are studying law under APP's Leadership Programme. In the APP law class, prisoners and prison staff attend their daily law classes together and support each other as they study and prepare for exams. Here, in the law class, there are no barriers. They are using the power of the law to bring lasting change in their prisons environment. Pascal Kakuru an inmate in the final year of his law degree, currently sits as the Legal Advisor on the Human Rights Committee at Uganda's only maximum security prison in Kampala. The Committee which comprises of both prison staff and prisoners has the responsibility of monitoring the human rights situation at the prison and reporting and arising issues to the administration. Their role also extends to providing basic legal advice and support to the most vulnerable in prison who are unable to afford the services of a lawyer.

In 2015 and 2016, more than 2,300 prisoners in Uganda and Kenya have received direct legal support from the law students in their appeals, bail applications and drafting of submissions and other court

documents. 12 death sentences have been overturned with many having their convictions overturned as well. Prisons can build skills, courage, resilience, and confidence.

To find out more about the African Prisons Project, [visit their website](#).

Judicial Bench Book on Violence Against Women in East Africa

A Review by Justice Lynne Leitch

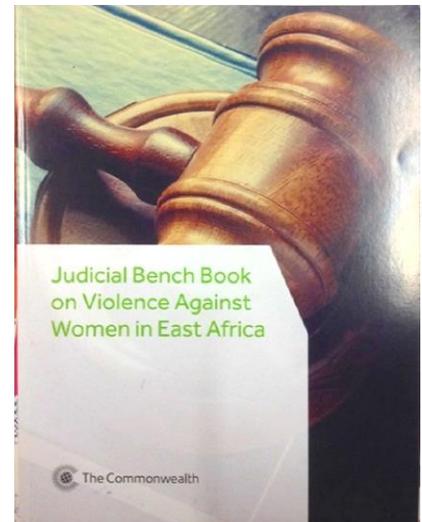
The Commonwealth Judicial Bench Book on Violence Against Women in East Africa discusses crimes involving violence against women (VAW) and the role of the judiciary in combating VAW in Kenya, Rwanda, Tanzania and Uganda. The book seeks to define VAW on an international, national and sub-national level, highlighting the unique challenges that women face in a gendered society and the mechanisms currently in place to help combat these challenges.

Its self-proclaimed aim is to address the challenges faced by women affected by violence as they navigate the legal system.

The book emphasizes the importance of the judiciary as a pivotal actor in challenging social norms regarding the acceptance of VAW. It is up to the judiciary to ensure that perpetrators of violence against women are held accountable and that the burden of enforcement does not fall to the individual members of society.

The book is divided into two sections. Section one provides the reader with a contextual understanding of VAW, encouraging the reader to develop an understanding of the cultural bias against women and victims of violence, and how this bias is intertwined with the judicial system impeding access to justice. It also provides an overview of the

standards that the judiciary is expected to follow from an international and state perspective. Section two includes case summaries organized by topic, ranging from sexual and other forms of violence against women and children to sexual harassment in the workplace.



The summaries include both best case practices, to be used as a quick reference guide for judicial officers to follow, and critiques of cases where justice was denied, to serve as a lesson for future decisions.

This bench book is the first step in building awareness and providing valuable resources and direction to the judiciary in East Africa and other commonwealth countries. However, the level of resources available highlight how much work is still left to be done. From a legal perspective, the available precedent is minimal. This further emphasizes the importance of the judiciary in shaping future decisions to develop strong, well-thought out legal precedent that addresses and acknowledges VAW in these countries.

This is an important goal, and one that should be endeavored by the judiciary in every Commonwealth country. The prevalence of violence in society has far reaching implications that affect not only the victims of direct violence but future generations who witness violence and live in a society impacted by violence.

We owe our children – the most vulnerable members of any society – a life free from violence and fear. In order to ensure this we must become tireless in our efforts not only to attain peace, justice and prosperity for countries but also for communities and members of the same family: Nelson Mandela, “Forward” in World Health Organization World Report on Violence and Health (Geneva: World Health Organization, 2002).

The book is currently available for purchase on the Commonwealth website at

<https://books.thecommonwealth.org/judicial-bench-book-violence-against-women-commonwealth-east-africa-paperback> .

Pacific Women’s Network on Violence Against Women

In August 2016, the Pacific Women’s Network on Violence Against Women (PWNAVAW) held a meeting in Singatoka, Fiji. During the week long meeting, they identified the need for improvements to the support systems for women and girls. In particular they suggested the following recommendations:

- Increased services for survivors of violence against women and girls
- Improving access to justice through better working relationships with police forces and sensitive and urgent response from police personnel
- Increased and ongoing training in gender equality
- Urging Pacific governments to put global conventions on women and girls into practice

The PWNAVAW agreed that further action was required in particular in

the areas of combating sorcery related violence, culture and religion, and disability. It was also extremely important to ensure that male advocates were on board to promote and protect women’s human rights.

News from Around the Commonwealth



Malawi

In November 2016, an HIV positive man was condemned to 2 years in prison having admitted that he had slept with over 100 widows who were victims of the outlawed practice of “widows cleansing”. Unfortunately the charge of defiling young girls was dropped when none of the victims came forward. Instead he was tried for “harmful cultural practices” under Section 5 of the Gender Equality’s Act.



Papua New Guinea

In December, it was reported that PNG is currently considering changes to its marriages laws.

The e Marriage (Amendment) Bill 2015 and the Matrimonial (Clauses) Bill 2015 when passed by parliament will be assist in entrenching women and child rights in PNG.

According to a report at the time in the Pacific Islands Report

“Currently, there is no definition of marriage applicable to both customary and non-customary marriages. Thus, a definition is required to ensure that all marriages regardless, meet certain basic requirements regarding consent and marriage age before

they are legally valid. Proposed clauses 2A and 2B of Matrimonial (Clauses) Bill achieve this purpose.”

The changes also link into the Lukautim Pikinini Act 2015 and deal with forced marriages of minors (under 18 years of age) which carry a penalty of a fine of K10,000 [US\$3200] to K20,000 [US\$6400] and jail terms of five and seven years.

“Ms Solomon noted that the civil registry will only recognise first customary marriages but will recognise children as those who have not yet turned 18 years old, that is, in the best interest of the child – that in itself is child protection!

The new laws also recognise the effort of the stay-home spouse - either man or woman - in caring of the household. *“We are now recognising that service and have strengthened that in the best interest of our children,”* Ms Solomon added.

“Some of the custody considerations outlined are for courts to consider parental responsibility. Many of our women or spouses who are not working are left very vulnerable when there is a marriage breakup. And not only are they left vulnerable but are left with all other issues, they really have nowhere to go.”

Under the proposed law, a spouse’s indirect contributions as home-maker to the economic stability and security of the family, including in particular the acquisition of the property, will be recognised. The court is required to take into account any financial and non-financial contribution made by a party to the marriage.



South Africa

In the CMJA Newsletter of November 2016, it was reported that the Parliament was considering the Redraft of the Traditional Courts Bill.

The following report by Thulani Gqirana, appeared in News 24 on 12 October 2016

"The reworked Traditional Courts Bill will be reintroduced to Parliament before the end of the year, the Department of Justice and Correctional Services said on Wednesday.

The new draft of the bill encouraged the "equal participation of women", Parliament's justice committee heard on Wednesday.

Advocate JB Skhosana told the committee that the draft bill would now go through Cabinet, before being reintroduced to Parliament between November 29 and December 10.

An earlier version of the bill, which was first introduced to Parliament in 2012, was rejected after criticism from opposition parties and women's rights groups. They said the bill trampled on the rights of women, especially in rural areas.

The bill lapsed at the end of the fourth administration.

Skhosana said, following several meetings with a reference group, parts of the bill were "clarified".

"The minister has set aside a consultation schedule, where he will continue to engage with all structures affected by the bill. The dialogue continues," he said.

The bill was not about transforming customary law, but about establishing structures that would help transform customary law.

"It's a different dispensation that enhances access to justice. The bill recognises traditional courts as courts of law. It's a different court from the conventional court. It's got its own special proceedings, processes, and the enforcement is different," he said.

He assured the committee that the contentious parts of the bill would be addressed and that it would be in line with the Constitution regarding women's roles.

*"It creates a progressive approach for the equal participation of women. This was a very sore point during the public hearings. At the time, it created an impression of increasing the powers of traditional leaders and ignoring the role of women in the process. The bill (now) provides a progressive **mechanism**."*

**Ideas?
Suggestions?
Comments?
Contributions?**



We would like to hear from you. If you have comments, suggestions, ideas, or concerns please send us an e-mail at info@cmja.org

If you have an interesting story to tell, please send these too

Gender Section Committee

Justice Lynne Leitch
(Chair, Council)

Mrs Nicole Stoneham
(Vice Chair, Council)

Ms Debbie LeMottee
(Secretary)

Regional Representatives:

Mrs Cordella Bart-Stewart
Atlantic and Mediterranean

Justice Carolita Bethell
Caribbean

Ms Naume Sikohya
East, Central and Southern
Africa

Mrs Linda Bradford-Morgan
Pacific

Mrs Olubunmi Ayobowale
Akokhia
West Africa

A Representative is still required for the Indian Ocean

(Contact the CMJA Secretary General on kbrewer@cmja.org to send in your nomination)

Further information about the Gender Section can be found on the CMJA's website at: www.cmja.org/gender